



**BUSINESS AS
USUAL?**



**NOT
ANYMORE...**

Report on the impact of the rule of law crisis
on the effectiveness of the protection of the rights
of entrepreneurs in Poland

Warsaw
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LIST OF ACRONYMS

FULL NAME	ACRONYM
European Court of Human Rights	ECtHR
European Convention on Human Rights	ECHR
Chamber of Extraordinary Control and Public Affairs	CECPA
The European Commission	EC
Polish Financial Supervision Authority	PFSA
National Council of the Judiciary	NCJ
United Nations	UN
Ombudsman for Small and Medium-Sized Enterprises	OSME
The Supreme Court	SC
The Constitutional Court	CC
Court of Justice of the European Union	CJEU
The European Union	EU
Office of Competition and Consumer Protection	OCCP

SUMMARY

- ▶ In the rule of law ranking published at the end of 2022 by the **World Justice Project**, Poland was ranked **36th out of 140 countries**. Similarly, in the last 7 years, Poland has dropped 18 places.
- ▶ In 2022, Poland was also ranked **26th among the 27 countries** of the European Union in the European Commission's survey on respect for the rule of law.
- ▶ In that survey, the maintenance of the principle of independence of the judiciary in Poland was assessed positively by fewer than 20% of the enterprises surveyed.
- ▶ The enterprises also largely negatively assessed the effectiveness of the legal protection of their investments.
- ▶ In the ranking of observance of the rule of law prepared by the World Bank, Poland was **ranked 63rd**, behind Hungary and Slovakia, among others.¹
- ▶ These ratings are most probably due to changes regarding:
 - ▷ the Constitutional Court
 - ▷ the method of appointing judges to the ordinary courts and the Supreme Court
 - ▷ the increased influence of the executive and legislative branches on the functioning of the judiciary
 - ▷ the method of conducting the legislative process.
- ▶ The changes in the judiciary to date and their impact on the right of entrepreneurs to a court and fair proceedings have already been assessed by the European Court of Human Rights and the Court of Justice of the European Union:
 - ▷ On 7 May 2021, the European Court of Human Rights issued a judgment in *Xero flor v Poland*, in which it held that the bench of the Constitutional Court containing people who had been appointed to already filled positions, did not satisfy the requirements of a 'court established by law'.
 - ▷ On 3 February 2022, the European Court of Human Rights issued a judgment in *Advance Pharma v Poland*, finding a breach of the Convention by having the company's case heard by people nominated to the Civil Chamber of the Supreme Court with the participation of the new National Council of the Judiciary.
- ▶ Further cases regarding the right of entrepreneurs to a trial in court are already pending before the European Court of Human Rights and will undoubtedly constitute a further indication of the effectiveness of the system of protection of citizens' rights in Poland.
- ▶ Moreover, the situation in Poland has already been analyzed by the Court of Justice of the European Union. In its various judgments the CJEU examined issues related to the status of Disciplinary Chamber in the Supreme Court, status of neo-judges from the Chamber of Extraordinary Control and Public Affairs in the Supreme Court and whether the Supreme Court's panel of judges with their participation can be considered an independent and impartial court established by law within the meaning of EU law.²

1 https://www.theglobaleconomy.com/rankings/wb_ruleoflaw/ accessed on April 22, 2023.

2 A.K. v Poland (C-585/18, C-624/18 i C-625/18), A.B. v Poland (C-824/18), W. Ż. v Poland (C-487/19).

FOREWORD

As it was stated by Robert Spano, former President of the European Court of Human Rights (2020–2022), during the conference on “The Rule of Law in Europe: Vision and Challenges” in 2021:

‘While there is no abstract definition of the rule of law in the Court’s case-law, the Court (note: the European Court of Human Rights) has developed various substantive guarantees which may be inferred from this notion. These include the principle of legality or foreseeability, the principle of legal certainty, the principle of equality of individuals before the law, the principle that the executive cannot have unfettered powers whenever a right or freedom is at stake, the principle of the possibility of a remedy before an independent and impartial court and the right to a fair trial. Some of these principles are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the State.’³

The rule of law is an inherent element of democratic states, while its preservation and reinforcement is also the objective and foundation of the existence of organizations, such as the Council of Europe, the European Union and the United Nations.

‘(...) reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy; (...) have in consequence decided to set up a Council of Europe’ – Preamble to the Statute of the Council of Europe adopted on 5 May 1949 in London.

‘CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law (...) HAVE DECIDED to establish a European Union’ – Preamble to the Treaty on European Union

‘(...) to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained (...) and hereby establish an international organization to be known as the United Nations.’ – United Nations Charter

For us, the rule of law is extremely important, because it is primarily intended to serve the citizens in protecting them against the actions of the authorities.

Being fully aware that the matter of the rule of law in Poland has received a great deal of attention in the reports of non-governmental organizations, domestic and foreign academic works, as well as opinions of European and international bodies, in this Report we shall try to look at it from a different perspective, i.e. the perspective of entrepreneurs and people representing the business sector, on both the foreign and the domestic forums.

³ R. Spano, Conference on *The Rule of Law in Europe: Vision and Challenges*, available at: https://echr.coe.int/Documents/Speech_20210415_Spano_Seminar_Rule_of_Law_ENG.pdf, accessed on April 27, 2023.



CHAPTER I

Introductory information

1. POLAND ON THE GLOBAL RULE OF LAW MAP

Introduction

Before presenting a detailed analysis of the changes in the law that have taken place in recent years, it is worth answering the question of why it is important to prepare a report on Poland at all, with its centerpiece again being the **'RULE OF LAW'**.

The conclusion, however, seems obvious. In the rule of law ranking published at the end of 2022 by the **World Justice Project**, Poland was ranked 36th out of 140 countries.⁴

For some people, this result will undoubtedly be alarming, for others it may not paint a very negative picture of Poland's compliance with the principles of the rule of law.

However, this result should be viewed from a broader perspective.

Geographical perspective

The presented assessment of Poland should primarily be compared with information on Poland's neighboring countries. For example, Germany is ranked 6th, Lithuania 18th, the Czech Republic 20th and Slovakia 35th.

The authors of the ranking also propose an analysis in a regional context – encompassing 31 countries – European countries, EFTA⁵ countries and North American countries. Within this group of countries, Poland was ranked 26th (ahead of Romania, Greece, Croatia, Bulgaria and Hungary).

Historical perspective

The next perspective that will help correctly interpret the recently published data is the historical perspective. It arises from earlier reports:

4 *WJP Rule of Law Index 2022*, <https://worldjusticeproject.org/rule-of-law-index/global>, accessed on April 27, 2023.

5 European Free Trade Association – an international economic organization, the aim of which was to create a free trade zone for industrial goods between Member States by reducing customs duties and import restrictions. It currently comprises Iceland, Liechtenstein, Norway and Switzerland.

YEAR	POSITION OF POLAND ⁶	NUMBER OF COUNTRIES IN THE RANKING
2015	18	102
2016	28	113
2017	40	113
2018	40	113
2019	50	126
2020	51	128
2021	67	139
2022	66	150

Perspective of the subject matter

Poland was ranked 52nd in the category related to respect for fundamental rights and freedoms (compared to 21st position in 2015).

With respect to civil justice, Poland was ranked 45th, a substantial drop from its 22nd place in 2015. The duration of civil proceedings was also examined in the analysis of this matter. In the assessment of whether civil proceedings are lengthy, Poland was ranked as low as 92nd. In the area of criminal justice, Poland was ranked 37th by the authors of the ranking, and 15th in 2015. Within this category, the matter of whether the criminal justice system is free from undue government influence was also assessed. **Here, Poland ranked just 71st (in the case of civil proceedings, it was 70th).** Poland fared better in the assessment of whether the penal system is impartial; the authors of the ranking placed us in 33rd position.

