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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**POLAND**

**EXPLANATORY NOTE TO THE  
DRAFT LAW AMENDING THE  
LAW ON THE NATIONAL COUNCIL OF THE JUDICIARY**

## **Explanatory Note to the Draft Law amending the Law on the National Council of the Judiciary <sup>1</sup>**

The primary objective of the proposed law is to restore the content of the provisions regulating the method of election of judges to the National Council of the Judiciary to be consistent with the Constitution of the Republic of Poland and to ensure the independence of the National Council of the Judiciary from the legislature and the executive in the procedure for appointment of judges.

### **Basis for drafting the assumptions and the draft law**

1. In its judgment of 19 November 2019. (C-585/18, C-624/18, C-625/18), the Court of Justice of the European Union (hereinafter CJEU) held, *inter alia*, that Article 47 of the Charter of Fundamental Rights of the European Union and Article 9(1) of Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding disputes concerning the application of Union law from falling within the exclusive jurisdiction of a body which does not constitute an independent and impartial tribunal within the meaning of the first of those provisions. The CJEU has indicated that a body which does not constitute an independent and impartial tribunal may be referred to when the objective circumstances under which the body in question was set up and its characteristics and the manner in which its members were appointed are such as to give rise, in the minds of individuals, to justified doubts as to the independence of that body from external factors, in particular from direct or indirect influences of the legislature and the executive, and its neutrality *vis-à-vis* the interests that clash before it, and thus lead to the body failing to show signs of independence or impartiality, which could undermine the trust that the judiciary should inspire in individuals in a democratic society. At the same time, the CJEU authorised the Supreme Court Labour and Social Security Chamber to determine - on the basis of the CJEU's guidelines - whether the Disciplinary Chamber of the Supreme Court is a body which does not constitute an independent and impartial court within the meaning of the Treaty rules.

2. Implementing the CJEU judgment of 19 November 2019, the Supreme Court Chamber of Labour and Social Insurance, in a judgment of 5 December 2019. (III PO 7/18) ruled that the National Council of the Judiciary, in its current composition, is not an impartial and independent body from the legislative and executive powers. Consequently, the Supreme Court also ruled that the Disciplinary Chamber of the Supreme Court is not a court under European Union law and therefore not a court under national law.

3. In a resolution of 23 January 2020. (BSA1-4110-1/20) issued by a panel of three combined Chambers of the Supreme Court - the Civil, Criminal and Labour and Social Security Chambers, the Supreme Court held that:

1) undue manning of the court within the meaning of Article 439(1)(2) of the Code of Criminal Procedure or inconsistency of the composition of the court with the provisions of the law within the meaning of Article 379(4) of the Code of Civil Procedure also occurs when the composition of the court includes a person appointed to the office of a judge of the Supreme Court at the request of the National Council of the Judiciary formed in accordance with the procedure set out in the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts;

2) undue manning of the court within the meaning of Article 439 § 1 item 2 of the Code of Criminal Procedure or inconsistency of the composition of the court with the provisions of the law within the meaning of Article 379 item 4 of the Code of Civil Procedure also occurs when the composition of the court includes a person appointed to the office of a judge in a general or military court at the request of the National Council of the Judiciary shaped in the procedure specified by the provisions of the Act of 8

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<sup>1</sup> Unofficial translation.

December 2017 on amending the Act on the National Council of the Judiciary and certain other acts, if the defectiveness of the appointment process leads, in specific circumstances, to a violation of the standard of independence and impartiality within the meaning of Article 45(1) of the Constitution of the Republic of Poland, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms;

3) the interpretation of Article 439 para. 1 item 2 of the Code of Criminal Procedure and Article 379.4 of the Code of Criminal Procedure adopted in the resolution does not apply to judgments issued by courts before the date of its adoption and to judgments to be issued in proceedings under the Code of Criminal Procedure pending on that date before a given formation of the court;

4) undue manning of the court within the meaning of Article 439(1)(2) of the Code of Criminal Procedure or inconsistency of the composition of the court with the provisions of the law within the meaning of Article 379(4) of the Code of Criminal Procedure shall apply to rulings made with the participation of judges of the Disciplinary Chamber established in the Supreme Court pursuant to the Act of 8 December 2017 on the Supreme Court regardless of the date on which these rulings were made.

4. In its judgment of 2 March 2021. (C-824/18), the CJEU held, *inter alia*, that the second subparagraph of Article 19(1) TEU must be interpreted as precluding such legal solutions which, in connection with the process of appointing judges, may give rise, in the minds of individuals, to justified doubts as to the invulnerability of judges to external factors, in particular to the direct or indirect influence of the legislative and executive authorities, and as to their neutrality with regard to the interests that clash before them, and thus lead to the absence of visible signs of the independence or impartiality of those judges. At the same time, the CJEU authorised the Supreme Administrative Court to assess whether Poland's system of appointing judges with the participation of the National Council of the Judiciary, the members of which - judges - are not elected by judges, violates the provisions of the Treaty to the extent resulting from the CJEU judgment.

5. The Supreme Administrative Court - implementing the CJEU's ruling of 2 March 2021 in, *inter alia*, judgments of 6 May 2021 in the cases: II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18, II GOK 7/18, ruled that the National Council of the Judiciary in its new composition does not provide sufficient guarantees of independence from the legislature and the executive in the procedure for appointing judges. The Supreme Administrative Court pointed out that currently 23 out of 25 members of the National Council of the Judiciary are appointed to its composition by authorities other than the judiciary, while the rules and procedure for creating the personal composition of the National Council of the Judiciary are clearly motivated by the intention to subject it to a kind of guardianship of the executive power, and thus the parliamentary majority, which in the context of the procedure for the selection of members of the National Council of the Judiciary emphasises the importance of the factor of (political) loyalty of the candidates to the entity making the selection. The Supreme Administrative Court also emphasised that not all judges are represented in the composition of the National Council of the Judiciary (e.g. no representation of the judges of the Supreme Court), which stands in clear contradiction with Article 187(2) of the Constitution of the Republic of Poland, which requires that 15 judges - members of the National Council of the Judiciary be elected from among judges of the Supreme Court, common courts, administrative courts and military courts. The Supreme Administrative Court pointed out that among the members of the National Council of the Judiciary, i.e. among the judges of common courts, there are presidents and vice-presidents of common courts appointed by the executive power, which proves the strict functional subordination of those members of the Council to the executive power, represented in this forum by the Minister of Justice, by which subordination is also of an institutional nature.

