

THE COST OF A “REFORM”

THE WORK OF THE JUSTICE SYSTEM,

2015-2022



The cost of a “reform”. The work of the justice system, 2015-2022

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In 2020-2022, the Helsinki Foundation for Human Rights was conducting comprehensive monitoring of the functioning of institutions forming the human rights protection system in Poland such as courts, the prosecution service and advocacy institutions).

In the reports, analyses and discussions developed as part of the project, the HFHR presents how key changes in the law affect the work of these institutions and the protection of fundamental rights.

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Summary

- In the period from 2015 to 2020, Polish courts received, on average, 15 million cases a year. Over the last ten years, the average duration of court proceedings has increased significantly, from an average of four months in 2011 to more than seven months in 2019. The duration of proceedings also depends on the type of case. Judgments in criminal matters are handed down over a relatively short period of time while those in commercial matters are pronounced after the longest periods. Another relevant factor is the level of court: in regional courts, the average waiting time for a judgment was more than 10 months (in 2020).
- Since 2016, the ruling majority has adopted more than 25 amendments concerning the court system and functioning of the judiciary. These amendments were also accompanied by multiple changes in civil and criminal procedures (the Code of Criminal Procedure alone was amended more than 40 times over that period). However, these changes have not resulted in an improvement in the efficiency of the judicial system. Even more worryingly, they have reduced the level of protection of independence of the courts and of the judges.
- The COVID-19 pandemic also had a significant impact on the functioning of courts. The legislative changes intended to allow online trials have often been hastily adopted and have not been preceded by any in-depth analyses or public consultation. In effect, the “pandemic reforms” have brought organisational chaos and a lack of standardised practices. The pandemic also affected the arrangements for communication with courts – in 2020, the Common Courts Information Portal was introduced as a means of delivering procedural documents in civil proceedings to parties’ legal representatives.
- A key change introduced after 2015 concerns the National Council of the Judiciary. In consequence of the changes in the law that became effective in 2018, the Sejm elects 19 out of 25 members of the Council. Both the change in the procedure

for electing the Council's judicial members and the way this body operates in its new form indicate that this body is no longer independent. Furthermore, as from mid-2018, the reshaped NCJ has not undertaken any significant action to protect the independence of the judges. Despite growing concerns about the establishment of the NCJ and its operations (confirmed, inter alia, by the jurisprudence of international courts), the Council continued its work, appointing some 2,000 judges over a four-year period.

- The changes to the work of the courts have also been accompanied by changes that limit the independence of judges. In the wake of the 2017 legislative amendments (and subsequent changes in the law introduced in 2020), the Minister of Justice obtained wide powers concerning the appointment of judicial disciplinary officers and judges of disciplinary courts. The amended laws also weakened the guarantees related to the defence of judges accused of disciplinary offences. Since 2018, disciplinary officers have been initiating disciplinary proceedings against judges actively engaged in the defence of the rule of law. These proceedings concerned, among other things, the merits of pronounced judgments, public speeches or voices in the discussion on the changes in the justice system.
 - Disciplinary proceedings are not the only form of pressure exerted on judges. In addition to these, the prosecution service has developed in recent years a practice, employed in politically charged cases, which involves attempting to lift judges' immunity from criminal prosecution, suspending judges from official duties or organising smear campaigns against judges in the public media and media outlets supporting the ruling majority's party line.
 - The changes in the Polish justice system have been the subject of many judgments by international and domestic courts. International courts and the Polish Supreme Court have issued certain landmark judgments (such as the CJEU judgment of 19 November 2019, the resolution of three Chambers of the Supreme Court of 20 January 2020 and subsequent ECtHR rulings including *Reczkowicz v. Poland*) in which they have pointed out the systemic deficits of the introduced justice reform. These criticisms focus primarily on issues related to the formation of the National Council of the Judiciary, the functioning of the Disciplinary Chamber of the Supreme Court and the expanding powers of the Minister of Justice over the judiciary. However, none of these judgments has been fully implemented by the ruling majority.
-

Timeline

November–December 2015	Following the parliamentary elections won by the United Right, the new ruling majority adopts amendments to the Constitutional Court Act designed to cripple the Court's operations. At the same time, the Sejm elects three persons for the posts of judges to the Constitutional Court without a legal basis.
January 2016	Leader of the ruling majority Jarosław Kaczyński announces the need to reform the justice system. In the months that follow, Mr Kaczyński says: "We are preparing for a reform of the courts, it's unacceptable for the courts to bow down to gangsters or crooks as they do sometimes ... while at the same time a nursing home inmate who has not paid off an instalment for a TV set lands in prison." ¹
12 April 2017	A group of Sejm deputies table proposals to amend two laws: the Common Courts Act (including changes to the procedure of appointing the presidents of courts) and the National Council of the Judiciary Act.
31 July 2017	President of Poland refuses to sign the amendment to the National Council of the Judiciary Act and submits it to the Sejm for reconsideration.
12 August 2017	The amendment to the Common Courts Act enters into force. By February 2018, almost 150 presidents and deputy presidents of courts are dismissed by the Minister of Justice.
8 December 2017	On the initiative of the President, the Sejm adopts an amendment to the National Council of the Judiciary Act.
6 March 2018	Fifteen new judges are elected as members of the NCJ, but the lists of those endorsing the candidates are not made public.
4 June 2018	The Minister of Justice appoints the Disciplinary Officer for Common Courts Judges and Disciplinary Officer's two deputies.
September 2018	Disciplinary officers launch one of the first disciplinary proceedings against judges in connection with their public statements on the defence of the rule of law.

1 [Gazeta Prawna, Kaczyński announces the reform of the courts and the modernization of unified services \(PL\), 2 May 2016 \(8.07.2022\).](#)

3 April 2019	The European Commission commences infringement proceedings related to the design and operation of the disciplinary regime for judges.
19 November 2019	In a judgment, the CJEU sets out the criteria for assessing the independence of the NCJ.
20 December 2019	The Sejm adopts the so-called “Muzzle Law”, which limits the independence of judges, introducing, among other measures, disciplinary liability for judges questioning the status of a judge appointed by the new National Council of the Judiciary.
14 February 2020	Following a legal dispute lasting more than two years, the Speaker of the Sejm publishes the names of persons endorsing the NCJ judicial candidates.
29 April 2020	The European Commission commences infringement proceedings related to the Muzzle Law.
15 July 2021	Following the infringement procedure initiated on 3 April 2019, the Court of Justice of the European Union enters a judgment on the Disciplinary Chamber.

1. PART ONE

The work of the justice system during the “reforms” since the beginning of 2016

In 2016, the ruling majority has adopted more than 25 amendments to the laws concerning the functioning of the courts and at least two amendments to criminal and civil procedures that may be considered structural in their nature. However, the introduced changes have failed to materially improve the work of the courts. Furthermore, certain systemic problems, such as those concerning expert witnesses or access to defence lawyers in criminal proceedings, remain unresolved.

1.1. NUMBER OF CASES IN COMMON COURTS

According to statistics published by the Ministry of Justice, the annual number of cases submitted to the Polish courts is in the range of 13.5 and 17.7 million. Moreover, with the exception of 2020, the number of cases submitted has been steadily increasing. As a result, Poland ranks third among the EU countries in terms of the number of cases received by courts per 100,000 inhabitants.²

Another symptom of the growing crisis of the Polish justice system is the progressing problems with the handling of the constantly increasing influx of cases. In recent years, we have observed spikes in the effective caseload handling index, including a cyclical transition from the catching-up phase to the backlog creation phase.

2 European Commission, [2021. EU Justice Scoreboard](#) (23.05.2022).

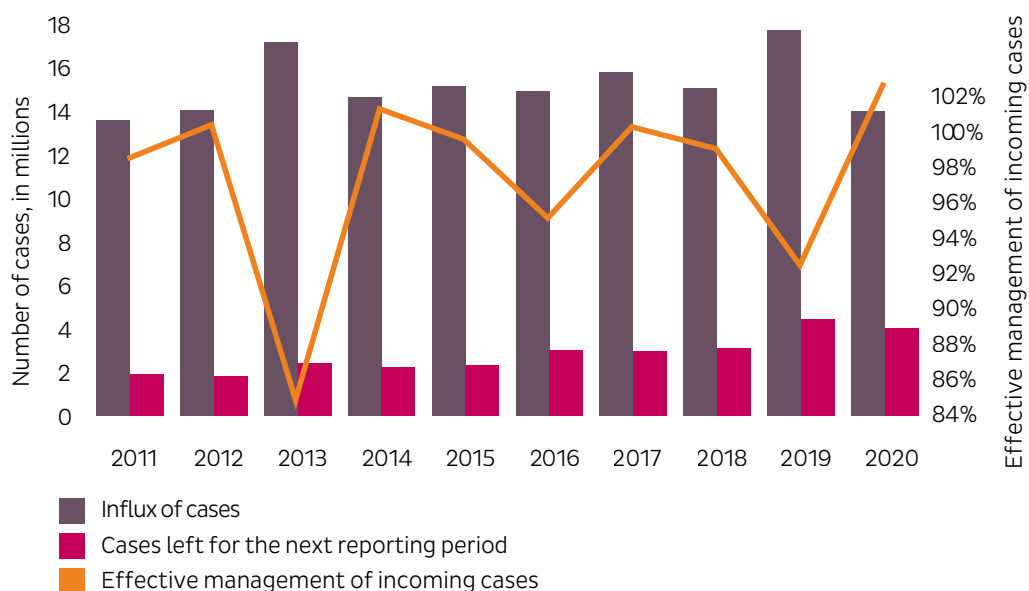


Chart 1. An influx of cases to common courts, cases left for the next reporting period and the handling of the influx of cases in common courts³.

However, the 2020 figures are not indicative. Due to the unfolding COVID-19 pandemic, there have been two significant interventions by the legislature. The first one was the suspension of the procedural time limits for nearly three months.⁴ The other resulted in the postponement of limitation periods for criminal cases until after the lifting of the state of pandemic emergency.⁵ Emergency measures taken by the leadership of courts have hindered effective communication with the courts, including the possibility of filing procedural documents.⁶ As a result, the number of submitted cases has clearly decreased. This, in turn, allowed the courts to slightly catch up with the backlog of previous years. However, the extent of the improvement should be considered minor, given the duration of the actual suspension of operations of the justice system.

3 Poland, Ministry of Justice, [The number of cases in common courts \(PL\)](#) (23.05.2022).

4 Article 15zszs of the Act of March 2, 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws, item 374, as amended), in the wording in force from March 31, 2020 to May 16, 2020.

5 Article 15zsr of the Act of March 2, 2020 on special solutions related to the prevention, counteraction and combating COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws, item 374, as amended) (PL)

6 Helsinki Foundation for Human Rights, [Access to court to court in times of pandemic. Part one.](#) (23.05.2022).

In any case, over the last decade, the courts have recorded a systematic increase in the backlog of cases that the courts are unable to finish in a given year. Moreover, the number of long-term cases lasting at least 12 months has increased significantly, too. While in 2011 the number of proceedings that lasted more than 12 months and less than two years was just over 157,000, the figure for 2021 is nearly 600,000.⁷ Similar increases can be observed in other case duration categories identified in the Ministry of Justice statistics.

These increases cannot be explained by an upturn in the overall number of cases. A comparison of the share of each category of cases in the total number of cases heard by the courts in a given year shows a worsening judicial backlog.

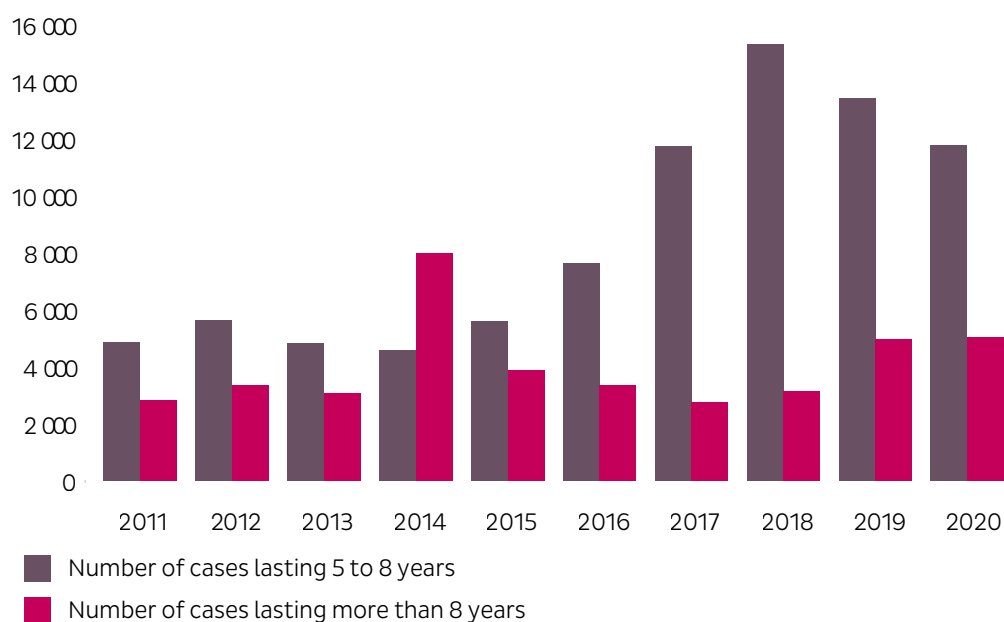


Chart 2. Number of cases lasting five to eight years and more than eight years, heard by courts between 2011 and 2020⁸

⁷ Poland, Ministry of Justice, [Average duration of court proceedings in 2011 – Q1 2022 – selected repertories \(PL\)](#), (23.05.2022).

⁸ Poland, Ministry of Justice, [Average duration of court proceedings in 2011 – Q1 2022 – selected repertories \(PL\)](#), (23.05.2022).

1.2. EXCESSIVE LENGTH OF PROCEEDINGS BEFORE POLISH COURTS.

The excessive length of judicial proceedings is one of the most important long-standing problems faced by the Polish justice system. Among the 1,027 judgments of the European Court of Human Rights concerning Poland issued until 2021, in which a violation of at least one provision of the Convention was found, as many as 445 (43%) concerned the excessive length of judicial proceedings.⁹ A key ruling in this regard was the 2015 ECtHR judgment in *Rutkowski and Others v. Poland*¹⁰, in which the Court reiterated the systemic nature of the violation of the right to be heard within a reasonable time. Despite the passage of more than seven years since this ruling was made, it is still considered by the Committee of Ministers of the Council of Europe to be unimplemented. The relevance of the problem of excessively lengthy proceedings is also pointed out by legal professionals. As many as 98% of the surveyed members of the legal profession in Poland (*adwokaci* and *radcowie prawni*) in the HFHR survey indicated that the excessive length of the proceedings in Polish courts is a systemic problem.¹¹

Themes such as the operational efficiency of the justice system and, most notably, the excessive length of judicial proceedings have repeatedly recurred in statements made by politicians of the ruling coalition. Subsequent changes in the rules of civil¹² and criminal¹³ procedures were also justified by the need to speed up the proceedings. The same objective is to be pursued by a change that has been promised over the last two years, namely the flattening of the judicial structure.¹⁴

9 ECHR, [Violations by Article and by State](#) (23.05.2022).

10 ECHR judgment of 7 July 2015 in the case *Rutkowski and others v. Poland*, application no. 72287/10.

11 A. Klepczyński, P. Kładoczny, K. Wiśniewska, [W poszukiwaniu rozsądnego czasu postępowañ sądowych](#) (PL) (23.05.2022).

12 Dziennik Gazeta Prawna, [Ziobro: We have draft amendments to the Code of Civil Procedure and the Code of Criminal Procedure](#) (PL) (23.05.2022).

13 Poland, Ministry of Justice, [Faster and more efficient courts – reform of the criminal proceedings](#) (PL) (23.05.2022).

14 Prawo.pl, [Further reform of the judiciary is getting closer – draft amendments are prepared are ready](#) (PL) (23.05.2022).

However, almost none of the changes to court procedures introduced in recent years has had the effect of speeding up the work of the courts. On the contrary, the average duration of proceedings increases significantly year-to-year. In 2021, the duration of judicial proceedings was, on average, 7.1 months.¹⁵ This means that since 2015, it has increased by about 66%. This was mainly due to the ongoing changes in the judiciary (including the appearance of a significant number of judicial vacancies in 2015-2017), no improvements in the organisation of the work of judges, and, for the last two years, the limitations on the work of the courts related to the pandemic.

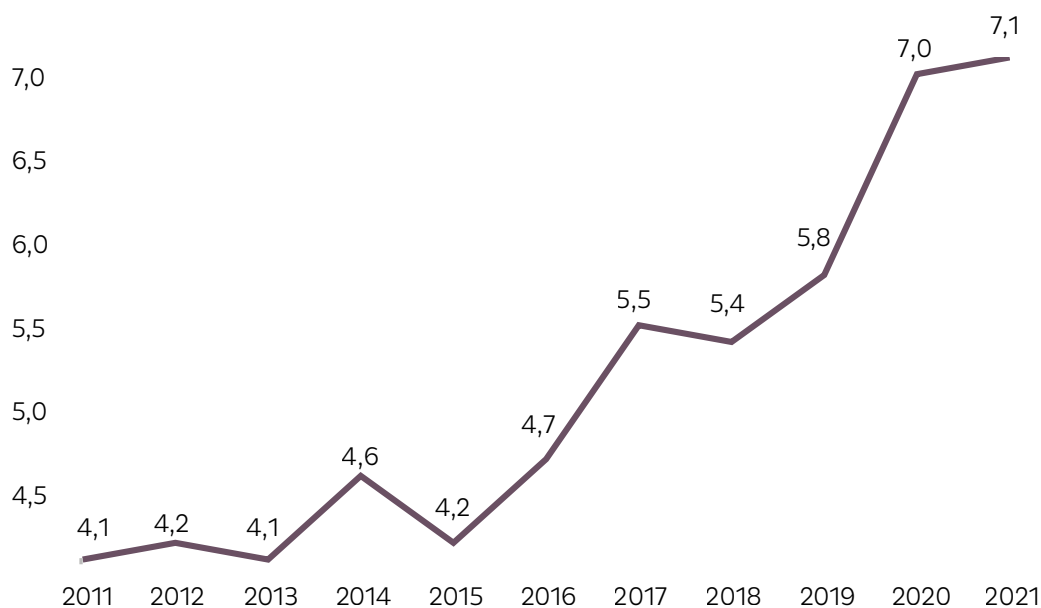


Chart 3. Average duration of judicial proceedings¹⁶

Data collected by the Ministry of Justice show that in 2021 the longest periods of waiting for a ruling were recorded in proceedings related to labour and social security law conducted by district courts. The average duration of such proceedings was 11.5 months, compared to the 2011 average of 5.8 months.¹⁷

15 Poland, Ministry of Justice, [Average duration of court proceedings in 2011 – Q1 2022 – selected repertories](#) (PL), (23.05.2022).

16 Poland, Ministry of Justice, [Average duration of court proceedings in 2011 – Q1 2022 – selected repertories](#) (PL), (23.05.2022). The latest data indicated in this source concern the first quarter of 2022. However, due to methodological reasons, particularly the need to compare data registered at the end of each year, the HFHR used data aggregated at the end of 2021.

17 Ibidem.

In 2015-2021, the average length of civil proceedings also increased. The most significant change in this respect concerns civil trials conducted before district courts. On average, a party must wait 17.1 months for a judgment in such proceedings. Meanwhile, in 2015, the average civil trial duration was 10.3 months.¹⁸ A comparably grim outlook emerges in commercial proceedings. The period of waiting for a commercial dispute to be resolved before a regional court is almost 20 months (21 months in district courts).¹⁹

The waiting time for rulings in non-litigious civil cases has also increased. Consequently, in 2021, proceedings in cases involving, for example, a declaration of the acquisition of an inheritance or the abolition of co-ownership of a property took around 10.2 months, which is almost 5 months longer than just 7 years ago.²⁰

The time needed to obtain a court ruling in (civil) proper and summary order for payment procedures has also been increasing. In the decade between 2011 and 2021, the waiting time for an order for payment has doubled, both in ordinary civil proceedings and civil proceedings to which business operators are the parties (commercial proceedings). This change significantly affects the possibility of recovering debts from commercial entities and thus has a direct impact on the economic situation of Poland, constituting a barrier to economic growth.²¹

Moreover, the average time taken by the district courts to hear a criminal case has slightly increased: in 2021, it took an average of 4 months to dispose of a case, as compared to 3.5 months in 2015.²²

Against the background of the increasing length of proceedings, it is worth noting the Ministry of Justice's efforts to artificially understate the problem of the excessive length of judicial proceedings. At the beginning of 2022, the Ministry changed the rules of work of court registries²³ and ordered that proceedings for the declaration of enforceability of

18 Poland, Ministry of Justice, [Average duration of court proceedings in 2011 – Q1 2022 – selected repertories](#) (PL), (23.05.2022).

