# Disciplinary proceedings against judges of common courts in Poland

## 2022 monitoring report

HELSINKI FOUNDATION
FOR HUMAN RIGHTS

*Disciplinary proceedings against judges of common courts in Poland. 2022 monitoring report*

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# Glossary of abbreviations and terms:

- CC – Act of 6 June 1997 – the Criminal Code
- CCP – Act of 6 June 1997 – the Code of Criminal Procedure
- CJEU – Court of Justice of the European Union
- CPO – Act of 20 May 1971 – the Code of Petty Offences
- CPR – Chamber of Professional Responsibility
- DC – Disciplinary Court at a court of appeal (first instance disciplinary court)
- DCSC – Disciplinary Chamber of the Supreme Court
- DDOJCC – Deputy Disciplinary Officer for Judges of Common Courts
- DOJCC – Disciplinary Officer for Judges of Common Courts
- ECHR – European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
- ECtHR – European Court of Human Rights
- LSCC – Act of 27 July 2001 – the Law on the System of Common Courts
- Muzzle Law – Act of 20 December 2019 amending the Act – the Law on the System of Common Courts, the Act on the Supreme Court and certain other acts
- NCJ – National Council of the Judiciary
- SC – Supreme Court

# Introduction

- Since the end of 2015, Poland has been experiencing a crisis of the rule of law, marked by, among other things, the seizure of political control over independent institutions (including, for example, the Constitutional Court, public media and other institutions of the state), the ignoring of binding judgments of national and international courts and the tailoring of laws to the vested interests of the ruling majority. The rule of law crisis is accompanied by systemic changes to the existing legal system.

- Since 2015, the ruling majority has adopted at least 25 pieces of legislation pertaining to the system and operation of the justice bodies in Poland – the Constitutional Court, the Supreme Court and the common and military courts. Successive changes to the judiciary have brought about, among other things, a new judicial disciplinary system.

- Disciplinary proceedings against judges of common courts are based on the model of criminal proceedings, in which a judge appointed for this purpose acts as a prosecutor and the case is heard by a tribunal made up of other judges of common courts or the Supreme Court. Judges accused in disciplinary proceedings should enjoy procedural guarantees corresponding to those enjoyed by defendants in criminal cases, above all the rights of the defence.

- In 2018, new provisions came into force, which significantly extended the influence of the Minister of Justice over the judicial disciplinary system. The Minister has been given, inter alia, the power to appoint a "central" Disciplinary Officer for Judges of Common Courts and their Deputies and to confer the duties of a disciplinary judge. Meanwhile, a Disciplinary Chamber has been established in the Supreme Court, authorised to hear disciplinary cases of judges.

- Since the introduction of changes in the judicial disciplinary system, there has been a significant increase in the number of politically motivated disciplinary proceedings,

in particular, those launched against judges actively engaged in public debate. Certain disciplinary proceedings have been initiated in relation to the content of rulings made by judges, their public statements, their presence at certain public events or their membership in professional associations.

- With the current set-up of the system of disciplinary courts, which includes judges defectively appointed by the National Council of the Judiciary in its current composition, judicial disciplinary proceedings do not guarantee that cases will be heard by an independent and impartial court established by law, a guarantee that forms part of the broader right to a fair trial. This follows from a number of rulings issued by the European Court of Human Rights, the Court of Justice of the European Union and the standards contained in those rulings which should guide the legislator in restoring the state of legal conformity. Neither the amendments introduced in July 2022 by the amending law sponsored by the President of the Republic of Poland nor those proposed in the latest draft fully implement these rulings into the Polish system.

- From March to July 2022, the Helsinki Foundation for Human Rights monitored twelve disciplinary proceedings, which included cases of judges of common courts pending before courts of first instance and the Disciplinary Chamber of the Supreme Court. The monitoring covered both cases where there was an underlying element of potential political motivation and those involving ordinary disciplinary offences. In the first category of cases, a much stronger involvement of the Disciplinary Officer for Judges of Common Courts and his two Deputies was evident.

- The analysis of the course of disciplinary proceedings has shown, above all, that they are excessively lengthy: the longest of the observed proceedings has been pending before a court of first instance for almost 5 years, in another one, the court of first instance issued a judgment more than 3 years after the proceedings were commenced. The excessively long duration of proceedings may constitute an additional reprisal against judges and furthermore demonstrates the low efficiency of the disciplinary system.

- The monitored cases were also decided by panels composed of judges appointed by the National Council of the Judiciary in its current formation. However, none of the motions for disqualification of a judge made in the monitored proceedings was granted.

- While the changes to the law introduced in 2018 limited judges' rights of the defence (e.g. by allowing certain procedural steps to be carried out in the absence of the defendant and shortening the time limits for submitting evidence), the monitoring itself did not reveal any significant violations of these rights in practice.

- In the majority of the monitored proceedings, the principle of publicity was observed and members of the public were allowed to be present during court hearings. However, the problems identified in this area concerned access to the content of court decisions and cause lists itemising disciplinary cases.

- The report is based on an analysis of the legislation and points to legislative changes introduced in 2022 and further amendment proposals. It also refers to the jurisprudence of national and international courts and the literature on the subject. The essential part of the monitoring report is based on the personal observation of individual disciplinary proceedings and interim monitoring reports.

# Contents

# Part I.

# LEGISLATIVE AMENDMENTS CONCERNING THE DISCIPLINARY SYSTEM AND THE PRACTICE OF THEIR APPLICATION

## 1. Disciplinary liability of judges of common courts – key features and changes in the law

Under Polish law, a judge, in connection with his or her office, may incur three types of legal liability: criminal liability (subject to the immunity enjoyed by judges[1]), civil liability and disciplinary liability.

The source of the disciplinary liability of judges is to be found in the provisions of the Constitution of the Republic of Poland, which, on the one hand, sets out the principle of irremovability of judges[2] and, on the other, provides for the possibility of removing a judge from office or transferring him to another location against his will. However, this can only be done by a court decision and only in cases specified in a separate law.[3]

In Poland, the disciplinary liability of judges of common courts, i.e. judges of district, regional courts or courts of appeal, as well as the system of disciplinary courts, is subject to detailed regulation primarily under the 2001 Act – the Law on the System of Common Courts (LSCC).[4] Since its entry into force, the LSCC has been amended several times, with the most momentous changes concerning the disciplinary regime having been introduced in 2017, 2020 and 2022.

1 Constitution of the Republic of Poland of 2 April 1997, Article 181.

2 *Ibid*., Art. 180(1).

3 *Ibid*., Art. 180(2).

4 Act of 27 July 2001 – the Law on the System of Common Courts (*Ustawa z dnia 27 lipca 2001 r. Prawo o ustroju sądów powszechnych*), Section II, Chapter 3, Articles 107–133a.

## 1.1. Scope of disciplinary liability of judges (disciplinary offences) and disciplinary penalties

Traditionally, the scope of disciplinary liability of judges included (as of 2018, this catalogue has since been expanded) two types of professional misconduct, otherwise known as disciplinary offences: the obvious and blatant violation of the law and the violation of the integrity of the office. At the same time, one act may be included in both categories. Furthermore, a judge may also be liable to disciplinary action for other professional misconduct, consisting mainly of violations of the provisions of the LSCC or employment law.

The first type of tort **(obvious and blatant violation of the law)** must result from a judge's infringement of specific legal provisions. Such an infringement may be related to the sphere of the judge's judicial activity, i.e. deficiencies directly related to the manner in which the proceedings are conducted and strictly judicial errors. The prevailing view is that the infringement may primarily concern adjectival law (the procedure), not substantive law[5]. Adjectival (procedural) law is a set of legal norms governing proceedings pending before judicial authorities and public administration bodies which implements the norms of substantive law and enables their enforcement. Procedural law is codified, for example, in the Code of Criminal Procedure (CCP) or the Code of Civil Procedure, while the norms of substantive law, implemented by the rules of procedure, arise from the provisions of the Criminal Code (CC) or the Civil Code (CivC).

What is more, the violation of the law must be "obvious" and "blatant" in nature. The first attribute exists if the error made is easily identifiable and the correct provision could have been applied without further consideration. In turn, a violation of the law is gross when it simultaneously compromises the rights and substantial interests of the participants in the proceedings or causes a threat to the interests of justice or the court[6].

An obvious and blatant violation of the law may relate, for example, to the rules of criminal or civil procedure governing the time limits for the preparation of statements of grounds.

5 A. Górski, *Prawo o ustroju sądów powszechnych. Komentarz*, Warszawa 2013, note 23 to Art. 107.

6 J. Gudowski (red.), *Komentarz do ustawy – Prawo o ustroju sądów powszechnych, [in:] Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz, 2nd edition*, Warszawa 2009, note 17 to Art. 107.

Other examples of this type of disciplinary offence derived from the jurisprudence of courts include the issuing of judgments without any legal basis, depriving a party of his or her rights of the defence or depriving a person of his or her liberty in a manifestly unjustified manner.

The other type of professional misconduct **(violation of the integrity of the office)** may, in turn, involve conduct contrary to certain provisions of the LSCC, in particular those providing for the wording of the judicial oath of office[7], the obligation to have an impeccable character, or the obligation to be of irreproachable character[8], or the obligation to uphold the dignity of the judge's office and to avoid anything that might bring the judge's dignity into disrepute or undermine confidence in his or her impartiality.[9]

Violation of the integrity of the office may also result from conduct incompatible with norms laid down in the set of rules of professional ethics for judges, which every judge is obliged to observe, both in and out of court. These rules are currently prescribed by a 2017 resolution of the National Council of the Judiciary (the body established by the Polish Constitution to uphold the independence of the courts and judges).[10] Pursuant to the resolution, while in office, a judge should, inter alia, undertake procedural steps without delay (§ 8), avoid behaviour that could undermine confidence in his or her independence and impartiality (§ 10) and refrain from publicly expressing his or her opinion on pending proceedings (§ 13). Out of court, on the other hand, a judge must not in any way create even the appearance of disrespecting the legal order (§ 16) and provide legal services (§ 21) and should exercise restraint when using social media (§ 23).

Finally, a violation of the integrity of the office may result from a petty offence committed by the judge. A petty offence (Polish: *wykroczenie*) is a prohibited act presenting a lower degree of social harm than a criminal offence (*przestępstwo*), described in the Code of Petty Offences[11] or a law. Under the LSCC, as a rule, a judge's liability for a petty offence is

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7 Act of 27 July 2001 – the Law on the System of Common Courts, Art. 66 § 1.

8 *Ibid*., Art. 61 § 1 (2).

9 *Ibid*., Art. 82 §2.

10 National Council of the Judiciary, Resolution No. 25/2017 of the National Council of the Judiciary of 13 January 2017 on the publication of a consolidated text of the Set of Rules of Professional Ethics for Judges and Associate Judges.

11 Act of 20 May 1971 – the Code of Petty Offences.

solely of a disciplinary nature.[12] However, in the case of petty offences classified as traffic infractions (e.g. exceeding the maximum speed limit on the road), a judge may agree to be held criminally liable and accept a penalty notice (fine), which excludes disciplinary liability for this act.[13]

In February 2020, an amendment to the LSCC came into force[14] which expanded the list of disciplinary offences to include three more types of conduct. Due to its repressive nature, this amendment has become commonly known as the "Muzzle Law". It is widely perceived that the purpose of the Muzzle Law was to introduce a chilling effect among judges involved in defending the rule of law in Poland who, for example, refused to hear cases in panels with judges appointed by the new NCJ, referred questions concerning the judiciary for a preliminary ruling of the Court of Justice of the European Union or made public statements. The newly introduced types of disciplinary offences involve: (1) **an act or omission which may prevent or significantly impede the functioning of a judicial authority**; (2) **actions questioning the existence of the official relationship of a judge, the validity of a judicial appointment, or the constitutional mandate of an organ of the Republic of Poland**; (3) **public activities incompatible with the principle of independence of the courts and judges**. In February 2022, the Disciplinary Officer for Judges of Common Courts informed that two judges had been charged with questioning the effectiveness of the appointment of other judges by examining the legality of their appointment (the matter of one of the defendants was also referred to a disciplinary court)[15].

In addition, with the entry into force of a law abolishing the Disciplinary Chamber of the Supreme Court in July 2022[16] (see below), another type of professional misconduct has been added, namely **refusal to administer justice**. At the time this report was written, there are no reports that would indicate this type of offence being invoked in the practice of disciplinary officers or disciplinary courts.

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12 Act of 27 July 2001 – the Law on the System of Common Courts, Art. 81 § 1.

13 *Ibid*., Art. 81 §§ 2–4.

14 Act of 20 December 2019 amending the Act – the Law on the System of Common Courts, the Act on the Supreme Court and certain other acts.

15 Media release of the Deputy Disciplinary Officer for Judges of Common Courts, 7 February 2022 (accessed on 13.12.2022).

16 Act of 9 June 2022 amending the Act on the Supreme Court and certain other acts.

On the other hand, the above-mentioned amendment of July 2022 introduced a new provision of the LSCC, according to which the submission of a request for a preliminary ruling referred to in Article 267 of the Treaty on the Functioning of the European Union to the Court of Justice of the European Union is not a disciplinary offence.[17] This change was the result of negotiations between the Polish Government and the European Commission on funds from the National Recovery Plan and the implementation of one of the "milestones" relating to the area of the judiciary, including the judicial disciplinary system.[18]

> As a result of the amendments, under the current wording of Article 107 § 1 LSCC, **a judge of a common court may incur disciplinary liability for the following types of disciplinary offences:**
>
> (1) an obvious and blatant violation of the law (para. 1);
>
> (2) refusal to administer justice (para. 1a);
>
> (3) an act or omission which may prevent or significantly impede the functioning of a judicial authority (para. 2);
>
> (4) actions questioning the existence of the official relationship of a judge, the validity of a judicial appointment, or the constitutional mandate of an organ of the Republic of Poland (para 3);
>
> (5) public activities that are incompatible with the principle of independence of the courts and judges (para. 4);
>
> (6) violation of the integrity of the office (para. 5).