Conclusions

These perspectives are important for understanding the current situation of the Polish rule of law and the Polish legal system. They show that Poland is not heading in the right direction in terms of the rule of law.

6 Overall index score.

2. ENTREPRENEURS’ OPINION ABOUT THE POLISH JUDICIARY: THE RULE OF LAW, EFFICIENCY AND STABILITY

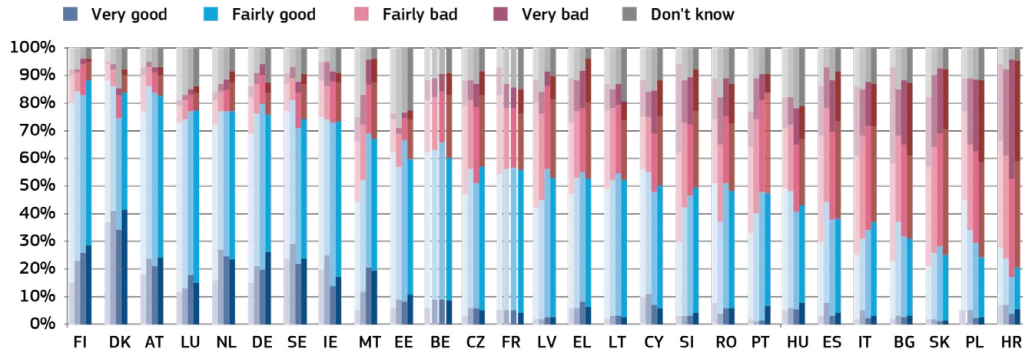
Public opinion on the independence of the courts and of judges in 2016–2022

The state of functioning of the judiciary in the European Union Member States and the state of compliance within it with the principles of the independence of the courts and of the judges, as well as the citizens’ perception of them, is regularly monitored by the European Commission.⁷

The results of this monitoring are published in particular in the Justice Scoreboard. In it, the Commission presents, among other things, mechanisms for protecting citizens’ rights and freedoms, procedural guarantees for litigants, the length of court proceedings, and solutions to uphold the independence of the courts and the independence of judges.

From what you know, how would you rate the justice system in terms of the independence of courts and judges?

Light colors: 2016, 2020 and 2021, dark colors: 2022



Source: The 2022 EU Justice Scoreboard, Luxembourg 2022

The best assessments in 2022⁸ on the preservation of the principle of independence⁹ were recorded in Finland (almost 90%), the worst score in Croatia (approx. 20%). Poland was ranked 26th among the 27 countries of the European Union. Of Poland’s neighbors

7 The 2022 EU Justice Scoreboard, Luxembourg 2022, https://commission.europa.eu/system/files/2022-05/eu_justice_scoreboard_2022.pdf, accessed on April 14, 2023.

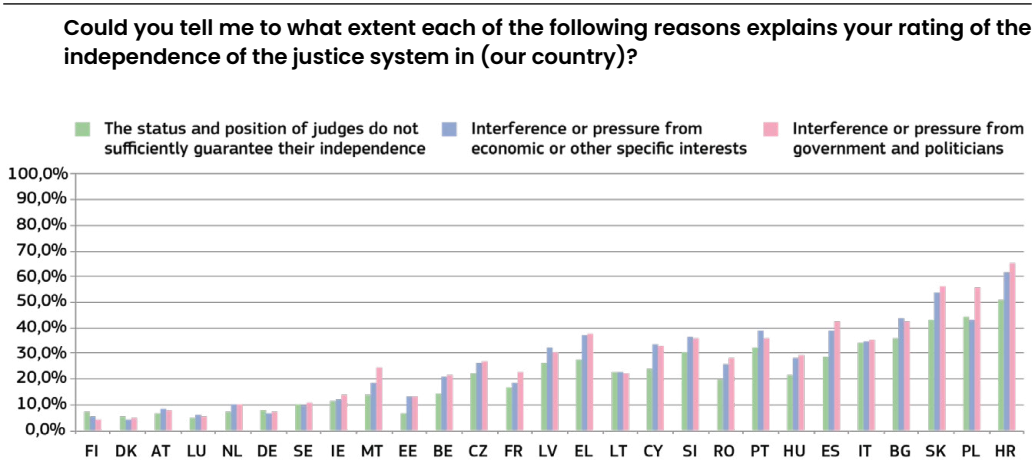
8 The survey was conducted between 17 and 24 January 2022 and published in 2022.

9 ‘Very good’ and ‘fairly good’.

which are also members of the European Union, Germany ranks best (almost 80% “very good” and “fairly good” opinions). In turn, Slovakia is the worst, ranking one place ahead of Poland.

Over the period 2016–2022, stably positive opinions are expressed with respect to Finland, Denmark, Austria, Luxembourg, the Netherlands, Germany, Sweden and Ireland (over 70%).

Over the same period, there is a marked decline in positive assessments of the independence of the judiciary in Poland. In 2016, the independence of the courts was assessed positively by almost 50% of respondents, whereas it was just 25% in 2022. This was therefore a drop of half the percentage points.¹⁰



Source: *The 2022 EU Justice Scoreboard, Luxembourg 2022*

The most important reasons for assessing the extent to which the principle of independence of the judiciary was upheld in Poland were:

- ▶ ‘interference or pressure from the government and politicians’ (approximately 55% of respondents);
- ▶ ‘the status and position of judges which do not sufficiently guarantee their independence’ (over 40%).¹¹

Entrepreneurs’ opinion about the Polish justice system

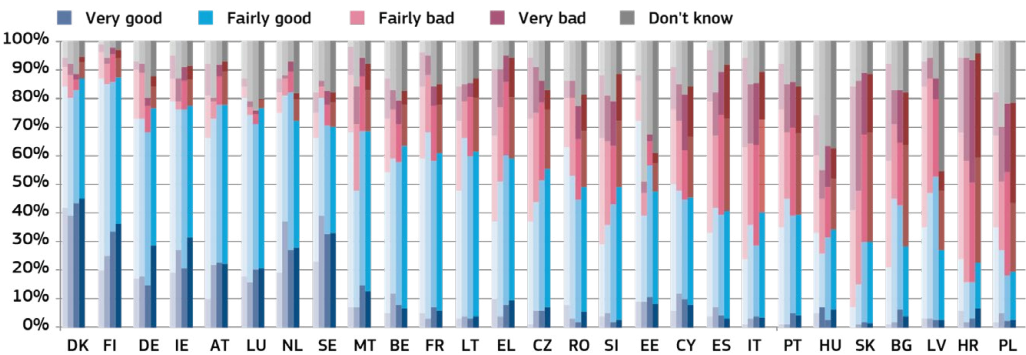
The European Commission also pays attention to the perception of the judiciary by enterprises.

¹⁰ Ibid, figure 50.

¹¹ Ibid, figure 51.

From what you know, how would you rate the justice system in terms of the independence of courts and judges?

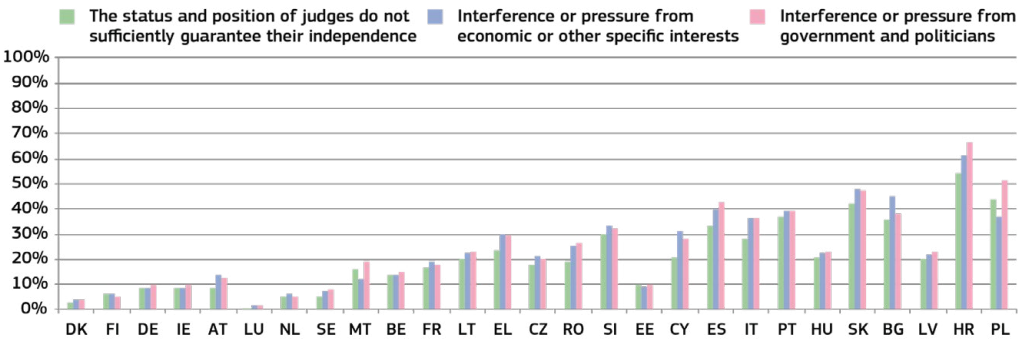
Light colors: 2016, 2020 and 2021, dark colors: 2022



Source: *The 2022 EU Justice Scoreboard, Luxembourg 2022*

The enterprises surveyed saw a halving of the positive opinions on the preservation of the principle of judicial independence in the country's judiciary (in 2016, approximately 35% of respondents assessed the functioning of the Polish judiciary positively in this context, i.e. as 'good' or 'very good',¹² whereas this percentage was less than 20% in 2022).¹³ For this reason, Poland was ranked last on this list among the European Union countries.

