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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

POLAND

EXPLANATORY MEMORANDUM TO THE DRAFT ACT ON THE RESTORATION OF THE RIGHT TO A TRIAL BY AN INDEPENDENT AND IMPARTIAL COURT ESTABLISHED BY LAW BY REGULATING THE EFFECTS OF THE RESOLUTIONS OF THE NATIONAL COUNCIL OF THE JUDICIARY ADOPTED IN 2018–2025

Draft of 24 April 2025

Main *ratio legis*

of the draft Act on the restoration of the right to a trial by an independent and impartial court established by law by regulating the effects of the resolutions of the National Council of the Judiciary adopted in 2018–2025

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I. Subject matter and objective of the Act

The subject matter of the Act is to restore the right to a trial by an independent and impartial court established by law by regulating the effects of the resolutions of the National Council of the Judiciary established on the basis of the Act amending the Act on the National Council of the Judiciary and Certain Other Acts of 8 December 2017 (Journal of Laws of 2018, item 3; hereinafter: the “Act of 8 December 2017”). Guaranteeing citizens this right and with it the independence of courts and the impartiality of judges was the fundamental, consensus-based objective of the systemic transformation after 1989. This consensus included basic solutions for the appointment of judges by the President of the Republic of Poland at the request of the National Council of the Judiciary, which had the task of safeguarding the independence of the courts and judges, being a body that is independent of the political authorities. This body was supposed to represent the judicial self-government, as well as the legislative and executive authorities.

These principles were undermined by the Act of 8 December 2017. Its adoption meant that the National Council of the Judiciary lost its constitutional identity and therefore the ability to present candidates for the office of judge to the President of the Republic of Poland in a manner which guaranteed their impartiality and independence in the administration of justice. The Supreme Administrative Court pointed this out (in its judgments of 6 May 2021 in cases: II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18, II GOK 7/18; of 21 September 2021 in cases: II GOK 8/18, II GOK 10/18, II GOK 11/18, II GOK 12/18, II GOK 13/18 and II GOK 14/18, and of 11 October 2021 in cases: II GOK 9/18, II GOK 15/18, II GOK 16/18, II GOK 17/18, II GOK 18/18, II GOK 19/18, II GOK 20/18), as did the Supreme Court (including in the resolution of 21 May 2019, III CZP 25/19, the resolution of the three combined chambers of 23 January 2020, BSA I-4110-1/20, and in the resolution of the seven judges of the Supreme Court of 2 June 2022, I KZP 2/22, OSNK 2022, no. 6, item 22). The defectiveness of the nomination proceedings before the current Council was initiated by a violation of the constitutional principle of electing the judicial part of its membership, as specified in Article 187 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws no. 78 item 483, as amended) (hereinafter: the Constitution of the Republic of Poland). This was exacerbated by the way the Council made decisions on the selection of candidates for vacant judicial positions and the restriction – including as a result of amendments made to other Acts in 2017–2024 – of the possibility of substantively assessing these candidates in conditions of an open competitive recruitment to judicial positions. As pointed out in the case law of the international courts, the changes introduced by the Act of 8 December 2017, which are in conflict with the principle of the rule of law, the separation of powers and the independence of the judiciary, deprived the judges who received their positions at the request of the current Council of the legitimacy to administer justice as an independent and impartial court established by law. The loss of the current Council’s constitutional identity was also associated with the legislator disabling the effective judicial review of its decisions by entrusting this review to the Chamber of Extraordinary Review and Public Affairs, which is not an independent and impartial court established by law in the meaning of Article 6 of the Convention for the Protection of Human

Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, later amended by Protocols nos 3, 5 and 8 and supplemented by Protocol no. 2 (Journal of Laws of 1993, no. 61, item 284, as amended) (hereinafter: ECHR) and the second sub-paragraph of Article 19(1) of the Treaty on European Union (OJ EU C 202, 2016, p. 13) (hereinafter: TEU), and is filled exclusively with people appointed to judicial positions at the request of the current Council in proceedings which were affected by qualified legal defects (see, in particular, judgment of the CJEU of 21 December 2023, C-718/21, EU:C:2023:1015; order of the CJEU of 9 April 2024, C-22/22, EU:C:2024:313; judgment of the ECtHR of 8 November 2021, Dolińska-Ficek and Ozimek v Poland, applications nos 49868/19 and 57511/19).

The changes adopted in the Act of 8 December 2017 and the amendments to other Acts made in the years 2017–2024 resulted in Poland becoming the first country with respect to which the European Commission decided to conduct proceedings under the Communication "A new EU Framework to strengthen the Rule of Law". When this did not bring the expected result, the Commission, also for the first time, decided to initiate the Article 7(1) TEU procedure to find that the Republic of Poland has created a clear risk of a serious breach of the rule of law under Article 2 TEU. The Commission also decided, for the first time in history, to bring actions before the Court of Justice of the European Union regarding the failure to ensure the independence and impartiality of national courts, including in particular the national last instance court in the meaning of the third paragraph of Article 267 of the Treaty on the Functioning of the European Union (OJ EU C 202, 2016, p. 47) (hereinafter: TFEU) (namely the Polish Supreme Court) under the second sub-paragraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union (OJ EU C 202, 2016, p. 389) (hereinafter: CFR). Both Polish and foreign courts started to submit requests for preliminary rulings to the Court of Justice of the European Union under Article 267 TFEU, in which successive elements of Poland's actions with respect to the judiciary were assessed as being in breach of EU standards. As a result of these questions, the CJEU found – also for the first time in the history of European integration – that the principle of mutual trust cannot be applied to a Member State such as Poland in the context of the European Arrest Warrant because of the existence of a real risk of a breach of the fundamental right to a fair trial guaranteed by the second sub-paragraph of Article 47 CFR, due to systemic or general irregularities with regard to the independence of the judiciary (judgment of the CJEU of 25 July 2016 in the case of Minister for Justice and Equality v LM, C-216/18 PPU).

The European Court of Human Rights (hereinafter: ECtHR) has also issued numerous judgments up to 2025 on various aspects of the reform of the judiciary in Poland, in which it found a violation of Article 6(1) ECHR on various grounds. An inherent component of these findings was the fact that the violation of the rights of the applicants arose from the changes in Polish legislation which deprived the Polish judiciary of the right to elect members of the NCJ from among judges and allowed the legislative and executive authorities to directly or indirectly interfere in the procedure for appointing judges, thereby systematically undermining the legitimacy of the court composed of judges appointed in this way. The ECtHR emphasized that prompt remedial action is required of Poland in such a situation and in the interests of the

rule of law and the principles of the separation of powers and the independence of the judiciary. The lack of adequate response from the Polish authorities resulted in the European Court of Human Rights issuing a pilot judgment on 23 November 2023 in Wałęsa v Poland (application no. 50849/21; hereinafter the “pilot judgment of the ECtHR in Wałęsa v Poland”), in which it found that the defective procedure for appointing judges with the involvement of the current Council is continuously affecting the independence of the judges appointed in this way.

All this means that it is not currently possible to guarantee the parties in every case the right to a trial by an independent and impartial court established by law. The systemic nature of this violation has been established in numerous judgments of national and international courts (see, for example, judgments of the ECtHR of 22 July 2021, Reczkowicz v Poland, application no. 43447/19; of 8 November 2021, Dolińska-Ficek and Ozimek v Poland, applications nos 49868/19 and 57511/19; of 3 February 2022, Advance Pharma sp. z o.o. v Poland, application no. 1469/20; judgments of the CJEU of 19 November 2019, in joined cases C-585/18, C-624/18 and C-625/18, AK v National Council of the Judiciary and CP and DO v the Supreme Court, EU:C:2019:982; of 2 March 2021, in case C-824/18, A.B., C.D., E.F., G.H. and I.J. v National Council of the Judiciary, EU:C:2021:153; of 6 October 2021, C-487/19, W.Ż., EU:C:2021:798; resolution of the Supreme Court in the full bench – the Civil, Criminal and Labour and Social Insurance Chambers of the Supreme Court of 23 January 2020, BSA I-4110-1/20, OSNKW 2020, no. 2, item 7) and, in particular, in the pilot judgment of the ECtHR in Wałęsa v Poland, which this draft aims to implement.

The finding that the current Council is not a body that is identical to the National Council of the Judiciary as a constitutional body, and that its involvement in the procedure for appointing judges is a source of fundamental doubts as to the independence and impartiality of the people appointed to the office of judge at its request, justifies the comprehensive regulation of the effects of the current Council’s resolutions. The European Court of Human Rights clearly highlighted the need for such actions in the above pilot judgment in Wałęsa v Poland. It is also noted in the Joint Opinion of the Venice Commission and the Directorate General for Human Rights and the Principles of Law (DGI) on European standards regulating the status of judges of 14 October 2024, CDL-AD(2024)029, Opinion No 1206/2024 (hereinafter: the “Opinion of the Venice Commission of 14 October 2024”). Furthermore, as transpires from this opinion, there have been no comparable situations in the past to the situation of a systemic breach of the rule of law in Poland, which means that the recommendations arising from this opinion and based on the acquis of the Council of Europe regarding clearly different violations of the rule of law should also be appropriately adapted to this extraordinary situation and the circumstances of the Polish legal order. In this light, the broad recognition and freedom of choice of means pointed out by the ECtHR in the pilot judgment of the ECtHR in Wałęsa v Poland, by which the Republic of Poland can discharge its obligations arising from the implementation of European standards, including ECtHR judgments, should also be understood.

In such a situation, the failure to make the legislative changes would exacerbate the situation in which Poland does not guarantee the parties to court proceedings access to an independent and impartial court established by law in every case, and therefore exposes itself to liability for a violation of Article 6(1) ECHR, including financial liability.

This is all the more important because the justice system is experiencing its greatest crisis since 1989. Its consequences may have an adverse impact on the ability of citizens to effectively protect and exercise their rights in the coming years, as the Supreme Audit Office points out in the information on the results of the audit presented on 1 October 2024, entitled "Ensuring the efficient functioning of the justice system" (KPB.430.2.2024)[1]. The Supreme Audit Office clearly states that the way in which the Minister of Justice took legislative action in 2018–2023 had an adverse impact on the stability of the law and, consequently, on the efficiency of the justice system (p. 9 of the information on the results of the audit). Furthermore, it transpires from the findings of the Supreme Audit Office that, from a global perspective, the actions taken by the Minister of Justice with regard to the organization of the ordinary courts and the management of their staff at that time did not bring clear, unequivocal benefits to the efficiency of the ordinary courts.

It should be emphasized that the current Council's loss of its constitutional identity means that nominations by the President of the Republic of Poland of people for whom the Council requested appointment to judicial positions are not based on the constitutional grounds specified in Article 179 of the Constitution of the Republic of Poland, but are made exclusively on the basis of statutory provisions. The unconstitutional nature of such nominations means that the judges who received them do not benefit from the guarantees to which judges appointed on the basis of the Constitution of the Republic of Poland, as referred to in Article 180 of the Constitution of the Republic of Poland, are entitled (cf. judgment of the Constitutional Tribunal of 8 May 2012, K 7/10)[2]. *Ex iniuria ius non oritur.*

In the absence of an effective constitutional review of the statutes, which we are currently experiencing, the burden of recognizing this defectiveness and taking remedial action rests with all public authorities to the extent of their powers (see the resolution of the Sejm of the Republic of Poland of 6 March 2024 on the elimination of the effects of the constitutional crisis of 2015–2023 in the context of the Constitutional Tribunal's activities[3], resolution no. 162 of the Council of Ministers of 18 December 2024 on counteracting the adverse effects of the constitutional crisis in the judiciary[4]). This is confirmed by the aforementioned judgments of the international courts interpreting international agreements that are binding on the Republic of Poland (Article 9 of the Constitution of the Republic of Poland). In the light of this case law, it should be accepted that all Polish courts have the problem of defective judicial appointments,

[1] See: https://www.nik.gov.pl/plik/id,29767,vp,32638.pdf

[2] See: https://www.saos.org.pl/judgments/110903

[3] See: https://eli.gov.pl/api/acts/MP/2024/198/text.pdf

[4] See: https://eli.gov.pl/api/acts/MP/2024/1068/text.pdf

and therefore not only the Supreme Court, but also the ordinary, administrative and military courts (cf. judgments of the ECtHR of 8 November 2021, Dolińska-Ficek and Ozimek v Poland, § 334 and § 368, and of 3 February 2022, Advance Pharma Sp. z o.o. v Poland, § 364).

Therefore, the Act takes into account the recommendations arising from the Opinion of the Venice Commission of 14 October 2024, which – referring to the Urgent Joint Opinion of the Venice Commission and the Directorate General for Human Rights and Rule of Law of the Council of Europe on the draft law amending the Law on the National Council of the Judiciary issued on 8 May 2024, CDL-PI(2024)009, Opinion No. 1181/2024 (hereinafter referred to as the "Urgent Opinion of the Venice Commission of 8 May 2024") – stated that "the requirement of security of tenure can only apply when the relevant appointment, nomination or election was made in compliance with the Constitution and with European standards. To hold otherwise would mean that it would be possible for a government to disregard or circumvent the constitutional provisions on appointment and subsequently invoke the constitutional principle of security of tenure to make such appointment irreversible, a situation which would defeat the rule of law" (para. 15 of the Opinion of the Venice Commission of 14 October 2024). This passage should be read in the context of the judgment of the ECtHR of 1 December 2020, Guðmundur Andri Ástráðsson v Iceland, application no. 26374/18, cited in the urgent opinion of the Venice Commission of 8 May 2024, which stated that the acknowledgment that a court is not a court established by law may have significant consequences for the principles of legal certainty and irremovability of judges, which must be carefully observed with regard to the purposes they serve. In certain circumstances, the observance of these principles at any expense and at the cost of requiring a court established by law may cause even greater harm to the rule of law and public confidence in the administration of justice. As in all cases in which the fundamental principles of the Convention come into conflict, they must be weighed up in order to determine whether there is an pressing need – of a significant and compelling nature – justifying a departure from the principle of legal certainty and *res judicata* and from the principle of the irremovability of judges, in the circumstances of the given case.

It is clear from the cited position that, although the principle of irremovability is an important aspect of the rule of law and the independence of the judiciary, there may be circumstances in which people appointed to judicial positions do not benefit from such protection. This is so – as accepted in the draft Act – especially when the appointment was made – as in the case of the activities of the National Council of the Judiciary established by the Act of 8 December 2017 – in a manner that is in conflict with Article 179 of the Constitution of the Republic of Poland and international standards. The upholding of such appointments would therefore lead to the perpetuation of a state of affairs that is in conflict with these standards.

The draft Act resolves this dilemma by developing existing international standards, while respecting the achievements of European legal culture and the national constitutional order,

referring in particular to the constitutional principles of appointing judges specified in Article 179 of the Constitution of the Republic of Poland.

The Act regulates the effects of resolutions of the National Council of the Judiciary formed on the basis of the Act of 8 December 2017 and does so in a manner that is as proportionate as possible, taking into account the result of balancing the different and conflicting values that must be taken into account in this respect.

In the first instance, the objective of the Act is to restore the legitimacy of the people appointed to the office of judge at the request of the current Council to administer justice as an independent and impartial court established by law. The assumption of the draft Act is that this will take place through the comprehensive statutory regulation of the effects of the resolutions of the current Council. These effects differ because of the legal situation of the people appointed in 2018–2025 to the office of judge at the request of the defectively formed National Council of the Judiciary.

The basic solution is to reinstate approximately 1,200 judges who applied for appointment to serve in a different court or in a higher court with respect to their place of service in the court where they took office in accordance with Article 179 of the Constitution of the Republic of Poland, until the final conclusion of the renewed proceedings regarding appointments to judicial positions concluded with resolutions of the defectively formed Council. The status of this category of people will be finally determined in these proceedings, which will be conducted before a correctly formed National Council of the Judiciary and under the control of the Supreme Court.

This solution cannot be adopted with respect to people whose first appointment to the office of judge took place in conflict with Article 179 of the Constitution of the Republic of Poland. However, the effects that are to arise with respect to these people need to be differentiated when taking into account the legal situation in which they found themselves. With respect to the group of approximately 1,000 entry-level judges applying for judicial appointments as judicial assessors, court referendaries and judicial assistants and other people who passed the judicial examination, it is proposed that their status be validated by the future, correctly formed National Council of the Judiciary by confirming that the requests for their appointment to judicial positions formulated on the basis of resolutions adopted by the defectively formed National Council of the Judiciary are effective, with the effect of preventing their status as correctly appointed judges from being contested in the future. This solution takes into account the fact that these people found themselves in an involuntary situation and could not withdraw from participating in the competitive recruitment because of the risk of expiry of the right to hold the office of judge. Importantly, in the case of assessors in the ordinary courts, the role of the National Council of the Judiciary was very limited, while the resolutions it adopted did not constitute a decision in the competitive recruitment to a vacant judicial position. It is precisely this specific situation regarding equal access to the public service guaranteed by Article 60 of the Constitution of the Republic of Poland that justifies the

simplified validation of their status through the adoption of resolutions by the future, correctly formed National Council of the Judiciary.

However, this solution cannot include a group of approximately 350 people from the ordinary courts and approximately 80 people from the Supreme Court and the Supreme Administrative Court, who were not only appointed to the office of judge in conflict with Article 179 of the Constitution of the Republic of Poland, but were also in a different situation than the said judicial assessors, referendaries and judicial assistants. This category primarily consists of people who applied for the office of judge while they were prosecutors, attorneys-at-law, legal counsels, counsels of the Office of the General Counsel to the Republic of Poland, notaries public or academics. These people can only gain legitimacy to administer justice as an independent and impartial court established by law by undergoing the recruitment for the position of judge again, because, unlike in the case of the category of people mentioned above, there is no constitutional justification for subjecting the status of this category of people to statutory validation. Similarly, during the repeated recruitment to judicial positions, the people in this category will not be able to adjudicate, because they do not represent an independent and impartial court established by law. In the light of the pilot judgment of the ECtHR in Wałęsa v Poland, any further adjudication by these people would also expose the Republic of Poland to the need to pay compensation to the parties to the proceedings. Simultaneously, in view of these people having been appointed in conflict with Article 179 of the Constitution of the Republic of Poland, their employment is not subject to protection under Article 180 of the Constitution of the Republic of Poland. This enables the assumption to be made that it ends by law and may be established through a repeat recruitment to the position of judge. During the period of the repeat recruitment, these people may gain employment in the justice system in positions of court referendaries who have nothing to do with the administration of justice. This guarantees the stability of employment of these people until the final decision is made on their status in the repeat competitive recruitment. Then – depending on the outcome of the recruitment – these people will take up the office of judge or will continue their employment as court referendaries, if they do not resign from this employment.

