

# URGENT INTERIM OPINION ON THE BILL AMENDING THE ACT ON THE SUPREME COURT AND CERTAIN OTHER ACTS OF POLAND (AS OF 16 JANUARY 2023)

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## POLAND

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Based on an unofficial English translation of the Bill commissioned by the OSCE Office for Democratic Institutions and Human Rights (ODIHR).

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## EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

At the outset, ODIHR reiterates that, while every State has the right to reform its judicial system, such reforms should always comply with the country's constitutional requirements, adhere to the rule of law principles, be compliant with international law and human rights standards, as well as OSCE commitments. Such reforms must be based on a comprehensive analysis of the existing judicial system, impact assessment of the proposed policy and legislative options and should be accompanied by inclusive and meaningful public consultation, including with the judiciary, at all stages of the law-making process.

This Urgent Interim Opinion builds upon, and should be read together, with ODIHR's five legal reviews published between 2017 and 2020.

The Bill Amending the Act on the Supreme Court and Some Other Acts of Poland as transmitted by the Sejm to the Senate on 16 January 2023 ("the Bill" *Projekt ustawy*) was developed essentially for the purpose of complying with the obligations under the Council Implementing Decision (EU) No 9728/22 of 14 June 2022 approving the Assessment of the Recovery and Resilience Plan for Poland (hereinafter "EU Council Implementing Decision"), as emphasized in the Explanatory Statement to the Bill. *De facto*, it also partially responds to the rulings of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) regarding judicial discipline in Poland.

### *Disciplinary Body*

The Bill transfers the powers of adjudicating disciplinary cases against judges of the Supreme Court, Military Courts and common courts from the newly established Chamber of Professional Responsibility of the Supreme Court to the Supreme Administrative Court (SAC) of Poland. The said Chamber of Professional Responsibility was formed to replace the Supreme Court's Disciplinary Chamber whose independence was called into question as a result of the case-law of international courts.

However, it remains unclear how the Bill would solve the inherent deficiencies of the system or respond in full to the findings of the international courts, without addressing issues related to the independence and impartiality of the respective national courts, of the National Council of the Judiciary (NCJ), and inherent deficiencies of judicial appointment procedures. Indeed, the SAC itself may not be immune from challenges regarding its own independence and impartiality since, to a significant degree, it is also composed of judges appointed by the reformed NCJ.

ODIHR also notes reports related to concerns over the compatibility of the proposed legislation with the Polish Constitution. While it is a matter for competent national authorities to evaluate the constitutionality of legislation, it is of the utmost importance to ensure that these concerns are properly addressed throughout the legislative process.

### *Disciplinary Grounds*

The Bill attempts to circumscribe more strictly the application of the new disciplinary grounds introduced in 2020 by excluding disciplinary liability for the content of judgments or when, in the context of adjudicating, a judge assesses whether violations of law during the judicial appointment procedure may have occurred (i.e., the criteria of being "established by law"). This is in addition to

the June 2022 amendments, which clarified that disciplinary liability would not apply when a judge submits a request for consideration of a preliminary ruling to the CJEU, or examines whether a judge/court meets the requirements of independence and impartiality, or finds that a court judgment with the participation of a given (newly appointed) judge is flawed. Although these are steps made in the right direction, the Bill does not repeal altogether the problematic disciplinary grounds introduced in 2020, as evaluated by ODIHR in its Urgent Interim Opinion of January 2020.

In addition, the delineation between what may constitute a disciplinary violation and what is covered by the exclusion of liability may not be that clear cut. This means that while the disciplinary exemptions explicitly allow judges to carry out their fundamental judicial functions, the broad and vague disciplinary grounds are at the same time not repealed. Consequently, such grounds may still be used to impose disciplinary sanctions on judges exercising their functions or legitimate activities, and thereby impact on their independence.

ODIHR also finds necessary to reiterate some of its key recommendations made earlier with respect to judicial discipline, including but not limited to:

- ensuring that disciplinary proceedings against judges fall within the competence of an independent and impartial tribunal established by law; [para. 18]; and
- repealing overbroad and vague disciplinary grounds for judges, introduced in 2020 (revised in June 2022), since they are subject to potential arbitrary application, especially those relating to “*actions challenging the existence of a judge’s professional relationship or the validity of a judge’s appointment, or the legitimacy of a constitutional organ*”, and provisions that may unduly restrict judges’ freedom of expression. [see para. 25]

#### *Status of Judges who were Suspended or Disciplined*

The 2022 June amendments had introduced a mechanism for re-instating suspended judges on a case-by-case basis, and the possibility for judges who were subject to a final disciplinary judgment or who had their immunity lifted to be brought to criminal liability to request the reopening of the proceedings within 6 months from the date of entry into force of the amendments. They do not automatically reinstate the judges who have been suspended or disciplined in accordance with the illegitimate disciplinary grounds that are or will be covered by the exemption of liability clause. Nor do they reinstate those judges whose disciplinary sanctions were already held by international courts contrary to the requirements of independence and impartiality of a tribunal. According to the draft amendments, the situation of such judges would be re-examined by the SAC *ex officio*, however the Bill lacks a guarantee that such suspension or disciplinary measures will be reversed automatically, with compensation for lost wages.

