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## **URGENT OPINION ON THE DRAFT ACT AMENDING THE CODE OF PROCEDURE IN PETTY OFFENCE CASES**

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### **POLAND**

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Based on an unofficial English translation of the Draft Act commissioned by the OSCE Office for Democratic Institutions and Human Rights.

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## EXECUTIVE SUMMARY

The Draft Act proposes significant changes to the Code of Procedure in Petty Offence Cases of Poland. First, it would introduce the possibility for rulings in petty offence cases subject to a fine or a reprimand to be issued by court clerks in the form of “orders for punishment”. Second, when a fine is imposed by the police or other authorized officers, the Draft Act would remove the possibility to refuse the penalty notice [mandat karny], the fine becomes enforceable within seven days and can be appealed before a district court. Read together with the new role of the court clerk, such appeal could be heard by a court clerk.

Overall, the Draft Act presents a number of shortcomings, which substantially impact the right to a fair trial before an independent and impartial tribunal, as guaranteed by Article 6 of the ECHR and Article 14 of the ICCPR.

First, it is doubtful whether court clerks could be considered as a court or tribunal fulfilling all the requirements of Article 6(1) of the ECHR and Article 14(1) of the ICCPR. Further, it is not clear whether the objections against court clerks’ orders will lead to a review by a court of full jurisdiction, where substantive and procedural allegations may be raised. If not the case, this would be incompatible with the right to a fair trial. The proposed reform would also mean that there will be two parallel systems for adjudicating on petty offences cases, one carried out by a court, another by a court clerk, thereby potentially having similar cases being adjudicated according to different procedures, depending on the courts/location of the petty offence case, which goes against the right to equality in the administration of justice.

Second, the availability of a tribunal with full jurisdiction over the issuing of penalty notices – as required by fair trial guarantees – is similarly not sufficiently secured in the arrangements envisaged in the Draft Act.

Third, the proposed amendments mean that in fine proceedings in petty offence cases, the burden of proof will be shifted and no longer be on the prosecution, contrary to the principle of the presumption of innocence.

Fourth, the alleged wrongdoer, when appealing against the penalty notice has only seven days to gather all the evidence proving *that they did not commit the offence* and are precluded from submitting any further evidence (except those not known at the time of lodging the appeal). This *de facto* places them in a substantial disadvantage compared to the prosecution, without reasonable justification, and is therefore contrary to the principle of equality of arms embedded in Article 6 of the ECHR and Article 14 of the ICCPR. Moreover, the appellant will not be able to defend herself/himself with regards to the materials submitted by the prosecution, which are to be submitted only after the lodging of the appeal, which is at odds with the right to adversarial proceedings. It is therefore unlikely that the appellant will have adequate time and facilities for the preparation of a defence, which is also an essential element of the fair trial guarantees. Critically, it also potentially enables the police or prosecuting authority to tailor their evidence of what allegedly happened in a way which can exploit opportunities presented by the appellant’s evidence. Thus, not only does the appellant enjoy no right to require the prosecution to establish its case, but the appellant need not be made aware, and maybe will not be aware, of the detailed allegations against her or him when advancing evidence supposedly establishing her or his innocence at the time of lodging the appeal.

Fifth, the proposed amendments are likely to have a chilling effect on the exercise of fundamental freedoms, especially freedoms of expression and of peaceful assembly.

In light of the foregoing, several provisions of the Draft Act are inherently incompatible with the right to a fair trial, or/and potentially affect the right to an effective remedy, which puts into question the very legitimacy of the Draft Act, which should be reconsidered in its entirety and should not be adopted as it is.

ODIHR would also like to reiterate that any pivotal changes to fundamental legal acts governing the country should be preceded by an in-depth regulatory impact assessment with all relevant data, statistics and concrete evidence justifying the reform and be subject to open, inclusive, extensive and effective consultations, including with human rights organizations and the general public, which has not been the case so far for the Draft Act.

*As part of its mandate to assist OSCE participating States in implementing OSCE commitments, 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: Draft Act Amending the Code of Procedure in Petty Offence Cases of Poland**

## I. INTRODUCTION

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1. On 26 January 2021, the Commissioner for Human Rights of Poland sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) a request for a legal review of the Draft Act Amending the Code of Procedure in Petty Offence Cases of Poland (hereinafter “the Draft Act”).<sup>1</sup>
2. On 27 January 2021, ODIHR responded to this request, confirming the office’s readiness to prepare a legal opinion on the compliance of the Draft Act with international human rights standards and OSCE human dimension commitments. Given the short timeline to prepare this legal review, ODIHR decided to prepare an Urgent Opinion on the Draft Act, which does not provide a detailed analysis of all the provisions of the Draft Act but primarily focuses on the most concerning issues relating to the right to a fair trial and impact of the amendments on the exercise of fundamental freedoms.
3. This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.<sup>2</sup>

## II. SCOPE OF THE OPINION

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4. The scope of this Urgent Opinion covers only the Draft Act submitted for review. Thus limited, the Urgent Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating petty offences and criminal offences in Poland.
5. The Urgent Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on those provisions that require amendments or improvements than on the positive aspects of the Draft Act. The ensuing legal analysis is based on international and regional human rights and rule of law standards, case law, norms and recommendations as well as relevant OSCE human dimension commitments. The Urgent Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
6. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*<sup>3</sup> (hereinafter “CEDAW”) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*<sup>4</sup> and commitments to mainstream gender into OSCE activities, programmes and projects, the Urgent Opinion seeks to integrate, as appropriate, a gender and diversity perspective.

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<sup>1</sup> Contrary to what is suggested by the title of the Draft Act, beyond amendments to the Code of Procedure in Petty Offence Cases, the Draft Act also seeks to amend the Code of Petty Offences (1971, as amended), the Executive Penal Code (1997, as amended) and the Act of 21 November 2008 on the Civil Service.

<sup>2</sup> See especially [OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area](#) (2008), point 4, where the Ministerial Council “[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention [...]”.

<sup>3</sup> *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Poland ratified this Convention on 30 July 1980.

<sup>4</sup> See [OSCE Action Plan for the Promotion of Gender Equality](#), adopted by Decision No. 14/04, MC.DEC/14/04 (2004), par 32.

7. This Urgent Opinion is based on an unofficial English translation of the Draft Act commissioned by ODIHR, which is attached to this document as an Annex. Errors from translation may result. The Opinion is also available in Polish. However, the English version remains the only official version of the Opinion.
8. In view of the above, ODIHR would like to stress that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Poland in the future.

### III. LEGAL ANALYSIS AND RECOMMENDATIONS

#### 1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

9. The Draft Act proposes significant changes to the way fines may be imposed on and become enforceable against individuals for petty offences [*wykroczenia*].
10. The punishment of minor or petty offences by administrative authorities, in particular when the nature of the offence and/or purpose and severity of the penalty render them criminal in nature, is generally considered as falling within the ambit of the right to a fair trial (criminal limb).<sup>5</sup> Such right is protected by Article 14 of the *International Covenant on Civil and Political Rights*<sup>6</sup> (ICCPR), Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>7</sup> (ECHR) and Articles 47-48 of the *Charter of Fundamental Rights of the European Union*.<sup>8</sup> The UN Human Rights Committee further elaborated about the practical requirements of the right to a fair trial in its General Comment no. 32 on Article 14 of the ICCPR,<sup>9</sup> and in its jurisprudence on individual communications as well as concluding observations. In addition, the abundant case-law of the European Court of Human Rights (ECtHR) relating to Article 6 of the ECHR offers useful guidance regarding fair trial guarantees, including those applicable in petty offence cases.<sup>10</sup>
11. OSCE participating States specifically committed to respect the right to a fair trial, as an essential component of the rule of law.<sup>11</sup> Moreover, in its [\*Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area\*](#) (2008), the OSCE Ministerial Council called upon OSCE participating States “to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both

<sup>5</sup> See Sub-Section 2 of this Urgent Opinion and references included therein.

<sup>6</sup> *UN International Covenant on Civil and Political Rights* (hereinafter “ICCPR”), adopted by the UN General Assembly by the Resolution 2200A (XXI) of 16 December 1966. The Republic of Poland ratified the ICCPR on 18 March 1977.

<sup>7</sup> *Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter “ECHR”), signed on 4 November 1950, entered into force on 3 September 1953. The Republic of Poland ratified the ECHR on 19 January 1993.

<sup>8</sup> [\*Charter of Fundamental Rights of the European Union\*](#), OJ C 326, 26 October 2012, pages 391–407.

<sup>9</sup> UN Human Rights Committee (CCPR), [\*General Comment no. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial\*](#), 23 August 2007, especially paragraphs 9, 11, 13, 18, 19, 20, 21, 30 and 31.

<sup>10</sup> See, among many others, European Court of Human Rights (ECtHR), [\*Engel and Others v. the Netherlands\*](#) (Application nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72; judgment of 8 June 1976); and [\*Öztürk v. Germany\*](#) (Application no. 8544/79, judgment of 21 February 1984). See also e.g., on the issue of independence of judicial assistants, ECtHR, [\*Luka v. Romania\*](#) (Application no. 34197/02, judgment of 21 July 2009), pars 37-50; and the former system of assessors in Poland, [\*Henryk Urban and Ryszard Urban v. Poland\*](#) (Application no. 23614/08, judgment of 30 November 2010).