Furthermore, the draft Act assumes the adoption of solutions that will guarantee the efficient and, as far as possible, uninterrupted functioning of the judiciary during the transition period, while ensuring the restoration of a situation that is consistent with the Constitution of the Republic of Poland, Article 6(1) ECHR, the second sub-paragraph of Article 19(1) TEU and Article 47 CFR. For this reason, a system of delegation of judges of the ordinary, administrative and military courts has been envisaged, enabling them to adjudicate in the newly assumed positions for two years, and then end the cases they have started to handle. The exception only applies to those people whose continued adjudication in the position they occupy would be irreconcilable with the view of the court as an impartial or independent body. In such cases, the National Council of the Judiciary will have the right to recall a judge from the delegation, while ensuring the right of a judicial review of such decisions. Only a small group of people (around 20), those who became members of the incorrectly formed National Council of the Judiciary or had the functions of disciplinary commissioner of the judges of the ordinary courts

or his deputies, will be excluded *ex lege* from the possibility of obtaining statutory delegations because of their direct and active involvement in undermining the independence of the courts and the impartiality of judges.

In addition, solutions are planned to ensure that judgments issued by judges appointed with the involvement of the defectively formed National Council of the Judiciary will, in principle, remain in force and it will only be possible to overturn them if precisely defined conditions are satisfied. This is how the draft Act reconciles the stability of court judgments with the right of the parties to have their case heard by an independent and impartial court established by law in a balanced way.

Similarly, the draft not only aims to restore the values of the rule of law, but is also consistent with them. It rebuilds guarantees of access to an independent and impartial court established by law, takes into account the need to ensure the stability of judgments and, for judges appointed with the involvement of a defectively formed National Council of the Judiciary, it creates respect for their right to effective legal protection and equal access to public service, as well as giving the people, who refrained from taking part in competitive recruitments for vacant judicial positions because of the loss of the constitutional identity of the current Council, the opportunity to apply for the office of judge in repeat competitive recruitments intended to select candidates who satisfy the requirements envisaged for this to the highest degree.

The subject matter of the Act also includes amendments to other legal acts, such as: the Code of Civil Procedure of 17 November 1964 (consolidated text Journal of Laws of 2024, item 1568), the Act on the Supreme Court of 8 December 2017 (consolidated text Journal of Laws of 2024, item 622), the Law on the Structure of the Military Courts of 21 August 1997 (consolidated text Journal of Laws of 2022, item 2250), the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation of 18 December 1998 (consolidated text Journal of Laws of 2023, item 102), the Law on the Structure of the Ordinary Courts of 27 July 2001 (consolidated text Journal of Laws of 2024, item 334), the Law on the Structure of the Administrative Courts of 25 July 2002 (consolidated text Journal of Laws of 2024, item 1267), the Law on the Prosecutor’s Office of 28 January 2016 (consolidated text Journal of Laws of 2024, item 390), the Law on Higher Education and Science of 20 July 2018 (consolidated text Journal of Laws of 2024, item 1571), the Act amending the Law on the Structure of the Ordinary Courts, the Act on the Supreme Court and Certain Other Acts of 20 December 2019 (consolidated text Journal of Laws of 2020, item 190), the Act on the Ombudsman for Small and Medium-Sized Enterprises of 6 March 2018 (consolidated text Journal of Laws of 2023, item 1668) and the Act on the State Commission for the Investigation of Cases against Sexual Liberty and Decency against Minors under the Age of 15 Years of 30 August 2019 (consolidated text Journal of Laws of 2024, item 94). The solutions proposed in this regard do not eliminate the need for the comprehensive regulation of the matters covered by these Acts to fully restore constitutional order, improve the state of the justice system and ensure its effective functioning. Recognizing the need to take such

action, the scope of changes introduced by this Act has been limited purely to such modifications as are necessary to achieve the objectives of the draft Act. Priority in this Act has been given to restoring the right of the parties in each case to a trial by an independent and impartial court established by law.

II. Compliance of the proposed regulations with the standard of the Constitution and international law

There is no doubt that the existing state of the law characterized by increasing systemic defects is in conflict with Polish law, EU law and the European Convention for the Protection of Human Rights and Fundamental Freedoms. It does not guarantee full independence of the judiciary, threatens the right to effective judicial protection and does not provide adequate protection of the rights and freedoms of the individual. The comprehensive regulation by statute of the status of the people who were incorrectly appointed is an element of repairing the judicial system, restoring its systemic role and ensuring that adjudication is entrusted to people who meet the substantive and ethical requirements.

It should be emphasized that neither the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights, nor EU law and the Court of Justice of the European Union give precise guidelines on how to resolve the said systemic defects. The Polish legislator has the competence and obligation to regulate this issue, having the freedom to choose the measures by which it will perform its obligations arising from the performance of the judgments of the European courts (cf. pilot judgment in Wałęsa v Poland, para. 332). In doing so, it must simultaneously comply with the rules of its own Constitution, standards arising from the case law of the European Court of Human Rights and EU law.

Therefore, the draft assumes that the effects of the resolutions of the current Council will be regulated in two stages. In the first, which will take place together with the entry into force of the Act, the judgments of national and international courts specified in **section I of the *ratio legis*** will be implemented. Therefore, there will be a statutory restoration of the legitimacy of the people appointed to the office of judge at the request of the current Council to administer justice as independent and impartial courts established by law or the termination of the service of these people. The continuation of these effects is determined by the result of the second stage, which involves conducting the proceedings again on the appointment to judicial positions which had ended with resolutions of an incorrectly formed Council (with respect to a group of approximately 1,200 judges who took part in the promotion procedure with the involvement of the incorrectly formed National Council of the Judiciary), or the validation of their status through a confirmation by the future National Council of the Judiciary, which is consistent with the Constitution, that the requests for their appointment to judicial positions formulated on the basis of resolutions adopted by the incorrectly formed National Council of the Judiciary are effective (with respect to a group of approximately 1,000 people who, at the

time of their first appointment to a judicial office, requests for whom were submitted by the incorrectly formed National Council of the Judiciary, the composition of which did not satisfy the requirements of Article 187, para. 1 of the Constitution of the Republic of Poland). The status of individual people encompassed by the scope of application of the Act will be finally decided in these proceedings – conducted before a correctly formed National Council of the Judiciary and under the control of the Supreme Court. In this way, the objective of the draft is to resolve the paradox of a judge who cannot adjudicate, which currently appears in the Polish legal system. Its sources are as follows.

The systemic defects of the judicial nomination procedure described in **section I of the *ratio legis*** mean that the involvement of a person appointed at the request of the National Council of the Judiciary formed by the Act of 8 December 2017 in the examination of the case of individuals who have the right to a trial in a court will lead to a violation of that right. This thesis clearly arises from the judgments of the national and international courts already presented, in particular the pilot judgment of the ECtHR in Wałęsa v Poland, implemented by this Act. The fact that an independent and impartial court established by law cannot be created with judges appointed at the request of the current Council means that they cannot administer justice. This leads to the emergence of a paradoxical situation in which “judges”, who do not constitute a court and therefore cannot judge, are operating in the legal system. Such a judge is deprived of the *votum* to administer justice, which is a contradiction in itself. The rulings that the judge issues can be and are effectively challenged as being in breach of the right to trial in a court in the meaning of Article 6 ECHR and Article 47 CFR.

The explanation of such a paradox is simple. Neither the European Court of Human Rights nor the Court of Justice of the European Union have the jurisdiction to rule on who is a judge in a given legal order, but state that such people do not constitute a court in the meaning of acts of law interpreted by these courts. Whether people who, according to the standard of international law, do not constitute a court established by law are not judges can only be settled by the Constitution of the Republic of Poland. However, the case law in the Convention indicates that a breach of the law regulating the process of appointing judges can make the involvement of a judge in the examination of a case “incorrect”, given the relationship between the procedure of appointing a judge and the “legality” of the bench of which such a judge is then a part (ECtHR judgment of 8 November 2021, Dolińska-Ficek and Ozimek v Poland). In this context, it was also stated that a judge appointed in breach of the provisions regulating the process of appointing judges may not have the legitimacy to serve as a judge (ECtHR judgment of 1 December 2020, Ástráðsson v Iceland).

In such a situation, it is not possible to apply the vetting procedure to restore the legitimacy of judges appointed at the request of the current Council to administer justice as an independent and impartial court established by law.

Firstly, the problem of defective nominations to the office of judge is of a systemic nature and arises from the formation of the NCJ in a manner which is inconsistent with the Constitution of the Republic of Poland, and not – as in the cases of applying this institution to

date in other countries – phenomena that can be assessed individually with respect to the conduct of a specific judge (e.g. corruption or cooperation with an undemocratic regime). In other words, the paradox of a judge who is unable to judge stems from the constitutional defect in the procedure in which he obtained his current status, and not from his individual qualifications. In the light of international standards, it is crucial to restore the status of judges who can form a "court established by law" to people appointed at the request of the current Council, which the verification mechanism is incapable of doing because of the constitutional defectiveness of the nominations.

Secondly, any attempt to individually assess the qualifications of people who took up their positions on the basis of resolutions of the current Council would lead to a long-term paralysis of court proceedings, because of the number of appointments made at its request, which could simultaneously create the impression that judges are only concerned with their own matters and not with resolving disputes, which is what the justice system is called upon to do. The crisis situation of the justice system and the obligation to ensure the efficiency and speed of court proceedings constitute arguments against this solution.

Thirdly, the body conducting the verification would also have to have investigative powers to determine what non-substantive factors influenced the resolution of the current Council, which would prolong the verification process even more.

Finally, the individual verification procedure carries the risk of revenge. For these reasons, the draft Act supports the use of objective criteria, without individually assessing the qualifications of the people appointed at the request of the current Council. This also enables the avoidance of public stigmatization of people undergoing individual assessment, which could pose a risk of violating their dignity and their personal rights.

The draft Act takes the justification for the mechanism from the case law of the European Court of Human Rights on appointments to the Supreme Court, as cited in **section I of the *ratio legis***. In the ECtHR's verification of the Ástráðsson test criteria in Reczkowicz v Poland, Dolińska-Ficek and Ozimek v Poland and Advance Pharma sp. z o.o. v Poland, as well as in the pilot judgment in Wałęsa v Poland, the defectiveness of the procedure for appointing a judge led to the deprival of the body in which the defectively appointed person adjudicated of the attribute of a court established by law. It is clear from these judgments that this defectiveness was a consequence of the lack of the required independence of the current Council, while domestic law did not simultaneously ensure an effective judicial review of this procedure. This was sufficient to conclude that the person's appointment was defective. In these cases, the European Court of Human Rights did not conduct an individual assessment of the situation of each of the defectively appointed people. Therefore, the failure to meet the requirements of Article 6(1) ECHR was determined by objective defects in the procedure for appointing judges, which was not related to a specific person. Likewise, in case C-326/23, judgement of 7 November 2024, C.W. S.A. and Others v Prezes Urzędu Ochrony Konkurencji i Konsumentów (paras 35–36), the Court of Justice of the European Union also found that the circumstances capable of giving rise to such systemic doubts in the minds of individuals as to

the independence and impartiality of the judge, which are of a systemic nature, relate, in principle, to the individual situation of the judge or judges and, in particular, to irregularities committed during their appointment within the given judicial system. In other words, in principle, systemic defects identified in the context of judicial nominations apply individually to each judge affected by such a nomination. In this sense, a systemic defect is also an element of the individual assessment of a particular judge and is taken into account by the legislator during the implementation of the said judgments.

In this context, the suggestion contained in the Opinion of the Venice Commission of 14 October 2024 that the ECtHR supported the solution adopted by the Supreme Court in the resolution of the joined chambers of 23 January 2020, involving the differentiation of the defectiveness of judicial appointments to the Supreme Court and the ordinary courts (para. 11 of the Opinion) is unreasonable. The European Court of Human Rights has repeatedly referred to the resolution of the Supreme Court in its judgments, in particular using the Supreme Court's findings on the factual circumstances and the legal context of the Polish procedure for appointing judges. It also cited the Supreme Court's opinion on the differentiation of the assessment of incorrect judicial appointments (ECtHR's pilot judgment in Wałęsa v Poland, para. 324, point a). Even so, it only mentioned it as "one of the possibilities" of resolving the systemic defectiveness of appointments in the Polish judiciary (judgment in Advance Pharma sp. z o.o. v Poland, para. 365). This does not rule out other solutions, especially in the light of the freedom of the State to choose the means by which it discharges the ECtHR's judgments (pilot judgment of the ECtHR in Wałęsa v Poland, para. 332).

Based on the ECtHR case law to date, there is no justification for differentiating the status of judges of the Supreme Court and the ordinary courts, as well as the other courts. So far, neither the ECtHR nor the CJEU has ruled on such differentiation of the assessment and effects of defectiveness. For several years, the ECtHR has been hearing cases regarding allegations of a violation of Article 6(1) ECHR as a result of the lack of court established by law because of the defective appointment of judges of the ordinary courts. In the light of the ECtHR decision to further postpone the consideration of cases regarding Poland's rule of law crisis until 23 November 2025 (communication of the Chancellor of the ECtHR of 20 November 2024, ECHR 269 (2024)), it seems that this situation will not change for at least a year. Consequently, the already known conclusions from the case law of the ECtHR should be used and the defectiveness of the procedure for appointing all judges in Poland should be assessed according to the same yardstick – i.e. the *Ástráðsson* test criteria applied in the judgments of the Reczkowicz v Poland group.

The constitutional grounds for the proposed solutions are based on the arguments contained in the judgment of the Constitutional Tribunal of 8 May 2012, K 7/10. The analogy between the so-called horizontal promotions, which the Constitutional Tribunal assessed, and appointments at the request of the current Council, is based on the fact that, in both cases, Article 179 of the Constitution of the Republic of Poland did not constitute a legal basis for the request of the National Council of the Judiciary and the decision of the President of the

Republic of Poland on the appointment of a judge to the office of judge. Neither judgments nor the literature have questioned the constitutional admissibility adopted in this judgment to deprive judges of their official positions by law if they were obtained at the request of the National Council of the Judiciary and fulfilled via appointment by the President of the Republic of Poland, when this appointment was made solely on the basis of an Act and not Article 179 of the Constitution of the Republic of Poland. Reference to this precedent is all the more justified in the current situation, when appointments at the request of the current Council were made in breach of the Constitution of the Republic of Poland and international standards.

In the judgment of 8 May 2012, K 7/10, the Constitutional Tribunal unequivocally held that the appointment of judges in the meaning of Article 179 of the Constitution of the Republic of Poland is based on cooperation between the President of the Republic of Poland, as a body with a direct public mandate, and the National Council of the Judiciary, namely a body which, according to the legislator's intention, is supposed to safeguard the independence of courts and judges, whereas the current Council does not satisfy this requirement. Therefore, the loss of the current Council's constitutional identity, both in terms of its composition and its ability to safeguard the independence and impartiality of judges, means that resolutions on the submission of requests to the President of the Republic of Poland for the appointment of a judge do not have any legal effect. The President of the Republic of Poland should take this circumstance into account, as, according to Article 126 of the Constitution of the Republic of Poland, he is responsible for ensuring compliance with the Constitution. If, despite this, the President of the Republic of Poland accepts a request from a body that is not the National Council of the Judiciary in the meaning of Article 186, para. 1 of the Constitution of the Republic of Poland, then such a request is based solely on provisions of the rank of a statute, and the act of appointment of a judge by the President of the Republic of Poland made on its basis is not an appointment in the meaning of Article 179 of the Constitution of the Republic of Poland. Therefore, the guarantees of irremovability under Article 180 of the Constitution of the Republic of Poland do not apply to anyone appointed at the request of the current Council, because these only apply to judges in the constitutional sense. The office of judge established solely by statute is alien to Chapter VIII of the Constitution of the Republic of Poland. Only the guarantees arising from Article 60 of the Constitution of the Republic of Poland apply to it. It is therefore permissible for the legislator to regulate the effects of appointments that took place on the basis of the statute, but did not constitute appointments in the meaning of Article 179 of the Constitution of the Republic of Poland.

The assumptions adopted are consistent with the interference with the principle of the irremovability of judges that is permissible in the light of international standards. Similarly, even if it is accepted – solely for the purposes of the argument – that the proposed solutions lead to such interference (which is not the case, because the nominations of the President of the Republic of Poland under consideration did not constitute appointments in the meaning of Article 179 of the Constitution of the Republic of Poland), the case law of the European Court of Human Rights and the Court of Justice of the European Union allows for the dismissal of

judges as a way of restoring the rule of law that was violated as a result of the systemic defect of appointments, and therefore precisely in such a situation as is currently the case in Poland.

This exception is made to avoid the perpetuation of a situation that is in conflict with the rule of law, which would be the result of literally adhering to the standard of irremovability of judges in the situation in which the appointment to the office of judge took place in breach of constitutional principles or European standards. As was correctly noted in the opinion of the Venice Commission of 14 October 2024: “To hold otherwise would mean that it would be possible for a government to disregard or circumvent the constitutional provisions on appointment and subsequently invoke the constitutional principle of security of tenure to make such appointment irreversible, a situation which would defeat the rule of law” (para. 15 of the Opinion). The Court of Justice of the European Union adopted such a position in a case that directly applied to Poland, namely in the judgment of 24 June 2019 C-619/18, in which it held that “The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality” (para. 76). This enables the assumption to be made that, if the appointment to the judicial position was defective in the light of constitutional or international law standards, the protection of the durability of such a relationship as arises from compliance with the principle of irremovability is decidedly weaker and must give way to other objectively justified and serious objectives, such as the restoration of the rule of law and the correctness of the appointment (cf. A. Sajó, *The Limits of Judicial Irremovability from the Perspective of the Restoration of the Rule of Law: A View from Strasbourg*, [in:] *Rule of Law in Europe*, ed. F. Marques, P. Pinto de Albuquerque, Cham 2024, pp. 57–59). This interference therefore requires an objective need and the adoption of proportionate solutions.

In the light of the above comments, as well as in the face of systemic and glaring defects in the process of nominating judges arising from the violation of the Constitution of the Republic of Poland, EU law and the European Convention on Human Rights, as well as in view of the fact that these defects apply to all judges nominated at the request of the current Council, it should be stated that the starting point for a systemic remedy of the justice system and the regulation of the status of erroneously appointed judges must be the acceptance that judges nominated by the National Council of the Judiciary, which was formed by the Act of 8 December 2017, as judges appointed exclusively on the basis of a statute and not the Constitution of the Republic of Poland, are not unquestionably protected by the guarantee of the irremovability of judges provided for in the Constitution of the Republic of Poland and in European standards.

III. Acceptance of the position of the Venice Commission and the Office for Democratic Institutions and Human Rights of the OSCE in the proposed regulations

The proposed solutions take into account the positions contained in the opinion of the Venice Commission of 14 October 2024 and in the ODHIR Final Opinion on the Act Introducing Amendments to the Act on the National Council of the Judiciary of 31 December 2024 (hereinafter referred to as "the ODHIR Final Opinion of 31 December 2024").