In December 2022, deputies of the ruling majority presented a proposal for an amendment to the Act on the Supreme Court and other acts which sought to limit the scope of disciplinary liability of judges by, among other things, abolishing disciplinary liability for issuing rulings concerning the status of judges. However, the amendment did not change the provisions on disciplinary liability for refusal to administer justice.[19]

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17 Act of 27 July 2001 – the Law on the System of Common Courts, Art. 107 § 3 (2).

18 Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, COM(2022) 268 final, 1 June 2022, reform F1.1.

19 Parliamentary Bill amending the Act on the Supreme Court and certain other acts, Paper No. 2870.

## 1.2. Disciplinary penalties

The provisions on **disciplinary sanctions** that may be imposed on judges of common courts have also evolved.

Traditionally, the list of disciplinary sanctions included five items. Disciplinary sanctions were, in order of severity, **admonishment, reprimand, removal from the position held, transfer to another position and the removal of a judge from office**. The imposition of certain types of penalties further entailed certain consequences with regard to the judge's financial or professional situation: for example, in the case of a reprimand, the period of service required to obtain a higher rate of remuneration was extended, and removal from office or transfer to another place of service deprived a judge of the opportunity to be promoted to a higher court for several years. If the most severe of the penalties, i.e. removal from office, was imposed, the affected judge was permanently disqualified from applying for any judicial office.

In April 2018, the list of penalties was extended by the addition of the penalty of the **reduction of the basic remuneration by 5% to 50%** for a period of six months to two years. Subsequently, a further type of penalty – **a fine equal to one month's basic remuneration plus certain allowances** – was introduced by the Muzzle Law in February 2020.

Moreover, the Muzzle Law introduced a solution whereby, in the event of a conviction for committing a disciplinary offence added by its provisions (see paras. 2 to 4 as above), the disciplinary court may, as a general rule, impose only the two most severe penalties, namely transfer to another position or removal from office.

An additional disadvantageous consequence of an unappealable disciplinary conviction is its obligatory (until 2018: only optional) publication, namely the posting of the operative part of the judgment on the Supreme Court's website.[20] The disciplinary court may only exceptionally derogate from this obligation. As of 2018, final notices on the transfer of a judge to another post and those on the removal of a judge from office are also subject

20 Art. 109a LSCC.

to publication by the Minister of Justice (in the Official Gazette of the Republic of Poland *Monitor Polski*).[21]

The disciplinary court may waive the disciplinary penalty in a "minor case", which is not defined in the law. In such a scenario, finding a judge guilty of a disciplinary offence does not have any adverse effect on the convicted judge but merely constitutes a finding of moral reprehensibility of the judge's conduct.

## 1.3. The disciplinary court, prosecutors (disciplinary officers), defence counsel

### Disciplinary court

Initially, after the LSCC entered into force in 2001, the adjudication of disciplinary cases of common court judges belonged to the courts of appeal and the Supreme Court. **Disciplinary courts located at each of the 11 courts of appeal** operated as courts of first instance in disciplinary matters. If an appeal was lodged against a judgment handed down by the "local" disciplinary court, the case was heard in the second instance by the Supreme Court.

The structure of the disciplinary justice system for common court judges was modified with the entry into force of the new Supreme Court Act[22], which became effective on 3 April 2018. The new law provided, inter alia, for the creation of a new chamber of the Supreme Court, the **Disciplinary Chamber**, which assumed jurisdiction over disciplinary cases of judges and members of other legal professions.

In the new model of disciplinary justice for judges, the courts of appeal remained the disciplinary courts of first instance. However, the Disciplinary Chamber also assumed first-instance jurisdiction in cases involving, for example, disciplinary offences which also contain the elements of intentional offences prosecuted by public indictment and in the case of disciplinary offences introduced by the Muzzle Law involving the questioning of another judge's official relationship, the validity of another judge's appointment or the

21 Art. 109b LSCC.

22 Act of 8 December 2017 on the Supreme Court.

constitutional mandate of an authority of the Republic of Poland. Above all, however, the Disciplinary Chamber was awarded the exclusive competence in dealing with disciplinary cases as the court of second instance.

The new chamber was formed entirely from persons appointed with the participation of the new National Council of the Judiciary, which led to many legal concerns regarding the status of the judges appointed by the NCJ and the legality of the Chamber's operation (see National and international jurisprudence concerning the Disciplinary Chamber and the disciplinary system). Furthermore, among other things, because of the far-reaching organisational distinctiveness of the Disciplinary Chamber within the Supreme Court, it was pointed out that the Chamber had the character of an extraordinary court, the functioning of which is only permitted under the Constitution in times of war[23]. An important and controversial novelty in the functioning of the Disciplinary Chamber was also the presence of lay judges (in both instances). As a result, the Disciplinary Chamber examined cases in the basic composition of 2 professional judges and 1 lay judge.

Polish authorities decided to dissolve the Disciplinary Chamber in the face of a growing body of jurisprudence from national[24] and international courts (CJEU and ECtHR)[25] that challenges the Chamber's independence. Another factor leading to the dissolution was the adoption of the National Recovery Plan and its milestones that must be reached for the disbursement of further instalments of financial support to Poland.

On 15 July 2022, a law abolishing the Disciplinary Chamber of the Supreme Court (replaced by the **Chamber of Professional Responsibility**, with a comparable remit) came into force.[26] The procedure for selecting 33 candidates for the Chamber's

23 W. Wróbel, "Izba Dyscyplinarna jako sąd wyjątkowy w rozumieniu art. 175 ust. 2 Konstytucji RP", (2019) 1–2 Palestra.

24 See the resolution of a joint panel of the Civil, Criminal, and Labour and Social Insurance Chambers of the Supreme Court of 23 January 2020, file no. BSA I-4110-1/20.

25 See CJEU, judgment of 19 November 2019 (Grand Chamber), Joined Cases C-585/18, C-624/18 and C-625/18; CJEU, judgment of 15 July 2021 (Grand Chamber), Case C-791/19; ECtHR, Reczkowicz v. Poland, no. 43447/19, 22 July 2021.

26 Act of 9 June 2022 amending the Act on the Supreme Court and certain other acts.

judgeship took place by draw of lots on 9 August 2022.[27] On 18 September 2022, the President of the Republic of Poland appointed 11 persons from this group to serve as judges of the Chamber of Professional Responsibility.[28] Of these, six were nominated by the National Council of the Judiciary elected under the laws amended in 2017. As signalled by, among others, the HFHR[29], the new chamber is as defective as its predecessor, owing to the procedure for the nomination of candidates and the involvement of the new NCJ.

In December 2022, a parliamentary bill to amend the Act on the Supreme Court and certain other acts was tabled in the Sejm.[30] The main purpose of the bill was to transfer the function of the top disciplinary court for the judges of the Supreme Court, common courts and military courts to the Supreme Administrative Court.

It should be noted that the Disciplinary Chamber of the Supreme Court has also been endowed with other powers relevant to the status of judges of common courts. First, the DCSC was given jurisdiction to hear requests to authorise the criminal prosecution or pre-trial detention of judges and assistant judges suspected of criminal offences (i.e. cases for the lifting of judicial immunity).[31] Second, the DCSC had the power to decide on the suspension of a judge against whom it had adopted a resolution on the lifting of immunity or against whom disciplinary proceedings had been instituted[32] (which is accompanied by a 25-50% reduction in remuneration), as well as on an extension of the suspension of a judge ordered by the president of his or her court or the Minister of Justice for the duration of the disciplinary proceedings against the judge concerned.[33] The above competences have now been taken over by the Chamber of Professional Responsibility of the Supreme Court. The Disciplinary Chamber of the Supreme Court

27 Gazetaprawna.pl, "Zakończyło się losowanie sędziów do Izby Odpowiedzialności Zawodowej SN [LISTA NAZWISK]", 9 August 2022.

28 Gazetaprawna.pl, "Duda powołał sędziów Izby Odpowiedzialności Zawodowej SN. Szrot: Prezydent kierował się względami merytorycznymi", 18 September 2022.

29 Helsinki Foundation for Human Rights, "Nowe pomysły prezydenta na Izbę Dyscyplinarną Sądu Najwyższego – stare problemy z praworządnością", 18 March 2022.

30 Parliamentary Bill amending the Act on the Supreme Court and certain other acts, Paper No. 2870.

31 Act on the Supreme Court, Art. 27 § 1 (1a).

32 Art. 129 § 1 LSCC.

33 Art. 130 § 3 LSCC.

also heard matters of employment and social security law concerning judges of the Supreme Court and the retirement of these judges.[34]

**Disciplinary courts at courts of appeal** are composed of judges with at least 10 years of judicial experience. The Minister of Justice appoints them to serve in the disciplinary court for a 6-year term after consulting with the NCJ.[35] The presidents of disciplinary courts are appointed by the President of the Supreme Court for a three-year term.[36]

As a rule, the disciplinary courts attached to the courts of appeal decide cases in three-member panels. A panel of the disciplinary court is chosen by drawing lots, from a list of all judges of the court concerned, including at least one judge hearing criminal cases on a daily basis.[37] A panel of the disciplinary court is presided over by a judge hearing criminal cases on a daily basis, the most senior in service.

From 15 July 2022, jurisdiction to hear a judge's case is vested in the disciplinary court in whose district the judge serves.[38] Previously, such a court was excluded from hearing the judge's case and, in each case, a disciplinary court was designated by the President of the Disciplinary Chamber of the Supreme Court at the request of a disciplinary officer. Currently, a disciplinary court is designated by the Chamber of Professional Responsibility (formerly the Disciplinary Chamber) only in cases involving judges of either courts of appeal or regional courts. Yet the choice is narrowed exclusively to disciplinary courts whose districts are adjacent to the district of the court of appeal in which the judge concerned serves. The problem of the inconvenience of travelling a considerable distance between the place of work and the disciplinary court, which may be, on some occasions, several hundred kilometres, was reported in the case of at least two judges whose proceedings were monitored (see Part II).

34 Act on the Supreme Court, Art. 27 § 1 (2)–(3).
35 Art. 110a LSCC.
36 Art. 110b LSCC.
37 Art. 111 LSCC.
38 Art. 110 § 3 LSCC.

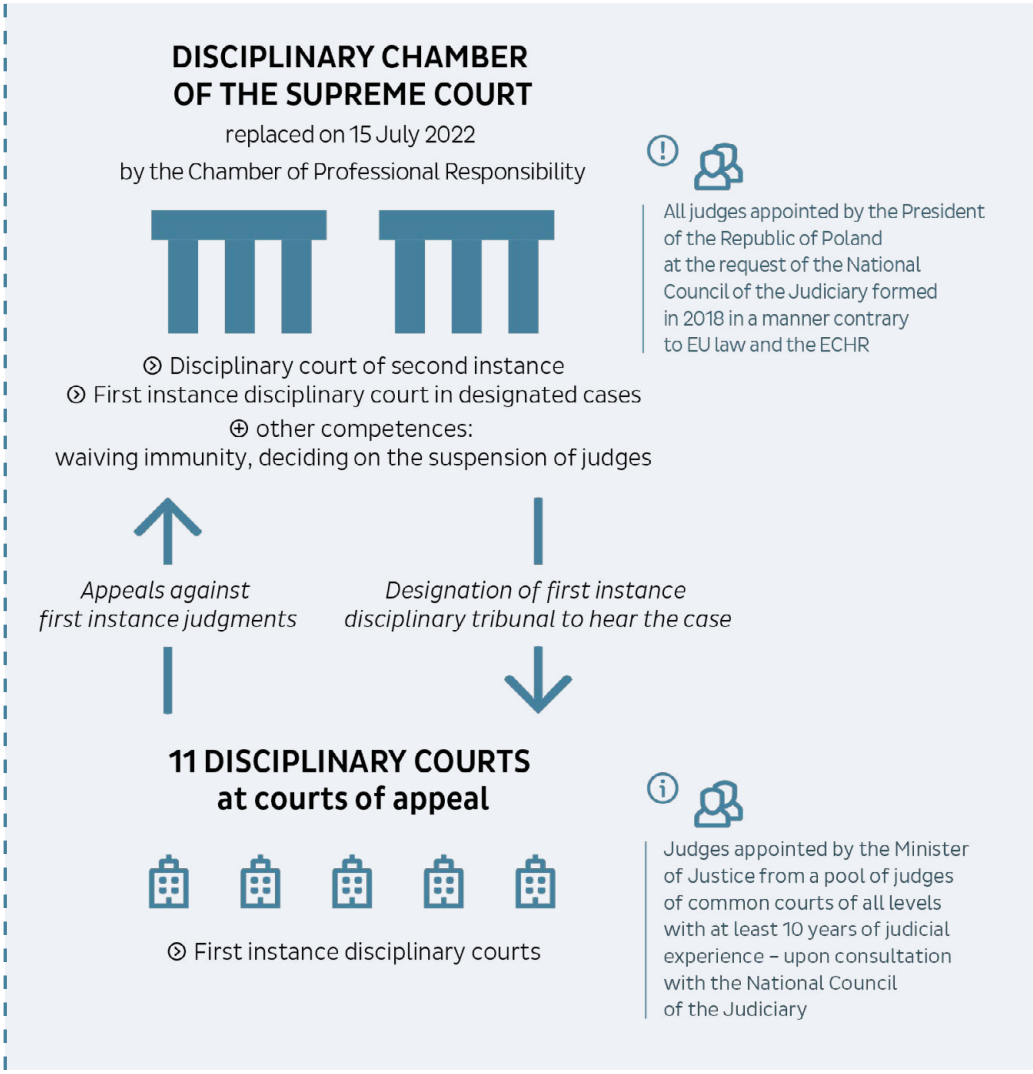


*Diagram 1. Structure of disciplinary courts handling disciplinary cases of common court judges in Poland*

## Disciplinary officers

In 2018, changes were also introduced regarding **prosecutors before disciplinary courts (disciplinary officers)**. Until 2018, there were two types of prosecutors in disciplinary proceedings. The first one included disciplinary officers authorised to argue cases concerning judges of courts of appeal, as well as presidents and deputy presidents of regional courts. They were elected for a four-year term by the National Council of the Judiciary

from among candidates nominated by general assemblies of judges of courts of appeal and were attached to the NCJ. The second group consisted of deputy disciplinary officers, authorised to prosecute cases of judges of regional and district courts. They were elected for two-year terms for individual districts of courts of appeal and regional courts by the local assemblies of judges.