<sup>11</sup> Most notably, see CSCE/OSCE, [\*Concluding Document of Vienna – The Third Follow-up Meeting\*](#), Vienna, 15 January 1989, par 13.9; and [\*Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE\*](#), Copenhagen, 29 June 1990, par 5. See also e.g., OSCE, Ministerial Council’s [\*Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems\*](#) (Ljubljana, 2005), which states that “rule of law must be based on respect for internationally recognized human rights, including the right to a fair trial, the right to an effective remedy, and the right not to be subjected to arbitrary arrest or detention”. As stated in the [\*OSCE Copenhagen Document 1990\*](#), “the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression” (par 2).

*international and national levels, including in all aspects of their legislation, administration and judiciary*”, as a key element of strengthening the rule of law in the OSCE area.<sup>12</sup>

12. In addition, a number of other specialized documents of a non-binding nature elaborated in various international and regional *fora* provide useful and more practical guidance and examples of good practices to help ensure respect for the right to a fair trial.<sup>13</sup>
13. The right to a fair trial primarily provides that in the determination of one’s civil rights and obligations or of any criminal charge against him/her, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law and thereby has the right of access to the courts. When charged with a criminal offence, it also provides the defendant with additional essential guarantees specified in Article 14 pars 2-7 of the ICCPR and Article 6 pars 2-3 of the ECHR, including the right to be presumed innocent until proven guilty according to law, the principle of equality of arms and the right to adversarial proceedings.

## 2. “PETTY OFFENCES” AS CRIMINAL CHARGES UNDER ARTICLE 14 OF THE ICCPR AND ARTICLE 6 OF THE ECHR

14. Article 1 of the Draft Act introduces changes to the current procedure of fines for petty offences that stem from the Code on Petty Offences. It is important to note that Article 1 of the Code on Petty Offences defines “petty offences” [*wykroczenie*] as “*any socially harmful act, prohibited by the law in force at the time of its commission, which is subject to a penalty of detention, restriction of liberty, a fine of up to PLN 5,000 or a reprimand*”.<sup>14</sup> Pursuant to Article 25 of the Code on Petty Offences, if the imposition of a fine has proved or would be ineffective, the court may convert the fine into socially useful work. If refused by the alleged wrongdoer or likely to be ineffective, such work could ultimately be replaced by a court order for the imposition of a substitute prison sentence of a maximum of 30 days in detention, with one day of detention corresponding to a fine of PLN 20 to 150.
15. Both the UN Human Rights Committee and the ECtHR have adopted a substantive rather than a formal conception of the notion of “criminal charge” for the purpose of determining the applicability of additional fair trial guarantees applicable to “criminal charges”, with the classification under domestic law only constituting a starting point.<sup>15</sup>

<sup>12</sup> OSCE, [Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area](#) (Helsinki, 4-5 December 2008).

<sup>13</sup> These include, among others: the [1948 Universal Declaration of Human Rights](#), Articles 10 and 11; [UN Basic Principles on the Independence of the Judiciary](#) (General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985), in particular Principles 1-7, 10-14 and 17-20; [UN Standard Minimum Rules for Non-custodial Measures](#), General Assembly Resolution 45/110 of 14 December 1990, Section 3 on Legal Safeguards; [UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#), General Assembly Resolution 40/34 of 29 November 1985, in particular Principles 4-7; [Bangalore Principles of Judicial Conduct](#), adopted by the Judicial Group on Strengthening Judicial Integrity, which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judges from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in its Resolution 2006/23 of 27 July 2006; relevant reports of the UN Special Rapporteur on the Independence of Judges and Lawyers, especially [2015 Report](#), UN Doc. A/HRC/32/34, 5 April 2016 (see paras. 30-60); [UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders](#), General Assembly Resolution 65/229 of 21 December 2010, Rules 57-62; CEDAW, [General Recommendation no. 33 on Women’s Access to Justice](#), UN Doc. CEDAW/C/GC/33, 3 August 2015; Council of Europe, [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities](#), 17 November 2010; ODIHR, [Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia](#) (2010); and Venice Commission, [Report on Judicial Appointments](#), CDL-AD(2007)028; and [Report on the Independence of the Judicial System Part I: The Independence of Judges](#), CDL-AD(2010)004. See also Council of Europe/ECtHR, [Guide on Article 6 of the Convention – Right to a fair trial \(criminal limb\)](#) (31 December 2020); and ODIHR, [Legal Digest of International Fair Trial Rights](#) (2012).

<sup>14</sup> Code of Petty Offences of the Republic of Poland of 20 May 1971, as amended, consolidated version Dz. U. 1971 Nr 12 poz. 114 available at: <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19710120114/U/D19710114Lj.pdf>.

<sup>15</sup> See e.g., ECtHR, [Adolf v. Austria](#) (Application no. 8269/78, judgment of 26 March 1982), par 30.

Based on this autonomous approach, the ECtHR has developed a well-established case law concerning the meaning of a “criminal charge”, based on three criteria (so-called “Engel criteria”) requiring consideration of: (1) the domestic classification of the act as criminal or otherwise; and (2) the nature of the offence; and/or (3) the purpose and severity of the penalty.<sup>16</sup> Regarding the severity of the penalty specifically, the Court further underlined that the fact that the commission of an offence is not punishable by imprisonment and is not entered on the criminal record are not decisive,<sup>17</sup> and that the relative lack of seriousness of a fine also cannot divest an offence of its inherently criminal character.<sup>18</sup> The UN Human Rights Committee considers similar factors, namely: (1) whether the acts are declared to be punishable under domestic criminal law; (2) whether such acts are criminal in nature; 3) whether they are accompanied by sanctions that, “*regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity*”.<sup>19</sup>

16. “Petty offences” as defined by the Code on Petty Offences, and the penalties contained therein are intended, *inter alia*, to be a deterrent to prevent the occurrence of socially harmful acts, have a punitive character and extend to the population at large.<sup>20</sup> At the same time, all the petty offences, even those that result in milder sanction of reprimand, always include the alternative of a fine at minimum and/or more serious restriction of liberty or detention. The fines imposable are potentially significant<sup>21</sup> and the possibility to convert any fine into substitute prison sentence of maximum 30 days, confirms the inherent punitive and deterrent character of the penalties for petty offences. This is also confirmed by the applicability of aspects of the Code of Criminal Procedure to elements of proceedings in petty offence cases. Accordingly, as also noted in the Explanatory Memorandum,<sup>22</sup> petty offences under the Polish legal system fall within the ambit of Article 14 of the ICCPR and Article 6 of the ECHR, as they apply to “criminal charges” irrespective of the fact that they are not classified as “criminal offences” under national law and of the relative lack of seriousness of the penalties contemplated in the Code on Petty Offences.

### 3. ADJUDICATION OF PETTY OFFENCE CASES BY COURT CLERKS

17. Article 1(1) of the Draft Act provides that rulings [*orzeczenie*] in petty offence cases may now be issued not only in the form of a judgment [*wyrok*] or decision [*postanowienie*] as currently provided by Article 32(2) of the Code of Procedure in Petty Offence Cases (hereinafter “the Code”), but also in the form of an “order for punishment” [*nakaz karny*]. Such orders may be issued by a court clerk [*referendarz sądowy*] when the Code so provides (proposed Article 32(2a)). The proposed Article 94a(1) specifically provides for such a possibility in cases involving petty offences in which a reprimand or a fine may be imposed, noting that no additional punitive measure may be imposed by way of

<sup>16</sup> See ECtHR, *Engel and Others v. the Netherlands* (Application nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72; judgment of 8 June 1976), paras 80-85. See also ECtHR, *Deweert v. Belgium* (Application no. 6903/75, judgment of 27 February 1980), paras 44-46; *Jussila v. Finland* [GC] (Application no. 73053/01, judgment of 23 November 2006), paras 29-39; *Ezeh and Connors v. the United Kingdom* [GC] (Applications nos. 39665/98 and 40086/98, judgment of 9 October 2003), paras 82-130 (also noting in par 86 that the second and third criteria laid down in *Engel* are alternative and not necessarily cumulative); and *Öztürk v. Germany* (Application no. 8544/79, judgment of 21 February 1984), paras 46-56 (concerning in particular “petty offences” under German legislation).

<sup>17</sup> See e.g., ECtHR, *Kadubec v. Slovakia* (Application no. 27061/95, judgment of 2 September 1998), par 52.

<sup>18</sup> *Op. cit.* footnote 16, par 54 (1984 ECtHR *Öztürk v. Germany*), where the Court stated that “[t]he relative lack of seriousness of the penalty at stake [a fine between 5 and 1,000 DM at the time corresponding approximately to between EUR 2,5 and 500] cannot divest an offence of its inherently criminal character”. See also e.g., ECtHR, *Lauko v. Slovakia* (Application no. 26138/95, judgment of 2 September 1998), par 58.