6. In its order of 14 July 2021. (C-204/21), the CJEU required Poland to:

1) suspend, firstly, the application of the provisions of Article 27(1)(la) of the Act of 8 December 2017 on the Supreme Court, as amended by the Act of 20 December 2019 on the amendment of the Act - Law on the System of Common Courts, the Act on the Supreme Court and certain other acts, on the basis of which the Disciplinary Chamber of the Supreme Court is competent to adjudicate in the first and second instance in cases of authorising the prosecution of judges and court assessors, their temporary arrest, detention or forced removal, and, secondly, to suspend the effects of the resolutions of the Disciplinary Chamber already issued on the basis of that article authorising the prosecution of a judge or his or her detention, and to refrain from referring the cases referred to in the aforementioned article to a judicial body that does not meet the requirements of independence, as indicated in particular in the CJEU judgment of 19 November 2019. (C-585/18, C-624/18, C-625/18);

2) Suspension of the application of the provisions of Article 27(1)(2) and (3) of the Act of 8 December 2017 on the Supreme Court, as amended, under which the Disciplinary Chamber of the Supreme Court has jurisdiction to rule on matters relating to the status of judges of the Supreme Court and the performance of their office, in particular in labour and social security law cases concerning judges of the Supreme Court and in cases involving the transfer of a judge of the Supreme Court to a state of rest and to refrain from referring the aforementioned cases to a judicial body that does not meet the requirements of independence, as indicated in particular in the CJEU judgment of 19 November 2019. (C-585/18, C-624/18, C- 625/18);

3) Suspension of the application of the provisions of Article 107 § 1 points 2 and 3 of the Act of 27 July 2001. - Law on the System of Common Courts, in the wording introduced by the Act amending the Act - Law on the System of Common Courts, the Act on the Supreme Court and Certain Other Acts and Article 72 § 1 points 1-3 of the Act on the Supreme Court, as amended, permitting the disciplinary liability of judges for examining the fulfilment of the requirements of independence and impartiality of a court previously established by law within the meaning of Article 19(l) TEU in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union;

4) suspension of the application of the provisions of Articles 42a § 1 and 2 and 55 § 4 of the Act of 27 July 2001. - Law on the System of Common Courts, as amended, Article 26 § 3, as well as Article 29 § 2 and 3 of the Act on the Supreme Court, as amended, and Article 5 § 1a and 1b of the Act of 25 July 2002. - Law on the System of Administrative Courts, as amended by the Act amending the Act - Law on the System of Common Courts, the Act on the Supreme Court and certain other Acts, as well as Article 8 of the Act amending the Act - Law on the System of Common Courts, the Act on the Supreme Court and certain other Acts, in so far as they declare it inadmissible for national courts to examine the fulfilment of the European Union's requirements for an independent and impartial court previously established by law within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights;

5) Suspension of the application of Articles 26 § 2, 4-6 and 82 § 2-5 of the Act of 8 December 2017 on the Supreme Court, as amended, as well as of Article 10 of the Act amending the Act - Law on the System of Common Courts, the Act on the Supreme Court and certain other acts, transferring to the exclusive jurisdiction of the Extraordinary Control and Public Affairs Chamber of the Supreme Court the examination of allegations of lack of independence of a judge or lack of independence of the court.

7. In its judgment of 15 July 2021. (C-791/19), the CJEU ruled that:
- 1) failing to ensure the independence and impartiality of the Disciplinary Chamber of the Supreme Court, which has jurisdiction to review decisions made in disciplinary proceedings against judges,
  - 2) allowing that, in the case of common court judges, the content of judicial decisions can be qualified as disciplinary misconduct,
  - 3) conferring on the President in charge of the Disciplinary Chamber of the Supreme Court the discretionary power to designate the competent disciplinary court of first instance in cases of judges of ordinary courts, thereby failing to ensure that disciplinary cases are decided by a court established by law,
  - 4) by failing to ensure that disciplinary cases concerning judges of ordinary courts are dealt with within a reasonable time, and by providing that the acts relating to the appointment of a defence counsel and his undertaking of the defence do not stay the course of the disciplinary proceedings and that the disciplinary court conducts the proceedings despite the excused absence of the accused judge or his defence counsel notified to it, thereby failing to ensure respect for the rights of defence of the accused judges of ordinary courts,

- The Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

The CJEU also ruled that by allowing the right of the courts to refer to the Court of Justice of the European Union for a preliminary ruling to be limited by the possibility of disciplinary proceedings, the Republic of Poland had failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU.

8. On 22 July 2021. The European Court of Human Rights (hereafter referred to as the ECtHR) delivered its judgment in the case of *Reczkowicz v Poland* (case number 43447/19). The ECtHR ruled that the manner in which judges were elected to the Disciplinary Chamber of the Supreme Court was blatantly contrary to both Polish law and the elementary principle of the rule of law, which is the independence of the judiciary. The Court held that the Disciplinary Chamber of the Supreme Court is not court established by law within the meaning of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court also found that the National Council of the Judiciary, after the changes made in 2017, does not provide sufficient guarantees of independence from the legislative and executive powers. In the Court's view, the political authorities had undue influence over the judicial appointment procedure and could directly or indirectly interfere in who would be appointed to the office of judge.