The position presented in the ODHIR Final Opinion of 31 December 2024 states, in particular, that:

a) "While acknowledging the margin of appreciation and Poland's wider autonomy in choosing the way to cure the violations of the right to a fair trial by an independent and impartial tribunal established by law, the applied measures should be proportional and differentiated, considering specific circumstances of individual appointments or promotions (whether individually or category-based), while respecting the rights of affected judges";

b) "The effects of the deficient judicial appointments due to the involvement of the NCJ as composed after the 2017 Amendments may vary depending on the type of courts and positions within the judiciary, as explicitly acknowledged by the ECtHR.";

c) "In light of the abundant international case law, the appointments made by the NCJ as composed after the 2017 Amendments to the Chamber of Extraordinary Control and Public Affairs and the Chamber of Professional Responsibility (a successor of the now abolished Disciplinary Chamber), as well as to other Chambers of the Supreme Court should be reconsidered. In this respect, authorities have a choice of various policy options at their discretion. This could be done for instance through regulating *ex lege* the status of these appointees";

d) "In case of *ex lege* invalidation, the legislation should also clarify the conditions and modalities of transfer of the judges concerned to their previous judicial positions or, if not possible, to a judicial office of equivalent status and tenure – ideally with the consent of the judges concerned, while ensuring that they have the possibility to appeal the administrative decisions regarding such transfers as well as related benefits";

e) "While authorities enjoy certain discretion in revisiting the status of all judicial appointments (since March 2018), in the case of entry-level appointments and potentially some other categories of lower-level judicial appointments, validation or confirmation of status may be considered as a valid and appropriate policy option";

f) "An institutional mechanism to ensure that grounds for invalidation or validation of the appointments/promotions provided by law are rightly applied to an individual appointee may be required";

g) “Any decision concerning the individual status of a defectively appointed judge should be subject to judicial review mechanism meeting the criteria of an “independent and impartial tribunal established by law” under Article 6(1) of the ECHR, not themselves involving defectively appointed judges and with strict procedural rules for recusal in place.”

These indications were taken into account in the proposed solutions, but the drafter accepted the gravity of the violation relativized to the legal situation of the candidates included in the individual groups, and not only the type of court and the position in the structure of the judiciary, as a criterion for determining the effects of the resolutions of the current Council in nomination proceedings. This is how the draft provides for differentiation according to the status of the person appointed to the position of judge at the request of the current Council before the adoption of the resolution on this matter, i.e. before that person was recommended for the position of judge. However, the type of court to which the given person received the nomination was taken into account – in accordance with the proposal contained in the ODHIR Final Opinion of 31 December 2024 – in relation to the Supreme Court and the Supreme Administrative Court as the highest judicial bodies in the structure of the justice system. It seems that the opinion proposed the adoption a narrower scope of *ex lege* regulations than that proposed in the draft Act. For the reasons explained in greater detail below, the drafter supports the broadest possible statutory regulation of the status of people appointed to judicial positions as a solution for avoiding long-term paralysis of the judicial system and to restore the right to a trial by an independent and impartial court established by law within a reasonable period.

Referring to the opinion of the Venice Commission, it should be emphasized that it did not take a position on whether it is admissible to regulate the return of judges or other legal professionals by statute (para. 33 of the Opinion). However, the possibility of determining by statute that all nominations of the current Council made within a specified time frame are invalid *ex tunc* was assessed critically (para. 49 of the Opinion). However, as explained **in section I of the *ratio legis***, the proposed mechanism does not provide for this. On the contrary, the draft Act regulates the effects of the current Council’s resolutions *ex nunc* and refers to the main recommendations of the Venice Commission as to how to restore the rule of law (para. 18 of the Opinion). And so:

a) the draft Act, which is especially important in the light of the opinion of the Venice Commission of 14 October 2024, enables a long-term paralysis of the judicial system to be avoided, which, on the one hand, arises the proposed mechanism of statutory delegation and, on the other, from the relatively short time needed to achieve the effects of the Act, including with respect to the group of approximately 1,000 entry-level judges of the lowest courts, the rehabilitation of whose status will require the adoption of resolutions by the future, correctly formed National Council of the Judiciary.

It should be explained that the drafter took into account an alternative solution, which was reflected in the draft Act prepared by the Codification Commission of the Judiciary System and the Public Prosecution System, providing for the regulation of the effects of resolutions

adopted by the current Council by entrusting this task to the National Council of the Judiciary, which is independent of the executive and legislative powers. The formula for solving the problem of defective judicial appointments proposed in the alternative draft which assumed grouping, i.e. the adoption of resolutions by a correctly formed National Council of the Judiciary jointly with respect to the people who are subject to the same consequences, divided into people holding positions in the Supreme Court, in the ordinary courts, in the administrative courts and in the military courts. This formula was supposed to enable the Council to make an assessment within individual groups and, in this way, it directly took into account the recommendations formulated in the opinion of the Venice Commission of 14 October 2014. The draft Act assumed a differentiation of the consequences with respect to people qualifying for individual groups. The consequences were specified in it with account taken of the gravity of the violation taking place relative to the legal situation of the candidates included in the individual groups, as well as with an awareness of the need to ensure the efficient functioning of the judicial system and guarantee protection against a further exacerbation of its crisis.

This solution was abandoned in this draft Act, proposing the broadest possible scope of statutory regulation of the effects of the resolutions of the National Council of the Judiciary established on the basis of the Act of 8 December 2017 (*ex lege* variant). This solution is supported by the aim to restore the right to a trial by an independent and impartial court established by law within a reasonable time, which would not have been possible had this task been entrusted to a correctly formed National Council of the Judiciary with respect to all groups of judges whose status needs to be rehabilitated. Therefore, it is only with respect to a group of approximately 1,000 entry-level judges of the lowest-level courts that the rehabilitation of their status will require the adoption of resolutions by the future, correctly formed NCJ, whereby the role of the NCJ will be limited solely to verifying the correctness of the inclusion of people in this particular group.

On the one hand, the need for urgent action arises from the deadlines for implementing the ECtHR's pilot judgment in Wałęsa v Poland, which is currently 23 November 2025 and, on the other, from the risk to the stability of the legal system and the parties to proceedings associated with the continued adjudication by people who do not represent an independent and impartial court established by law. The scale of the threats can be demonstrated by the issue that is currently the subject matter of a request for a preliminary ruling submitted to the Court of Justice of the European Union in case C-225/22. It applies to the admissibility of the examination by an ordinary court of whether a higher court or the Supreme Court meets the requirement of an independent and impartial court established by law and, if it is found that it does not meet this requirement, the admissibility of omitting or declaring the judgment of such a court null and void, setting aside and referring the case for reconsideration. It should be noted that the opinion of Advocate General Dean Spielmann was delivered on 10 April 2025. It transpires from this that "the second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law must be interpreted as meaning that a national court which has delivered a judgment that has been set aside, in extraordinary appeal proceedings, by a higher judicial body that has referred the case back to it for re-examination, must disregard the

judgment of that body or, where such a consequence is essential in view of the procedural situation at issue in order to guarantee the primacy of EU law, must find that judgment to be null and void, where that judgment cannot be regarded as originating from an independent and impartial tribunal, previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU." It should be pointed out that the opinion does not determine how the Court of Justice of the European Union expects this issue to be finally resolved. However, it shows that the failure to resolve the problem within a reasonable time can lead to a situation in which the status of judgments issued by people who do not represent an independent and impartial court established by law may be challenged at any time, not only within an appellate review or measures provided for by law, but also incidentally during the consideration of other cases. The proposed solutions prevent the appearance of such effects.

The need for the legislator to take urgent action to restore the right to a trial by an independent and impartial court established by law is an argument against entrusting the whole of this task to the National Council of the Judiciary, which is independent of the executive and legislative powers. This primarily arises from the time needed for the National Council of the Judiciary to be constituted in the manner specified in the Act amending the Act on the National Council of the Judiciary of 12 July 2024 ("Act of 12 July 2024"), which has not entered into force because the President of the Republic of Poland submitted a petition to the Constitutional Tribunal on 1 August 2024 to examine its compliance with the Constitution of the Republic of Poland. According to the drafter, the Act of 12 July 2024 will potentially not enter into force before September 2025. Given the timescales for ordering the first elections of members of the National Council of the Judiciary specified in this Act and, in particular, the fact that these elections should be ordered on a day that is no later than three months from the date of adoption of the resolution on ordering the elections (Article 2, para. 1 of the Act of 12 July 2024), the draft Act assumes that the election results will not be announced earlier than in December 2025. It is only at that time that the activities of the people in the National Council of the Judiciary elected by the Sejm to the National Council of the Judiciary on the basis of Article 9a, para. 1, which was adopted by the Act of 8 December 2017, will end. Until then, the current, defectively formed Council, which does not safeguard the independence of the courts and judges, will continue to operate and will therefore be unable to perform the task specified in the draft Act. Taking into account the time needed for this body to be constituted, it will only be possible to take any actions intended to assess judges from 31 January 2026. It can therefore be assumed that resolutions regarding people appointed to judicial positions would be adopted in the first half of 2026. Taking into account the need to award a right to appeal in these proceedings, the drafter estimates that, in such a variant, final decisions would be made no earlier than in the second half of 2026. It would therefore be possible to start announcing competitive recruitments for judicial positions vacated as a result of final resolutions of the National Council of the Judiciary at the end of 2026. Given the time needed to conduct competitive recruitment proceedings, which consist of the evaluation of the candidate in a given court, which should be estimated at an average period of at least 9 months, followed by the evaluation of these candidates by the National Council of the Judiciary, as well as the possibility of appealing against the resolution of the National Council

of the Judiciary by the people participating in the competitive recruitment proceedings, it can be expected that the first nomination proceedings would be resolved no earlier than in the second quarter of 2027. Even assuming that priority is to be given to the competitive recruitment proceedings before the Supreme Court and the validation of the status of a group of entry-level judges, as proposed by the Codification Commission of the Judiciary System and the Public Prosecution System, the status of some people appointed to this court might still not be clearly determined in the repeat recruitment at the time when the Supreme Court should rule on the validity of the elections to the Sejm and Senate of the Republic of Poland, the constitutional term of which ends in the autumn of 2027. From the point of view of the stability of the democratic system, such a solution is difficult to accept.

For these reasons, the drafter decided to accept the dominant variant of the statutory regulation of the effects of the resolutions of the National Council of the Judiciary formed on the basis of the Act of 8 December 2017 (except for the group of entry-level judges, the validation of whose status by the correctly formed National Council of the Judiciary will be of a simplified nature), which, as explained in greater detail in **section XI of the *ratio legis***, will enable most of the repeated competitive recruitments before the National Council of the Judiciary to end in the third quarter of 2027.

b) the draft Act implements the judgments of the national and international courts referred to in **section I of the *ratio legis***, establishing the existence of a systemic defect in the judicial appointments at the request of the current Council, which leads to the loss of the attribute of a court established by law by a body in which a defectively appointed person adjudicated. In principle, the systemic defects identified in the context of judicial nominations apply individually to every judge who received such a nomination. In this sense, the systemic defect is also an element of the individualized assessment of a specific judge, as expected by the Venice Commission, which was discussed in greater detail in **section II of the *ratio legis***;

c) the draft Act, as recommended by the Venice Commission, refers to the status of everyone appointed to the office of judge at the request of the current Council, but a simplified validation by the future National Council of the Judiciary, which is compliant with the Constitution, is proposed with respect to the category of entry-level judges by means of a confirmation that the requests for their appointment to judicial positions formulated on the basis of resolutions adopted by the defectively formed National Council of the Judiciary are effective, as discussed in greater detail in **section IV of the *ratio legis***;

d) the draft Act also implements the position of the Venice Commission to the extent to which it differentiates the status of these people, taking into account their legal situation, and proportionately specifies the effects of a defective appointment to the office of judge, depending on this situation;

e) the planned effects with respect to the group of judges who took part in the promotion procedure before the incorrectly formed NCJ will take place *ex nunc* with the entry into force of the Act, whereas, whether they are upheld will depend on a final decision in the proceedings

conducted again by the correctly formed National Council of the Judiciary, which is independent of the legislative and executive powers, regarding appointments to judicial positions, which previously ended with resolutions of the incorrectly formed Council;

f) the notification made by the Minister of Justice about the effects of the planned Act affecting a specific person will be appealable before the Supreme Court, which already creates a basis for judicial review of the planned solutions and therefore ensures access to a trial by a court for the people affected by the planned effects, which was discussed in greater detail in **section V of the *ratio legis***.

It should be explained that the drafter assumes that the judicial review of the effects specified in the Act can take place in full within the framework of the repeated competitive recruitment proceedings for vacant judicial positions, because the opening of these competitive recruitments and the participation in them of the people appointed to the office of judge at the request of the current Council is inherently related to the vacation of the judicial positions. It should be emphasized that although, in technical and legal terms, the structure of repeated competitive recruitment (nomination) proceedings has been used here, in terms of the way in which the group of entities participating in these proceedings is formed and the criteria taken into account in these competitive recruitments, the National Council of the Judiciary was given the opportunity to make a decision on whether to uphold the effects arising from the Act.

The use of such a technical and legal structure is justified, on the one hand, by the aim to efficiently and quickly regulate the resolutions of the current Council and, on the other, by the assurance that the individual qualifications for holding judicial positions will be assessed in conditions of transparent competition for vacant judicial positions. Weighing up these values, the draft Act assumes that the assessment of individual competencies for the position of judge cannot be made *in abstracto*, but must take into account a comparison with other potential candidates for this position, which reflects the model of selection of candidates for judicial positions in competitive conditions adopted in Poland. Of particular importance when assessing *in abstracto*, and therefore in the absence of rival candidates, is that it is difficult for the National Council of the Judiciary to make an open and transparent assessment of the merits of the candidates for individuals (future parties to the proceedings). This solution is also justified by the guarantee of equal access to public service for those judges who refrained from taking part in promotion competitions because of the defective status of the NCJ;

g) conducting the competitive recruitments again will enable the National Council of the Judiciary to assess the individual qualifications of the candidate for the position of judge. This assessment will take place in conditions of open competition so as to ensure that people satisfying the highest substantive criteria administer justice;

h) the draft Act provides that judges who took up their first judicial position in a manner that is consistent with the standard arising from Article 179 of the Constitution of the Republic of Poland and then changed their place of service in the same judicial branch will be delegated

by law to perform judicial duties in the court in which they currently hold positions or to which they were transferred; such statutory delegation is to last two years (with the possibility of standing down with six months' notice) and may be extended at the request of the judge, if that judge is taking part in the repeated competitive recruitments. Similarly, the draft Act allows judges who decided to take part in repeated proceedings to continue to adjudicate in the court in which they took up their position until the competitive recruitment is settled, provided that this is justified by the needs of the justice system and the will of the judge himself. This enables the negative effects of changing the place of service of a judge who is affected by the effects of the Act to be mitigated until the new competitive recruitment is settled. All the more so because a solution is being drafted to ensure that judges delegated to a higher court receive a salary at a rate that is similar to the rate which is appropriate for the place of service in the court where the delegated judge performs his/her duties. Importantly, the adoption of such a solution also protects parties to proceedings from the effects of a judgment issued by a person who was incorrectly appointed to the office of judge, because the judge's *votum* to adjudicate at the place of service to date no longer arises in this case from a defective appointment at the request of the current Council, but from the original act of appointment based on Article 179 of the Constitution of the Republic of Poland and the delegation based on the draft Act.

IV. Effects of resolutions adopted in 2018–2025 by the National Council of the Judiciary

A consequence of the constitutional defectiveness of appointments made at the request of the National Council of the Judiciary, which – as explained in **section I of the *ratio legis*** – has lost its constitutional identity, leading to the President of the Republic of Poland making nominations solely on the basis of the provisions of an Act and not Article 179 of the Constitution of the Republic of Poland, is the possibility of regulating the effects of resolutions of the current Council by means of a statute.

This is reflected in Article 2, para. 1 of the draft Act, which provides that resolutions of the current Council 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 do not have any legally binding force. In this way, the draft Act implements the order arising from the judgments of the national and international courts to restore the rule of law by regulating the defective appointments made by the current Council *ex nunc*. The legal consequences of depriving the resolutions of the National Council of the Judiciary, which was formed in manner resulting in the people appointed by the President of the Republic of Poland at its request not constituting an independent and impartial court established by law, of their legal force are specified in subsequent provisions of the Act.

The analysis of the situation of the people appointed to the office of judge on the basis of these resolutions justifies their grouping into the following main categories:

a) judicial assessors in ordinary courts appointed to the position of a district court judge;

b) judicial assessors in voivodship administrative courts appointed to the position of a voivodship administrative court judge;

c) court referendaries and judicial assistants, who passed the judicial examination and became eligible to apply for appointment to the office of judge within 5 years of passing the examination or by 21 June 2024, appointed to the position of a district court judge;

d) people exercising the right to return to the profession of judge,

e) judges appointed to their first position under Article 179 of the Constitution of the Republic of Poland, who are applying to the current Council for appointment to the office of judge in another court or in a higher court;

f) people applying for appointment to the office of judge, who were not previously judges;

g) people applying for appointment to the office of judge of the Supreme Court or a judge of the Supreme Administrative Court, who were not previously judges;

h) people appointed to the position of judge who had retired or were sent into retirement.

The draft Act introduces differentiated effects with respect to people qualifying for these groups. These effects were determined with account taken of the gravity of the violation taking place relative to the legal situation of the candidates included in the individual groups, as well as with an awareness of the need to ensure the efficient functioning of the judicial system and to guarantee protection against a further exacerbation of its crisis. This solution is based on the mechanism of proportional weighting up of values, to which the Venice Commission drew attention in its opinion of 14 October 2024.

IV.1 Entry-level judges, judges exercising the right to return to the profession of judge

The draft Act envisages that, in the case of judicial assessors (points a and b above), court referendaries and judicial assistants (point c above), as well as the people exercising the right to return to the profession of judge (point d above) by means of a resolution of a future, correctly formed National Council of the Judiciary, the appointment will be validated

with the effect of preventing their status as correctly appointed judges from being contested in the future.

A solution involving the return *ex lege* of anyone, whose first appointment to the office of judge was made without the observance of the requirements of Article 179 of the Constitution of the Republic of Poland, to the last positions correctly held cannot be adopted because, at the time of their first appointment to the office of judge, the request for the appointment of these people was made by an incorrectly formed National Council of the Judiciary, the composition of which did not satisfy the requirements of Article 187, para. 1 of the Constitution of the Republic of Poland. The acceptance of the legal situation in which these people found themselves requires a special definition of the principles of remedying their defective status. It is proposed that the status of the group of approximately 1,000 judges starting their judicial career, applying for judicial appointments primarily as former judicial assessors, court referendaries and judicial assistants, is validated by a future, properly shaped National Council of the Judiciary by confirming that applications for their appointment to judicial positions formulated on the basis of resolutions adopted by the incorrectly formed National Council of the Judiciary are effective, with the effect of preventing their status as correctly appointed judges from being contested in the future.