<sup>19</sup> *Op. cit.* footnote 9, par 15 (2007 CCPR General Comment no. 32); and CCPR, *Perterer v. Austria*, Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004), par 9.2.

<sup>20</sup> *Op. cit.* footnote 16, par 53 (1984 ECtHR *Öztürk v. Germany*).

<sup>21</sup> They can be as high as 5,000 PLN (approximately 1,111 EUR).

<sup>22</sup> See *Explanatory Memorandum for the Draft Act*, pages 4-5 (English version).

an order for punishment. Such a power would be in addition to the current possibility of a court issuing a penalty order in respect of a petty offence, where the court has the power to impose community orders and other punitive measures and not just fines. The proposed new procedure would seem to become the default procedure in petty offence cases sanctioned by a fine or reprimand as the court clerk would be required to refer the case to the president of the court “*if it is found that there are no grounds for issuing an order for punishment*” (proposed Article 94a(2)). An objection may be lodged against such an order for punishment (proposed Article 94a(3))<sup>23</sup> (see also pars 31-33 *infra*).

### 3.1. General Principles on Access to an Independent and Impartial Tribunal

18. Article 14(1) of the ICCPR and Article 6(1) of the ECHR encompass the right of access to the courts in the determination of criminal charges and rights and obligations in a suit at law, for the purpose of ensuring that no individual is deprived of her/his right to claim justice. Limitation of access to courts may be justified providing that States’ discretion is guided by the following key principles, requiring that the regulation of access rights: (1) must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired; (2) should pursue a legitimate aim; and (3) should be justified by reasonable relationship of proportionality between the means employed and the aim sought to be achieved.<sup>24</sup> Preventing courts from becoming overloaded with cases of lesser importance may constitute such a legitimate aim provided that this does not impair the very essence of the applicant’s right to a court or “tribunal” within the meaning of Article 6(1) of the ECHR.<sup>25</sup> For this reason, a limited exception to the general rule that criminal penalties can only be imposed by a court or tribunal meeting international fair trial standards, applies to minor offences provided that there is a possibility of full review on appeal by such a court/tribunal.<sup>26</sup>
19. The UN Human Rights Committee considers that “*any criminal conviction by a body not constituting a tribunal would be incompatible with Article 14 par 1 of the ICCPR*”.<sup>27</sup> The ECtHR has recognized that conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with international standards provided that the person concerned has the opportunity to challenge any decision thus made against her/him before a tribunal that offers the guarantees of Article 6(1) of the ECHR.<sup>28</sup> Indeed, it is a common feature of arrangements in many countries that regulatory or other less serious offences are not determined by a court or tribunal in the first place.
20. However, it is crucial that the court or tribunal subsequently dealing with the case after the initial determination fulfils all the requirements of the fair trial guarantees. Thus, apart from being independent and impartial, it must have jurisdiction to examine all questions of fact and law relevant to the dispute before it<sup>29</sup> and be able to make its own assessment of the issues raised,<sup>30</sup> including as to the penalty to be imposed,<sup>31</sup> unless this is fixed by law.<sup>32</sup> This means that the body should not operate as a traditional court of appeal but as

<sup>23</sup> Article 103 pars 3a and 3b of the Code of Procedure in Petty offence Cases provides that “*objections may be raised against the decisions and orders issued by the court clerk*”, which renders the decision or order invalid; the objection should be submitted within seven days from the announcement of the decision or order, or its date of delivery when it is subject to service.

<sup>24</sup> See e.g., ECtHR, *Ashingdane v. the United Kingdom* (Application no. 8225/78, judgment of 28 May 1985), par 57; *Steel and Morris v. the United Kingdom* (Application no. 68416/01, judgment of 15 February 2005), par 62; *Aćimović v. Croatia* (Application no. 61237/00, judgment of 9 October 2003), par 29.

<sup>25</sup> See e.g., ECtHR, *Brualla Gómez de la Torre v. Spain* (Application no. 26737/95, judgment of 19 December 1997), par 33.

<sup>26</sup> *Op. cit.* footnote 16, par 56 (1984 ECtHR *Öztürk v. Germany*).

<sup>27</sup> *Op. cit.* footnote 9, par 18 (2007 CCPR General Comment no. 32).

<sup>28</sup> See e.g., *op. cit.* footnote 16, par 56 (1984 ECtHR *Öztürk v. Germany*); and *op. cit.* footnote 18, par 64 (1998 ECtHR *Lauko v. Slovakia*). See also ECtHR, *Tolmachev v. Estonia* (Application no. 73748/13, judgment of 9 July 2015), par 43.

<sup>29</sup> See ECtHR, *Grande Stevens and Others v. Italy* (Application no. 18640/10, judgment of 4 March 2014), par 139.

<sup>30</sup> See ECtHR, *Ortenberg v. Austria* (Application no. 12884/87, judgment of 25 November 1994), par 34

<sup>31</sup> See ECtHR, *Diennet v. France* (Application no. 18160/91, judgment of 26 September 1995).

<sup>32</sup> See ECtHR, *Segame SA v. France* (Application no. 4837/06, judgment of 7 June 2012), but then it should be proportionate (par 59).



an ordinary first-instance court, examining the matter in its entirety without being bound by the limits of the complaint filed or facts established by a lower instance court.<sup>33</sup>

21. Moreover, it is particularly important that the said body does not start with the preconceived idea that the person concerned has committed the offence charged. This is because the burden of proof must be on the prosecution, and any doubt must benefit the person charged. As a result, it is for the prosecution to inform her or him of the case that will be made against her or him, so that s/he may prepare and present her or his defence accordingly. Moreover, the prosecution must adduce evidence sufficient to convict her or him.<sup>34</sup>
22. Furthermore, it should be possible for the person concerned to be legally represented in the proceedings.<sup>35</sup> Although the nature of some cases may not require an oral hearing,<sup>36</sup> there should be a possibility to hear and examine witnesses where any issues of credibility exist or where the facts are in dispute. Otherwise the person concerned would be deprived of the right to have the factual aspects of the decision by administrative authorities to impose a sanction against her/him reviewed by a tribunal with full jurisdiction.<sup>37</sup> This is particularly so where there is a need to put the credibility of a police officer's findings to the test.<sup>38</sup> In addition, the appeal should not be determined in the absence of the person concerned where her or his presence is necessary for the determination of the case, e.g., where this is required to verify the accuracy of her or his statements and compare them with those of any victim (whose interests also need to be protected) and of the witnesses.<sup>39</sup>

### 3.2. Application

23. The issue at stake is to determine whether at some point of the amended procedure in petty offence cases, the alleged wrongdoer will have access to a court or tribunal fulfilling all the requirements of Article 6(1) of the ECHR and Article 14(1) of the ICCPR.<sup>40</sup> It is therefore necessary to analyse first whether "court clerks" would fulfil all requirements of Article 6(1) of the ECHR and Article 14(1) of the ICCPR. While an in-depth analysis of the legal framework applicable to court clerks would go beyond the scope of this opinion, it is important to review the key characteristics of such function to determine whether it may constitute an independent and impartial tribunal. This includes considering various elements, *inter alia*, the manner of appointment and the duration of their term of office, the existence of guarantees against outside pressure and whether a court clerk presents an appearance of independence.<sup>41</sup>
24. First, it is important to emphasize that Article 147(1) of the Law on the Organization of Common Courts (2001, as amended – hereinafter "the 2001 Law") specifies that court clerks "*are employed in courts to perform duties specified in acts, falling within the competence of courts in the scope of legal protection other than administering justice*" [*emphasis added*]. Therefore, it may be questioned whether court clerks are legally

<sup>33</sup> See ECtHR, [Tolmachev v. Estonia](#) (Application no. 73748/13, judgment of 9 July 2015), par 51

<sup>34</sup> See ECtHR, [Grande Stevens and Others v. Italy](#) (Application no. 18640/10, judgment of 4 March 2014), par 159.

<sup>35</sup> See e.g., ECtHR, [Tolmachev v. Estonia](#) (Application no. 73748/13, judgement of 9 July 2015), par 49.

<sup>36</sup> Such as in proceedings for traffic offences, where the issues at stake are of a technical nature or where the person concerned has had an adequate opportunity to put her or his case in writing and to challenge the evidence against her or him; see e.g., ECtHR, [Marčan v. Croatia](#) (Application no. 40820/12, judgment of 10 July 2014), par 35.

<sup>37</sup> See e.g., ECtHR, [Jussila v. Finland](#) [GC] (Application no. 73053/01, judgment of 23 November 2006), par 48; and [Produkcija Plus storitveno podjetje d.o.o. v. Slovenia](#) (Application no. 47072/15, judgment of 23 October 2018), par 59.

<sup>38</sup> See e.g., ECtHR, [Marčan v. Croatia](#) (Application no. 40820/12, judgment of 10 July 2014), par 44.