#### *Assessing whether a court/judge is independent, impartial and “established by law”*

The Bill appears to broaden the scope of the assessment introduced by the June 2022 amendments, whereby a party to judicial proceedings may submit a motion to assess the independence and impartiality of a judge hearing the case. Such assessment, to be carried out by the SAC and no longer by the Supreme Court pursuant to the Bill, would now also include a review of whether the requirement of being “established by law” is fulfilled, meaning whether grave irregularities during the appointment procedure of a judge may have occurred and, in addition, providing the possibility for the bench to raise the

issue *ex officio*. The Bill also removes the requirement to prove that the circumstances surrounding the appointment (or the judge's conduct after the appointment) may influence the proceedings or the outcome. While this seems to address to an extent some of the deficiencies of the legislation remaining after the June 2022 amendments, the lack of clarity with respect to the criteria guiding the assessment of the independence, impartiality and whether the court in question is "established by law" appears to persist. The strict 7-day deadline for submitting a motion from the day of notification of the composition of the bench remains a potentially impeding requirement for the effective application of this mechanism in practice.

In addition, this also risks creating a bottleneck for the administration of justice as the impartiality and independence of a judge (or panels composed fully or partially of judges) appointed by the reformed NCJ may be repeatedly questioned, resulting in new litigations, which risk paralyzing the SAC, notwithstanding the two weeks deadline provided for its decisions.

#### *Other Unaddressed Fundamental Systemic Deficiencies Undermining Judicial Independence*

Despite addressing a number of issues, the Bill does not deal with other fundamental systemic deficiencies undermining judicial independence, as they were underlined previously by international courts, other international institutions as well as in previous ODIHR Opinions. These deficiencies concern especially the lack of independence of the NCJ and the overly predominant role of the executive over the administration of justice and the judiciary. ODIHR thereby reiterates the key recommendations it has made in the past, which are also in line with the case-law of the CJEU and ECtHR, including, but not limited to:

- reverting to a system where the judge members of the NCJ are selected directly by the judiciary, guaranteeing that the majority of members of the judicial council are judges chosen by their peers in line with international recommendations; [see para. 36] and
- reconsidering entirely the overly prominent role of the executive in the administration of justice, including in the appointment of presidents of courts and disciplining of judges through the disciplinary officers appointed by the executive. [para. 37]

#### *Conclusion*

While the Bill introduces mechanisms to address some of the existing issues in the justice system, the efficiency and effectiveness of the proposed solution, as it is, remains doubtful. It offers no safeguards that would preclude disciplinary decisions of the SAC issued by panels composed of judges appointed by the reformed NCJ being questioned in the same way as the decisions of the newly established Supreme Court's Chambers. More importantly, the proposed amendments do not address the root causes by leaving unchanged the fundamental systemic deficiencies of the legislation undermining the independence of the judiciary and of individual judges, as established by the CJEU and the ECtHR.

*As part of its mandate to assist OSCE participating States in implementing OSCE human dimension commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.*

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**ANNEX: Bill Amending the Act on the Supreme Court and Some Other Acts, as transmitted by the Sejm to the Senate on 16 January 2023**

## I. INTRODUCTION

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1. *By letter received on 20 January 2023, the Chairperson of the Legislative Committee of the Senate of Poland requested from the OSCE Office for Democratic Institutions and Human Rights (hereinafter, “ODIHR”) an urgent legal analysis of the Bill Amending the Act on the Supreme Court and Some Other Acts as transmitted by the Sejm to the Senate on 16 January 2023 (hereinafter, “the Bill”/Projekt ustawy).<sup>1</sup> According to Article 121 of the Constitution of the Republic of Poland, the Senate has 30 days to review the Bill and either adopt it or send it back to the Sejm with adopted amendments or a rejection in its entirety.*
2. *Given the indicated urgency to publish this legal review, ODIHR decided to prepare an Urgent Interim Opinion,<sup>2</sup> which does not provide a detailed analysis of all the provisions of the Bill but primarily focuses on the most concerning issues relating to its compliance with international human rights standards and OSCE human dimension commitments, especially in relation to judicial independence.*
3. *This Urgent Interim Opinion should be read together with the previous legal reviews on the independence of the judiciary in Poland that have been published by ODIHR between 2017 and 2020,<sup>3</sup> in so far as the main findings and recommendations contained therein have not been addressed.*
4. *This Urgent Interim Opinion was prepared in response to the above request. ODIHR conducted this assessment within its general mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.*

## II. SCOPE OF THE URGENT INTERIM OPINION

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5. *The scope of this Urgent Interim Opinion covers only the Bill submitted for review and due to its urgent character, focuses primarily on the most pressing issues relating to the independence of the judiciary in Poland. Thus limited, it does not constitute a full and comprehensive review of each and every provision of the Bill nor of the entire legal and institutional framework regulating the judiciary in Poland. The Urgent Interim Opinion, although taking into account the existing legal and constitutional framework, does not purport to assess the constitutionality of the Bill, which is a matter falling outside the scope of this legal review and to be decided upon by competent national institutions.*
6. *The Urgent Interim Opinion raises key issues and provides indications of areas of concern. The ensuing legal analysis is based on international and regional human*

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1 Available at <<https://www.senat.gov.pl/prace/proces-legislacyjny-w-senacie/ustawy-uchwalone-przez-sejm/ustawy-uchwalone-przez-sejm/ustawa,1464.html>>.

2 Following the publication of the Urgent Interim Opinion, ODIHR may decide to carry out additional research, consultations and/or expert involvement. If, on this basis, ODIHR considers that significant changes need to be made to the legal analysis contained therein, then ODIHR will issue a Final Opinion.