Could you tell me to what extent each of the following reasons explains your rating of the independence of the justice system in (our country)?



Source: *The 2022 EU Justice Scoreboard, Luxembourg 2022*

¹² 'Very good' and 'fairly good'.

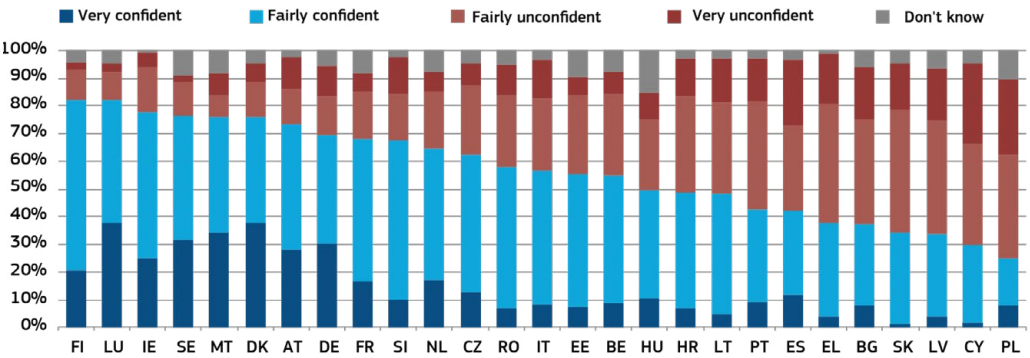
¹³ Ibid, figure 52.

As the main reasons for this rating enterprises indicated the following:¹⁴

- ▶ pressure from the authorities (50% of respondents);
- ▶ low level of guarantees of independence of judges (over 40% of respondents);
- ▶ almost 40% identified this assessment with interference and pressure from economic interests.

It is also worth drawing attention to how businesses feel about the certainty of the legal and judicial protection of the investments they make.

To what extent are you confident that your investments are protected by the law and courts in (your country) if something goes wrong?



Source: The 2022 EU Justice Scoreboard, Luxembourg 2022

Almost 75% of respondents indicated that they felt uncertain¹⁵ as to whether their investments are protected by national laws and courts, which placed Poland last in this ranking.

In comparison, for the five EU countries that fare best in the ranking (i.e. Finland, Luxembourg, Ireland, Sweden and Malta), 75% of respondents stated that they were confident with legal protection.¹⁶

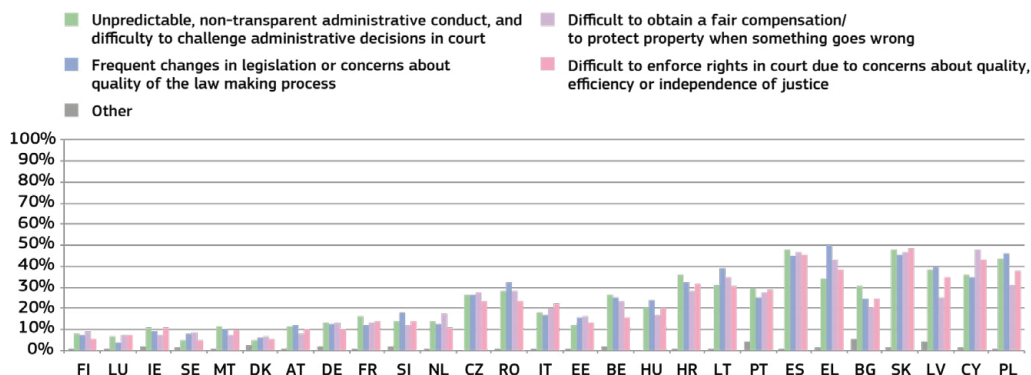
In turn, a difference in opinion is noticeable among the central and eastern European countries, from the Czech Republic, where more than 60% of respondents feel confident or fairly confident about the protection of their investments, to Slovakia, where two out of three respondents feel uncertain in this respect.

¹⁴ Ibid, figure 53.

¹⁵ 'Fairly unconfident' and 'very unconfident'.

¹⁶ Ibid, figure 54.

What are your main reasons for concern about the effectiveness of investments protection?



Source: The 2022 EU Justice Scoreboard, Luxembourg 2022

The main sources of concern about the effectiveness of the protection of investments made in Poland are:

- ▶ frequent changes in legislation and concerns about the quality of the law-making process (almost 50% of respondents);
- ▶ unpredictable, non-transparent administrative conduct and difficulty in challenging administrative decisions in court (over 40%);¹⁷
- ▶ difficulties in enforcing rights due to concerns about the quality, efficiency or independence of the judiciary (almost 40% of respondents).