The largest subgroup in this group (approx. 500 people in the ordinary courts and approx. 100 people in the administrative courts) consists of people appointed to judicial positions after serving as judicial assessors. In their case, it is significant that they did not take part in competitive recruitments with the involvement of the incorrectly appointed National Council of the Judiciary, because, in their case, the position of judicial assessor was only transformed into the position of judge. In addition to the judges who completed their judicial assessorship, the group in question primarily includes judges starting their judicial careers, who passed the judicial examination, have not undergone assessorship, and worked in courts as court referendaries (approx. 280 people) or judicial assistants (approx. 120 people) before taking up the office of judge. They were forced to enter the nomination procedure before the National Council of the Judiciary within the deadline specified by law so as not to lose the right to take up the position of judge as a result of successfully passing the judicial examination.

The solution from the draft takes into account the fact that, on the one hand, after passing the judicial exam, these people represent a high professional level for holding the office of judge and, on the other, they found themselves in an involuntary situation and could not withdraw from taking part in the competitive recruitment procedure before the defective National Council of the Judiciary because of the risk of expiry of the right to hold the office of judge. Therefore, by adopting the involuntary situation of the people forced by their legal situation to initiate and undergo the nomination process before the defectively formed National Council of the Judiciary as a criterion, the drafter specified in Article 2, para. 2 of the Act the groups of current judges which are not affected by the effects described in Article 2, para. 1 of the Act.

This group includes:

1. district court judges appointed to the office of judge in the procedure specified in Article 106 xa of the Law on the Structure of the Ordinary Courts of 27 July 2001, namely assessors who had to apply for appointment to the office of judge because of the deadline specified by law;

2. district court judges whose right to apply for appointment to the office of judge arose from Article 15, para. 11, Article 18 or Article 20, para. 1 of the Act amending the Act on the National School of Judiciary and Public Prosecution, the Law on the Structure of the Ordinary Courts and Certain Other Acts of 11 May 2017 (Journal of Laws of 2017, item 1139 and of 2018, item 1443), namely the people who gained the opportunity to apply for the office of judge because they passed the examination but did not complete the court assessorship, including former court referendaries and judicial assistants;

3. voivodship administrative court judges, whose right to apply for appointment to the office of judge arose from holding the position of a judicial assessor in a voivodship administrative court, for which they applied before the date on which the Act amending the Act on the National Council of the Judiciary and Certain Other Acts of 8 December 2017 (Journal of Laws of 2018, item 3) entered into force;

4. judges who resigned from the office of judge and then returned to the office of judge and the position previously held, if they took up the position previously held in a manner other than as a result of applying for the appointment of a judge submitted to the president of the Republic of Poland by the National Council of the Judiciary formed in accordance with Article 9a of the Act on the National Council of the Judiciary of 12 May 2011, or in the manner referred to above in points 1–3).

In the case of assessors (both in the ordinary courts and the administrative courts), the role of the National Council of the Judiciary was very limited, which is also important. The resolutions it adopted did not constitute a decision in the competitive recruitment to a vacant judicial position. It should be emphasized that, in the current state of law, it is only possible to achieve the position of assessor by passing the judicial exam. The Minister of Justice guarantees assessor positions for all graduates of the National School of Judiciary and Public Prosecution, so they do not take part in competitive recruitments. Furthermore, the failure to take up the position of assessor results in the requirement for them to refund the costs of education during the training. It should also be pointed out that, over the many years of operation of the institution of judicial assessorship in its current form, while considering hundreds of applications for transforming the position of assessor into the position of judge, there was only one case of a person who had completed judicial assessorship not being

presented for appointment to the position of judge.[5] This illustrates the symbolic role of the National Council of the Judiciary with regard to the appointment of judicial assessors to judicial positions. Moreover, had these people not decided to take part in the competitive recruitment before the unconstitutionally formed National Council of the Judiciary, they would have lost the rights arising from the positive result of the judicial exam. Pursuant to Article 106 and § 8 of the Act on the Structure of the Ordinary Courts (consolidated text – Journal of Laws 2024, item 334) "*A judicial assessor shall perform the duties of a judge for 4 years from the date of on which he/she takes up the position of assessor,*" and in the event of the failure to take up the position of judge within this period, his further *votum* to adjudicate expires.

People, who had already been working in the judicial system (primarily as court referendaries or judicial assistants) and had passed the judicial exam before being appointed to the office of judge, constitute another important part of this group. The fact that these people passed the judicial exam, which is considered the most difficult legal exam in Poland, confirms the high and specific qualifications of the people from the said groups to hold the office of judge. Their continued work in the justice system, either as judicial assistants (whose basic task is to prepare draft orders, rulings or their justifications,[6] which is the essence of a judge's work outside the courtroom), or as court referendaries (who perform tasks within the broadly understood scope of legal protection[7]), enabled them to consolidate the practical use of the knowledge gained while preparing for the judicial exam. Had these people not decided to take part in the competitive recruitment before the unconstitutionally formed National Council of the Judiciary, they would have lost the rights arising from the positive result of the judicial exam. According to the principles laid down by the Act amending the Act on the National School of Judiciary and Public Prosecution, the Act on the Structure of the Ordinary Courts and Certain Other Acts of 11 May 2017 (Journal of Laws 2017, item 1139), court referendaries and judicial assistants who gained the right to be appointed to the position of district court judge, retain this right for 7 years from the date of entry into force of this Act (Article 18, para. 1 of the Act). Court referendaries and judicial assistants who passed the judicial examination after this Act entered into force may be appointed to the position of district court judge within 5 years of the date of passing the judicial examination (Article 20, para. 1 of the Act). It is this factor and time

[5] This case is described in the table on page 44 of the information from the NCJ in 2021 (https://krs.pl/pl/dzialalnosc/sprawozdania/1369-informacje-o-dzialalnosci-krs-w-2020-r-2.html). Characteristically, the candidate was not rejected as a result of the substantive assessment, but because of doubts about the ethical attitude of the person running for the office of judge. It should be noted that the National Council of the Judiciary, which had been operating up to March 2018 in a composition that was consistent with the constitutional standard (before its term of office was interrupted as a result of the unconstitutional change in the procedure for electing judge-members of the NCJ by the Act of 8 December 2017, Journal of Laws of 2018, item 3), never questioned the candidacy of a person applying for the office of judge after the assessorship.

[6] Cf. § 2 of the Regulation of the Minister of Justice of 8 November 2012 on the activities of judicial assistants, Journal of Laws of 2012, item 1270

[7] Cf. Article 2, § 2 of the Act on the Structure of the Ordinary Courts (consolidated text – Journal of Laws of 2024, item 334)

pressure that distinguishes their situation from judges who decided to take part in competitive recruitments to higher judicial positions, or people practising other legal professions who did not pass the judicial examination, but argued their qualifications for the office of a judge from their professional experience in other legal professions. These people were not acting under the pressure of time arising from the regulations and could have waited with their application for judicial positions until the restoration of the National Council of the Judiciary to its constitutional form.

The drafter decided to also include voivodship administrative court judges, who took up their positions as judicial assessors in these courts, within the group of judges in question, in the case where this assessorship started before the amendments were made to the Act on the National Council of the Judiciary on the basis of the Act of 8 December 2017. In the situation where these people took part in the competitive recruitment for the position of assessor before the still correctly operating National Council of the Judiciary, and their position was only transformed later, as in the case of assessors in the ordinary courts, then, even in this case of taking up judicial positions, the role of the defectively formed National Council of the Judiciary was actually symbolic.

This group also included judges who returned to the office of judge after having resigned from their judicial positions.[8] It is significant here that they were originally appointed to the judicial positions, from which they resigned, at the request of the National Council of the Judiciary, operating in a form that was consistent with the Constitution of the Republic of Poland. The role of the new, legally defective National Council of the Judiciary was also marginal in this case. It can be pointed out here that such a legal situation could apply to no more than a few judges.

A special situation regarding equal access to public service, as guaranteed by Article 60 of the Constitution of the Republic of Poland, justifies the simplified validation of the status of the above judges, who took office with the involvement of the unconstitutionally formed National Council of the Judiciary by confirming *ex post* that the applications of the people from the above groups for appointment to judicial positions formulated on the basis of resolutions adopted by the defectively formed NCJ are effective (Article 2a, para. 2 of the draft act). Had they not applied for the transformation of their status to the status of a judge within the deadline specified by law, they would have lost their access to public service in the form of the possibility of holding the office of judge. Given the presented compulsory legal situation in which they found themselves through no fault of their own, none of the judges listed in Article 2, para. 2 of the Act should suffer the consequences of the enactment of a law that is in conflict with the

[8] This applies to group of judges who resigned from office as a result of their nomination, appointment or election to perform functions in state bodies, local government, diplomatic or consular service or in bodies of international and supranational organizations operating on the basis of international agreements ratified by the Republic of Poland, after which they return to judicial service (Article 89, § 2 and § 3 of the Act on the Structure of the Ordinary Courts, consolidated text – Journal of Laws of 2024, item 334)

Constitution of the Republic of Poland and, consequently, should not be deprived of the ability to administer justice as judges.

In order to eliminate all doubts as to the status of the judges referred to in Article 2, para. 2 of the Act and in order to create security for the parties (participants) of proceedings which were and are pending before courts adjudicating in benches that include these judges, the drafter clearly points out that these judges shall retain their office and judicial position from the time of their appointment to office (Article 3 of the Act).

The drafter bore in mind the future of the judges referred to in Article 2, para. 2 of the Act and primarily the need to guarantee citizens the right to a trial in a court established by law in the future, and so decided to entrust the National Council of the Judiciary formed in accordance with the requirements of the Constitution with the powers to adopt resolutions confirming that requests made in the past to present these people to the president of the Republic of Poland for appointment to the office of judge are effective (Article 2a, para. 2 of the draft Act). This solution was adopted to ensure certainty of legal transactions and to eliminate the risk of questioning the status of the judges specified in Article 2, para. 2 of the Act in the future. The authority of the judges appointed to office without an effective request from the National Council of the Judiciary is also significant. According to the requirements of Article 179 of the Constitution of the Republic of Poland, the president appoints judges at the request of the National Council of the Judiciary. In the situation where the National Council of the Judiciary, operating in the form specified in the Act amending the Act on the National Council of the Judiciary and Certain Other Acts of 8 December 2017 (Journal of Laws of 2018, item 3), could not effectively submit requests for appointment to the position of judge, after restoring its form to one that is consistent with the Constitution of the Republic of Poland, it is reasonable for this body to subsequently confirm the effects of resolutions adopted by the National Council of the Judiciary operating in a composition that is inconsistent with the Constitution. The drafter is aware of the controversial nature of the solution adopted here, but acknowledges that the nature of the irregularities made through the appointment of judges to office as a consequence of the constitutionally ineffective requests of the National Council of the Judiciary, as well as the scale of these irregularities, require the adoption of such a non-standard, transitional solution. It is precisely the size and scale of the irregularities that have taken place since 2018, when the National Council of the Judiciary started to operate in a legally defective form that forces the adoption and application of occasionally atypical remedial instruments. An alternative would be to accept that the whole group of judges referred to in Article 2, para. 2 of the Act should go through the entire nomination path from the beginning, which would, firstly, violate the right of citizens to a trial in a court, which also includes the right to an efficient hearing of the case and, secondly, would mean that it is reasonable for these judges to refrain from administering justice until the end of the nomination process. This group constitutes approximately 10% of the total number of judges of the ordinary courts in Poland, who additionally, adjudicate in first instance courts, i.e. those which receive the largest number of all court cases. Furthermore, given that these are judges adjudicating in district courts, it is practically impossible to replace them, even through so-called horizontal delegations (from

other equivalent courts), because all district courts throughout the country, are struggling with an insufficient number of adjudicators.

In such very difficult conditions, when the justice system cannot afford to disqualify such a large number of judges, who adjudicate and handle hundreds of thousands of proceedings, from administering justice, the solution is to entrust the National Council of the Judiciary with special powers to adopt resolutions, having the effect of confirming that the resolutions of this body, which previously operated in a legally defective form as a result of which it temporarily lost its constitutional identity, are effective. It should be emphasized that the solution is decidedly a one-off solution and is motivated by the special situation arising from the operation of the National Council of the Judiciary since 2018 on principles that were inconsistent with the wording of Article 187, para. 1 of the Constitution of the Republic of Poland. Given such a large number of judges who require confirmation of their incorrectly granted investiture, only such a solution can reconcile the need to provide these judges with a constitutionally based *votum* to adjudicate from a National Council of the Judiciary functioning, in its shape and composition, in accordance with the Constitution (Article 187 of the Constitution of the Republic of Poland) with the needs of the judicial system, from which approximately 1,000 active judges cannot be disqualified from ruling without significant harm coming to citizens. It should be added that, in its opinion of 14 October 2024 in case CDL-AD(2024)029, the European Commission for Democracy through Law (Venice Commission) also noted that, when issuing a pilot judgment on 11 November 2023 in case 50849/21, Wałęsa v Poland, the European Court of Human Rights did not specify how to “address” the status of the incorrectly appointed judges. Poland is free to choose the legal instruments it creates and uses for this purpose, taking care only that the means used in this process are consistent with the European Convention on Human Rights and the overall requirements of the rule of law (para. 12 of the opinion).

In order to streamline the validation process designed for the new, correctly formed National Council of the Judiciary, the legislator introduced a mechanism in Article 2a, para. 2 of the Act for grouping the judges referred to in Article 2, para. 2 of the Act, which will enable the National Council of the Judiciary to efficiently exercise the said powers. In its opinion of 14 October 2024 in case CDL-AD(2024)02, the European Commission for Democracy through Law (Venice Commission), also indicated that it is possible to group judges in the process of their validation (para. 19 of the opinion), taking into account practical considerations and the efficiency of this process.

The required efficiency of the validation procedure, which the National Council of the Judiciary is to conduct as quickly as possible, resulted in the drafter deciding to rule out the possibility of judges, to whom this procedure applies, appealing to the court (Article 2 a, para. 4 of the draft Act). If the National Council of the Judiciary does not interfere with the rights and duties of judges encompassed by the validation procedure in question through its resolutions, and the Council’s resolutions only apply to their systemic position, the exclusion of the court route arising from the needs for efficiency of proceedings encompassing approximately 1,000

judges is reasonable and permissible under the standard of protection of the Convention (Article 6, para. 1 of the European Convention on Human Rights) and the Constitution (Article 45, para. 1 of the Constitution of the Republic of Poland). In a democratic state governed by the rule of law, the court route may be disabled if this is justified by other universally recognized values, such as, in particular, legal security, the principle of legalism or confidence in the law.

The reason for the mechanism of validation of the effects of resolutions by a correctly formed National Council of the Judiciary which were adopted at a time when it was operating in a composition that is inconsistent with the Constitution of the Republic of Poland, is primarily the legal security of citizens. Such resolutions do not interfere with the civil law situation of the judges to which they apply, because their effect will only be the constitutional consolidation of these judges, so that the votum granted to them to adjudicate satisfies the requirements of Article 179 of the Constitution of the Republic of Poland.

In view of the need to quickly validate the previously defective applications for appointment to the office of judge, the National Council of the Judiciary was given a deadline of 30 days to pass resolutions on this. This period starts from the day of the first meeting of the correctly formed National Council of the Judiciary.

There is no need to regulate the status of the current judicial assessors in any special way, because they will be able to obtain judicial nominations from the future National Council of the Judiciary formed in accordance with the constitutional and convention standards.

IV.2 Judges applying for appointment to the office of judge in another court or in a higher court

As for judges applying for appointment to the office of judge in another court or in a higher court (point e above), the draft Act provides for their reinstatement to the positions entrusted in accordance with Article 179 of the Constitution of the Republic of Poland. This is a group of around 1,200 people. With respect to them, the draft Act follows the rule of return, because a judge who originally had a correctly granted *votum* may only lose it in the situations and in the manner specified in Article 180 of the Constitution of the Republic of Poland. At the constitutional level, such a judge has already been correctly appointed to the office of judge and his employment, in which he administered justice, was originally correctly established. In this respect, he is protected by the guarantees of Article 180 of the Constitution of the Republic of Poland. In order to regain the properly granted legitimacy to administer justice, the judge should therefore return to the place where he served in the court specified to him in the resolution of the President of the Republic of Poland issued on the basis of Article 179 of the Constitution of the Republic of Poland, based on a request from the correctly formed National Council of the Judiciary.

This will lead to the modification of the effects of the resolution of the President of the Republic of Poland on the appointment to the office of judge by law. In principle, such

modifications are permissible in the situations specified in Article 180 of the Constitution of the Republic of Poland. However, the effects of the decisions of the President of the Republic of Poland issued without being based on Article 179 of the Constitution of the Republic of Poland may be modified to a broader extent, if this is justified by the need to implement constitutional principles. As for appointments made by the President of the Republic of Poland at the request of the current Council, its source is the need to restore the right to a trial by an independent and impartial court established by law, as a principle arising from both the Constitution of the Republic of Poland and international law which is binding on the Republic of Poland (Article 45 para. 1 and Article 9 of the Constitution of the Republic of Poland). This justifies the acceptance of such solutions which allow for the specification of the place of service in such a way that a person appointed to office at the request of the current Council becomes a judge again, having been appointed on a constitutional basis, from being a judge established exclusively on the basis of a statute.

It should be emphasized that the Constitution of the Republic of Poland does not require that the principle of return be implemented exclusively within courts of a given type and, in particular, it does not prohibit the return of a person appointed to the office of judge in the Supreme Court or the Supreme Administrative Court to an ordinary court. A different assessment would have to lead to the conclusion that the employment of these people ends. However, the draft Act does not go that far, given that Articles 175, 179 and 180, para. 1 of the Constitution of the Republic of Poland only prejudge that the President of the Republic of Poland appoints judges for an indefinite term and entrusts them with the *votum* to administer justice at the request of the National Council of the Judiciary. The Constitution of the Republic of Poland does not specify the wording of the resolution of the President of the Republic of Poland regarding the place and scope of administration of justice by a judge. The basis for specifying the place and scope of administration of justice is a statute. Finally, the Constitution of the Republic of Poland does not provide for separate procedures for appointing judges of ordinary courts to the Supreme Court or administrative courts. Therefore, since a statute constitutes the legal basis for the specification by the President of the Republic of Poland of the type of court to which a given person is appointed in the resolution, the statute may also specify the court to which this judge is to return. There are no constitutional obstacles to the principle of return expressed in the statute involving the reinstatement of a judge in a court of a different type (e.g. from the Supreme Court to an ordinary court).