3 See ODIHR, *Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019)*, 14 January 2020, in English and Polish [here](#); ODIHR, *Opinion on Certain Provisions of the Bill on the Supreme Court of Poland (as of 26 September 2017)*, 13 November 2017, in English and in Polish [here](#); *Opinion on Certain Provisions of the Bill on the Supreme Court of Poland*, 30 August 2017, in English and in Polish [here](#); *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, in English and in Polish [here](#); and *Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 22 March 2017, in English and in Polish [here](#).



rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Urgent Interim Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. In that respect, ODIHR would like to caution against replicating country examples without considering broader national institutional and legal framework, as well as country legal and social context and political culture.

7. This Urgent Interim Opinion is based on an unofficial English translation of the Bill, which is attached to this document as an Annex. Errors from translation may result. The Urgent Interim Opinion is also available in Polish language. In case of discrepancies, the English version shall prevail.
8. In view of the above, the content of this ODIHR Urgent Interim Opinion is without prejudice to any future oral comments or written analysis and recommendations on the Bill or other related legislation regulating the judiciary in Poland that ODIHR may prepare in the future.

### III. LEGAL ANALYSIS AND RECOMMENDATIONS

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9. For a detailed overview of relevant international standards and OSCE commitments (as well as national legal framework) pertaining to the independence of the judiciary and judicial discipline, ODIHR hereby refers to its 2020 ODIHR Opinion, in particular the Sections IV.1 and IV.2.<sup>4</sup>

#### 1. BACKGROUND

10. On 13 January 2023, the Bill Amending the Act on the Supreme Court and Certain Other Acts was passed in third reading by the *Sejm*, the lower house of the Parliament of Poland, and is currently pending with the upper-house – the *Senate*.<sup>5</sup> As indicated in the Explanatory Statement to the Bill, these amendments were initiated in order to fully fulfil Poland’s obligations under the Council Implementing Decision (EU) No 9728/22 of 14 June 2022 approving the Assessment of the Recovery and Resilience Plan for Poland (hereinafter “Council Implementing Decision”).<sup>6</sup>
11. In June 2022, as a result of the amendments adopted for the same purpose,<sup>7</sup> the Supreme Court’s Disciplinary Chamber was dismantled and replaced by the Chamber of Professional Responsibility. In addition, while the disciplinary grounds introduced in 2020 were not removed, the drafters introduced new provisions excluding disciplinary liability when a judge examines whether a judge/court meets

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4 See ODIHR, *Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019)*, 14 January 2020, in English and Polish [here](#), Sections IV.1 and IV.2.

5 The Bill includes amendments to the Act on the Supreme Court, the Act on the Organization of Military Courts, the Act on the Organization of Common Courts, and the Act on the Organization of Administrative Courts.

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

7 See the Act amending the Act on the Supreme Court of 9 June 2022 (Journal of Laws 2022, item 1259).

the requirements of independence and impartiality, submits a request for consideration of a preliminary ruling to the Court of Justice of the European Union (CJEU) or finds that a court judgment with the participation of a given (newly appointed) judge is flawed. In addition, disciplinary sanctions against a number of judges were revoked.

12. As underlined in the Explanatory Statement, the Bill seeks to remove possible doubts regarding the application of the provisions introduced in June 2022, thereby seeking full compliance with the above-mentioned obligations set by the EU. However, it does not address fundamental systemic deficiencies of judicial institutions identified in the judgments of the CJEU<sup>8</sup> and of the European Court of Human Rights (ECtHR),<sup>9</sup> as well as ODIHR's previous opinions.<sup>10</sup> This includes, but is not limited to the lack of institutional independence and impartiality of the reformed National Council of the Judiciary (NCJ)<sup>11</sup> and, as a consequence, the systemic shortcomings in judicial appointments procedure, the defective judicial discipline regime, including vague and overbroad disciplinary grounds,<sup>12</sup> the lack of independence of some of the Chambers of the Supreme Court,<sup>13</sup> the overly predominant role of the executive over the administration of justice and the judiciary and the jurisprudence and composition of the Constitutional Tribunal.<sup>14</sup>

## 2. DISCIPLINARY PROCEEDINGS

13. The proposed amendments to the Act on the Supreme Court remove the responsibility for deciding on disciplinary cases against Supreme Court judges from the Supreme Court's Chamber of Professional Responsibility, which was only established in 2022 in a previous effort to comply with the above-mentioned obligations set by the EU. Such a competence is transferred from the Supreme Court to the Supreme Administrative Court (SAC) (proposed Article 29 § 8 of the Act on the Supreme Court).

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8 Including in particular, but not limited to: [8 April 2020, CJEU interim measures](#) requiring Poland to immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges; [14 July 2021](#) Vice President of the CJEU's [interim order](#) C-204/21 R, stating that Poland must [immediately suspend](#) the application of national provisions relating to the powers of the Disciplinary Chamber of the Supreme Court and certain disciplinary grounds; [15 July 2021, judgment](#) in C-791/19 - *Commission v. Poland*, paras. 137 to 148, concluding that the disciplinary regime for judges is not compatible with EU law; [27 October 2021, CJEU Vice-President order](#), for Poland to pay the European Commission a €1 000 000 daily penalty for not suspending the application of the provisions of national legislation relating, in particular, to the areas of jurisdiction of the Disciplinary Chamber of the Supreme Court as it had been ordered to do in the interim measure of 14 July 2021 in case C-204/21 R (*Commission v. Poland*).

