

JUSTIFICATION OF THE BILL on the amendment of the Act on the National Council of the Judiciary, the Act on the Supreme Court and on certain other Acts)

on the adjustment of the statutory provisions to the standards specified in the rulings of the Court of Justice of the European Union, the European Court of Human Rights and rulings of the Supreme Court and the Supreme Administrative Court, regarding guarantees of separateness and independence of the judiciary from other state authorities, including:

- guarantees of independence of the National Council of the Judiciary from the bodies of the legislative and executive authorities in the procedure of appointing and SECONDING judges;
- the assurance of the independence, impartiality and right to a defence in the disciplinary liability system for judges.

I. Basis for preparing the assumptions and the bill

1. In the judgment of 19 November 2019 (C-585/18, C-624/18, C-625/18), the Court of Justice of the European Union held, among other things, that Article 47 of the Charter of Fundamental Rights of the European Union and Article 9(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding disputes regarding the application of EU law from falling within the exclusive jurisdiction of a body which does not constitute an independent and impartial tribunal in the meaning of the first of these provisions. The Court specified that there can be talk of an independent and impartial court where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts in the minds of subjects of the law as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. The CJEU simultaneously authorised the Labour and Social Security Chamber of the Supreme Court to establish – on the basis of the CJEU’s guidelines – whether the Disciplinary Chamber of the Supreme Court is a body which constitutes an independent and impartial court in the meaning of the Treaty regulations.
2. When implementing the CJEU’s judgment of 19 November 2019, in a judgment of 5 December 2019 (III PO 7/18), the Chamber of Labour and Social Security of the Supreme Court ruled that the National Council of the Judiciary in its current membership is not a body that is impartial and independent of the legislative and executive authorities. Consequently, the Supreme Court also ruled that the Disciplinary Chamber of the

Supreme Court is not a court in the meaning of European Union law, and is therefore not a court in the meaning of national law.

3. In the resolution of 23 January 2020 (BSA I-4110-1/20) issued by three joint Chambers of the Supreme Court – the Civil, Criminal and Labour and Social Security Chambers, the Supreme Court held that:
 - a) a bench is incorrectly selected in the meaning of Article 439 § 1, item 2 of the Criminal Procedures Code or there is a conflict in the membership of the bench with the provisions of the law in the meaning of Article 379, item 4 of the Civil Procedures Code if a person is appointed to the bench having been appointed to the office of judge by on the motion of the National Council of the Judiciary formed in the procedure specified by the provisions of the Act amending the Act on the National Council of the Judiciary and certain other acts of 8 December 2017;
 - b) the bench is incorrectly staffed in the meaning of Article 439 § 1, item 2 of the Criminal Procedures Code or there is a conflict of the membership of the bench with the provisions of the law in the meaning of Article 379, item 4 of the Civil Procedures Code if a person appointed to the office of judge is appointed to the bench in an ordinary or military court on the motion of the National Council of the Judiciary formed in accordance with the provisions of the Act amending the Act on the National Council of the Judiciary and certain other acts of 8 December 2017, if the defectiveness of the process of appointment leads, in specific circumstances, to a breach of the standard of independence and impartiality in the meaning of Article 45, item 1 of the Constitution of the Republic of Poland, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6, clause 1 Convention for the Protection of Human Rights and Fundamental Freedoms;
 - c) the interpretation of Article 439 § 1, item 2 of the Criminal Procedures Code and Article 379, item 4 of the Civil Procedures Code adopted in the resolution does not apply to judgments issued by courts before the date of its adoption or to decisions that will be issued in proceedings that are pending on that date on the basis of the Criminal Procedures Code before the given court;
 - d) improper staffing of the court in the meaning of Article 439, para. 1, item 2 of the Criminal Procedures Code or inconsistency of the membership of the court with the provisions of the law in the meaning of Article 379, item 4 of the Criminal Procedures Code applies to judgments issued with the involvement of judges of the Disciplinary Chamber formed in the Supreme Court on the basis of the Act on the Supreme Court of 8 December 2017 regardless of the date on which such judgments were issued.
4. In its judgment of 2 March 2021 (C-824/18), the Court of Justice of the European Union held, among other things, that the second subparagraph of Article 19(1) TEU must be interpreted as precluding such legal solutions which, in connection with the process of appointing judges, can give rise to reasonable doubts as to the invulnerability of judges to external factors in the minds of individuals, in particular to direct or indirect influence by

the legislative and executive authority, and as to their neutrality with respect to the interests that clash before them, and thus lead to a lack of visible signs of independence or impartiality of those judges. The CJEU simultaneously authorised the Supreme Administrative Court to assess whether the system in force in Poland of appointing judges with the involvement of the National Council of the Judiciary, whose judge-members are not elected by judges, is in breach of the provisions of the Treaty to the extent arising from the judgment of the CJEU.

5. While implementing the CJEU judgment of 2 March 2021, among other things, in the judgments of 6 May 2021 in cases II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18 and II GOK 7/18, the Supreme Administrative Court ruled that the National Council of the Judiciary with its new membership does not provide sufficient guarantees of independence from the legislative and executive authorities in the procedure of appointing judges. The Supreme Administrative Court stated that 23 out of 25 members of the National Council of the Judiciary are currently appointed to its membership by authorities other than the judiciary, while the principles and procedure for forming the staff membership of the NCJ are clearly motivated by the intention to subject it to a kind of custody on the part of the executive authority, and therefore of the parliamentary majority, which, in the context of the procedure for selecting members of the NCJ, emphasises the importance of the factor of the (political) loyalty of the candidates to the entity making the selection. The Supreme Administrative Court also emphasised that not all judges are represented in the membership of the NCJ (e.g. Supreme Court judges are not represented), which is clearly in conflict with Article 187, para. 2 of the Constitution of the Republic of Poland, which requires that 15 judge-members of the NCJ are to be selected from among judges of the Supreme Court, the ordinary courts, the administrative courts and the military courts. The Supreme Administrative Court pointed out that, among the members of the NCJ, i.e. judges of the ordinary courts, there are presidents and vice-presidents of ordinary courts appointed by the executive authority, which proves that those members of the Council are strictly functionally subordinated to the executive, which is represented in this forum by the Minister of Justice, and so the subordination is also of an institutional nature.
6. In its order of 14 July 2021 (C-204/21), the Court of Justice of the European Union obliged Poland to:
 - a) suspend, first, the application of point 1a of Article 27(1) of the ustawa o Sądzie Najwyższym (Law on the Supreme Court), of 8 December 2017, as amended by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws), of 20 December 2019, pursuant to which the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland) has jurisdiction to hear and determine, both at first and second instance, applications for authorisation to initiate criminal proceedings against judges or trainee judges or to place them in provisional

detention, arrest them or summon them to appear before it and, second, the effects of the decisions already adopted by the Disciplinary Chamber on the basis of that article which authorise the initiation of criminal proceedings against or the arrest of a judge, and to refrain from referring cases covered by that article to a court which does not meet the requirements of independence defined, in particular, in the CJEU judgment of 19 November 2019 (C-585/18, C-624/18, C-625/18);