IV.3 People who entered the judicial profession from other legal professions with the involvement of the incorrectly formed National Council of the Judiciary.

However, the above solution cannot include the group of approximately 350 people in the ordinary courts and approximately 80 people in the Supreme Court and the Supreme Administrative Court, who did not originally have a properly granted *votum* and were judges appointed solely on the basis of an Act from the beginning (points f and g above). This category primarily consists of people who applied for the office of judge while they were prosecutors,

attorneys-at-law, legal counsels, notaries public or academics. The members of this group were in a different situation from that of the aforementioned court assessors, court referendaries or judicial assistants, because, in their case, the right to apply for appointment to the office of judge was not granted for a statutorily specified period, but was of an indefinite nature. This justifies the acceptance of a different effect with respect to these people. This is the termination of employment in the position of a judge. This solution should be considered admissible in the light of both constitutional and international standards for the reasons discussed in **section II of the *ratio legis***.

Notwithstanding the above, the draft Act takes into account the need to regulate the effects of the termination of employment in the position of judge by law in a manner that is as proportionate as possible, which was reflected in the regulations protecting the rights of the people affected by these effects, as discussed in detail in **section VI of the *ratio legis***.

Based on the criteria presented above, the Act also specifies the effects with respect to people who have retired or who have been retired (point h above).

As pointed out in **section I of the *ratio legis***, the draft Act assumes that the National Council of the Judiciary will decide on the continuation of the effects arising from the Act, under the control of the Supreme Court in the repeat proceedings regarding appointment to judicial positions which had ended in resolutions of the defectively formed Council.

Regardless of this, the draft Act, as explained in **section V of the *ratio legis***, envisages a separate instrument of judicial review as early as at the stage of when the effects arise under the Act.

V. Court review at the stage of appearance of the effects from the Act

The draft Act assumes that the effects provided for in it regarding the status of judges appointed at the request of the National Council of the Judiciary formed on the basis of Article 9a of the Act of 8 December 2017 will arise by law upon the entry into force of the Act. The Minister of Justice will establish whether these effects appear for individual judges. The draft requires the Minister of Justice to announce a list of the effects for each of the judges in the Official Journal of the Republic of Poland “Monitor Polski”, encompassing their forenames, surnames, dates of birth, positions and dates of appointment to these positions, indicating the effects caused by the Act and their legal basis. According to the draft, the act of the Minister of Justice is purely of an informative nature. Based on the list that is announced, all entities and bodies for which this is of legal significance will be able to obtain information about the appearance by law of the effects arising directly from the Act with respect to a particular judge. However, this solution primarily serves to officially confirm the statutory effects with respect to the given judge. The entry onto the list announced by the Minister of Justice will authoritatively specify the legal status of the judge named in the list in connection with the entry into force of the Act.

Furthermore, the proposed institution of the entry onto the list may be treated as the subject matter of a judicial review, to which any actions affecting the status of judges should be subject. According to the standard adopted in the case law of the European Court of Human Rights, the judicial protection provided for in Article 6(1) of the Convention may be disabled in cases regarding the status of state officials after two conditions are met: firstly, the state must expressly rule out the right to a trial in a court for the position or category of staff to which the matter applies in national law, and secondly, such an exclusion must be justified on objective grounds of state interest (cf. judgment of 19 April 2007, Eskelinen v Finland, no. 63235/00). This position has also been extended to encompass disputes regarding the status of judges, because, although the judiciary is not part of the civil service, it is considered part of a typical public service. Therefore, the ECtHR applied the established criteria for disabling the judicial route to all types of disputes regarding judges, including disputes regarding recruitment and appointment, career and promotion, transfer, suspension, disciplinary proceedings, as well as removal from office, reduction of the salary as a result of a conviction for a serious disciplinary offence, removal from office while retaining the office of judge or the deprival of judges of the ability to perform judicial functions after the reform (cf., for example, judgment of 15 March 2022, Grzęda v Poland, no. 43572/18, § 263, together with the case law cited therein).

The draft Act contains solutions which modify the employment relationship of the persons appointed to hold office as judges to varying degrees, and stipulate that, in exceptional situations, this relationship ends by law. In view of the gravity and scope of the impact of these solutions on the sphere of personal and professional rights of these persons, the draft assumes that the matter of the appearance of the effects arising from the Act should be subject to direct judicial review. This is also in line with the suggestion contained in the joint opinion of the Venice Commission and the Directorate General for Human Rights and the Principle of Law (DGI) of 14 October 2024 [CDL(2024)029] on European standards regulating the status of judges, which expressed the view that judicial appointees should be given the right to seek judicial review against the invalidation of their nomination or promotion if the decision of invalidation is not taken by a judicial body, and that the fact of protesting against a decision would not necessarily have the effect of suspending it while judicial recourse is being sought (para. 36).

While implementing these recommendations, the draft contains separate regulations specifying the principles by which interested parties exercise the right to a trial in court and regulating the procedure for conducting proceedings in such cases. In this respect, the draft provides for the ability of an interested party to file an appeal with the Supreme Court to enable an examination to be conducted of the correctness of the specification of the effects arising from the Act with respect to that party in the entry in the list announced by the Minister of Justice. In connection with the position expressed in the resolution of the full bench of the Supreme Court of 14 January 2014 (BSA-I-4110-4/13), the draft assumes that the actions of the Minister of Justice regarding the status of judges cannot be classified as one of the forms of operation of public administration and do not constitute a resolution of an administrative case, but refer to the sphere of system law, which the Minister of Justice can specify as the

holder of a specific competence affecting the judge's employment relationship. Even so, for the avoidance of doubts that may arise in this context, the draft stipulates that no appeal may be filed with an administrative court against the announcement of the Minister of Justice specifying the effects arising from the Act. However, in line with the model of the solution in force in Article 74, § 4 of the Law on the Structure of the Ordinary Courts of 27 July 2001 (Journal of Laws of 2024, item 334), it was accepted that the court with jurisdiction to review the method in which the Minister of Justice specifies the effects arising from the Act should be the Supreme Court. De lege lata, the Supreme Court is also the body appointed to review resolutions adopted by the National Council of the Judiciary in individual cases of judges (Article 44, para. 1 of the Act on the National Council of the Judiciary of 12 May 2011, Journal of Laws of 2024, item 1186). These regulations confirm that, in the national legal system, the Supreme Court is treated as the court with jurisdiction over matters regarding the status of judges and the holding of their office, which justifies entrusting this Court with the review of the effects that are to take place with respect to judges on the basis of the draft Act.

The draft provides for the award of the right to file an appeal, serving as the court review of the correctness of the specification of the effects arising from the Act in the entry in the list, also to the relevant president of the court in which the person affected by the effects of the Act had previously had his/her place of service. This is an important solution from the point of view of the possible appearance of such situations in which the irregularity regarding the specification in the list of effects arising from the Act with respect to a given person would be that such effects, which are more favourable than those actually arising from the Act, would be specified or the person affected by the effects of the Act would be omitted from the list. These are situations in which the interested party may consider that he/she has no interest in filing an appeal. The president of the court holding the judge's employment documentation is the competent authority for determining the possible appearance of such irregularities.

The draft assumes that an appeal should be filed with the Supreme Court within two weeks of the date of the announcement made by the Minister of Justice, while filing an appeal will not suspend the effects arising as a result of the Act, which takes into account the position expressed in the above Joint Opinion of the Venice Commission and DGI of 14 October 2024. The matter of the correctness of the specification of the effects indicated by the Minister of Justice in the published entry in the list is to be reviewed in proceedings conducted in connection with the filing of the appeal. When considering the appeal, the Supreme Court will be authorized to find that the appellant was incorrectly included in the group of persons encompassed by the effects of the Act. In such a situation, if the Supreme Court accepts the appeal, it will cancel the entry in the list and thus end the proceedings with respect to the person who should not have been listed by the Minister of Justice in the published list. In turn, if the application of the Act with respect to the appellant is justified but the effects arising from this Act with respect to that appellant are simultaneously incorrectly specified, the Supreme Court will be required to cancel the entry in the list in order to correctly specify these effects in the list. Such a ruling under the appropriately applied Article 365, § 1 of the Code of Civil Procedure will be binding on the Minister of Justice and, as a result of it being issued under

the draft regulations, the obligation will arise to announce the list once again, correctly specifying the effects with respect to the appellant, taking into account the results of the proceedings conducted before the Supreme Court. According to the draft, the interested party will be entitled to appeal against being re-entered onto the announced list to the Supreme Court on general principles.

As for the regime of cases handled as a result of appeals, the draft stipulates that the Supreme Court should take steps on the basis of the appropriately applied provisions of the Code of Civil Procedure of 17 November 1964 regarding cassation appeals. The decision issued in these cases will only apply to the legal sphere of the person who filed the appeal, although the Minister of Justice, as the authority determining the appearance of the effects under the Act and applying its provisions in this respect, cannot be considered an interested party in this case. Therefore, it was considered appropriate to refer cases conducted as a result of appeals to non-contentious proceedings, which are organized in such a way that enables the examination of the case and the issuance of a decision in it, even in the absence of the procedural opponent initiating the proceedings before the court.

In view of the importance of cases regarding the correctness of specifying the effects introduced by the Act and the precedent-setting nature of the solutions applied, the draft introduces special regulations regarding the bench in the Supreme Court that will consider appeals. The draft stipulates that a qualified bench of five judges appointed from among all judges of the Supreme Court, as well as judges delegated to perform judicial duties in the Supreme Court, will have the competence to hear appeals, whereby the adjudicating judge will be determined by the order in which the appeal is received, taking into account the surnames of all the Supreme Court judges on the list in alphabetical order, which is kept for this purpose, but which does not include delegated judges. The bench examining the appeal will be chaired by a Supreme Court judge holding a position in the Civil Chamber or in the Chamber of Labour, Social Insurance and Public Affairs, which is related to the fact that the proceedings in the case will be conducted on the basis of the provisions of the Code of Civil Procedure applied accordingly.

In order to ensure appropriate efficiency of the proceedings before the Supreme Court and to achieve the related stabilization of legal relations in judicial appointments, the draft assumes that it will not be permissible to reinstate the deadline for filing an appeal, while an appeal that does not meet the formal requirements will be rejected without requesting its correction or supplementation. In order to achieve the same objective, the draft introduces instructional deadlines to ensure the proper speed of action taken by the Supreme Court. The draft requires the Supreme Court to make a decision on the appeal no later than within one month of the date on which it is filed in cases regarding persons appointed to the position of Supreme Court judge and no later than within 2 months of that date in other cases.

VI. Repeat appointment proceedings for judicial positions taken up on the basis of resolutions of the defectively formed National Council of the Judiciary

The second stage of restoring the right to an independent and impartial court established by law in the proposed Act involves repeating proceedings (hereinafter also referred to as "competitions") for positions taken up on the basis of resolutions of the defectively formed National Council of the Judiciary in 2018–2025. This stage is inherently connected with the accepted structure of regulation of the effects of resolutions of the current Council through the Act with respect to people who are judges applying for appointment to the office of judge in another court or in a higher court, because it is only in these proceedings – conducted before the correctly formed National Council of the Judiciary and under the control of the Supreme Court – that the status of individual categories of people affected by the application of the Act will be finally decided. This is reflected in Article 28 of the draft Act, which envisages the repetition of proceedings on the appointment to the office of judge in a position taken up on the basis of a resolution of the current Council.

In this respect, the draft Act refers to the Icelandic experience with the implementation of the judgment of the Grand Chamber of the ECtHR of 1 December 2020 in Guðmundur Andri Ástráðsson v Iceland (application no. 26374/18), in which it was held that "A finding that a court is not a 'tribunal established by law' may, evidently, have considerable ramifications for the principles of legal certainty and irremovability of judges, principles which must be carefully observed having regard to the important purposes they serve. That said, 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" (para. 240). In this judgment, the ECtHR gave a clear signal that the restoration of the correctness of the appointment may constitute grounds for departing from the principle of the irremovability of judges. It should therefore be noted that, in Iceland, where the said judgment was executed, a new competition procedure was implemented in connection with the correctness of judicial nominations being called into question.

It should be explained that there are significant structural differences between the planned new (repeat) proceedings on appointments to judicial positions and the new competitions announced for these positions. The drafter assumes that the judicial review of the effects referred to in the Act may take place in the repeat competition proceedings for filling vacant judicial positions, which is not possible in the case of new competitions. This would not be possible if "new" competitions were announced on general terms, and not repeated, as is the case with the draft Act. Furthermore, in the repeat competitions, the same achievements and the given person's achievements are to be assessed as in the original proceedings, with

the possibility of also presenting new achievements, which is of guarantee significance. Thirdly, people affected by the effects of the Act take part in the competition by law and do not have to apply, but they are able to withdraw from it. Finally, the requirements regarding the length of service in the profession that is necessary for taking up the position of judge are to be assessed on the basis of the laws in force on the date of submission of the application for the judicial position, to which the given person was appointed under the current Council's resolution, which is also of guarantee significance.

The draft Act assumes that, regardless of the type of court, vacancies should be announced by the Minister of Justice. The need to coordinate numerous proceedings for positions in various courts justifies concentrating the competence for announcing vacancies in one body. The consolidation of all competitions conducted for the same court or the same chamber of the Supreme Court or Supreme Administrative Court by announcing them together, unless this is not possible or advisable, serves the purpose of efficiently conducting these competitions. This will help reduce the number of competitions announced, joint decisions to be made about candidates applying for positions in the same court and, finally, the announcement of competitive recruitments for individual courts in stages. For example, this means that the Minister of Justice will be able to announce vacancies first in courts from one appellate area, and only after candidates have applied for them or after the proceedings have ended, will he announce vacancies in courts from another appellate area. In this way, the proposed solutions will minimize the adverse impact of repeat competitions on the efficiency of examining court cases. This is because it is not a requirement that all vacancies which are to be filled in the repeat proceedings should be announced at the same time.

In principle, the people who assumed the office of judge at the request of the current Council will take part in new proceedings by law, retaining the possibility of resigning from taking part in the competition. In this respect, the proposed changes in the structure of the Supreme Court leading to the liquidation of the chamber of the Supreme Court in which the judicial position was originally taken up have been taken into account by enabling applications to be submitted in a competition announced for a vacant position in another chamber of the Supreme Court.

Furthermore, the proposed solutions enable participation in competitions not only for people with respect to whom the current Council's resolutions will be repealed in the procedure and on the principles specified in the draft Act, but also for other candidates who meet the requirements for taking up the given position – regardless of whether or not they took part in the original competitive recruitments or not. This will enable those people, who refrained from taking part in the proceedings because of the loss by the current Council of its constitutional identity and other changes resulting in the unfairness of the competitions, to take part in the competitive recruitment.

Resolutions of the National Council of the Judiciary adopted in repeat competitive recruitments will be appealable to the Supreme Court, which will provide the judicial review of the proposed mechanism. The possibility of appealing against resolutions of the National

Council of the Judiciary to the Supreme Court arises from Article 44, para. 1 of the Act on the National Council of the Judiciary.

Such a solution assumes that individual competences for holding the position of judge will be assessed in the repeat competitive recruitment procedures in conditions of open competition, so as to ensure the administration of justice by people meeting the highest substantive criteria. This is because it should be borne in mind that, since 2018, there has been no real judicial review of nomination procedures at all, since this was exercised by the Chamber of Extraordinary Review and Public Affairs, which is not a court established by law, and furthermore, from 2018 to August 2023, only one candidate applied in over 557 recruitments. As many as 45% of such competitions were held for courts of appeal, namely the highest-ranking courts in the structure of the ordinary courts (Helsinki Foundation for Human Rights, *Powołania w latach 2018–2023 na wniosek tzw. „nowej" Krajowej Rady Sądownictwa* [Eng. – Appointments in 2018–2023 at the request of the so-called "new" National Council of the Judiciary], Warsaw 2023, pp. 7–8).

The proposed amendments to the Act on the Supreme Court of 8 December 2017, the Law on the Structure of the Military Courts of 21 August 1997, the Law on the Structure of the Ordinary Courts of 27 July 2001 and the Law on the Structure of the Administrative Courts of 25 July 2002 are to serve the purpose of ensuring the correct course of the repeat competition proceedings and creating conditions for open competition for the office of judge. The proposed modifications in this respect primarily involve:

a) ensuring the involvement of the judicial self-government in the assessment of candidates for vacant judicial positions in courts of all types (*de lege lata* such a solution was excluded with respect to the Supreme Court, and radically limited in other courts);

b) specifying the criteria for evaluating candidates for vacant judicial positions in courts of all types;

c) increasing the requirements for taking up the position of judge of the Supreme Court (in accordance with the proposal contained in the public draft Act on the Supreme Court, Warsaw 2023, presented at the Congress of Polish Lawyers on 24 June 2024, https://www.profinfo.pl/pliki/Ustawa-o-sn-z-sprawiedliweniem, accessed on 30 January 2025);

d) extending the right originally granted in the Act amending the Act on the National School of Judiciary and Public Prosecution, the Law on the Structure of the Ordinary Courts and Certain Other Acts of 11 May 2017 (Journal of Laws of 2017, item 1139) to court referendaries and judicial assistants, who have passed the judicial examination to apply for appointment to the position of district court judge up to 31 December 2028;

e) waiving the requirement for people applying for vacant judicial positions to have only Polish citizenship. Such solutions, which have been in force since 3 April 2018, prevented

Polish citizens, who are also citizens of other countries, from participating in competitions. These solutions were discriminatory, which justifies waiving them.

The solutions adopted in this respect guarantee that competitions will be conducted on the basis of objective substantive criteria and fair procedural rules, so as to ensure the selection of the most qualified candidates, both in terms of their professional competence and impeccable character, which, in the light of the case law of the European Court of Human Rights (ECtHR judgment of 1 December 2020, Guðmundur Andri Ástráðsson v Iceland, application no. 26374/18) and the Court of Justice of the European Union (CJEU judgment of 26 March 2020, C-542/18 RX-II, and C-543/18 RX-II, Simpson and HG; CJEU judgment of 19 November 2019, C-585/18, C-624/18 and C-625/18, A.K. and others, and the CJEU cases of 22 March 2022, C-508/19, and of 6 October 2021, C-487/19) constitute the primary requirements for the existence of a court established by law in the meaning of Article 6(1) ECHR and Article 47 CFR.