9 To cite a few, European Court of Human Rights (ECtHR), *Reczkowicz v. Poland* (Application no. [43447/19](#), 22 July 2021), concluding that the Disciplinary Chamber of the Supreme Court, which examined the applicant's case, was not a "tribunal established by law"; *Dolińska-Ficek and Ozimek v. Poland* (Application nos. [49868/19](#) and [57511/19](#), 8 November 2021) regarding the Chamber of Extraordinary Review and Public Affairs of the Supreme Court. ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland* (Application no. [4907/18](#), 7 May 2021), regarding the Civil Chamber of the Supreme Court; *Grzęda v. Poland* [GC] (Application no. [43572/18](#), 15 March 2022) regarding the lack of judicial review of premature termination *ex lege*, after legislative reform, of a serving judge's mandate as member of the National Council of the Judiciary; *Advance Pharma SP. z o.o. v. Poland* (Application no. [1469/20](#), 3 February 2022), on systemic deficiencies in judicial appointments procedure; *Żurek v. Poland* (Application no. [39650/18](#), 6 June 2022), on undue limitations to the freedom of expression; *Juszczyszyn v. Poland* (Application no. [35599/20](#), 6 October 2022), on grave irregularities in appointment of judges to the Disciplinary Chamber, that suspended judge from duties for verifying independence of another judge appointed upon recommendation of reformed NCJ, among other.

10 For the list of ODIHR Opinions, see *op. cit.* footnote 3.

11 For the purpose of this Urgent Interim Opinion, the term "reformed National Council of the Judiciary" (NCJ) is used to refer to the NCJ established with the membership and in the procedure provided for by the Act amending the Act on the National Council of the Judiciary and certain other acts of 8 December 2017 (Journal of Laws 2018, item 3), whereby the 15 judge members of the NCJ are no longer directly elected by the judiciary but elected by the parliament.

12 See ODIHR, *Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019)*, 14 January 2020, Key Recommendation F.

13 Especially, the Supreme Court's Disciplinary Chamber, Civil Chamber and Chamber of Extraordinary Review and Public Affairs (see *op. cit.* footnotes 8 and 9).

14 See ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland* (Application no. [4907/18](#), 7 May 2021), noting the violation of Article 6 § 1 of the ECHR in light of the grave irregularities vitiating the election of the Constitutional Court judge sitting on the panel that examined the applicant company's constitutional complaint.



14. Similarly, under the proposed Article 39a § 1a of the Act on the Organization of Military Courts, the SAC decides on disciplinary cases regarding administering penalties (a panel of three judges in both instances) as well as on issues concerning the immunity of judges (one judge in the first instance and a panel of three judges in the second instance). Changes proposed to the Act on the Organization of Common Courts similarly transfer disciplinary cases to the SAC, which decides with a panel of three judges in the first and second instances (with the exception of cases considered under Article 37 § 5 and Article 75 § 2(3) of the same Act). The SAC also retains its competence over disciplinary cases brought against judges of administrative courts (existing Article 48 of the Act on the Organization of Administrative Courts).

### 2.1. Independence and Impartiality of the Disciplinary Body

15. Transferring the powers of disciplinary action over judges of the Supreme Court, Military Courts and Common Courts to a new body is only effective to respond to the rulings of the CJEU and ECtHR regarding judicial discipline in Poland if such body is itself an independent and impartial tribunal established by law.<sup>15</sup>
16. Specifically, the composition of the body that appoints judges of the SAC is relevant for assessing the requirement of “independence”.<sup>16</sup> In the given circumstances, the composition of the SAC is determined by the NCJ. The ECtHR has specifically ruled in a number of cases that the NCJ is “unduly influenced by legislative and executive powers” and is “defective”.<sup>17</sup> The CJEU has expressly acknowledged in its judgment of 15 July 2021 that the NCJ is a body “whose independence from the political authorities is questionable”.<sup>18</sup> As concluded in ODIHR’s 2017 Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary,<sup>19</sup> the new appointment modalities of judge members of the NCJ whereby the legislature, rather than the judiciary, would appoint the fifteen judge representatives to the Judicial Council risks having the legislative and executive powers exercising decisive influence over judicial appointment procedures.
17. Since about 30% of SAC judges were appointed by the reformed NCJ, it is very likely that some of them may be hearing judicial discipline cases. It is therefore probable that due to the deficient modalities of judicial appointments by the reformed NCJ, **independence and impartiality of judges of the new disciplinary body may also be questioned** as it was the case with respect to the Disciplinary Chamber of the Supreme Court.
18. Alternative modalities should be found to ensure adjudication of these disciplinary cases against judges by an independent and impartial court “established by law”. The Bill may consider introducing a mechanism ensuring that disciplinary issues are heard by judges whose independence may not be questioned on the basis of their appointment by the reformed NCJ. One of the options for achieving this, at least temporarily, could be to require a minimum number of years of serving as a judge

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15 See Principle 20 of the [United Nations Basic Principles on the Independence of the Judiciary](#), endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

16 See ECtHR, *Oleksandr Volkov v. Ukraine*, Application no. 21722/11, paras. 109-117 and 130; *Özpinar v. Turkey*, Application no. 20999/04, paras. 78-79.