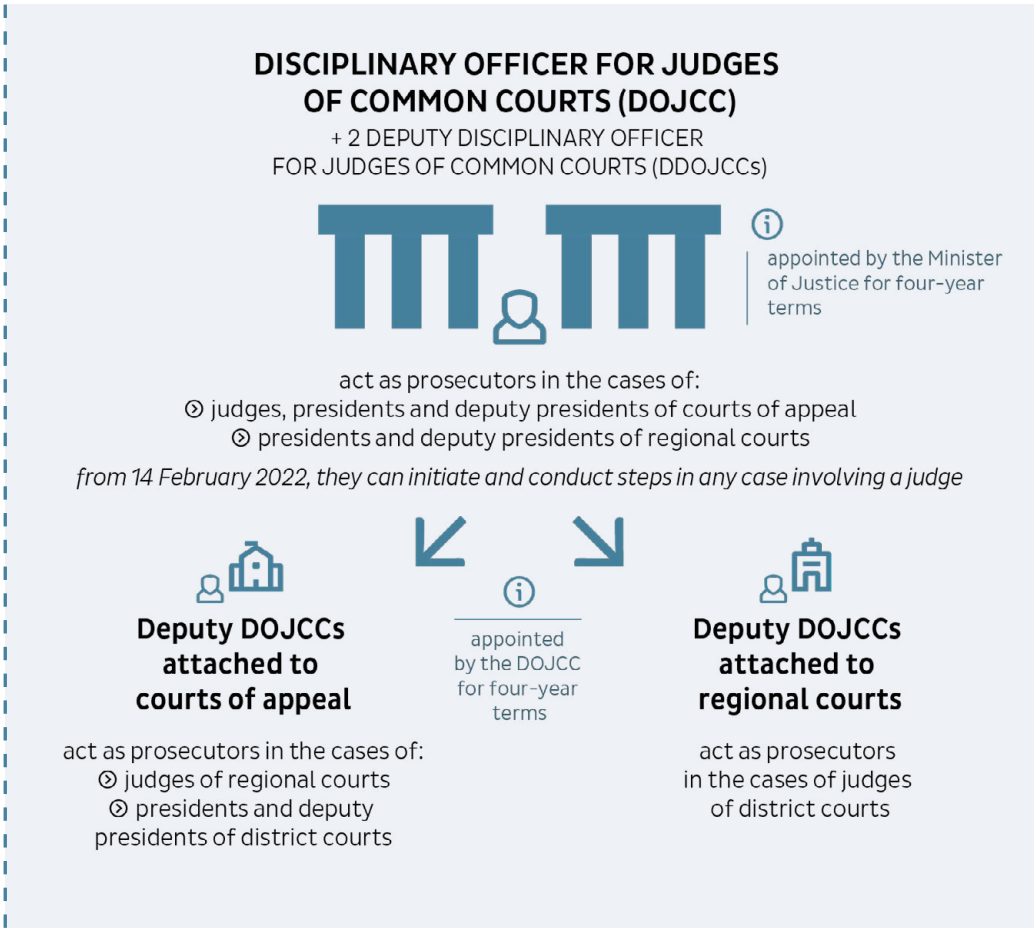


*Diagram 2. Disciplinary officers as prosecutors acting before disciplinary courts*

In April 2018, the amendment to the LSCC established the roles of Disciplinary Officer for Judges of Common Courts (DOJCC) and two Deputy Disciplinary Officers for Judges of Common Courts (DDOJCCs)[39], appointed by the Minister of Justice for a four-year term. In addition to the above, there are also deputy disciplinary officers attached to the courts

39 Art. 112 LSCC.

of appeal and deputy disciplinary officers attached to the regional courts.[40] They also serve for four years, except that they are appointed by the Disciplinary Officer for Judges of Common Courts. Disciplinary officers attached to a court of appeal are appointed from among judges of a given court or regional courts of a given court's district. Disciplinary officers attached to a regional court are appointed from among judges of district courts of a given regional court's district.

As a general rule, the Disciplinary Officer for Judges of Common Courts and his two deputies may bring disciplinary actions against judges of courts of appeal and the presidents and deputy presidents of courts of appeal and regional courts. Other disciplinary officers, depending on the level at which they operate, may bring cases against judges of regional courts (deputy disciplinary officers at courts of appeal) and district judges and associate judges (deputy disciplinary officers at regional courts).

However, the Muzzle Law **introduced the possibility for the Disciplinary Officer for Judges of Common Courts and his two Deputies to take up and pursue any case** involving a judge. This change was introduced in response to the practice employed by first instance disciplinary courts which discontinued certain disciplinary proceedings due to the absence of a complaint made by an authorised disciplinary prosecutor (i.e. originating from the Disciplinary Officer for Judges of Common Courts rather than from his deputies at the level of courts of appeal or regional courts).

> One of the first rulings of a first instance disciplinary court that discontinued disciplinary proceedings due to the absence of a complaint from an authorised prosecutor was the **order of 14 January 2020 made by the Disciplinary Court at the Court of Appeal in Wrocław (file no. ASD 2/19)**.
>
> The case at hand concerned two statements posted on social media by a district court judge in which she expressed criticism of the candidacy of a former public prosecutor for a seat on the Disciplinary Chamber of the Supreme Court and of the activities of the Minister of Justice. Disciplinary proceedings in this case were launched by the initiative of the Deputy Disciplinary Officer for Judges of Common Courts in August 2019, before the entry into force of the Muzzle Law. The DDOJCC charged the defendant with a violation of the integrity of the office.

40 Art. 112 §§ 6–7 LSCC.

> At the outset of the statement of grounds, the disciplinary court noted that "the condition for disciplinary proceedings against a judge for disciplinary misconduct to be conducted before a disciplinary court is the existence of a substantive complaint [a request to examine a disciplinary case] from an authorised prosecutor". In the court's opinion, the request in this case did not come from an authorised prosecutor and therefore the proceedings should be discontinued.
>
> In the statement of grounds, the court pointed out, inter alia, that the legislation established a clear-cut division of jurisdiction between the Disciplinary Officer for Judges of Common Courts and his deputies operating at the courts of appeal and regional courts and that further provisions governing, among other things, the assignment of cases to disciplinary officers according to an alphabetical list and on a first-received, first-examined basis, are intended to ensure that the method of appointment is as transparent as possible and excludes *"any suspicion that any reasons other than those concerning facts and the law are behind the initiation and conduct of proceedings in a given case"*.

In addition, the Minister of Justice may appoint a "Disciplinary Officer of the Minister of Justice" to conduct a specific case concerning a judge.[41] Whenever the Minister's disciplinary officer is appointed to prosecute a case, no other officer is able to act in the case. However, the Minister of Justice is yet to exercise the power to appoint that "special" disciplinary officer.

### Defence counsel

A judge who is the defendant in disciplinary proceedings may have a **defence counsel**. According to the LSCC, another judge, a prosecutor, lawyer (*adwokat* or *radca prawny*) may be appointed as a defence counsel of choice.[42] If the defendant is unable to attend the proceedings because of an illness, the disciplinary court may, at the request of the defendant (or, in special cases, without such request), appoint a legal aid defence counsel from among the lawyers. However, the above rule does not guarantee that the court-appointed defence counsel is a legal professional with experience in judicial disciplinary cases.[43]

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41 Art. 112b LSCC.

42 Art. 113 LSCC.

43 A court-appointed defence counsel appearing in one of the monitored cases pending before a first instance disciplinary court admitted in a conversation with a HFHR monitor to having no experience in disciplinary cases of judges.

The amendment, which entered into force in July 2022, abolished a provision unfavourable to defendants which provided that steps related to the appointment of a legal aid defence counsel and them taking up the defence do not suspend the course of disciplinary proceedings.[44]

## 1.4. The course of disciplinary proceedings and selected procedural aspects

The course of disciplinary proceedings against judges is governed by the provisions of the LSCC. Provisions of the Code of Criminal Procedure (CCP) and the Criminal Code (CC) apply mutatis mutandis to any matters not regulated by the LSCC.

Disciplinary proceedings consist of three stages: disciplinary inquiries, proceedings before a disciplinary officer, and judicial proceedings.

Disciplinary proceedings proper are preceded by **disciplinary inquiries** *(czynności wyjaśniające)* made by a disciplinary officer, which are equivalent to the preparatory proceedings in criminal cases *(postępowanie przygotowawcze*). The disciplinary officer may launch **disciplinary inquiries** at the request of, inter alia, the Minister of Justice, a president of a court or on his or her own initiative. **Inquiries** should be completed within thirty days from the date when the first one was made. In the course of the disciplinary inquiries phase, the disciplinary officer may invite the judge concerned to make a written statement concerning the subject matter of the inquiries or take a verbal statement from the judge. The judge's failure to make the statement does not suspend the further course of the proceedings.

If, after disciplinary inquiries are completed, there are grounds for instituting disciplinary proceedings, the disciplinary officer **formally initiates disciplinary proceedings and draws up a written statement of disciplinary charges**, which must be served on the defendant without delay. When serving the statement of disciplinary charges, the disciplinary officer invites the defendant to provide written explanations and all submissions of evidence within 14 days and, at the same time, asks the Chamber of Professional

44 Former Art. 113a of the LSCC.

Responsibility (former Disciplinary Chamber) to appoint a disciplinary court to hear the case at first instance.

Upon the expiry of the 14-day deadline for submitting evidence and explanations, the disciplinary officer submits **a request to examine the disciplinary case** to the designated disciplinary court. This request performs the function of an indictment from criminal proceedings. The defendant's failure to provide explanations within this period does not suspend the further course of the proceedings.

The disciplinary officer may refuse to initiate (if there are no grounds for doing so) or discontinue proceedings (if the initiated proceedings have not provided grounds for referring the case to a court).

The disciplinary court proceeds by conducting the trial *(rozprawa)* and the hearing *(posiedzenie).* As a rule, the court examines the case by holding a trial unless it is sufficient to schedule a **hearing** (the latter option is a novelty introduced in 2018). In any event, the case should be examined within 30 days of receipt of the disciplinary officer's request.

In accordance with the rule introduced in 2018, the defendant's unexcused failure to appear at the trial or hearing does not suspend the examination of the case if the defendant has been properly notified of the date of the trial or hearing.[45] Moreover, due to a provision of the CCP concerning the participation of the public prosecutor in **remotely** held trials and hearings, applied mutatis mutandis, an imbalance in the procedural position of the disciplinary officer and that of the defendant has emerged in this respect. This is because the disciplinary officer, who directly enjoys the powers of the public prosecutor, may, at his or her request, participate in the trial or hearing over a video link, whereas the CCP gives this option to defendants only if they are deprived of their liberty.[46] This problem was reported by judges in the monitored proceedings (see Part II).

The provisions of the LSCC governing **evidence proceedings** (in the wording in force since 15 July 2022) have reduced the time limit for submissions of evidence from 14 days to a mere 7 days from the date of receipt of the notice of the trial. This change is

45 Art. 115a § 1 LSCC.

46 Code of Criminal Procedure, Art. 374 §§ 3-4.

unfavourable for the defendant.[47] The amendment that came into force in April 2018 enabled the use of evidence obtained in criminal proceedings, including those collected with covert investigative methods, in disciplinary proceedings.[48] In view of the undefined grounds for the application of such methods, as well as the lacklustre supervision of their application by the courts, this possibility should be assessed as a potential threat to the procedural guarantees of the judges charged in disciplinary proceedings.

A very important feature of the proceedings before disciplinary courts since the adoption of the LSCC has been **publicity**[49], understood as the possibility for the public (including, for example, monitors from non-governmental organisations) to participate. The disciplinary court may only exclude publicity of the proceedings due to circumstances enumerated in the LSCC, such as good morals, national security or protection of the private life of the parties. Even if the proceedings are not open to the public, the operative part of the ruling must be announced publicly.

The principal form of conclusion of first instance disciplinary proceedings is a **judgment** in which the court either convicts or acquits the defendant.

An **appeal** may be brought against the judgment and other decisions of the first instance court preventing the delivery of the judgment. The appeal may be lodged within 30 days of the delivery of the decision, by the defendant, the disciplinary officer, the National Council of the Judiciary and the Minister of Justice. The appeal should be heard within two months.

In appeal proceedings (as pointed out by the defendants participating in the disciplinary cases we monitored – see Part II), the provision of the Code of Criminal Procedure stipulating the ne peius rule does not apply.[50] It provides that, in criminal proceedings, an appellate court may not convict a defendant who was acquitted at first instance or in respect of whom proceedings were discontinued at first instance. Instead, the court must set aside the judgment and remand the case for reconsideration by the court of first

47 Art. 115 § 2 LSCC.

48 Art. 115c LSCC.

49 Art. 116 LSCC.

50 Art. 121 § 3 LSCC read in conjunction with Art. 454 § 1 CCP.

instance. In the context of disciplinary proceedings, this means that if at least one appeal is lodged against the defendant's acquittal by the first instance court, there is nothing that would prevent the second instance court from convicting the defendant straight away. This leads to a situation in which accused judges are deprived of an important procedural guarantee enjoyed by defendants in criminal proceedings.

Rulings of the second instance disciplinary court are not subject to a cassation appeal. The exception to this rule is a judgment of the appellate disciplinary court imposing a disciplinary penalty despite the preceding acquittal or discontinuance of proceedings by the first instance court. In such a case, there is a right of **appeal to another composition of the second instance court**, i.e. another composition of the Chamber of Professional Responsibility (formerly, Disciplinary Chamber). This arrangement, however, does not guarantee the defendant that his or her case will be heard by another body, and therefore also places him or her in a less favourable position compared to that of a defendant in criminal proceedings, where a ruling by the second instance court (either a regional court or a court of appeal) can be challenged in a cassation appeal to the Supreme Court (Criminal Chamber).