9. On 21 September 2021. Supreme Administrative Court in its decisions 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, issued following the CJEU judgment of 2 March 2021. in Case C-824/18, held that the factors relevant to the assessment of the condition of independence to be fulfilled by the National Council of the Judiciary are: firstly, the constitution of the National Council of the Judiciary with a new composition by means of the shortening of the four-year term of office of the members previously forming that body; secondly, the fact that the 15 members of the National Council of the Judiciary elected from among judges were previously selected by the judiciary and are now designated by the Polish legislature; thirdly, the existence of possible irregularities which may have affected the process of appointment of certain members of the National Council of the Judiciary in its new composition; fourthly, the manner in which that body fulfils its constitutional role of upholding the independence of the courts and the independence of judges and exercises its powers. The Supreme Administrative Court pointed out that while each of these factors mentioned may not in itself be subject to criticism and fall, in this case, within the competence of the Member States

and the choices of solutions made by them, their combination, combined with the circumstances in which those choices were made, may nevertheless lead to doubts as to the independence of the body involved in the judicial appointment procedure, even though such a conclusion would not arise if those factors were considered separately. The Supreme Administrative Court indicated, in effect, that the current National Council of the Judiciary does not provide sufficient guarantees of independence from the legislature and the executive in the judicial appointment procedure, emphasising that there are currently 14 representatives of common court judges in the composition of the National Council of the Judiciary, and the judges of the Supreme Court and the judges of the administrative courts are not represented in it, contrary to Article 187(2) of the Polish Constitution.

Furthermore, the Supreme Administrative Court pointed out that the members of the National Council of the Judiciary include presidents and vice-presidents of common courts appointed by the executive power in place of those previously dismissed by that power during their term of office. This leads to the conclusion of a strict functional subordination of these members of the National Council of the Judiciary to the executive power. The Supreme Administrative Court found that a segment of the executive power, but also of the legislative power (given the peculiar fusion of these powers resulting from the logic of the adopted system of government), i.e. powers which by their nature are political in nature, have significantly gained in importance and influence in a body whose primary function is to guard the independence of the courts and the independence of judges.

The Supreme Administrative Court referred to the fact that 23 out of 25 members of the National Council of the Judiciary are appointed to its composition by authorities other than the judiciary. At the same time, the principles of the Sejm's selection of 15 judges to the National Council of the Judiciary must be regarded as far from respecting the principle of representativeness, given that their selection, in addition to being made by the first chamber of parliament (the Sejm), may also take place from among candidates put forward by a group of 25 judges, excluding retired judges. Such a quantitative criterion of the effectiveness of the nomination is not a reliable criterion for assessing the representativeness of the candidate, especially when set against the number of active judges and, moreover, when set against the practice of assessing its fulfilment. The latter allowed for support for one's own candidature, mutual support between candidates, or even - in an extreme case - the use as support given of support effectively withdrawn by judges initially supporting the candidature. The Supreme Administrative Court indicated that the principles and procedure of creating the personnel composition of the National Council of the Judiciary was thus clearly motivated by the intention to subject it to a kind of guardianship of the executive power, and thus of the parliamentary majority, which, in the context of the procedure for the election of members of the National Council of the Judiciary and the required majority, as well as in relation to the indicated functional and institutional subordination of the National Council of the Judiciary, also emphasises the significance of the factor of (political) loyalty of the candidates to the entity making the selection. In the view of the Supreme Administrative Court, the composition of the National Council of the Judiciary, shaped in such a way, nullifies the possibility for it to effectively perform its basic function, namely to guard the independence of the courts and the independence of judges.

**10.** By order of the Vice-President of the CJEU of 27 October 2021. (C-204/21), Poland was ordered to pay to the European Commission a periodic penalty payment of EUR 1,000,000 per day from the date of service of that order on the Republic of Poland until the date on which Poland fulfils its obligations under the order of the Vice-President of the Court z of 14 July 2021 r. (C-204/21) or, in the absence of compliance with that order, until the date of the final judgment in Case C-204/21.

**11.** On 28 October 2021. The National Council of the Judiciary was stripped of its membership of the European Network of Councils for the Judiciary (ENCJ). The justification for the decision was that the way in which the judges - members of the National Council of the

Judiciary - were elected did not guarantee independence from the legislative and executive powers, such independence being a condition for membership of the ENCJ.

**12.** In its judgment of 8 November 2021 in the case of *Dolińska-Ficek and Ozimek v. Poland* (case nos. 49868/19 and 57511/19), the ECtHR held that following the statutory changes concerning the National Council of the Judiciary made in 2017, the judiciary in Poland has been deprived of the possibility to have a real impact on the functioning of the National Council of the Judiciary, while the executive and the legislature, which obtained a decisive influence on shaping the composition of the National Council of the Judiciary, fully control the functioning of this body. The ECtHR found that the National Council of the Judiciary, in its current form, is a body that does not guarantee independence from the legislature and the executive. The Court found that the effect of this state of affairs is that the executive and legislature can directly influence the process of appointing judges in Poland.

The ECtHR, in its judgment of 8 November 2021, unequivocally indicated that the procedure for the appointment of judges in Poland provides for an improper - excessive - influence of the legislative and executive powers on the judicial appointment process, which, according to the Court, is incompatible with Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court considered this to be a fundamental irregularity affecting the undue staffing of the courts, as persons appointed to judicial posts under a flawed procedure do not guarantee that the court on whose bench they sit is an independent and impartial court established by law.