19 Ibidem.

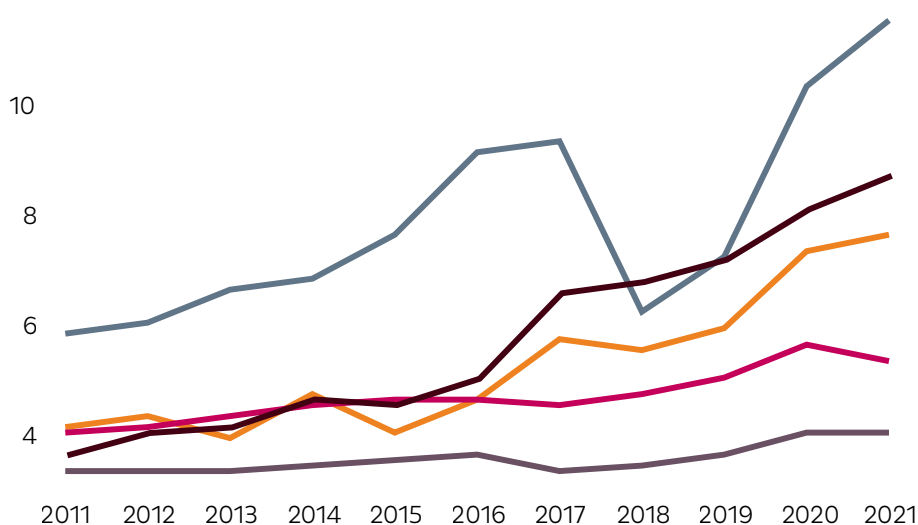
20 Ibidem.

21 A. Rizos, P. Kapopoulos, [Judicial Efficiency and Economic Growth: Evidence based on EU data](#) (PL), (23.05.2022).

22 Poland, Ministry of Justice, [Average duration of court proceedings in 2011 – Q1 2022 – selected repertories](#) (PL), (23.05.2022).

23 The ordinance of the Minister of Justice of 30 December 2021 amending the ordinance on the organization and scope of operation of court secretariats and other judicial administration departments (Journal of Laws of 2021, item 328).

a judgment or a court-approved settlement be treated as a separate category of proceedings. As the process of granting the enforceability clause is short, this will lead to a reduction in the average duration of all civil proceedings.²⁴ However, a side effect of this measure will be that attorneys and judges will find it difficult to determine which case realistically concerns requests for enforceability clauses.



	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Civil law proceedings	4,1	4,3	3,9	4,7	4,0	4,6	5,7	5,5	5,9	7,3	7,6
Criminal law proceedings	3,3	3,3	3,3	3,4	3,5	3,6	3,3	3,4	3,6	4,0	4,0
Labour and insurance law proceedings	5,8	6	6,6	6,8	7,6	9,1	9,3	6,2	7,2	10,3	11,5
Family law proceedings	4	4,1	4,3	4,5	4,6	4,6	4,5	4,7	5,0	5,6	5,3
Commercial law proceedings	3,6	4	4,1	4,6	4,5	5,6	6,5	6,7	7,1	8,0	8,6

Chart 4. Average duration of judicial proceedings before district courts, by type of proceedings²⁵.

24 P. Stowik, [Ziobro boasted that the courts work faster. Moments earlier, he changed the way of calculating statistics \(PL\)](#) (23.05.2022).

25 Poland, Ministry of Justice, [Average duration of court proceedings in 2011 – Q1 2022 – selected repertories \(PL\)](#), (23.05.2022).

1.3. CHALLENGES CONCERNING THE EXCESSIVE LENGTH OF PROCEEDINGS

The number of successful challenges concerning the excessive length of judicial proceedings was constantly increasing until 2019 (from 926 in 2010 to 2240 in 2019). Furthermore, the data made available by the Ministry of Justice shows a significant increase in the number of successful challenges that led courts to award damages to complaining parties to excessively lengthy proceedings. In 2011–2020, Poland paid over PLN 50 million in such damages.²⁶

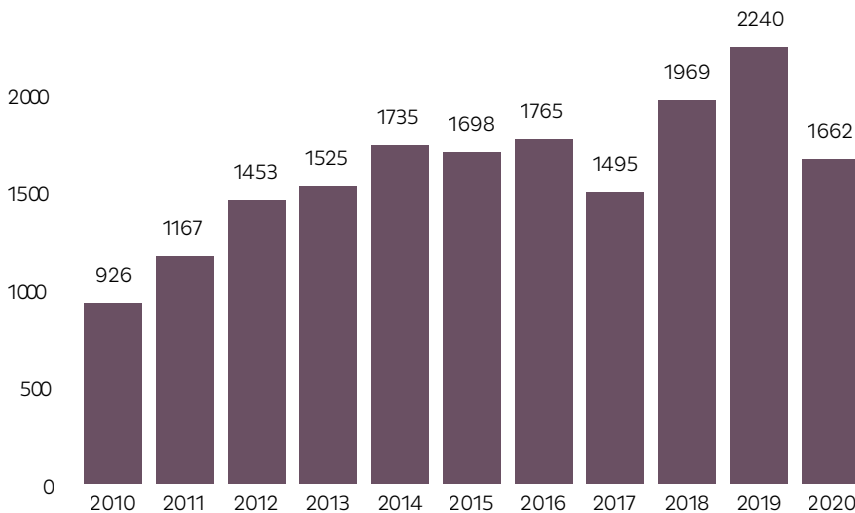


Chart 5. The number of cases in which damages for the excessive length of proceedings were sought that were settled by an award of damages by courts of appeal and regional courts, 2010–2020.²⁷

A comparison between the number of all cases brought before the courts and the number of proceedings in which damages were paid to claimants on account of the excessive length of proceedings highlights the lack of correlation between these two figures. In other words, the number of affirmed excessive length challenges increased more rapidly in 2011–2018 as compared to the increase in the number of cases submitted to the courts recorded over the same period. The year 2017 was exceptionally in this respect with the number of the affirmed challenges decreasing by 15% compared to the previous year.

²⁶ Poland, Ministry of Justice, [Complaint against excessive length of court proceedings in district courts and courts of appeal in 2010–2020](#) (PL) (23.05.2022).

²⁷ Ibidem.

2020 saw a slightly larger decrease. However, this change should be interpreted in view of the fact that the chart shows only the cases in which a challenge concerning excessive length of proceedings has been affirmed. At the same time, the Ministry of Justice does not publish details of the total number of such challenges. The decrease recorded in 2020 may be a result of the then-ongoing COVID-19 pandemic and in particular the possibility of considering it a cause of excessive length for which the courts are not responsible.

1.4. CHANGES TO THE RULES OF JUDICIAL PROCEDURES

In 2016-2022, a number of amendments to the Code of Criminal Procedure and Code of Civil Procedure were introduced. However, the manner in which these amendments were prepared and adopted was questionable due to the lack of adequate expert consultation and a description of the problems that the amendments were to address.

Firstly, in 2016, the Minister of Justice disbanded two bodies – the Criminal Law Codification Commission and Civil Law Codification Commission – which played a key advisory role in designing legislative changes. Second, the approach to public consultation has also changed. Important projects concerning the justice system were either consulted hastily or submitted as parliamentarian-sponsored proposals. Even when public consultations were organised, their conclusions were only given limited consideration.²⁸ As soon as the Cracow Institute of Criminal Law criticised the merits of the proposed changes, the Minister of Justice threatened them with legal action.²⁹

Since 2016, the Code of Criminal Procedure was amended on approximately 40 occasions. At least several of these amendments brought significant changes. Some, as intended by their drafters, were directly aimed at speeding up criminal proceedings. These amendments removed certain elements of procedural formalism – the obligation to make a verbal pronouncement of a ruling when no one has appeared at the hearing or the obligation to verbally enumerate documents included in the evidence of the proceedings.

28 More information about the shortcomings of the Polish legislative process: P. Fraćzak, K. Izdebski, G. Kopińska, W. Michatek, A. Vetulani-Cęgiel, [Polish Legislative Disorder. Report of the Civic Legislation Forum on the first two years of the 9th term of the Sejm \(PL\)](#) (23.05.2022).

29 [Newsweek.pl, The Ministry of Justice is suing professors of the Jagiellonian University. IT accuses them of lying \(PL\)](#) (23.05.2022).

The loosening of the requirement to pronounce very lengthy rulings in full should be viewed positively.

However, these positive changes were accompanied by measures aimed at reducing the length of proceedings at the expense of the procedural guarantees afforded to litigants. The latter include the obligation to draw up statements of grounds for decisions on official forms, the possibility of interviewing witnesses in the absence of the suspect and their defence lawyer, or the right of the court to set a deadline for submissions of evidence. The introduction of the appellate court's power to convict a perpetrator whose case has been conditionally dismissed by the first instance court should also be regarded as a concerning development. These changes have greatly undermined the protection of the right to a fair trial in light of constitutional standards and under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR) and EU directives.

Changes within the civil procedure involved, among other things, the reintroduction of commercial procedure, including the introduction of the possibility for parties to contractually exclude certain types of evidence. Another significant change concerned the development of the theory of abuse of procedural right, the restricting of the possibility to recuse a judge on account of the judge's decision on evidence or the possibility of returning a procedural document without requiring the rectification of its formal defects (e.g. a statement of claims filed by a lawyer without proper payment of court fees). Experts commenting on those amendments also highlighted potential risks to the fairness of civil proceedings.³⁰

1.5. JUDICIAL VACANCIES AND THE SECONDMENT OF JUDGES

In 2016-2018, the number of judicial vacancies increased significantly, which was the result of the Ministry of Justice's policy of not announcing any new competitions for judicial

30 Prawo.pl, [Prof. Jarocho: The speed of the proceedings competes with its fairness \(PL\)](#) (23.05.2022).

posts.³¹ This practice led to months of delays in filling vacancies and had the direct effect of weakening the court's capacity to deal with an increasing number of cases.

The problem seems all the more serious given the long-declining number of professional judges. Between 2016 and 2020, the number of judges decreased by 901. The highest percentage of the judges leaving the profession (over 600) were those sitting in district courts which examine the largest portion of cases submitted to all common courts.³² These negative developments were not even partially mitigated by the appointment of associate judges (*asesorzy sądowi*), junior judicial officers legally excluded from the examination of certain types of cases. In 2020, there were 434 associate judges.³³

The staffing situation in the courts was also influenced by the secondment of judges to posts in bodies of the government administration. The Ministry of Justice has led to the extension of the list of situations in which judges may be seconded. In addition to being transferred to other judicial posts at courts, judges may choose to work at the Ministry of Justice, the Chancellery of the President of the Republic of Poland and the Ministry of Foreign Affairs. Secondments continue to be used as a measure to mitigate staff shortages in higher courts. This situation leads to the blockage of full-time positions in lower courts (which may last years) and forces such courts to handle the increasing caseload with reduced staffing levels.

According to the information obtained by the HFHR³⁴ on 31 March 2022, a total of 153 judges were seconded to the Ministry of Justice and the organisational units subordinate to, or supervised by, the Ministry³⁵, whereas 221 judges were seconded to the higher courts³⁶. Judges were seconded to institutions outside the Ministry of Justice only incidentally, with the exception of the National School of Judiciary and Public Prosecution where 24 judges were temporarily transferred. As of 31 March, no judge was seconded to the

31 Poland, Commissioner for Human Rights, [Why does the Minister of Justice not inform about any vacant judicial positions?](#) (PL), (23.05.2022).

32 Poland, Central Statistical Office. Small statistical yearbooks of Poland for 2011–2021.

33 Poland, Central Statistical Office. Small statistical yearbooks of Poland for 2011–2021

34 Helsinki Foundation for Human Rights, a motion to the Ministry of Justice for the access to public information.

35 Pursuant to Art. 77 § 1 point 2 of the Law on the System of Common Courts.

36 Pursuant to Art. 77 § 1 point 1 of the Law on the System of Common Courts.

Chancellery of the President or the Ministry of Foreign Affairs, which calls into question the wisdom of creating such a possibility.

Judicial secondments were also used as a de-facto measure of influencing rulings of courts. On at least three occasions, the Minister of Justice has decided to terminate a judge's secondment in connection with the judge's ruling. The secondment of Judge Paweł Juszczyński was immediately terminated after the judge asked the Chancellery of the Sejm for a list of signatures under the letters of endorsement for judicial candidates for members of the National Council of the Judiciary.³⁷ Judge Krzysztof Ptasiewicz was recalled from an external posting shortly after he issued a decision not to apply the pre-trial detention of a suspect.³⁸ In the case of Judge Justyna Koski-Janusz, the decision to terminate her secondment was related to the Ministry of Justice's publication of a media release with an assessment of her handling of a high-profile case. In March 2018, a regional court ruled that the release violated the personal interests of the judge.³⁹

1.6. THE SITUATION OF THE NON-JUDICIAL STAFF OF THE JUSTICE SYSTEM

The situation of the support staff of the courts (including judicial clerks) and the stability of their employment are also crucial for the proper functioning of the judiciary.

Both administrative staff and judicial clerks are among the categories of lowest-earning employees of the justice system. Their salaries have been long uncompetitive, especially when compared to the responsibilities and the pressure associated with these roles. This means that positions of court administrative staff and judicial clerks are not the most sought-after jobs and the staff turnover remains high. This, in turn, translates into staff shortages and the necessity to often repeat the onboarding process for newly recruited employees, reducing the efficiency of the entire court's work.

37 [Prawo.pl, A judge who requested the disclosure of the lists of judges supporting the candidates to the National Council of the Judiciary, dismissed from the delegation \(PL\) \(23.05.2022\).](#)

38 [Poland, Commissioner for Human Rights, The judge who refused to arrest the suspect was dismissed from the delegation. The Commissioner for Human Rights intervenes in the Ministry of Justice \(PL\). \(23.05.2022\).](#)

39 [Wyborcza.pl, Zbigniew Ziobro lost the proceedings against a judge from Warsaw. His ministry must apologize to her \(PL\). \(23.05.2022\).](#)

Although, according to experts⁴⁰, the subject of employment opportunities for administrative staff and judicial clerks is a fundamental element of any genuine reform of the court system, for a long period it hardly appeared in the Government's plans. In 2017 and 2018, wages for court supporting staff increased by 1.3% and 2%, respectively,⁴¹ which in fact barely compensated for the loss of value of money caused by inflation. A summary of the three years of the so-called "justice system reform" presented by the Ministry of Justice at the end of 2018 did not mention improving the situation of court employees⁴², despite the fact that protests related to their bad situation were then ongoing. The protesting employees took sick and personal days, which resulted in a temporary absence of supporting staff in some courts. These actions led to the progressing paralysis of certain courts, cancelled trials⁴³ and the necessity to personally perform some of the administrative work by judges.

Ultimately, the protests led to an agreement between trade unions and the Ministry of Justice. Under the agreement, court employees were to receive an increase of PLN 200, before taxes, effective from 1 January 2019. The remaining two increases of PLN 450, before tax, were to be paid from 1 October 2019 and 1 January 2020. However, in 2021, court employees continued their protest, opposing a puny salary increase of 4.4%. Only in October 2021, the protest led to more than 500 cancelled court sittings in the Łódź appellate circuit.

40 B. Grabowska-Moroz, [What reform of the judiciary do we need? \(PL\)](#), (23.05.2022).

41 Ministry of Justice, [Ministry of Justice takes care of raising the salaries of employees of the judiciary \(PL\)](#) (23.05.2022).

42 Ministry of Justice, [Three years of positive changes – summary of the Ministry of Justice efforts \(PL\)](#) (23.05.2022).

43 Radiozet.pl, [Protest of justice system employees \(PL\)](#) (23.05.2022).

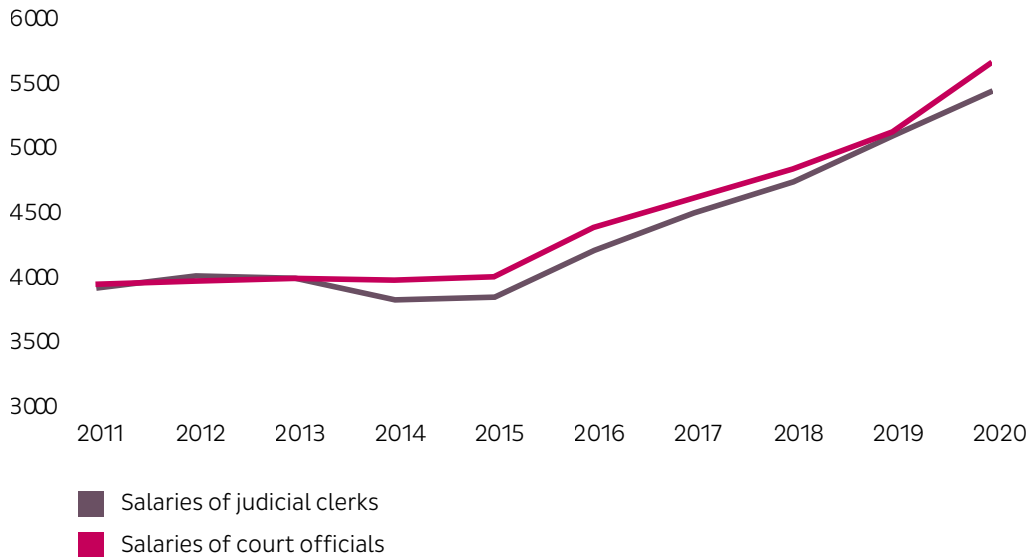


Chart 6. Salaries of administrative officials and judicial clerks (amounts before tax)⁴⁴

However, the salary increases were not followed by the creation of additional support positions. The number of such positions remains almost unchanged, despite the faster influx of new cases and a progressive increase in backlogs.

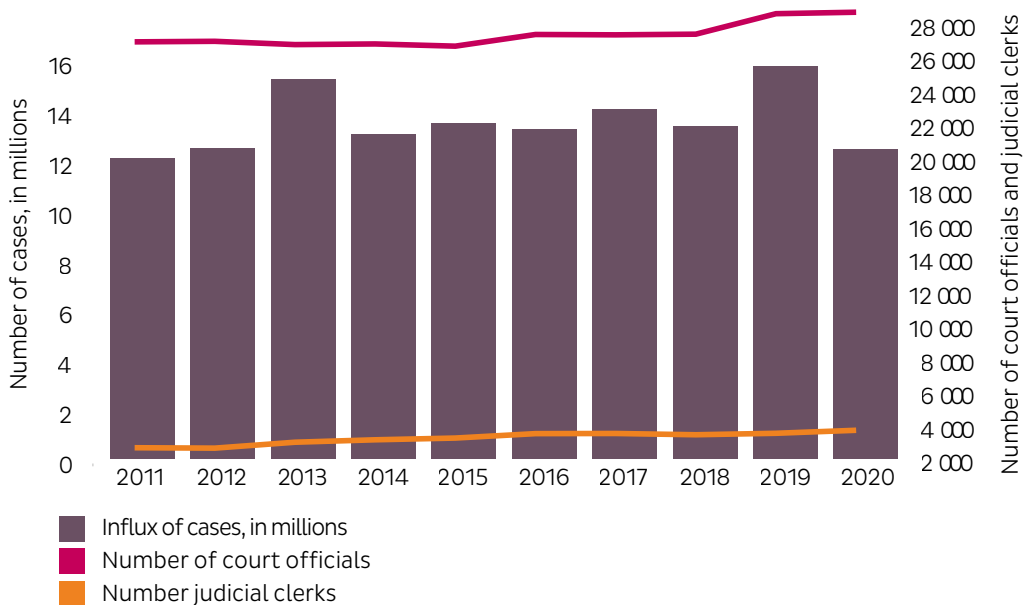


Chart 7. The number of court officials and judicial clerks in relation to the number of cases lodged with the courts⁴⁵

44 Poland, Central Statistical Office. Small statistical yearbooks of Poland for 2011–2021.

45 Poland, Central Statistical Office. Small statistical yearbooks of Poland for 2011–2021.

1.7. INTRODUCTION OF THE RANDOM CASE ALLOCATION SYSTEM

Another important element of the changes in the justice system was the deployment of the Random Case Allocation System (*System Losowego Przydziału Spraw*, SLPS). The system uses an algorithm operated by the Ministry of Justice to decide on the allocation of cases to individual judges. Since the algorithm and its source code have not been made public, there have been suspicions about the system's "impartiality" and the possibility that its operations may be manipulated.⁴⁶ In April 2021, the Supreme Administrative Court accepted the arguments put forward by the *Moje Państwo* Foundation and ruled that the SLPS algorithm should be made public.⁴⁷ Subsequently, in proceedings initiated by the Citizens Network Watchdog Poland, the Supreme Administrative Court held also the SLPS source code constitutes a piece of publicly accessible information.⁴⁸

A report by the Supreme Audit Office (*Najwyższa Izba Kontroli*, NIK), which indicated that the SLPS lacked "safeguards against potential intentional actions limiting the 'randomness' of case allocation to judge rapporteurs", partly confirmed concerns about the manipulation risk.⁴⁹ Consequently, it was possible to "arbitrarily match the random selection summary reports (containing only the information about the drawn judge) to any other case in the same category".⁵⁰

In addition, NIK pointed to irregularities in the deployment of the SLPS, which resulted in end-users receiving "an IT tool that malfunctioned and lacked key functionalities".⁵¹ NIK pointed out that the system was authorised for use without key security tests and operated as such for nearly 1.5 years. Errors in system development, no or inadequate training of its operators, as well as the patching of the actively operated SLPS resulted in, among other things, certain judges being over- or under-burdened with assigned cases. The system was operated without any error reporting procedure or integration with the

46 Moje Państwo Foundation, [Algorithm of the Random Case Allocation System](#) (PL), (23.05.2022).

47 Poland, Judgment of the Supreme Administrative Court of 19 April 2021, case no. III OSK 836/21.

48 Poland, Judgment of the Supreme Administrative Court of 26 May 2022, case no. III OSK 1189/21.

49 Poland, Supreme Audit Office, [Implementation of IT projects aimed at improving the administration of justice](#) (PL), (23.05.2022).