- b) suspend the application of points 2 and 3 of Article 27(1) of the Law on the Supreme Court, as amended, on the basis of which the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court) has jurisdiction to adjudicate in cases relating to the status of judges of the Sąd Najwyższy (Supreme Court) and the performance of their office, in particular in cases relating to employment and social security law and in cases relating to the compulsory retirement of those judges, and to refrain from referring those cases to a court which does not meet the requirements of independence defined, in particular, in the CJEU judgment of 19 November 2019, (C-585/18, C-624/18, C-625/18);
- c) suspend the application of points 2 and 3 of Article 107(1) of the ustawa – Prawo o ustroju sądów powszechnych (Law relating to the organisation of the ordinary courts) of 27 July 2001, as amended by the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, and of points 1 to 3 of Article 72(1) of the Law on the Supreme Court, as amended, which allow the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union;
- d) suspend the application of Article 42a(1) and (2) and of Article 55(4) of the Law relating to the organisation of the ordinary courts, as amended, of Article 26(3) and Article 29(2) and (3) of the Law on the Supreme Court, as amended, of Article 5(1a) and (1b) of the ustawa – Prawo o ustroju sądów administracyjnych (Law relating to the organisation of the administrative courts) of 25 July 2002, as amended by the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, and of Article 8 of the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, in so far as they prohibit national courts from verifying compliance with the requirements of the European Union relating to an independent and impartial tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights;
- e) suspend the application of Article 26(2) and (4) to (6) and Article 82(2) to (5) of the Law on the Supreme Court, as amended, and of Article 10 of the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, establishing the exclusive jurisdiction of the Izba Kontroli

Nadzwyczajnej i Spraw Publicznych Sądu Najwyższego (Extraordinary Review and Public Affairs Chamber) of the Sąd Najwyższy (Supreme Court) to examine complaints alleging lack of independence of a judge or court.

7. In its order of 15 July 2021 (C-791/19), the Court of Justice of the European Union held that:
- a) by failing to guarantee the independence and impartiality of the Disciplinary Chamber, which has jurisdiction for the review of decisions issued in disciplinary proceedings against judges;
 - b) by allowing the content of judicial decisions to be treated as a disciplinary offence so far as this applies to judges of the ordinary courts;
 - c) by conferring on the President of the Disciplinary Chamber the discretionary power to designate the competent disciplinary court of the first instance in cases regarding the judges of the ordinary courts and, therefore, by failing to guarantee that disciplinary cases are adjudicated on by a court established by law;
 - d) by failing to guarantee that disciplinary cases against judges of the ordinary courts are heard within a reasonable period, and by stipulating that acts related to the appointment of a defence counsel and that counsel's handling of the defence do not have a suspensory effect on the course of the disciplinary proceedings and that the disciplinary court is to conduct the proceedings despite the justified absence of the notified accused or his or her defence counsel and, therefore, by failing to guarantee the rights of the defence of accused judges of the ordinary courts;
- the Republic of Poland has failed to meet its obligations under the second paragraph of Article 267 TFEU.

The CJEU also held that, by allowing courts the right to refer questions to the CJEU for a preliminary ruling to be limited by the possibility of the initiation of disciplinary proceedings, the Republic of Poland has failed to meet its obligations under the second and third paragraphs of Article 267 TFEU.

8. The European Court of Human Rights ruled in *Rzeczkwicz v Poland* (application 43447/19) on 22 July 2021. The ECtHR held that the manner in which judges were selected for the Disciplinary Chamber of the Supreme Court was in gross breach of both Polish law and the elementary principle of the rule of law, namely the independence of the judiciary. The Court held that the Disciplinary Chamber of the Supreme Court is not a court established by law in the meaning of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court also held that, after the changes made in 2017, the National Council of the Judiciary does not provide sufficient guarantees of independence from the legislative and executive authorities. According to the Court, the political authorities had excessive influence over the procedure for appointing judges and can directly or indirectly interfere with who is appointed to the office of judge.

9. On 21 September 2021, in its judgments in cases II GOK 8/18, II GOK 10/18, II GOK 11/18, II GOK 12/18, II GOK 13/18 and II GOK 14/18, issued as a result of the CJEU judgment of 2 March 2021 in Case C-824/18, the Supreme Administrative Court held that the factors of relevance to the assessment of the condition of independence that the National Council of the Judiciary is to satisfy are firstly, the constitution of the NCJ in a new membership by shortening the four-year term of office of the members previously comprising that body; secondly, the circumstance that the 15 members of the NCJ elected from among judges were previously selected by the judicial community and are now designated by the Polish legislative authority; thirdly, the existence of possible irregularities which may have affected the process of appointing certain members of the NCJ in its new membership and fourthly, the manner in which that body fulfils its constitutional role of safeguarding the independence of the courts and the impartiality of the judges and exercises its powers. The Supreme Administrative Court stated that, while each of these factors cannot, in itself, be subject to criticism and, in this case, fall within the remit of the Member States and their choice of solutions, their combination, in connection with the circumstances in which those choices were made, can nevertheless give rise to doubts as to the independence of the body involved in the procedure of appointing judges, even if such a conclusion would not arise if those factors were considered separately. In effect, the Supreme Administrative Court pointed out that the current NCJ does not provide sufficient guarantees of independence from the legislative and executive authorities in the procedure of appointing judges, simultaneously emphasising that the NCJ is currently made up of 14 representatives of judges of the ordinary courts, while Supreme Court judges and administrative court judges are not represented in it, which is in conflict with Article 187, item 2 of the Polish Constitution.

Furthermore, the Supreme Administrative Court pointed out that the NCJ members include presidents and vice-presidents of ordinary courts appointed by the executive authority in place of those removed by that authority during their term of office. This leads to the conclusion that these members of the NCJ are closely functionally subordinated to the executive. The Supreme Administrative Court held that a segment of the executive authority, but also of the legislative authority (given the unique fusion of these authorities arising from the logic of the adopted system of government), and therefore the authorities which, by their nature, are political, have become substantially more significant and have greater influence in a body, the primary function of which is to safeguard the independence of the courts and judges.

The Supreme Administrative Court cited the fact that 23 of the 25 members of the NCJ are nominated to its membership by authorities other than the judiciary. Simultaneously, the principles of election of 15 judges to the NCJ by the Sejm must be regarded as far from respecting the principle of representativeness, since their selection, in addition to being made by the lower chamber of parliament (the Sejm), may also be made from among candidates proposed by a group of 25 judges, excluding retired judges. Such a quantitative criterion of the effectiveness of a nomination is not a reliable criterion for assessing a candidate's representativeness, especially when compared to the number of

active judges and, furthermore, when compared to the practice of assessing compliance with this criterion. The latter allowed for a candidate to support his own application, for candidates to support each other or even, in an extreme case, for support, which was effectively withdrawn by judges initially supporting the candidature, to be used as support that was given. The Supreme Administrative Court held that the principles and procedure of creating the membership of the NCJ were therefore clearly motivated by the intention to subject it to a kind of curatorship on the part of the executive authority, and therefore of the parliamentary majority, which, in the context of the procedure of electing members of the NCJ and the majority required to do so, as well as in relation to the said functional and institutional subordination of the NCJ, also emphasises the importance of the factor of (political) loyalty of the candidates to the entity making the choice. According to the Supreme Administrative Court, the membership of the NCJ formed in this way therefore nullifies the possibility of effectively performing its primary function, namely safeguarding the independence of the courts and the impartiality of judges.