The proposed solutions implement the international standards regarding the model for entering the profession of judge and, in particular, the assumption specified in Article 10 of the *The UN Basic Principles on the Independence of the Judiciary* that the people selected for judicial office are to be individuals of integrity and ability with appropriate training or qualifications in law. The criteria for selecting judges should therefore guarantee the selection of the most suitable candidate and must be objective. As transpires from the cited international standard, such criteria should refer in particular to qualifications, integrity, ability and efficiency, whereby the selection of judges must be based solely on substantive premises. Therefore, the draft Act aims to achieve a state in which competitions for vacant judicial positions will enable the selection of the best candidate, and will also take into account not only the highest standards of qualifications and professional skills, as well as an impeccable character, but also the objective needs of the justice system and the court to which the given candidate is applying for a position.

The draft Act does not interfere with the adopted model of entry into the judicial profession, maintaining the principle that the most appropriate is the competition system based on education at the National School of Judiciary and Public Prosecution, subject to the admission to the competitive recruitment of representatives of other legal professions and people holding the academic degree of doctor habilitatus in law or the academic title of professor of law.

In order to guarantee the rights of people holding judicial positions at the request of the defectively formed National Council of the Judiciary and taking into account the specificity of their situation, it was accepted that, in their case, the requirements regarding the length of professional experience needed to take up the position are to be assessed on the basis of the laws in force on the date of submission of the application. The bill therefore preserves the rights of these people and guarantees them access to the competition regardless of the changes in the requirements for taking up office.

VII. Protection of the rights of people whose employment ends until the outcome of a new competitive recruitment for a vacant judicial position

Section IV of the *ratio legis* points out that the drafter sees a need to regulate the effects of the termination of the employment relationship in the position of judge in the most proportionate manner possible, maintaining the protection of those rights that have been definitively acquired and introducing social solutions protecting people who are in a difficult personal situation.

Firstly, when defining the status of people whose employment relationship in the position of judge ends, the drafter followed the basic rule of the return to the position previously held. The list of these positions takes into account the categories of people entitled to participate in competitions for vacant judicial positions. And so:

a) people who held the position of counsel of the Office of the General Counsel to the Republic of Poland on the date of the adoption of the resolution by the current Council on the submission of a request for appointment to the position of judge have the right, at their own request, to return to the position they previously held or to a position equivalent to the one they previously held;

b) people who held a position in a public institution related to the application or creation of administrative law on the date of the adoption of the resolution by the current Council on the submission of a request for appointment to the position of judge have the right, at their own request, to return to the position they previously held;

c) people who held the position of prosecutor on the date of the adoption of the resolution by the current Council on the submission of a request for appointment to the position of judge may apply, at their own request, for appointment to the previously held position of prosecutor. The objective of such a solution arises from the fact that the prosecutor's office is a fundamental element of the system of bodies reviewing and safeguarding the law. The efficiency and correct functioning of the system justify the return of judges established solely by statute to the prosecutor's office;

d) a different solution was adopted with respect to people who were practising the profession of attorney-at-law, legal counsel or notary public on the date of the adoption of the resolution by the current Council on the submission of a request for appointment to the position of judge. These people may apply for entry onto the appropriate list or appointment on the principles specified in separate laws. In this respect, the implementation of the return rule is limited by the autonomy of legal self-governments guaranteed by Article 17, para. 1 of the Constitution of the Republic of Poland. It was therefore acknowledged that the entry or appointment should be preceded by an appropriate resolution of the professional self-government body.

Secondly, exercising the proposed right to return to the previously held position shall be ruled out if a person, whose employment ended upon the entry into force of the Act, takes advantage of the possibility of obtaining an appointment to the position of court referendary. In this respect, the return rule is replaced by the creation of the possibility of remaining within

the judicial system in non-judicial positions, which do not involve the administration of justice, but otherwise provide legal protection.

On the one hand, this constitutes a protective solution, giving the ability to continue to work professionally in the administration of justice until the repeat competition for the vacant judicial position is settled (as already mentioned in **section V of the *ratio legis***) and, on the other, mitigates the effects of the termination of the employment relationship by law, because appointment to the position of court referendary will be of an indefinite nature. It should be emphasized that the salaries of court referendaries are stable and are set proportionally to the salaries of judges[9]. They therefore create the opportunity for those who do not intend to exercise the rights arising from the proposed return rule to continue to work professionally.

As for the procedure for taking up the position of a court referendary, the draft Act envisages that the president of the relevant court of appeal or the relevant administrative court will appoint such a person – at their request – to the position of court referendary in the ordinary or administrative court in which that person held office as judge. These provisions do not apply to people appointed to hold office as judges of the Supreme Court or the Supreme Administrative Court, because the proceedings on the appointment to these positions have been affected by qualified defects and, furthermore, there are no court referendaries in these courts.

Thirdly, the draft Act regulates the social consequences of termination of the employment relationship in the position of judge, in particular regarding maternity benefits and leave, paternity, parental and upbringing leave or loans granted to meet housing needs. The draft Act also provides for the retention by family members of the right to family benefits on the principles in force on the date on which it arises. The assumption was to regulate this matter as comprehensively as possible in a way that would protect those rights that have been definitively acquired and for which there are no constitutional reasons to take them away (Articles 16-23 of the draft).

Notwithstanding these solutions, it should be pointed out again that the draft Act gives the right to a judicial review of the termination of the employment relationship and does not rule out the resumption of this relationship if the same candidate is selected in the repeat competition proceedings.

[9] Pursuant to Article 151 b § 4 of the Law on the Structure of Ordinary Courts of 27 July 2001 (Journal of Laws of 2024, item 334), the basic salary of a court referendary is 75% of the basic salary of a district court judge

VIII. Regulations intended to ensure the uninterrupted functioning of the justice system in the transitional period

As explained in **section I of the *ratio legis***, the assumption of the draft Act is to guarantee the efficient and, as far as possible, uninterrupted functioning of the judiciary during the period of repeat competitions. A system of statutory delegations is proposed for this reason.

The draft Act provides that judges who took up their first judicial position on the basis of Article 179 of the Constitution of the Republic of Poland and then changed their place of service in the same judicial branch will be delegated by law to perform judicial duties in the court in which they currently hold positions or to which they were transferred. In this case, the *votum* of the judge to adjudicate in the place where he/she has been serving to date does not arise from a defective appointment at the request of the current Council, but from the original act of appointment based on Article 179 of the Constitution of the Republic of Poland and the delegation arising from the draft Act.

This solution applies to judges of ordinary courts who hold positions in a regional court or a court of appeal, judges of a voivodship administrative court holding positions in the Supreme Administrative Court and judges of military courts holding positions in a military regiona court at the request of the current Council. Their statutory delegation is to last two years, whereby the scope of the delegation also covers the completion of cases that the judges started to handle during that period. A judge will be able to resign from the statutory delegation by giving six months' notice.

The president of the relevant court or the Minister of Justice in the case of military courts may also extend the period of delegation indefinitely at the request of the judge, on condition that the judge is taking part in a repeated competition. Such delegation will end upon the judge's resignation with three months' notice or upon the final conclusion of the repeat competitive recruitment, unless the judge is presented for appointment to office in the court to which he/she is delegated. Similarly, the draft Act allows judges who decided to take part in repeat proceedings to continue to adjudicate in the court in which they took up their position until the competitive recruitment is settled, provided that this is justified by the needs of the justice system and the will of the judge himself.

The exception only applies to those people whose continued adjudication in the position they occupy would be irreconcilable with the view of the court as an impartial or independent body. In such circumstances, the National Council of the Judiciary will be entitled to recall a judge from the delegation at the request of the chair of the National Council of the Judiciary, the president of the relevant court and the disciplinary commissioner. Only a small group of people (approximately 20), those who became members of the incorrectly formed National Council of the Judiciary during its first or second term of office, or who held the functions of Disciplinary Commissioner for Judges of the Ordinary Courts or his deputies, will be excluded from the possibility of obtaining statutory delegations *ex lege*. These people should not receive

statutory delegations because of their direct and active involvement in undermining the independence of courts and the impartiality of judges, while their exclusion from the possibility of obtaining them is not subject to judicial review (Article 4, para. 2 of the Act).

In view of the statutory nature of the proposed delegation, its minimum period and its importance for maintaining the efficient functioning of the justice system in the transitional period, a solution is being designed to ensure that judges delegated to a higher court receive a salary at the rate specified for judges delegated by the Minister of Justice (which means granting them an allowance of 20% of the basis for setting the judge's basic salary – Article 77, § 7 of the Law on the Structure of the Ordinary Courts), as a result of which their salaries plus the allowance will be very similar to the salary at the rate specified according to the court in which the delegated judge will perform his/her duties.

IX. Special basis for setting aside a judgment issued with the involvement of a person appointed at the request of the defectively formed NCJ

The draft Act creates a special legal remedy for the parties or other participants of court proceedings enabling judgments issued with the involvement of people appointed to judicial positions at the request of the current Council to be set aside.

In structural terms, the proposed solution assumes the award of the right to this remedy to the parties or participants of the proceedings who, at the time that was appropriate for filing a motion for the recusal of a judge, raised objections as to the correctness of the composition of the first instance court or as to the independence or impartiality of a person in that composition, with respect to whom the current Council passed a resolution to present a request for appointment, because of circumstances related to the appointment of that person to hold office as a judge, and then filed appeals on that basis.

The proposed solution refers to the position expressed in the justification of the resolution of the three chambers of the Supreme Court of 23 January 2020, BSA I-4110-1/20, that "the attitude of the parties presented during the proceedings, indicating the lack of reservations as to the independence and impartiality of the judge, cannot remain without influence on the subsequent assessment of whether the standard of impartiality and independence of the court handling the proceedings was breached, with the effect of recognizing that this court was composed in a manner that was in conflict with the law." The draft Act therefore assumes that the right to have a judgment set aside – in the procedure that essentially reflects the regulations on reopening court proceedings – cannot be used in procedural arrangements in which a party or participant of the proceedings raised procedural objections (motions, appeals) with regard to the bench only because of their procedural interest at a specific stage of the proceedings, and therefore their procedural activity targeted at challenging the correctness of the bench adjudicating in the court case arose from procedural tactics that had the intention of achieving the expected judgment, regardless of the

composition of the bench. Therefore, on the one hand, such an assumption guarantees a party or participant of the proceedings the right to have their case finally settled by a court in the constitutional sense (Article 45, para. 1 of the Constitution of the Republic of Poland) and in the meaning of the Convention (Article 6(1) ECHR) and, on the other, taking care of the principle of legal certainty and the finality of judgments (*res iudicata*), it guarantees other participants of the proceedings that a final judgment will only be overturned in exceptional situations, namely when, during the proceedings, regardless of the judgment that is issued, the party actually sought for the case to be adjudicated on by a bench that has the features of a court established by law, independent and impartial.

It should be borne in mind that the acceptance of a different solution would involve the need to overturn all judgments issued with the involvement of judges appointed to their positions at the request of the current Council. Such provisions would essentially reward not those parties or participants of the proceedings who used all available means to actively seek to shape the bench such that it has the features of a court, but those parties or participants of proceedings who raised their reservations about the bench only when the judgment that was passed was not in line with their expectations. It is also not difficult to see that such a solution would have drastic social consequences, because it would lead to undermining the stability of judgments and adversely affect citizens' confidence in the justice system. Handling such a significant number of court cases again would not only be an organizational problem for the courts, but primarily for the parties to the proceedings, which would also involve them incurring additional financial costs. For these reasons, the draft Act assumes the limitation of the possibility to overturn judgments to only those parties and participants who raised objections at the appropriate time as to the independence or impartiality of a judge in connection with his/her appointment.

In terms of the constitutional foundations of the proposed mechanism, it should be emphasized that the Constitutional Tribunal has expressed its opinion on the matter of limiting the possibility of reopening proceedings in a specific case if the violation of the right to a trial by a court is related to its constitutional position (see the judgment of the Constitutional Tribunal of 24 October 2007, SK 7/06, Journal of Laws No. 204, item 1482). Such a nature of the violation – in contrast with violations of a financial or procedural nature – gives the legislator greater freedom in determining the effects of the violation of the right to a trial in a court established by law. This is because it requires weighing up various constitutional principles, on the one hand, the principle of legal certainty, and on the other the right to a trial by a court.

According to the drafter, the adopted technique of weighing up values ensures the possibility of seeking a reasonable balance in specific court proceedings and the circumstances of a specific dispute. This is especially important if the overturning of a judgment issued by a defective body affects parties to court disputes who are in a horizontal relationship with each other (and therefore not in a relationship between the State and the individual). When applying the proposed mechanism, national courts will be able to take into account all principles underlying the national and EU legal order, such as the principle of legal

certainty, the principle of *res judicata*, or the principle of legitimate expectations in the specific circumstances of the case being settled.

Therefore, the proposed admissibility of challenging judgments:

a) only applies to judgments issued before the entry into force of the Act;

b) applies to judgments issued in closed and pending cases; whereby the draft Act distinguishes the manner of proceeding with respect to both categories of judgments;

c) is only possible at the request of a party or another participant of the proceedings;

d) is possible on condition that the party raises objections as to the correctness of the composition of the court within the appropriate time for the given proceedings.

The draft Act assumes that the effects of judgments that are not overturned or are not subject to being overturned will be recognized and observed in legal transactions, unless different consequences arise from judgments of international courts issued in specific cases (cf. for instance, judgment of the CJEU in the case of 6 October 2021, C-487/19 W.Ż., para. 160, in joined cases of 13 July 2023, C-615/20 and C-671/20 YP and others, paras 65–66).

Furthermore, with the exception of the cases examined under the Code of Criminal Procedure of 6 June 1997 (consolidated text Journal of Laws of 2025, item 46), the Code of Petty Crimes of 24 August 2001 (consolidated text Journal of Laws of 2024, item 977, as amended) and the Fiscal Penal Code of 10 September 1999 (consolidated text Journal of Laws of 2024, item 628, as amended), in order to protect the stability of judgments, it was accepted that, if a final judgment or decision adjudicating on the essence of the case caused irreversible legal effects, the court shall limit itself to stating that the judgments were issued in breach of the law and to the indication of the circumstances as a result of which it issued such a decision. However, in such a case, the party will be able to claim compensation for damage caused by such a judgment being issued without previously finding that the judgment is unlawful in separate court proceedings.

The model of the solution adopted regarding the overturning of a final judgment can be briefly presented in the context of criminal cases. In a situation where a final judgment was issued as a result of the examination of the case in the first and/or second instance by a bench which included a person appointed to the position of a judge at the request of the current Council, in order for the party to be able to effectively demand that the final judgment is overturned, he/she must prove that he/she filed a motion during the proceedings, at the appropriate time for filing such a motion, to disqualify such a person from the bench of the respective court (first and/or second instance), and then, when such a motion was not accepted, he/she raised an appropriate objection regarding the composition of the bench in an appeal or in cassation proceedings, unless such a party was not entitled to file a cassation (e.g. in cases in which the ordinary court ruled in disciplinary proceedings). The failure to meet

both of these conditions with regard to a judgment issued by an ordinary court or a military court will not lead to a final judgment being overturned. Judgments upholding the motion will lead to the final judgment being overturned and to the repetition of the proceedings before a proper composition of the court in the first or second instance. A different regulation is provided for with regard to judgments issued by the Supreme Court in a bench which includes a person appointed to the position of a judge at the request of the current Council. As such judgments are not appealable, in order to set aside a judgment ending court proceedings, it is sufficient to demonstrate in the motion that is filed that the party requested the disqualification of such a person from the composition of the court at the appropriate time.

The draft Act also regulates proceedings in cases at the stage of appeal proceedings and cassation proceedings. In pending appeal proceedings, a judgment issued in the first instance by an ordinary court or a military court may also be overturned if the party files a motion to disqualify the judge at the appropriate time and then raises an objection in the appeal on this basis. The same requirement is provided for in cassation proceedings.

A special solution is being prepared for Supreme Court judgments on extraordinary appeals, which may be overturned on the motion of the parties or another participant of the proceedings filed within one month of the date of entry into force of the Act. The upholding of this motion was not made conditional on satisfying any additional conditions. This is determined by the conflict between the regulation on extraordinary appeals and the provisions of the European Convention on Human Rights, as stated in the pilot ECtHR judgment in Wałęsa v Poland, implemented by this draft Act.

A similar solution was adopted for cases heard by the Supreme Court in the Professional Liability Chamber, which ended in a final ruling before the date of entry into force of the draft Act, which are also, in principle, to be subject to reopening at the request of a party. In such a case, the judgment was issued by a body, with respect to which there are no grounds for assuming that it satisfies the criteria of a court in the meaning of Article 6 ECHR.

The proposed mechanism is fully consistent with the case law of the European Court of Human Rights, the Court of Justice of the European Union and the opinion of the Venice Commission of 14 October 2024. As for the legal and practical consequences for final judgments already issued by benches which included judges appointed at the request of the current Council and the effects of such judgments in the Polish legal order, the ECtHR has already noted that one of the possibilities for the respondent State to consider is to take into account, in the necessary general measures, the conclusions of the Supreme Court regarding the application of its interpretative resolution of 23 January 2020 with respect to the Supreme Court and other courts and with respect to the judgments issued by the benches in question (see Advance Pharma sp. z o.o. v Poland, §§ 364–365). The mechanism proposed in the draft Act satisfies this requirement and, furthermore, enables the implementation of the Venice Commission’s guidelines on respecting the principle of *res judicata* and finding that a fundamentally defective composition is a reason for which the principle of *res judicata* may be breached (para. 41 of the Opinion of the Venice Commission of 14 October 2024). The

proposed mechanism also enables finding a balance in each individual case between departing from the principle of legal certainty and assuring the party of effective judicial protection and protection of other values underlying the provisions that are applicable in the specific case (paras 42 and 45 of the Opinion). The possibility of applying the mechanism is also established for a specified period (para. 43 of the Opinion) for parties which invoke the defective composition (para. 45 of the Opinion). However, the requirement to specify the impact of the defective composition on a specific procedure is not justified in the case law of the ECtHR (paras 44–45 of the Opinion).

X. Amendments to the Supreme Court Act

X.1 Changes in the structure of the Supreme Court

The most important changes in the Act amending the Act on the Supreme Court are the changes in the structure of the Supreme Court. The amendments to the Act on the Supreme Court of 8 December 2017 arise from the need to adapt the current legal regulations to the international regulations that are binding on Poland (Article 9 of the Constitution of the Republic of Poland), the relationship of which to the applicable Acts arises from Article 91, paras 2 and 3 of the Constitution of the Republic of Poland. The generally known case law of the international tribunals has set Poland several tasks regarding the functioning of the Supreme Court. They apply, in particular, to the resolution of the matter of the status of the Chamber of Extraordinary Review and Public Affairs and the Professional Liability Chamber, together with the system of disciplinary liability of judges, as well as the method of regulating the extraordinary appeal. The draft Act addresses all these issues.