<sup>39</sup> See e.g., ECtHR, [Tolmachev v. Estonia](#) (Application no. 73748/13, judgement of 9 July 2015), pars 54-57.

<sup>40</sup> See e.g., ECtHR, [Le Compte, Van Leuven and De Meyere v. Belgium](#) (Application nos. 6878/75, 7238/75; judgment of 23 June 1981), par 51.

<sup>41</sup> See e.g., ECtHR, [Ramos Nunes de Carvalho e Sá v. Portugal](#) [GC] (Applications nos. 55391/13, 57728/13 and 74041/13, judgment of 6 November 2018), par 144; [Campbell and Fell v. the United Kingdom](#) (Application no. 7819/77, 7878/77, judgment of 28 June 1984), par 78; [Incal v. Turkey](#) [GC] (Application no. 22678/93, judgment of 9 June 1998), par 71; and [Luka v. Romania](#) (Application no. 34197/02, judgment of 21 July 2009), pars 37-50. See also *op. cit.* footnote 9, par 19 (2007 CCPR General Comment no. 32).

permitted to adjudicate at all even in the context of petty offences. Though it cannot be excluded that the Code can effectively change or modify the 2001 Law, there seems to be a contradiction between the norms.

25. Article 151(1) of the same Law underlines that “[w]ithin the scope of their duties, court clerks are independent as to the content of the issued rulings and orders provided for in acts”, which would suggest a certain degree of independence.
26. However, a number of other features of their appointment and dismissal, career and status may potentially question their independence. First, while recruitment of court clerks is done through open competition, the Minister of Justice may have some influence over such recruitment as s/he defines, by way of a regulation, the detailed method and procedure of conducting the competition, in particular the composition of the selection boards and the manner and mode of their operation (Article 149a(2) of the 2001 Law) and modalities of their periodic evaluations (Article 148(3) of the 2001 Law). Also, the Minister of Justice exercises certain prerogatives that may potentially interfere with the alleged independence of court clerks, such as the establishment of disciplinary committees to hear disciplinary cases concerning court clerks in the second instance (Article 152(5)) or taking decisions on transfers (though with the consent of the court clerks in most cases) outside the given appeal court area (Article 151a(1)). Moreover, the fact that a court clerk is appointed and dismissed by the president of the court of appeal (Article 150(3)) may also potentially question the internal independence of clerks<sup>42</sup> since this may imply a type of hierarchical relationship between the said president and the appointed court clerk. This is further compounded by the existence of an “*employment relationship*”, which generally implies some forms of subordination, as well as the application of certain rules for appointed civil servants (see Article 152(8)).
27. In addition, court clerks do not enjoy security of tenure, which is an essential element to protect independence,<sup>43</sup> and may for instance be terminated in case of two consecutive negative periodical evaluations or where a court is abolished or reorganised, which renders further employment of the court clerk impossible (Article 151a (10) of the 2001 Law).<sup>44</sup> It is also concerning that, according to Article 151a(6), court clerks may, “*if required by the interests of the administration of justice*”, be transferred to another court even without their consent, though this should be for a period not longer than six months.<sup>45</sup> Furthermore, it is also not clear whether the safeguards in place to guarantee the independence of judges are applicable to law clerks, e.g., the rules on recusal. In certain circumstances, the accused may wish to ask for the removal of one or more of the judges dealing with his or her case for fear of a lack of impartiality and it is not certain whether this could be invoked against a law clerk. Also, even if a candidate to become a court clerk is required to have passed the court clerk, judicial, public prosecutor, notary, bar or legal counsel exam, or finished judicial training or public prosecutor's training (Article 149(1)), there is no requirement of a minimum number of years of experience before being allowed to adjudicate, which may question their “*competence*” mentioned

<sup>42</sup> See ECtHR, [Parlov-Tkalčić v. Croatia](#) (Application no. 24810/06, judgment of 22 December 2009), par 86. See also *op. cit.* footnote 13, Point 1.4, which states that “[i]n performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently”.

<sup>43</sup> See e.g., ECtHR, [Campbell and Fell v. the United Kingdom](#) (Application no. 7819/77, 7878/77, judgment of 28 June 1984), pars 78-80; [Findlay v. the United Kingdom](#) (Application no. 22107/93, judgment of 25 February 1997), par 73; [Bochan v. Ukraine](#) (Application no. 7577/02, judgment of 3 May 2007), par 65; and [Moiseyev v. Russia](#) (Application no. 62936/00, judgment of 9 October 2008), par 173. See also *op. cit.* footnote 9, par 19 (2007 CCPR General Comment no. 32).

<sup>44</sup> Of note, regarding the former system of assessors in Poland before they were reinstated in 2016, in its case [Henryk Urban and Ryszard Urban v. Poland](#) (Application no. 23614/08, judgment of 30 November 2010), the ECtHR had considered them not to have the necessary guarantees of independence, primarily because no grounds for removal were specified in the law and any decision in this regard could be taken by the Minister of Justice, which is not the case for the legal framework regulating court clerks.

<sup>45</sup> See e.g., concerning judges, Council of Europe, [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities](#), adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, par 52; and Venice Commission, [Report on the Independence of the Judicial System – Part I: The Independence of Judges](#) (2010), CDLAD(2010)004, 16 March 2010, pars 41-43.

- in Article 14(1) of the ICCPR, i.e., that they are suitably qualified and experienced persons to act as judicial officers.<sup>46</sup> Finally, it is questionable whether, in light of their status and position within a court, they may fulfil the requirement of an outward appearance of independence as one may believe that court clerks may *de facto* be under the influence of judges of the respective courts.
28. In light of the foregoing, **there is considerable doubt about whether court clerks could be assimilated to a court or tribunal fulfilling all the requirements of Article 6(1) of the ECHR and Article 14(1) of the ICCPR.**
  29. The proposed reform would also mean that there will be two parallel systems for adjudicating on petty offences cases, one carried out by a court, another by a court clerk, who does not offer the same fair trial guarantees. The Explanatory Memorandum emphasizes that this new competence of court clerk will be optional and depending on the court in question.<sup>47</sup> **This is problematic since depending on the courts/location of the petty offence case, similar cases may be adjudicated according to a different procedure. This goes against the right to equality in the administration of justice,** which lies at the heart of the rule of law and demands that all persons have equal rights of access to the courts and that justice is administered in a way that achieves fairness for all.<sup>48</sup> The equality before courts and tribunals requires in particular that similar cases be dealt with in similar ways,<sup>49</sup> which will not be guaranteed according to the contemplated scheme.
  30. It is also important to further consider whether the accused person will subsequently have access to an independent and impartial tribunal.
  31. Proposed new Article 94a(3) provides for the possibility to lodge an objection against an order for punishment issued by a court clerk. Article 103(3a) and (3b) of the Code also refers to the objections that may be raised against the decisions and orders issued by a court clerk, which render the decision or order invalid; such objection should be submitted within seven days from the announcement of the decision or order, or its date of delivery when it is subject to service. Article 103(3b) further states that “[t]he president of the court refuses to accept the objection if it was filed late or by an unauthorized person”.
  32. First, the deadline for raising an objection is extremely tight and may potentially prevent applicants from properly developing their arguments and effectively present their case/objection.<sup>50</sup> Furthermore, there is no explicit indication in the Code as to the modalities and procedure for submitting such objections and which entity will be in charge of ruling on it. Proposed Article 94a(4) states that “[i]n matters not regulated here, provisions relating to the penalty order and the procedure for issuing a penalty order shall apply *mutatis mutandis* to the order for punishment and to the procedure for issuing an order for punishment” (article 94a(4) draft law). Article 94 of the Code, which deals with penalty order [*wyrok nakazowy*], further refers to the applicability of Article 506(1)–(3), (5) and (6) of the Code of Criminal Procedure, which deals with objections and provides that upon objection, the penal order becomes invalid and “*the case shall then be subject to examination according to the general rules*”. Accordingly, filing an objection against an order for punishment results in the loss of legal force of the

<sup>46</sup> See e.g., *op. cit.* footnote 13, Sub-Section 3.2.1 on the Competence of Individual Judicial Officers (2012 ODIHR Legal Digest of International Fair Trial Rights).

<sup>47</sup> See Explanatory Memorandum for the Draft Act, page 1 (English version).

<sup>48</sup> See e.g., *op. cit.* footnote 13, page 39 (2012 ODIHR Legal Digest of International Fair Trial Rights). See also *op. cit.* footnote 9, par 2 (2007 CCPR General Comment no. 32).

<sup>49</sup> *ibid.* par 14 (2007 CCPR General Comment no. 32).