10. By order of the Vice-President of the Court of Justice of the European Union of 27 October 2021 (C-204/21), Poland was ordered to pay the European Commission a periodic fine of EUR 1,000,000 per day from the date of service of that order on the Republic of Poland until the date on which Poland fulfils its obligations arising from the order of the Vice-President of the Court of 14 July 2021 (C- 204/21) or, failing compliance with that order, until the date of service of the judgment ending the proceedings in Case C-204/21.
11. On 28 October 2021, the National Council of the Judiciary was stripped of its membership of the European Network of Councils for the Judiciary (ENCJ). The grounds for the decision indicated that the method of selecting judge–members of the NCJ does not guarantee independence from the legislative and executive authorities, while such independence is a condition of membership of the ENCJ.
12. In its judgment of 8 November 2021 in *Dolińska - Ficek and Ozimek v Poland* (case no. 49868/19 and 57511/19), the European Court of Human Rights ruled that, after the changes in the law on the National Council of the Judiciary made in 2017, the judicial authority in Poland was deprived of the ability to have a real influence on the functioning of the NCJ, while the executive and legislative authorities, which obtained a decisive influence on shaping the membership of the National Council of the Judiciary, fully control the functioning of this body. The ECtHR held that the National Council of the Judiciary, in its current form, is a body which does not guarantee independence from the legislative and executive authorities. The Court held that the effect of this state of affairs is the possibility of the executive and legislative authorities being able to directly influence the process of appointing judges in Poland.

In its judgment of 8 November 2021, the ECtHR unequivocally held that the procedure of appointing judges in Poland provides for the incorrect – excessive – influence of the legislative and executive authorities on the process of nominating judges, which, according to the Court, is inconsistent with Article 6(1) of the Convention for the

Protection of Human Rights and Fundamental Freedoms. The ECtHR held that this was a fundamental irregularity affecting the incorrect appointment of judges, as people appointed to judicial office in a defective procedure do not guarantee that the court in the bench of which they adjudicate is an independent and impartial court established by law.

The ECtHR ruled that there were two fundamental breaches of the law in the staffing of the Chamber of Extraordinary and Public Affairs of Supreme Court, which affected the judicial correctness of appointments to that chamber. First, the applications for appointment to judicial office were made by the National Council of the Judiciary which had been established on the basis of the amending Act of 2017, and therefore by a body that does not provide sufficient guarantees of independence from the legislative and executive authorities. Secondly, despite the Supreme Administrative Court having suspended the implementation of the resolutions of the National Council of the Judiciary on the appointment of judges to the Chamber for Extraordinary Control and Public Affairs of the Supreme Court, the President of the Republic of Poland, appointed the people specified in these resolutions to judicial positions, thereby grossly disregarding the law. The Court indicated that these shortcomings prevented the Chamber of Extraordinary Control and Public Affairs of the Supreme Court from being considered a court established by law in the meaning of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

13. On 11 October 2021, the Supreme Administrative Court examined seven successive appeals against resolutions of the National Council of the Judiciary regarding the presentation (lack of presentation) of a motion for appointment to the office of judge of the Supreme Court. One case applied to the resolution of the National Council of the Judiciary of 28 August 2018 No. 331/2018 on the presentation (lack of presentation) of a motion for appointment to the office of judge of the Supreme Court in the Extraordinary Control and Public Affairs Chamber (case ref. II GOK 9/18), while the remaining cases applied to the resolution of the NCJ of 23 August 2018 No. 317/2018 on the presentation (lack of presentation) of a motion for appointment to the office of judge of the Supreme Court in the Disciplinary Chamber (case ref. II GOK 15/18, II GOK 16/18, II GOK 17/18, II GOK 18/18, II GOK 19/18 and II GOK 20/18).
14. The CJEU judgment of 16 November 2021 in case C-748-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim* (District Prosecutor's Office in Mińsk Mazowiecki) (secondment of judges) resolved another important problem regarding the independence of the court and its establishment by law, and related to the secondment of judges to another court. The Court held that the second paragraph of Article 19(1) TEU, read in the light of Article 2 TEU and Article 6(1) and (2) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on enhancing certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings (OJ EU L 2016, No. 65, p. 1) must be interpreted as precluding national legislation by which the Minister of Justice of a Member State may, on the one hand, second a judge to a criminal court of a higher instance for a fixed term or indefinitely on the basis of criteria which have not

been made public and, on the other hand, remove a judge from that secondment, whether for a fixed term or indefinitely, at any time, on the basis of a decision which does not contain a justification.

II. Assumptions to the bill

1. The objective of the bill is to fulfil Poland's obligations arising from the rulings of the Court of Justice of the European Union, in particular regarding the defective organisation of the National Council of the Judiciary and the resulting consequences, as well as the defective organisation of the system of disciplinary liability of judges.

National Council of the Judiciary – guiding assumptions

2. The principles of forming the judicial part of the membership of the National Council of the Judiciary should correspond to constitutional and treaty regulations, and so it is necessary to:

- a) introduce a solution according to which judge–members of the National Council of the Judiciary, as representatives of the judiciary, in accordance with the European standard, should be elected by judges and not by the Sejm (Article 11a of the amended Act). Elections should be held as direct elections in a secret ballot. The content of the “Opinion of the Executive Board of the European National Councils for the Judiciary (ENCJ)” on the draft laws presented by the Polish government of 30 January 2017 should be reiterated. According to the opinion, ‘The European National Councils for the Judiciary made a clear standard in this matter which stipulates that the mechanism for appointing judicial members of a Council must be a system which excludes any executive or legislative interference’. The European National Councils for the Judiciary also emphasised that the mechanism of appointing judicial members of a Council must ‘exclude any executive or legislative interference and the election of judges should be solely by their peers and be on the basis of a wide representation of the relevant sectors of the judiciary.’ These principles are also reflected in the Basic Principles of the Independence of the Judiciary and the Independence of Judges approved by the UN General Assembly (Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985) and Recommendation No. R(94) of the Committee of Ministers to Member States on the independence, efficiency and role of judges (adopted by the Committee of Ministers on 13 October 1994 at the 516th meeting of the Deputy Ministers). According to the principles specified in these documents, all decisions regarding the careers of judges should be based on objective criteria, while judges should be recruited and promoted on the basis of their achievements, taking into account their qualifications, integrity, ability and efficiency. Point 1.32 of the European Charter on the Statute for Judges (available on the Ministry of Justice website

<http://bip.ms.gov.pl/pl/ministerstwo/wspolpraca-miedzynarodowa/wspolpraca-europejska/europejskie-standardy-prawne-dotyczace-sedziow/>) provides: ‘In respect of

every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.’ In the judgment of 8 November 2021 (case nos. 49868/19 and 57511/19), the European Court of Human Rights in Strasbourg ruled that the participation of the National Council of the Judiciary, which is composed of judges elected by parliament after the right to elect judges has been removed from them, results in a person so appointed not guaranteeing the right to an independent and impartial court. Poland was obliged to take measures to remedy this shortcoming and the bill is the implementation of these recommendations.