## 2. The practice of applying the provisions on disciplinary proceedings involving judges of common courts

### 2.1. Number of disciplinary proceedings launched at the initiative of DOJCC and DDOJCC in 2018–2022

According to the information provided by the Disciplinary Officer for Judges of Common Courts at the request of the HFHR[51], during the period from 4 June 2018 to 3 June 2022 (i.e. from the commencement to the end of the DOJCC's 4-year term), the Officer and his two Deputies:

- undertook disciplinary inquiries in 251 cases;
- commenced disciplinary proceedings in 127 cases;
- referred 38 requests to the disciplinary courts to examine the case.

51 Response from the Disciplinary Officer for Judges of Common Courts to the a access to public information request of the HFHR, 13 June 2022.

However, the referrals made to the disciplinary courts (first instance courts at the courts of appeal and the Disciplinary Chamber of the Supreme Court) to examine cases during this period resulted in the issuance of:

- 2 appealable convictions;
- 3 appealable acquittals;
- 1 judgment convicting the defendant on some counts and acquitting them on others (appealable);
- 7 appealable orders to discontinue the proceedings.

As the Disciplinary Officer explained, the absence of non-appealable rulings of disciplinary courts during the period in question was a result of an "almost three-year" hiatus in the processing of cases by the Disciplinary Chamber of the Supreme Court.[52]

At the same time, there is no data on the number of cases in which disciplinary inquiries and proceedings were undertaken in the relevant period by disciplinary officers operating at the courts of appeal and regional courts, as well as on the number of rulings issued during this period by disciplinary courts attached to the courts of appeal in cases submitted by these officers.

## 2.2. Disciplinary proceedings as a form of pressure on judges of common courts

Since 2018, disciplinary proceedings have been identified as a form of pressure exerted on judges of common courts in Poland.[53]

52 The course of proceedings pending before the Disciplinary Chamber of the Supreme Court was undoubtedly influenced by the interim measure order of the Court of Justice of the European Union issued on 8 April 2020. By the order, Poland was obliged to suspend the application of the provisions of the Act on the Supreme Court which form the basis of the jurisdiction of the Disciplinary Chamber in disciplinary cases of judges both in the first and second instance and to suspend the assignment of pending cases for examination by the Chamber. The interim measure was in force until the date of the CJEU's final judgment, 15 July 2021.

53 See e.g. Amnesty International, Polska: Wolne sądy, wolni ludzie. Sędziowie bronią swojej niezawisłości; Komitet Obrony Sprawiedliwości, Państwo, które karze; UN Special Rapporteur on the independence of judges and lawyers, Report of Special Rapporteur Diego García-Sayán on his mission to Poland from 23 to 27 October 2017; American Bar Association, The Case of Judge Alina Czubieniak: Threats to Judicial Independence in Poland through the Use of Judicial Disciplinary Procedures.

According to the HFHR report *Czas próby. Polscy sędziowie wobec zmian w wymiarze sprawiedliwości (*English title: *The time of trial. How do changes in justice system affect Polish judges?)*[54], more than half of the surveyed judges have been threatened with disciplinary action, summoned to appear before disciplinary officers or been targeted with disciplinary proceedings. The respondents agreed that the practice of using disciplinary proceedings had deteriorated significantly during the year following the entry into force of the amended laws.

In recent years, disciplinary proceedings have been initiated against judges for several reasons. In practice, three groups of proceedings stand out: those related to public statements and activities of judges, those arising from their judicial activities and those caused by their membership in associations.

### Disciplinary proceedings relating to public statements of judges

Since 2018[55], there has been a tendency to use disciplinary proceedings to restrict judges' freedom of expression. This applies to statements of a public nature, in particular those made in newspapers or 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.[56] 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.[57] In the interview, the judge noted the unlawful functioning of the Constitutional Court and argued that the appointment of a judge to the Supreme Court

54 M. Kalisz, M. Szuleka, M. Wolny, Czas próby. Polscy sędziowie wobec zmian w wymiarze sprawiedliwości, Warszawa 2022.

55 Response of the Disciplinary Officer for Judges of Common Courts to the question of D. Woźnicka (Radio ZET journalist), 22 November 2018 (accessed on 13.12.2022).

56 Media release of the Disciplinary Officer for Judges of Common Courts on the initiation of disciplinary proceedings against judges who failed to comply with the direction to exercise restraint on social media, 28 August 2019 (accessed: 13.12.2022).

57 K. Sobczak, Sędzia Żurek: Kamil Zaradkiewicz chce zafundować obywatelom chaos w sądach, 4 July 2019

was illegal. According to a Deputy Disciplinary Officer, Judge Żurek's actions were to violate the integrity of his judicial office.

In the same press release, the Deputy Disciplinary Officer informed about the initiation of disciplinary proceedings against **Judge Olimpia Barańska-Małuszek**. 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-Małuszek failed to respect the integrity of her office.

Another example of a restriction of freedom of expression is a series of disciplinary proceedings initiated in August 2020 in response to **a letter from 1,278 Polish judges** (including nearly 1,200 judges of common courts) **to the director of the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe.**[58] The letter expressed concerns about changes to the law governing the upcoming presidential election, which was due to be held by correspondence under the COVID-19 epidemic state in May 2020. The signatories also drew attention to the legally flawed process of appointing members of the Supreme Court's Extraordinary Review Chamber, which determines the validity of the elections, and called on the OSCE to include monitoring of the conduct of the elections. In connection with the letter, the disciplinary officer at the Regional Court in Piotrków Trybunalski presented disciplinary charges to a group of 16 judges who were accused of, among other things, questioning the legality of the Extraordinary Review and Public Affairs Chamber of the Supreme Court, i.e. committing a new type of disciplinary offence introduced by the Muzzle Law.[59] In turn, the Deputy Disciplinary Officer for Judges of Common Courts sent a letter to all disciplinary officers operating at regional courts and courts of appeal in Poland, asking whether they had already initiated disciplinary inquiries against the signatories of the letter in their respective circuits and requesting that they send copies of the relevant decisions or justification for not initiating such investigations.

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58 Forum Współpracy Sędziów (Forum for the Cooperation of Judges), Pismo sędziów polskich do OBWE w sprawie wyborów prezydenckich, 28 April 2020 (accessed on 13.12.2022).

59 M. Jałoszewski, "To już obłęd. Rzecznik dyscyplinarny Ziobry chce ścigania na raz 1278 sędziów z całej Polski!", OKO.press, 19 August 2020.

## Disciplinary proceedings relating to the judicial activities of judges

Since 2018, disciplinary officers have also been initiating disciplinary proceedings in connection with the content of judgments issued by judges.[60]

One of the most emblematic disciplinary proceedings related to the content of a procedural decision concerns **Paweł Juszczyszyn,** a judge of the District Court in Olsztyn.

On 20 November 2019, the judge 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 before[61], which set out the criteria for assessing the independence of the NCJ, Judge Juszczyszyn issued an order directing the Head of the Chancellery of the Sejm to submit, among other things, 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 informed about the initiation of disciplinary proceedings against Judge Juszczyszyn.[62] According to the Deputy Disciplinary Officer, by issuing an order, the judge 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.

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60 Another, even more severe form of repressive action taken against judges in connection with their judicial activity is the initiation of criminal proceedings by the public prosecutor's office and the consequent submission of requests to the Disciplinary Chamber of the Supreme Court for permission to hold a given judge criminally liable (the lifting of immunity). In November 2020, the DCSC lifted (by a final decision) the immunity of Igor Tuleya, a judge of the Regional Court in Warsaw, in connection with the intention of the National Prosecutor's Office to present the judge with charges of a violation of the secrecy and confidentiality of a criminal preparatory proceedings. According to the prosecution service, Judge Igor Tuleya committed a crime by allowing members of the media to be present during the pronouncement an oral statement of reasoning for an order issued in a highly publicised case involving politicians of the ruling majority.

61 CJEU, judgment of 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18.

62 Disciplinary Officer for Judges of Common Courts, Media release on the initiation of disciplinary proceedings against Paweł J., judge of the District Court in Olsztyn, 28 November 2019.

Moreover, Judge Juszczyszyn was dismissed from his secondment by the Minister of Justice and transferred to a judicial position in a district court, and the president of his home court suspended him from official duties for the maximum discretionary period of one month. Later, in February 2020, the Disciplinary Chamber of the Supreme Court ruled that Judge Juszczyszyn should be suspended pending the determination of the disciplinary charges and reduced his remuneration by 40%.[63]

Judge Paweł Juszczyszyn was suspended from his duties for more than two years. In May 2022, the Disciplinary Chamber set aside the suspension order.[64] Judge Juszczyszyn returned to his duties but was transferred to another division of the court by a decision of the court's president.[65]

Another example of disciplinary proceedings initiated in connection with the content of a ruling was that brought against **Judge Alina Czubieniak**. When hearing an appeal in 2016 against a first-instance court's order of pre-trial detention of a man suspected of a sexual offence, she set aside the order, as a result of which the man was released for a short period of time. The judge justified her decision on the grounds that the suspect did not have an appointed defence counsel during the interview at a prosecutor's office and the arrest hearing. Also, there was a reasonable suspicion that the suspect had an intellectual disability and could not read – and should therefore have a defence counsel appointed ex officio. Disciplinary proceedings against the judge were initiated at the request of the Minister of Justice, in whose opinion she had violated the law in an obvious and blatant manner. In January 2018, the first instance disciplinary court acquitted Judge Czubieniak of the charge but the Minister of Justice appealed the judgment to the Disciplinary Chamber of the Supreme Court. Finding that a disciplinary offence had been committed, the DCSC initially imposed a penalty of admonishment on Judge Alina Czubieniak. However, another panel of the Disciplinary Chamber amended this judgment on appeal, by, inter alia, waiving the disciplinary penalty.[66]

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63 Resolution of the Supreme Court of 4 February 2020, case file no. II DO 1/20.

64 Resolution of the Disciplinary Chamber of the Supreme Court of 23 May 2022, file no. I DO 13/22.

65 Gazetaprawna.pl, "Sędzia Juszczyszyn: nie zgadzam się z przeniesieniem do innego wydziału i wysłaniem na urlop", 1 June 2022.

66 Gazetaprawna.pl, "Izba Dyscyplinarna Sądu Najwyższego częściowo utrzymała wyrok ws. sędzi Aliny Czubieniak", 21 November 2019.

As an example of the conduct of disciplinary proceedings in relation to rulings made by judges, one should also mention the disciplinary inquiries initiated against **judges Ewa Maciejewska and Igor Tuleya** in September 2018, which concerned their requests for a preliminary ruling to the Court of Justice of the European Union. In the view of the Disciplinary Officer for Judges of Common Courts, by issuing preliminary ruling orders contrary to the content of the provisions of the Treaty on the Functioning of the European Union, the judges may have caused a "breach of the proper course of proceedings" and thus violated judicial integrity.[67]

### Disciplinary proceedings relating to judges' membership of associations

The practice of applying disciplinary measures after 14 February 2020 also suggests that the freedom of association of judges is being curtailed.

The 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.[68] This obligation is enforced by disciplinary officers.

For example, in July 2020, Deputy Disciplinary Officer for Judges of Common Courts Przemysław Radzik informed about the presentation of disciplinary charges and initiation of disciplinary proceedings against **14 judges of courts of appeal, district and regional courts**.[69] These judges allegedly failed to submit to presidents of their courts a declaration of their membership in the Forum for the Cooperation of Judges – an informal platform for the communication and cooperation between Polish judges.[70] In the opinion of the disciplinary officer, they thus committed the disciplinary offence of an obvious and blatant violation of the law and, at the same time, violated the integrity of their office.

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67 Disciplinary Officer for Judges of Common Courts, Media Release of the Disciplinary Ombudsman for Judges of Common Courts on investigations involving Judges Ewa Maciejewska and Igor Tuleya, in connection with their requests for a preliminary ruling to the Court of Justice of the European Union, 17 December 2018 (accessed on 19.12.2022).

68 Art. 88a LSCC.

69 Media Release of the Deputy Disciplinary Officer for Judges of Common Courts, July 2022 (accessed on 19.12.2022).

70 Forum Współpracy Sędziów (Forum for the Cooperation of Judges), the Działalność (Activities) section of the Forum's website (accessed on 19.12.2022).

## 3. National and international jurisprudence concerning the Disciplinary Chamber and the disciplinary system for judges of common courts

Since 2016, the ruling majority has adopted **more than 25 amendments concerning the court system and the functioning of the judiciary in Poland**. A key change related to the method of electing members of the National Council of the Judiciary, the body appointed to uphold the independence of the judiciary and judges. As a result, in 2018, the lower chamber of the Polish Parliament (Sejm) elected 15 judges-members (out of 25 all members) of the National Council of the Judiciary, while, under the old law, judicial members were elected by the judicial community. From the very beginning, such a formation of the National Council of the Judiciary raised many serious objections on the grounds of its non-conformity with the Polish Constitution and EU and international law.

Despite growing concerns about the establishment of the NCJ and its operations, the Council continued its work, appointing some 2,000 judges over a four-year period.[71] These judges included persons appointed to sit on common courts at all levels, as well as on the Supreme Court. The NCJ, as currently constituted, has participated, inter alia, in the procedure for the appointment of all judges sitting in the Disciplinary Chamber of the Supreme Court, and is currently participating in this procedure of appointing the judges of the Chamber of Professional Responsibility.

The changes in the Polish justice system have been the topic of **many judgments by international and national courts.** International courts and the Polish Supreme Court have issued certain landmark judgments (such as the CJEU judgment of 19 November 2019[72], the resolution of three Chambers of the Supreme Court of 20 January 2020[73] and subsequent ECtHR rulings including *Reczkowicz v. Poland*[74]) 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

71 National Council of the Judiciary, *Informacje o działalności KRS z lat 2018-2021* (Information on the activities of the National Council of the Judiciary in 2018-2021) (accessed on 28.11.2022).

72 CJEU, judgment of 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18.

73 Resolution of a joint panel of the Civil, Criminal, and Labour and Social Insurance Chambers of the Supreme Court of 23 January 2020, file no. BSA I-4110-1/20.

74 ECtHR, *Reczkowicz…* .

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 Polish ruling majority.