<sup>50</sup> See e.g., ECtHR, *Adorisio and Others v. The Netherlands* (Application nos. 47315/13 48490/13 49016/13, decision of 17 March 2015), par 99.

challenged decision or order, and then the proceedings are normally conducted according to the general rules. At the same time, unless provided by other texts, it is not clear whether this means that the case should be heard before a court of first instance, where substantive and procedural allegations may be raised, or a court of appeal where limited grounds for revocation would apply as per Article 104 of the Code,<sup>51</sup> and which cannot therefore qualify as a court of full jurisdiction. **This should be clarified.**

33. In any case, **if the order for punishment cannot in practice be reviewed by a court of full jurisdiction upon objection, this would then be incompatible with the right to a fair trial.** Indeed, in such case, the alleged wrongdoer will not have had any opportunity during the whole procedure to challenge the decision before a court/tribunal offering the guarantees of Article 6(1) of the ECHR and Article 14(1) of the ICCPR (see par 19 *supra*). This may also potentially affect the right to an effective remedy enshrined in Article 13 of the ECHR in light of the extremely short deadlines for lodging objections, the restrictions concerning evidentiary standards and the enforceability of sanctions.
34. Finally, a court clerk would be required to refer the case to the president of the court “*if it is found that there are no grounds for issuing an order for punishment*” (proposed Article 94a(2)). However, it is not clear when such situation would occur, which may in turn raise an issue with regard to the principle of legal certainty. The absence of grounds for issuing an order for punishment could refer to the lack of basis for a conviction, or the conclusion that a fine or reprimand would not be sufficient. In any case, it might be more appropriate for a case to be remitted for a hearing before the court in all cases where there are issues of credibility or disputed facts. **If such a reform were pursued, it would be necessary to clarify what is meant by the absence of grounds for issuing an order for punishment, while ensuring that the court clerk should refer to a court all cases where issues of credibility or disputed facts are raised.**

#### 4. NEW PROVISIONS ON THE IMPOSITION AND ENFORCEABILITY OF FINES

35. In Poland, all fines of up to PLN 500 as well as higher fines in limited listed cases<sup>52</sup> and reprimands may be directly imposed by police officers or other authorities when a special law so provides (see Articles 95 and 96 of the Code). Article 97(1) of the current Code provides that for such cases, a police officer may impose a fine by way of a penalty notice [mandat karny] only if either (a) the perpetrator of the offense has been caught red-handed or immediately after committing the offense, or (b) if the officer ascertains that an offense has been committed, in particular with the use of a control and measurement or recording device and there is no doubt as to the perpetrator of the act. At present, a penalty notice may become legally binding upon either (a) the payment of the fine or (b)

<sup>51</sup> Pursuant to Article 104(1) of the Code, the appellate court shall repeal the judgment under appeal if: 1) the decision was issued by a person who is not entitled to adjudicate or a judge excluded by operation of law or unable to adjudicate; 2) the court was not properly staffed or the judgment was not signed; 3) a common court ruled in a matter within the jurisdiction of a military court or a military court ruled in a matter within the jurisdiction of a common court; 3a) a lower court ruled in a case belonging to the jurisdiction of a higher court; 4) imposed a penalty or measure unknown to the Act; 5) there is a contradiction in the content of the decision, preventing its execution; 6) the accused person did not have a defense lawyer in the cases specified in Art. 21 § 1 or the defender did not take part in the activities in which his participation was mandatory; 7) one of the circumstances excluding the proceedings, specified in art. 5 § 1 items 4–10.

<sup>52</sup> Article 96 par 1 of the Code provides that fine proceedings apply to fines in the amount of up to PLN 500, and in the case referred to in Article 9 § 1 of the Code of Petty Offenses (i.e., where the wrongful act has the features of an offense specified in two or more provisions of the Act) - up to PLN 1,000. Paragraphs 1a to 1c of Article 96 of the Code then lists a number of exceptions in case of violations of provisions of other specific legislation, where higher fines may be imposed such as fines of up to PLN 2,000 in case of violations of Articles 54–56 and Article 57a Act of 20 March 2009 on the Safety of Mass Events (i.e., non-compliance with order or summons issued by law enforcement or information services at the time and place of a mass event, carrying alcoholic beverages at a mass event, and dissimulation of face to prevent or significantly impede the recognition of the person during mass sports event), a fine of up to PLN 1,000 in cases covered by Article 116 par 1 of the Code of Petty Offenses (non-compliance with the prohibitions, orders, limitations or obligations specified in the provisions on preventing and combating infections and infectious diseases in humans when being sick, a carrier or in contact with a sick person), etc..

the receipt of the notice.<sup>53</sup> Pursuant to Article 97(2) of the current Code, a person may refuse to accept the penalty notice, which means that the authority whose officer imposed the fine has to lodge a motion for a penalty to be imposed and prove the commission of the petty offence in court<sup>54</sup> (current Article 99 of the Code). In such cases, there is provision for revocation of a “*legally valid penalty notice*” in a number of circumstances, including when the law provides that the perpetrator does not commit an offence for reasons referred to in Articles 15-17 of the Code of Petty Offences (see Article 101(1) of the current Code).

36. The proposed amendments to Article 97(2) of the Code would remove the possibility of refusing to accept a penalty notice, and would deem such a notice to have been received where a person either (a) refuses to receive it or (b) refuses or is unable to acknowledge its receipt (proposed Article 98(8) of the Code). The fine would become binding and enforceable within seven days. Pursuant to the Draft Act, a (non-suspensive) appeal against the penalty notice can be brought before a district court within seven days from the date of the fine being imposed by such penalty notice (proposed new Article 99a(1) of the Code). The initiative for bringing the matter before the court in the case of persons who are deemed to have received penalty notices would now lie with them and not the authority whose officer imposed the fine as is currently the case. Such an appeal would not suspend the enforceability of the penalty notice since only “[t]he court may suspend the enforcement of the penalty notice being appealed” (proposed new Article 99a(4)). Read together with the proposed new Article 32(2a) and Article 94a of the Code, that would mean that appeals in such cases may or would be heard by “court clerks” as this concerns petty offences sanctioned by a fine.
37. When lodging such an appeal, the person concerned would be required to indicate both whether it is the imposition of the penalty or just its amount that is being appealed and all the evidence known to support her or his contentions (proposed new Article 99a(2)). It would not be possible to adduce any evidence at the appeal other than that which was referred to when lodging the appeal, unless this evidence was not known to the appellant at the time of doing so (proposed new Article 99a(5)). The court would be able to impose a harsher penalty than the one that was imposed by the notice (proposed new Article 99a(6)). There would also be the possibility of a further appeal against a judgment upholding the penalty notice (proposed new Article 99b).
38. Furthermore, while there would be no change affecting penalty notices that become final (i.e., in the event of the payment or the receipt of the mandate), the provision for lodging a motion for a penalty to be imposed would now only apply to alleged wrongdoers who were not found at the place of the commission of the offence and have not paid the fine.<sup>55</sup>
39. Courts hearing appeals against *final* penalty notices would be second tier ones in the larger cities (proposed amendment to Article 101(2) of the Code).

#### **4.1. Access to an Independent and Impartial Tribunal**

40. As stated in par 19 *supra*, prosecution and punishment of minor offences by administrative authorities is not inconsistent with international standards provided that the person concerned has the opportunity to challenge any decision thus made against her/him before a tribunal that meets all the fair trial requirements and offers an effective

<sup>53</sup> Article 98 of the Code; the former applies when the person is either (a) only temporarily resident in the territory of the Republic or Poland or has no permanent place of residence or stay or (b) is a perpetrator who was not found at the place of the commission of the offence whereas the latter applies to those who are temporarily resident or have a place of permanent residence or stay in the Republic of Poland or another European Union Member State.

<sup>54</sup> It is unclear from the wording of Article 99 to which court such an action should be brought, but may perhaps be the district court.

<sup>55</sup> As a result of the proposed amendment to Article 99 of the Code.

remedy. The current system whereby an alleged wrongdoer may refuse to accept a penalty notice, based on which the relevant authority should bring a motion for penalties before a court, is in compliance with such a principle.

41. It is worth noting however that the mere fact that the persons concerned would be required to lodge an appeal would not seem to entail a lack of compliance with the requirement to have access to an independent and impartial tribunal with full jurisdiction. The ECtHR tends to focus on the powers of the tribunal rather than on the manner of approaching it.<sup>56</sup>
42. Moreover, as mentioned in par 33 *supra*, if according to the Draft Act, the appeal against a penalty notice is indeed only heard by a court clerk, who *prima facie* does not seem to meet all the requirements of Article 6 of the ECHR and Article 14 of the ICCPR, and if a so-called “objection” does not lead to a review by a court of full jurisdiction, then the person against whom a penalty for an offence is imposed cannot be considered to have had access to an independent and impartial tribunal established by law for the purpose of Article 6 of the ECHR and Article 14 of the ICCPR.
43. Proposed Article 99b(1) provides that “[t]he parties may appeal against the court judgment passed as a result of the examination of the appeal” and paragraph 2 specifies that “[t]he provision of Article 99a(5) [i.e., on the limitation regarding evidence] shall apply *mutatis mutandis* to court appeal proceedings”. When the first stage of the proceedings are not handled by an independent and impartial tribunal, as mentioned in par 20 *supra*, the body in charge of the appeal should not operate as a traditional court of appeal but as an ordinary first-instance court, examining the matter in its entirety, including both questions of facts and law, which does not seem to be the case for appellate courts in petty offence cases (see par 31 *supra*).
44. Moreover, the right of access to court should be practical and effective, and accordingly, a litigant should not be denied the opportunity to present his or her case effectively before the court and should be able to enjoy equality of arms with the opposing side.<sup>57</sup> In that respect, the very tight deadline for lodging an appeal and the fact that the appellate court will only be able to rely on evidence lodged at the time of the initial appeal, will considerably impede the effectiveness of any right of access to court or/and potentially the right to an effective remedy (see also Sub-Sections 4.3 and 4.4 *infra*).