- b) introduce a solution according to which all judges (of the Supreme Court, ordinary courts, administrative courts and military courts) will be represented in the National Council of the Judiciary. The objective of these regulations (Article 11a of the amended Act) is to ensure the broadest possible representation of judges in the Council. As for the principles of election that were in force before 2018, it was argued that the curial system of selection depreciates the role of district court judges. Following the amendments in 2018, it was almost exclusively district court judges who became members of the council. The draft regulation intends to ensure that judges of all courts participate in the council appropriately to their number.
- c) accordingly, it is proposed that judges from the following are elected to the Council:
 - a. from the Supreme Court – 1 judge of that Court;
 - b. from the courts of appeal – 1 judge of an ordinary court;
 - c. from the regional courts – 2 judges of the ordinary courts;
 - d. from the district courts – 8 judges of the ordinary courts;
 - e. from the Supreme Administrative Court – 1 judge of that Court;
 - f. from the voivodship administrative courts – 1 judge of a voivodship administrative court.
- d) A specific group of judges should have the right to propose candidates for judge-members of the NCJ (Article 11b, para. 1, item 1 of the amended Act), as should legal associations of lawyers, groups of citizens and bodies authorised to confer academic degrees in legal studies (Article 11b, para. 1, items 2–6 of the amended Act);
- e) A candidate for the position of a member of the NCJ should not be a judge who is, or was within three years before the announcement of the elections, seconded to perform administrative duties in the Ministry of Justice or in another office subordinated to the executive authority (Article 11b, para. 3 of the amended Act); the restriction of the ability to be a candidate for the position of a member of the Council is justified by the opinions and positions of the National Council of the Judiciary received to date and by the ruling of the Constitutional Tribunal of 15 January 2009 (case ref.

K.45/07). On several occasions, the National Council of the Judiciary expressed the view that a judge seconded to work in the Ministry of Justice cannot actively participate in adjudication and secondment to these activities should be temporary. In turn, in a judgment in 2009, the Constitutional Tribunal held that the combination by a judge of judicial functions with the performance of administrative activities, on the basis of a secondment to the Ministry of Justice and organisational units that are subordinated to the Minister of Justice, is inconsistent with the principle of the division and balance of powers. It also breaches the independence of the courts, as it blurs the distinction between practising the administration of justice and working for the executive. Meanwhile, the basic assumption to shaping the membership of the Council is the balancing in it of representatives of authorities other than the judiciary. The proportions are precisely specified in the Constitution. This is confirmed by Article 187, according to which the National Council of the Judiciary consists of the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and a person appointed by the President of the Republic of Poland, as well as fifteen members elected from among the judges of the Supreme Court, the ordinary courts, the administrative courts and the military courts, four members elected by the Sejm from among MPs and two members elected by the Senate from among the senators. Judges who de jure perform official functions and are subordinated to the Minister of Justice – Prosecutor General, were able to become members of the NCJ, and would de jure and de facto represent the latter. This would therefore result in a breach of the principles governing the membership of the NCJ. The need to maintain high standards also justifies the situation that judges who are officials should not be able to stand for election to the NCJ for a period of at least three years after the end of their period of secondment.

- f) An obligatory public hearing and the ability to ask questions of the candidates for members of the Council should be introduced (Article 11b, para. 9 of the amended Act). This institution refers to the informal institution of Civic Monitoring of Candidates for Judges of the Constitutional Tribunal and the General Prosecutor. The formalisation of this institution should be considered appropriate so that the public is able to familiarise itself with all the candidates and confront them with the result of the elections.
- g) The body ordering elections for judge–members of the NCJ should be (Article 11d of the amended Act):
- the First President of the Supreme Court with regard to elections in the Supreme Court, the ordinary courts and the military courts;
 - the President of the Supreme Administrative Court with regard to elections in the administrative courts.
- h) Elections should be conducted either in the traditional form of voting (using ballots) or by electronic voting (ensuring secrecy and security of voting) – whereby the Act

should provide for both possibilities, while the decision to hold elections in a particular form would be left to the body managing the elections (Article 11d, para. 2) of the amended Act).

- i) In the case of traditional voting, ballot counting committees would be set up in the individual courts by the court presidents, but the body managing the elections should be able to appoint joint ballot counting committees for several courts (Article 11e, para. 2) of the amended Act);
 - j) The Act should provide for the ability to file a protest against the validity of the election of a member of the Council. Such a protest should be examined by the Supreme Court with the appropriate application of the provisions of the Electoral Code (Article 11h, para. 2 and 3 of the amended Act).
3. A Social Council should be established at the National Council of the Judiciary as an advisory body (Article 22a of the amended Act), in particular on matters regarding the consideration and assessment of candidates to hold office in the positions of judge and assessor. The objective of appointing the Council is to ensure the open participation of civic and professional organisations in the formulation of the strategy for reforming the judiciary and to ensure objectivity in the process of its monitoring. It will allow for full control over the process of nominating judges. Ultimately, it will be an important guarantor of compliance with the principles of independence of judges and the independence of the courts, as well as being an expression of civic cooperation and joint responsibility for the Council's decisions. The National Council of the Judiciary will be able to protect the courts more effectively against political pressure as a result of the establishment of the Social Council.
4. It is proposed that the membership of the Social Council should include (Article 22a, para. 2 of the amended Act) a person nominated by the Supreme Bar Council, a person nominated by the National Chamber of Legal Advisers, a person nominated by the National Notarial Council, a person nominated by the Main Council of Science and Higher Education, a person nominated by the Ombudsman, a person nominated by the National Council of Prosecutors under the Prosecutor General and three representatives of NGOs specified by the President of the Republic of Poland. The term of office of the Social Council has been set at 4 years.

Transitional provisions should provide for the expiry of the mandate of judge–members of the NCJ elected by the Sejm by law (Article 9 of the amending Act) because the Act is an implementation of the ECtHR judgment of 8 November 2021. This regulation does not give rise to any doubts as to its compliance with the Constitution and the ECHR.

III. Amendment of the provisions on the results of the activity of the NCJ formed on the basis of the provisions of the Act on the amendment to the Act on the National Council of the Judiciary and certain other acts of 8 December 2017 and the decisions issued by people appointed to judicial positions by this NCJ.