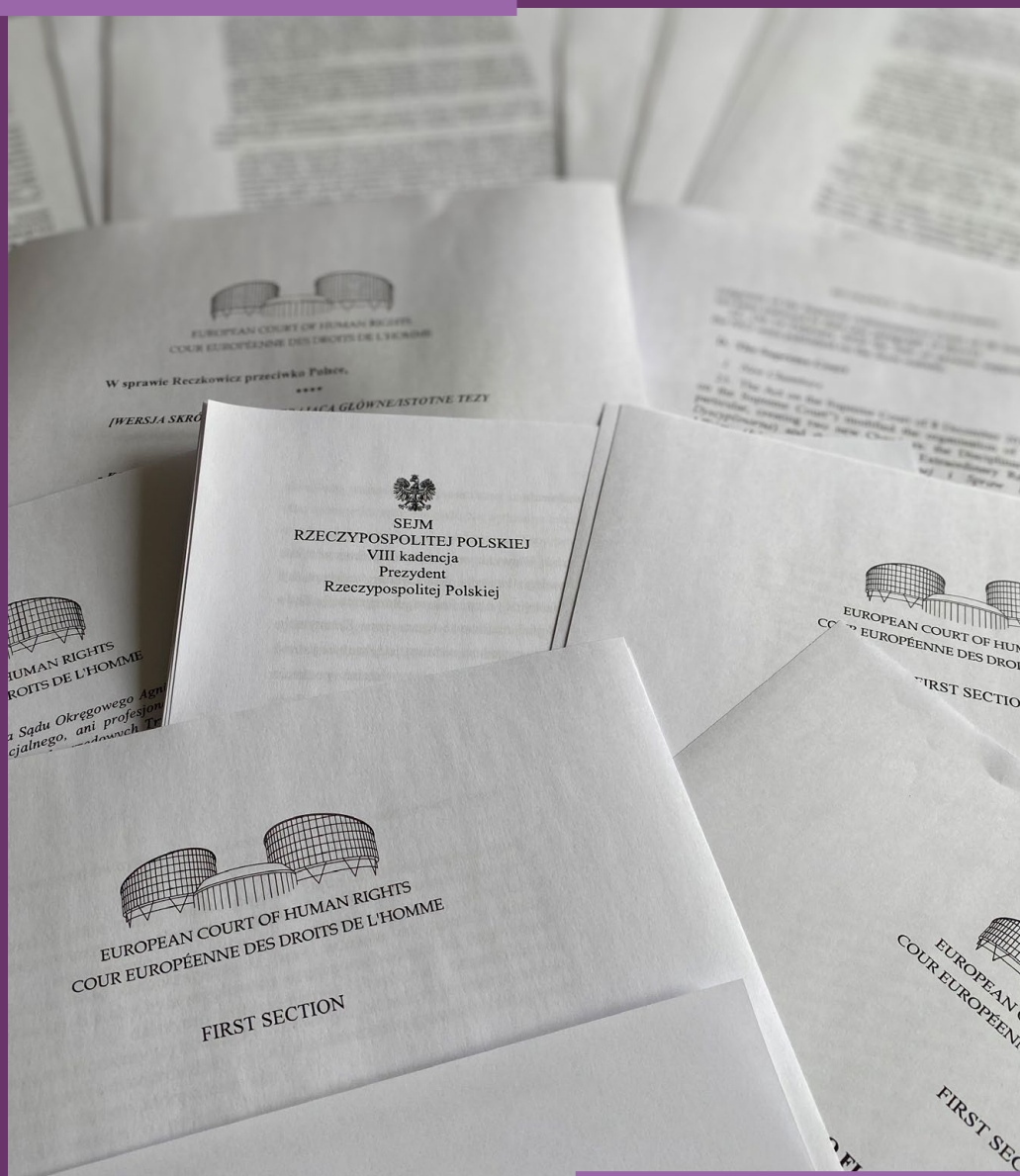
Summary

The research presented above unequivocally shows that, over the last 7 years, there has been a significant reduction in the confidence of citizens in the Polish justice system and the national legal system.

In this Report, we will try to answer the question – what could have caused such a substantial decline in positive assessments of the observance of the principle of independence in the Polish judiciary.

In seeking an answer to this question, we shall devote particular attention to the impact of the reforms that have been introduced and of the legal institutions on the situation of entrepreneurs in Poland.

¹⁷ Ibid, figure 55.



CHAPTER II

Bodies protecting rights and freedoms in times of the rule of law crisis

1. INTRODUCTION

The above opinions and the increasing rule of law crisis explain the further overview of the institutions which protect the fundamental rights and freedoms of the individual, including the right to a court and fair proceedings.

Such an analysis will help answer, among other things, the following questions:

- ▶ *What legislative changes could have led to a decline in the confidence of citizens (including entrepreneurs) in the judiciary?*
- ▶ *Are any guarantees still in place in the Polish legal system which safeguard against undue influence of the executive over the justice system and provide a safety net for citizens and business entities?*
- ▶ *Are the recent changes in the legal system and the judiciary noticeable by entrepreneurs?*



Adrian Grycuk / Wikimedia Commons, CC BY-SA 3.0 pl

2. CONSTITUTIONAL COURT AND THE RIGHTS OF ENTREPRENEURS

Introduction

The Constitutional Court used to play an extremely important role until 2015. It was a guarantee against laws that breached fundamental civil rights and freedoms, including the rights of entrepreneurs.

However, there is a significant downturn in citizens' confidence in this institution in recent years and a decline in its authority. This is confirmed by research conducted by CBOS (The Public Opinion Research Center), from which it arises that the Constitutional Court is the institution which, of the entities included in the survey, has seen the greatest decline in confidence and increase in distrust over the period 2016–2022.¹⁸

Landmark case

The case of *Xero Flor v Poland*,¹⁹ in which the ECtHR issued its judgment on May 7, 2021, best illustrates the problems that entrepreneurs can currently face in connection with the changes that have taken place in the Constitutional Court and the role it currently plays.

The applicant company, Xero Flor sp. z o.o., is one of the leading producers of turf in Poland. It is located within the territory of the hunting grounds where the State Forests Holding operates a game breeding area. The breeding area is managed by the Szprotawa forest district. In September and October 2010 the applicant company notified the forest district about damage to its turf caused by game.

Xero Flor sp. z o.o. sued the State Treasury represented by the Szprotawa forest district for the payment of the rest of the compensation. The Regional Court awarded the company compensation at less than the full amount. Ultimately, after the Supreme Court refused to consider the cassation appeal, Xero Flor filed a constitutional complaint with the Constitutional Court, which rejected the company's allegations and discontinued the proceedings.

However, the Constitutional Court's decision was subject to a legal defect – Mariusz Muszyński, a so-called 'stand-in judge', was a member of the bench (see section 2.3 of the report for a detailed discussion of this problem). On this basis, the company filed a complaint with the European Court of Human Rights, arguing that Article 6 of the Convention had been breached by the failure to guarantee its right to 'trial by a court established by law'.

18 Communication from the CBOS survey *Zaufanie Społeczne* [Social confidence] no. 37/2022, pp. 9–10 https://www.cbos.pl/SPISKOM.POL/2022/K_037_22.PDF, accessed on April 22, 2023.

19 Judgment in *Xero Flor v Poland* of May 7, 2021 (application 4907/18)

This was primarily the first time that the ECtHR had the ability to address the situation prevailing in the Constitutional Court. The ECtHR agreed with Xero Flor, stating that Article 6 of the European Convention on Human Rights had been breached by the fact that it had been denied the right to a 'court established by law', because an incorrectly appointed judge was a member of the bench.

It is also worth emphasizing that, for two years, this judgment has not been executed by the Polish authorities, the company has not received compensation and, more importantly, the situation in the Constitutional Court has only deteriorated, as is presented below.




Timeline of the case

2010 Fall	The Company notified the forest district of damage to its lawn by game
2012 September 18	The Company filed an action with the Regional Court in Zielona Góra against the State Treasury
2013 February 6	The Regional Court awarded some of the damages to the Company
2014 September 16	The Court awarded a further part of the damages
2014 December 16	The Court of Appeal in Poznań dismissed most of the appeal allegations
2015 December 3	The Supreme Court refused to accept the cassation appeal for consideration
2015 April 15	The Company filed a constitutional complaint with the Constitutional Court
2017 July 5	The Constitutional Court announced an order to discontinue the proceedings by a majority of three votes to two
2018 January 3	Xero Flor sp. z o.o. filed a complaint with the ECtHR
2021 May 7	The ECtHR issued its judgment in <i>Xero Flor v Poland</i> , in which it confirmed the defectiveness of the procedure for appointing stand-in judges
2023 May	The execution of the judgment is still pending


History of a loss of independence of the Constitutional Court

At the end of 2015 the ruling majority introduced changes in the composition of the Constitutional Court, which were made in breach of the act of Constitutional Court²⁰ and the Polish Constitution. These changes led to the destruction of the authority of this constitutional body, which had been built up over the years.

	TIMELINE ²¹
2015 November 6	<p>The nine-year term of office of three judges of the Constitutional Court ended. The Sejm (the lower chamber of the Parliament) of the 8th term of office elected successors in their place in October 2015: Roman Hauser, Andrzej Jakubecki and Krzysztof Ślęzak. President Andrzej Duda did not swear them in, acknowledging that there had been a 'gross breach of democratic principles and the stability of a democratic state governed by the rule of law'. The President declared that <i>'today, we have judges of the Constitutional Court elected by the Sejm, who I believe have been elected defectively. Hence my hesitation and therefore – to this day – the fact that these judges have not been sworn in.'</i> The judges did not take office</p>
2015 November 25	<p>The Sejm passed five resolutions declaring the resolutions of the Sejm of October 8, 2015 on the election of judges of the Constitutional Court to have no legal force</p>
2015 November 30	<p>The Constitutional Court called on the Sejm to refrain from proceeding with the election of judges of the Constitutional Court until the Court issues its final ruling on the matter, because the opposition MPs had applied to the Court for a ruling on the matter (ref. K 34/15)</p>
2015 December 2	<p>The Polish Sejm elected five new judges of the Constitutional Court (re-election resolutions): Henryk Cioch, Lech Morawski, Mariusz Muszyński, Julia Przyłębska and Piotr Pszczółkowski</p>
2015 December 3	<p>President Duda swore in four judges of the CC. From that moment, there are judges and stand-in judges (3), namely those elected to fill previously filled positions, in the Constitutional Court. Up to December 13, 2016, President Andrzej Rzepliński did not allow the stand-in judges to rule</p>

20 In particular, the Act on the Constitutional Court of June 25, 2015, which had been in effect until December 5, 2015.

21 <https://wolnesady.org/files/2500-dni-bezprawia-update-raportu-2000-dni-PL-.pdf>, accessed on April 22, 2023.