17 See, for example, *Dolińska-Ficek and Ozimek v. Poland* and *Żurek v. Poland*.

18 See Judgment of the CJEU of 15 July 2021, *Commission v. Poland* (Disciplinary regime for judges) (C-791/19, EU:C:2021:596). See also the ECtHR case-law regarding the NCJ, including *Reczkowicz v. Poland*, Application no. 43447/19, judgment of 22 July 2021; *Dolińska-Ficek and Ozimek v. Poland*, Application nos. 49868/19 and 57511/19, judgment of 8 November 2021; *Advance Pharma sp. z o.o. v. Poland*, Application no. 1469/20, judgment of 3 February 2022.

19 *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, in English and in Polish [here](#).

of the SAC, such as ten years.<sup>20</sup> It is noted that the Bill proposes a mechanism for assessing the independence and impartiality of a judge hearing a case. This mechanism can presumably be used with respect to a judge or bench of the SAC considering a disciplinary case. However, the body reviewing alleged lack of independence of the said judge/bench may itself face similar challenges related to its own independence, in addition to the potential deficiencies of such an assessment mechanism further detailed in Sub-Section 3 below.

19. ODIHR also notes discussions over the concerns of potential incompatibility of the proposed amendments with the Polish Constitution.<sup>21</sup> While it is a matter for competent national authorities to evaluate the constitutionality of legislation, it is of the utmost importance to ensure that these concerns are properly addressed throughout the legislative process. More generally, as stated in previous ODIHR opinions, any judicial reform should always comply with the country's constitutional requirements, adhere to the rule of law principles and be compliant with international law and human rights standards as well as OSCE commitments. In addition, it must be based on a comprehensive analysis of the existing judicial system and impact assessment of the proposed policy and legislative options and should be accompanied by inclusive and meaningful public consultation, including with the judiciary, at all stages of the law-making process (see also Sub-Section 5 *infra*).

## 2.2. Disciplinary Grounds

20. While the June 2022 Amendments did not repeal the new disciplinary grounds introduced in 2020, they introduced new provisions specifying that:
- it is admissible to examine whether a judge meets the requirements of independence and impartiality, taking into account the circumstances surrounding his/her appointment and post-appointment conduct, when requested by a party to the proceedings if, given the circumstances and the nature of the case, this would affect the proceedings or the outcome of the case (see Sub-Section 3 *infra*);<sup>22</sup>
  - the following would not constitute a disciplinary offense: (1) the finding that a court judgment issued with the participation of a given judge is flawed in terms of the interpretation and application of provisions of national or European Union law or in the determination of the facts or evaluation of evidence; (2) the fact of applying to the CJEU with a request for consideration of a preliminary ruling referred to in Article 267 of the TEU; and (3)

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20 Alternative modalities could also consist, as done in some other countries, of a disciplinary body whose judge members would be elected by their peers without any interference from political authorities or judicial hierarchies through methods guaranteeing the widest representation of the judiciary; see e.g., Consultative Council of European Judges (CCJE), Opinion n°24(2021) on the Evolution of the Councils for the Judiciary and their Role in Independent and Impartial Judicial Systems [CCJE\(2021\)11](#). See also [ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia \(2010\)](#), paras. 9 and 26. In this case, the decision by such a disciplinary body should still be challengeable on appeal before an independent and impartial tribunal established by law; the ECtHR has expressly recognized that fair trial rights, including the right to appeal, are applicable to disputes concerning a judge's removal from office; see ECtHR, *Olujić v. Croatia*, Application no. [22330/055](#), February 2009, paras. 31-44; see also *Baka v. Hungary*, Application no. 20261/12, decision of 27 May 2014, para. 77.

21 See <https://www.senat.gov.pl/prace/proces-legislacyjny-w-senacie/ustawy-uchwalone-przez-sejm/ustawy-uchwalone-przez-sejm/ustawa,1464.html>.

22 New Article 29 § 5 of the Act on the Supreme Court; new Article 23a § 4 of the Act on the Organization of Military Courts; new Article 42a § 3 of the Act on the Organization of Common Courts; new Article 5a § 1 of the Act on the Organization of Administrative Courts.

examination of compliance with the requirements of independence or impartiality in the above-mentioned case.<sup>23</sup>

21. These are steps made in the right direction, since the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to disciplinary liability, except in cases of malice or gross negligence.<sup>24</sup> However, the Bill does not repeal the problematic disciplinary grounds introduced in 2020, that ODIHR considered to be vague, imprecise and broadly-worded in its 2020 Opinion.<sup>25</sup> In addition, the delineation between what may constitute a disciplinary violation and what is covered by the exclusion of liability may not be that clear cut.
22. This means that while the disciplinary exemptions explicitly allow judges to carry out their fundamental judicial functions, the broad and vague disciplinary grounds remain and may still be used to impose disciplinary sanctions on judges exercising their functions or legitimate activities. The mere prospect of having to face proceedings before a body whose independence is not guaranteed may create a ‘chilling effect’ for judges and affect their own individual independence.
23. In addition, they may ultimately have an impact on judges’ independent and impartial interpretation of the law, assessment of facts and weighing of evidence, their freedom of expression, especially on issues pertaining to the functioning of the justice system, the reform of the judiciary or other issues relating to the separation of powers and the rule of law in Poland.<sup>26</sup> They may also be abused to exert undue pressure on judges when deciding cases and thus ultimately undermine their independence and impartiality.<sup>27</sup>
24. The Bill has also not annulled the prerequisite of Article 72 § 1 (1a) of the Act on the Supreme Court, Article 107 § 1 (1a) of the Act on the Organization of Common Courts and Article 37 § 2 (1a) of the Act on the Organization of Military Courts qualifying the refusal to exercise justice as a disciplinary ground. As a consequence, judges must continue to rule with judges appointed by the reformed NCJ, under the threat of disciplinary responsibility for the refusal to do so. **This provision may therefore also impact the individual independence of judges and should be reconsidered.**
25. In light of the foregoing, **ODIHR reiterates its recommendations from its Urgent Interim Opinion published in January 2020 to remove the overbroad and vague disciplinary grounds for judges, introduced in 2020**, especially those relating to “*actions challenging the existence of a judge’s professional relationship or the validity of a judge’s appointment, or the legitimacy of a constitutional organ*”, and provisions that may unduly restrict judges’ freedom of expression (see Section 6.1 of ODIHR Urgent Interim Opinion of January 2020).<sup>28</sup>