1. The bill assumes that, as a result of the actions of the Sejm and the President of the Republic of Poland:
 - 1) the constitutional order has been breached, as a result of which the Constitutional Tribunal has lost its independence and is not performing the tasks entrusted to it by the Polish Constitution;
 - 2) the National Council of the Judiciary was dissolved before the end of the term of office of its judge–members and, contrary to the provisions of the Constitution, the Sejm appointed new judge-members in their place, of a membership that is in conflict with the provisions of the Polish Constitution, as a result of which the Council, as a body that is completely subordinated to the political authority, is incapable of adopting valid resolutions;
 - 3) the President of the Republic of Poland appointed over a thousand people as judges with the participation of the National Council of the Judiciary, which was established in breach of the Polish Constitution, bypassing the judiciary;
 - 4) the political authority took over the Supreme Court through successive legislative and executive acts, and subordinated the activity of this supreme judicial authority to its own will;
 - 5) these actions resulted in a state of lawlessness and the destruction of the foundations of a democratic state governed by law.

Like the ECtHR, the author of the bill accepted that, in order to restore the constitutional order, in particular the independence of the judiciary, the harmful changes in the judiciary – including personnel changes – need to be reversed as soon as possible (see ECtHR judgment of 8 November 2021, CJEU judgments of 14 and 15 July 2021).

The experience of the past years indicates that, in order to achieve the desired effect, the solution to this important issue must assume the form of legislation, following the example of remedial Acts adopted in the past to restore or shape the constitutional order after periods of unconstitutional rule. While understanding the need to maintain the continuity of the State and the certainty of the law and social order, the need to restore public confidence in democracy in general and in the administration of justice in particular cannot be ignored. Nor can unlawful acts be considered law, even if they assume the appearance of law-making or applying the law. As the CJEU emphasised, lawlessness does not give rise to law (*ex iniuria ius non oritur*). It is irrelevant which body commits the unlawful acts. Bodies of public authority operate on the basis and within the limits of the law (Article 7 of the Polish Constitution). This also applies to the President of the Republic of Poland and, in order to be valid and effective, his decisions must be

legally authorised (see paragraph 160 of the justification of the CJEU judgment of 6 October 2021 C-487/19). People appointed to judicial positions in a defective procedure are not judges in the meaning of the Constitution and international law (Article 6 ECHR, Article 47 of the CFR), and leaving them in these positions, even for a short time, poses a threat of irreparable damage to the legal order in Poland and the rights of its citizens. It simultaneously pushes Poland to the legal periphery not only of the European Union, but also the whole of Europe. An example of a country that does not respect the judgments of the ECHR is currently Russia, which does not recognise the judgments passed in the case of A. Navalny.

2. As a requirement to achieve the aforementioned goal, the bill assumes that resolutions in individual cases regarding appointments to the office of a Supreme Court judge, an ordinary court judge, a military court judge, an administrative court judge or a court assessor in an administrative court passed by the National Council of the Judiciary consisting of members elected on the basis of Article 9a, para. 1 of the Act amended in Article 1 are invalid by law (Article 11, para. 1 of the bill). In turn, the office of a Supreme Court judge, an ordinary court judge, a military court judge, an administrative court judge or a court assessor in an administrative court which applied to resolutions passed by the National Council of the Judiciary consisting of members elected on the basis of Article 9a, para. 1 of the Act amended in Article 1 shall be considered vacant judicial positions that are subject to announcements about vacant judge or assessor positions (Article 11, para. 2). Consequently, it is assumed, as proposed in Article 12, para. 1 of the bill, that an employment relationship in the position of a Supreme Court judge, an ordinary court judge, a military court judge, an administrative court judge or a court assessor in an administrative court is deemed not to have been established if this position was taken up as a result of the resolution referred to in Article 11, para. 1. In such a case, a person who takes up the post of Supreme Court judge, ordinary court judge, military court judge or administrative court judge, referendary or assistant may return to the previously held post of judge, referendary, assistant or court assessor in an administrative court. A request to this effect is submitted to the president of the relevant court. If a request is submitted, the employment relationship in the previously occupied position is deemed to be continuous (Article 13, para. 1).
3. The bill differentiates the situation of former court assessors because of the different way of taking up the office of a district court judge, including the different role of the National Council of the Judiciary in the nomination proceedings arising from the transformation of the assessor's post into a judicial post. Therefore, the bill provides for a unique presumption of correctness of the appointment of an assessor to the position of a district court judge (Article 11, para. 3), Article 12, para. 2). In special cases, the National Council of the Judiciary will be able to adopt a resolution to submit a motion to a disciplinary court to remove a judge from office (Article 13, para. 2).
4. The salaries of people appointed to the positions of judges of the Disciplinary Chamber and, from 23 January 2020, the people appointed to other positions of judges of the

Supreme Court and Supreme Administrative Court, received in connection with holding these positions will be deemed undue (at the amount exceeding the salary that would have been due to that person in the position held immediately before taking up the said position) – Article 14 of the bill. The justification for this solution is the fact that the people nominated as judges were not appointed under the Act or, in other words, they were appointed in breach of the law. The Disciplinary Chamber acted illegally from the beginning; it was not a court, the judgments of the people who are members of the Disciplinary Chamber have no legal force and therefore there are no legal grounds for these people to receive a salary. The same consequences applied to other people appointed to the posts of Supreme Court Judge and Supreme Administrative Court Judge no later than from the date of the resolution of the Supreme Court in the three-chamber composition in case BSA I-4110-1/20. It was clear from this date that these people could not issue any valid decisions and should refrain from adjudicating, so there were no grounds for paying a salary. The question of the liability of these people for their actions in the area of disciplinary or criminal liability is a completely different matter.

5. According to the bill, rulings issued by the Disciplinary Chamber and the Chamber of Extraordinary Control and Public Affairs of the Supreme Court will become null and void by law and will lose their legal effect (Article 15, para. 1). In the light of the case law of the CJEU and the ECtHR, these two Chambers do not have the status of an independent court established by law. Therefore, judgments which do not meet the standard arising from the principle of the right to a trial in court need to be eliminated from circulation. The rule adopted in this respect will not apply to judgments regarding the examination of election protests and the ascertainment of the validity of elections to the Sejm and Senate, the election of the President of the Republic of Poland and the elections to the European Parliament (Article 15, para. 2). This is because in this respect, the Supreme Court is not a body exercising the administration of justice. Proceedings ending in judgments, as referred to in para. 1, shall be repeated and discontinued if it has become unnecessary to issue a judgment or the ruling has produced irreversible legal effects (Article 15, para. 3 and 4). Simultaneously, anyone injured by a final ruling having been issued, which has become invalid and has lost its legal effects, will be able to demand redress without the ruling being found unlawful in the relevant proceedings. In this respect, the bill introduces a separate provision which ‘provides otherwise’ in the meaning of the first sentence of Article 417¹ § 2 of the Civil Code.
6. As for judgments issued by other judges of the Supreme Court and the Supreme Administrative Court, a formula has been proposed in Article 15a, which is consistent with the resolution of the three joint Chambers of the Supreme Court based on ascertaining the irregularity of the membership of the bench adjudicating in the case. The bill confirms that a defective appointment to the office of judge of the Supreme Court and Supreme Administrative Court leads to the appearance of a qualified shortcoming, the consequences of which are regulated in the provisions on proceedings before the relevant courts. However, this only applies to judgments which were issued after 23 January 2020, in accordance with the temporal limitation of the application of the

established interpretation adopted in the resolution. It should be emphasised that Polish legislation is familiar with the formula proposed in Articles 15 and 15a and there are already numerous judgments, which will help in the process of implementing the Act. This bill is in line with the case law of the Supreme Court (resolution of the three joint Chambers) and the rulings of the ECtHR (*Reczkowicz v Poland* – case ref. 43447/19 and *Dolińska - Ficek and Ozimek v Poland* – case ref. 49868/19 and 57511/19) and of the Polish courts, issued on the basis of rulings of the European Courts.