	TIMELINE
2016 December 9	President Duda swore in the fifth judge of Constitutional Court
2016 December 19	The term of office of the then president of the Constitutional Court, Andrzej Rzepliński, ended
2016 December 20	President Andrzej Duda entrusted Julia Przyłębska with the office of acting president of the Constitutional Court until the appointment of the president of the CC. On the same day, she called a General Assembly of Judges of the CC, which elected the president of the CC. Julia Przyłębska and Mariusz Muszyński were presented to the President as candidates for the office of president of the CC. Six people took part in the voting on the candidates. The Constitution does not provide for the position of acting president of the Constitutional Court and the Assembly did not pass a resolution on the presentation of the candidates to the President
2016 December 21	President Andrzej Duda appointed Julia Przyłębska president of the Constitutional Court
2021 May 7	The European Court of Human Rights issued a ruling in <i>Xero Flor v Poland</i> , in which it held that the bench of the Constitutional Court containing people who had been appointed to already filled positions, did not satisfy the requirements of a 'court established by law'

In Poland, the term of office of a judge of the Constitutional Court is 9 years. According to the drafters of the Constitution, such a long term of office for a judge was intended to provide protection against a situation in which the majority of the Court would be filled by a single-term Sejm (in which one party would have a majority).²²

However, as history has shown, this mechanism has not worked and does not provide an adequate safeguard against undue influence of the legislative and executive branches on the composition of the Court.

²² M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom II. Komentarz do art. 87–243*, Beck 2016, Article 194, para. 59.

Current composition of the Constitutional Court

All current judges of the Constitutional Court have been appointed by the ruling party that has been in power since 2015.

Furthermore, the current composition still also includes members appointed to previously filled positions, as explained in detail in the timetable of events on pages 19–20 of the report. This continuing state of affairs leads to a breach of the right to a court established by law.

JUDGE	START OF THE TERM	END OF THE TERM
Julia Przyłębska <i>president</i>	12/09/2015	12/09/2024
Mariusz Muszyński <i>vice-president</i>	12/03/2015	12/03/2024
Krystyna Pawłowicz	12/05/2019	12/05/2028
Stanisław Piotrowicz	12/05/2019	12/05/2028
Justyn Piskorski	09/18/2017	09/18/2026
Zbigniew Jędrzejewski	04/28/2016	04/28/2025
Piotr Pszczółkowski	12/03/2015	12/03/2024
Bartłomiej Sochański	04/09/2020	04/09/2029
Jakub Stelina	12/05/2019	12/05/2028
Wojciech Sych	05/08/2019	05/08/2028
Bogdan Świączkowski	02/16/2022	02/16/2031
Marcin Warciński	12/20/2016	12/20/2025
Rafał Wojciechowski	01/07/2020	01/07/2029
Jarosław Wyrembak	01/30/2018	01/30/2027
Andrzej Zielonacki	06/28/2017	06/28/2026

Note: stand-in judges are highlighted in **grey**.

CONSTITUTIONAL COURT



(Un)equal cases

In the almost eight years of the Constitutional Court's operation with incorrectly appointed members, there have been rulings which have undermined its international positions, negatively affecting the image of the Polish judiciary.

Legitimization of changes in the law

On the one hand, the tendency for the Constitutional Court to legitimize the provisions of laws passed by the parliamentary majority has become noticeable.²³

Undermining of Poland's international obligations

On the other hand, the Constitutional Court has recently been used to undermine Poland's European obligations.

²³ Ruling of the Constitutional Court of April 15, 2021 (ref. K 20/20), which resolved the issue of the Ombudsman holding office after the expiry of his term of office, but before the election of his successor.

Case K 6/21

The Constitutional Court held that Article 6(1) of the European Convention on Human Rights is incompatible with the Polish Constitution 'to the extent to which the concept of a court used in that provision includes the Constitutional Court'²⁴



Timeline of the case

2021 July 27	Application
2021 August 29	Position of the Ministry of Foreign Affairs
2021 November 15	Position of the President of the Republic of Poland
2021 November 18	Position of the Sejm
2021 November 24	Judgment
4 months approximately	Duration of the proceedings

'Such an act (the creation of new norms by interpreting the provisions of the Convention – author's explanation) in the light of this case is the unauthorized interpretation of the Convention – specifically its Article 6(1) – by the ECtHR in its judgment of May 7, 2021, which extended the content of that provision, essentially leading to a modification that can only be made by way of an amendment to an international agreement (in the case of the Convention, by the adoption of a further additional protocol by the State-Party), and therefore with the consent of the given State-Party.'

'The Constitutional Court is not a court in the meaning of Article 6(1) of the Convention. The norm derived from this provision, which includes the Court under the term 'court', is therefore in conflict with the provisions of the Constitution, which specify the constitutional position of the Polish constitutional court. In the light of Article 173 and Article 10(2) of the Constitution, courts and tribunals, despite being listed together as bodies of judicial authority, have different powers, whereby only the Supreme Court, the ordinary courts, the administrative courts and the military courts, namely those to which Article 6(1) of the Convention refers, have the monopoly on exercising justice in the sense of adjudicating on individual civil, criminal or administrative cases, as expressly provided for in Article 175(1) of the Constitution.'

***Ruling of the Constitutional Court of November 24, 2021,
ref. K 6/21, para. 68, 92.***

24 <https://trybunal.gov.pl/sprawy-w-trybunale/art/art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny>, accessed on April 12, 2023.

Case K 7/21

The CC found the possibility of the assessment of the status of Polish judges²⁵ by the European Court of Human Rights²⁶ to be incompatible with the Polish Constitution



Timeline of the case

2021 November 9	Application
2022 January 11	Position of the Ministry of Foreign Affairs
2022 January 14	Position of the Sejm of the Republic of Poland
2022 January 16	Position of the President of the Republic of Poland
2022 January 21	Position of the NCJ
2022 March 10	Judgment
4 months approximately	Duration of the proceedings

'In other words, rapid interpretative activity cannot lead to a normative effect at the level of the Convention, with respect to which a formal amendment of the Convention would be required, or, all the more so, an effect that is in conflict with the assumptions of the State structure at the constitutional level, and this with the expectation of the effect that the State will be bound by it. In the opinion of the Constitutional Court, such activity of the ECtHR constitutes interference with State sovereignty and the will of a democratic society manifested in the action of parliament (see ruling of November 24, 2021, ref. K 6/21)."

***Ruling of the Constitutional Court of March 10, 2022,
ref. K 7/21, para. 203.***

²⁵ This issue is discussed in detail in section 2.3 of the report.

²⁶ <https://trybunal.gov.pl/sprawy-w-trybunale/art/dokonywanie-na-podstawie-art-6-ust-1-zd-1-ekpcz-przez-sady-krajowe-lub-miedzynarodowe-oceny-zgodnosci-z-konstytucja-i-ekpcz-ustaw-dotyczacych-ustroju-sadownictwa-wlasciwosci-sadow-oraz-ustawy-dotyczacej-krajowej-rady-sadownictwa>, accessed on April 12, 2023.