## 3.1. Proceedings before the Court of Justice of the European Union (CJEU)

### CJEU judgment of 19 November 2019. (*A.K. v Krajowa Rada Sądownictwa* and *CP and DO v Sąd Najwyższy*, Joined Cases C-585/18, C-624/18 and C-625/18

The judgment was given in a matter involving questions referred for a preliminary ruling to the CJEU by the Polish Supreme Court. In August and September 2018, the Supreme Court heard appeals by three Supreme Court judges who had reached retirement age within the meaning of the new legislation against decisions resulting in their retirement, which they considered unfavourable. As a result of the changes in the law, their appeals were to be heard by the Disciplinary Chamber of the Supreme Court. 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. One of the referred questions 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.

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 several 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.

Regarding the National Council of the Judiciary, the Court 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).

### Implementation of the CJEU judgment of 19 November 2019 by national courts

**On 5 December 2019, the Supreme Court (the Labour and Social Insurance Chamber)** heard one of the aforementioned appeals. The Supreme Court ruled that the interpretation contained in the CJEU judgment of November 2019 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 NCJ, 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"**.[75]

75 Resolution of the Supreme Court of 5 February 2019, case file no. III PO 7/18 (accessed on 19.12.2022).

**On 20 January 2020**, **three Chambers of the Supreme Court** adopted **a joint resolution.** The Supreme Court held in the resolution that the NCJ "is not an independent body but acts as one directly subordinated to a political authority".[76] The Supreme Court also explained how the validity of the proceedings may be affected in situations where such proceedings are brought before judges appointed with the involvement of the new NCJ. **The Supreme Court held that any proceedings pending before the Disciplinary Chamber were null and void, both before and after the adoption of the resolution.**

### Proceedings before the CJEU concerning the judicial disciplinary system

**On 15 July 2021**, the CJEU delivered a **judgment on the European Commission's complaint regarding the disciplinary liability regime for judges**.[77] 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 judgment was partially implemented by an amendment to the Act on the Supreme Court and other acts of 9 June 2022.**[78] The key change introduced by this amendment was the abolition of the Disciplinary Chamber of the Supreme Court and the creation of a Chamber of Professional Responsibility (CPR) in its place. However, the CPR include not only validly appointed judges but also persons appointed by the President in the procedure involving the NCJ in its present composition (see Part I). The change introduced by the amendment, therefore, does not guarantee that disciplinary proceedings before the CPR take place before an independent court composed of independent and impartial judges. To the extent that the amendment establishes an objective criterion for the territorial jurisdiction of the first instance court, abolishing the CPR's discretionary power to designate this court, it has ensured that certain first instance proceedings will be

76 Resolution of a joint panel of the Civil, Criminal, and Labour and Social Insurance Chambers of the Supreme Court of 23 January 2020, file no. BSA I-4110-1/20 (accessed on 19.12.2022).

77 CJEU, judgment of 15 July 2021, Case C-791/19.

78 Act of 9 June 2022 amending the Act on the Supreme Court and certain other acts (Journal of Laws of 2022, item 159).

conducted in compliance with the standard of a court established by law, resulting from the CJEU judgment.[79]

By expressly excluding the situation of a judge making a request for a preliminary ruling to the Court of Justice of the European Union[80] from the list of disciplinary offences, the amendment has fully implemented the CJEU's requirement that making such requests cannot constitute grounds for judges' liability. This change can also be seen as fulfilling, to a very small extent, the recommendation that the content of court decisions cannot be qualified as a disciplinary offence. By contrast, the amendment did not affect the persistence of the new types of disciplinary offences introduced by the Muzzle Law.

The June 2022 amendment, in conformity with the CJEU judgment, removed the possibility of reopening disciplinary proceedings in the same case by a special disciplinary officer appointed by the Minister of Justice.[81] The new law also implemented the CJEU judgment by repealing the provision according to which steps related to the appointment of a defence counsel do not suspend the course of disciplinary proceedings[82] and the provision allowing proceedings to be conducted in the excused absence of the defendant or his or her defence counsel[83].

Moreover, **in April 2020, the European Commission launched another infringement procedure against Poland**, this time concerning the changes introduced by the Muzzle Law. The procedure 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

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79 The amended art. 110 § 3 LSCC stipulates that the disciplinary court in whose district the judge concerned serves is competent to hear the case in the first instance. However, this does not apply to the cases of judges of regional courts and courts of appeal, in which the disciplinary court is designated by the Chamber of Professional Responsibility at the request of a disciplinary officer. Given the above, the recommendation resulting from the CJEU judgment has therefore been implemented only in relation to judges of district courts.

80 Amended Art. 107 § 3 (2) LSCC: "The submission of a request for a preliminary ruling referred to in Article 267 of the Treaty on the Functioning of the European Union to the Court of Justice of the European Union shall not be a disciplinary offence."

81 Amended Art. 112b § 5 LSCC.

82 Repealed Art. 113a LSCC.

83 Repealed Art. 115a § 3 LSCC.

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**.[84]

The Polish Government has not executed the interim measures order (e.g. the Disciplinary Chamber carried on its operations), 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 euro on Poland.[85]

## 3.2. Proceedings before the European Court of Human Rights (ECtHR) – the case of *Reczkowicz v. Poland*

In *Reczkowicz v. Poland*, the European Court of Human Rights examined whether the right of the applicant (a practising advocate, not a judge), to have her case heard by an independent court established by law was violated by the fact that the cassation appeal in her disciplinary case was heard by the Disciplinary Chamber of the Supreme Court. In addition to sitting as a second instance court in disciplinary cases of judges, the Disciplinary Chamber (now the Chamber of Professional Responsibility) hears cassation appeals against disciplinary rulings in cases of members of other legal professions.

In a judgment **of July 2021**, the European Court of Human Rights found that the **hearing of the applicant's case by the Disciplinary Chamber had indeed led to a violation of her right to have her case heard by an independent court established by law**.[86] In assessing the status of the Disciplinary Chamber, the ECtHR first drew attention to the very manner in which the judges of the Disciplinary Chamber were elected by the National Council of the Judiciary, including the manner in which the judges-members of the NCJ were

84 CJEU, Order of the Vice-President of the of 14 July 2021, Case C-204/21 R.

85 CJEU, Order of the Vice-President of 27 October 2021, Case C-204/21 R.

86 ECtHR, *Reczkowicz*... .

selected by the Sejm. According to the ECtHR, national authorities had undue influence over the judicial appointment process.

The ECtHR referred to the radically different assessments of the changes to the NCJ in the rulings of the Supreme Court and the Constitutional Court – while the Supreme Court considered that the current model of the NCJ was defective and that the defects affected the appropriateness of the judicial appointments process, the Constitutional Court considered that the alterations made to the NCJ were compatible with the Constitution. Although the ECtHR did not engage in the constitutional assessment of the adopted amendments, it referred extensively to the jurisprudence of the Constitutional Court. The ECtHR pointed out that the Constitutional Court, by declaring the amendments to be constitutional, departed from its earlier line of jurisprudence according to which the judges-members of the NCJ who should be elected by judges and, in doing so, disregarded the broad catalogue of principles on which the ECtHR's jurisprudence and the Convention are based, such as the rule of law or the separation of powers.

The ECtHR held that **the aggregate of legal violations related to the establishment of the Disciplinary Chamber meant that it could not be considered a tribunal established by law**, and therefore there was no need to further assess whether the right to an independent and impartial tribunal had also been violated.

Experts argue that the *Reczkowicz* judgment means that *"any person who has lost their case before the Disciplinary Chamber should be able to successfully argue before the ECtHR that their right to a tribunal established by law has been violated"*.[87]

87 M. Szwed, "ETPCz: Izba Dyscyplinarna narusza Europejską konwencję praw człowieka [ANALIZA WYROKU]", OKO.press, 30 July 2021.

# Part II.

# SUMMARY OF THE RESULTS OF MONITORING OF DISCIPLINARY PROCEEDINGS

## 1. Introduction and methodology

The monitoring that serves as the basis for this report covered 12 individual disciplinary cases pending against judges of common courts that had reached the judicial stage of the disciplinary process.

The core part of the monitoring took place between 9 March 2022 and 29 June 2022 and consisted of personal observation of the hearings by HFHR monitors. In one case, a follow-up took place on 28 July 2022. The monitoring of cases with court dates adjourned for the period from August to December 2022 took the form of tracking their outcome in the media or on courts' websites.

The monitoring involved proceedings before four first instance disciplinary courts (disciplinary courts attached to the Courts of Appeal in Białystok, Kraków, Łódź and Wrocław). Monitors were unable to observe two cases (pending before disciplinary courts at the Courts of Appeal in Gdańsk and Szczecin) because the proceedings were taken off the cause lists without earlier notice. Moreover, four of the monitored cases were pending before the Disciplinary Chamber of the Supreme Court, the second instance disciplinary court.

The essential criterion for the selection of cases for observation was that they have entered or were at the stage of judicial proceedings before the disciplinary court of first or second instance in 2022. In view of the presidential proposal for changes to the judicial

disciplinary system announced already in February 2022, the cut-off point for monitoring was to be the abolition of the Disciplinary Chamber of the Supreme Court (which took place on 15 July 2022).

Bearing in mind the need to ensure an objectively diversified (and largest possible) portfolio of cases, the primary method of identifying proceedings for monitoring was sending regular email requests for a schedule of court dates (first instance courts) and continuously following cause lists posted on the court's website (the DCSC and some first instance courts).

Furthermore, the project required a selection of proceedings that ensured that the monitoring covers both cases with a potential element of political pressure and those lacking this feature. To this end, on the one hand, cases that aroused suspicions about their political undertones were identified based on information from the media, judges' associations or NGOs; on the other hand, some disciplinary cases were randomly selected without any information about their subject matter.

The project methodology was primarily based on the personal participation of a member of the research team – an author of the report or one of the 4 monitors – who attended sessions of disciplinary courts as an audience. Subsequently, based on the information collected during the sessions, the monitors drew up detailed interim reports according to a pre-prepared form. The monitors' interim reports served as the basis for compiling Part II of the final report, devoted to the analysis of the monitoring of the proceedings.

The authors used also other sources of information to prepare the remaining parts of the final report. These include the jurisprudence of disciplinary courts, made available by the parties to proceedings or existing in the public domain, as well as judgments of the Supreme Court and European courts (CJEU, ECtHR). Some information was made available to the authors by competent authorities (e.g. by the Disciplinary Officer for Judges of Common Courts) upon request.

# 2. A review of individual disciplinary cases: charges, disciplinary courts, parties

## 2.1. Types of misconduct giving rise to the initiation of disciplinary proceedings by disciplinary officers

The grounds for disciplinary proceedings in the 12 monitored cases were the various types of misconduct attributed to the disciplined judges. These include both disciplinary cases with an element of potential political repression against judges, as well as common disciplinary cases without such a feature. At this point, attention should also be drawn to the legal qualification of the misconduct attributed to the judges.

Our monitoring revealed **4 disciplinary proceedings that likely have been conducted to exert pressure on the judge concerned** in connection with his or her public activities or statements. In a case pending before the DCSC (file no. II DOW 22/22), the defendant was a judge who upheld a lower court's decision to refuse the initiation of proceedings for an offence against participants in a happening that took place in 2018. These individuals had dressed the sculptures in a public place with T-shirts bearing an inscription calling on the President of the Republic to respect the Constitution, as a result of which they received a police citation with the request to impose a penalty for a petty offence. Earlier, on the occasion of the centenary of Poland's independence, the judge hearing the case in the second instance was photographed with a group of other judges in a commemorative photo wearing a T-shirt with the inscription "Constitution". The disciplinary officer argued that the defendant's conduct breached the requirements for judges to be impartial and objective.

In another case (file no. ASD 3/21, DC in Białystok), the judge's disciplinary offence allegedly consisted of accepting a cash bonus from the then mayor (a member of the largest opposition party in Poland) in connection with her activities in defence of the independence of the judiciary in Poland. At the time when the judge accepted the award, criminal proceedings were pending against the mayor in another division of the defendant's court. Although the mayor had no influence on the composition of the award-giving jury or their decisions but only presented the award and the awardee herself immediately donated the money to a charity, the disciplinary officer alleged that the judges had breached the standards of impartiality in this case. The political motivation behind the disciplinary proceedings in this case may

be evidenced by the content of the DOJCC media release published after the proceedings were initiated, which referred to the judge's acceptance of a "financial gratification" from the accused mayor (the judge requested the disciplinary officer to correct this release).[88]

An element of political pressure may also have been present in disciplinary proceedings against another judge related to his social media post (file no. ASD 1/21, DC in Wrocław). In a post signed with his name and addressed to the President of the Republic of Poland, the defendant called the head of state *"a bad man, a lousy president, breathing hatred in the name of his immediate and partisan political goals" and accused him of "harming Poland"*. The entry was supposed to be a response to earlier words of the President about the role of the Disciplinary Chamber of the Supreme Court[89] which, as the President put it, was to "eliminate the black sheep" from the judicial community.

In addition to the 3 above cases, potential political motivations may underlie another DCSC case (file no. II DOW 26/22). The disciplinary offence charged in these proceedings has allegedly arisen from the judge's failure to exclude herself (although the LSCC establishes no obligation to do so) from participating in a vote on candidates for vacant judicial posts in a regional court to be presented to the National Council of the Judiciary. The judge herself was one of the candidates put forward during the vote. The initiation of disciplinary proceedings in this case can be seen as part of broader measures against this judge. The defendant's candidature, which was supported by 67 out of 72 votes of the assembly of the judges of an appellate judicial circuit and given unequivocally positive opinions of judges-auditors, was rejected by the NCJ (already sitting in a new composition elected by the Sejm), whereas the recommendation was given to judges who had received a negative opinion at the assembly.[90] Earlier in the year, the Minister of Justice dismissed the judge from her position as president of a district court, a decision that was met with a strong reaction from, among others, the Iustitia association of judges.[91]

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88 M. Jałoszewski, "Ścigana sędzia ostrzega rzecznika dyscyplinarnego: sprostowanie insynuacji albo będzie proces", OKO.press, 7 June 2019.