7. The bill does not deprive judgments in criminal, administrative and civil proceedings with the participation of people who took up office in the conditions referred to in paragraph 1 of their legal validity. Such decisions should be made in an independent manner by the Polish courts, taking into account circumstances such as the degree of defectiveness of the appointment, the fact that the judgments have become final, taking into account both the current legal situation, the actual and legal possibility of benefiting from provisions guaranteeing everyone the right to have their case heard by an independent and impartial court established by law, as well as future decisions of courts and European tribunals. Given that proceedings regarding the status of defectively appointed judges of ordinary courts are conducted before the European Courts, interference of the legislator in implementing such rulings is also not ruled out.
8. If it is found that the nomination process is illegal, primarily because the National Council of the Judiciary is not the body referred to in the Constitution of the Republic of Poland, and furthermore, is directly and indirectly dependent on the legislative and executive authorities, this results in the acknowledgement that proceedings in individual cases regarding appointment to the office of judge of the Supreme Court, judge of an ordinary court, judge of a military court, judge of an administrative court or assessor in an administrative court, which are pending before the National Council of the Judiciary, consisting of members elected on the basis of Article 9a, para. 1 of the Act amended in Article 1 must be discontinued by law (Article 10, para. 1). In order to ensure the legality of judicial appointments, and therefore the stability of their judgments and the highest possible level of judges verified by an open and transparent procedure, recruitments should be conducted from the beginning (with the exception of positions in the Disciplinary Chamber and the Chamber of Extraordinary Control and Public Affairs, which should be liquidated) with the participation of the judicial community and the National Council of the Judiciary, whose selection method, membership and operation will be in line with the provisions of the Polish Constitution. Therefore, the bill stipulates that the positions of judge of the Supreme Court, judge of an ordinary court, judge of a military court, judge of an administrative court or assessor in an administrative court to whom the proceedings referred to in para. 1 applied are subject to re-announcement of vacancies in the position of judge or assessor within one month of the date of entry into force of this Act (Article 10, para. 2). Similarly, the new NCJ should take into account the particularly difficult and forced situation of those appointed to the positions of judge: assessors, assistants and referendaries. These recruitments should be repeated as a matter of priority, in an expeditious manner.

9. Only such a solution offers hope for the fast and effective elimination of the state of lawlessness and chaos caused by the political authority, the consequences of which are being borne by the citizens both in the legal sphere and in terms of the financial consequences related to the penalties imposed on Poland for failing to respect the judgments of the CJEU and the damages awarded by the ECtHR.

From the point of view of axiology and in the light of the standards exemplified in the above judgments, it is inadmissible for people who have breached the fundamental principles of judicial service through their participation in the illegal nomination process to remain in judicial office and to be recognised as judges. Leaving such people in judicial positions means tolerating lawlessness. The bill assumes that the bodies of the state appointed by the provisions of the Constitution of the Republic of Poland to lay down the law, will perform their legislative duties in the spirit of respect for constitutional values, truth, honesty and responsibility for present and future generations, guided by the desire to repair the Republic of Poland for the common good of all citizens.

It should be pointed out that the repetition of the examination of nominations by the legitimate NCJ, without reopening the recruitments a) will not make it possible to ensure that everyone is entitled to participate in the public service, and b) will not sanction the illegality of the nomination process at the stage before the NCJ. This is because it will not be possible for a candidate for the office of judge to be required to assert his rights by participating in an illegal recruitment which does not guarantee equal and transparent access to the public service. This, in turn, means that the adoption of a different system than that proposed in the bill exposes Poland and its citizens to further complaints to the ECtHR and proceedings before national courts. Meanwhile, it is difficult to imagine that democratic formations in parliament could introduce a prohibition to assert one's rights before the ECtHR arising from the failure to guarantee the right of access to a court established by law, like the Muzzle Act prohibited invoking defects in the appointment of a judge.

It should be emphasised that **a large number of the judges appointed** to the office of district court judges (approximately 66%) with the involvement of the NCJ are former assessors who, in principle, are expected to remain in their positions as judges.

Temporary difficulties in the operation of the courts should be addressed through the secondment of judges to other courts. Similarly, such secondments should comply with the EU standards of an independent court, which was resolved by the CJEU on 16 November 2021 (C-748/19 to C-754/19). It should be noted that the number of judges seconded to other courts is consistently more than 500, while the number of judges seconded to the Ministry of Justice is approx. 200. These numbers confirm the assumption that this bill will provide the most predictable and harmonious method possible of achieving the target state, namely guaranteeing everyone the right to have a case heard by an independent court established by law.

IV. Secondment of judges

1. The bill provides for the implementation of the CJEU case law on the secondment of judges by the Minister of Justice – Prosecutor General, while simultaneously temporarily leaving an adapted ministerial secondment in place (Article 76a of the Act on the Structure of Ordinary Courts – ASOC) and the so-called small secondment of court presidents (Article 77 § 8 and 9 ASOC). This measure will allow for the smooth use of judicial personnel in handling proceedings in which judges who had been incorrectly appointed by the neo-NCJ had previously ruled. In justified cases, those judges may also be seconded, which will allow them to acquire skills for further adjudication, while simultaneously guaranteeing everyone the right to have a case heard by an independent court appointed in accordance with the law. In addition, the recovery of approximately 200 judicial positions because of the elimination of the secondment of judges to the Ministry of Justice will contribute to the achievement of the above objective.
2. In European law (Articles 2 and 19(1)(2) TEU), it is indisputable that the requirement of independence of judges falls within the essential content of the fundamental right to a fair trial, which is itself of fundamental importance as a guarantee for the protection of all rights which individuals infer from EU law (see paragraph 40 of the CJEU judgment of 25 July 2018, C-216/18). The case law of the CJEU unequivocally indicates that the right to an independent court includes the bench hearing the case. Therefore, reference is made to the right to have a case heard by a neutral judge. It should be recalled that, in the judgment on seconded judges, the CJEU held that the second paragraph of Article 19(1) TEU, read in the light of Article 2 TEU and Article 6(1) and (2) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on enhancing certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings (OJ EU L 2016, No. 65, p. 1) must be interpreted as precluding national legislation by which the Minister of Justice of a Member State may, on the one hand, second a judge to a criminal court of a higher instance for a fixed term or indefinitely on the basis of criteria which have not been made public and, on the other hand, remove a judge from that secondment, whether for a fixed term or indefinitely, at any time, on the basis of a decision which does not contain a justification (CJEU judgment of 16 November 2021, in case C-748-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim* (District Prosecutor's Office in Mińsk Mazowiecki) (secondment of judges). Therefore, this judgment put a stop to the discretionary influence of the Minister of Justice – Prosecutor General on the membership of the court. This bill fully implements the CJEU judgment.
3. This bill also provides for the abolition of the institution of secondment of judges of ordinary courts to perform the duties of a judge or administrative activities in the Ministry of Justice or another organisational unit subordinated to or supervised by the Minister of Justice or the Chancellery of the President of the Republic of Poland.