Case K 3/21

The CC found the provisions of the Treaty on European Union, which are of key importance to European integration, to be incompatible with the Polish Constitution²⁷



Timeline of the case

2021 March 29	Application of the prime minister
2021 June 21	Position of the prosecutor general
2021 July 2	Position of the President of the Republic of Poland
2021 July 9	Position of the Sejm
2021 July 13	Position of the Ombudsman
2022 October 7	Ruling
6 months approximately	Duration of the proceedings

*'When accepting the *acquis communautaire* (the so-called community's legal achievements), the Republic of Poland did not agree to the unconditional operation of the principle of the primacy of EU law in the Polish legal system, all the more so to the unlimited creation of legal norms by the CJEU enjoying the attribute of priority of application over the Polish Constitution. (...) This obligation does not in any way imply any blanket consent that, upon accession to the EU, the Republic of Poland was to be bound by the law-making of bodies and institutions of the EU extending beyond the competences conferred on the EU, contrary to the principles of subsidiarity and proportionality, breaching the Polish constitutional identity. Such an obligation does not arise from the provisions of the Treaties (...) or the *acquis communautaire*.'*

***Ruling of the Constitutional Court of October 7, 2021,
ref. K 3/21, para. 228.***

The Court's above actions served only to legitimize the political ideas of the ruling party, disregarding the obligations that Poland has assumed by joining the European Union or the Council of Europe and being bound by the European Treaties, as well as the European Convention on Human Rights. The content of both the Convention and the EU Treaties provides for the possibility of their termination, which would obviously lead to a significant weakening of the system of protection of citizens' rights and would be an

²⁷ <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>, accessed on April 12, 2023.

undesirable action, but if the ruling party tries to bring about such a situation, it should be conducted in accordance with the relevant procedures.

In the expert's opinion

Have the decisions of the current Constitutional Court regarding the validity and scope of Poland's European obligations changed anything in the legal situation of entrepreneurs and the effectiveness of the protection of their rights?

Through its rulings, the Constitutional Court has practically ruled out the possibility of applying European standards regarding independent courts in Poland. This means that entrepreneurs, investors, companies or other entities conducting business cannot be sure that their case will be decided upon by an independent court. Therefore, they do not know whether they will receive proper legal protection, for instance in a dispute with companies owned either directly or indirectly by the State Treasury. Problems could also arise in the recognition and enforcement of judgments of Polish court in other EU countries, e.g. a judgment issued by a Polish court ordering payment to an entrepreneur may not be respected in Germany. In such a situation, in accordance with the principle of the primacy of EU law, Polish courts should disregard the effects of rulings of the Constitutional Court which rule out European standards. However, this gives rise to legal uncertainty for entrepreneurs as to whether the court will decide to do so in their case. The risk of not being able to count on such protection is all the greater, given that already more than 50% of judges of the Polish Supreme Court were nominated in breach of these European standards and enjoy the protection afforded to them by the said rulings of the Constitutional Court.

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(Un)constitutional complaint

According to the Polish constitutional regulations (Article 79), the Constitutional Court adjudicates not only in proceedings initiated by public authorities or authorized entities (such as the courts, the Ombudsman, trade union bodies or authorities of employers' organizations), but also as a result of citizens' complaints.

'Anyone, whose rights have been breached,' is entitled to file a constitutional complaint, so not only individuals, but also partnerships and commercial law companies, associations and foundations.²⁸ For obvious reasons, the scope of rights and freedoms guaranteed for business entities is narrower than that guaranteed for individuals, but rights such as the right of ownership or the freedom to conduct business activity by their very nature also encompass legal persons.²⁹

28 M. Safjan, L. Bosek (eds.), *Konstytucja RP. Komentarz do art. 1-86*, Beck 2016, Article 79, para. 31.

29 Decision of the Constitutional Court of March 21, 2000, ref. SK 6/99.

A basic tool for protecting rights?

Until 2015, legal mechanisms intended to protect citizens' rights (such as the constitutional complaint or the legal question) were used by citizens to fight for their rights and by the courts to clarify doubts about the constitutionality of provisions of statutes. However, with the numerous reforms of the CC and the increasing influence of politicians on it, the number of cases filed with it has dropped.

The chart below presents data on the Court's registered cases and completed cases in a given year (completed in that year or later years).³⁰ Increasingly fewer cases are being filed with the Court from year to year; the Court itself is also working slower and the percentage of cases heard is lower from year to year.

Only the number of constitutional complaints received by the Court has increased. This could arise from the fact that professional attorneys are sometimes obliged by their clients to initiate such proceedings. However, the question remains as to whether, in the Court's current shape, this is an effective measure and whether a ruling issued by the Court has legally binding force.

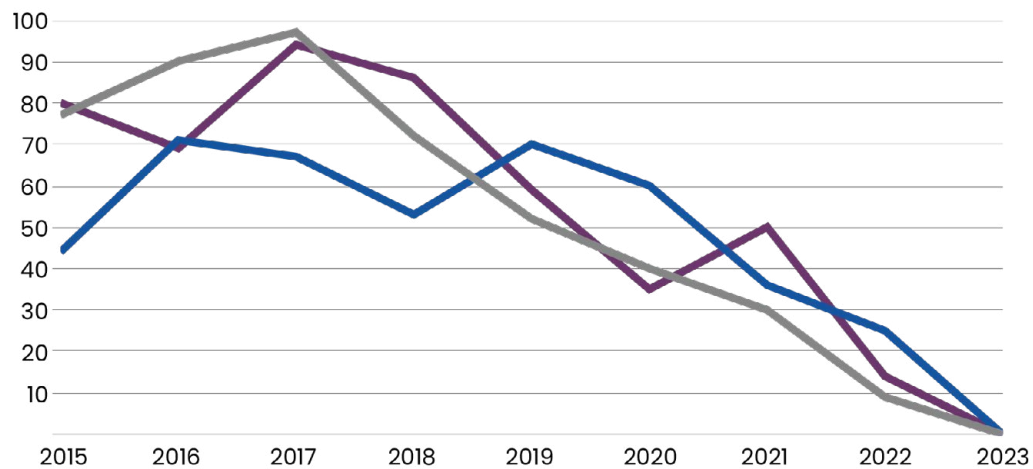
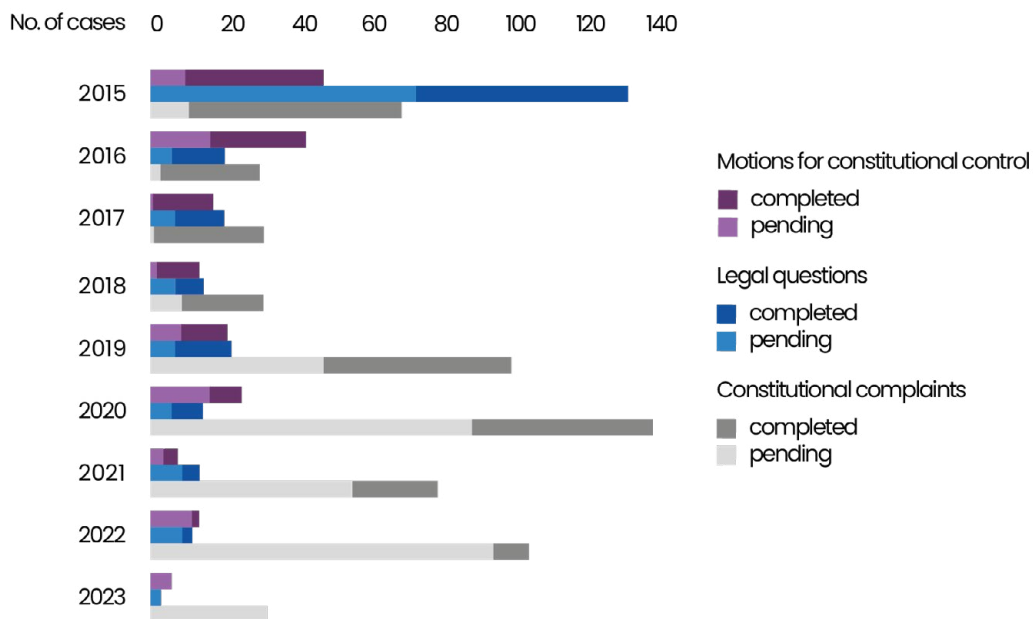
In the expert's opinion

Is the constitutional complaint still an effective means of protecting the rights of citizens (including those conducting business)?