50 Ibidem.

51 Ibidem.

existing court registration and filing systems. The system's reporting module, designed to record the identity of users entering data, as well the time and location of data entries, was inoperable.⁵² Following the NIK's observations, the Ministry of Justice decided to modify the SLPS to improve the system's transparency.⁵³

1.8. OTHER SYSTEMIC PROBLEMS RELATED TO THE WORK OF THE JUSTICE SYSTEM

Since 2015, the Ministry of Justice has not taken any effective action to solve the long-standing problems affecting the justice system.

The first one is access to alternative methods of dispute resolution (ADR) such as mediation. Despite the increasing number of cases, only a small percentage of them are resolved by mediation. For example, in 2011–2020, the percentage of civil cases resolved by mediation barely increased, from 0.03% to 0.1% of the total number of civil cases heard by the courts, notwithstanding a four-fold increase in the overall caseload.⁵⁴ The ADR statistics for criminal proceedings are even worse: they show a tiny number of cases referred for mediation (a mere 3-4 thousand per year) and that figure has not much changed for years. Unfortunately, it is only a small portion of the total number of cases dealt with by the criminal courts.⁵⁵

The Ministry of Justice has also taken almost no action to regulate the laws and practices concerning expert witnesses. The present Ministry of Justice has regrettably followed the footsteps of its predecessors and has been unable to present anything more than a concept of the relevant changes. In effect, the obtaining of expert opinions in judicial proceedings is still based on archaic solutions that do not guarantee that court-appointed experts are adequately qualified and deliver their opinions in a timely manner; what is more, the procedures currently in place do not create the conditions that would encourage highly-trained professionals to register as expert witnesses.

52 Ibidem.

53 [Response of the Secretary of State in the Ministry of Justice – Michał Woś to the interpellation no. 19196 regarding the method of assigning court cases \(PL\)](#). (23.05.2022).

54 Poland, Ministry of Justice, [Mediation in civil proceedings in the years 2006–2020 \(PL\)](#) (23.05.2022).

55 Poland, Ministry of Justice, [Mediations in the criminal proceedings in the years 1998–2020 \(PL\)](#) (23.05.2022).

The Ministry of Justice has also not taken any action to improve the procedural guarantees of the accused in criminal proceedings. The Ministry leadership have abandoned the implementation of solutions transposing all EU criminal procedure directives into the national legal order. In consequence, Poland is yet to adopt systemic solutions to ensure that suspects have effective access to a defence lawyer before the initial questioning⁵⁶ or that they are instructed about their rights in a comprehensible manner⁵⁷.

1.9. THE IMPACT OF THE COVID-19 PANDEMIC ON THE WORK OF THE COURTS

Due to the then-unfolding global pandemic of the SARS-CoV-2 virus and the first cases of the disease reported in Poland, a state of pandemic was introduced throughout the country on 20 March 2020 (previously, from 12 March 2020, a state of pandemic emergency was in place). Some of the successive legal measures adopted by the Polish Government to counteract the outbreak of COVID-19 concerned the functioning of the courts. These restrictions have had a significant impact on the situation of litigants (in particular, their access to courts), as well as on the work of the judges, other court employees and legal representatives. The pandemic revealed substantial vulnerabilities in the operation of the courts, including a lack of systemic preparedness for the remote conduct of hearings or the electronic filing of pleadings.

1.9.1. Suspension of time limits and amendments to the rules of procedure

The so-called “Covid Law”⁵⁸, which entered into force on 8 March 2020 and has been amended several times thereafter, was (and, to an extent, still is) a basis for the functioning of state institutions, including common courts.

56 A. Klepczyński, P. Kładoczny, K. Wiśniewska, [Inaccessible access to a lawyer \(PL\)](#), (23.05.2022).

57 M. Kopczyński, K. Wiśniewska, [How to inform in criminal proceedings. Polish law and practice in the context of European standards](#) (PL) (23.05.2022).

58 The Act of March 2, 2020 on special solutions related to the prevention, prevention and combating of COVID19, other infectious diseases and the crisis situations caused by them (Journal of Laws of 2020, item 374, as amended).

At the very beginning of the state of pandemic in Poland, the Covid Law established a suspension of the running of time limits in most categories of cases heard by the courts. Pursuant to art. 15zsz added to the Act, effective from 31 March 2020, the procedural and judicial time limits in Law (including judicial administrative) proceedings, enforcement, criminal, tax fraud, petty offences and administrative proceedings were not to start and those already running were to be suspended for the duration of the state of pandemic.

At the same time, the law specified a list of "urgent cases" which needed to be examined despite the cessation of the courts' activities.⁵⁹ Urgent cases included, among others, the examination of pre-trial detention requests, as well as cases involving the execution of a custodial sentence or any other penalty or coercive measure involving deprivation of liberty, if the decision of the court concerned the release of a person deprived of liberty. In addition, the category of urgent cases included, for example, cases concerning the removal of a person subject to parental authority or guardianship, mental health cases or cases concerning the placement of a minor in a juvenile shelter or an extension of such placement. The rule of suspension of procedural and judicial time limits did not apply to the above types of cases.⁶⁰

Such not commenced or suspended time limits were resumed after the entry into force of the Act amending the COVID Law and some other acts on 16 May 2020.⁶¹ According to the amended law, these time limits were to start (or resume) running after seven days from the date of entry into force of the amending act.⁶²

In addition, the 16 May 2020 amendment changes introduced certain changes to the rules of civil procedure. They required, in particular, the compulsory holding of remote trials and open-court hearings, except in cases where the holding of a non-remote trial or hearing would not unduly jeopardise the health of the participants.⁶³ In the case of remote

59 Ibidem, Article 14a section 4.

60 Ibidem, Article 15zsz section 2.

61 Act of May 14, 2020 amending certain acts in the field of protective measures connected with the spread of SARS-CoV-2 virus (Journal of Laws of 2020, item 875).

62 Ibidem, Article 68 section 6-7.

63 The Act of March 2, 2020 on special solutions related to the prevention, prevention and combating of COVID-19, other infectious diseases and the crisis situations caused by them, Article 15zsz1.

trials and hearings, only the members of the court panel were allowed to be present in the court building, while the participants could participate in a trial or hearing by means enabling the transmission of video and audio from outside the court building. In extraordinary cases, with the agreement of the competent president of the court, the members of the court panel (with the exception of the presiding judge and the judge-rapporteur) may also participate in a remote trial or hearing from a location outside the court building provided that the court sitting concerned was not held to conclude the proceedings.

If it was not possible to hold a trial or an open hearing remotely and the parties to the proceedings did not object, the presidents of court divisions were given the authority to issue orders to refer cases to be heard *in camera*. Courts could also conduct trials and deliver rulings *in camera* after the conclusion of the taking of evidence and receipt of written submissions from the parties or participants in the proceedings.⁶⁴ In addition, appellate courts' gained expanded powers to examine cases *in camera* if they considered the conduct of a trial unnecessary unless the parties requested the conduct of a trial or a witness or a party was to give evidence.⁶⁵

Another law on counteracting the effects of the COVID-19 pandemic, which entered into force on 24 June 2020, changed the provisions of the Code of Criminal Procedure.⁶⁶ In particular, the amendment introduced the possibility of conducting remote trials and hearings in criminal matters. Before, only penitentiary courts were allowed to examine cases remotely in connection with the pandemic.⁶⁷ The available data shows that the courts were relatively inclined to use this option. For example, the Regional Court in Bydgoszcz remotely heard 1995 cases between 31 March 2020 and 31 December 2020⁶⁸.

64 Ibidem, Article 15zszs2.

65 Ibidem, Article 15zszs3.

66 Act of 19 June 2020 on interest subsidies for bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for approval of an arrangement in connection with the occurrence of COVID-19 (Journal of Laws of 2020, item 1086), Article 39.

67 The Act of March 2, 2020 on special solutions related to the prevention, prevention and combating of COVID-19, other infectious diseases and the crisis situations caused by them, art. 14f section 1.

68 P. Kładoczny, K. Wiśniewska (red.), *New Technologies – New Justice – New Questions. Implementation of new technologies in the justice*, Warsaw 2021, p. 177.

The new legislation enabled public prosecutors to remotely participate in criminal trials and hearings. Detained defendants, subsidiary prosecutors and private accusers were allowed to participate remotely but, differently from public prosecutors, they needed the consent of the presiding judge to do so. In the event that a detained defendant, auxiliary prosecutor or private accuser remotely participated in a trial or hearing, a court registrar or judicial clerk was required to be present at the location where the party was present, while the defendant's lawyer was given the choice between physically accompanying the defendant or remotely participating in the proceedings from the court building. If the defence lawyer attended the trial or hearing from a location different from that of the defendant, the court was allowed to order an intra-day recess to enable the defence lawyer to contact the defendant by telephone, unless this clearly did not contribute to the exercise of the right to a defence and, in particular, was aimed at disrupting or unreasonably prolonging the trial.

A similar option of departing from a suspect's conveyance to appear in court, provided that the suspect's remote participation (and, in particular, the exercise of their right to testify) was properly ensured, was introduced in relation to pre-trial detention hearings. Also in this case, a court registrar, judicial clerk or a Prison Service officer was required to be present at the suspect's location. According to then-adopted regulations, the defence lawyer could choose the location of their participation in the hearing, unless he was obliged to appear at the courthouse. If the defence lawyer participated in a hearing being physically present at a location different from that of the defendant, the court could order a recess and allow the defence lawyer to contact the defendant by telephone, unless this would interfere with the proper conduct of the hearing or create a risk that the pre-trial detention request may not be decided on before the expiry of the duration of the defendant's lawful initial detention. The possibility of conducting a remote pre-trial detention hearing did not apply to deaf, dumb or blind suspects.

The arrangements introduced to the Code of Criminal Procedure on 24 June 2020 have been criticised as potentially dangerous for the defendant's procedural guarantees. In its comments on the proposed law⁶⁹, the Helsinki Foundation for Human Rights emphasised

69 Helsinki Foundation for Human Rights, Comments to the draft act on interest subsidies for bank loans granted to ensure financial liquidity to entrepreneurs affected by the effects of COVID-19 (PL) (14.06.2020).

that the introduced possibility of remotely conducting trials and hearings was set out in a piecemeal manner and covered only the remote participation of litigants deprived of liberty, while failing to address, for example, the situation of non-detained defendants. The HFHR further argued that leaving it to the discretion of the court to determine if telephone contact between the defendant and their defence lawyer is warranted on a case-by-case basis may prejudice the defendant's right to a defence and, in some cases, even affect the fairness of the trial as a whole.

Commenting on the option of remotely conducting pre-trial detention hearings, the HFHR noted, first and foremost, that such a solution was incompatible with Article 5 (3) of the European Convention on Human Rights which guarantees to be brought promptly before a judge, which involves the physical presence. As it is apparent from the ECtHR case law, the *physical* presence of a suspect is intended to ensure a better appreciation of the possible use or extension of a suspect's detention by the court, while at the same time serving to prevent torture by allowing the court to see the suspect's state of health first-hand. The HFHR also noted that pre-trial detention hearings should not be held remotely for other categories of suspects afforded mandatory defence, including, for example, persons with intellectual disabilities. In the context of remotely held pre-trial detention hearings, the comments pointing to the risk of violating a suspect's right to a defence remain fully valid.

Apart from referring to the weakened procedural guarantees of suspects and defendants, the HFHR also pointed out that in both cases (i.e. remotely conducted pre-trial detention hearings and trials) the principle of direct examination of evidence⁷⁰, which requires the court to have direct contact with the evidence being taken, is also undermined. This is particularly relevant for verbal testimony given by witnesses or experts, whose remote examination may suffer from various drawbacks (e.g. the possibility of their testimony being influenced by third parties or the court's inability to observe their reactions).⁷¹

70 A. Klepczyński, P. Kładoczny, P. Kubaszewski, K. Wiśniewska, Has SARS-CoV-2 coronavirus attacked the criminal justice system? HFHR report on the impact of the coronavirus pandemic on the functioning of the criminal justice system (PL), Warsaw 2021, p. 8.

71 A. Łukaszewicz, [Opponents of remote criminal trials: the court must observe the behavior of accused person \(PL\)](#), Rp.pl, (8.06.2021).

The way in which these measures were prepared and implemented was also, arguably, questionable. Specific legal changes were adopted in the pandemic-related legislation hastily, without any in-depth analysis or proper public consultation. They usually were designed as temporary measures for the duration of the state of pandemic. Solutions relating to remotely conducted trials were not accompanied by any arrangements facilitating their implementation. In particular, the measures were introduced without a sufficiently prompt purchase of equipment and the adoption of standardised technical arrangements. This uncoordinated process resulted in organisational chaos⁷², which, for example, led court presidents to make non-standardised choices about the deployment of software used to conduct trials remotely. Already in November 2020, the IUSTITIA association called for the implementation of uniform solutions that would allow all courts to conduct remote proceedings and purchase the necessary equipment.⁷³

According to the available data⁷⁴, between June and December 2020, only 5 out of 11 courts of appeal and 21 out of 45 regional courts remotely conducted criminal trials. Moreover, there are no reports for the same period that would show any court of appeal or regional court remotely holding a hearing to apply or extend pre-trial detention whereas district courts remotely held pre-trial detention hearings on an incidental basis only.⁷⁵

1.9.2. Communication with the courts

The COVID-19 pandemic occurred at a time when the courts were operating essentially without any possibility of filing procedural documents electronically (via the internet). The default way of filing procedural documents in the criminal and civil procedure was to deliver them to the court's registry office or, alternatively, dispatch them at a post office.⁷⁶ The submission of claimant's and defendant's procedural documents through an ICT

72 P. Kładoczny, K. Wiśniewska (red.), *New Technologies – New Justice – New Questions. Implementation of new technologies in the justice*, Warsaw 2021,.

73 Association of Polish Judges – IUSTITIA, [Pandemic in the courts. Position of the SSP Iustitia on the recommendation of the Ministry of Justice of November 5, 2020](#) (PL), (6.11.2020).

74 A. Klepczyński, P. Kładoczny, P. Kubaszewski, K. Wiśniewska, *Has SARS-CoV-2 coronavirus attacked the criminal justice system? HFHR report on the impact of the coronavirus pandemic on the functioning of the criminal justice system* (PL), Warsaw 2021, p. 12.

75 *Ibidem*, p. 10-11.

76 Article 126 of the Code of Criminal Proceedings; Article 165 § 2 of the Code of Civil Proceedings.

system is allowed only for a single type of separate civil proceedings – the summary order for payment procedure (*postępowanie upominawcze*).⁷⁷

Since there were no top-down regulations on the submission of procedural documents at the time when the state of the pandemic was announced, the communication of litigants with the courts became very chaotic. The reason for this was that different courts employed different systems for sending and receiving correspondence. Some courts permitted letters to be lodged on-site, either at the registry office or in a drop box, without the possibility of obtaining confirmation of delivery. In other courts, regular mail was the only acceptable form of communication. Certain courts allowed the delivery of procedural documents also via the ePUAP system or by e-mail. According to a study prepared by the HFHR in April 2020⁷⁸, some registry offices of courts of appeal continued to accept pleadings delivered by hand while others had special boxes created for this purpose. Only one court of appeal accepted appeals sent electronically to a special e-mail address. The situation in the regional courts was similar with different courts located in the same judicial circuit using different methods of communication. The greatest variation in adopted arrangements existed at the level of 318 Polish district courts.

Delivery of court correspondence was also fraught with confusion. Changes introduced in July 2020⁷⁹ obliged courts to deliver procedural documents in civil proceedings to professional legal representatives (*adwokaci, radcowie prawni*, patent attorneys and lawyers working for the State Treasury Solicitors' Office of the Republic of Poland) by posting the contents of such documents in a dedicated ICT system (the Information Portal). However, these changes were implemented in a highly questionable manner. The Ombudsman⁸⁰ pointed out, among other things, their lack of clarity and precision, as well as the fact that no provision obliged legal representatives to have accounts on the website.

77 Code of Civil Proceedings, Article 50531 §§ 1-2.

78 HFHR, Access to court in a pandemic time, Warsaw 2021, ([part I](#)) ([part II](#) – PL).

79 Act of March 2, 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws of 2020, item 1842), art. 15zsz9.

80 Poland, Commissioner for Human Rights, [Serving pleading via the system of court information. Doubts of the Commissioner for Human Rights \(PL\)](#).

The lawyers themselves criticised the design of the Information Portal, indicating that “it is not technologically and functionally prepared to be used as a means of delivering pleadings to professional legal representatives”⁸¹. Another significant problem resulted from the fact that the Portal operated in a separate iteration for each of 11 appellate circuits. A lawyer who handled cases in Warsaw, Gdańsk and Białystok needed to constantly browse through the correspondence separately in each portal for a given circuit. The new regulations also did not provide an avenue for submitting comments or complaints in a situation where the new system fails.

On the other hand, the changes introduced in 2021 in the registration procedure should be assessed as positive. They led to the creation of the Judicial Registers Portal and all registration proceedings are now conducted electronically.

1.9.3. Publicity of court proceedings in times of a pandemic

During the COVID-19 pandemic, adherence to the principle of publicity of proceedings, which applies to all types of legal procedures (criminal, civil and administrative), was significantly weakened.

In June 2020, the Court Watch Polska Foundation studied the practice of applying the principle of publicity of judicial proceedings and access to the courts including the Supreme Court, common courts and administrative courts. According to the final report from that study⁸², the vast majority of presidents of courts (370 out of 392, or 94%) issued orders that changed litigants’ access to trials and open hearings as a result of the then-effective state of pandemic. In 345 cases (i.e. in 88% of courts in Poland), these orders included provisions limiting access of members of the public. In 35% of courts, presidents’ orders explicitly excluded members of the public from participating in trials and open hearings.

81 M. Domagalski, [Incoming catastrophe concerning the service of documents by courts \(PL\)](#), legalis.pl, (6.07.2020).

82 B. Pilitowski, B. Kociotowicz-Wiśniewska, Report on the realization in Poland the individuals’ right to have their case recognized in public hearing (PL), Court Watch Polska Foundation, Toruń 2020.

However, according to the authors of the report, external publicity (i.e. public access to the proceedings) was de-facto excluded also in those courts whose presidents did not issue any orders to that effect.

2. PART TWO

Changes in the justice system

2.1. THE NATIONAL COUNCIL OF THE JUDICIARY

In January 2017, the Ministry of Justice announced a further round of justice reform. Among the reform's priorities, the Ministry indicated a change in the rules of operation of the National Council of the Judiciary, including, in particular, a change in the procedure for the election of judicial members of the NCJ. While presenting the original objectives of the reform⁸³, the Ministry of Justice promised to democratise, and increase the fairness of, the candidate selection process⁸⁴. The proposed amendment was intended to increase the prestige and independence of the NCJ, as well as to disentangle it from the corporatist interests of the judges. Adoption of the reform would lead to, as the Ministry of Justice called it, an introduction of "civilised, European standards".⁸⁵ The appointment of judges to the NCJ was to be made by the Parliament, which was modelled on the procedure for appointing judges to the Constitutional Court.⁸⁶

As the Parliament was working on the first draft of the amendment to the NCJ Act, the Constitutional Court examined a case concerning the provisions of the Act defining,

83 The original assumptions of the Ministry's draft that were vetoed by the President of the Republic of Poland, were almost entirely repeated in the presidential bills on the Supreme Court. A significant difference between the two bills concerned the division of the National Court Register into two separate assemblies. The presidential draft lacked that solution. Both projects envisaged the election of judge members of the National Council of the Judiciary by the Sejm.

84 Ministry of the Judiciary, [Reform of the National Council of the Judiciary – draft adopted by the government](#) (PL) (23.05.2022).