With regard to the structure of the Supreme Court, it should be stated that the separation of five chambers in the Supreme Court, which the current Act on the Supreme Court of 2017 assumes, is in conflict with the Polish constitutional tradition. There is also no substantive or functional justification for continuing to maintain the Chamber of Extraordinary Review and Public Affairs and the Professional Liability Chamber, which is still pursuing the functions performed by the Disciplinary Chamber in a modified form. The draft Act therefore envisages that they will be abolished.

The ECtHR addressed the systemic nature of the violation of the standards of the right to a trial in a court in proceedings conducted by the Chamber or Extraordinary Review and Public Affairs, which is separated within the Supreme Court’s organizational structure, in the pilot judgment of 23 November 2023, Wałęsa v Poland, which is being implemented by this Act. In that judgment, it was found that Poland had violated Article 6(1) of the Convention with respect to the applicant’s right to a trial by an independent and impartial court established by law and with respect to legal certainty. The fundamental element that resulted in the finding of a violation of Article 6(1) of the Convention was the lack of independence of the Chamber of

Extraordinary Review and Public Affairs of the Supreme Court (para. 6b of the judgment) and therefore a situation in which this chamber does not have the features of a court.

As for the Chamber of Extraordinary Review and Public Affairs, which was formed entirely by judges appointed at the request of the current Council, it should be reiterated that its formation was primarily related to the institution of the extraordinary appeal, the main function of which is to verify final court judgments for a second time, including judgments issued in proceedings in which a Supreme Court judgment has already been issued, on the basis of general and vague criteria. In judicial practice, the extraordinary appeal significantly interferes with the principle of stability of judgments and, in this context, it is difficult to find an extension of the right to a trial by a court, as the stability of court judgments is the guarantee element of the right to a trial by a court. In particular, in its judgment of 24 October 2007, SK 7/06, the Constitutional Tribunal expressed the view that finality is a constitutional value in itself, while challenging finality must always be the subject of a meticulous weighing up of values. In this context, it should be acknowledged that the values were not properly weighed up in the case of the extraordinary appeal. The Polish legal system already has both ordinary and extraordinary remedies that achieve such objectives, in particular, a cassation appeal in civil proceedings and a cassation in criminal proceedings, as well as – depending on the types of court proceedings – a complaint or application to reopen proceedings, while the Act on the Supreme Court itself contains an additional regulation regarding a petition to invalidate a final court judgment, the regulation of which is traditional under Polish law. Therefore, as an extraordinary remedy, the appeal is yet another exception to the concept of the finality of judgments in its negative and positive sense. The introduction of the extraordinary appeal into the legal system was not accompanied by a reflection on how this institution should be systemically linked to the other legal measures for contesting final judgments, which are included in the civil and criminal procedures, with which the extraordinary appeal is currently entering into various unclear interactions.

Fundamental flaws were found in the extraordinary appeal procedure in the ECtHR judgment in the Wałęsa case (paras 228–239 and 323, item c). Given such significant procedural reservations, i.e. the freedom of the interested authorities to interpret the grounds of the appeal, using the appeal procedure as an “ordinary camouflaged appeal”, enabling the adjudicating body to consider the case anew, including with regard to the factual situation (paras 232–235), it is advisable that this remedy be removed from the legal system, also in view of the fact that the system of procedural law contains instruments for correcting final judgments which breach the law.

Additionally, If account is taken of the fact that this Chamber reviews resolutions passed in nomination proceedings conducted before the current Council, including for vacant judicial positions in the Supreme Court, then this chamber can be described as a special king of a court, which has been granted exclusive powers to actually decide on the composition of the Supreme Court and, in some cases, also on the correctness of judgments made in other chambers of that court. This Chamber also has extraordinary rights, which were challenged

by the judgment of the CJEU of 5 June 2023, C-204/21, regarding the assessment of the independence of the court or of a judge. It therefore has no reason for being in the Supreme Court in this form.

In view of the above, it is proposed that the Chamber of Extraordinary Review and Public Affairs be abolished and the cases in which it has the jurisdiction to consider be transferred to the other chambers according to their substantive competence transformed under the draft Act. The extraordinary complaints that have been filed but not examined will be examined in the other chambers of the Supreme Court according to their jurisdiction transformed as part of the project.

The case law of the European courts to date does not refer directly to the status of the Professional Liability Chamber. However, its status is questioned in the case law of the national courts (cf., among others, the decision of the Supreme Court of 7 February 2024, II ZIZ 14/23). It should be reiterated that the Professional Liability Chamber of the Supreme Court was formed after the CJEU issued its judgment of 15 July 2021, C-791/19, in which it held that the Disciplinary Chamber of the Supreme Court lacked independence and impartiality. However, the way in which this chamber was established, viewed together with its staffing and its subject-matter jurisdiction, leads to the assumption that, just like the Disciplinary Chamber, this chamber also does not meet the standard of an independent and impartial court established by law. The way in which the Professional Liability Chamber was formed also breaches the principle of independence of the judiciary (Article 173 of the Constitution of the Republic of Poland). The most important elements of such an assessment are:

a) entrusting the decision on the appointment of the members of the Professional Liability Chamber to the executive authority of the President of the Republic of Poland (countersigned by the prime minister), who initiated the previous formation of the Disciplinary Chamber and, after the failure of that project, took the initiative to establish the Professional Liability Chamber, reserving decisions regarding its staffing for himself;

b) the lack of criteria that the President of the Republic of Poland and the prime minister should follow when “selecting” judges they consider suitable for adjudicating in cases falling within the jurisdiction of the Professional Liability Chamber. The decisions made on this by the President of the Republic of Poland and the prime minister, appointing a small group of 11 Supreme Court judges to adjudicate in the Professional Liability Chamber, are consequently entirely discretionary and non-transparent, which, in combination with the unambiguously political nature of these bodies, must give rise to reasonable doubts in the opinion of individuals about the vulnerability of the benches of this chamber to influence from external factors, including, in particular, the direct or indirect influence of the legislative and executive authorities, as well as with regard to their neutrality with respect to the interests appearing before them;

c) the adopted model also groundlessly departs from the earlier principle (which was, after all, maintained in the administrative courts), according to which all Supreme Court judges were entitled to adjudicate in disciplinary cases on equal terms;

d) the current method of staffing the Professional Liability Chamber also requires consideration; in other words, 6 out of 11 people designated to adjudicate in the Professional Liability Chamber were appointed to hold office with the involvement of the National Council of the Judiciary established by the Act of 8 December 2017. Decisions issued in benches which include these people lead to a breach of Article 6(1) ECHR.

Such a composition means that two collegial (three-person) professional benches cannot be formed in the Professional Liability Chamber with the participation of other judges without breaching the guarantees of the Convention, and no ruling can be issued in an enlarged bench (a bench of 7 judges or a bench of all members of the Chamber) which would not be in conflict with Article 6(1) ECHR. This means that the continued operation of the Professional Liability Chamber leads to the dysfunction of the entire system of disciplinary liability of judges.

The abolition of the Professional Liability Chamber is planned for this reason. Instead, it is proposed that disciplinary cases – within the jurisdiction of the Supreme Court – be heard in benches drawn from the list of Supreme Court judges in such a way that the bench includes at least one judge who permanently adjudicates in criminal cases, who acts as the chair of the panel, and at least one judge permanently adjudicating in cases in which the accused adjudicates.

The abolition of the Professional Liability Chamber will result in the transfer of cases registered in it to the Criminal Chamber of the Supreme Court, other than cases regarding the employment of Supreme Court judges, which will be transferred to the president of the Supreme Court who directs the work of the Chamber of Labour, Social Insurance and Public Affairs, in order for that Chamber to transfer cases not completed in the first instance to the labour court with the jurisdiction to examine them and, with respect to cases in which a judgment has been issued in the first instance, to enable them to be continued in a higher instance. The latter cases will no longer be examined in the Supreme Court, but in the labour courts.

X.2 Changes in the disciplinary liability system.

The Act amending the Act on the Supreme Court and Certain Other Acts (Journal of Laws of 2020, item 190), which is referred to as the “Muzzle Act” because of its content and provisions undermining judicial independence, amended, among others, Article 72 of the Act on the Supreme Court, as well as Article 107 of the Law on the Structure of the Ordinary Courts, Article 37, § 2 of the Law on the Structure of the Military Courts and Article 137, § 1 of the Law on the Public Prosecutor’s Office, so as to supplement the grounds for disciplinary

liability with new elements. Acts or omissions that could prevent or significantly impede the functioning of a judicial body, acts questioning the existence of a judge's employment, the effectiveness of appointment of a judge or the constitutional authority of a body of the Republic of Poland, as well as public activity that cannot be reconciled with the principles of the independence of courts and the impartiality of judges constituted new behaviours that were to be a cause for disciplinary liability of judges (new wording of Article 72 of the Act on the Supreme Court and Article 107 of the Act on the Structure of the Ordinary Courts). The elements added in the "Muzzle Act" essentially make it possible to hold judges and prosecutors liable on disciplinary grounds for acts performed in their adjudicatory duties (judges) and official duties (prosecutors), which are intended to implement the norms of the Constitution and Convention regarding the right of parties to have their cases heard by a court established by law, which is independent and impartial. The status quo from before this change needs to be restored.

The introduction of these changes into the legal order became the basis for the European Commission's complaint to the Court of Justice of the European Union (case C-204/21). In the judgment of the CJEU of 5 June 2023 in case C-204/21, it was held that "*by adopting and maintaining in force points 2 and 3 of Article 107(1) of the ustawa – Prawo o ustroju sądów powszechnych (Law relating to the organisation of the ordinary courts) of 27 July 2001, as amended by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws) of 20 December 2019, and of points 1 to 3 of Article 72(1) of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017, as amended by that law of 20 December 2019, which allow the examination of compliance with the EU requirements relating to an independent and impartial tribunal previously established by law to be classified as a disciplinary offence, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, and under Article 267 TFEU*." The justification of the judgment pointed out that the provisions contained in Article 72, § 1, items 2 and 3 of the Act on the Supreme Court, as amended by that Act, and Article 107, § 1, items 2 and 3 of the Act on the Ordinary Courts, as amended, were formulated in such a broad and imprecise manner that it cannot be ruled out that the doubts and questions related to the referral of questions for a preliminary ruling to the Court of Justice regarding the interpretation of the requirements related to the independence and impartiality of courts and the concept of a "court previously established by law", arising from the provisions of the second sub-paragraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights will be deemed to "*question the existence of the employment relationship of a judge, the effectiveness of the appointment of a judge or the legitimacy of a constitutional organ of the Republic of Poland*", or to contribute to "*seriously undermin[ing] the functioning of a judicial authority*" in the meaning of these provisions (paras 152–161). In this judgment, the CJEU found that, "*by adopting and maintaining the provision set out in point 1 of Article 72(1) of the amended Law on the Supreme Court, and thus enabling the obligation of the Sąd Najwyższy*

(Supreme Court) to refer questions to the Court of Justice for a preliminary ruling to be restricted by the possibility of triggering a disciplinary procedure against judges of that national court, the Republic of Poland failed to fulfil its obligations under Article 267 TFEU" (para. 168).

Therefore, in implementing this judgment, it became necessary to prepare an amendment to Article 72 of the Act on the Supreme Court (as well as to the Act on the Structure of the Ordinary Courts). It is therefore proposed that the basis for the disciplinary liability of judges of the Supreme Court and judges of the ordinary courts is professional misconduct, including an obvious and gross violation of the law or a breach of dignity (Article 72, § 1 of the Act on the Supreme Court and Article 107, § 1 of the Law on the Structure of the Ordinary Courts; hereinafter – LSOC). In turn, the provisions of Article 72, § 6, items 1 and 2 of the Act on the Supreme Court Act and Article 107, § 3, items 1 and 2 LSOC, which were introduced on 15 July 2022 to implement the judgment of the CJEU of 15 July 2021 in case C-791/19 constitute a guarantee of the appropriate scope of application of disciplinary liability of judges for errors in adjudication. These provisions are still part of the law, constituting negative premises for holding a judge liable on disciplinary grounds for errors committed in the adjudication process.

X.3 Competitive recruitments to the Supreme Court

In principle, the people who assumed the office of judge at the request of the current Council will take part in new proceedings by law, having the possibility of withdrawing from taking part in the competitive recruitment. In this respect, the proposed changes in the structure of the Supreme Court leading to the abolition of the chamber of the Supreme Court in which the judicial position was originally taken up have been taken into account by enabling applications to be submitted in a competition announced for a vacant position in another chamber of the Supreme Court.

The proposed amendments to the Act on the Supreme Court of 8 December 2017, as well as the Law on the Structure of the Military Courts of 21 August 1997, the Law on the Structure of the Ordinary Courts of 27 July 2001 and the Law on the Structure of the Administrative Courts of 25 July 2002 are to serve the purpose of ensuring the correct course of the repeated competition proceedings and of creating conditions for open competition for the office of judge. The proposed modifications in this regard primarily involve ensuring the participation of the judicial self-government in the assessment of candidates for vacant judicial positions (such a solution is currently disabled with respect to the Supreme Court), raising some of the requirements that are necessary for taking up the position of a Supreme Court judge, and ensuring a more transparent procedure for evaluating a given candidate and issuing his/her opinion (two Supreme Court judges preparing evaluations of each candidate).

The solutions adopted in this respect guarantee that competitions will be conducted on the basis of objective substantive criteria and fair procedural rules, so as to ensure the

selection of the best qualified candidates, both in terms of their professional competence and impeccable character.

X.4 Repeal of provisions on the examination of the status of judges.

In its judgment of 5 June 2023, C-204/21, the CJEU challenged the provisions of Article 29, § 2 and § 3 of the Act on the Supreme Court, as well as Article 42a, § 1 and § 2 and Article 55, § 4 of the Act on the Structure of the Ordinary Courts and Article 5, § 1a and b of the Act on the Structure of the Administrative Courts. These provisions were introduced into the legal order by the said Act of 20 December 2019, the so-called “Muzzle Act”.

Therefore, these provisions need to be removed from the Act on the Supreme Court, as well as the Law on the Structure of the Ordinary Courts, the Law on the Structure of the Administrative Courts and the Law on the Structure of the Military Courts to bring national legislation into compliance with the treaty norms. The Court in Luxembourg did not assess the provisions introduced into the legal order on 15 July 2022, namely the provisions of Article 29, §§ 4–25 of the Act on the Supreme Court, Article 23a, §§ 3–15 of the Law on the Structure of the Military Courts, Article 42a, §§ 3–14 of the Law on the Structure of the Ordinary Courts and Article 5, § 1c and Article 5a of the Law on the Structure of the Administrative Courts. The so-called independence and impartiality test procedures were introduced in each of the courts in every instance (the Supreme Court, the Supreme Administrative Court, the ordinary courts, the military courts and the administrative courts) on the basis of the said provisions. The point is, however, that the institution of the test of the independence and impartiality of a judge that was introduced (e.g. Article 29, § 5 *et seq*. of the Act on the Supreme Court) for the application that was submitted to be formally effective (so that it would not be rejected as early as at the initial stage of the examination) does not allow it to be based purely on the circumstances accompanying the appointment of the judge. This is because it was clearly stated in the Act on the Supreme Court that the circumstances accompanying the appointment of a Supreme Court judge cannot constitute the exclusive basis for challenging a judgment issued with the participation of that judge or for questioning his/her independence and impartiality (Article 29, § 4 of the Act on the Supreme Court). Identical solutions were included in other Acts (Article 23a, § 3 of the Law on the Structure of the Military Courts, Article 42a, § 3 of the Law on the Structure of the Ordinary Courts, Article 5, § 1c of the Law on the Structure of the Administrative Courts). An additional condition was added to each of these acts whereby the application for the examination of the independence and impartiality of a judge is to be considered on the merits. The application also needs to be based on the circumstances regarding a judge’s conduct after the appointment (e.g. Article 29, § 5 of the Act on the Supreme Court). Such a solution leads to the inability to consider an application if it is based solely on the circumstances related to the appointment of a given person to the office of judge (cf. the reference numbers of such decisions provided in the justification of the Supreme Court’s decision of 4 April 2023, I ZB 52/22). In its decision of 27 February 2022 in case II KB 10/22, the Supreme Court pointed out that the procedure formed in this way was intended to

prevent the application of the norm of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as interpreted by the ECtHR in its judgments in cases against Poland (Reczkowicz, Dolińska-Ficek and Ozimek and Advance Pharma sp. z o.o.), relying on the judgment of the Grand Chamber of the Court of Human Rights in Guðmundur Andri Ástráðsson v Iceland (application 26374; judgment of the Grand Chamber of the Court of Human Rights of 1 December 2020). After considering the argument in this respect, the Supreme Court emphasized that, with respect to the violation of national law in the process of appointing judges, the judgments of the ECtHR did not require that the examination of the standard of Article 6(1) ECHR with respect to the "court established by law" should be transferred to elements and circumstances that took place after the judge was appointed in such a procedure, in breach of national law (identical positions were presented in the decisions of the Supreme Court: of 13 April 2023, III CB 6/23 and of 19 October 2023, I ZB 52/23). The justification of this decision correctly indicated that, a standard from the Convention was set in the case law of the ECtHR with regard to the examination of whether a court is established by law, and therefore whether account is taken of meeting the requirement of independence and impartiality, which cannot be narrowed (lowered) by statute (because of Article 91, paras 1 and 2 of the Constitution of the Republic of Poland) through the introduction of additional conditions and premises.

Given the above, the provisions of the law that reduce the standard of review of the independence and impartiality of a judge, thereby leading to a breach of the standard of Article 6(1) of the Convention must be removed from the legal order.

In summary, the planned amendments to the Act on the Supreme Court include the elimination of the special delicts introduced by the Muzzle Act, which enabled the punishment of judges, among other things, through the introduction of a ban on the examination by the courts of the correctness of a judge's empowerment, as well as the empowerment of the courts and tribunals to punish judges for the content of court judgments intended to challenge the status of other judges in the execution of CJEU and ECtHR judgments. The amendments also include the elimination of the test of independence and impartiality introduced by the Act amending the Act on the Supreme Court and Certain Other Acts of 9 June 2022 (Journal of Laws 2022, item 1259), which, in practice, proved to be the cause of excessive length or even paralysis of court proceedings, while maintaining the validity of the circumstances introduced by the same Act disabling the unlawfulness of the actions of judges involving the erroneous interpretation or application of the law, the submission of question to the CJEU for a preliminary ruling, or conducting a test of independence and impartiality of another judge (Article 72, § 6 of the Act on the Supreme Court).