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23 New Article 72 § 6 of the Act on the Supreme Court; new Article 37 § 4 of the Act on the Organization of Military Courts; new Article 107 § 3 of the Act on the Organization of Common Courts; new Article 48 § 6 of the Act on the Organization of Administrative Courts.

24 See the [CJEU’s interim order C-204/21 R of 14 July 2021](#) regarding the suspension of provisions allowing the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal. See also, for example, Council of Europe, [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities](#), para. 66, emphasizing that the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to disciplinary liability, except in cases of malice or gross negligence. See also [ODIHR Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova](#), para. 25.

25 ODIHR, *Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019)*, 14 January 2020, in English and Polish [here](#), Sub-Section 6.1.

26 *Ibid.* [2020 ODIHR Opinion](#), para. 58..

27 *Ibid.* [2020 ODIHR Opinion](#), para. 70.

28 See ODIHR, *Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019)*, 14 January 2020, in English and Polish [here](#), Section 6.1.

### 2.3. Re-instatement of Judges who Were Suspended or Disciplined

26. According to Article 7 of the Bill, the SAC shall, *ex officio*, at the first hearing of the case, examine the decision of the Supreme Court's Chamber of Professional Responsibility or (abolished) Disciplinary Chamber on "*the suspension from office of a judge against whom disciplinary proceedings were initiated or against whom a resolution was issued permitting that they be held criminally liable and their salary or emoluments be reduced for the duration of the suspension or the disciplinary proceedings*". For the cases filed but not concluded prior to entry into force of the Bill, deadlines are extended unless the statute of limitation expired "*before the end of 12 months from the date of entry into force*" (Article 8.1 of the Bill). This means that the re-instatement of the suspended judges will be examined on a case-by-case basis, by a court, the independence and impartiality of which may potentially be questioned (see Sub-Section 2.1).
27. The Amendments also provide for a possibility for judges who were subject to a final disciplinary judgment or who had their immunity lifted to be brought to criminal liability to request the reopening of the proceedings within three months from the date of entry into force of the Amendments.
28. **In this respect, judges who were dismissed or disciplined on grounds which fall short of international standards and are now expressly considered in the Bill as no longer constituting acts leading to disciplinary liability (e. g. asking for preliminary review) could and should be granted automatic full rehabilitation *ex lege*.** Moreover, disciplinary sanctions with respect to some of the judges were already held by international courts to have been adopted by a body not fulfilling the requirements of independence and impartiality of a tribunal.<sup>29</sup> These judges should also be immediately and automatically reinstated, with compensation for lost wages.

### 3. ASSESSMENT OF THE INDEPENDENCE, IMPARTIALITY AND "ESTABLISHED BY LAW" REQUIREMENTS

29. Under the existing legal framework, as amended in June 2022, a party to proceedings can submit a motion to assess the independence and impartiality of a judge hearing the party's case, proving that the circumstances surrounding the appointment (or the judge's conduct after the appointment) may influence the proceedings or the outcome. Currently, the court or adjudicating judges may not carry out this assessment *ex officio*. The deadlines for filing a motion (within seven days from the notification, to the person entitled to file a motion, of the composition of the adjudicating bench hearing the case), and the necessity to notify a person entitled to file a motion about the composition of the adjudicating panel, and any subsequent changes, remain the same.
30. The Bill seeks to broaden the scope of such an assessment, which would now also include a review of whether a judge or the bench may be considered "established by law", meaning among others whether grave irregularities during the judicial appointment procedure of judges participating in the adjudication of the case may

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<sup>29</sup> See e.g., ECtHR, *Juszczyszyn v. Poland* (Application no. [35599/20](#), 6 October 2022, oaras. 308-336, considering disciplinary measures leading to applicant's suspension predominantly aiming to sanction and dissuade him from verifying lawfulness of appointment of judges upon recommendation of reformed NCJ. See also the [CJEU's interim order C-204/21 R of 14 July 2021](#) regarding the suspension of provisions allowing the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal.

have occurred.<sup>30</sup> This is in line with the spirit of the recent case-law of the ECtHR, which emphasizes the fundamental importance of the legality of judicial nominations as an integral part of the right to a fair trial.<sup>31</sup> In addition, it introduces the possibility for the competent court to raise the issue *ex officio*. The Bill also removes the requirement to prove that the circumstances surrounding the appointment (or the judge’s conduct after the appointment) *may influence the proceedings or the outcome*, which beyond being rather vague, is also potentially very difficult to prove for an individual. Proposed amendments to the Act on the Supreme Court would also repeal Article 29 § 4, which currently provides a clause preventing to challenge a decision issued with the participation of a judge, or to question a judge’s independence and impartiality, “*based solely on the circumstances of the appointment of the judge in question.*” Read together with the proposed new paragraph 5 of Article 29, it would now be admissible to examine whether a Supreme Court judge or a judge delegated to perform judicial functions in the Supreme Court meets the requirements of “independence, impartiality and established by law”, invoking only “the circumstances surrounding their appointment and post-appointment conduct”.<sup>32</sup>