85 Ibidem.

86 Dziennik Gazeta Prawna, [Ziobro wants the judges to be elected by the parliament](#) (23.05.2022).

inter alia, the method of electing judges to the NCJ and the term of office of the Council members. In a judgment made in June 2017, the Constitutional Court ruled that the method of electing judicial members of the NCJ was unconstitutional. It also considered the adoption of an individual term of office for NCJ members to be incompatible with the Constitution.⁸⁷

In July 2017, the Sejm legislated a package of three laws on the justice system: apart from the amendments to the Common Courts System Act mentioned above, new provisions on the Supreme Court and the NCJ were also enacted.⁸⁸ Two of these laws, including the NCJ Act, were vetoed by President Andrzej Duda.⁸⁹ President Duda said he would start working on his proposals concerning a reform of the justice system.

In December 2017, the Sejm adopted an amendment to the National Council of the Judiciary Act based on the President's proposal. The amended Act was not materially different from the previously proposed solutions which focused on changing the procedure for selecting the judicial members of the NCJ.

Until 2017, 15 judicial members of the National Council of the Judiciary were directly elected by judges of common courts, which ensured that judges from common courts of all levels, administrative courts and the Supreme Court were represented in the NCJ. Following the changes made in December 2017, the judicial members of the National Council of the Judiciary are elected by the Sejm from a pool of nominated candidates, by a majority of three-fifths of votes. As a result, the legislative branch took control of the election of 21 out of 25 members of the NCJ, which led to an imbalance in the council's membership.

According to the new legislation, the Sejm was to elect the judicial members of the NCJ from among the candidates who presented a written endorsement from at least 25 judges or at least 2,000 citizens. The controversy surrounding the collection of a sufficient

87 Poland, judgment of the Constitutional Tribunal of 20.06.2017, case no. K 5/17.

88 Poland, seventh term of Sejm, Act amending the Act on the National Council of the Judiciary and certain other acts (Sejm paper no. 573) and the Act on the Supreme Court (Sejm paper no. 569).

89 The Office of President, [The president referred to the Sejm the Act on the National Court Register for reconsideration](#) (PL) (23.05.2022).

number of endorsements for candidates was a key argument pointing to irregularities in the election of the new members of the National Council of the Judiciary (for a more detailed discussion on this topic, please see *The election of judicial-members of the NCJ. Endorsement lists*).

After the appointment of the new National Council of the Judiciary in March 2018, and in the face of growing doubts about its legal status, the NCJ itself requested the Constitutional Court to review the constitutionality of the provisions of the NCJ Act of December 2017, which, among other things, determined the procedure for the election of NCJ judicial members by the Sejm. A similar constitutional review request was prepared by a group of senators of the ruling parliamentary majority. When assessing the application of the National Council of the Judiciary, the Court noted that the request had an ostensible character and sought to confirm the council's legal position. It nevertheless reviewed the provisions challenged by the NCJ and the senators and decided that they were constitutional.⁹⁰ However, the Constitutional Court reached a different conclusion in relation to the provisions allowing NCJ individual decisions on the appointment of a judge of the Supreme Court or the Supreme Administrative Court to be appealed against to the Supreme Court. In the same ruling, the Constitutional Court held that the provisions allowing such an appeal were unconstitutional.⁹¹

2.1.1. The 2018 election of NCJ judicial members

The process of electing new judges to the NCJ began in January 2018. The Sejm received 18 applications from the candidates.⁹² Candidates included persons closely linked to the Ministry of Justice, including, among others, judges previously seconded to work at the Ministry (such as Maciej Mitera) and presidents and vice-presidents of courts appointed by the Minister of Justice (e.g. Dariusz Drajewicz or Jarosław Dudzicz)⁹³ based on the Minister's new (and legally questionable) discretionary powers⁹⁴.

90 Poland, judgment of the Constitutional Tribunal of 25.03.2019, case no. K 12/18.

91 Ibidem.

92 Poland, Sejm, [List of candidates for judge members of the NCJ \(PL\)](#) (23.05.2022).

93 [Oko.press, The National Council of Zioebro, formerly the National Council of Judiciary. Democracy has replaced the caste – the minister-prosecutor triumphs \(PL\)](#) (23.05.2022).

94 ECHR judgment of 29.06.2021 in the case Broda and Bojara v. Poland, application no. 26691/18.

On 6 March 2018, the Sejm elected 15 new judicial members of the National Council of the Judiciary.⁹⁵ At the same time, the term of office of the members of the previous National Council of the Judiciary was terminated by statute, which raised legitimate legal concerns.

Case law of the European Court of Human Rights

Grzęda v. Poland

In March 2022, the ECtHR issued a judgment in the case of *Grzęda v. Poland*⁹⁶ concerning the early termination in 2018 of the term of office of an NCJ judicial member, Supreme Administrative Court's judge Jan Grzęda. In *Grzęda*, the Court affirmed the applicant's contentions, finding a violation of Convention Article 6 which has resulted from depriving the applicant of the opportunity of a judicial review of the decision to terminate his term of office.

On that occasion, the ECtHR referred to the actions of Polish authorities regarding the justice system. The Court stressed that successive phases of the justice reform were geared towards the weakening of judicial independence. Following the implementation of the reform, the judiciary has been exposed to interference from the executive and the legislature and thus significantly weakened.

The early termination of the applicant's term of office as a member of the NCJ was an element of this process. In the Court's view, that decision was in no way justified by objective reasons while the applicant himself was deprived of an opportunity of launching a judicial review of the decision.

The Court also recalled that a judge should enjoy, like any other citizen, protection from arbitrariness on the part of other authorities. The ECtHR also ruled that such protection is only provided if a decision on the early termination of the term of an NCJ member is subject to a review by an independent court.

Żurek v. Poland

In *Żurek v. Poland*, another ruling concerning the early termination of the term of judicial members of the NCJ⁹⁷, the ECtHR reiterated its conclusions from *Grzęda v. Poland*. In doing so, the Court emphasised the need to guarantee the autonomy of the judicial councils from the influence of other branches of government as a safeguard against political

95 Poland, The Resolution of Sejm of 6.03.2018 electing judicial members of the National Council of Judiciary (Official Journal of the Republic of Poland 2018, item 276).

96 ECHR judgment of 15.03.2022 in the case *Grzęda v. Poland*, application no. 43572/18.

97 ECHR judgment of 16.06.2022 in the case *Żurek v. Poland*, application no. 39650/18.

influence on judicial independence. As it did in *Grzęda v. Poland*, the ECtHR found that the applicant's lack of legal recourse violated his rights protected under Article 6 of the Convention.

At the same time, the Court referred to the applicant's second complaint regarding the infringement of his freedom of expression, protected by Article 10 of the Convention. Judge Žurek gave many examples of the executive's actions against his freedom of expression, including an audit of his property declarations by the Central Anti-Corruption Bureau, a review of his judicial performance at the Regional Court in Kraków and his dismissal from the position of spokesperson of a Kraków court. The ECtHR considered these actions to be related to the public activity of the judge, and in particular his criticism of the changes in the judiciary. In the Court's view, those actions were not justified by any misconduct on the part of the applicant. The ECtHR found that these measures were focused on intimidating and silencing the applicant in relation to the views he expressed in defence of the rule of law and judicial independence. They also aimed to produce a chilling effect on other judges and discourage them from participating in the debate on the changes to the judicial system and the protection of judicial independence. All the above led the Court to decide that the applicant's case also involved a violation of his freedom of expression protected under Article 10 of the Convention.

Referring to the judges' freedom of expression, the Court emphasised their right to speak out on matters concerning the protection of the rule of law, judicial independence and other similar issues. In the Court's view, in some situations, judges' freedom of expression on matters concerning the judiciary can even turn into a duty to speak out when values such as the rule of law or independence are threatened.

Despite the appointment of new judges to the NCJ, the lists with endorsements for the elected candidates have not been publicly disclosed. Both opposition MPs and individual citizens requested access to those lists. In one of legal proceedings brought to obtain such access, in June 2019, the Supreme Administrative Court ruled that the endorsement letters are public information and as such should be made available by the Chancellery of the Sejm.⁹⁸ Although the Court's judgment became unappealable, Judge Maciej Nawacki, one of the newly elected members of the National Council of the Judiciary, applied to the Personal Data Protection Office (PDPO) for the review of the lawfulness of the procedure for providing access to the lists, and the PDPO President issued a decision to seal

98 Poland, judgment of the Supreme Administrative Court of 11.01.2022, case no. III OSK 929/21.

the personal data of judges endorsing the candidates, which effectively suspended the publication of the lists.⁹⁹

Meanwhile, four judges from an Olsztyn court who initially endorsed Judge Nawacki publicly announced the withdrawal of their support for his candidacy in January 2018, before the list was officially delivered to the Sejm. Judge Nawacki ignored their statement and submitted the list. It contained not only the signatures of the judges who withdrew their endorsements but also one of Judge Nawacki, who endorsed himself. Effectively, one must conclude that the judge did not collect the required 25 endorsements. Moreover, a representative submitting his candidature did not have the authority to do so. Because the NCJ members are elected jointly, the deficiencies in the election of Judge Nawacki affected the validity of the appointment of all 15 judicial members of the National Council of the Judiciary.

In February 2020, the Chancellery of the Sejm published the NCJ candidates' endorsement lists. A review of the lists showed that 49 out of 360 judges endorsing individual candidates had been seconded to the Ministry of Justice, while 36 and 26 had been appointed by the Minister of Justice as presidents and deputy presidents of courts, respectively.¹⁰⁰

2.1.2. The 2022 election of NCJ judicial members

On 4 December 2021, the Speaker of the Sejm published a notice of commencement of the procedure for submitting candidates for the judicial members of the National Council of the Judiciary. Just like in 2018, the election process was boycotted by the vast majority of judges. In response, the National Council of the Judiciary, in a resolution adopted on 21 December 2021, called the boycott "detrimental to the interests of the justice system".¹⁰¹

In total, 19 candidates applied to participate in the elections for the next formation of the NCJ. As many as 14 were the Council's incumbent members. The vast majority of

99 Poland, the Office for the Protection of Personal Data, [Statement on the procedure to make public the lists of support for candidates for the National Court Register \(PL\)](#) (23.05.2022).

100 P. Wachowiec, [List of judges supporting candidates to the new National Council of the Judiciary as of February 13, 2019 \(PL\)](#) (23.05.2022).

101 Poland, National Council of Judiciary, [The statement of the National Council of Judiciary of 17.12.2021 no. WO 41.16.2021 \(PL\)](#) (23.05.2022).

the applying judges sat in district courts (14). The incumbent Council nominated some of these judges to serve on higher courts, including the Supreme Administrative Court and the Disciplinary Chamber of the Supreme Court but their appointments were still pending approval by the President of the Republic of Poland. Among the remaining judges, only four were regional court judges and one candidate was a judge of the Supreme Administrative Court at the time of her appointment.

The new group of judicial candidates presented the Speaker of the Sejm with letters of endorsement with a total of 753 signatures from merely 351 judges. Among the endorsing judges were more than 100 presidents and vice-presidents of courts. They signed a total of 244 endorsements, most frequently for the candidature of Judge Łukasz Piebiak (44 signatures). However, Judge Piebiak was not elected to the NCJ because the Law and Justice parliamentary grouping withdrew their approval of his candidature. Endorsements for NCJ judicial candidates were also made by 29 judges seconded to work at the Ministry of Justice. They signed 85 endorsements for different candidates. One of these judges, Andrzej Skowron, endorsed as many as nine candidates.

The two mentioned groups consisted of at least 181 judges nominated by the then-incumbent National Council of the Judiciary for appointment to a higher judicial position¹⁰² in a resolution. Again, in this group, Judge Łukasz Piebiak received the highest number of endorsements (42).

In eight cases, judges endorsing a candidate received the Council's nominations immediately before (or shortly after) the commencement of the procedure for the selection of candidates for members of the National Council of the Judiciary. Moreover, a daughter of a candidate for a judicial post (whose candidacy was reviewed during the elections of the new National Council of the Judiciary) even became a representative of a candidate applying for the NCJ membership.

All published endorsement lists exhibited yet another similar feature, namely shared endorsements. This phenomenon has appeared among a group of Kraków judges running

102 As of 1 February 2022. This group did not include judges who participated in the proceedings before the new National Council of the Judiciary, but did not receive recommendations from the Council.

for the NCJ membership. As many as 19 judges endorsed the same four candidates from Kraków courts. In another 11 cases, the judges supported three of the four candidates from this group applying for Council membership. Similar correlations, although on a smaller scale, could also be observed in other subgroups of judges.

2.1.3. The functioning of the National Council of the Judiciary

The newly elected NCJ convened for the first time in April 2018. After its first session, NCJ spokesperson Maciej Mitera declared that “professionalism, speed and decision-making ability” were the most important objectives that the new council had set for itself.¹⁰³ However, its activities have raised a number of controversies regarding the conduct of deliberations and the decisions taken.

Protection of judicial independence

Since 2018, the NCJ has only occasionally responded to multiple violations of judicial independence. Only in a small number of cases did the NCJ step in to defend judges. The Council appealed against the ruling sanctioning Judge Alina Czubieniak¹⁰⁴ for making a pro-EU interpretation of national law¹⁰⁵, called for an end to criticism of court rulings by public figures¹⁰⁶, and expressed its position on the questioning as witnesses of judges at the Court of Appeal in Katowice in connection with their ruling taken in relation to the secondment of prosecutor Mariusz Krasoń. However, the reading of the NCJ statements indicates the cautious and reserved nature of the Council’s actions. In its appeal against the ruling of the Disciplinary Chamber of the Supreme Court against Judge Czubieniak,

103 Dziennik Gazeta Prawna, [KRS spokesman: Professionalism, speed and decision-making are the most important goals of the new Council \(PL\)](#) (23.05.2022).

104 [Oko.press, The Disciplinary Chamber appointed by PiS will not forgive Judge Czubieniak for a fair ruling \(PL\)](#) (23.05.2022).

105 According to the data published by the National Council of the Judiciary in its annual reports, in 2018–2021 the National Council of the Judiciary appealed against 22 disciplinary rulings concerning judges. However, the Council’s reports do not indicate whether these appeals were made in favor of the judges. Interestingly, in 34 disciplinary judgments, the National Council of the Judiciary was not able to appeal due to the expiration of the deadline. This poses an important question about the functioning of NCJ.

106 Poland, National Council of Judiciary, [Statement of the NCJ of 2.10.2019, no. WO 401-14/19 \(PL\)](#). (23.05.2022).

the National Council of the Judiciary did not argue that the judge's act had not presented features of a disciplinary violation, pointing to the negligible social harm associated with it. The Council, therefore, did not seek the judge's acquittal but merely requested that the proceedings against her be discontinued. On the other hand, in the case of judges of the Court of Appeal in Katowice, the Council complied with the request of the president of that court and stated that the legitimacy of the procedural steps taken against the judges by the Internal Affairs Department of the National Prosecutor's Office could not be ex-ante excluded.¹⁰⁷

The NCJ has not taken a position on other cases of attacks on judges. For example, the NCJ did not make any broader comments on the so-called "hater scandal" at the Ministry of Justice¹⁰⁸, public attacks on judges by representatives of the ruling coalition and the public media, or the activities of disciplinary officers in relation to judges voicing their opinions in public discussions on the changes in the judiciary.

In a response sent to the European Network of Councils for the Judiciary, which conducted an inquiry related to the possible exclusion of the NCJ from ENCJ membership, the Polish Council wrote it did not need to defend judges who opposed changes in the justice system "because criticism of changes is not a disciplinary violation" and "no actions taken against judges in response to their criticism have been reported to the Council".¹⁰⁹ In another position statement, concerning the implementation of the CJEU's rulings in the context of the exclusion of a judge from adjudicating in the Criminal Chamber on account of the manner of his appointment, the NCJ called Supreme Court judge Stanisław Zabłocki "unworthy of the office entrusted to him by the Republic of Poland".¹¹⁰ In yet another statement referring to the decision of the Supreme Court of 5 December 2019¹¹¹, the Council explicitly called on authorised bodies to make a "firm response" to all actions that undermine the legality of the appointment of a judge.¹¹²

107 Poland, National Council of Judiciary, [Statement of the NCJ of 16.04.2021 \(PL\)](#) (23.05.2022).

108 Poland, National Council of Judiciary, [Statement of NCJ of 17.10.2019 \(PL\)](#) (23.05.2022).

109 Poland, National Council of Judiciary, [Response to the questions from ENCJ \(PL\)](#) (23.05.2022).

110 Poland, National Council of Judiciary, [Statement of the NCJ of 9.11.2018 \(PL\)](#) (23.05.2022).

111 Poland, judgment of the Supreme Court of 5.12.2019, case no. III PO 7/18.

112 National Council of Judiciary, [Stanowisko Krajowej Rady Sądownictwa z dnia 13 grudnia 2019 r. \(WO 401-20/19\) \(PL\)](#) (23.05.2022).

At the same time, the Council generally approved the so-called “Muzzle Law”¹¹³, a controversial amendment to the Common Courts Act. In the Council’s view, the law served to “realise the constitutional principle of the separation of powers under Article 10 of the Constitution of the Republic of Poland”.¹¹⁴ The NCJ emphasised that this law did not affect the independence of judges and of the courts. In doing so, it welcomed the provisions amending the grounds for the disciplinary responsibility of judges, which effectively prohibited the implementation of the CJEU’s rulings, pointing out that “[t]he necessity of their introduction stems, inter alia, from the impermissible questioning by certain judges of a constitutional prerogative of the President of the Republic of Poland”.¹¹⁵

In addition to these activities of the NCJ, a note should be made of the council’s involvement with proceedings before the Court of Justice of the European Union and the European Court of Human Rights. In its individual position statements, the Council supported the stance taken by the Government. In the CJEU proceedings concerning the independence of the Disciplinary Chamber of the Supreme Court¹¹⁶, the NCJ argued that CJEU has no jurisdiction to hear the matter in question and concluded that there is no legal basis for challenging the independence of the Chamber’s judges¹¹⁷. In the proceedings concerning the Supreme Administrative Court’s inability to review the NCJ’s resolutions, the NCJ requested that the question referred by the acting court for a preliminary ruling be declared unfounded due to the Constitutional Court’s repeal of the provision that formed the basis for the question.¹¹⁸

In the proceedings before the European Court of Human Rights in the case of *Broda and Bojara v. Poland*, which concerned the arbitrary removal of court presidents by the Minister of Justice, the NCJ indicated that the right to serve as a court president does not fall within the scope of Article 6 of the Convention. The Council argued that the dispute on that subject matter was “outside the jurisdiction of the European Court of Human

113 Act of 20 December 2019 amending the Act – Law on the System of Common Courts, the Act on the Supreme Court and some other acts (Journal of Laws of 2020, item 190, as amended).

114 Poland, National Council of Judiciary, [Statement of NCJ of 10.01.2020 \(PL\)](#) (23.05.2022).

115 Ibidem.

116 The CJEU judgment (Great Chamber) of 19.11.2019, case no. C-585/18, C-624/18, C-625/18.

117 Poland, National Council of Judiciary, [Statement of NCJ of 4.04.2019 \(PL\)](#) (23.05.2022).

118 Poland, National Council of Judiciary, [Statement of NCJ of 9.05.2019 \(PL\)](#) (23.05.2022).

Rights".¹¹⁹ The National Council of the Judiciary issued similar position statements in which it challenged the ECtHR jurisdiction to examine key cases related to the independence of the Polish judiciary: *Grzęda v. Poland*¹²⁰ and *Advance Pharma sp. z o.o. v. Poland*¹²¹.

The NCJ also initiated proceedings before national courts. Just one week after the three combined chambers of the Supreme Court issued a resolution, the NCJ applied to the Constitutional Court¹²² for declaring the provisions of the Code of Criminal Procedure and Code Civil Procedure unconstitutional insofar as they are interpreted in the way presented in aforementioned CJEU ruling. Equivalent constitutional review requests were submitted at the same time by the President of the Republic of Poland¹²³ and the Prime Minister¹²⁴.

2.1.4. Appointment of judges

The Council sitting in 2018–2022 considered 5434 candidacies of judges, judicial clerks, court registrars, lawyers and other persons who applied for judicial positions.¹²⁵ Of these, the Council presented the names of 2088 persons to the President of the Republic for judicial appointments. In the discussed period, the President appointed a total of 1,753 people to judicial posts. The vast majority of them obtained a judicial nomination from the incumbent NCJ. Only a few became judges before the change of the Council's composition.