89 TVN24.pl, "Nie będą nam tutaj w obcych językach narzucali, jaki ustrój mamy mieć w Polsce", 17 January2020.

90 E. Maciejewska, Co zrobiła KRS i co to dla nas oznacza?, Forum Współpracy Sędziów, 14 October 2018 (accessed on 19.12.2022).

91 Iustitia.pl, Uchwały Zgromadzenia Przedstawicieli Sędziów Okręgu Łódzkiego z dnia 26.02.2018 r. (accessed on 18.12.2022).

In each of the above 4 cases with a potential element of political pressure, the conduct of the judges was qualified by a disciplinary officer as a disciplinary offence of the violation of the integrity of the office (Article 107 § 1(5) LSCC).

In contrast, the **cases identified as lacking the element of potential reprisals** featured different types of misconduct giving rise to disciplinary proceedings. Among the 8 cases concerning "common" disciplinary offences, the following instances of misconduct can be distinguished:

- exceeding the maximum time limit for the detention of a suspect as a result of the judge starting the pre-trial detention hearing 15 minutes after the expiry of the constitutional time limit, which resulted in the obligatory release of the detained person (file no. II DOW 45/21, DCSC);
- exceeding the statutory time limit for the preparation of statements of grounds for a judgment – 2 cases (ASD 4/21, DC in Białystok and ASD 5/21, DC in Łódź);
- a judge's failure to pay two penalty notices issued for committed petty offences (ASD 2/22, DC in Łódź);
- driving while under the influence of alcohol, which is a petty offence (ASD 1/20, DC in Kraków);
- conducting proceedings in a protracted manner (ASD 9/17, DC in Krakow);
- committing a traffic infraction, i.e. overtaking another vehicle when it is forbidden to do so (ASD 1/22, DC in Łódź);
- improperly performing the role of president of a civil division (II DOW 16/22, DCSC).

As most of the cases falling into the second category involved violations of the applicable law, mainly rules of the criminal or civil procedure, the misconduct alleged in those cases was classified by disciplinary officers as an obvious and blatant violation of the law (Article 107 § 1 (1) LSCC). Only in two cases, one concerning the commission of a petty offence and the other involving the non-payment of the penalty notices, a disciplinary officer charged the defendants with violating the integrity of their office (Article 107 § 1 (5) LSCC).

## 2.2. Disciplinary courts involved in the proceedings. Disciplinary officers, defence counsel, attendance of parties and other participants

The proceedings monitored took place before both first instance disciplinary courts and the second instance disciplinary court, the Disciplinary Chamber of the Supreme Court. The vast majority of cases (8) were heard by disciplinary courts attached to the courts of appeal, while only 4 cases reached the appeal stage before the DCSC.

In 5 out of the 12 monitored cases, the disciplinary proceedings were initiated by the Disciplinary Officer for Judges of Common Courts (DOJCC) or his Deputies (DDOJCCs). This group included all cases identified as having an element of political pressure and one case involving the commission of a petty offence (driving under the influence of alcohol). In 2 potentially politically motivated proceedings (II DOW 22/22 and II DOW 26/22), which entered the appeal stage before the DCSC, Deputy Disciplinary Officers for Judges of Common Courts, in addition to launching the cases, also acted as appellants challenging the first instance courts' decisions favourable to the defendants (notably, in the same cases, other appellants challenging the first instance decisions favourable to defendants were also the Minister of Justice and the National Council of the Judiciary).

In the remaining 7 disciplinary cases (none of which showed features of political motivation), the role of the prosecutor was performed by disciplinary officers operating at regional courts or courts of appeal.

Disciplinary officers attended trials or hearings in 8 out of 12 cases, including 4 cases in which they exercised their right to participate over a video link. The disciplinary officers attached to the regional courts and courts of appeal participated in all cases in which they acted as prosecutors before first instance courts. On the other hand, the Deputy Disciplinary Officer for Judges of Common Courts took part in 3 out of 6 proceedings in which they were prosecutors or appealed against the decision of the first instance court to the DCSC. Moreover, DDOJCCs participated only in those of the cases identified as politically motivated that were pending before the DCSC. The only case pending before a court of first instance in which a DDOJCC participated

concerned the judge driving under the influence of alcohol (file no. ASD 1/20, DC in Krakow).

Two trials before the Disciplinary Chamber of the Supreme Court were attended, in addition to a DDOJCC, by representatives of the National Council of the Judiciary (as appellants).

In the majority of the monitored cases, defendants were assisted by defence counsel – other judges or lawyers. Only in 3 cases (non-politically motivated ones), the judges personally conducted their defence or had not yet appointed a defence counsel due to the early stage of the judicial proceedings, and in one case before the DCSC (II DOW 16/22), due to the parties' absence, it is not clear whether a defence counsel has at all been appointed. As a rule, the defendants were assisted by defence counsel of their choice, while in one case (ASD 1/20, DC in Kraków) the disciplinary court appointed a legal aid defence counsel due to the advanced age of the defendant, her life situation and the consequent failures to appear during the disciplinary inquiries before the disciplinary officer.

With the exception of one case heard by the Disciplinary Chamber of the Supreme Court (II DOW 26/22) and another pending before a first instance court, defence counsel appointed in disciplinary cases were in attendance on the designated trial and hearing dates. In the former of the proceedings, which was potentially political in nature, the absence of the three defence counsel (judges and a lawyer) and the defendant herself may have been due to their refusal to recognise the DCSC as a body that meets the standards of an independent tribunal.

The accused judges personally participated in half of the monitored trials and hearings. In two politically motivated cases, the non-appearance of the defendants may have been related to them not recognising the Disciplinary Chamber of the Supreme Court. In three cases, the absent judges were represented by their defence counsel, while in the remaining three cases, neither the defendant nor any of his defence counsel appeared in court. In one case (ASD 4/21, DC in Białystok), the defendant, who was absent for medical reasons and had not appointed a defence counsel, requested that the case be heard in her absence and that her written explanations be read out.

# 3. The course of disciplinary proceedings – key observations

## 3.1. Motions for disqualification of a judge: questioning the objectivity of the members of the judicial panel and the legitimacy of the Disciplinary Chamber of the Supreme Court

In four of the monitored proceedings, **disciplinary officers or defendants (or the latter's defence counsel) requested disqualification of judges of the disciplinary court's panel** hearing the cases. These motions were submitted on the basis of circumstances which, in the opinion of the movers, proved the lack of objectivity of the judges concerned (such a justification was invoked above all in the motions submitted by DDOJCCs) or their defective appointment (this argument was put forward by the defendants in the proceedings before the Disciplinary Chamber of the Supreme Court).

For example, in a case concerning a judge's posts on social media (ASD 1/21, DC in Wrocław), a Deputy Disciplinary Officer for Judges of Common Courts based his motion to disqualify one of the members of the panel on the fact that the judge concerned belonged to the association of which the defendant was also a member. Similarly, a defendant in another case justified his motion to disqualify a disciplinary judge by arguing that members of the court's panel would not be impartial because they belonged to judicial associations that in the past expressed critical opinions about the activities of the defendant.

On the other hand, in the case concerning the refusal to initiate proceedings against the participants in a happening (II DOW 22/22), the defendant's counsel requested disqualification of the entire judicial panel of the Disciplinary Chamber of the Supreme Court. At the same time, they invoked irregularities arising from participation in the nomination procedure of the NCJ in its unlawful composition formed in 2018. In view of the impossibility of assembling a composition suitable to hear the motion, the disciplinary proceedings in this case have been adjourned sine die.

In the case concerning the exceeding of the time limit for pre-trial detention (II DOW 45/21), the participants in the trial expressed their respective position on the lawfulness of

the functioning of the DCSC. While the defendant expressed full confidence in the judges of the Disciplinary Chamber and did not object to the Chamber hearing her case, the disciplinary officer (one attached to a regional court) noted that the decision on whether or not to hear the case rests exclusively with the DCSC, the Chamber should nevertheless *"take into account the best interests of the Republic of Poland"*.

Furthermore, during the trial of another case (ASD 3/21, DC in Białystok), the judge presiding over the panel made a statement on behalf of himself and other judges hearing the case that none of the members of the panel had been appointed or promoted during the functioning of the National Council of the Judiciary in its current composition.

**None of the motions for disqualification of judges made in the monitored proceedings was successful.** One of the first instance disciplinary courts, when examining the DDOJCC's motion to disqualify all members of the panel due to their membership of a particular judges' association (which allegedly affected their impartiality), pointed out that adjourning the trial to consider the motion and further delaying the proceedings could amount to further harassment of the defendant (ASD 3/21, DC in Białystok).

## 3.2. Challenges to the legitimacy of the DOJCC and DDOJCC to initiate disciplinary proceedings

In several of the monitored cases, **defendants requested that the proceedings be discontinued on formal grounds – due to the absence of a complaint from an authorised prosecutor.** The defendants thus questioned the authority of the DOJCC and his Deputies to initiate and prosecute any case against a judge of a common court under the law in force prior to the entry into force of the Muzzle Law, i.e. 14 February 2020. (See Part I. Changes in the law – disciplinary officers).

Such a request was submitted e.g. in the proceedings concerning a judge's social media post (ASD 1/21, DC in Wrocław). However, in this case, the disciplinary court discontinued the proceedings on substantive grounds (due to the lack of elements of a disciplinary offence), so the issue of DDOJCC's standing was not considered. Discontinuance of the proceedings due to the lack of DDOJCC's authority to initiate disciplinary action was also requested by the defence counsel for the judge accused of accepting an award from

the mayor (ASD 3/21, DC in Bialystok). However, since the first instance court acquitted the judge of the charge (as it happened in the earlier discussed social media posts case) consideration of the request became moot and the court did not rule on the DDOJCC's standing.

However, the question of the authority of the DOJCC and its Deputies to start proceedings in any disciplinary case was addressed in one of the monitored cases (II DOW 26/22) by the Disciplinary Chamber of the Supreme Court. In reversing the first instance court's order to discontinue the proceedings due to the lack of a complaint from an authorised prosecutor, the DCSC pointed out that this authority was also available to the DOJCC and DDOJCCs before 14 February 2020. The DCSC argued that since under the old law, the DOJCC could take over proceedings from the disciplinary officers attached to regional courts or courts of appeal, they were all the more able to undertake the proceedings on their own (the *a maiori ad minus* reasoning). Furthermore, as the DCSC stated, it would not be logical for the deputies of the DOJCC operating at the regional courts and courts of appeal to be allowed to do more than the DDOJCC and the DDOJCCs. The Disciplinary Chamber also emphasised that the amendment only clarified the authority of the Disciplinary Officer for Judges of Common Courts as defined prior to 14 February 2020 but had not expanded it.

## 3.3. Publicity of proceedings

The publicity of disciplinary proceedings can be considered from two perspectives: internal and external. The former most generally relates to the right of the parties to the proceedings to be informed about the proceedings (e.g. receive information about the charge, have access to the case file and an opportunity to attend the trial and hearing). The latter aspect of publicity, in turn, is expressed in the possibility for the public, including NGO monitors, to participate in trials and hearings.

The monitoring of 12 disciplinary proceedings against common court judges did not provide information on any significant problems related to the internal publicity of these proceedings.

On the other hand, when it comes to the external publicity of the monitored disciplinary proceedings, **11 of them were heard as a trial or hearing held in open court, which**

**meant that HFHR monitors had unrestricted access to the proceedings.** Only in one case – the DCSC proceedings concerning a judge accused of refusing to initiate proceedings against the participants in a happening (II DOW 22/22) – the presiding judge informed the HFHR observer at the beginning of the hearing that it was not open to the public and instructed him to leave the room. The defendant's defence counsel unsuccessfully requested the court's permission to allow members of the public and the media to participate in the hearing.

The day-to-day analysis of the cause lists of the Disciplinary Chamber of the Supreme Court, performed to identify cases by July 2022, showed that **an overwhelming majority of disciplinary cases heard by the DCSC in the first instance were referred to hearings closed to the public**, which meant that HFHR monitors were precluded from attending the hearings It appears from information obtained from the DCSC spokesperson[92] that the non-public character of the hearings may have been related to them being the first sessions in a case devoted to case management. Such a course of procedure, however, finds no clear support in the law and contradicts the principally public character of disciplinary proceedings against judges. Furthermore, as indicated by the monitored practice of the disciplinary courts attached to the courts of appeal, full publicity was also guaranteed when cases were heard at the hearing (e.g. before the DCSC in Wrocław, ASD 1/21, or before the DC in Łódź, ASD 2/22), and therefore the panels of the DCSC should proceed accordingly. In a small number of first instance cases referred to a public trial or hearing, the DCSC subsequently informed that the case had been taken off the docket (this happened, for example, on the trial dates at which the merits of case I DCSC 1/21 were to be examined (17 February 2022, 27 April 2022 and 28 April 2022), or the cases heard on 26 April 2022 (I DCSC 9/21) and 26 May 2022 (I DCSC 5/22).

Moreover, in one first instance disciplinary court (at the court of appeal in Poznań), an order of the president, issued in connection with the ongoing COVID-19 pandemic, was in force for most of the monitored period, which allowed access to trials and hearings only for parties and persons who had been summoned. This prevented the monitoring of at least 3 disciplinary cases set to be heard by this court during the period in question.

92 Information given verbally to an HFHR monitor by the spokesperson of the Disciplinary Chamber of the Supreme Court on 29 June 2022.

The external publicity of the proceedings is linked to the more general problem of access to information about disciplinary cases of common court judges. In particular, the problem concerns access to the cause lists of disciplinary courts and access to the content of rulings of disciplinary courts.

**Only 3 of the 11 first instance disciplinary courts post up-to-date information on pending disciplinary cases of judges on their websites** in the form of a schedule of trials and hearings (DC in Białystok[93], DC in Łódź[94]) or include them in their electronic cause lists (DC in Kraków[95]). For the remaining 8 first instance disciplinary courts, obtaining information about cases and scheduled court dates each time requires contacting the court's registry office. Information on cases pending before the Disciplinary Chamber (now the Chamber of Professional Responsibility) is also published on the Supreme Court's website[96] although, in this case, the scope of the information posted is somewhat broader. In addition to the case number, date and time, courtroom number and names of the members of the formation of the court, the information also includes an indication of the initials of the judge concerned and a brief description of the case, as well as indicates whether the hearing is open or closed to the public. This indication, however, is not always accurate, as was evident in the case described above, in which the HFHR monitor was asked to leave the courtroom because the proceedings were closed to the public (contrary to the information on the cause list).