31. Despite addressing some of the concerns raised by international courts and bodies, the efficiency and effectiveness of the proposed solution, as it is, remain doubtful. First, there is still a lack of clarity with respect to the criteria guiding the assessment of the independence, impartiality and whether the court in question is “established by law” requirements, thus risking erroneous, arbitrary or potentially inconsistent application of the law, undermining the effectiveness of this mechanism.<sup>33</sup> Moreover, the very strict 7-day deadline for submitting a motion from the day of notification of the composition of the bench remains, which may impede the use of this mechanism in practice; *de facto*, it will be challenging for a party to know or get information about the circumstances surrounding the appointment from the competent body, especially in such a little time.
32. According to proposed Article 29 § 7 of the Act on the Supreme Court, in addition to parties and participants in the proceedings before the Supreme Court, the competent court may also initiate a motion provided that there is a serious doubt as to whether the bench is independent, impartial and “established by law”. Similar provisions were introduced to proposed Article 42a § 6 of the Act on the Organization of Common Courts, Article 23a § 7 of the Act on the Organization of Military Courts and Article 5a § 3 of the Act on the Organization of Administrative Courts.
33. Furthermore, in case a motion is granted to dismiss a judge from a case for non-compliance with the requirements of independence, impartiality or being “established by law”, this does not serve as a basis for excluding that judge from

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30 See ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC] (Application no. [26374/18](#), judgment of 1 December 2020), para. 211, meaning a “tribunal established in accordance with the law” (paras. 229-230), considering any provision of domestic law – including, in particular, provisions concerning the independence of the members of a court – which, if breached, would render the participation of one or more judges in the examination of a case “irregular” (para. 232). The examination under the “tribunal established by law” requirement must systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the fundamental principles of the rule of law and the separation of powers and to compromise the independence of the court in question (paras. 234 and 237).

31 See e.g., ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC] (Application no. [26374/18](#), judgment of 1 December 2020), paras. 287-290.

32 The same change is suggested in the proposed Article 23a(4) of the Act on the Organization of Military Courts, Article 42a(3) of the Act on the Organization of Common Courts and Article 5a(1) of the Act on the Organization of Administrative Courts.

33 On the case-law of the ECtHR on the requirement of being “established by law”, see ECtHR Registry, [Guide on Article 6 of the Convention – Right to a fair trial \(civil limb\)](#) (22 August 2022), para. 243.



other cases considered with her/his participation.<sup>34</sup> In practice, this means that the impartiality and independence of a judge (or panels composed fully or partially of judges) appointed by the reformed NCJ may be repeatedly questioned, resulting in new litigations. Consequently, this risks creating a bottleneck for the administration of justice, which risks paralyzing the SAC, notwithstanding the two weeks deadline provided for its decisions.

#### 4. OTHER UNADDRESSED FUNDAMENTAL SYSTEMIC DEFICIENCIES UNDERMINING JUDICIAL INDEPENDENCE

34. The Bill seems to only focus on fulfilling the requirements imposed in the Council Implementing Decision.<sup>35</sup> In doing so, the proposed amendments do not address the root causes by leaving unchanged other fundamental systemic deficiencies undermining judicial independence, as underlined by international courts, other international institutions and in previous ODIHR Opinions, especially but not limited to those further detailed below.

##### 4.1. The Modalities of Appointing the Judge Members of the National Council of the Judiciary and Systemic Deficiencies in Judicial Appointments Procedure

35. In its previous Opinions, ODIHR severely criticized the change in the modalities of appointing the judge members of the NCJ, resulting in having the legislature, rather than the judiciary, appointing the fifteen judge representatives to the NCJ. As emphasized in the recent ECtHR case-law, such change has allowed the legislative and executive powers to exercise decisive influence over judicial appointment procedures carried out by the NCJ. This has amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the appointed judges and the respective bench/court.<sup>36</sup>
36. **ODIHR therefore reiterates its earlier recommendations that judge members of the NCJ should be selected directly by the judiciary,<sup>37</sup> and not by the parliament.** This would be in line with recommendations pertaining to the selection of judicial members of judicial councils or other similar bodies developed under the auspices of the OSCE and the Council of Europe, which advise for a majority of members of judicial councils to be judges chosen by their peers.<sup>38</sup> **The legal drafters could in addition consider possible options to enhance the openness,**

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34 See Article 29 § 18 of the Act on the Supreme Court; Article 42a § 11 of the Act on the Organization of Common Courts, Article 23a § 12 of the Act on the Organization of Military Courts and Article 5a § 13 of the Act on the Organization of Administrative Courts.

35 See *op. cit.* footnote 6.

36 See e.g., ECtHR, *Reczkowicz v. Poland* (Application no. [43447/19](#), judgment of 22 July 2021); *Dolińska-Ficek and Ozimek v. Poland* (Application nos. [49868/19](#) and [57511/19](#), judgment of 8 November 2021); *Xero Flor w Polsce sp. z o.o. v. Poland* (Application no. [4907/18](#), judgment of 7 May 2021).