The ECtHR ruled that, with regard to the staffing of the Supreme Court's Extraordinary and Public Scrutiny Chamber, there were two fundamental violations of law that impinge on the regularity of judicial appointments to the Chamber. First, the applications for judicial appointments were made by the National Council of the Judiciary formed on the basis of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts, and therefore by a body that does not provide sufficient guarantees of independence from the legislative and executive powers. Secondly, the President of the Republic of Poland, despite the suspension by the Supreme Administrative Court of the implementation of the resolutions of the National Council of the Judiciary on the appointment of judges to the Chamber of Extraordinary Control and Public Affairs of the Supreme Court, appointed the persons indicated in these resolutions to judicial positions, thus flagrantly disregarding the law. The ECtHR indicated that the above-mentioned shortcomings make it impossible to consider the Extraordinary Control and Public Affairs Chamber of the Supreme Court as a court formed by law within the meaning of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

**13.** On 11 October 2021. The Supreme Administrative Court heard seven further appeals against resolutions of the National Council of the Judiciary on the presentation (non-presentation) of an application for appointment to the office of a judge of the Supreme Court. One case concerned the resolution of the National Council of the Judiciary of 28 August 2018 No. 331/2018 on the presentation (non-presentation) of an application for appointment to the office of a judge of the Supreme Court in the Chamber for Extraordinary Control and Public Affairs (file No. II GOK 9/18), while the other cases concerned the resolution of the NCJ of 23 August 2018 No. 317/2018 on the presentation (non-presentation) of an application for appointment to the office of a judge of the Supreme Court in the Disciplinary Chamber (case numbers GOK 15/18, IIGOK16/18, IIGOK 17/18, II GOK 18/18, II GOK 19/18, II GOK 20/18).

### **Assumptions to the proposed law**

The purpose of the proposed law is primarily to restore the content of the provisions regulating the method of election of judges to the National Council of the Judiciary in line with the Constitution of the Republic of Poland and to remove the negative consequences of the defective solution in force since 2018. The draft law also aims to bring the statutory provisions in line with

the standards set out in the rulings of the Court of Justice of the European Union, the European Court of Human Rights and in the rulings of the Supreme Court and the Supreme Administrative Court concerning the guarantees of the independence and distinctiveness of the judiciary from other state authorities, including the guarantees of the independence of the National Council of the Judiciary from the legislature and the executive in the procedure for the appointment of judges.

### **Amendments to the Act on the National Council of the Judiciary (Article 1)**

Pursuant to Article 186(1) of the Constitution of the Republic of Poland (hereinafter: the Constitution of the Republic of Poland), the fundamental systemic function of the National Council of the Judiciary is to guard the independence of the courts and the independence of judges. This function can only be performed properly if the National Council of the Judiciary is a body that is independent and autonomous from other authorities. Guarantees of this independence and independence are provided for by Article 187(1) and (3) of the Constitution of the Republic of Poland, which determine the composition of the National Council of the Judiciary and establish the 4-year term of office of its elected members. The essential part of the composition of the National Judicial Council - pursuant to Article 187(1)(2) of the Constitution of the Republic of Poland - should be constituted by representatives of judges of the Supreme Court, common courts, administrative courts and military courts. The election of representatives of the judiciary to the National Council of the Judiciary should therefore be autonomous and carried out by the judiciary, without the possibility of active participation of the legislative and executive authorities.

In order to restore the National Council of the Judiciary's capacity to properly perform its constitutional functions and tasks, to bring it into line with Article 187 of the paragraph 1(2) of the Constitution of the Republic of Poland, as well as Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, and Articles 2 and 19(1) of the Treaty on European Union, implementing the judgments of the Supreme Court, the Supreme Administrative Court, the Court of Justice of the European Union and the European Court of Human Rights,<sup>2</sup> the Sejm of the Republic of Poland stated that, in accordance with the cited judgments:

- 1) Resolution of the Sejm of the Republic of Poland of 6 March 2018 on the election of members of the National Council of the Judiciary, published in the "Monitor Polski" of 12 March 2018. (item 276),
- 2) Resolution of the Sejm of the Republic of Poland of 20 May 2021 on the election of a member of the National Council of the Judiciary, published in the "Monitor Polski" of 27 May 2021. (item 497),

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<sup>2</sup> In particular: the judgment of the Court of Justice of the European Union of 19 November 2019, delivered in the joined cases ref. C-585/18, C-624/18 and C-625/18; the judgment of the Supreme Court of the Chamber of Labour and Social Security of 5 December 2019, ref. III PO 7/18; the resolution of the Supreme Court of 23 January 2020, delivered in the composition of three joined Chambers of the Supreme Court, i.e.: Civil Chamber, Criminal Chamber, Labour and Social Insurance Chamber, ref. BSA I-4110-1/20; judgment of the Court of Justice of the European Union of 2 March 2021. (Case ref. C-824/18); judgment of the European Court of Human Rights of 22 July 2021. (Reczkowicz v. Poland, case no. 43447/19); judgment of the European Court of Human Rights of 8 November 2021. (Dolińska-Ficek and Ozimek v. Poland, nos. 49868/19 and 57511/19); resolution of the Supreme Court of 2 June 2022, issued by a panel of 7 judges of the Supreme Court, ref. I KZP 2/22; judgment of the European Court of Human Rights of 23 November 2023 (Wałęsa v. Poland, ref. 50849/21); judgments of the Supreme Administrative Court issued in cases ref. II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18 and II GOK 7/18 - in connection with which the Supreme Administrative Court submitted a preliminary question to the Court of Justice of the European Union, as well as subsequent judgments issued in analogous cases ref. II GOK 4/18, II GOK 8/18, II GOK 10/18, II GOK 11/18, II GOK 12/18, II GOK 13/18, II GOK 14/18, II GOK 9/18, II GOK 15/18, II GOK 16/18, II GOK 17/18, II GOK 18/18, II GOK 19/18 and II GOK 20/18.



3) Resolution of the Sejm of the Republic of Poland of 12 May 2022 on the election of members of the National Council of the Judiciary, published in the 'Monitor Polski' of 19 May 2022 (item 485)

- were taken in gross violation of the Constitution of the Republic of Poland.