As regards access to the **content of rulings of disciplinary courts**, these rulings in general are notably unpublished and can only be made available to non-parties by means of a public information request. The only exceptions to this rule are final convictions of first instance disciplinary courts, i.e. judgments that have been either upheld or not successfully appealed to an appellate court, published on the Supreme Court website.[97] In such

93 Court of Appeal in Białystok, Terminarz spraw wyznaczonych w Sądzie Dyscyplinarnym przy Sądzie Apelacyjnym w Białymstoku (Schedule of cases to be examined by the Disciplinary Court at the Court of Appeal in Białystok) (accessed on 30.11.2022).

94 Court of Appeal in Łódź, Terminarz spraw wyznaczonych w Sądzie Dyscyplinarnym przy Sądzie Apelacyjnym w Łodzi (Schedule of cases to be examined by the Disciplinary Court at the Court of Appeal in Łódź) (accessed on 30.11.2022).

95 Court of Appeal in Kraków, Wokanda (Cause list) (accessed on 30.11.2022).

96 Supreme Court, e-Wokanda i wykaz posiedzeń (Electronic cause list and a schedule of court dates (accessed on 30.11.2022).

97 Supreme Court, Prawomocne wyroki skazujące sądu dyscyplinarnego (art. 109 a usp) (Final convictions of the disciplinary court (Art. 109 a LSCC) (accessed on 30 November 2022).

a case, only the operative part of the judgment, including, inter alia, information about the alleged offence and the disciplinary penalty imposed, is published, while the statement of grounds of the judgment is not made public (and thus it is not possible to retrieve the line of reasoning of the disciplinary court).

Furthermore, certain rulings issued by the Disciplinary Chamber of the Supreme Court are available in the case law database of the Supreme Court and commercially available legal reference systems (e.g. LEX). They are published in different forms – some rulings include the statement of grounds (e.g. those issued in the monitored cases II DOW 26/22, II DOW 45/21) whereas for some only the operative part is presented (e.g. in case II DOW 16/22).

## 3.4. Duration of disciplinary proceedings

An analysis of the course of disciplinary proceedings that were concluded during the monitored period (i.e. six cases in which a ruling was made by the first or the second instance disciplinary court) permits some observations to be made as to the duration of the proceedings.

The proceedings conducted by the Disciplinary Officer for Judges of Common Courts and his two Deputies allow for the fullest assessment owing to the availability of the content of procedural decisions as well as media coverage of the cases concerned. In four of their proceedings, at least 16 months (16, 19, 23 and as many as 39 months) elapsed between the date of the presentation of the charges to the defendants, i.e. the formal initiation of the disciplinary proceedings, and the date of the first instance disciplinary court's ruling. In another of the cases, conducted by the disciplinary officer at a regional court, the ruling of the first instance disciplinary court was made approximately 15 months after the date of the prosecuted misconduct (the date of the charge is unavailable).

The duration of the proceedings must be assessed against the time limit specified in the LSCC, namely the 30-day time limit for examining a disciplinary case in the first instance. Although the time limit runs only from the date on which the disciplinary officer's request to examine the case is received by the competent court (and not from the presentation of the charges), the very presentation of the charges obliges the disciplinary

officer to immediately apply to the Disciplinary Chamber (now: Chamber of Professional Responsibility) to appoint the first instance disciplinary court (which should imply a short time lag between the filing of charges and the request for the case to be examined by the designated court). In only two of the monitored cases is the exact date of the disciplinary officer's request to have the case examined by the court known: in these proceedings periods between the request and the judgment of the first instance disciplinary court were 8 months and 15 months. In addition, in three other cases, an analysis of their file numbers enables the conclusion with certainty that at least 3 months elapsed between the court's receipt of the case and the first instance ruling. The 30-day period for issuing a judgment established in the LSCC has therefore been considerably exceeded in five proceedings.

It should further be noted that in six monitored cases pending before the courts for at least 4 months, not even a ruling of the first instance disciplinary court had been made as of the date of preparation of this report. This includes proceedings before a disciplinary court since 2017 for disciplinary offences that took place in 2014-2015 (the case was adjourned sine die) and proceedings conducted before another court since 2020 (concerning conduct that took place in 2019). In all pending cases, the time limit for their examination by a first instance court has already been exceeded.

The statutory deadline for hearing a case, which in this respect is two months from the date of receipt of the appeal, was also not met for any of the three cases heard by the Disciplinary Chamber as the second instance court. The defendant in a monitored case waited for a final decision of the disciplinary court more than 2 years (26 months) from the date of the disciplinary officer's challenge to the first instance disciplinary court's ruling to obtain a final ruling, while in another case the period was 20 months. In the third case that ended with a ruling of the Disciplinary Chamber, almost a year elapsed between the judgment of the first instance court and the examination of the appeal against that judgment.

Finally, the LSCC notably obliges disciplinary officers to observe strict timelines when carrying out disciplinary inquiries prior to the filing of charges and the initiation of the disciplinary proceedings proper. The available data on two proceedings conducted by the DOJCC and his two Deputies allow us to conclude that the 30-day deadline was not met in these proceedings, too. In one of the cases, a disciplinary inquiry was launched

in January 2020 but disciplinary charges were not filed until July 2020 and the request for the case to be heard in court was lodged in March 2021. In another case, disciplinary inquiries started in March 2019 and lasted three months, while the request went to court only in 2021.

## 3.5. Other aspects related to procedural guarantees for defendants revealed by the monitoring

**Monitoring of the proceedings before first instance courts did not reveal any significant problems with evidence proceedings.** In the monitored cases, the defendants and their defence counsel were free to submit requests related to evidence, most of which were granted (e.g. in Case ASD 5/21 before the DC in Łódź, where the court dismissed only one of the defendant's dozens of submissions of evidence).

The most common evidence taken was documentary evidence, witness testimony and expert opinions. For example, in Case DC 1/22 (DC in Łódź), three witnesses were interviewed at the defendant's request and a surveillance video was played, and in Case DC 1/20 (DC in Kraków), the opinion of an expert toxicologist, among other things, was used. In the monitored proceedings, the defendants did not raise objections to the applicable time limits for making submissions of evidence.

In the monitored proceedings, **the judges accused of disciplinary offences were also given the opportunity to freely give testimony ("explanations"), which guaranteed the proper exercise of their rights of the defence**. They could do so in person by appearing at the trial or by sending their written statements. In one case (ASD 9/17, DC in Krakow), the presiding judge allowed the defendant to speak freely and at length, despite the fact that the issues to be explained had already been raised many times at previous trial dates and that the defendant often presented his negative opinions about the work of his court and the head of his division.

Notably, in none of the monitored cases did the trial or hearing take place in a situation where at least the defendant's counsel would not be present and the defendant would request an adjournment of the trial for an excusable reason.

In two cases (ASD 2/22 and ASD 5/21, DC in Łódź), the defendants admitted that **the necessity to travel to attend the trial at the court located far away from their places of residence** prompted them to voluntarily submit to the least severe penalty, despite disagreeing with the charge in principle. Such an attitude may amount to the relinquishment of the rights of the defence, forced to an extent by the rules in force before 15 July 2022, which allowed for the unrestricted appointment of the first instance disciplinary court.

Moreover, in several cases, defendants pointed to the inconvenience of **not being able to attend their disciplinary trials over a video link.** In one of the cases (ASD 1/20, DC in Kraków), the defendant, invoking her age and the need to care for an ill family member, requested to be allowed to give explanations at one of two proposed courts close to her residence (the disciplinary court did not grant her request).

Furthermore, in one of the cases (ASD 1/22, DC in Łódź), the defendant indicated that the alleged offence related to a different event than he remembered. He admitted having committed a traffic infraction – overtaking another vehicle at a location where it was forbidden to do so. Meanwhile, as he learned after watching the video, the charge presented by the disciplinary officer referred to another traffic incident. Thus, the defendant argued that he was charged with an act he had not committed and, as a result, pleaded not guilty to the offence imputed.

## 4. Dispositions of disciplinary courts

Six of the 12 observed proceedings ended with a disposition made by the court: in 3 cases, a ruling was issued by the first instance disciplinary court and in 3 cases – by the Disciplinary Chamber of the Supreme Court.

The remaining cases are still pending before first instance courts (5 cases) or the Chamber of Professional Responsibility (case II DOW 22/22, later designated as II ZOW 40/22).

**First instance disciplinary courts** issued **1 conviction** (ASD 4/21, DC in Białystok) and **1 acquittal** (ASD 3/21, also DC in Białystok). In addition, in one case (ASD 1/21, DC in Wrocław), the first instance disciplinary court decided to **discontinue the proceedings** due to the absence of elements of a disciplinary offence. An acquittal

and an order to discontinue the proceedings were issued in the cases classified as politically motivated.

**The Disciplinary Chamber of the Supreme Court**, in turn, ruled **in one case to set aside** the judgment of the first instance disciplinary court and remand the case for retrial, and furthermore **upheld one judgment of conviction** of a first instance disciplinary court and **amended another first instance conviction** with regard to the penalty imposed. The decision to set aside the judgment concerned the rulings of the first instance disciplinary court in favour of the defendant (discontinuing the disciplinary proceedings) in a case with an element of potential political motivation. The other two rulings, which imposed a more severe penalty than originally pronounced, were made in cases without a political element.

Based on observations, it can therefore be concluded that first instance disciplinary courts in the monitored cases have treated the judges accused of disciplinary offences with a more lenient attitude in proceedings that were likely politically motivated but showed no such leniency in cases of common disciplinary offences (e.g. by convicting the defendant of delays in drafting statements of grounds, case ASD 4/21). The rulings of the Disciplinary Chamber of the Supreme Court, on the other hand, show a general tendency to treat all cases of disciplinary offences in a more severe manner, as manifested by the reversals of rulings favourable to accused judges or by the imposition of harsher penalties.

In the case of the only judgment of conviction delivered by a first instance disciplinary court, the penalty imposed was an admonishment (the most lenient of disciplinary penalties). The Disciplinary Chamber of the Supreme Court, in turn, in one case imposed a more severe disciplinary penalty (a reprimand, as compared to the originally imposed admonishment). In the other case, the DCSC upheld the first instance conviction without penalty.

## Examples of rulings of first instance courts

**Case ASD 1/21 (DC in Wrocław) – order of 20 June 2022**

In this case, the first instance disciplinary court decided to discontinue disciplinary proceedings against a judge who published a post criticising the President of the Republic of Poland on social media.

The disciplinary court found, inter alia, that the accused judge acted within the bounds of permissible criticism and that the assessment of his conduct should depend on the specific situation and context in which the criticism was made.

The court emphasised that under Article 10 (2) ECHR there is little freedom to impose restrictions on political speech or debate on issues of public interest and that the limits of permissible criticism of a politician are broader than for a private individual. It is also important, the court argued, that the criticism forms part of a debate and is not merely an unjustified personal attack.

In the court's view, the defendant's statement fell within the scope of public discourse, was not offensive in nature or referred to the private or family sphere, and was therefore protected.

The court also noted that the judge's statement was not political but strictly professional, as it did not refer to a party's political agenda but was a response to the President's earlier words about the judges and the justice system.

The disciplinary court stressed that the expression of judges' opinions on public issues, incidentally and without political involvement, is a demonstration of concern for the affairs of the state, *"even if the assessments made by the judge are inappropriate"*.

**Case ASD 3/21 (DC in Białystok) – judgment of 5 September 2022**

The disciplinary court acquitted a judge accused of a violation of judicial integrity allegedly resulting from the judge accepting an award from a mayor.

The disciplinary court noted that there was no provision that would prohibit judges from accepting awards. The court emphasised that the defendant, in accepting the award from the mayor, had not breached the rules of professional ethics and had no conflict of interest, and therefore there had been no breach of judicial integrity in the case.

In the court's view, the defendant behaved transparently and in an exemplary manner, as she only retained a badge accepted as part of the award and donated all the awarded funds to a charity.

## Examples of rulings of the Disciplinary Chamber of the Supreme Court

**Case II DOW 26/22 – judgment of 29 June 2022**

In this case, the DCSC overturned the judgment of a first instance disciplinary court discontinuing proceedings against a judge whose disciplinary misconduct allegedly concerned her failure to abstain from voting on nominations for judicial vacancies. The proceedings were discontinued on the grounds that the Disciplinary Officer for Judges of Common Courts lacked the authority to undertake disciplinary proceedings in cases of district court judges before 14 February 2022 (see Part I – Disciplinary Officers).

As, inter alia, the DCSC pointed out, since the Disciplinary Officer was authorised to take over any disciplinary case from a deputy disciplinary officer attached to a regional court and prosecute the case before the disciplinary court before the date of entry into force of the Muzzle Law, he was all the more entitled to independently carry out these steps (including to initiate proceedings and refer a case to a disciplinary court).

**Case II DOW 45/21 – judgment of 9 March 2022**

The DCSC upheld the judgment of conviction issued by a first instance disciplinary court in a case concerning the 15-minute violation of the maximum period of detention of a person who was the subject of pre-trial detention proceedings.

The Disciplinary Chamber took into account as a mitigating circumstance the fact that the defendant's conduct was unintentional and *"largely due to overwork and exhaustion caused by the number of duties she took on"*.

However, as the DCSC noted, the case involved an unlawful deprivation of liberty of a citizen, which *"has adverse consequences not only for the individual concerned but also harms the interests of justice"*. In turn, the freedom of the person, guaranteed under the Constitution and the ECHR, is, alongside life, a human being's most essential interest, which must be protected in an absolutely principled manner.

**Case II DOW 16/22 – judgment of 29 June 2022**

In that case, which concerned the improper performance of the role of the head of a court's division, the Disciplinary Chamber decided to amend the first instance judgment of conviction by changing the penalty imposed.

In justifying the escalation of the penalty from an admonishment to reprimand, the DCSC held it was guided by the relevance of the penalty to the offence. The Chamber explained its decision by noting that the delays caused by the defendant in cases pending in his division had had a negative impact on parties to the proceedings, a circumstance which the penalty originally imposed did not reflect.