## 4.2. Presumption of Innocence

45. Article 6(2) of the ECHR and Article 14(2) of the ICCPR provide that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, a principle also enshrined in Article 48 of the Charter of Fundamental Rights of the European Union and in the EU Directive 2016/343.<sup>58</sup> In this regard, the ECtHR has said that presumption of innocence means: “(1) when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; (2) the burden of proof is on the prosecution, and (3) any doubt should benefit the accused”.<sup>59</sup>

<sup>56</sup> See, e.g., ECtHR, *Tolmachev v. Estonia* (Application no. 73748/13, judgment of 9 July 2015). See also e.g., ECtHR, *Marčan v. Croatia* (Application no. 40820/12, judgment of 10 July 2014), in which case an objection had to be lodged within eight days of the penalty notice finding that an offence had been committed with the objection either challenging the finding of guilt or the sanction imposed.

<sup>57</sup> See e.g., ECtHR, *Steel and Morris v. the United Kingdom* (Application no. 68416/01, judgment of 15 February 2005), par 59. See also *Airey v. Ireland* (Application no. 6289/73, judgment of 9 October 1979), par 24.

<sup>58</sup> See EU, *Directive 2016/343(EU) Parliament and Council of 9 March 2016 on Strengthening of Certain Aspects of the Presumption of Innocence and the Right to be Present at Trial in Criminal Proceedings*, Article 3.

<sup>59</sup> See ECtHR, *Barberà, Messegué and Jabardo v. Spain* (Application no. 10590/83, judgment of 6 December 1988), par 77, which states that: “Paragraph 2 (art. 6-2) embodies the principle of the presumption of innocence. It requires, *inter alia*, that when carrying out their

46. The proposed amendments mean that the burden of proof will be shifted and no longer be on the prosecution (see also pars 21-22 *supra*). Currently, a person whom the police considers to have committed an offence under the Code of Petty Offence can be issued a fine/financial penalty but may refuse such a fine (Article 97(2) of the current Code). In such a case, the authority whose officer imposed the fine has to lodge a motion for a penalty to be imposed and prove the commission of the petty offence in court (Article 97(2) of the current Code), where all of the procedural guarantees secured by Article 6 of the ECHR and Article 14 ICCPR are in principle in place. That is, first and foremost, the onus currently rests with the law enforcement authority to prove that the person has committed the petty offence, evidence must be made available to the defendant, who should face trial before an independent tribunal of law and who should have the right to an appeal.
47. **Shifting the burden of proof from the prosecution to the appellant as proposed by the Draft Act will undermine the principle of the presumption of innocence required by Article 6(2) of the ECHR and Article 14(2) of the ICCPR.**

#### 4.3. Equality of Arms and the Right to Adversarial Proceedings

48. Article 1(8) of the Draft Act introduces four new Articles 99a, 99b, 99c and 99d in the Code, which describe the manner in which a person may appeal the decision of the police officer/law enforcement authority with the district court. The appellants have only seven days to gather all the evidence proving *that they did not commit the offence* that will be reviewed by the court and are precluded from submitting any further evidence (except those not known at the time of lodging the appeal). Moreover, the appellants do not receive any information on the evidence held against them, until the proceedings are already in motion and after having submitted evidence of their “innocence”. Proposed Article 99a(5) states that “[i]n court proceedings, the person on whom the penalty has been imposed may not adduce evidence other than that referred to in the second sentence of para. 2 [i.e., all the evidence submitted when lodging the appeal], unless the evidence was not known to him or her at the time when the appeal was lodged”. This means that the appellant is not given any further opportunity to submit additional evidence (except for those not known at the time of lodging the complaint) to counter that of law enforcement, once it is revealed during the proceeding.
49. Generally, the basis for establishing that a particular petty offence has been committed can vary from ones where potentially objective evidence is available in the form of a control and measurement or recording device is used<sup>60</sup> to ones where there can be conflicting testimony as to what occurred from law enforcement officers and others, including the accused. The latter is something often seen in proceedings relating to alleged breaches of public order and peace, notably those said to have been committed in the course of assemblies and other protest action.
50. Article 6 of the ECHR has been interpreted by the ECtHR as including the principle of equality of arms between the parties. This requires that “each party be given a reasonable opportunity to present [her/his] case under conditions that do not place [her/him] at a substantial disadvantage vis-à-vis [her/his] opponent”.<sup>61</sup> As a general principle, only such measures restricting the rights of the defence which are strictly necessary are

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*duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him”.*

<sup>60</sup> As recognised in Article 97(1) of the Code.

<sup>61</sup> See e.g., ECtHR, *Foucher v. France* (Application no. 22209/93, judgment of 18 March 1997), par 34; *Öcalan v. Turkey* [GC] (Application no. 46221/99, judgment of 12 May 2005), par 140.

permissible under Article 6(1) of the ECHR.<sup>62</sup> The UN Human Rights Committee similarly considers that the right to equality before courts and tribunals also ensures equality of arms, meaning that “*the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant*”.<sup>63</sup> In particular, the accused must be able to “*submit such evidence as he or she deems relevant*”,<sup>64</sup> which is not what is contemplated by the proposed amendments.

51. Another element of a fair hearing is also the right to adversarial proceedings, meaning that each party must have the opportunity not only to make known any evidence needed for her/his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court’s decision.<sup>65</sup> The proposed reform goes against this key principle.
52. The proposed amendments restrict the evidence that the person who has received the penalty may adduce and *de facto* require the person to inform the prosecutor when he or she lodges the appeal of all the evidence she or he intends to invoke. This limits the reporting of evidence by the punished individual to only seven days from receiving the penalty notice, unless the evidence was not known to her or him when the appeal was lodged. Critically it enables the police or prosecuting authority potentially to tailor their evidence of what allegedly happened in a way which can exploit opportunities presented by the appellant’s evidence. Thus, not only does the appellant enjoy no right to remain silent and to require the prosecution to establish its case, but the appellant need not be made aware, and maybe will not be aware, of the detailed allegations against her or him when advancing evidence supposedly establishing her or his innocence. In principle, a prosecutor’s duty to act fairly, impartially and in an autonomous manner requires that the prosecutor puts all the credible evidence available before a court and disclose all relevant evidence to the accused, not merely the evidence favouring the prosecution case.<sup>66</sup>
53. In light of the foregoing, **the proposed amendments, especially as they relate to the rules on evidence, *de facto* place the appellant in a substantial disadvantage compared to the prosecution, without reasonable justification, and are therefore contrary to the principle of equality of arms and the right to adversarial proceedings embedded in Article 6 of the ECHR and Article 14 of the ICCPR** (see also Sub-Section 4.4 *infra*).

#### 4.4. Lack of Adequate Time and Facilities for the Preparation of One’s Defence

54. The right to have adequate time and facilities for the preparation of one’s defence is an essential element of the guarantee of a fair trial and a corollary of the principle of equality of arms.<sup>67</sup> The meaning of “adequate time” depends on the circumstances of each case. Time-limits for lodging an appeal are in principle legitimate limitations on the right of access to a court. However, such time-limits should be ones that those instituting the

<sup>62</sup> See e.g., ECtHR, *Van Mechelen and Others v. the Netherlands* (Application no. 21363/93, judgment of 23 April 1997), par 58.

<sup>63</sup> *Op. cit.* footnote 9, par 13 (2007 CCPR General Comment no. 32).

<sup>64</sup> See e.g., CCPR, *Mr. Manuel Francisco Becerra Barney v. Columbia*, Communication no. 1298/2004, CCPR/C/87/D/1298/2004, 10 August 2006, par 7.2.

<sup>65</sup> See e.g., ECtHR, *Adorisio and Others v. The Netherlands* (Application nos. 47315/13 48490/13 49016/13, decision of 17 March 2015), par 89.

<sup>66</sup> See e.g., Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service*, CDL-AD(2010)040, par 15. See also International Association of Prosecutors (IAP), *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, adopted by the IAP on 23 April 1999, Point 1.6, which states “*always protect an accused person’s right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial*”.