An analysis of the Council's resolutions on judges' cases indicates several types of concerns regarding the legitimacy of the NCJ decisions. First, members of the incumbent Council relatively often sought promotion to a higher court. In the course of the current term of office, the National Council of the Judiciary recommended 7 of its 15 judicial members for higher judicial posts. Judges Grzegorz Furmankiewicz, Dagmara Pawełczyk-Woicka and Joanna Kołodziej-Michałowicz were promoted from a district (lower) court

119 Poland, National Council of Judiciary, [Statement of NCJ of 22.11.2019 \(PL\)](#) (23.05.2022).

120 Poland, National Council of Judiciary, [Statement of NCJ of 12.03.2021 \(PL\)](#) (23.05.2022).

121 Poland, National Council of Judiciary, [Statement of NCJ of 12.03.2021 \(PL\)](#) (23.05.2022).

122 Poland, National Council of Judiciary, Motion to the Constitutional Tribunal, case no. K 3/20.

123 Poland, Motion to the Constitutional Tribunal, case no. K 2/20.

124 Poland, Motion to the Constitutional Tribunal, case no. K 5/20.

125 Poland, National Council of Judiciary, [Information about the functioning of NCJ in the years 2018-2021 \(PL\)](#) (23.05.2022).

to a regional (higher) court. Judge Maciej Nawacki, a former judge of the District Court in Olsztyn, was immediately nominated to the Supreme Administrative Court.¹²⁶ A similar situation involved district court judge Zbigniew Łupina who was also nominated to sit on the Supreme Administrative Court. Another NCJ member, Dariusz Drajewicz (a district court judge at the moment of his appointment to the Council) obtained the NCJ's nomination twice, initially to the Disciplinary Chamber of the Supreme Court (this resolution was repealed by the Extraordinary Review and Public Affairs Chamber of the Supreme Court), and then to the Court of Appeal in Warsaw.¹²⁷ The same situation occurred with another judge, Rafał Puchalski, initially sitting at the District Court in Jarosław, nominated to the Disciplinary Chamber and the Court of Appeal in Rzeszów.

Secondly, persons closely linked to NCJ members – spouses, partners and siblings – sought the Council's recommendation. During the current Council's term, the media have described at least four cases of such decisions. One of them concerned a promotion from a regional court to the Supreme Court.¹²⁸ During the four-year term of the National Council of the Judiciary, there were more cases of appointments of family members or other associates by the NCJ than during the past 27 years of the Council's work.¹²⁹

In addition to making these nominations, the Council also decided to promote persons affiliated with disciplinary officers for common courts judges or the Ministry of Justice itself. During its current term, the Council had nominated two deputy disciplinary officers for common courts who were later promoted to higher judicial posts. One of them, having been briefly seconded to the Regional Court in Warsaw, was immediately promoted to a court of appeal. His spouse was also given the Council's recommendation and was promoted from the post of director of District Court for Warsaw's Żoliborz district, (a non-judicial role) to the position of a judge of the Supreme Administrative Court's

126 [Okopress, National Council of His Own. "The famous" Maciej Nawacki was promoted to the Supreme Administrative Court from the National Council of the Judiciary, in which he is a member \(PL\) \(23.05.2022\).](#)

127 [Okopress, This is how the new NCJ works: promotion of Drajewicz and removal from the office of the rebellious judge from Gdańsk \(PL\) \(23.05.2022\).](#)

128 Poland, National Council of Judiciary, The resolution of NCJ from 12.05.2021 concerning the appointment of two judges of the Supreme Court – Civil Chamber.

129 TVN24, [The KRS promotes its members, their partners and spouses \(PL\). \(23.05.2022\).](#)

Finance Chamber.¹³⁰ The NCJ also nominated two Deputy Ministers of Justice. The first of them, Łukasz Piebiak, left the Ministry of Justice immediately after the media accused him of taking part in the so-called "hater scandal".¹³¹ Already after the scandal has been exposed, the National Council of the Judiciary nominated Mr Piebiak to a judicial post at the Supreme Administrative Court, despite the fact that his judicial experience is limited to serving as a judge of a district court. The other Deputy Minister, Anna Dalkowska, a former judge of a district court, was promoted to serve as a judge of the Supreme Administrative Court on the Council's recommendation.

Finally, the Council has taken several decisions evoking doubts about its ability to carry out a fair assessment of candidates. In this respect, a note should be made, for example, of the rapid and cursory interviewing of candidates for the newly created Supreme Court chambers.¹³²

In other proceedings, the Council recommended that a judge of a criminal division of a district court should be appointed to the Provincial Administrative Court despite the judge in question has been on a six-year secondment at the Ministry of Justice and has not adjudicated a single case since. This candidate was also nominated by the NCJ to the Disciplinary Chamber of the Supreme Court¹³³ and, formally speaking, awaits his nomination to be confirmed by the President's appointment. In an interview with members of NCJ, the judge explained his desire to adjudicate in the provincial administrative court by saying that he would like to "take the path of another adventure", as well as that he finds administrative matters "a tempting area".¹³⁴ The Council nominated him for a judicial post at the Provincial Administrative Court in Kraków.¹³⁵ The discussion did not address the

130 Oko.press, [Radzik's wife will go to the Supreme Administrative Court, Karski's wife will go to the Supreme Court \(PL\)](#) (23.05.2022).

131 Prawo.pl, [Hate speech against judges – deputy Minister of Justice dismissed \(PL\)](#) (23.05.2022).

132 M. Kalisz, M. Szuleka, M. Wolny, [Changes around the Supreme Court in 2017-2021 \(PL\)](#), p. 23 (23.05.2022).

133 Poland, National Council of Judiciary, Resolution no. 237/2020 of 31.01.2020 concerning the appointment of 6 judges of the Supreme Court – Disciplinary Chamber.

134 Poland, National Council of Judiciary, [Video of the NCJ's sitting of 1-4.03.2022 \(PL\)](#) (23.05.2022).

135 Poland, National Council of Judiciary, [The list of persons recommended for the judicial position during NCJ sitting of 1-04.03.2022 \(PL\)](#) (23.05.2022).

fact that during the elections of the NCJ members for the next term of office, he endorsed as many as eight members of the current NCJ seeking re-election.¹³⁶

In another case, a judicial clerk (with short work experience) seconded to the administrative law department of the Ministry of Justice was nominated to serve at the Provincial Administrative Court in Wrocław. He won the contest that also included 11 long-term experienced lawyers.¹³⁷ Another candidate judge was a member of the ruling political party at the time of his election. In the same year that he sought a judgeship, he donated PLN 12,500 to the party's electoral fund.¹³⁸

The Council also nominated a director in the Ministry of Justice to the Supreme Court. His candidature sparked protests from a ruling majority parliamentarian who was a member of the NCJ. The parliamentarian accused the candidate of having presented liberal scientific views on the constitutional admissibility of gay marriage. The Minister of Justice, who rarely appears at Council sessions, personally defended the candidate, explaining that he had changed his mind on marriage and had even expressed this in writing. Ultimately, the Council endorsed his candidacy in a second vote.¹³⁹

2.1.5. Exclusion of the National Council of the Judiciary from the Judicial Councils Network

The European Network of Councils for the Judiciary (ENCJ) is an organisation set up in 2004 on an initiative of national judicial councils from across Europe, including the Polish NCJ. In August 2018, as a result of changes to the NCJ appointment procedure, the ENCJ performed a review of whether the Council continues to meet the requirements of the Network's statutes, including whether it guarantees the courts are independent of the legislative and executive branches of government, thereby enabling judges to make independent rulings. These concerns led to the suspension of the NCJ's membership in

136 Poland, ninth term of office of Sejm, [The list of judges supporting candidates to the National Council of Judiciary \(PL\)](#) (23.05.2022).

137 Oko.press, [How a former flight attendant got an appointment to an important court \(PL\)](#) (23.05.2022).

138 Oko.press, [The member of the ruling party has been appointed as a judge \(PL\)](#) (23.05.2022).

139 Oko.press, [Zaradkiewicz appointed as a judge of the Supreme Court \(PL\)](#) (23.05.2022).

the ENCJ in 2018.¹⁴⁰ Moreover, on 21 October 2021, the ENCJ General Assembly decided to expel the Council from the Network.¹⁴¹ In justifying its request for the expulsion, the ENCJ Board drew attention to the aforementioned lack of independence of the NCJ, its inaction in defending the independence of judges, as well as the NCJ's practice of undermining the applicability of European Union law concerning matters of judicial independence.¹⁴²

2.1.6. Changes of NCJ chairpersons

In January 2018, the NCJ's then-sitting chairperson, Supreme Court Judge Dariusz Zawistowski, resigned in protest against the newly adopted provisions of the National Council of the Judiciary Act.¹⁴³ The Council elected President of the Supreme Court Małgorzata Gersdorf¹⁴⁴ to replace Judge Zawistowski. However, she resigned from the chairmanship after the Sejm elected new NCJ judicial members in March 2018. However, it was still a matter for the President of the Supreme Court to set the first date of the Council session. The President of the Supreme Court convened the first Council session on 27 April 2018. At that session, the NCJ elected Judge Leszek Mazur as its Chairperson.¹⁴⁵

However, Judge Mazur was dismissed from the chairmanship in January 2021. Formally, the request to dismiss the chairman was justified on the grounds of a „loss of confidence”, but unofficial media reports suggested that the Chairperson's dismissal was prompted by his disclosure of documents concerning the additional remuneration of NCJ members obtained by postponing the deliberations of individual Council teams to days when no Council sessions were held,¹⁴⁶ which entitled the members of such teams to receive extra

140 European Network of the Councils of Judiciary, [ENCJ suspends Polish National Judicial Council – KRS](#) (23.05.2022).

141 European Network of the Councils of Judiciary, [ENCJ votes to expel Polish Council of Judiciary – KRS](#)

142 European Network of the Councils of Judiciary, [Position Paper of the board of the ENCJ on the membership of the NCJ](#) (23.05.2022).

143 Dziennik Gazeta Prawna, [The Chairman of NCJ resigned \(PL\)](#) (23.05.2022).

144 Polsatnews.pl, [President of the Supreme Court appointed as the Chairman of NCJ \(PL\)](#) (23.05.2022).

145 Dziennik Gazeta Prawna, [Who is Leszek Mazur, the new Chairman of NCJ \(PL\)](#) (23.05.2022).

146 TVN24, [Chairman of NCJ dismissed \(PL\)](#) (23.05.2022).

per diems. At the next session, the National Council of the Judiciary appointed Judge Paweł Styrna as the new Chairperson.

Next, in 2022, at the first session of the newly elected Council, it appointed Judge Dagmara Pawełczyk-Woicka as NCJ Chairperson. She was appointed President of the Kraków Regional Court in 2018 by a decision by the Minister of Justice. The Regional Court in Kraków is one of the largest courts in Poland, and at the time of her appointment as its president, Judge Pawełczyk-Woicka served as a judge of a district court.¹⁴⁷

2.1.7. Judges appointed by the new NCJ – the case law of international and domestic courts

The irregularities in the appointment of judicial members of the NCJ in 2018 and the lack of NCJ's independence translate into growing concerns as to the lawfulness of NCJ decisions. Both international and national courts have commented in their rulings on the impact that judges appointed by the new NCJ may have on litigants' right to have a case heard by an independent court established by law.

This issue was first addressed by the Court of Justice of the European Union in its judgment of 19 November 2019 entered in three joined cases concerning appeals against decisions of the new NCJ.¹⁴⁸ In those cases, the CJEU was called upon to answer questions referred for a preliminary ruling which concerned, inter alia, the Disciplinary Chamber satisfying the requirements of independence and impartiality laid down in Article 47 of the Charter of Fundamental Rights. On this occasion, the CJEU also commented on the status of the NCJ. The CJEU considered that the National Council of the Judiciary should be sufficiently independent of the legislature and the executive. In this respect, the CJEU has formulated criteria relevant for the assessment of the independence of the Council. Among those criteria, the CJEU pointed out at the outset that the new National Council of the Judiciary was created by shortening the term of office of its then-incumbent members. Second, the CJEU noted that 15 of the NCJ members were, at the time, designated by the Parliament, which resulted in a significant increase in the number of NCJ members

147 TVN24.pl, [Judge Dagmara Pawełczyk-Woicka has become the new Chairman of NCJ \(PL\)](#) (3.06.2022).

148 CJEU judgment (Great Chamber) of 19.11.2019, case no. C-585/18, C-624/18 i C-625/18.

elected by political forces. Third, the CJEU drew attention to the reported irregularities that may have affected the process of appointing certain members of the NCJ in its new composition.

Later on, in a 2021 judgment concerning the transfer of judge Waldemar Żurek to another division in the Regional Court in Kraków, the CJEU addressed the problem of judgments issued single-handedly by a judge appointed to the Supreme Court on NCJ's nomination. The CJEU pointed out that such rulings must be considered null and void where a judge deciding a case single-handedly was appointed "in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned".¹⁴⁹

The question of NCJ's independence has also been addressed by the European Court of Human Rights in Strasbourg. In one of the first in a series of judgments on changes to the Polish judiciary, *Reczkowicz v. Poland*¹⁵⁰, the ECtHR found a violation of the applicant's right to a court established by law, stemming from the fact that the judges of the Disciplinary Chamber of the Supreme Court had been appointed with the participation of the NCJ, a body which, in the Court's view, did not provide sufficient guarantees of independence from the legislature and the executive. In order to determine if a violation has occurred, the ECtHR used the independence test that had been developed for an earlier case, *Guðmundur Andri Ástráðsson v. Iceland*¹⁵¹. As part of that three-pronged test, the Court examined whether there had been a flagrant breach of national law in the case, whether this had the effect of precluding the court from acting independently, and whether the national court had assessed the possible breach of the individual's right to a court in a manner consistent with the Convention.

Subsequently, on 8 November 2021, the ECtHR ruled in the case of *Dolińska-Ficek and Ozimek v. Poland* concerning an appeal of two judges against an NCJ resolution made in

149 CJEU judgment of 6.10.2021, case no. C-487/19

150 ECHR judgment of 22.07.2021 in the case *Reczkowicz v. Poland*, application no. 43447/19.

151 ECHR judgment (Great Chamber) of 1.12.2020 in the case *Guðmundur Andri Ástráðsson v. Iceland*, case no. 26374/18.

the Supreme Court nomination procedure.¹⁵² In *Dolińska*, the Court unanimously found that there had been a violation of the applicants' right to have their case heard by an independent and impartial court established by law due to the fact that the judges of the Extraordinary Review and Public Affairs Chamber, to which the appeal had been submitted, had been appointed with the participation of then-current NCJ. According to the ECtHR, this irregularity adversely affected the entire process and undermined the legitimacy of the Supreme Court's Extraordinary Review and Public Affairs Chamber to examine the applicants' case. The Court also highlighted the need for the Polish lawmakers to take urgent corrective action to prevent the authorities from interfering in the process of judicial appointments.

Finally, in *Advance Pharma sp. z o.o. v. Poland*, the ECtHR has referred to the appointment of seven judges of the Civil Chamber of the Supreme Court in a procedure that involved the participation of the then-sitting NCJ.¹⁵³ Bering in mind that the procedure was similar to that for the appointment of judges of the Disciplinary Chamber, the Court upheld most of its findings regarding the NCJ presented in *Reczkowicz*, in particular those concerning the violation of the law caused by the NCJ's participation in the proceedings. As the ECtHR noted, the legislation in force, which deprived the judiciary of the right to elect the judicial members of the NCJ, enabled the legislature and the executive to achieve decisive influence over the NCJ's composition, which, in turn, effectively allowed the executive and the legislature to (directly or indirectly) interfere in the judicial appointment procedure. In the Court's view, a procedure for the appointment of judges that reveals the influence of the legislative and executive branches of government constitutes, by its very nature, a violation of the right to a court established by law. The ECtHR further noted that the continuing operation of the NCJ in this manner may result in multiple future potential violations of the right in question.

The national courts have also been critical in their jurisprudence in assessing the independence of the post-reform NCJ and its functioning. In a resolution of three joint chambers, the Supreme Court held that the NCJ "is not an independent body but acts as one directly

152 ECHR judgment of 8.11.2022 in the case *Dolińska-Ficek and Ozimek v. Poland*, case no. 49868/19 and 57511/19.

153 ECHR judgment of 3.02.2022 in the case *Advance Pharma sp. z o.o. v. Poland*, case no. 1469/20.

subordinated to a political authority".¹⁵⁴ In the same resolution, the Supreme Court also explained how the validity of the proceedings may be affected in situations where such proceedings are brought before judges appointed by the new NCJ. The Supreme Court distinguished between situations in which judges were appointed to the Supreme Court and those involving appointment to common courts. As regards judges appointed to the Supreme Court's Chambers other than the Disciplinary Chamber, the Supreme Court indicated that their participation in court panels *after the date of adoption of the resolution* would result in the composition of a given court being considered inappropriate and, consequently, in the proceedings being declared invalid. On the other hand, the Supreme Court held that any proceedings pending before the Disciplinary Chamber were null and void *both before or after* the adoption of the resolution. However, the Supreme Court has taken a relativised approach to the impact of participation of judges appointed by the National Council of the Judiciary to common courts on the validity of proceedings, holding that such proceedings should be deemed invalid if an absolute ground for appeal exists. The Supreme Court's resolution indicates that a procedural defect in proceedings involving such judges may arise if the court reviewing these circumstances concludes that the manner in which a judge was nominated by the NCJ in a particular case leads to a violation of the standard of judicial independence and impartiality.¹⁵⁵

2.1.8. Proposed amendments to the National Council of the Judiciary Act

Since 2018, opposition parties have been repeatedly proposing ways to limit the negative rule of law effects of the changes introduced by the ruling majority. The draft of the so-called "Corrective Law" presented in January 2020¹⁵⁶ sought to end the term of the current National Council of the Judiciary and the election of a new Council by judges, in proportion to the population of judges serving at courts of different levels. According to the proposal, judges of district courts would have the right to elect eight members of the National Council of the Judiciary. Judges themselves, certain other entities (e.g. the Polish

154 Poland, Supreme Court, [Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber \(case BSA I-4110-1/20\)](#). (BSA I-4110-1/20).

155 M. Szuleka, M. Wolny, M. Kalisz, 2020. [Pandemic, crisis of the rule of law, challenges for human rights \(PL\)](#) (23.05.2022).

156 Poland, Senate, [Draft act amending the act on the National Council of the Judiciary and certain other acts \(PL\)](#) (druk senacki nr 50) (23.05.2022).

Bar Association) and groups of at least 2,000 citizens were given the right to nominate candidates for judicial members of the new Council. Judges who had been seconded to the Ministry of Justice or another unit subordinate to the Ministry of Justice in the three years preceding the election would be excluded from the pool of candidates. These assumptions were then transferred to the bill presented at the beginning of 2022 by representatives of certain social organisations and opposition parties.¹⁵⁷ The bill also provided for the annulment of NCJ individual resolutions regarding judicial appointments. According to the bill, the judicial posts filled by those appointments should be considered vacant and filled in new competitions organised by the new National Council of the Judiciary elected by judges.

2.2. CHANGES IN THE MANAGEMENT OF COURTS

2.2.1. Changes in court leadership

The legislative changes, introduced from 2016 onwards, regarding the operation of the courts and the selection of their leadership were among the key elements of the ongoing justice reform. One of the first changes implemented concerned the appointment and dismissal of court presidents.

The president of a court runs the court and oversees the work of judges, associate judges, court registrars and judicial clerks. As part of their internal supervision duties, the president reviews the efficiency of proceedings in individual cases.

Before 2017, the presidents of courts were appointed by the Minister of Justice from among the judges of a given court (a court of appeal in the case of courts of appeal, a court of appeal and a regional court in the case of district courts, and a district court or a regional court in the case of district courts) after consulting the assembly (or the meeting of judges) of a given court. In certain cases, the Minister of Justice could also dismiss the president of a court before the end of their term, but the dismissal could only take place after the Minister obtained the opinion of the National Council of the Judiciary.

157 The Association of Polish Judges IUSTITIA, [Draft Act restoring the rule of law in Poland \(PL\)](#) (23.05.2022).

The Minister of Justice was unable to proceed with dismissal if the NCJ's opinion on the dismissal was negative.

In July 2017, the Sejm adopted an amendment to the Common Courts Act, which introduced changes to the procedure for appointments and dismissals of presidents of common courts. The changes significantly limited the involvement of judicial self-governing bodies in the appointments and dismissals process and expanded the powers of the Minister of Justice in this area.

The amended provisions authorised the Minister of Justice to appoint court presidents without consulting the assembly (or the meeting) of judges, as well as to dismiss them after consulting the National Council of the Judiciary. The Minister was to abide by the negative opinion of the NCJ if adopted by a two-thirds majority of votes. In addition, the amendment stipulated that for six months from its entry into force (i.e. from July 2017 to February 2018), the Minister of Justice was empowered to freely dismiss then-sitting presidents and deputy presidents of common courts and appoint his designees in their place.