# Part III.

# Conclusions and recommendations

## 1. Conclusions

1. **Disciplinary proceedings underway after 2018 in Poland do not guarantee fair trial standards with regard to the right to a court.** A number of rulings by national and European courts show that the Disciplinary Chamber of the Supreme Court, which existed before 15 July 2022, did not meet the criteria of an independent and impartial tribunal established by law, which effectively deprived the parties to proceedings before it of their right to a court. The then-applicable procedural arrangements enabling the President of the Disciplinary Chamber to designate any first instance disciplinary court as one having jurisdiction to hear the disciplinary case resulted in the defectiveness of not only proceedings before the DCSC but also those pending before the disciplinary courts attached to courts of appeal (as confirmed by the CJEU judgment of 15 July 2021 in case C-791/19).

2. **The practice of applying the rules on disciplinary proceedings indicates that some of these proceedings are launched in politically motivated cases.** Among the 12 monitored cases, the risk of a potential political motivation underlying the initiation of proceedings was identified in 4 cases. A distinguishing feature of such cases was the involvement of the Disciplinary Officer for Judges of Common Courts and his two Deputies at the stage when the charges were presented or their appeals (submitted in concert with the Minister of Justice and the National Council of the Judiciary) against judgments favourable for defendants in these cases.

3. **Judicial disciplinary system is marked by low efficiency.** According to figures made available by the Disciplinary Officer for Judges of Common Courts, during the 2018-2022 term, 38 requests for disciplinary sanctions were submitted to the disciplinary

courts, based on which these courts issued 13 rulings (including 7 discontinuances) that could still be appealed. In addition, scheduled trial and hearing dates are taken off the docket relatively often (especially at the DCSC), which contributes to the protraction of proceedings.

4. **Disciplinary proceedings take an inordinately long time.** In three of the monitored cases, the period from the filing of charges, i.e. the formal initiation of disciplinary proceedings, to the judgment of the first instance disciplinary court was at least 5 years, more than 3 years and close to 2 years. The remaining proceedings took approximately ten or more months. Such a long duration of proceedings runs counter to the legal deadlines and may constitute additional repression against judges, especially in politically motivated cases. On the other hand, the duration of disciplinary proceedings is a manifestation of a general problem of the Polish justice system, namely the excessive length of proceedings.

5. **The principle of publicity of disciplinary proceedings is not fully implemented in practice.** While the possibility for members of the public to participate is guaranteed before first instance disciplinary courts, the monitoring revealed problems in this respect in the Disciplinary Chamber of the Supreme Court (e.g. cases have been unwarrantedly assigned to closed hearings where no audience is allowed to participate). Furthermore, the availability of first instance courts' cause lists is limited (only three courts of appeal publish them on their websites). Access to the content of the rulings is severely impeded – it is limited at the DCSC and practically non-existent at the first instance disciplinary courts.

6. **Rules of procedure place accused judges at a disadvantage.** Some of the provisions that establish guarantees in criminal proceedings do not apply in disciplinary proceedings. As a result, it is possible, for example, for a defendant acquitted of a disciplinary charge to be convicted by the second instance court. Also, the rules of disciplinary proceedings establish more extensive possibilities to conduct the trial in the absence of the defendant. The laws applicable during the monitoring period also enabled the discretionary appointment of the first instance disciplinary court, which sometimes meant that defendants had to travel to distant locations. The disadvantage is exacerbated by the inability of defendants in disciplinary cases to benefit from the

possibility of participating in the trial over a video link, whereas disciplinary officers have this right.

7. **The key procedural rights of accused judges were observed.** Despite the existence of legal conditions adversely affecting the position of the defendants, during the monitoring period they have been given an unfettered opportunity to exercise their key procedural rights, including the rights of the defence. Judges were able to attend trial and hearing sessions, have the assistance of counsel of their choice or one appointed by the court, may make submissions of evidence and speak freely in court.

## 2. The future design of the disciplinary system as per the recommendations of the EU institutions

In view of the aforementioned case law of international and national courts, the judicial disciplinary system currently in force in Poland does not guarantee that proceedings are conducted with respect to the right to a fair trial and effective judicial protection. A reform of the system as such is therefore required, one that would take into account in particular the recommendations coming from the EU institutions. Particularly noteworthy in this respect are the indications contained in the CJEU judgment of 15 July 2021 (concerning the disciplinary system for judges)[98] and the milestones set out in the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland[99].

### 2.1. CJEU judgment of 15 November 2021 – standards of disciplinary proceedings

In its judgment of 15 July 2021, the CJEU stressed, in particular, the need to ensure that any disciplinary proceedings must take place **before an independent court comprised of independent and impartial judges**. The CJEU pointed out that, in order to ensure independence, judges should, inter alia, be protected against the possibility of external intervention and pressure, both direct and indirect.

98 CJEU, judgment of 15 July 2021, Case C-791/19.

99 Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, COM(2022) 268 final, 1 June 2022.

Referring to the judicial disciplinary system itself, the Court noted that legislation should contain the **necessary guarantees adopted to avoid the risk of the disciplinary regime being used as a system of political control of the content of the judicial decisions.** In this context, the CJEU identified as particularly relevant the provisions defining disciplinary offences and penalties, as well as the provisions regulating the procedural rights of defendants (primarily the rights of the defence). The Court also stressed that in disciplinary proceedings it is necessary to ensure the right to judicial review of first instance rulings by a body that itself meets the criterion of independence.

It is essential, in the CJEU's view, that the commission of an error in the interpretation or application of the law cannot, in itself, lead to the triggering of the disciplinary liability of a judge. **The number of cases in which disciplinary liability is incurred over the contents of a ruling should therefore be kept to an absolute minimum** (and include, e.g., deliberate or most blatant errors) so that judicial independence is not compromised. In turn, the law should precisely and clearly define the conduct giving rise to disciplinary liability. In addition, it is impermissible to introduce provisions which would imply that judges may be exposed to **disciplinary proceedings for making a request for a preliminary ruling to the CJEU**. Indeed, the mere prospect of the launch of proceedings in such a case may adversely affect the actual exercise of that power by judges and thus undermine their independence.

Also, in order to preserve the independence of judges and to avoid any risk of the judicial disciplinary system being used as a device for the political control of their rulings, it is important, in the CJEU's view, that the rules governing disciplinary proceedings permit disciplinary cases to be **heard within a reasonable time.** The procedural rules, in turn, should guarantee defendants the right to be effectively heard by a disciplinary court and to benefit from an effective defence before that court.

Finally, as noted by the CJEU, judicial proceedings in disciplinary cases of judges should be tailored to the nature of disciplinary responsibility. Central to this is the guarantee that public trust in the functioning and independence of the judiciary, which, according to the Court, lies at the heart of the existence of a democratic state ruled by law, is not compromised.

## 2.2. The NRP Council Decision – milestones

In turn, the EU Council's decision of 1 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland (National Recovery Plan, NRP) sets out the so-called milestones that the national authorities are required to meet. Referring to the judiciary, the decision indicates that the NRP should aim to **enhance the independence and impartiality of the courts**, as well as to **improve the situation of judges affected by the resolutions of the Disciplinary Chamber of the Supreme Court** in disciplinary cases and those relating to judicial immunity. These judges should be reinstated following positive review proceedings by the new the Chamber of Professional Responsibility, operating from 15 July 2022, to be conducted without delay.

As part of specific recommendations aimed at enhancing the independence and impartiality of the courts, the Council identified the following tasks regarding the judicial disciplinary system for judges of common courts:

- Delegating the competence to hear disciplinary and judicial immunity cases of judges to **another chamber of the Supreme Court which meets the requirements of an independent and impartial tribunal established by law**;
- Excluding the possibility of judges incurring disciplinary liability for referring questions for a preliminary reference to the CJEU and determining that the content of judgments rendered by judges cannot constitute grounds for disciplinary proceedings;
- Introducing the possibility of conducting judicial proceedings to review that the criteria of a judge being **independent, impartial and "established by law",** are met; ordering such a review cannot be regarded as a disciplinary offence;
- Ensuring that disciplinary cases of judges are examined **within a reasonable time**;
- **Making more precise regulations** so that it is clear which first instance disciplinary court should hear the case;
- **Strengthening the rights of the defence** (ensuring a reasonable time frame for the appointment of a defence counsel, as well as providing time for substantive preparation of the defence counsel to perform his or her functions, suspending the proceedings in the event of the justified absence of the accused judge or his or her counsel).

As regards the improvement of the situation of judges whose cases, concerning disciplinary liability or judicial immunity, have been decided by the Disciplinary Chamber of the Supreme Court, the Council pointed out that, first and foremost, **it is necessary to ensure the possibility of requesting a re-examination of their case by an independent and impartial court established by law**. At the same time, the Council's decision set the time limits for the examination of such cases and determined that proceedings pending before the DCSC would be transferred to the aforesaid court, which would replace the Disciplinary Chamber (namely, the Chamber of Professional Responsibility).

## 3. HFHR Recommendations

Bearing in mind the conclusions drawn from the monitoring of disciplinary proceedings, as well as the recommendations of national, European and international bodies, the HFHR makes the following recommendations on the desired shape of the disciplinary system for common court judges:

1. It should be ensured that disciplinary cases of judges are heard by an **independent and impartial court established in a lawful manner**, which must include fulfilling the condition of the judges of first and second instance disciplinary courts being established by law;

2. It must be guaranteed that disciplinary proceedings against judges are initiated **based on transparent and objective criteria** so that they are protected from political pressure, which implies the establishment of a clear delineation of the powers of disciplinary officers and the local jurisdiction of first instance disciplinary courts.

3. There is a need to **define precisely and clearly the conduct that constitutes disciplinary offences**, which should include
   a. abolishing the new types of disciplinary offences introduced by the Muzzle Law and the June 2022 amendment (denial of justice);
   b. ensuring that the content of a judge's ruling may not constitute a disciplinary offence subject to the proviso that the exceptional and most serious cases of judicial errors nevertheless give rise to disciplinary liability.

4. Ensuring that the **duration of disciplinary proceedings is aligned with the time frames indicated in the law** and that the swift delivery of justice prevents additional reprisals against accused judges.

5. **Guaranteeing**, as far as possible in accordance with current legislation, **publicity for the examination of disciplinary cases (during the trial and public hearing) and information about the proceedings (publication of cause lists and content of judgments)**, which will enable public scrutiny of the administration of justice in disciplinary cases.

6. **Strengthening certain procedural rights** of accused judges (including their rights of the defence).

# Annex 1.

## Disciplinary proceedings – summary of monitored cases

**Glossary of abbreviations**

- DCSC – Disciplinary Chamber of the Supreme Court
- DC BIA – Disciplinary Court at the Court of Appeal in Białystok
- DC KRK – Disciplinary Court at the Court of Appeal in Kraków
- DC ŁDZ – Disciplinary Court at the Court of Appeal in Łódź
- DC WRO – Disciplinary Court at the Court of Appeal in Wrocław

**Clarifications**

- * from the presentation of disciplinary charges to the delivery of the judgment by the first instance court/DCSC
- ** no daily and monthly data available, approximate yearly date based on case file no.
- *** from the date of the alleged offence
- **** no information on subsequent trial hearing dates
- ***** length of proceedings only before the second instance court

| | File number | Disciplinary court | Date of the alleged offence | Date of initiation of inquiries by a disciplinary officer | Date of presentation of charges | Date of request to examine the case | Date and content of first instance judgment | Date of appeal | Date and content of second instance judgment | Total duration of proceedings* |
|---|---|---|---|---|---|---|---|---|---|---|
| 1. | ASD 1/21 | DC WRO | 18.01.2020 | 18.01.2020 | 23.07.2020 | 10.03.2021 | 20.06.2022 **Discontinuation of proceedings** | n/a | n/a | Ca. 23 months |
| 2. | II DOW 22/22 (*II ZOW 40/22*) | DCSC | November 2018 | n/a | February 2019 | 2019** | 2.10.2020: **Discontinuation of proceedings** | n/a | Case pending – the next trial date: 13.01.2023 | Ca. 19 months |
| 3. | ASD 3/21 | DC BIA | 9.12.2018 | March 2019 | 8.06.2019 | 2021** | 5.09.2022: **Acquittal** | n/a | n/a | Ca. 39 months |
| 4. | II DOW 26/22 | DCSC | 26.06.2018 | n/a | 18.06.2019 | 7.02.2020 | 12.10.2020: **Discontinuation of proceedings** | 5-10.11.2020 | 29.06.2022: **Judgment set aside and remanded for reconsideration** | Ca. 16 months |
| 5. | II DOW 45/21 | DCSC | 31.12.2019, 1.01.2020 | n/a | n/a | n/a | 16.04.2021: **Conviction** (without penalty) | n/a | 9.03.2022: **First instance judgment affirmed** | Ca. 15 months*** |
| 6. | ASD 4/21 | DC BIA | n/a | n/a | n/a | 2021** | 16.03.2022: **Conviction** (penalty of admonishment) | n/a | n/a | n/a |
| 7. | ASD 2/22 | DC ŁDZ | n/a | n/a | n/a | 2022** | Case pending**** | n/a | n/a | n/a |
| 8. | ASD 1/20 | DC KRK | September 2019 | n/a | n/a | 2020** | Case pending**** | n/a | n/a | At least 24 months |
| 9. | ASD 5/21 | DC ŁDZ | n/a | n/a | n/a | 2021** | Case pending – adjourned sine die | n/a | n/a | At least 12 months |
| 10. | ASD 9/17 | DC KRK | 2014-2015 | n/a | n/a | 2017** | Case pending**** | n/a | n/a | More than 60 months |
| 11. | ASD 1/22 | DC ŁDZ | July 2021 | n/a | n/a | 2022** | Case pending**** | n/a | n/a | n/a |
| 12. | II DOW 16/22 | DCSC | n/a | n/a | n/a | 2019** | 2.12.2019 **Conviction**: penalty of admonishment | 10.02.2020 | 29.06.2022 **Judgment amended**: penalty of reprimand | More than 24 months***** |

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