Judges are appointed to exercise the administration of justice or its ancillary functions. There is no justification for judges to perform administrative duties in the executive sphere, including holding clerical positions. This is incompatible with the principle of judicial independence, which requires a judge to avoid activities that could raise doubts about his or her independence. Almost 200 judges are currently seconded to the Ministry of Justice (data as of 31 December 2018 <https://www.iustitia.pl/ujawniamy-wyjasniamy/2867-ujawniamynazwiska-sedziow-przebywajacych-na-delegacjach-w-ministerstwie-sprawiedliwosci-stan-na-1-stycznia-2019>, more recent data is not available). This is more than the total number of judges in the Regional Court in Katowice, which is one of the largest courts in Poland. Simultaneously, the policy of the Minister of Justice has resulted in 745 vacant judicial posts and 66 vacant assessor posts in Poland at the end of 2018 (data as at 31 December 2018 <https://www.iustitia.pl/ujawniamy-wyjasniamy/2868-ujawniamy-w-ktorych-sadach-pozostaja-wakaty-na-nieobsadzone-stanowiskasedziowskie-i-asesorskie-stan-na-31-grudnia-2018>). Judges seconded to the Ministry of Justice are to perform tasks for which they are often not trained and are completely unqualified. Furthermore, the secondment prevents filling the judge's position, despite a judicial vacancy having been created in his or her home court. The secondment of a judge also results in an additional burden on the state budget because of the possibility of obtaining a special allowance in the salary, the right to free accommodation, per diems and the reimbursement of travelling expenses. Consequently, this leads to the subordination of the judge to the Minister of Justice and detaches him from his primary professional function, which is the administration of justice. This is because, according to Article 77 § 2b ASOC, a judge cannot combine the function of adjudicating with the performance of administrative duties in the Ministry of Justice or another organisational unit subordinated to the Minister of Justice or the Chancellery of the President of the Republic of Poland. The bill provides for the complete abolition of the possibility to second judges of ordinary courts to perform judicial or administrative duties at the Ministry of Justice or the Chancellery of the President of the Republic of Poland, as well as for the termination of the current secondments after three months from the entry into force of the Act. However, in view of the constitutional freedom to choose an occupation and a place of work (Article 65 para. 1 of the Constitution), the bill does not deprive a person of the opportunity to take up employment in the Ministry of Justice or another organisational unit subordinated to or supervised by the Minister of Justice. According to the assumptions adopted, however, taking up such employment will require the judge to resign from office or retire on the same principles as in the case of taking up the mandate of an MP or senator (Article 98 ASOC). This does not preclude his or her return to the office of judge and the position previously held if the break in the performance of judicial duties is no more than nine years.

V. System of disciplinary liability of judges – guiding assumptions

1. The bill implements the basic assumption that disciplinary proceedings are encompassed by the constitutional and European principle of the right to a trial in court. Therefore, those regulations which were in conflict with this assumption and have been specified in the cited judgments of the CJEU, *inter alia*, in the judgments of 14 and 15 July 2021, have been removed. The removal of the Disciplinary Chamber from the system, as a repressive unit, which is not a court, was obvious in this context. Simultaneously, the bill ensures fairness and effectiveness of the proceedings with the participation of the injured party.
2. The bill provides for a change in the legal definition of a disciplinary offence. The criterion of 'more than negligible harm' was introduced into the definition. A distinction of three grounds for liability has been adopted – a breach of the dignity of the office, official duties or an obvious and gross breach of the law – which is established in the case law of the Supreme Court. However, the concept of 'official misconduct' has been dropped, as it introduces a two-stage definition (a disciplinary offence is official misconduct or a breach of dignity, while official misconduct is an obvious and gross breach of the law or of other official duties). A single-level definition is proposed, according to which a breach of the law may also be a breach of dignity (as in the ruling of the Supreme Court of 7 July 2004, SNO 26/04 OSNSD 2004, No. 2, item 36).
3. Liability for committing a so-called judicial tort has been retained, which limits the possibility of instigating proceedings to situations related to an 'obvious and gross' breach of regulations, and eliminates potential situations in which any breach of the law could constitute grounds for instigating disciplinary proceedings because of an offence against the dignity of the office, understood as a breach of the law in general.
4. The principle of a judge's liability before taking up his or her office is retained. However, the removal of 'misconduct in office at the time' is proposed, as this falls within the concept of 'proving unworthy of the office of judge'. According to the authors of the bill, only such misconduct in a previously held office which indicates a lack of appropriate dignity of the office of judge can constitute the basis for liability.
5. The bill leaves the current rules for liability for misconduct in place.
6. The changes include a shortening of the limitation period to 3 years (from the commitment of the act to the start of proceedings) and to 5 years in the case of the start of proceedings. A provision has been introduced regarding the limitation of punishability to a year from the time that the commissioner learns of the offence. This is intended to prevent the creation of a 'state of suspension' of the case by the commissioner, who could try to influence the judge about whom he has knowledge that he could have committed a tort, until the expiry of the limitation period for prosecution. The suspension of the countdown to the end of the limitation period by the initiation of proceedings has been eliminated in the absence of grounds.

7. The changes in the list of penalties include:
 - a change in the hierarchy of penalties – the author of the bill assumes that removal from the position held is less severe than a reduction in salary;
 - the introduction of a ban on assuming the function of a divisional president and press officer in the event of being punished;
 - retention of the authority of the Disciplinary Court to designate the place of service in the event of a penalty of transfer;
 - the introduction of the possibility of issuing new penalty measures:
 - the obligation to apologise to the injured party;
 - publication of the judgment;
 - a driving ban in the case of traffic offences.
8. The rules on the imposition of cumulative penalties, including a joint sentence, have been regulated in detail.

In terms of the structure of disciplinary judiciary, a decision was made to liquidate disciplinary courts in their current form – as separate entities at the Courts of Appeal – as they are unnecessary and disruptive. The previous structure providing for the combination of the disciplinary courts with the courts of appeal has been restored. Such a change reflects the desire to tidy up the structure and to rule out the possibility of the compulsory assignment of the tasks of disciplinary court judges. Disciplinary cases would be handled by the secretariat of the Criminal Division/Criminal Chamber of the Supreme Court.

9. It is proposed that the Disciplinary Chamber of the Supreme Court be liquidated as a body which is not supported by the provisions of the Polish Constitution and does not meet the requirements of a court, which arises from a number of judgments of the Supreme Court, the CJEU and the ECtHR.
10. The principle of a three-member professional bench of the court, chosen by lot, has been introduced, with the observance of the following rules:
 - the chairman is from the Criminal Division;
 - one member of the bench is from the same division as the accused;
 - one member is from another Division.