Given that the Constitutional Court in Poland considers constitutional complaints, which can be filed by anyone whose constitutional rights or freedoms have been breached, such an application to the Constitutional Court is an important legal remedy which can be used when an unfavourable decision has been issued on the basis of an act of law which is inconsistent with the Constitution, as well as on the basis of an interpretation of that act which is inconsistent with the Constitution (so-called interpretative rulings). In my opinion, given that the Constitutional Court has been subordinated to the parliamentary majority, a complaint to the Constitutional Court has ceased to be a viable means of legal protection. I frequently come across the situation where entrepreneurs withdraw from this legal remedy altogether in situations that qualify for it, convinced that this remedy has no chance of any success whatsoever for non-legal reasons. This applies, for example, to constitutional complaints regarding rulings issued by administrative courts, as well as regarding administrative decisions issued by various regulators.

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University of Warsaw

³⁰ The data was compiled on the basis of the Internet Portal of Judgments of the Constitutional Court, accessed on April 7, 2023.



Percent of completed cases

■ Motions for constitutional control
 ■ Legal questions
 ■ Constitutional complaints

Practical problems

Duration of proceedings before the Constitutional Court

An additional factor that adversely affects the assessment of the functioning of the Constitutional Court is the duration of the proceedings.

The ECtHR drew attention to the issue of the duration of proceedings before the Constitutional Court in *Bieliński v Poland*. The ECtHR found that one of the reasons for the protraction in these proceedings was the inaction of the Constitutional Court with regard to the consideration of the legal question posed by the Regional Court in Warsaw, which was of major importance for a large number of other proceedings.³¹

The case of ref. SK 34/19 could be mentioned to illustrate the importance of this problem to the rights of entrepreneurs.

Case SK 34/19

The case applies to Article 183 of the Act on Trading in Financial Instruments, a provision that sanctions financial manipulation on the market. The problem with this provision involves the reference in its terms to an EU regulation which defines the concept of 'market manipulation'. This offence is punishable by a fine of up to 5 million zlotys or imprisonment for three months to five years.³² It is argued in the Polish doctrine of criminal law and criminal proceedings that this provision may be inconsistent with the Polish Constitution because of the imprecise definition of the signs of the type of offense, which would breach the principle of '*nullum crimen sine lege certa*'^{33/34} (cf. Ruling of the Constitutional Court: K 11/94).³⁵ It is therefore required that the Court rules on the matter from at least two aspects – individual and general. Individual, because a person has been convicted on the basis of a potentially unconstitutional provision. This undoubtedly affects the willingness of investors to take action on the stock market, as they cannot be sure that they will not face criminal liability for their actions.

The Court received the application on February 14, 2019. However, the Court has not considered it for more than four years. This length of proceedings gives rise to doubts about the effectiveness of the constitutional complaint as a mechanism for protecting

31 ECtHR judgment of July 21, 2022, *Bielinski v Poland* (application 48762/19).

32 The Act on trading in financial instruments of July 29, 2005 (Journal of Laws 2022, item 1500, consolidated text, as amended).

33 The principle of '*nullum crimen sine lege certa*' (the principle of 'no crime without a define law') is the guiding principle of criminal law, which is that the scope of punishability of an act must be strictly defined in the legislation in order to guarantee the citizen's certainty as to the legality of the actions taken and to limit the discretion of the courts in interpreting provisions of criminal law.


34 Dr P. Karlik, 'Kontrowersje wokół karalnej manipulacji instrumentem finansowym' [Controversies concerning criminal manipulation of financial instruments], *Monitor Prawniczy*, Beck 5/2020.

35 Ruling of the Constitutional Court of April 26, 1995, ref. K 11/94.

the rights of entrepreneurs and about the duration of proceedings in cases in which the ruling majority is not interested in the outcome.

The status of judgments issued by the current Constitutional Court

In light of the changes that have taken place in the structure of the CC, the fundamental question is how to treat judgments (even if they are favorable for entrepreneurs) issued by the CC with the involvement of the members appointed in conflict with the Constitution?

Case SK 39/19	
A ruling was issued in case SK 39/19 (also issued 3.5 years after the application was filed) regarding the matter of taxation of real estate owned by natural persons who are entrepreneurs. ³⁶ Provisions that prevented the application of a lower tax rate when determining the amount of tax on real estate owned by entrepreneurs, even though the real estate was not used for business, were declared unconstitutional. This is doubtless a favorable ruling for entrepreneurs – it enables the application of lower tax rates, which enables the cost of doing business to be reduced. However, the bench contained stand-in judges. The question therefore arises: is this ruling valid? Is it invalid? Or can the proceedings in which it was made be reopened in the future or be challenged by the tax authorities?	
	Timeline of the case
2017 September 21	Application
2021 September 30	Position of the prosecutor general
2021 December 20	Position of the Sejm
2022 February 24	Ruling
3 years and 4 months approximately	Duration of the proceedings

Opinions among experts on the status of the rulings issued currently by incorrectly formed benches are divided.

Some claim that the inclusion of unauthorized members constitutes a premise for the resumption of proceedings. However, it should be borne in mind that this could set

36 <https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&sprawa=21645>, accessed on April 12, 2023.

a dangerous precedent and could undermine the constitutional principle of the ‘finality’ of rulings of the Court.³⁷

Other experts suggest that a solution to this situation will be the possibility to approve the judgement in a procedure that satisfy the requirement of a tribunal established by law. However, this will be possible only after the reform of the Constitutional Court.³⁸

A comparison of the above views demonstrates that this matter is currently unresolved and is a source of great uncertainty for citizens – both now and over a longer time horizon.

The actual scale of the problem is illustrated by the table below, which presents data on rulings issued with the involvement of stand-in judges. A total of 86 rulings involving stand-in judges were issued. No ruling with their participation can create a legal situation for an individual, so the ordinary courts are required to disregard every such ruling, invoking the principle of the direct application of the Constitution³⁹ and international agreements that are binding on Poland.⁴⁰

YEAR	RULINGS ISSUED WITH THE INVOLVEMENT OF STAND-IN JUDGES ⁴¹	TOTAL RULINGS ISSUED	PERCENT [%]
2017	17	36	47
2018	13	36	36
2019	19	31	31
2020	13	24	54
2021	14	19	74
2022	9	14	64

Polish lawyers and NGOs are still searching for solutions that can rectify the situation in the Constitutional Court.

37 M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom II. Komentarz do art. 87–243*, Beck 2016, para. 65.

38 M. Matczak, T. Zalasinski, ‘Jak przywrócić państwo prawa?’, Stefan Batory Foundation 2019, p. 56 https://www.batory.org.pl/wp-content/uploads/2020/02/Jak-przywrocic-panstwo-prawa_Interaktywne.pdf, accessed on May 5, 2023.

39 Article 8 of the Polish Constitution.

40 <https://www.prawo.pl/prawnicy-sady/wyroki-tyk-wydane-z-udzialem-sedziow-dublerow-moga-byc-ignorowane,508673.html>, accessed on April 12, 2023.

41 The data was compiled on the basis of the Internet Portal of Judgments of the Constitutional Court, accessed on April 7, 2023.

The Stefan Batory Foundation proposed a draft Act. Extensive consultations were held with judges, professors of law and NGOs on it. The draft Act envisages the annulment of rulings passed with the involvement of stand-in judges while protecting legal certainty.⁴²

Constitutional Court v the Rest of the World

The doubts mentioned above regarding the functioning of the current Constitutional Court have also encountered a strong international response.

THE EUROPEAN UNION

After the rulings of the Polish Constitutional Court of July 14, 2021 and October 7, 2021, in which it held that the provisions of the European Union treaties are incompatible with the Polish Constitution, explicitly questioning the primacy of EU law, the European Commission initiated infringement proceedings against Poland. The EC issued a letter of formal notice on December 22, 2021 to rectify the infringements.