The effect of their adoption was to shape the composition of the National Council of the Judiciary in a manner contrary to the Constitution of the Republic of Poland, the Treaty on European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms, and consequently the loss of the ability of the National Council of the Judiciary to perform its constitutional functions and tasks, including in particular its ability to uphold the independence of the courts and the independence of judges.

In accordance with the Constitution of the R P. The National Council of the Judiciary (hereinafter referred to as the NCJ) shall consist of:

- 1) First President of the Supreme Court, the Minister of Justice, the President of the supreme Administrative Court and a person appointed by the President of the Republic;
- 2) fifteen members selected from among judges Court Supreme Court, common courts, administrative courts and military courts;
- 3) four members elected by the Sejm from among MPs and two members elected by the Senate from among senators.

Both for the parties to the agreement concluded between the government and the opposition in 1989 (the Round Table) and for the members of the Constitutional Committee of the National Assembly working on the draft Constitution of the Republic of Poland, it was clear that judges to the NCJ were to be elected by judges (see transcripts of the meetings). This is also how this provision has been understood since the entry into force of the 1997 Constitution of the Republic of Poland. The principle of the election of the members of the NCJ referred to in Article 187(1)(2) of the Constitution of the Republic of Poland by judges thus follows from a systemic interpretation, and is further supported by historical interpretation.

Although the Constitution of the Republic of Poland clearly indicates the role of the Sejm, as well as the Senate, in the composition of the NCJ (election - four and two members, respectively), the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, item 3) transferred the competence to elect 15 judges-members of the NCJ to the Sejm. Virtually all legal opinions at the time pointed to the incompatibility of this solution with the Polish Constitution. In practice, this solution also carries negative procedural, legal and financial consequences for Polish citizens and the Polish State in international and intra-EU legal transactions.

Although the optimum number of members of the NCJ elected by individual entities can be debated, without an amendment to the Constitution of the Republic of Poland, no change in this respect is possible: 15 members from among the judges should be elected by the judges. The best possible solution at present is to align the content of the Act on the National Council of the Judiciary with the Polish Constitution.

The novelty proposed in the draft, compared to the pre-2018 state of the law, is that the 15 judges to the NCJ will be directly elected by all Polish judges. Until 2018, judges were elected to the NCJ by general assemblies or assemblies of representatives.

It should be borne in mind that, according to the Constitution of the Republic of Poland, 'the National Council of the Judiciary shall safeguard the independence of the courts and the independence of judges. The courts should be independent of both the legislative and executive

branches of government. The incompatibility of the solution introduced in the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts providing that the Sejm elects a total of 19 out of 25 members of the NCJ, is that the independence of the courts is guarded by a body selected by the current parliamentary-government party majority. The NCJ dominated by the parliamentary-government majority is unable to uphold independence from that majority (Sejm, government, party).

Complementing this, the most democratic way of staffing the body since 1989 (whose main task is to select the best candidates for judicial posts), is the proposal to set up an advisory body attached to it, consisting of representatives of institutions, professional groups and associations active in the field of human rights or justice.

There is no doubt that the core of power in a democratic state is the party (coalition) that has obtained a majority in parliament (or its first chamber), in free, fair elections. There is also no doubt that even elected power must be controlled (constrained) by institutions such as independent courts, independent media and must be accompanied by other independent bodies (be it an independent president, an independent second chamber or an independent local government). It is noteworthy that only a court (constitutional, administrative, civil or criminal) that is independent of the ruling party is able to ensure that a citizen receives a fair judgment in the event that a representative of the current government or ruling party (either as a representative of a governing body or as a private individual) stands on the opposing side.

The rules for the formation of the composition of the NCJ in the judicial part should correspond to the constitutional and treaty regulations. Accordingly:

- 1) A solution was introduced whereby judges - members of the NCJ, as representatives of the judiciary, in line with the European standard, should be elected by judges and not by the Sejm (Article 11f). The election should be direct and secret. It is important to recall the content of the opinion of the Executive Council of the European Network of Councils for the Judiciary (ENCJ) on the draft laws presented by the Polish government of 30 January 2017. It indicated that 'the European Network of the Judicial Councils has clear standards on this matter, which state that the mechanism for the appointment of the members of the Council elected from among the judges must be a system that excludes interference from the executive or the legislature'. The European Network of Councils for the Judiciary also stressed that the mechanism for appointing members of the Council elected from among the judges must "exclude interference by the executive or legislature", and the selection of judges should only be made by other judges on the basis of broad representation of the relevant sectors of the judiciary. The above principles are also reflected in the Basic Principles on the Independence of the Judiciary and the Independence of Judges endorsed by the UN General Assembly (Resolutions: 40/32 of 29 November 1985 and 40/146 of 13 December 1985) and Recommendations No. R(94) of the Committee of Ministers to the Member States of the Council of Europe on the independence, efficiency and role of judges (adopted by the Committee of Ministers on 13 X 1994 at the 516th meeting of the Deputy Ministers). According to the principles set out in these documents, all decisions on the careers of judges should be based on objective criteria, and the recruitment and promotion of judges should be made on the basis of merit taking into account qualifications, integrity, ability and efficiency. European Charter of Statutory Principles for Judges (available on the Ministry of Justice website: [http://bip.ms.gov.pl/pl/ministerstwo/wspolpraca-international/European cooperation/European legal-standards--judges/](http://bip.ms.gov.pl/pl/ministerstwo/wspolpraca-international/European%20cooperation/European%20legal-standards--judges/)) provides in paragraph 1.3: "With regard to any decision concerning the recruitment, recruitment, appointment, career progression or termination of a judge, the statute provides for the participation of a body, independent of the executive and legislative branches, in which at least half of those sitting are judges elected by other judges, in accordance with rules ensuring the widest possible representation of judges." In the judgment of 8 November 2021 (Case nos. 49868/19 and 57511/19), the European Court of Human Rights in