<sup>67</sup> See e.g., *op. cit.* footnote 9, par 32 (2007 CCPR General Comment no. 32).



relevant proceedings can reasonably be expected to meet and they should not be strictly interpreted in a way that disregards the relevant practical circumstances.<sup>68</sup>

55. In particular, the proposed requirement to disclose all the known evidence within the seven days within which an appeal should be lodged is problematic in cases where there is a dispute concerning the evidence. Certainly, there may be no guarantee that the person wishing to appeal will have ready access to the police officer's statement concerning the alleged offence. Furthermore, it may take time to identify possible witnesses and establish their whereabouts. Moreover, before seeking to gather all this evidence, there will be a need first to obtain legal advice and assistance as to the lodging of an appeal. Taken together, all these steps will not necessarily be practicable in cases where the evidential issues are significant.
56. Also, there would not seem to be any pressing need for the appellant's evidence – as opposed to the grounds – to be disclosed at this stage, nor should there be any such obligation, especially as there is no comparable obligation on the police/prosecution.
57. In light of the above, **the requirement to lodge the appeal within seven days (and disclose all evidence known within such time) would appear inconsistent with the requirement that any limitation on access to court have a legitimate aim and be proportionate** (see par 18 *supra*),<sup>69</sup> as well as **potentially in breach of the right to equality of arms,<sup>70</sup> and its corollary right to have adequate time for the preparation of one's defence.**
58. Moreover, the facilities must include access to documents and other evidence which the alleged wrongdoer requires to prepare her/his case, including all materials that the prosecution plans to offer in court against the accused.<sup>71</sup> Since the authority whose officer imposed the fine by way of the penalty notice being appealed will only submit the materials related to the case after the lodging of the appeal, this means that the appellant will not be able to submit new evidence to counter such materials/evidence. **This *de facto* means that the appellant will not be able to defend herself/himself with regards to the materials submitted by the prosecution,<sup>72</sup> thereby questioning the availability of adequate facilities for the preparation of the appellant's defense.**

#### 4.5. Lack of Suspensive Effect of the Appeal

59. According to the Draft Amendments, appeals against the penalty notice before the district court will not have suspensive effect and only the district court may suspend the enforcement of the penalty notice being appealed (proposed Article 99a(4)). It is not clear how often a court will be likely to grant a suspension and based on which criteria. Of note, Article 24(3) of the Code on Petty Offences provides that “[w]hen imposing a fine, the perpetrator's income, personal and family conditions, property relations and earning capacity shall be taken into account”, but it is uncertain whether such provision would also be applied in case of the potential granting of a suspension. This may mean that the appellant will generally be required to pay the fine, irrespective of the lodging of the appeal. While the amount at stake may not *prima facie* be important to all appellants, the reimbursement should an appeal be successful may not fully compensate the individual for his or her losses,<sup>73</sup> especially for persons from low socio-economic backgrounds.

<sup>68</sup> See, e.g., ECtHR, *Shishkov v. Bulgaria* (Application no. 38822/97, judgment of 9 January 2003); and *Neshev v. Bulgaria* (Application no. 40897/98, judgment of 28 October 2004).

<sup>69</sup> See e.g., ECtHR, *Ashingdane v. the United Kingdom* (Application no. 8225/78, judgment of 28 May 1985), par 57.

<sup>70</sup> See e.g., ECtHR, *Edwards and Lewis v. United Kingdom* [GC] (Application no. 39647/98, judgment of 27 October 2004), par 46.

<sup>71</sup> See e.g., *op. cit.* footnote 9, par 33 (2007 CCPR General Comment no. 32).

<sup>72</sup> Of note, in Poland, the Minister of Justice is also the General Public Prosecutor of Poland.

<sup>73</sup> See e.g., ECtHR, *Kyprianou v. Cyprus* (Application no. 73797/01, judgment of 27 January 2004), para 45; ECtHR, *Vastberga Taxi v. Sweden* (Application no. 36985/97, judgment of 23 July 2002), par 120.

#### 4.6. *Reformatio in Peius*

60. Proposed Article 99a(6) of the Code provides that “[t]he court hearing the case after an appeal has been lodged may impose a harsher punishment on the person on whom the penalty has been imposed”. This would exclude the applicability of the principle of prohibition of *reformatio in peius* (“change for the worse”) as this would mean that the appellants may find themselves in a worse position than if they had not appealed in the first place. The ECHR and the ICCPR do not set out a prohibition of *reformatio in peius*. Moreover, the ECtHR has not pronounced itself on the issue of non-compliance with such principle in cases where this practice was forbidden by national law, finding that the “domestic courts are in a better position to interpret domestic legislation, in particular laws relating to procedural matters”, including the prohibition of *reformatio in peius*.<sup>74</sup>
61. At the same time, the prohibition of *reformatio in peius* is currently provided for by Article 434 of the Code of Criminal Procedure of Poland, to which Article 109(2) of the Code of Procedure in Petty Offence Cases refers as being applicable in appellate proceedings. There is no clear justification for introducing an exception to this principle in cases of appeal against a penalty notice in petty offence proceedings, as opposed to other appeals. Moreover, providing for an exception to this principle is likely to play as a deterrent for individuals to challenge the penalty notice and seek redress.

#### 4.7. Potential Impact of the Draft Act on the Exercise of Fundamental Freedoms

62. It is also important to analyze the potential impact of the Draft Act on the exercise of fundamental freedoms. The Draft Act will affect the proceedings as concerns a plethora of petty offences, ranging from traffic or labour offences to sanctions for non-compliance with the legislation on assemblies<sup>75</sup> or with the rules on contagious diseases.<sup>76</sup>
63. Firstly, according to Article 63a(1) of the Code on Petty Offences, “whomever places an advertisement, poster, placard, appeal, leaflet, inscription or drawing or makes it visible, in a public place not intended for such purpose” may be held liable for a petty offence. The infraction carries the possibility of restriction of liberty or a fine. While the right to freedom of expression is not absolute under international human rights law, any restriction is justifiable only if “prescribed by law” (i.e., provided in precise and accessible law that makes clear when the restrictions will be necessary), it pursues a “legitimate aim” provided by international human rights law,<sup>77</sup> is “necessary in a democratic society”, and as such respond to a pressing social need, and is non-discriminatory. It cannot be excluded that expression in the form of signs or placards may come under the Code and thus be subjected to the new procedure proposed by the Draft Act.

<sup>74</sup> See e.g., among others, ECtHR, *Kuokkanen and Johannesdahl v. Finland* (Application no. 38147/12, decision of 2 June 2015), par 27; and *Alkes v. Turkey* (no. 2) (Application no. 16047/04, judgment of 8 June 2010), par 21.

<sup>75</sup> Particularly Articles 50, 51, 54 and 90 of the Code of Petty Offences.

<sup>76</sup> A person may be held liable under Article 116 par 1a of the Code on Petty Offences, which makes it an offence to contravene rules on contagious diseases, as a separate offence altogether.

<sup>77</sup> Article 10 par 2 of the ECHR provides that freedom of expression “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”. Article 19 (3) of the UN International Covenant on Civil and Political Rights (ICCPR) states that the right to freedom of expression may “be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals”. See also Article 20 of the ICCPR as well as Article 4 of the UN International Convention on the Elimination of All Forms of Racial Discrimination, Article 3(c) of the Convention on the Prevention and Punishment of Genocide, and UN Security Council resolution 1624(2005). See also CCPR, *General Comment no. 37 (2020) on the right to peaceful assembly*, 17 September 2020, pars 50-51.

64. What is more, Article 50 of the Code on Petty Offences states that “*anyone who does not leave a public gathering despite being summoned by the competent authority, is punishable by detention or a fine*”. This Article further stipulates in Article 52(2)(2) that anyone who “*organizes an assembly without the required notification or leads such assembly or forbidden assembly*” or in point 3 “*leads the assembly after its dissolution*”, may also be punished by a fine.
65. While the right to freedom of peaceful assembly is not absolute, any restriction must similarly be prescribed by law, pursue a “legitimate aim” provided by international human rights law,<sup>78</sup> be “necessary in a democratic society”, and as such respond to a pressing social need, and be non-discriminatory. The list of legitimate aims is exhaustive and cannot be supplemented by additional grounds invoked by the public authorities, especially based on arguments which represent their own views.<sup>79</sup> Thus, these are the only permissible legitimate aims that can be pursued, to restrict the exercise of the right to freedom of peaceful assembly. It is the burden of the State to prove that the interference (based on one of these grounds) was justified. Public health is one of the legitimate aims listed under international law and many States have been restricting gatherings as a result of the COVID-19 pandemic. Restrictions however, must also pass the test of necessity and proportionality. Restrictions are not tantamount to blanket bans however, and to date, courts have annulled proceedings against protesters in Poland<sup>80</sup> but also in other European countries<sup>81</sup> where it was found that protests could go ahead where social distancing and precautionary measures were maintained, therefore not limiting the right completely.
66. Moreover, “[a]ny organizers or participants who have criminal or administrative charges levelled against them, should provide basic fair trial rights as set out in relevant international instruments, including access to a fair and public hearing within a reasonable time before an independent and impartial tribunal established by law”.<sup>82</sup> Furthermore, “the burden of proof should be on the relevant state authority to prove that the restrictions imposed are justified” and “[c]ourts or tribunals should have the authority to review all circumstances of the case”.<sup>83</sup> As emphasized above, it is questionable whether the new procedure envisaged in the Draft Act respects the rights to a fair trial and to an effective remedy, which means that persons exercising their right to freedom of peaceful assembly may be deprived of effective redress and of access to an effective remedy. This may discourage participants from taking part in assemblies and potential organizers from organizing such assemblies.
67. More generally, the new procedure may have a “chilling effect” on the exercise of fundamental freedoms, such as the right to freedom of expression or the right to freedom of peaceful assembly.