During that period, the Minister of Justice dismissed almost 150 presidents and deputy presidents of courts throughout Poland. Most often, the notice of dismissal was phrased as a single sentence, had a retroactive date and was sent to a court by fax. Moreover, the Ministry of Justice informed about changes in press releases published on its website. In the published releases, the Ministry used statistical data concerning the work of the court in question to justify the necessity of the changes. A study conducted by the HFHR showed the process of dismissing presidents and deputy presidents of courts was not based on a comprehensive analysis of the situation in the courts concerned. The published releases invoked different criteria for different courts: one cited the performance of criminal divisions as a crucial factor, while another release referred to the general index of effective caseload handling. In the assessment of the situation in the courts, the Ministry was not guided by any general factors such as the number of judicial vacancies (which increased significantly in 2017) or the comparison of a court's year-to-year performance statistics.¹⁵⁸ The HFHR study also showed that the selection of persons appointed to serve

158 B. Grabowska-Moroz, M. Szuleka, [It starts with the staff. Change of presidents and vice-presidents of common courts from August 2017 to February 2018 \(PL\)](#) (5.06.2022).

as new presidents and deputy presidents was conducted in a non-transparent manner and was based on non-substantive criteria.

In the period from August 2017 to February 2018, the media covered controversial cases of appointments of new court presidents and deputy presidents. In the District Court in Wałbrzych, the newly appointed president was a judge with a judicial tenure of less than two years. While working as a judicial clerk, the new president made 52 attempts to obtain the qualification of a judge.¹⁵⁹ The new president of the District Court for Kraków's Śródmieście district has been disciplined for many cases of professional misconduct, including unjustified delays in proceedings.¹⁶⁰ A judge convicted in disciplinary proceedings was appointed president at the District Court in Wodzisław Śląski. As he took office, he was accused in other disciplinary proceedings for "acts classified as a gross violation of the law or a violation against of the judicial integrity".¹⁶¹

The provisions on the dismissal of court presidents were once more amended in May 2018. Under the new rules, the Minister of Justice may dismiss a court president after consulting the governing board of that court. If the board's opinion is negative, the dismissal must be approved by the National Council of the Judiciary. A negative opinion of the NCJ is binding on the Minister if issued by a majority of two-thirds of votes.

Case law of the European Court of Human Rights

In June 2021, the European Court of Human Rights delivered the judgment in the case of *Broda and Bojara v. Poland*.

Judges Mariusz Broda and Alina Bojara were deputy presidents of the Regional Court in Kielce. In 2018, they were dismissed from office by the Minister of Justice. In their application to the European Court of Human Rights, the judges complained that Poland had violated Article 6 (1) of the European Convention of Human Rights by having them removed from their posts unlawfully and arbitrarily and failing to ensure them an opportunity to appeal the dismissal decision.

159 TVN24.pl, [A woman tried to become a judge 52 times. After more than a year she became the president of the court \(PL\)](#) (5.06.2022).

160 J. Sidorowicz, [The new president of the District Court in Warszawa Śródmieście was punished with disciplinary sanction \(PL\)](#), Wyborcza.pl (5.06.2022)

161 G. Łakomski, [Mobbing and gross violation of the law – court presidents appointed by Zbigniew Ziobro \(PL\)](#), Wp.pl (5.06.2022).

In its judgment, the ECtHR found that Poland had violated the Convention as challenged. The court noted the importance of procedural safeguards in cases involving judicial careers. The Court also pointed out that the law did not provide any criteria for the dismissal of court presidents and deputy presidents.¹⁶²

In response to the ECtHR judgment, the Prosecutor General petitioned the Constitutional Court to examine the constitutionality of Article 6(1) of the Convention, *inter alia*, insofar as it concerns the right of "a judge to perform an administrative role in the structure of the common courts".

The Constitutional Court considered this provision of the Convention, insofar as it "authorises the European Court of Human Rights to create, under national law, a judicially protected subjective right for a judge to perform an administrative role within the organisational structure of the common courts", to be incompatible with the Constitution.¹⁶³

2.2.2. Changes in the functioning of judges' self-governing bodies and the court governing board

The next step in restricting the independent functioning of judges' self-governing bodies was the changes introduced in January 2020 by the so-called Muzzle Law. The law marginalized the role of general assemblies of judges. Until 2020, a general assembly of judges, e.g. that of a court of appeal, consisted of judges of the court of appeal as well as representatives of regional and district courts located within the appellate circuit. After the Muzzle Law entered into force, an assembly of judges comprise only the judges sitting in the court concerned. Furthermore, the law limited the powers of the assemblies of judges to give opinions on candidates for judicial positions. From 2020 onwards, giving an opinion on candidates has become the exclusive competence of the court's governing board, which, following the changes introduced by the Muzzle Law, is composed exclusively of persons designated by the Minister of Justice (i.e. the presidents of the courts of a given judicial circuit).

The Muzzle Law also introduced a restriction to the remit of court governing boards which cannot engage in political matters and, in particular, are forbidden to adopt any "resolutions that undermine the functioning of authorities of the Republic of Poland and its constitutional bodies".

162 ECHR judgment of 29.06.2021 in the case *Broda i Bojara v. Poland*, case no. 26691/18 i 27367/18.

163 Poland, Constitutional Tribunal judgment of 10.03.2022, case no. K 7/21.

These changes were most likely introduced in response to many resolutions of the judges' self-governing bodies taken in response to subsequent violations of the rule of law and independence of the courts. Judges' self-governing bodies passed resolutions in protest against the unlawful replacement of presidents and deputy presidents of courts¹⁶⁴, the appointment of their successors without the participation of the judges' self-governing bodies¹⁶⁵, the adoption of laws interfering with judicial independence, limiting the powers of the judges' self-governing bodies or the stepping up of disciplinary measures against judges¹⁶⁶ or actions taken against judges by disciplinary bodies¹⁶⁷. Judges' self-governing bodies also adopted resolutions calling for the initiation of the EU infringement procedure in connection with changes made in judicial legislation¹⁶⁸ or withholding opinions on candidates in connection with concerns regarding the independence and lawfulness of operations of the National Council of the Judiciary¹⁶⁹.

2.3. CHANGES IN THE RETIREMENT AGE OF COMMON COURTS JUDGES

The amendments to the Common Courts Act introduced in July 2017 also envisaged changes to judges' retirement age. Until 2017, judges retired at the age of 67. However, the amendments introduced differentiated the retirement age of male and female judges: the former retired at the age of 65, while the latter retired at the age of 60 unless the Minister of Justice gave permission for the judge to continue sitting in office.

As in the case of dismissals of court presidents, also in this case the decision of the Minister of Justice does not need to be based on any detailed analysis of the judge's performance, is completely discretionary and is not subject to a judicial review. By April 2018, 219 judges had applied for the Minister's approval for continuation in office despite reaching the

164 [Resolution No. 1 of the Assembly of Representatives of Judges of the District Court in Poznań of 26.02.2018 on the changes to functional positions in common courts](#) (PL) (5.06.2022).

165 [Resolution No. 3 of the Assembly of Representatives of Judges of the District Court in Warsaw of 26.02.2018](#) (PL) (5.06.2022).

166 [Resolution No. 1 of the General Assembly of Judges of the District Court for Kraków-Krowodrza of 2.03.2020](#) (PL) (5.06.2022).

167 [Resolution No. 4 of the Assembly of Representatives of Judges of the District Court in Warsaw](#) (PL) (5.06.2022).

168 [Resolution of the Assembly of Representatives of Judges of the Wrocław Appeal of 21.06.2018](#) (PL) (5.06.2022).

169 M. Kryszkiewicz, [Assemblies of judges do not issue opinions. The effect of the CJEU judgment](#) (PL), *Gazeta Prawna* (5.06.2022).

retirement age. The Minister of Justice has so far considered 130 of these applications and granted approval merely in 69 cases.¹⁷⁰

Already in July 2017, the European Commission launched an infringement procedure and later referred the case to the Court of Justice of the European Union. However, as the procedure was pending, the ruling majority amended the rules on the retirement age establishing the same age for both men and women (65). The procedure for extending judicial tenures was also changed – the applications of judges who would like to remain in office after attaining the age of 65 are now considered by the National Council of the Judiciary rather than the Minister of Justice.

In November 2019, the Court of Justice of the European Union ruled that the introduction of different retirement ages for male and female judges was in breach of EU law. In addition, the CJEU drew attention to the role of the Minister of Justice, who was given excessive powers to decide which judge could remain in office, which constituted an interference with judicial independence.¹⁷¹

At the same time, the case of Judge Dorota Jezierska is pending before the European Court of Human Rights; the judge was forced to retire after the change in the law because she was over 60 years of age. The applicant complains that her being placed in retirement constituted an interference with her private and professional life (Article 8 ECHR) inasmuch as she was completely deprived of the possibility of practising the profession she had pursued the most of her adult life, which also had a negative impact on her financial situation.¹⁷²

2.4. DISCIPLINARY PROCEEDINGS AGAINST JUDGES

2.4.1. Changes in the law

The new 2017 Supreme Court Act introduced several new provisions on the disciplinary liability of judges of common courts and disciplinary proceedings.

170 M. Szuleka, M. Wolny, M. Kalisz, [Rule by law replaced the rule of law. Threats to human rights in Poland, 2015-2019](#) (5.06.2022).

171 CJEU judgment of 5.11.2019, case no. C-192/18.

172 HFHR, [The ECtHR will deal with the provisions lowering the retirement age of judges](#) (PL) (5.06.2022).

Above all, the new Act established the Disciplinary Chamber of the Supreme Court.¹⁷³ The Disciplinary Chamber's powers include the examination of disciplinary cases of judges, requests for the criminal prosecution of judges, appeals against decisions of disciplinary courts (e.g. those issued in disciplinary proceedings against prosecutors) and appeals against resolutions of the National Council of the Judiciary. The new regulations also provided for a broad autonomy of the Disciplinary Chamber within the structure of the Supreme Court (which included, among other things, awarding the President of the Disciplinary Chamber powers broader than those exercised by presidents of other Chambers of the Supreme Court, e.g. those relating to appointing presidents of divisions or seconding judges). The new Act also established that the judges of the Disciplinary Chamber were entitled to a remuneration 40% higher than the remuneration of other judges of the Supreme Court.

Furthermore, the new provisions amended the provisions of the Common Courts Act concerning the disciplinary liability of judges. First of all, the new law significantly extended the influence of the Minister of Justice on the disciplinary regime for judges. Most notably, the procedure for the appointment of judges sitting on disciplinary courts at courts of appeal was amended. Previously, these judges were elected by the assembly of judges of a given appellate circuit but since 2018, disciplinary judges are nominated by the Minister of Justice.

Similar changes were made to the role of a disciplinary officer. Before the reforms, the Disciplinary Officer for Common Courts Judges was appointed by the National Council of the Judiciary from among the candidates selected by the judges. Following the 2017 amendments, the competence to appoint the disciplinary officer and two deputy disciplinary officers was given to the Minister of Justice. The Minister of Justice also has the authority to appoint disciplinary officers (officially named "Disciplinary Officers of the Minister of Justice") to conduct a specific disciplinary case concerning a judge.

The new provisions have also changed procedural rights of judges subject to disciplinary proceedings. They introduced, among other things, a 14-day deadline for submitting all evidence of the defence (no such time frame has been established for disciplinary officers)

173 M. Kalisz, M. Szuleka, M. Wolny, [Changes in the Supreme Court in 2017-2021](#) (PL) (23.05.2022).

and negatively affects the situation of the accused at the stage of appeal. As a rule, under the Code of Criminal Procedure, a person acquitted in first instance proceedings cannot be convicted as a result of an appeal. However, this rule does not apply to disciplinary proceedings concerning judges: even if a judge is acquitted by a disciplinary court of the first instance, the Disciplinary Chamber can still find them guilty.

The provisions governing the disciplinary regime for judges have been further enhanced by the so-called Muzzle Law adopted in January 2020. Above all, the law extended the list of disciplinary offences for which a judge may be held responsible. Previously, the judge was liable for professional misconduct, including obvious and blatant violations of the law and of the integrity of the office. The Muzzle Law extended the scope of disciplinary responsibility. Under that piece of legislation, judges are responsible not only for obvious and blatant violations of the law but also for actions that may prevent the functioning of the justice system and for challenging the validity of a judicial appointment. The Muzzle Law was the ruling majority's response to the emerging judgments of Polish courts challenging the status of judges appointed by the newly formed NCJ. Thus, the Muzzle Law introduced the possibility of disciplining judges for the content of their rulings.

2.4.2. Examples of disciplinary proceedings against judges

Since the amendment to the Common Courts Act which came into force in 2018, disciplinary proceedings have become one of the most vexing forms of pressure exerted on judges. The above conclusion has been confirmed by the results of a survey conducted by the HFHR in 2019¹⁷⁴, which shows that over 50% of the respondent judges have been threatened with the initiation of disciplinary proceedings, called upon to provide explanations before disciplinary officers or had been subjects of pending disciplinary proceedings. On the other hand, the information provided by Disciplinary Officer for Common Courts Judges Piotr Schab shows that, in the period between June 2018 and June 2022, he and his deputies initiated disciplinary proceedings in 127 cases and submitted 38 requests for the examination of disciplinary cases by disciplinary courts (these requests led to 2 appealable convictions and 3 acquittals).¹⁷⁵

174 M. Kalisz, M. Szuleka, M. Wolny, [The Time of Trial. How do changes in justice system affect Polish judges?](#), (5.06.2022).

175 Poland, Disciplinary Officer for Common Courts, Response to the motion of the HFHR, 13.06.2022.

Proceedings in relation to public statements

For several years, there has been a tendency to use disciplinary proceedings to restrict judges' freedom of expression. This applies to all statements of a public nature, in particular those made in newspapers and published by judges on social media, which express criticism of the changes being made to the justice system or aim to defend the rule of law.

Waldemar Żurek is one of the judges targeted by disciplinary proceedings in relation to a statement published in a press article.¹⁷⁶ In 2019, the Deputy Disciplinary Officer for Common Courts Judges informed about the initiation of proceedings against Judge Żurek who was presented with disciplinary charges in connection with his interview for the Prawo.pl portal.¹⁷⁷ In the interview, the judge noted the unlawful functioning of the Constitutional Court and said that the appointment of Judge Kamil Zaradkiewicz to the Supreme Court was illegal. According to the Deputy Disciplinary Officer, Judge Żurek's actions were to violate the integrity of his judicial office.

In the same press release, the Deputy Disciplinary Officers informed about the initiation of disciplinary proceedings against Judge Olimpia Barańska-Małoszek. According to the Deputy Commissioner, by posting a critical post on social media relating to the nomination of a candidate to the Disciplinary Chamber of the Supreme Court by a prosecutor whose actions had in the past led to the acknowledgement of a violation of the European Convention on Human Rights by Poland, Judge Barańska-Małoszek failed to respect the integrity of her office.

Disciplinary proceedings were also launched against Judge Krystian Markiewicz, President of the Association of Polish Judges Iustitia.¹⁷⁸ In 2019, he published a statement on the Iustitia's website stating that he would not appear as a witness in the proceedings before the Disciplinary Officer for Common Courts Judges and also called on other persons summoned in this capacity to behave in a similar manner. As in the case of the above-mentioned

176 Poland, Disciplinary Officer for Common Courts, [Statement of the Disciplinary Officer for Common Courts on the initiation of disciplinary proceedings against judges not complying with the order to use social media restrainly \(PL\)](#) (5.06.2022).

177 K. Sobczak, [Judge Żurek: Kamil Zaradkiewicz is willing to create chaos in the justice system \(PL\)](#), Prawo.pl (5.06.2022).

178 Poland, Disciplinary Officer for Common Courts, [Statement of the Disciplinary Officer for Common Courts concerning five judges \(PL\)](#) (5.06.2022).

judges, Judge Markiewicz has also been accused of a violation of the integrity of the judicial office. A similar accusation was also made against Judge Markiewicz with regard to the open letters that he, as President of Iustitia, sent to judges of disciplinary courts.¹⁷⁹ In these letters, he noted, among other things, the lack of independence of the newly formed National Council of the Judiciary and the Disciplinary Chamber of the Supreme Court.

In 2020, the Deputy Disciplinary Officer for Common Courts Judges also informed that investigative procedures had been initiated against members of the board of the Iustitia Association.¹⁸⁰ These procedures were said to be related to a position statement published on the Association's website in which the Board referred to a resolution of the Extraordinary Review and Public Affairs Chamber declaring the validity of the election of the President of the Republic of Poland.¹⁸¹ The Association's resolution reads, among other things, that "the illegally established ... Extraordinary Review and Public Affairs Chamber has adopted an invalid resolution on the validity of the election of the President". In the opinion of the Deputy Disciplinary Officer, the content of the Association's resolution questioned the lawfulness and validity of the appointment of judges sitting in the Extraordinary Review and Public Affairs Chamber of the Supreme Court and the lawfulness of a constitutional body of the Republic of Poland (the President). Such conduct has allegedly manifested the features of new disciplinary offences introduced by the so-called Muzzle Law, namely the challenging of a judicial appointment or the constitutional mandate of a body of the Republic of Poland and constituted public activities incompatible with the principles of independence of the courts and of the judges.

Proceedings in relation to judicial decisions

In addition to proceedings related to public statements of judges, disciplinary officers also initiate disciplinary proceedings in connection with judicial decisions issued by judges.

179 Poland, Disciplinary Officer for Common Courts, [Statement of the Disciplinary Officer for Common Courts on the initiation of disciplinary proceedings against Krystian M., judge of the District Court in Katowice](#) (PL) (5.06.2022).

180 Poland, Disciplinary Officer for Common Courts, [Statement of the Disciplinary Commissioner for Common Courts](#) (PL) (5.06.2022).

181 Association of the Polish judges IUSTITIA, Statement of IUSTITIA concerning the validity of the presidential elections. [Statement of IUSTITIA concerning the validity of the presidential elections](#) (PL) (5.06.2022).

The most emblematic example of a judge suffering disciplinary consequences for a procedural decision he made is Paweł Juszczyzyn, a judge of the Olsztyn District Court. On 20 November 2019, while on secondment to the Regional Court in Olsztyn, he heard an appeal against a judgment of a district court's panel composed of a judge appointed with the participation of the newly formed National Council of the Judiciary. Bearing in mind a ruling issued by the CJEU the day before¹⁸², which set out the criteria for assessing the independence of the NCJ, Judge Juszczyzyn issued an order directing the Head of the Chancellery of the Sejm to submit applications, as well as lists of citizens, and lists of judges endorsing candidates for members of the National Council of the Judiciary, as well as statements by citizens or judges on the withdrawal of endorsement for these candidates, and to send these documents to the court.

On 28 November 2019, a Deputy Disciplinary Officer for Common Courts Judges announced the initiation of disciplinary proceedings against Judge Juszczyzyn.¹⁸³ According to the Deputy Disciplinary Officer, by issuing an order, Judge Juszczyzyn exceeded his powers, as well as granted himself the competence to assess the correctness, including lawfulness, of the elections of members of the National Council of the Judiciary and the exercise of the President's prerogative to appoint judges. In consequence, the Disciplinary Officer claimed, the judge was responsible for a violation of the integrity of his judicial office. The Minister of Justice has terminated Judge Juszczyzyn's secondment and the president of his home court suspended him from his duties for a period of one month, which is the maximum duration of a suspension that may be ordered by a court president.

Later on, the Disciplinary Chamber of the Supreme Court decided to extend the judge's suspension. Initially, at a hearing held on 23 December 2019, the Chamber revoked the order of the president of the District Court in Olsztyn, holding, in particular, that the suspension of Judge Juszczyzyn based on the accusation of a violation of the integrity of the judicial office had been unjustified as the issuing of a ruling by a judge cannot be qualified as a such violation. On appeal brought by the Disciplinary Officer, a different panel of the Disciplinary Chamber ruled, on 4 February 2020, that Judge Juszczyzyn should be

182 CJEU judgment (Great Chamber) of 19.11.2019, case no. C-585/18, C-624/18 i C-625/18.

183 Poland, Disciplinary Officer for Common Courts, [Statement of the Disciplinary Officer for Common Courts on the initiation of disciplinary proceedings against Paweł J., judge of the District Court in Olsztyn](#) (PL) (5.06.2022).

suspended pending the determination of the disciplinary charges and reduced his salary by 40%. As it was pointed out, Judge Juszczyzyn's conduct amounted to "jurisprudential misconduct" that jeopardised an interest described as other judges' ability to work in an undisturbed manner. The Chamber also ruled that the judge's jurisprudential act had no legal basis or proper justification. As a result of the Disciplinary Chamber's decision, Judge Paweł Juszczyzyn was suspended from his duties for more than two years. In May 2022, the Disciplinary Chamber overturned the suspension decision.¹⁸⁴ Judge Juszczyzyn returned to his duties but was transferred to another division of the court by a decision of the court's president.¹⁸⁵

Regardless of the resolution of the Disciplinary Chamber of May 2022, since 2021, Judge Juszczyzyn has been taking legal steps to prevent the effects of the resolution of the Disciplinary Chamber and to be restored to his duties. In April 2021, the District Court in Bydgoszcz granted Judge Juszczyzyn's motion for interim relief pending the outcome of his case in an employment court, ordering the District Court in Olsztyn to reinstate the judge to judicial duties. In the statements of grounds attached to its decision, the Bydgoszcz District Court observed that – in light of the rulings of the CJEU and the 2019 Supreme Court's ruling – the resolution of the Disciplinary Chamber of 4 February 2020 "may raise doubts as to its legal existence", and further noted that the Chamber itself takes steps against the participants in disciplinary proceedings it hears in an unlawful manner.¹⁸⁶ The District Court's ruling was subsequently upheld by a court of second instance (after being challenged by the president of the Regional Court in Olsztyn), and thus became unappealable. The Olsztyn Regional Court president refused to comply with the interim relief order, claiming that a common court does not have the authority to repeal the resolution of the Disciplinary Chamber of the Supreme Court. In response to that refusal, Judge Juszczyzyn notified a prosecutor's office that the president may have committed an offence of overstepping his official authority.