Strasbourg ruled that the participation of the National Council of the Judiciary, which is composed of judges elected by parliament after the right to elect them has been taken away from judges, results in the person so appointed not guaranteeing the right to an independent and impartial court. Poland was obliged to take action to remedy this deficiency and the draft law implements these recommendations;

2) A solution is proposed whereby all judges (Supreme Court, common courts, administrative courts and military courts) will be represented on the NCJ. The purpose of the above regulations (Article 11f) is to ensure the broadest possible representation of judges. With regard to the selection rules in place before 2018, it was argued that the curial system of selection depreciates the role of judges of courts of district courts. As a result of the 2018 amendments, the composition of the NCJ was almost exclusively composed of district court judges. The proposed regulation seeks to ensure that judges of all courts, appropriate to their numbers, participate in the NCJ.

- 3) It is therefore proposed that judges be elected to the composition of the NCJ:
- a) one judge of the Supreme Court;
  - b) two appeal court judges;
  - c) three district court judges;
  - d) six district court judges;
  - e) one military court judge;
  - f) one judge of the Supreme Administrative Court;
  - g) one judge of the provincial administrative court.

The distribution of seats proposed in the draft, which are to be filled by judges of particular judicial divisions or levels, corresponds to the ratio of the number of judges of the courts indicated in the subsequent paragraphs of Article 11f(1) to the total number of all judges. At the same time, the draft respects the mechanism of democratic selection by judges of their representatives - it is the judges who will decide who is to represent their environment in the NCJ. District court judges will be able to take six seats in the NCJ, which is the majority (6 out of 11) of the NCJ members who are judges of common courts.

4) The proposed regulation aims to introduce a modified procedure for the election of judges to the NCJ. In addition to the already mentioned return to the formula of election of representatives of the judicial community by judges, the draft also introduces new elements of this procedure. A specific group of judges should have the right to propose candidates for judges - members of the NCJ (Article 11i(1) of the amended Act). Also, a judge may support only one candidacy and may not support himself. This provision is intended to counteract the prolongation of the procedure for selecting judges to the NCJ.

5) The right to endorse a nomination and to stand for election as a member of the NCJ was excluded for retired judges, as the right of election to the NCJ is to be granted to active judges.

6) The State Electoral Commission, as the permanent supreme electoral body competent for the conduct of elections and referenda, was designated as the body administering elections to the NCJ - members of the NCJ who are judges (Article 11g). The resolution of the State Commission The decision of the Electoral Committee on the ordering of elections will be subject to publication in the Official Journal of the Republic of Poland "Monitor Polski".

7) The draft stipulates that candidates shall be proposed in writing to the State Election Commission, within the deadline indicated in the resolution ordering the election.

8) The draft formulates the requirements for the application of a candidate for a member of the NCJ. The application shall be accompanied by the judge's consent to be

a candidate for a member of the NCJ. The application of the candidate is made in writing by a proxy. The proxy shall be a person indicated by the candidate for a member of the NCJ, from among the persons on the candidate's support list. The application of the candidate is accompanied by a list of judges supporting the application, containing their forenames, surnames, positions and places of service, PESEL identification numbers and their handwritten signatures with the date of their signature.

- 9) The State Election Commission verifies the correctness of candidate applications.
  - a) As in the case of general elections, the State Election Commission verifies the correctness of the required number of signatures of the judges supporting the application.
  - b) Information on whether a candidate has the status of a judge with the right to stand for election as a member of the NCJ and whether the persons supporting the application have the status of a judge with the right to support the candidate as a member of the NCJ shall be provided to the State Election Commission by the Minister of Justice, the First President of the Supreme Court and the President of the Supreme Administrative Court.
  - c) The procedure for correcting deficiencies in the application is set out. In the case of an application having deficiencies that make it impossible to proceed, including in the event that the deficiencies are not remedied, the State Election Commission shall refuse to accept the candidate's application.
  - d) The draft provides for the possibility to appeal to the Supreme Administrative Court against a resolution of the State Election Commission refusing to accept the application of a candidate for a member of the NCJ.
- 10) The draft regulates the obligatory public hearing and the possibility to ask questions to candidates for members of the NCJ. This institution refers to the informal institution of Citizen Monitoring of Candidates for Judges of the Constitutional Tribunal and Attorney General. It should be considered appropriate to formalise this institution so that the public can see all the candidates and confront them with the outcome of the elections.
- 11) The election will be conducted by traditional voting, using ballots.
- 12) Voting in individual courts will be carried out by ballot commissions created in individual courts by court presidents, with the State Election Commission being able to create joint ballot commissions for several courts.
- 13) At the statutory level, the basic elements of the voting procedure and the determination of the results were regulated; however, given the nature of the elections, including the circle of candidates and voters, it was deemed unnecessary to establish regulations at such a level of detail as for the elections regulated by the Act of 5 January 2011 - Election Code.
- 14) The State Election Commission shall, within three days of the date on which the election report is drawn up, announce the election results, by way of a notice, in the Official Journal of the Republic of Poland "Monitor Polski".
- 15) The legislator imposes an obligation on the State Election Commission to make documents related to the election immediately available at the request of a judge who has stood for election as a member of the NCJ.

18) The Act provides for the possibility to lodge a protest against the validity of the election of a member of the NCJ. Such a protest should be considered by the Supreme Administrative Court with appropriate application of the provisions of the Act of 5 January 2011. - Electoral Code.

19) The proposal contains a provision according to which in the event that the mandate of a member of the NCJ referred to in Article 11f(1) expires before the end of his or her term of office, an election shall be called for a date falling no later than three months after the expiry of his or her mandate. An election ordered in the event that the mandate of a member of the NCJ expires before the expiry of his or her term of office or in the event that the Supreme Administrative Court decides to hold a new election as a result of a protest, shall not be held if the date of the election can be set within 3 months before the expiry of the joint term of office of the members of the NCJ elected from among the judges.