X.5 Extraordinary appeal

The extraordinary appeal as a new remedy, which was previously alien in this form to both the Polish civil procedure and the Polish criminal procedure, was introduced into the legal

order by the Act on the Supreme Court of 8 December 2017. The legislator's intention was to fill the gap arising from the narrow scope of the constitutional complaint, in the model adopted in Article 79 of the Constitution of the Republic of Poland.[10] The objective of both the constitutional complaint and the extraordinary appeal is to satisfy the same purpose, namely to protect the human rights specified and guaranteed in the Constitution of the Republic of Poland. Given the so-called narrow model of the constitutional complaint,[11] which was adopted on the basis of the Constitution of the Republic of Poland, the practice of the operation of this remedy suggests that this legal instrument is insufficient for providing an appropriate level of protection of human rights, as well as civil freedoms and rights. Therefore, the search for an institution that could supplement the remaining scope of protection, other than the actual possibilities of using the constitutional complaint, led to the amendment of the Act on the Supreme Court in 2017 and the introduction of the extraordinary appeal into the Polish legal order.

However, this remedy has been criticized by law academics and the Constitutional Tribunal since the very beginning, as it was accused of being too broad and the premises for its application, allowing for final judgments to be overturned, were defined too generally. This is because the extraordinary appeal interferes with the principle of stability of judgments in judicial practice. In its judgment of 24 October 2007, SK 7/06, the Constitutional Tribunal expressed the view that finality is a constitutional value in itself, while challenging finality must always be the subject of a meticulous weighing up of values.

The Polish legal system has both ordinary and extraordinary remedies that achieve such objectives, in particular, a cassation appeal in civil proceedings and a cassation in criminal proceedings, as well as – depending on the types of court proceedings – a complaint or application to reopen proceedings, while the Act on the Supreme Court itself contains an additional regulation regarding a petition to invalidate a final court judgment, the regulation of which is traditional under Polish law. The parties may also seek redress for the damage caused by a final judgment being issued if it is in conflict with the law, on the principles specified in Article 417^1 § 2 of the Civil Code of 23 April 1964 (consolidated text Journal of Laws of 2024, item 1061, as amended).

Therefore, as an extraordinary remedy, an extraordinary appeal is yet another exception to the concept of the finality of judgments in its negative and positive sense. Unfortunately, the

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[10] cf. A. Syryt *Skarga konstytucyjna a skarga nadzwyczajna: analiza porównawcza instytucji usuwania naruszeń wolności i praw człowieka i obywatela określonych w Konstytucji RP* [Eng. "Constitutional Complaint Versus Extraordinary Complaint: Comparative Analysis of Institutions of Remedy for Infringements of Human and Civil Liberties and Rights set out in the Polish Constitution"] Prawo i Więź no. 4(38) 2021 p. 37

[11] cf. resolution of the Constitutional Tribunal of 1 December 2020, case ref. SK 52/19, OTK ZU A/2020, item 66; resolution of the Constitutional Tribunal of 3 August 2011, case ref. SK 13/09, OTK ZU No. 6A/2011, item 68; A. Syryt *Skarga konstytucyjna a skarga nadzwyczajna: analiza porównawcza instytucji usuwania naruszeń wolności i praw człowieka i obywatela określonych w Konstytucji RP* Prawo i Więź no. 4(38) 2021 p. 37

introduction of the extraordinary appeal into the legal system was not accompanied by a sufficiently deep reflection on how this institution should be systemically linked to the other legal measures for contesting final judgments, which are contained in the civil and criminal procedures, with which the extraordinary appeal is currently entering into various unclear interactions.

The ECtHR agreed with the allegations formulated with respect to the extraordinary appeal to a significant extent. Fundamental defects were found in the extraordinary appeal procedure in the ECtHR judgment in Wałęsa v Poland (paras 228–239 and 323, item c). In particular, the ECtHR found that the premise linking the effectiveness of the appeal with the aim of protecting “social justice” opens the path to arbitrariness and causes a risk of misuse of the legal remedy and abuse of process. However, the solution that enables the Supreme Court to verify factual findings in appeal proceedings undermines the stability of final court decisions and the confidence of individuals in the final decision, constituting an ordinary appeal in disguise.

The analysis of the recommendations contained in this pilot judgment regarding the extraordinary appeal and the systemic criticism of this remedy lead to the conclusion that this remedy requires significant redefinition and, in fact, the creation of a new legal instrument which, on the one hand, will enable the protection that is not provided by a narrowly defined constitutional complaint to be supplemented and, on the other, will be deprived of the shortcomings to which attention has been drawn since the establishment of this extraordinary remedy in the Polish legal system. Such a task was set for the Codification Commission of the Judiciary System and the Public Prosecution System that was appointed, which, in view of the need to first develop solutions related to restoring constitutional order in the Polish judiciary (which this draft Act does), has not yet been able to address the matter of creating a remedy that will meet the legitimate objectives of the extraordinary appeal, but will simultaneously not have its legal defects. The Codification Commission of the Judiciary System and the Public Prosecution System should develop these solutions in cooperation with the Codification Commissions on Civil Law, Criminal Law and Family Law, to avoid errors arising from the excessively hasty preparation and development of the extraordinary appeal, which were made before 2017.

Given that it will take some time to develop an extraordinary appeal that does not have the previous shortcomings, the drafter faced the dilemma of whether to eliminate this measure of protection of human rights altogether under such conditions, or leave it intact until a new (improved) formula of the extraordinary appeal is developed. The drafter weighed up the objectives pursued by this even legally defective extraordinary appeal, which enables the effects of final judgments that clearly violate constitutionally guaranteed rights and freedoms to be set aside for citizens, against the significant comments and reservations that this extraordinary remedy raises in the study of the law, and decided to give primacy to upholding the right of every citizen to also contest a final judgment that breaches their fundamental rights or freedoms. Despite the existence of such extraordinary remedies in the Polish legal system

in the form of a cassation or cassation appeal, it still happens that they are insufficient. In such cases, one possibility of eliminating a final judgment that violates human rights or civil rights and freedoms from legal circulation is given by the extraordinary appeal, even though it is an imperfect and defectively designed remedy.

In such circumstances, the drafter decided to leave the extraordinary appeal intact, acknowledging that, despite its imperfections, it nevertheless gives citizens real protection in a situation in which they cannot benefit from other remedies.

Similarly, the elimination from the structures of the Supreme Court of the Chamber of Extraordinary Review and Public Affairs, which is not recognized by the ECtHR as an impartial and independent court established by law (see the pilot judgment in Wałęsa v Poland), is of particular importance. In accordance with the provisions of the draft Act, all judges adjudicating in this Chamber, as judges appointed to the position of Supreme Court judge, with the involvement of the unconstitutional National Council of the Judiciary, will stop performing their duties in the Supreme Court *ex lege*. Pending proceedings initiated by extraordinary appeals, as well as appeals that are newly filed with the Supreme Court, will be examined by the Chambers with jurisdiction over their subject matter (Civil, Criminal, Labour and Social Insurance). In such circumstances, when extraordinary complaints are being examined by a bench of the Supreme Court which is established in accordance with the law, according to the drafter, it will be possible to eliminate a significant proportion of the reservations that have been expressed to date regarding the procedure for examining this extraordinary remedy. Most importantly, there will be no concerns about politically motivated decisions being issued by the Chamber of Extraordinary Review and Public Affairs established in conflict with the Constitution of the Republic of Poland.

As for the entities that are authorized to file an extraordinary appeal with the Supreme Court, the drafter takes into account the doubts that were also expressed in the pilot judgment in Wałęsa v Poland (paras 230–231), which has already been cited many times, that, in the model of the prosecution service that is still functioning in Poland in which the Minister of Justice, namely a representative of the executive, is the Prosecutor General, he should not have such an extensive right as to date to contest practically any final judgment. However, it should be noted that a draft Act that is to bring about the separation of the functions of the Prosecutor General and the Minister of Justice has already been prepared and is being processed. As a result, the position of the Prosecutor General is not to be entrusted to a representative of the executive, which means that there will be no concerns about the potential possibility of politically exploiting this function.

According to the drafter, when taking into account the changes described regarding moving forward in proceedings initiated by an extraordinary appeal, if the appeal is examined by an impartial and independent Supreme Court established in accordance with the Constitution of the Republic of Poland, this remedy should remain in legal circulation, in its current form and scope, until a remedy is developed which will correspond appropriately with the other extraordinary remedies and will not be perceived as a political instrument, which, in

principle, has the objective of overturning final judgments. The examination of this remedy by a bench of the Supreme Court in a composition that has no political influences guarantees that it will not be abused and will be used prudently and with restraint.

XI. Planned amendments to the Act on the Structure of the Ordinary Courts.

Holding competitive recruitments again for judges who are to be evaluated requires the amendment of the provisions of the Act on the Structure of the Ordinary Courts. In accordance with the solutions adopted earlier, the judicial self-government bodies, i.e. the General Assemblies of Judges of the Courts of Appeal and Regional Courts were responsible for evaluating candidates for vacant judicial positions. The previous minister of justice transferred these competences to the Court Colleges by the Act amending the Act on the Structure of the Ordinary Courts, on the Supreme Court and Certain Acts of 20 December 2019 (the so-called Muzzle Act), simultaneously changing the rules for electing the members of these bodies. A provision was introduced according to which the presidents of the district courts from the area of jurisdiction of the given regional court are the members of the colleges of the regional courts. In turn, the presidents of the regional courts from the area of jurisdiction of the given court of appeal are the members of the colleges of the courts of appeal. Furthermore, the minister of justice arbitrarily appointed all court presidents on the basis of the amended provisions. In this way, the previous minister of justice had a decisive influence on the composition of the colleges of the regional courts and the courts of appeal, which, in turn, assessed the judge-candidates for the vacant judicial positions. The members of the colleges were previously elected by the General Assemblies of Judges.

Work is still ongoing on the amendment of the Acts on the structures of the ordinary and military courts and a government draft has been prepared, which will still undergo further modifications. Some of the solutions are similar to those prepared by the Codification Commission of the Judiciary System and Public Prosecution System in cooperation with which the Ministry of Justice will shortly prepare the final version of the bill, the objective of which will be to return to solutions providing for the involvement of the judicial self-government in the procedure for evaluating candidates for vacant judicial positions.

The process of repeating recruitments for vacant judicial positions is an unprecedented operation. More than 1,600 competitive recruitments to vacant judicial positions will be initiated by law as a result of the judges being returned to their previous positions (1,200) and people being deprived of the status of judge (430).

In view of the need to ensure that the justice system functions efficiently, solutions must be introduced to enable the efficient, yet impartial and thorough evaluation of the qualifications of the candidates. To this end, a new judicial self-government body has been designed, the main and fundamental responsibility of which will be the evaluation of candidates for vacant judicial positions.

Since a significant number of judges affected by the re-evaluation process are judges of courts of appeal and regional courts, the judicial self-government bodies in the form of general assemblies of judges will automatically be weakened and their numbers will be reduced. This is an exceptionally unfavourable situation, given the need to evaluate such a large number of candidates. Both judges who are to be evaluated and judges who refrained from taking part in promotion procedures for the past 8 years because of the incorrectly formed National Council of the Judiciary will take part in the competitive recruitments.

In order for their evaluation to be conducted appropriately, a new judicial self-government body has been planned as the Assembly of Representatives of Appellate Judges (Zgromadzenie Przedstawicieli Sędziów Apelacji – ZPSA). This body will consist of judges elected by the general assemblies of judges of the courts operating in the appellate area, in a number reflecting 1/10 of the judges serving in the given court. In this way, the ZPSA will simultaneously consist of judges of district courts, regional courts and courts of appeal. This way of forming this body will ensure that a transparent procedure will be held for evaluating candidates by the broadest possible group of representatives of the judicial self-government of all branches of the Polish judiciary. A total of 11 such judicial self-government bodies will be formed throughout the country, one at each court of appeal. The individual assemblies will consist of between 40 and approximately 120 members. For example, the smallest court of appeal in Poland currently has 19 judges, of whom over 50% will be returned to their previous positions as judges and will automatically cease to be members of the General Assembly of Appellate Judges. This would mean that the evaluation procedure will be conducted by an assembly consisting of 9 members. The planned self-government body in this appellate area will have 37 members consisting of representatives of the district courts, regional courts and courts of appeal.

The main task of the ZPSA is to give opinions on the candidacies of the judges for the vacant judicial positions in the courts operating in the appellate area. These will be competitions for positions in the district courts, regional courts and courts of appeal. The chair of the ZPSA is the president of the court of appeal.

This is a solution which ensures that representatives of the judicial self-government will participate at all levels of the ordinary judiciary in the procedure for evaluating candidates for vacant judicial positions. Bearing in mind the number of recruitments to be initiated under the provisions of this Act and their significance to the process of evaluating judges, the adoption of this solution is crucial for conducting transparent recruitments for vacant judicial positions.

Additionally, the government bill on the Amendment to the Act on the Structure of the Ordinary Courts assumes the reconstruction of the judicial self-government at each level by introducing colleges as advisory bodies to the court president at all levels of the ordinary judiciary: in the district courts, regional courts and courts of appeal. The departure from the adopted solution (under the Act of 20 December 2019) in which the presidents of the courts are the members of the colleges in favour of members elected to the colleges by the general

assemblies of judges is crucial. This is another element of strengthening the position of the judicial self-government.

Another significant change in the government bill is the introduction of a new procedure for electing court presidents. The Act of 20 December 2019 introduced the arbitrary right of the minister of justice to appoint court presidents. The previous minister of justice took advantage of this solution to fill the positions of court presidents with judges who did not have managerial skills or the respect of the community, but cooperated with the executive by, for example, signing letters of support for candidates for the incorrectly formed National Council of the Judiciary. The government bill assumes that the general assemblies of judges will choose between 2 and 5 candidates for the position of court president in a secret ballot. The minister of justice would then appoint the court president from among the candidates presented to him by the general assemblies of judges. In turn, the vice-president of the court would be appointed at the request of the court president, but after seeking the opinion of the court college. In contrast with the currently applicable regulations, this solution gives the key role of specifying the candidates for court presidents to the general assemblies of judges. Furthermore, the appointment of the vice-president of the court will also require the involvement of the court college, which, in turn, will be a body elected by the general assemblies of judges, so this is another element of strengthening the position of the judicial self-government in such an important process as the election of the court authorities.

The planned amendments to the Act on the Structure of Ordinary Courts also include the elimination of the special delicts introduced by the Muzzle Act, which enabled the punishment of judges, among other things, through the introduction of a ban on the examination by the courts of the correctness of a judge's empowerment, as well as the empowerment of the courts and tribunals to punish judges for the content of court judgments intended to challenge the status of other judges in the execution of CJEU and ECtHR judgments. The amendments also include the elimination of the test of independence and impartiality introduced by the Act amending the Act on the Supreme Court and Certain Other Acts of 9 June 2022 (Journal of Laws 2022, item 1259), which, in practice, proved to be the cause of excessive length or even paralysis of court proceedings, while maintaining the validity of the circumstances introduced by the same Act disabling the unlawfulness of the actions of judges involving the erroneous interpretation or application of the law, the submission of question to the CJEU for a preliminary ruling, or conducting a test of independence and impartiality of another judge (Article 72, § 6 of the Act on the Supreme Court).

XII. Entry into force and implementation of the Act

The proposed mechanism for restoring the right to an independent and impartial court established by law through the regulation of the effects of the resolutions of the current Council assumes that this task will be entrusted to the National Council of the Judiciary formed in accordance with the constitutional standard and under the control of the Supreme Court. This

means that there is no need to establish a correctly formed Council to achieve the objectives of the first stage. This enables the simultaneous entry into force of the proposed Act and the Act amending the Act on the National Council of the Judiciary of 12 July 2024 ("Act of 12 July 2024"). This enables the achievement of the fundamental objectives of the draft Act regarding the restoration of the right to an independent and impartial court established by law as of the date of entry into force of the Act, i.e. 1 October 2025.

It will also be possible for the Minister of Justice to announce competitive recruitments for vacant judicial positions and to start the first stage of this procedure, which involves candidates applying and being evaluated in the individual courts, even before a new, correctly formed National Council of the Judiciary is constituted. This stage lasts an average of approximately 9 months, which means that it will end at a time when the new Council should already be constituted.

The time required for this arises from the provisions of the Act of 12 July 2024 which, as can be assumed, will not enter into force before September 2025. Given the timescales specified in this Act for ordering the first elections of members of the National Council of the Judiciary and, in particular, the fact that these elections should be ordered on a day that is no later than three months from the date of adoption of the resolution on ordering the elections (Article 2, para. 1 of the Act of 12 July 2024), the drafter assumes that the election results will not be announced earlier than in December 2025. It is only at that time that the activities of the people in the current Council, who were elected by the Sejm to the National Council of the Judiciary on the basis of Article 9a, para. 1, which was adopted by the Act of 8 December 2017, will end. Until then, the current, defectively formed Council, which does not safeguard the independence of the courts and judges, will continue to operate and will therefore be unable to perform the tasks specified in the draft Act. The draft Act assumes that the correctly formed National Council of the Judiciary will not be able to perform any activities intended to conduct the competitive recruitment procedures that are repeated under the Act – taking into account the time that is required for this body to be constituted – earlier than 31 January 2026.

According to the drafter, priority should be given to restoring the state of the rule of law in the Supreme Court, so that it can perform its constitutional and statutory tasks efficiently and with a full staff, including monitoring the Council's resolutions adopted in the competitive recruitments that are repeated under the Act. Therefore, assuming that the Minister of Justice will announce vacancies in this court immediately after the Act enters into force, it can be expected that the correctly formed Council will be able to start passing resolutions on these positions in February 2026. Taking into account the possibility of filing appeals against resolutions of the National Council of the Judiciary, it will be possible to make the first appointments to the Supreme Court as early as in June 2026.

In turn, with regard to the positions vacated in the other courts, it should be assumed that the competitive recruitments will be announced gradually from October 2025. The duration of these proceedings is determined by three factors:

a) the activities undertaken in the competitive recruitment proceedings, including those related to the assessment of candidates, directly in the ordinary, administrative and military courts, which, taking into account past experience, should be estimated at an average of at least 9 months;

b) activities undertaken in the competitive recruitment proceedings before the National Council of the Judiciary, ending in the adoption of resolutions on presenting candidates for vacant judicial positions to the President of the Republic of Poland;

c) the possibility of appealing against resolutions of the National Council of the Judiciary to the Supreme Court, which delays the completion of the competitive recruitment proceedings and the presentation of the first judicial nominations.

Therefore, it should be estimated that most of the repeat competitions before the National Council of the Judiciary will end in the third quarter of 2027. The proposed statutory delegation of judges in the draft Act will also end at that time.

It should be emphasized that this timetable assumes that the National Council of the Judiciary and the Supreme Court will meet the deadlines specified in the Act and that the competitive recruitment proceedings will be handled efficiently at the stage of the announcement of the vacancies by the Minister of Justice, the submission and assessment of the candidates in the individual courts, the selection of candidates by the National Council of the Judiciary, the consideration of appeals by the Supreme Court and the handing out of nominations by the President of the Republic of Poland. Any delays at any of these stages will result in a delay in the achievement of the effects of the Act with respect to the accepted timetable.