184 Poland, Supreme Court, [Resolution of the Disciplinary Chamber of the Supreme Court of 23 May 2022](#) (PL), case no. I DO 13/22.

185 Dziennik Gazeta Prawna, [Judge Juszczyzyn: I do not agree with being transferred to another department and being sent on vacation](#) (PL) (6.06.2022).

186 M. Jałoszewski, [The Disciplinary Chamber acted unlawfully in the case of Judge Juszczyzyn](#) (PL), *Oko.press* (5.06.2022).

On 10 May 2021, the Regional Court in Olsztyn granted another interim relief motion sought by Judge Juszczyzyn, once again suspending the implementation of the Disciplinary Chamber's resolution. That decision was followed by an action for the protection of personal interests brought by the judge against the Supreme Court and the President of the Supreme Court in connection with the Disciplinary Chamber's decision ordering his suspension and reducing his remuneration. According to the interim relief order, the Supreme Court should annotate the decision to suspend Judge Juszczyzyn with a note informing its "validity and enforceability is suspended for the duration of the proceedings to determine that the resolution described is not a ruling of the Supreme Court". This interim relief order became unappealable on 30 September 2021, when the Regional Court in Olsztyn dismissed the interlocutory appeal brought by the President of the Supreme Court. The latest interim relief order has been complied with by neither the president of Olsztyn Regional Court nor the President of the Supreme Court – therefore, Judge Juszczyzyn and his legal representative submitted further notifications to a prosecutor's office.

On 17 December 2021, the District Court in Bydgoszcz sitting as an employment court ruled to reinstate Judge Paweł Juszczyzyn in his duties.¹⁸⁷ The ruling may be appealed. Referring to the constitutional standards concerning the right to a court, as well as those under the ECHR and EU law, the Bydgoszcz Regional Court found that the Disciplinary Chamber of the Supreme Court did not meet the requirements of judicial independence and that the decision to suspend Judge Juszczyzyn had no legal effect because it should be deemed not to have been issued by a court. On 20 December 2021, Judge Juszczyzyn appeared at his home court and was allowed to perform his duties for a few hours by the court deputy president (who performed the president's role due to the expiry of the latter's term of office). The acting president also ordered that the judge be paid full salary for the entire period of suspension.¹⁸⁸ However, on the same day, the Minister of Justice appointed the previous president of the District Court in Olsztyn for the second term who immediately decided to renew Judge Juszczyzyn's suspension.

187 M. Jatoszewski, [Precedensowy wyrok: Sędzia Juszczyzyn ma wrócić do pracy. Izba Dyscyplinarna zawiesiła go bezprawnie \(PL\)](#), *Oko.press* (5.06.2022).

188 M. Jatoszewski, [Judge Juszczyzyn should return to work. The Disciplinary Chamber suspended him illegally \(PL\)](#), *Oko.press* (5.06.2022).

Judge Paweł Juszczyszyn also took steps to challenge his suspension before international courts. On 10 May 2021, the European Court of Human Rights communicated a case based on the judge's application to Poland.¹⁸⁹ In his application, Judge Juszczyszyn alleged in particular that, as a result of the Disciplinary Chamber's resolution to suspend him, Poland had violated his right to a fair trial, as the Disciplinary Chamber, whose members were selected in a procedure involving the incumbent NCJ, did not meet the criteria of an impartial and independent court established by law.

Proceedings in relation to membership of associations

The practice of (ab)using disciplinary responsibility regime in recent years also extended to freedom of association, another sphere which has been gradually and significantly restricted for judges. The so-called Muzzle Law, which entered into force on 14 February 2020, obliges judges to submit declarations of their memberships in organisations, including associations, together with an indication of their function within a given organisation. This obligation is enforced by disciplinary officers.

For example, on 22 July 2020, Deputy Disciplinary Officer for Common Courts Judges Przemysław Radzik informed about the presentation of disciplinary accusations and initiation of proceedings against 14 judges of courts of appeal, district and regional courts. These judges allegedly failed to submit to presidents of their courts a declaration of their membership in the Forum for the Cooperation of Judges and a body of that orientation, the Permanent Presidium.¹⁹⁰ In the opinion of the deputy disciplinary officer, the concealment of Forum membership which, in accordance with the organisation's policy statement, constitutes an informal area of agreement and cooperation "ensuring communication between judges from various courts in Poland"¹⁹¹, presents the features of two disciplinary offences – an obvious and blatant violation of the law and a violation of the integrity of the office. As reported by the media, this obligation has not been complied with by, among others, the judges Michał Lasota¹⁹², the other Deputy Disciplinary Officer

189 ECHR, Application in the case Juszczyszyn v. Poland, case no. 35599/20.

190 Deputy Disciplinary Officer for Common Courts, [Statement](#) (PL) (23.05.2022).

191 [Forum Współpracy Sędziów](#)

192 P. Szymaniak, [The case of Judge Michał Lasota](#), [Gazetaprawna.pl](#) (5.06.2022).

for Common Courts Judges, and Rafał Puchalski¹⁹³, a member of the National Council of the Judiciary and the then president of the Regional Court in Rzeszów. However, no information posted on the Disciplinary Officer's website suggests that any disciplinary action has been brought against those judges.

Disciplinary charges related to the membership of an association were also presented to Warsaw Court of Appeal's judge Paulina Asłanowicz. On 14 March 2022, a deputy disciplinary officer informed about the commencement of disciplinary proceedings against Judge Asłanowicz, accusing her of having failed to provide the name of the association in the membership declaration, which is allegedly a violation of the aforementioned provisions of the Common Courts Act.¹⁹⁴ The disciplinary officer learned about this fact from a complaint submitted by a party to the proceedings conducted by the judge, in which the party alleged that the judge would have to suffer from an incurable disease. Meanwhile, as Judge Asłanowicz explained, the reason for her not providing the name of the association in her statement was the desire to protect the private life of her child.¹⁹⁵ Since the name of the association indicates a specific disease that her child has, the judge revealed in the statement only her membership of an association of patients (and parents of patients), suffering from a generically described chronic disease. She further explained that her membership involves only passive participation in meetings devoted to disseminating the knowledge of the disease in question).

2.4.3. Other forms of repression against judges

Proceedings in cases involving the lifting of immunities

One of the most severe forms of repression against judges observed in recent years is the prosecutor's service requests submitted to the Disciplinary Chamber of the Supreme Court in which the prosecution service seeks the Chamber's approval of the criminal prosecution of a judge (the lifting of the judge's immunity).

193 M. Jałoszewski, [Ziobro's disciplinary officers targets a group of 14 judges who organize help for harassed judges \(PL\)](#), OKO.press (5.06.2022).

194 Poland, Disciplinary Officer for Common Courts, [Statement of the Disciplinary Officer for Common Courts concerning the case of judge Paulina A from Appeal Court in Warsaw \(PL\) \(PL\) natio](#) (5.06.2022).

195 M. Jałoszewski, [Disciplinary officer chase the judge who protects her child. The 20th disciplinary proceedings of judge Żurek \(PL\)](#), OKO.press (5.06.2022).

The case of Judge Igor Tuleya

Igor Tuleya is a judge of the Regional Court in Warsaw. In 2017, Judge Tuleya heard an appeal against the prosecution's decision to discontinue the investigation into the vote in the Column Hall of the Polish Parliament in December 2016. At that time, the members of the opposition blocked the parliamentary lectern in solidarity with an opposition deputy who had been excluded from the Sejm's session. In response to the protest, the Speaker of the Sejm moved the session to the Column Hall. Although the opposition was not allowed to join the session and the session itself was marred with irregularities (including, above all, those related to the counting of votes), the Sejm passed several laws. On the notification of opposition parliamentarians, a prosecutor's office opened an investigation into the case, which was, however, discontinued. In December 2017, Judge Tuleya overturned the decision issued by the prosecutor's office and ordered it to re-open the investigation. While verbally delivering the key reasons for the order, Judge Tuleya agreed to the participation of members of the media in the hearing (in the absence of opposition from the prosecutor).

In response to that decision, the prosecution service launched an investigation into the alleged overstepping of authority by Judge Tuleya, which was accused of disseminating information from the proceedings by allowing the media to participate in the hearing. In February 2020, a prosecutor's office filed a request to the Disciplinary Chamber seeking to lift the immunity of Judge Tuleya. However, in June 2020, the Disciplinary Chamber refused to waive the judge's immunity.¹⁹⁶ The ruling indicated that the evidence gathered in the proceedings had provided no basis for a conclusion that Judge Tuleya had committed the imputed offence. The Disciplinary Chamber also pointed out that Judge Tuleya had not overstepped his authority by allowing the media to be present because the provisions of the Code of Criminal Procedure leave it to the court to decide on whether or not the hearing would be public.

The prosecutor's office appealed against the resolution of the Disciplinary Chamber and the Disciplinary Chamber re-examined the request to lift the immunity of the judge

196 Poland, Supreme Court, [the resolution of the Disciplinary Chamber of the Supreme Court of 9.06.2020 \(PL\)](#), case no. I DO 8/20.

at a hearing in November 2020. Having examined the case on appeal, judges of the Disciplinary Chamber decided to repeal the previous resolution and lift Judge Tuleya's immunity from criminal prosecution.¹⁹⁷ The Disciplinary Chamber considered that ordering the publicity of a hearing was not a decision that a court can take freely. Accordingly, the Chamber held, the court needs to take into account the circumstances of the case, including the nature of the hearing and the stage of the proceedings. Based on the above assumption the Chamber ruled that a judge should justify their decision in such a general manner that it "does not give rise to a reasonable suspicion that they have committed an offence [of overstepping their powers – editor's note]." Apart from waiving the judge's immunity, the Chamber suspended him in official duties and reduced his salary by 25%.

On the basis of this decision, the prosecutor's office summoned Judge Tuleya for questioning on three occasions but he refused to appear, indicating that the decision to lift his immunity was taken in an unlawful manner. In March 2021, the prosecutor's office requested the Disciplinary Chamber to order the conveyance of the judge to the questioning but the Chamber dismissed the request. The prosecutor's office may appeal against the decision of the Disciplinary Chamber but, as of the date of writing, there is no information on the submission of such an appeal.

The case of Judge Beata Morawiec

Judge Beata Morawiec is a judge of the Regional Court in Kraków, a former president of that court and the chairperson of the Themis Association of Judges. In September 2020, the National Prosecutor's Office sent a request to the Disciplinary Chamber to lift Judge Morawiec's immunity as part of pending proceedings concerning, among other things, the suspicion of the judge having accepted an unlawful financial advantage.

The prosecutor's office made the request while the action for the protection of personal interests brought by Judge Morawiec against the Minister of Justice was still pending. The judge sought damages for a moral loss caused by a press release of the Ministry of Justice published in November 2017. The release informed about the dismissal of Judge

197 Poland, Supreme Court, [the resolution of the Disciplinary Chamber of the Supreme Court of 18.11.2020 \(PL\)](#), case no. II DO 74/20.

Morawiec from her post and the then-pending anti-corruption investigation conducted in Kraków courts, which remained unrelated to the dismissal of Judge Morawiec but could suggest her involvement in these proceedings.

In October 2020, the Disciplinary Chamber adopted a resolution by which it lifted the immunity of Judge Morawiec, suspended her from official duties and reduced her salary by 50%.¹⁹⁸ After Judge Morawiec appealed against this ruling, the Disciplinary Chamber reconsidered the matter of lifting the judge's immunity in June 2021 but this time denied the request of the prosecutor's office.¹⁹⁹

Cases of judges of the Supreme Court

In March 2021, the National Prosecutor's Office requested the lifting of immunity of three Supreme Court judges: Marek Pietrusiński, Włodzimierz Wróbel and Andrzej Stępka. The requests were part of an investigation that the prosecutor's office was conducting in connection with the alleged misconduct of the judges. In the cases of judges Andrzej Stępka and Włodzimierz Wróbel, the prosecutor's office claimed that due to their negligence a person was unlawfully incarcerated for more than a month. In the proceedings concerning Judge Marek Pietrusiński, the prosecutor's office alleged that the judge had failed to check whether the person concerned was serving a sentence at the time of the Supreme Court adjudication of their case, which resulted in a delay in their release exceeding one month.²⁰⁰

The Disciplinary Chamber considered the prosecution's requests separately. In the case of Judge Włodzimierz Wróbel, the Disciplinary Chamber at first instance dismissed the request for the lifting of immunity. The Chamber concluded that criminal prosecution of this case would be disproportionate to the severity of the potential misconduct.²⁰¹ This decision was appealed by the prosecution and the appeal was due to be heard in February

198 Poland, Supreme Court, [the resolution of the Disciplinary Chamber of the Supreme Court of 12.10.2020 \(PL\)](#), case no. I DO 42/20.

199 Poland, Supreme Court, [the resolution of the Disciplinary Chamber of the Supreme Court of 07.06.2021 \(PL\)](#), case no. II DIZ 27/21.

200 Poland, National Prosecution Office, [Applications to waive the immunities of judges who led to unlawful deprivation of liberty of convicts \(PL\) \(5.06.2022\)](#).

201 Sn.pl, [The Supreme Court refuse to waive the immunity of Supreme Court judge \(PL\) \(6.06.2022\)](#).

2022. However, the day before the appellate hearing, the European Court of Human Rights indicated an interim measure in Judge Wróbel's case. The ECtHR specified that a decision on the lifting of immunity could not be made pending the final determination of his complaints by the Court.²⁰² In the case of Judge Pietrusiński, the Disciplinary Chamber at first instance ordered the lifting of his immunity but did not suspend him from his duties. On the other hand, the proceedings in the case of Judge Stęпка are still in progress as the judge of the Disciplinary Chamber who was to rule on the case failed to appear at the hearing in September 2021.

Proceedings relating to the suspension of judges in their official duties

The Common Courts Act provides for the possibility to suspend a judge from their duties “if, in view of the nature of the judge’s conduct, the integrity of the court or the vital interests of the [judicial] service require their immediate removal from the performance of their duties”. A judge may be suspended by the president of the court or the Minister of Justice for a maximum period of one month. During that time, the disciplinary court should decide whether the judge is to be suspended for the duration of the disciplinary proceedings. The above provision was introduced into the Common Courts Act in 2007. Moreover, the Constitutional Court ruled in 2009 that the provision, insofar as it allows the Minister of Justice to order an immediate cessation of a judge’s duties, is compatible with the Constitution.²⁰³ The Court pointed out that the mere possibility of suspending a judge is only an “emergency” measure and that the suspension decision may be taken if any of the following two conditions are met. First, a judge should be suspended if they are arrested while committing an intentional criminal offence. Second, a suspension should be ordered if – in view of the nature of the judge’s misconduct – it is required to ensure the integrity of the court or essential interests of the judicial service.

The past practice of applying this provision did not generate serious controversy. However, from mid-2021 onwards, a trend is apparent whereby this provision has started to be used as another form of disciplining judges in relation to their rulings.

202 Rzeczpospolita, [ECHR: The Disciplinary Chamber should cease its actions connected with judge Wróbel \(PL\)](#) (5.06.2022).

203 Poland, the judgment of the Constitutional Tribunal of 15.01.2009, case no. K 45/07.

The case of Adam Synakiewicz, a judge of the Regional Court in Częstochowa, may serve as an example of these worrying developments. In one of the appeals heard by Judge Synakiewicz, he assessed the lawfulness of the appointment of a judge of the court of first instance. In response to this decision, the Minister of Justice suspended the judge for a month. Since the Disciplinary Chamber did not adopt a resolution to suspend the judge during the period of his initial suspension, Judge Synakiewicz resumed his duties.

The Minister of Justice issued similar decisions in the case of Judge Marta Pilśnik, who overturned the application of pre-trial detention against a prosecutor pointing out that the Disciplinary Chamber had failed to validly lift the prosecutor's immunity and in the cases of another two judges who challenged the status of another judge appointed by the new NCJ (Agnieszka Niklas-Bibik and Joanna Hetnarowicz-Sikora). In these cases, the European Court of Human Rights issued interim measures and obliged the Polish Government to notify the Court and the judges concerned of the dates of any hearings of the Disciplinary Chamber on their suspension 72 hours in advance.²⁰⁴

However, in the cases of judges Maciej Ferek and Piotr Gąciarek, who were suspended for the same reasons, the Disciplinary Chamber adopted a resolution to suspend them in their duties pending the proceedings.

Attacks in the media

The changes to the justice system introduced in recent years have been accompanied by numerous attacks, targeting specific judges or the judiciary as a whole, from the public media, media outlets supporting the ruling majority and the representatives of that majority themselves.

In 2017, in response to the mass protests organised in defence of the independence of the courts and judges related to three proposals of justice legislation then considered by the Parliament, the Polish National Foundation (founded and financed by state-owned

204 M. Jatoszewski, [The ECtHR protects Polish judges. The Tribunal terminated the suspension of 4 judges \(PL\)](#), Oko.press (5.06.2022).

companies) launched the campaign *Sprawiedliwe sądy* (“Fair Courts”).²⁰⁵ The campaign featured billboards deployed across the country with the slogan “Let it stay the way it was. Are you sure you want it to?”. Another element of the campaign was the setting up of two websites disseminating distorted information about judges and their work.

Pieces critical of judges, in particular those actively engaged in public debate, have also repeatedly appeared in the public media and in media outlets supporting the ruling majority. An example of such a publication can be found in a 2017 article suggesting that Judge Igor Tuleya had decided on a case which supposedly involved a vested interest of his mother.²⁰⁶ Another example would be an article published in 2019, portraying Judge Waldemar Żurek’s statements about disciplinary proceedings as baseless utterances of an extremist online vigilante.²⁰⁷

Active politicians linked to the ruling majority have also made frequent attacks on the judiciary and judges. For example, when announcing changes to the justice system in October 2021, Deputy Prime Minister Jarosław Kaczyński suggested that the Polish judiciary was rife with “anarchy” that needed to be “contained”.²⁰⁸ President Andrzej Duda for his part spoke at election meetings in January 2020 about judicial reforms being blocked by judges “clinging to their privileges”.²⁰⁹ The President ended the same speech by suggesting that “our Polish home should be wiped clean”. Last but not least, Minister of Justice and Prosecutor General Zbigniew Ziobro, referring to persons sanctioned by the Supreme Court’s Disciplinary Chamber, spoke of judges who, “following the style typical of Eastern satrapies, got politically unruly and were punished for it”. According to the Minister, the abolition of the Chamber would lead to the blocking of the possibility of removing from the bench those judges guilty of offences such as rape or domestic violence.²¹⁰

205 [Polsatnews.pl, End of the campaign about the reform of the justice. The Polish National Foundation closed it because it was “successful” \(PL\)](#) (5.06.2022).

206 [TVP.info, Conflict of interests of judge Tulei. He issued a verdict affecting his mother \(PL\)](#) (6.06.2022).

207 [wPolityce.pl, Scandalous words of Waldemar Żurek on disciplinary proceedings \(PL\)](#) (6.06.2022).

208 M. Auzbiter, [Jarosław Kaczyński: We have to control the anarchy in Polish courts \(PL\)](#), Rp.pl, (6.06.2022).

209 D. Flis, [Duda on judges: “We need to clean our Polish house to the end”. Iustitia: “It’s hate speech” \(PL\)](#), OKO.press (6.06.2022).

210 [Bankier.pl, Ziobro sharply on PiS’s dispute with the EU: this is a critical moment \(PL\)](#) (6.06.2022).

The hater scandal

In August 2019, the media described high-ranking officials' and certain judges' involvement in inspiring attacks on judges. Press reports indicated that the then Deputy Minister of Justice, Łukasz Piebiak, some of the disciplinary officers and judges of the common courts (including those NCJ members) were orchestrating the attacks. The media also alleged that these persons collaborated with each other and exchanged information intended to bring the judges into disrepute in the eyes of the public, which was then passed on to sympathetic journalists and promoted on social media.²¹¹ The targeted judges included Prof. Krystian Markiewicz and Monika Frąckowiak, members of the Association of Polish Judges IUSTITIA.