A Social Council has been set up at the NCJ as an advisory body (Article 22a), in particular on matters relating to the examination and assessment of candidates for judicial and assessor posts. The purpose of the establishment of the Social Council is to ensure open participation of civil and professional organisations in the formulation of judicial reform strategies and to guarantee objectivity in their monitoring process. It will allow for full control of the judicial nomination process. Ultimately, it will be an important guarantor of compliance with the principles of independence of judges and independence of the judiciary, an expression of civic participation and co-responsibility for the decisions of the NCJ. The NCJ, through the creation of the Social Council, will be able to protect the courts more effectively from political pressure.

The composition of the Social Council should be as professional as possible so that it can fulfil the task entrusted to it.

It is proposed that the composition of the Social Council should include (Article 22a(2)): a person indicated by the Supreme Bar Council, a person indicated by the National Council of Legal Advisers, a person indicated by the National Notary Council, a person indicated by the General Council for Science and Higher Education, a person indicated by the Ombudsman, a person indicated by the National Council of Prosecutors to the Prosecutor General, three representatives of non-governmental organisations indicated by the President of the Republic of Poland. The term of office of the Social Council was set at 4 years.

### **Transitional provisions (art. 2, art. 3, art. 4 and art. 5) Termination of the activity in the NCJ of judges elected by the Sejm**

Transitional provisions provide for the termination of the activity in the NCJ of persons elected from among the judges by the Sejm on the basis of legislation passed in December 2017. (Article 2 of the draft law). The provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts introduced a mode of election that violated constitutional norms, in particular the interruption of the then ongoing four-year term of office of the members of the NCJ (Article 187(3) of the Constitution of the Republic of Poland), as well as the taking over by the Sejm of the Republic of Poland of the election of 15 judges - members of the NCJ, contrary to Article 187(1) in connection with Article 7, Article 10 and Article 186(1) of the Constitution of the Republic of Poland. Therefore, persons elected in an unconstitutional procedure, in gross violation of the law, cannot at the same time invoke the constitutional protection of the permanence of the four-year term of office of an elected member of the NCJ (Article 187(3) of the Constitution of the Republic of Poland). However, in order to ensure the continuity of a constitutional body such as the NCJ, the termination of the activities of these persons will not occur by operation of law on the date of entry into force of the of this Act, but as of the date of announcement, by means of the notice referred to in Article 11q(2) of the Act amended by Article 1, of the results of the first election of judges - members of the NCJ, the

regulation of which is provided for in Article 3(1) of this Act. Pursuant to Article 3 para.1 of the draft Act, the first election of the members of the NCJ in place of the members elected on the basis of Article 9a(1) of the Act amended by Article 1, as amended by this Act, shall be carried out on the basis of the Act amended by Article 1, as amended by this Act, with the necessary modification as to the timing of the election.

The draft therefore prejudices the continuity of the NCJ. Due to the fact that the Act is an implementation of the judgment of the European Court of Human Rights of 8 November 2021 and other previously cited judgments in the justification, the above regulation does not raise any doubts as to its compliance with the Constitution of the Republic of Poland, the law of the European Union and the European Convention on Human Rights.

### **Procedure for the 'first' formation of the correct composition of the NCJ in the judicial part (Article 3)**

Pursuant to Article 3(1) of the proposed law, the first election of members of the NCJ in place of the members elected under Article 9a(1) of the law amended by Article 1 in the current wording shall be conducted on the basis of the law amended by Article 1, as amended by this law, with the proviso that the State Election Commission shall order the election within 21 days from the date of entry into force of the law and the election shall be conducted within three months from the date of the order.

Subsequently, the proposed Article 3(2) of the Act indicates, consistently with the idea of amending the Act on the National Council of the Judiciary, that in the first election for a member of the NCJ after the entry into force of this Act, the right to stand for election as a member of the NCJ shall not be granted to judges who took up a position as a result of a motion for appointment of a judge submitted to the President of the Republic of Poland by the NCJ formed in application of Article 9a of the Act amended in Article 1 in the current wording.

The Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts led to a procedure for the election of judges-members of the NCJ that was contrary to the Constitution of the Republic of Poland, which resulted in this body, which is key to maintaining the independence of the Polish judiciary, losing the guarantees of its independence. Consequently, the procedure for the appointment or promotion of judges to senior positions with the participation of this body was defective, which is confirmed by a number of rulings of both international tribunals and Polish courts. In light of the well-established case law of the European Court of Human Rights (judgments in cases: *Reczkowicz v. Poland* of 22 July 2021. - application no. 43447/19, *Dolińska-Ficek and Ozimek v. Poland* of 8 November 2021. - application nos. 49868/19 and 57511/19, *Advance Pharma sp. z o.o. v. Poland* of 7 February 2022. - application no. 1469/20, *Broda and Bojara v. Poland* of 29 June 2021 - application nos. 26691/18 and 27367/18, *Grzęda v. Poland* of 15 March 2022 - application no. 43572/18, *Wałęsa v. Poland* of 23 November 2023. - application no. 50849/21), judgments of the Court of Justice of the European Union (of 19 November 2019 r. - AK case of joined actions C 585/18, C 624/18, C 625/18, judgment of the Grand Chamber of the Court of Justice of the European Union of 6 October 2021 in case no. C- 487/19), decisions of the Polish Supreme Court (judgment of 5 December 2019. III PO 7/18, OSNP 2020/4/38, decision of the Supreme Court of 15 January 2020. III PO 8/18, OSNP 2020/10/114, resolution of the combined Chambers of the Supreme Court of 23 January 2020. BSA I-4110-1/20) and decisions of the Supreme Administrative Court (inter alia, decision of 26 June 2019. II GOK 2/18, judgment of 11 October 2021, II GOK 9/18, judgments in cases II GOK 10/18, II GOK 11/18, II GOK 12/18, II GOK 13/18, II GOK 14/18 all of 21 September 2021), the composition of the NCJ formed by the law of 8 December 2017 r. on amending the Act on the National Council of the Judiciary and certain other acts is contrary to Article 187 of the Polish Constitution. This body does not meet the requirements of independence from the executive and legislative powers, with the result that a judge appointed with the participation of the NCJ in its new composition cannot be considered independent and impartial,