Such a bench in the Court ensures maximum impartiality and, simultaneously, appropriate knowledge and experience (in the field of applying procedural as well as substantive law regulations, especially in so-called adjudicatory torts).

11. The elimination of the participation of lay judges in disciplinary judiciary is argued on the grounds that the participation of non-professional adjudicators in disciplinary proceedings is in conflict with the axiology of these proceedings. Their introduction into

the disciplinary judiciary was solely the result of a political need and not a result of a substantive analysis.

12. The following are proposed as the equivalent of the participation of the so-called 'social factor' in the disciplinary judiciary:
 - full openness of the proceedings, including publication of the judgments;
 - enabling the participation of a social representative in the proceedings;
 - notification of the injured party of the date of the first hearing.
13. The bill provides for only two levels of disciplinary commissioners: the 'main' commissioners and those operating at the Court of Appeal – Disciplinary Court. The amendment abolishes the disciplinary commissioner in the Regional Court because of the small number of cases which are the subject of his/her activity. The possibility of the 'main' commissioners initiating disciplinary proceedings against any judge has been permitted. At the same time, the bill establishes clear rules for appointing disciplinary commissioners, transferring this right from the Minister of Justice to the National Council of the Judiciary. At the appellate level, disciplinary commissioners will be elected by the assembly of appellate judges from among the judges whose candidatures are put forward by the board of the relevant appellate court and the boards of the regional courts within the appellate area. A group of 10 members of this assembly has also been awarded the right to nominate a candidate. However, it should be emphasised that the bill assumes the democratisation of the bodies of the judicial association.
14. In procedural terms, the bill had the objective of making the rights of the accused equal to those of any citizen charged in an ordinary trial. In particular, the bill establishes the principle that a judge against whom investigations are being conducted may appoint a defence attorney from among judges, prosecutors, attorneys-at-law or legal counsels, which has been disputed to date. The principle of the preclusion of evidence has also been abandoned. The changes also include:
 - the right for each president (including a district court president) to request the initiation of proceedings;
 - a clear indication that the 'competent commissioner' is entitled to initiate proceedings, thereby eliminating the possibility of the 'main' commissioners initiating proceedings against any given judge;
 - the introduction of the principle that the investigation is based on the content of the notification, documents and statement (written or oral) of the judge;
 - the introduction of the principle that the judge requests the acceptance of an oral statement in the investigation;
 - the obligation to establish the identity of the victim so that he/she can be notified of the date of the first hearing;

- appeal proceedings are based on principles that are the same as those in the Criminal Procedures Code.

15. In principle, the bill transfers decisions in disciplinary cases from the Minister of Justice to the First President of the Supreme Court to avoid the possibility of the executive authority influencing judges as representatives of the judiciary. Simultaneously, the constitutional empowerment of the First President of the Supreme Court ensures due impartiality and responsibility within the framework of the delegated authority in disciplinary matters. For this reason, the Labour Chamber of the Supreme Court is entrusted with the right to order a break in the official duties of a judge, including the president of a court.

VI. Other provisions – guiding principles

1. The regulations of the Supreme Court specifying the internal organisation of the Supreme Court, the detailed distribution of cases among the chambers and the principles of internal proceedings shall be adopted by the General Assembly of the Judges of the Supreme Court and promulgated in the Official Journal of the Republic of Poland 'Monitor Polski' (they are currently being introduced by way of a regulation of the President of the Republic of Poland, which requires the countersignature of the Prime Minister to be valid).
2. The regulations of the Supreme Administrative Court, specifying the internal organisation of the Supreme Administrative Court and the principles of internal proceedings shall be adopted by the General Assembly of Judges of the Supreme Administrative Court and promulgated in the Official Journal of the Republic of Poland 'Monitor Polski' (they are currently being introduced by way of a regulation of the President of the Republic of Poland, which requires the countersignature of the Prime Minister to be valid).
3. The imposition of court regulations by the President of the Republic of Poland constitutes significant interference of the executive authority with the independence of the judiciary. This position is confirmed by the practice in recent years, where amendments to the regulations were of instrumental nature and intended to politicise the Supreme Court, e.g. by politically electing the First President of the Supreme Court and the President presiding over the work of the Civil Chamber.
4. It is proposed that the Chamber of Extraordinary Control and Public Affairs of the Supreme Court is abolished. Numerous rulings of the CJEU and the judgment of the ECtHR of 8 November 2021 unequivocally indicate that all judges of this chamber were appointed defectively. Its establishment had no substantive rationale from the beginning and was intended to serve purely political purposes. Therefore, its continued functioning has no legal basis. The matters being handled within this chamber should be taken over by the Civil Chamber of the Supreme Court, the Criminal Chamber of the Supreme Court or the Labour, Social Insurance and Public Affairs Chamber of the Supreme Court – in the case of extraordinary complaints regarding cases falling within the jurisdiction of the given chambers.

5. The Chamber of Labour, Social Security and Public Affairs of the Supreme Court that is to be established would have the jurisdiction to hear public law cases (e.g. election protests and protests regarding the validity of a national referendum and constitutional referendum, as well as with regard to the establishment of the validity of elections and a referendum).
6. Complaints to declare a final decision of the Supreme Court, ordinary courts, military courts and administrative courts, including the Supreme Administrative Court, illegal, if the illegality involves contesting the status of a person appointed to hold office as a judge if that person issued a decision in a case, will be considered by the Civil Chamber of the Supreme Court, the Labour, Social Security and Public Affairs Chamber of the Supreme Court or the Supreme Administrative Court.
7. Motions or declarations regarding the removal of a judge or the nomination of a court before which proceedings are to be conducted involving allegations of lack of independence of the court or a lack of impartiality of a judge will be considered by the competent courts which, based on the provisions of the Civil Procedures Code, the Criminal Procedures Code or the Misdemeanour Proceedings Code, have the jurisdiction to consider motions or declarations regarding the removal of a judge or the nomination of the court before which the proceedings are to be held.
8. Cases initiated and not completed in the Disciplinary Chamber of the Supreme Court shall be taken over by the Criminal Chamber of the Supreme Court (with respect to disciplinary cases) and by the Labour, Social Security and Public Affairs Chamber of the Supreme Court (with respect to labour law and social insurance cases regarding Supreme Court judges and cases of retiring a Supreme Court judge).
9. The consequence of the liquidation of the Disciplinary Chamber should be the liquidation of the Chancellery of the President of the Supreme Court managing the work of the Disciplinary Chamber.

VII. Financial consequences of not passing the Act

We are paying EUR 1 million every day for the lack of a bill implementing the decisions of the CJEU – and this can be simplified and the ECtHR can also be added. **As of the time of submission of the bill on 27 January 2022, this amounts to EUR 85,000,000, namely approx. PLN 391,000,000 and several dozen billion euros** because the financial aid for Poland as part of the EU post-pandemic recovery programme is frozen. Each additional day of the failure to pass such an Act means an increase in these amounts. In addition, the average amount obtained by a complainant before the ECtHR because of a breach of the right to a trial in court is EUR 15,000. Several dozen such cases have already taken place and a significant increase is expected.