The day after the media reports were published, Deputy Minister Łukasz Piebiak submitted his resignation. A Warsaw prosecutor's office opened an investigation into the conspiracy to inspire attacks on judges, which was then transferred, first to the Regional Prosecutor's Office in Lublin and later, in February 2021, to the Circuit Prosecutor's Office in Świdnica. After more than two years of investigation, no one has been charged.²¹²

In January 2022, in a television interview, Judge Arkadiusz Cichocki, one of the members of the group inspiring attacks on judges, admitted that he had been collecting information about Judge Monika Frąckowiak.²¹³ Several months later, another judge, Tomasz Szmydt, confessed that there was an informal group made up of judges, disciplinary officers and a former deputy minister of justice that communicated on private instant messaging groups. The judge also said that some members of the group were believed to have been receiving sensitive information about other judges from the Ministry of Justice. These materials were used by the pro-government media in their attacks on judges.²¹⁴

211 M. Gaczyńska, [A troll farm in the Ministry of Justice \(PL\)](#), Onet.pl (5.06.2022).

212 M. Gaczyńska, [Hate scandal investigation moved to othe unit \(PL\)](#), Onet.pl (5.06.2022).

213 TVN24, [Judge Arkadiusz Cichocki: a hate scandal took place \(PL\)](#) (5.06.2022).

214 TVN24, [The caste of steadfast judges \(PL\)](#) (5.06.2022).

3. PART THREE

Proceedings before international courts in cases relating to changes in the justice system

3.1. PROCEEDINGS BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

Since 2019, the Court of Justice of the European Union has issued a number of rulings on specific developments in the justice system. Some of these judgments have been made as a result of infringement procedures initiated by the European Commission (to date, five such procedures have been initiated by the Commission in relation to changes in the judiciary). These CJEU judgments concerned the retirement age of judges of common courts and of the Supreme Court, as well as the disciplinary regime for judges.²¹⁵

At the same time, national courts began to refer questions for a preliminary ruling of the Court of Justice relating to specific issues linked to the changes in the structure and functioning of the justice system, including the establishment and work of the new National Council of the Judiciary. Below is a selection of the key CJEU rulings in this area.

215 M. Kalisz, M. Szuleka, M. Wolny, [Changes around the Supreme Court in 2017-2021 \(PL\)](#), p. 44 (23.05.2022).

3.1.1. CJEU judgment of 19 November 2019 (A.K. v National Council of the Judiciary and C.P. and D.O. v Supreme Court)

The judgment of the Court of Justice of the European Union made on 19 November 2019²¹⁶ was the result of questions referred for a preliminary ruling to the CJEU by the Supreme Court in August and September 2018. The Supreme Court was prompted to raise the questions by the entry into force of profound changes to the Polish judicial system, including changes to the procedure for nominating candidates for the judicial members of the National Council of the Judiciary, the lowering of the retirement age for Supreme Court judges and the changes to the structure of the Supreme Court itself.

The preliminary questions were asked by the Labour and Social Insurance Chamber of the Supreme Court which considered the appeals of three Supreme Court judges who had reached the retirement age (65) before the new legislation came into force. They challenged the negative opinion of the new NCJ on their ability to remain in office (Judge A.K.) and the decisions of the President of the Republic of Poland ordering their retirement in the absence of a request to remain in office (Judges C.P. and D.O.). According to the new wording of the relevant provisions, these cases should have been heard by the Disciplinary Chamber of the Supreme Court, but the Chamber was not yet staffed at the time the appeals were filed.

Based on the above proceedings, the Labour and Social Insurance Chamber decided to refer questions to the CJEU for a preliminary ruling. The first question was whether the Disciplinary Chamber of the Supreme Court, formed in a procedure involving the NCJ in its new composition, constitutes an independent court within the meaning of EU law capable of hearing appeals brought by judges. The Labour Chamber also asked if it was permissible for them to disregard the new provisions and hear the appeals of judges, despite the absence of jurisdiction, in a situation where the answer to the above question would be negative.

216 The CJEU judgment (Great Chamber) of 19.11.2019, case no. C-585/18, C-624/18, C-625/18.

In its judgment of 19 November 2019, the CJEU did not determine whether the Disciplinary Chamber and the NCJ are independent bodies, leaving this issue to the assessment of the Supreme Court. However, the CJEU has articulated a number of criteria for making such an assessment which, in the Court's view, are key to guaranteeing the independence of both the NCJ and the Disciplinary Chamber.

The CJEU shared the concerns regarding the National Council of the Judiciary expressed in the questions submitted by the Chamber of Labour and Social Security. First, the CJEU pointed out that the NCJ in its new composition had been formed by reducing the ongoing four-year term in office of then-sitting members of the NCJ. Second, the CJEU noted that 15 of the NCJ members were, at the time, designated by the Parliament, which resulted in a significant increase in the number of NCJ members elected by political forces. Third, the CJEU drew attention to the reported irregularities that may have affected the process of appointing certain members of the NCJ in its new composition.

Referring to the criteria of the independence of the Supreme Court's Disciplinary Chamber, the CJEU initially pointed to the high degree of autonomy with which the Chamber has been endowed. Further, the CJEU expressed concerns about the method of selection of the judges sitting in the Disciplinary Chamber due to the involvement of the newly formed NCJ in that procedure and referred to the exclusive competence of the Disciplinary Chamber to hear employment and pension cases involving judges of the Supreme Court.

Consequently, if the Supreme Court were to assess that, in light of the criteria presented in the CJEU judgment, the Disciplinary Chamber does not constitute an independent court, it may disregard the new provisions that establish the jurisdiction of the Disciplinary Chamber over matters concerning the retirement of Supreme Court judges and refer such a case to the Chamber previously empowered to deal with retirement matters (i.e. the Labour and Social Insurance Chamber).

On 5 December 2019, the Supreme Court (the Labour and Social Insurance Chamber) heard A.K.'s appeal against the negative NCJ opinion. Implementing a judgment of the Court of Justice of the European Union delivered in November 2019, the Supreme Court ruled that the interpretation contained in the CJEU judgment is binding on every court

and state authority in Poland. As the CJEU judgment sets a clear and precise standard for assessing the independence and impartiality of a court applicable in all EU countries, a national court is obliged to examine *ex officio* whether this standard is met in every case it considers, argued the Supreme Court. In discharging this duty, the Supreme Court found that the National Council of the Judiciary, as currently constituted, is not an impartial body and is not independent of the legislative and executive branches of government, while the Disciplinary Chamber of the Supreme Court "is not a court under European Union law and thus not a court under national law".²¹⁷

3.1.2. CJEU judgment of 2 March 2021 (A.B., C.D., E.F., G.H., I.J. v. the National Council of the Judiciary)

In a judgment delivered on 2 March 2021²¹⁸, the Court of Justice of the European Union addressed the issues of the independence of the National Council of the Judiciary and the validity of appeals against the NCJ resolutions adopted as part of the judicial appointment procedure.

This judgment was based on questions referred for a preliminary ruling by the Supreme Administrative Court, which examined appeals of judges applying to join the Criminal (A.B. and C.D.) and Civil (E.F., G.H., I.J.) Chambers of the Supreme Court against the NCJ resolutions. The appeals originated from judges who had applied for a position at the Supreme Court in a competition announced in 2018 but later failed to obtain a recommendation from the NCJ. Upon receiving the appeals, the Supreme Administrative Court issued a preliminary injunction and suspended, to the extent challenged, the enforcement of the NCJ's resolutions on the appointment of judges to the Supreme Court. Despite the preliminary injunction of the Supreme Administrative Court, in September and October 2018, the President of the Republic of Poland appointed 37 judges to the Supreme Court.

The Supreme Administrative Court's request for a preliminary ruling was also prompted by the Constitutional Court's judgment of March 2019 and its implementation by the legislature. In that judgment²¹⁹, the Constitutional Court confirmed that provisions enabling

217 Poland, the judgment of the Supreme Court of 5.12.2019, case no. III PO 7/19.

218 CJEU judgment of 2.03.2021, case no. C-824/18.

219 Poland, the judgment of the Constitutional Tribunal of 25.03.2019, case no. K 12/18.

the election of NCJ judicial members by the Sejm were constitutional. At the same time, the Constitutional Court questioned the constitutionality of the provision allowing appeals to the Supreme Administrative Court against the NCJ resolutions with applications for the appointment of judges to the Supreme Court (Article 44 (1a)). In April 2019, the Sejm adopted an amendment to the National Council of the Judiciary Act²²⁰, excluding the possibility of lodging appeals against NCJ resolutions on the appointment of judges of the Supreme Court (Article 44 (1)). The amendment also discontinued, by operation of law, individual proceedings pending before the Supreme Administrative Court concerning judicial appointments to the Supreme Court.

In the questions submitted for a preliminary ruling, the Supreme Administrative Court asked the CJEU to indicate, first, whether a provision of national law determining that an NCJ resolution to present candidates for judicial posts on the Supreme Court is valid and effective, in the absence of a challenge to such a resolution by all the candidates named therein, infringes the right to an effective remedy and excludes a judicial review of the nomination process. The Supreme Administrative Court also asked about whether the situation in which the judicial members of the NCJ, a body in charge of the nomination procedure, are elected by the legislature undermines the principle of institutional balance. In addition, the Supreme Administrative Court requested an assessment of the question of the compatibility with the right to a court (insofar as it relates to the review of resolutions of the NCJ) of the measure involving the discontinuation, by operation of law, of proceedings pending before the Supreme Administrative Court.

Answering the first question referred by the Supreme Administrative Court, the Court of Justice of the European Union found that a situation in which the lodging of an appeal by a candidate for a judicial post at the Supreme Court against the NCJ's resolution on not submitting a candidature does not suspend the resolution's implementation in relation to the other candidates may conflict with the Member States' obligation to ensure effective judicial protection. This happens, according to the CJEU, when the above situation gives rise to legitimate doubts in the minds of individuals as to the imperviousness of judges

220 The Act of April 26, 2019 amending the Act on the National Council of the Judiciary and the Act – Law on the System of Administrative Courts (Journal of Laws 2019m, item 914).

appointed by the NCJ to direct or indirect influence from the legislature or the executive – and as to their neutrality.

Referring to the third question, the CJEU noted that changes in national legislation that exclude the possibility of reviewing appeals against the resolutions of the National Council of the Judiciary by the Supreme Administrative Court and provide for the discontinuation, by operation of law, of pending proceedings concerning such appeals may also be contrary to EU law. As with the first question, the Court emphasised the need for the Supreme Administrative Court to assess, based on all relevant circumstances, whether those changes are such as to give rise to reasonable doubts in the mind of individuals as to the imperviousness of judges to external factors. In addition, the CJEU has interpreted the principle of the primacy of EU law in a way that requires disapplying the discussed changes in the national legal order, irrespective of their rank, in the event that they are found to be contrary to EU law. Consequently, the Supreme Administrative Court would remain competent to hear appeals against the resolutions of the National Council of the Judiciary regarding the submission of candidatures for positions in the Supreme Court.

In the light of all the considerations, the CJEU found it unnecessary to answer the second question referred by the Supreme Administrative Court.

In May 2021, the Supreme Administrative Court heard the appeals of five judges against the resolutions of the National Council of the Judiciary, adopted in August 2018, in which the NCJ decided not to submit proposals for their appointment to a judicial position in the Supreme Court's the Civil Chamber and the Criminal Chamber. By judgments made on 6 May 2021, the Supreme Administrative Court revoked the contested resolutions in parts concerning the appellants.²²¹ The Supreme Administrative Court entered a similar ruling on 13 May 2021 in relation to the NCJ's resolution not to submit a proposal for the appointment of a sixth person as a judge of the Supreme Court's Civil Chamber.²²²

Proceedings before the CJEU concerning the disciplinary regime for judges

221 Poland, the judgment of the Supreme Administrative Court of 6.05.2021 in the cases: [II GOK 2/18](#), [II GOK 3/18](#), [II GOK 5/18](#), [II GOK 6/18](#) i [II GOK 7/18](#).

222 Poland, the judgment of the Supreme Administrative Court of 13.05.2021, case no. [II GOK 4/18](#).

In July 2021, the CJEU delivered its judgment on the European Commission's complaint regarding the disciplinary liability regime for judges. The CJEU found, *inter alia*, that the Disciplinary Chamber did not provide full guarantees of independence and impartiality. The Court ruled that the appointment of the judges of the Disciplinary Chamber largely depends on the newly formed National Council of the Judiciary and its independence may raise legitimate doubts.

The Polish Government has not executed the judgment, and the European Commission has requested the CJEU to impose financial penalties on Poland in connection with the activities of the Disciplinary Chamber and thus the failure to execute the CJEU interim measures applied in July 2021. In October 2021, the CJEU imposed a daily fine of one million euros on Poland.²²³

In response to these rulings, as well as other proceedings pending before the CJEU in cases concerning changes in the justice system, on 7 October 2021, the Constitutional Court issued a judgment declaring specific provisions of the Treaty on European Union unconstitutional. The Constitutional Court found the provisions of the Treaty unconstitutional insofar as they provide for the integration of the Union's Member States, which, in the Court's view, as a result of the CJEU's jurisprudence, reaches a "new stage" and results, *inter alia*, in EU bodies acting outside their authority and prevents the Republic of Poland from functioning as a sovereign, democratic state. The Constitutional Court also ruled on the unconstitutionality of those provisions of the Treaty which guarantee effective legal protection insofar as they confer on the courts the power to disregard provisions of the Constitution in the adjudication process. The above judgement of the Constitutional Court was widely criticised by the legal community (including retired judges of the Constitutional Court).²²⁴ In their comments, experts pointed out that by delivering such a judgement the Constitutional Court itself had acted outside its authority. They further argued that the judgement only ostensibly ensures the supremacy of the Constitution vis-à-vis EU law because the superior position of the Constitution in relation to EU law had already been sufficiently established in the existing case law of the Constitutional Court.²²⁵

223 The order of the Vice-President of the CJEU of 27.10.2021 issued in the case C-204/21.

224 Poland, the judgment of the Constitutional Tribunal of 07.10.2021, case no. K 3/21.

225 Monitor Konstytucyjny, [The statement of 26 retired judges of the Constitutional Tribunal with 10 untruths in the judgment of the Constitutional Tribunal](#) (PL) (10.10.2021) as well as Łętowska E.,

Meanwhile, the Prosecutor General initiated proceedings before the Constitutional Court concerning the CJEU's competence to impose financial penalties for a failure to impose an interim measure.²²⁶

Moreover, in April 2020, the European Commission launched another infringement procedure, this time concerning the changes introduced by the Muzzle Law. The proceedings concern three key issues: Polish courts being prevented from assessing the requirements of judicial independence and submitting questions to the CJEU for a preliminary ruling; the Extraordinary Review and Public Affairs Chamber's exclusive jurisdiction to rule on issues of judicial independence; and the extension of disciplinary responsibility of judges by holding them responsible for engaging in the assessment of the requirements of judicial independence. As part of that infringement procedure, in July 2021, the CJEU issued an order obliging Poland to suspend the application of the provisions permitting the disciplinary liability of judges for examining the fulfilment of the requirements of judicial independence and impartiality.²²⁷

3.2. PROCEEDINGS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Information from the European Court of Human Rights shows that, as of March 2022, there were 93 cases pending before the Court related to the individual consequences of the changes in justice. The cases are brought both by judges of common courts and the Supreme Court, who have faced various forms of repression by the authorities, as well as by applicants whose cases have been examined by Polish courts composed of, among others, judges appointed by the new NCJ.

To date, as indicated in the previous sections of this report, the ECtHR has delivered seven judgments on specific changes to the justice system (the eighth landmark judgment, *Xero Flor v. Poland*, concerns the changes affecting the Constitutional Court). These judgments relate to the dismissal of judges from the position of deputy presidents of courts (*Broda*

Biernat S., [Łętowska and Biernat explain the false statements indicated in the judgment of the Constitutional Tribunal](#), Rzeczpospolita, 26.10.2021 (9.07.2022)

226 Poland, Constitutional Tribunal, case no. K 8/21

227 The order of the Vice-President of the CJEU of 27.10.2021 issued in the case C-204/21.

and *Bojara v. Poland*), the status of the Disciplinary Chamber (*Reczkowicz v. Poland*), changes concerning the NCJ (including, inter alia, the shortening of the term of their members – *Grzęda v. Poland* and *Żurek v. Poland*); the effects of the NCJ's appointment of judges to the Extraordinary Review and Public Affairs Chamber of the Supreme Court (*Dolińska-Ficek v. Poland*) and to the Civil Chamber of the Supreme Court (*Advance Pharma v. Poland*).²²⁸

At the same time, the ECtHR issued several interim measures obliging the Polish authorities to suspend the proceedings pending the outcome of the proceedings before the Court. These decisions were taken mainly in cases concerning proceedings against judges, including those taken against Włodzimierz Wróbel, Andrzej Stępka and Tomasz Zawisłak (proceedings concerning the lifting of immunity), Agnieszka Niklas Bibik and Joanna Hetnarowicz-Sikora (proceedings concerning the suspension of judges in their duties).

Other proceedings pending before the ECtHR involve specific forms of repression of judges, e.g. transfers to other divisions (e.g. *Biliński v. Poland*, application no. 13278/20), proceedings to lift the immunity of judges (e.g. *Tuleya v. Poland*, no. 21181/29) or pending disciplinary proceedings (e.g. *Juszczyszyn v. Poland*, no. 35599/20). The applications submitted to the ECtHR also relate to cases of persons whose disputes were heard by national courts whose composition included judges appointed by the new NCJ (e.g. *Brodowiak and Dżus v. Poland*, application no. 48599/20, or a group of applications including e.g. *Dudek v. Poland*, no. 41097/20, *Ejsmont v. Poland*, no. 26638/21 or *Michała v. Poland*, no. 1510/22 concerning cases heard by judges appointed to the Civil Chamber by the new NCJ).

Despite the ever-increasing number of cases on the effects of changes in justice brought before the ECtHR and the judgments that have already become final, the Government makes no effort to ensure the systemic implementation of these judgments. Moreover, since mid-2021, the representatives of the ruling majority have started to petition the Constitutional Court with the ostensible aim to perform the constitutional review of

228 ECHR, the case *Broda and Bojara v. Poland* case no. 26691/18 and 27367/18; *Reczkowicz v. Poland* case no. 43447/19; *Dolińska-Ficek and Ozimek v. Poland* case no. 49868/19 and 57511/19; *Advance Pharma sp. z o.o. v. Poland* case no. 1469/20; *Grzęda v. Poland* case no. 43572/18; case *Żurek v. Poland* case no. 39650/18.

specific provisions of the European Convention for the Protection of Human Rights. However, these petitions are in fact intended to limit the application of ECtHR judgments. In the judgment of 10 March 2022, the Constitutional Court reviewed the constitutionality of Article 6 of the European Convention for the Protection of Human Rights, which provides for the right to a fair trial before a court established by law. The Constitutional Court ruled that this provision, insofar as it allows the ECtHR to “independently create standards regarding the procedure for the appointment of judges of national courts” and includes the subjective right of a judge to perform an administrative function within the structure of the court, and also authorises the ECtHR or national courts to assess the compatibility of laws on the judicial system with the Constitution and the Convention, is unconstitutional.²²⁹ That judgement of the Constitutional Court was a response to earlier judgments of the ECtHR concerning changes in the justice system. Like the Constitutional Court’s earlier judgment on the provisions of the Treaty on European Union, the March judgment was also strongly criticised by the legal community. Retired judges of the Constitutional Court made a statement in which they observed “that the ruling in question is another scandalous example of jurisprudence violating the Constitution” and noted that “[m]any judgments delivered in recent years which declared rulings of the CJEU and ECtHR unconstitutional have not only been beyond of the Constitutional Court’s jurisdiction but also testified to the intention to eliminate external review of legislation ... This exacerbate the crisis of the constitutional state, including, above all, the principle of a democratic state ruled by law and the principle of separation of powers, and caused Poland to be increasingly isolated in Europe.”²³⁰

Furthermore, the Government is also refusing to comply with the ECtHR’s obligations to compensate the applicants – in July 2022, the media reported that Poland would not pay the EUR 15,000 in compensation awarded to judges Monika Dolińska-Ficek and Artur Ozimek.²³¹ According to the HFHR, “the steps taken by Polish authorities to selectively respect international obligations, including CJEU and ECtHR judgments, undermine the

229 The Constitutional Tribunal judgment of 10.03.2022, case no. K 7/21.

230 Jatoszewski M., [26 judges of the Constitutional Tribunal comments the judgment of the Tribunal](#) (PL), *Oko.press*, 14.03.2022 (9.07.2022)

231 [The government does not intend to pay the judges despite the judgment of the ECHR](#) (PL), *Rzeczpospolita*, 4.07.2022 (9.07.2022).

democratic nature of our country. Such practices contradict the values and principles guaranteed by the Polish Constitution and serve only to advance partisan goals. However, the real price for these actions will be paid by the citizens of the Republic of Poland when their rights are violated by the authorities”²³²

232 Helsinki Foundation for Human Rights, [Statement of the HFHR concerning the Constitutional Tribunal judgment \(PL\)](#), 6.07.2022 (9.07.2022)



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