as his or her appointment was made in gross violation of the basic rules of the procedure for the appointment of judges. Therefore, in the first elections for a member of the NCJ after the entry into force of this Act, a provision should have been introduced according to which the right to stand for election as a member of the NCJ does not apply to judges appointed by the NCJ formed in application of Article 9a of the Act of 12 May 2011 on the National Council of the Judiciary.

Judges returning to a previously occupied judicial post under Article 98 § 3 of the Act of 27 July 2001 were excluded from the scope of regulation of Article 3(2). - Law on the system of common courts. The situation of persons who have resigned from the office of a judge in order to take up the functions specified in Article 98 § 2 of the Act of 27 July 2001. - Law on the System of Common Courts, and then intend to return to a previously held judicial post, is different from the situation of other persons in respect of whom the NCJ directs a request to the President of the Republic of Poland for their appointment to a judicial post. The right to return to the office of a judge is exercised in a simplified procedure and is conditioned only by the will of the interested party (his or her application is required) and the fulfilment of the conditions required for appointment to the office in question. As long as the former judge still fulfils these requirements, and thus in particular: has only Polish citizenship and enjoys full civil and civic rights, has not been validly convicted of an intentional offence prosecuted by public indictment or an intentional fiscal offence, is of irreproachable character, is capable, due to his state of health, of performing the duties of a judge, the NCJ may not refuse to submit to the President of the Republic of Poland a request for re-appointment to the office of judge. There is no assessment of the substantive qualifications of the person seeking appointment (much less a comparison with those of other candidates), nor is an opinion normally required in nomination proceedings sought. In the overwhelming number of cases, these persons, when applying for a judicial post, have undergone competition procedures (including verification of substantive qualifications) before the NCJ shaped in accordance with constitutional standards, about which there are no doubts related to their defectiveness. These judges benefit fully from the presumption of independence.

Pursuant to Article 3(3) of the proposed act, the first session of the NCJ following the first election to the NCJ, shall be convened by the Minister of Justice on a date falling no later than within 14 days of the day on which the results of the first election are announced. The session of the NCJ is presided over by the oldest member of the NCJ being a judge from among the judges elected on the basis of Article 11f(1) of the Act amended by Article 1 in the wording adopted by this Act. This judge shall preside over the session until a new Chair of the NCJ is elected.

### **Proceedings in individual cases initiated and not concluded**

Pursuant to Article 4 of the draft Act, proceedings in individual cases, initiated and not concluded before the NCJ formed pursuant to Article 9a of the Act amended in Article 1 in the current wording, are conducted by the NCJ formed by the present Act. In order to ensure the lawfulness of the proceedings conducted, in particular in the case of judicial appointments, and thus the stability of the decisions made by them and the highest possible level of judges verified by an open and transparent procedure, the proceedings initiated before the NCJ should be continued with the composition of the NCJ formed on the basis of the provisions of this Act. This should take into account the particularly difficult and coercive situation of court assessors, court registrars and judicial assistants participating in nomination procedures for vacant judicial positions and ensure that competitions which have commenced can be continued and, consequently, that cases are heard by the legitimate composition of the NCJ.

### **First meeting of the Social Council of the National Council of the Judiciary**

Pursuant to Article 5(1) of the draft Act, the Supreme Bar Council, the National Council of Legal Advisers, the National Notary Council, the General Council for Science and Higher Education, the Ombudsman for Civil Rights, the National Council of Prosecutors to the Prosecutor General

and the President of the Republic of Poland appoint the members of the Social Council to the President of the NCJ within one month from the day of announcement, by way of the announcement referred to in Article 11q(2) of the Act amended in Article 1, of the results of the first election of judges - members of the NCJ. The President of the NCJ shall convene the first meeting of the Social Council within 14 days from the date of expiry of the aforementioned one-month period.

### **Expected effects**

The expected social, economic and financial impacts of the proposed law are set out in the Regulatory Impact Assessment.

### **Statement of compliance with European Union law**

The draft fully complies with European Union law and also ensures that national law complies with the requirements under Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

### **Date of entry into force of the proposed law and other information**

The draft indicates that the law will enter into force 14 days after its promulgation.

The draft law has been posted on the subject page of the Public Information Bulletin of the Government Legislation Centre, in the Government Legislative Process service, pursuant to the requirements of Article 5 of the Act of 7 July 2005 on lobbying activities in the lawmaking process (Journal of Laws 2017, item 248) and in accordance with § 52(1) of Resolution No. 190 of the Council of Ministers of 29 October 2013. - Rules of Procedure of the Council of Ministers (M.P. of 2022, item 348).

The draft act is not subject to notification in accordance with the provisions of the Regulation of the Council of Ministers of 23 December 2002 on the functioning of the national system of notification of norms and legal acts (Journal of Laws, item 2039 and of 2004, item 597).

The proposed law contains regulations ensuring the implementation of the judgment of the Court of Justice of the European Union and the judgment of the European Court of Human Rights.

The draft law will not have a negative impact on the labour market and on the competitiveness of the economy and entrepreneurship, including on the functioning of enterprises.

The bill is not subject to an OSR assessment by the OSR coordinator under the § 32 of Resolution No. 190 of the Council of Ministers of 29 October 2013. - Rules of Procedure of the Council of Ministers.