<sup>78</sup> Article 11 par 2 of the ECHR refers to the legitimate aims of “national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others”; and Article 21 of the ICCPR refers to “national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others”. See also CCPR, [General Comment no. 37 \(2020\) on the right to peaceful assembly](#), 17 September 2020, par 36.

<sup>79</sup> See e.g., [Hyde Park v. Moldova \(no.3\)](#) (Application no. 45095/06, judgment of 31 March 2009), par 26.

<sup>80</sup> See e.g., <<https://oko.press/sad-umorzyl-postepowanie-za-manifestacje-w-okresie-pandemii/>>.

<sup>81</sup> See ODIHR, [Report on OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic](#) (17 July 2020), Sub-Section II.2.C on Freedom of Peaceful Assembly, especially footnote 483 regarding protests in Germany.

<sup>82</sup> See ODIHR-Venice Commission, [Guidelines on the Right to Freedom of Peaceful Assembly](#), 3<sup>rd</sup> edition (2019, subject to editorial revisions), par 30.

<sup>83</sup> *ibid.* par 125.

#### 4.8. Conclusion

68. In light of the foregoing, **the Draft Act presents a number of shortcomings, which substantially impact the fair trial guarantees provided by Article 6 of the ECHR and Article 14 of the ICCPR, or/and potentially the right to an effective remedy.**
69. **The availability of a tribunal with full jurisdiction over the issuing of penalty notices – as required by fair trial guarantees – is not sufficiently secured in the arrangements envisaged in the Draft Act. Moreover, the proposed amendments mean that the burden of proof will be shifted and no longer be on the prosecution, contrary to the principle of the presumption of innocence. Further, the conditions and modalities for lodging an appeal against the penalty notice, especially regarding the rules of evidence, place alleged wrongdoers in a substantial disadvantage compared to the prosecution, without reasonable justification, and is therefore contrary to the principle of equality of arms and the right to adversarial proceedings embedded in Article 6 of the ECHR and Article 14 of the ICCPR. Moreover, the appellant will not be able to defend herself/himself with regards to the materials submitted by the prosecution, which are to be submitted only after the lodging of the appeal. It is therefore unlikely that the appellant will have adequate time and facilities for the preparation of a defence, which is also an essential element of the fair trial guarantees.**
70. **Consequently, several provisions of the Draft Act are inherently incompatible with the right to a fair trial, or/and potentially to the right to an effective remedy, which puts into question the very legitimacy of the Draft Act, which should be reconsidered in its entirety and should not be adopted as it is.**

#### 5. RECOMMENDATIONS RELATED TO THE PROCESS OF PREPARING AND ADOPTING THE DRAFT ACT

71. The Draft Act was submitted to the *Sejm* (the first chamber of parliament) by a group of deputies and was not subject to any public or sectorial consultations. Strictly speaking, in accordance with Article 70a of the Rules of Procedure of the *Sejm*,<sup>84</sup> there is no obligation to consult on drafts which are submitted on the initiative of parliamentarians.
72. At the same time, 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*” (1990 OSCE Copenhagen Document, par 5.8).<sup>85</sup> It is also worth recalling that OSCE commitments require legislation to be adopted “*as the result of an open process reflecting the will of the people, either directly or through their elected representatives*” (Moscow Document of 1991, par 18.1). The Venice Commission’s Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input during the law-making process.<sup>86</sup> The Council of Europe’s Group of States against Corruption (GRECO) in its latest evaluation report on Poland noted with concerns the increased absence of proper public consultations.<sup>87</sup>
73. Particularly, legislation that may have an impact on human rights and fundamental freedoms, as is the case here, should undergo extensive consultation processes

<sup>84</sup> See <<http://www.sejm.gov.pl/prawo/regulamin/kon7.htm>>.

<sup>85</sup> Available at <<http://www.osce.org/fr/odihr/elections/14304><http://www.osce.org/fr/odihr/elections/14304>>.

<sup>86</sup> See Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, Part II.A.5.

<sup>87</sup> See Council of Europe Group of States against Corruption (GRECO), *Evaluation Report for the Fifth Evaluation Round - Preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies*, 28 January 2019, par 42.

throughout the drafting and adoption process, to ensure that human rights organizations and the general public, including marginalized groups, are fully informed and able to submit their views prior to the adoption of the Act.<sup>88</sup> This is particularly essential, since the Draft Act introduces significant changes to fundamental codes governing the criminal procedure in Poland and significantly impacts the procedural guarantees of parties to such proceedings under international law.

74. For consultations on draft legislation to be effective, they should provide sufficient time to stakeholders to prepare and submit recommendations on draft legislation, while the State should set up an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions, providing for clear justifications for including or not including certain comments/proposals.<sup>89</sup> To guarantee effective participation, consultation mechanisms must allow for input at an early stage *and throughout the process*,<sup>90</sup> meaning not only when the draft is being prepared but also when it is discussed before Parliament (e.g., through the organization of public hearings). Public discussions and an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance confidence and trust in the adopted legislation, and in the institutions in general.<sup>91</sup>
75. Further, given the potential impact of the Draft Act on the exercise and protection of human rights and fundamental freedoms, it is also essential that the development of legislation in this field be preceded by an in-depth regulatory impact assessment, including on human rights compliance, completed with a proper problem analysis using evidence-based techniques to identify the most efficient and effective regulatory option.<sup>92</sup> This is all the more important in light of the recent findings by GRECO that impact assessments are often neglected and specifically recommending to ensure adequate impact assessments when legislative initiatives are submitted.<sup>93</sup>
76. The legal drafters have prepared an Explanatory Memorandum on the Draft Act,<sup>94</sup> which attempts to list a number of reasons justifying the contemplated reform, but rather consists of laying down general claims without providing all relevant data, statistics and concrete evidence as to why such changes to the current procedure are needed. The Explanatory Memorandum speaks chiefly about the need to make the procedure “more efficient” and take “some weight off the courts” which are overwhelmed with cases of minor infractions and petty offences. Although it is stated that penalty orders are issued in 90% of cases in which petty offence proceedings are initiated and that more than 80% of such orders issued become final without the defendant lodging an objection, there is no indication as to either the time that is needed at present to deal with these cases or the extent of the burden that this is imposing on the functioning of the courts concerned. Also, it does not attempt to seriously assess whether the newly proposed procedure will not indeed amount to similar case-load. As regards the removal of the possibility of refusing to accept a penalty notice, it is stated that “the offender’s refusal to accept a penalty notice is often impulsive and ill-considered, and necessitates a number of steps

<sup>88</sup> See e.g., *Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes* (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015, par 16; and ODIHR, *Guidelines on the Protection of Human Rights Defenders Human Rights Defenders* (2014), Section II, Sub-Section G on the Right to participate in public affairs.

<sup>89</sup> See e.g., *Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes* (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

<sup>90</sup> See e.g., *op. cit.* footnote 90, Section II, Sub-Section G on the Right to participate in public affairs (2014 OSCE/ODIHR Guidelines on the Protection of Human Rights Defenders).

<sup>91</sup> See e.g., OSCE/ODIHR, *Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland, Warsaw*, Opinion-Nr.: NHRI-CHE/312/2017, 31 October 2017, par 95.

<sup>92</sup> See e.g., OSCE/ODIHR, *Preliminary Assessment of the Legislative Process in the Republic of Uzbekistan* (11 December 2019), Recommendations L and M; and Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, Part II.A.5.

<sup>93</sup> See *op. cit.* footnote 87, par 42 (2019 GRECO's Evaluation Report for the Fifth Evaluation Round).

<sup>94</sup> See <<https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=866>>.

related to prosecuting the petty offence in question”, but there is no indication as to the basis on which this assessment of the practice of refusing to accept penalty notices is made. Further, the Explanatory Memorandum does not contain a gender and diversity impact assessment, any assessment of the effects on other rights (such as for instance the right to freedom of peaceful assembly) nor a sound budgetary assessment. Of note, in accordance with Article 34 (7) of the Rules of Procedure of the Sejm, if the justification is deemed insufficient and does not meet the requisite criteria, the Speaker of the Parliament may return the Draft to the members of parliament who initiated the draft.

77. In light of the foregoing, **ODIHR calls upon the public authorities to ensure that the Draft Act and any legislative initiatives in this sphere, and more generally any pivotal changes to fundamental legal acts governing the country, is preceded by an in-depth regulatory impact assessment and is subject to open, inclusive, extensive and effective consultations, including with human rights organizations and the general public, including marginalized groups, offering equal opportunities for women and men to participate.** According to the principles stated above, such consultations should take place in a timely manner, at all stages of the law-making process, including when the planned reform and subsequently the draft legislation are discussed, including before the Parliament.

*[END OF TEXT]*

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