37 See *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, in English and in Polish [here](#), Section 3.1. See also Venice Commission-DG I, *Urgent Joint Opinion on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 16 January 2020*, CDL-AD(2020)017-e, para. 61; and Venice Commission, *Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, CDL-AD(2017)031-e, 8-9 December 2017, para. 130.

38 See e.g., ODIHR *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), para. 7; Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, para. 27; *European Charter on the Statute for Judges* (1998), para. 1.3; Consultative Council of European Judges (CCJE), *Opinion No. 10 (2007) on the Council for the Judiciary at the Service of Society*, paras. 17-18 and 25. See also 2010 *Venice Commission's Report on the Independence of the Judicial System*, para. 50.

**transparency and inclusiveness of appointing modalities, as already suggested in the 2017 ODIHR Final Opinion.**<sup>39</sup>

#### **4.2. Influence of the Executive over Disciplinary Proceedings**

37. The Bill does not address the concerns linked to the possibility of having disciplinary representatives/officers nominated by the executive, which remains in the existing legal framework. As noted in the *2020 ODIHR Urgent Interim Opinion* and *2017 November Opinion*, the legal framework as amended provides for a direct executive influence in judicial discipline.<sup>40</sup> International standards require that judges are not subjected to undue interference by the executive branch and are protected against improper pressure which is capable of influencing the way in which they exercise their independent judgment in the cases they decide, including in the context of disciplinary proceedings.<sup>41</sup> This principle applies not only to disciplinary courts as the final decision-maker but also disciplinary representatives/officers as they are at the centre of the initial stage of the disciplinary process. Therefore, any influence of the executive over disciplinary proceedings should be avoided. **As recommended before, all provisions pertaining to the appointment of disciplinary representatives/officers by the executive and their special role in disciplinary proceedings against judges should be removed, in light of their negative effects on judicial independence.**<sup>42</sup> The disciplinary representatives/officers appointed by the executive could be replaced by a judge rapporteur who would not be part of the panel of judges.

#### **5. PROCEDURE FOR ADOPTING THE BILL**

38. ODIHR hereby refers to its recommendations from the previous ODIHR Opinions concerning any law-making process relating to the judiciary.<sup>43</sup> It must also be emphasized that the Council Implementing Decision specifically refers to improving the process of law-making, with mention of impact assessments, public consultations for draft laws and limitation of the use of fast-track procedures.
39. It is understood that the Bill was submitted to the *Sejm* on 13 December 2022 and then adopted in first reading on 11 January 2023, second reading on 12 January 2023, and third reading on 13 January 2023.<sup>44</sup> This shows that the process was rather

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39 See *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, in English and in Polish [here](#), paras. 51-55.

40 ODIHR, *Opinion on Certain Provisions of the Bill on the Supreme Court of Poland (as of 26 September 2017)*, 13 November 2017, in English and in Polish [here](#), Sub-Section 5.1; and ODIHR, *Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019)*, 14 January 2020, in English and Polish [here](#), paras. 79-82.

41 See e.g., CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, paras 69, 71 and 77; and Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, para. 69. See also 2010 *ODIHR Kyiv Recommendations on Judicial Independence*, which states that “[b]odies deciding on cases of judicial discipline must not be controlled by the executive branch nor shall there be any political influence pertaining to discipline [and that] [a]ny kind of control by the executive branch over [...] bodies entrusted with discipline is to be avoided” (para. 9).

42 ODIHR, *Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019)*, 14 January 2020, in English and Polish [here](#), para. 82. See also Venice Commission-DG I, *Urgent Joint Opinion on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws, issued pursuant to Article 14a of the Venice Commission’s Rules of Procedure on 16 January 2020*, CDL-AD(2020)017-e, para. 59.

43 In particular, *1990 OSCE Copenhagen Document*, whereby OSCE participating States have committed to ensure that legislation will be “adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability” (para. 5.8); *1991 OSCE Moscow Document*, which specifies that “[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (para. 18.1); Venice Commission, *Rule of Law Checklist*, Part II.A.5. See also para. 31 of CCJE *Opinion no. 18* (2015)); para. 1.8. of the 1998 *European charter on the statute for judges*; and para. 9 of the *2010 CCJE Magna Carta of Judges*.

44 See <[Paper no. 2870 - Sejm of the Republic of Poland](#)>.

expedited and did not allow for the organization of open, inclusive and effective consultations and proper impact assessment of the contemplated legislative changes.

40. ODIHR would like to reiterate that is a good practice when initiating fundamental reforms of the judicial system, for the judiciary and civil society to be consulted and play an active part in the process. The Consultative Council of European Judges (CCJE) has expressly stressed the fact that “*the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system*”.<sup>45</sup> The 1998 European Charter on the Statute for Judges also specifically recommends that judges be consulted on any proposed change to their statute or other issues impacting their work, to ensure that judges are not left out of the decision-making process in these fields.<sup>46</sup> Public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.<sup>47</sup>

[END OF TEXT]

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45 See para. 31 of CCJE [Opinion no. 18](#) (2015). See also CCJE [Opinion no. 24](#) (2021), para. 8, and CCJE [Opinion no. 10](#) (2007).

46 See para. 1.8. of the 1998 [European charter on the statute for judges](#). See also para. 9 of the 2010 CCJE Magna Carta of Judges, which states that “[t]he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)”.

47 See [Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes](#) (from the participants to the Civil Society Forum organized by ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.