According to the Commission, by its rulings, the Constitutional Court breached the general principles of autonomy, primacy, effectiveness and uniform application of EU law, as well as the binding force of the decisions of the Court of Justice of the European Union.

'The Commission also considers that the Constitutional Court no longer meets the requirements of an independent and impartial tribunal previously established by law. This is due to the irregularities in the appointment procedures of three judges in December 2015 and in the selection of its president in December 2016'

EC's press release of February 15, 2023

The next stage of the proceedings started on July 15, 2022 with an exchange of opinions between the European Commission and the Polish government. The Commission concluded that the Polish government's response did not address the Commission's allegations⁴³

The Commission decided to refer Poland to the Court of Justice of the European Union in mid-February 2023.

The action currently being taken by the Commission is a further part of the proceedings initiated in December 2021. The Commission's objective is to ensure that the rights of Polish citizens are protected and that they can enjoy the privileges arising from being part of the European Community. The principle of primacy of EU law ensures that EU law is applied equally in all Member States.⁴⁴

42 https://www.batory.org.pl/informacje_prasowe/obywatelski-i-apolityczny-projekt-ustawy-o-trybunale-konstytucyjnym/, accessed on April 12, 2023.

43 https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842, accessed on April 12, 2023.

44 <https://komitetobronysprawiedliwosci.pl/komisja-europejska-kieruje-do-tsue-skarge-przeciwko-polsce-w-zwiazku-z-naruszeniami-prawa-unijnego-przez-trybunal-konstytucyjny-julii-przylebskiej/>, accessed on April 12, 2023.

	TIMELINE
2021 July 14 October 7	Rulings issued by the Constitutional Court declaring provisions of the Treaty on European Union and the TFEU to be incompatible with the Polish Constitution
2021 December 22	The European Commission sent a letter of formal notice to Poland to rectify the infringements
2022 July 15	The European Commission sent Poland an opinion on the infringements
2022 September 14	Poland sent the EC a reply to its opinion, in which it denied the allegations
2023 February 15	The European Commission filed an action against Poland with the Court of Justice of the European Union regarding the composition and functioning of the Constitutional Court.

In the expert's opinion

Could further proceedings filed by the European Commission against Poland, including proceedings regarding the Polish Constitutional Court, affect the perception of Poland as an investment target for entrepreneurs?

It is already significant for investors that the Constitutional Court is issuing increasingly fewer substantive rulings, with only 14 issued in the last year. In addition, about half of them are issued by benches which are defective according to European standards. This creates legal uncertainty as to the legal consequences of these rulings, especially in a situation in which the national courts can disregard rulings of the Constitutional Court, which lead to an outcome that is in conflict with EU law. This undermines confidence in the Polish Constitutional Court and makes Poland risky as a place for investment because of the fading ability to receive appropriate legal protection. The Commission's first complaint to the CJEU in the history of the EU for maintaining a Constitutional Court which is not sufficiently independent and issues rulings that are grossly in breach of the EU legal order will certainly continue the trend of undermining confidence in the Polish legal system. Meanwhile, if the CJEU issues a ruling in which the Polish Constitutional Court is held to be unable to provide effective constitutional control, this will make Poland a high risk area from the point of view of investors and an area of limited confidence in the Polish legal system. They will then naturally opt for the jurisdiction of courts of other EU Member States or use arbitration whenever possible. After all, this trend can already be observed.

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COUNCIL OF EUROPE

Secretary General of the Council of Europe

The Secretary General of the Council of Europe also voices her reservations about the Court. In her 2019 Report published after her visit to Poland, she pointed out **'that the Court's independence and credibility have been seriously compromised'**.⁴⁵

She also reacted firmly to the Constitutional Court's decision in case K 7/20. In the report prepared in connection with the ruling, the Secretary stated that the **Polish Court questioned the established and exclusive competence of the Court in Strasbourg to apply and interpret the laws specified in the Convention. She also emphasized that, as a result of this judgment, Poland does not guarantee a right to a fair trial by an independent and impartial court established by law.**⁴⁶

Committee of Ministers of the Council of Europe

The steps taken by the Polish Government after the ECtHR ruling in *Xero Flor v Poland* were negatively commented on by the Committee of Ministers of the Council of Europe.⁴⁷

The Committee recalled that the breach of the Convention was caused by the fact that Mr. Mariusz Muszyński, who 'unlawfully occupied one of the three seats of the Constitutional Court vacated on November 6, 2015 and filled by three judges legitimately elected in October 2015, who were nevertheless prevented from exercising their functions due to the unlawful refusal of the President of Poland to receive their oath,' was a member of the bench.

'It should be recalled that the violation in this case arose from the fact that Mr. M.M. unlawfully occupied one of the three seats of the Constitutional Court vacated on 6 November 2015 and filled by three judges legitimately elected in October 2015, who were nevertheless prevented from exercising their functions due to the unlawful refusal of the President of Poland to receive their oath.'

It also pointed out that the authorities had so far failed to present a convincing explanation of 'how *restitutio in integrum* could be ensured for the applicant company, and urged the authorities to continue the reflection on possible individual measures in this case'.

45 Commissioner for Human Rights Dunja Mijatović, *Report following her visit to Poland from 11 to 15 March 2019*, <https://rm.coe.int/report-on-the-visit-to-poland-from-11-to-15-march-2019-by-dunja-mijatovic/168094d848>, accessed on April 27, 2023.

46 *Report by the Secretary General under Article 52 of the European Convention on Human Rights on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland* – no. SG/Inf(2022)39.

47 1451st meeting of the Committee of Ministers, 6–8 December 2022, <https://hudoc.exec.coe.int/eng?i=004-58569>, accessed on April 12, 2023.

The Committee emphasized that swift action is needed to restore the composition of the Constitutional Court to its legal state and to remove the judges appointed in breach of the Polish Constitution.

'The Committee could therefore stress that rapid remedial action is required to ensure the lawful composition of the Constitutional Court, by allowing lawfully elected judges to adjudicate and by excluding those judges whose election cannot be regarded as lawful.'

In the latest report to the Committee of Ministers of the Council of Europe, the Polish Government emphasized that the judgment in *Advance Pharma v Poland* (and others) has not been implemented because of the decision of the Constitutional Court of March 10, 2022 (ref.: K 7/21), in which the Constitutional Court questioned the interpretation of the European Convention on Human Rights by the ECtHR in these cases. It also pointed out that 'the possible implications of this judgment are currently under examination.'⁴⁸

In the expert's opinion

Can the decision of the current Constitutional Court be an obstacle to the implementation of other ECtHR judgments? Is it a way for the Polish Government to escape liability?

The justification used by the Constitutional Court in its rulings on Article 6 ECHR refers to the development of the case law of the ECtHR in the light of the ECHR, which, according to the Constitutional Court, was not foreseeable when the agreement was concluded and to which Poland, as a State-Party to the Convention, did not agree. Therefore, the Constitutional Court played the role of an interpreter of international agreements, assessing that the ECtHR had misinterpreted the Convention, but also of an exponent of the State's will regarding what agreement the State would and would not like to be bound by. Additionally, the Polish authorities are able to refer to the Constitution and the Constitutional Court's rulings to justify actions which are in conflict with international law. Although this will not incite the desired effect in international relations, it gives the semblance of legality domestically. This method of reasoning can be applied to any legal issue that arises with respect to the future case law of the ECtHR. Consequently, there is no doubt that, whenever an issue arises in the ECtHR case law which is favourable from the point of view of entrepreneurs seeking legal protection, and unfavourable from the point of view of the government, the State Treasury or other important political legal interests of the authorities, the arguments used in the judgments of the Constitutional Court to date ruling out protection under Article 6 ECHR can work to the detriment of entrepreneurs in the same way.

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48 <https://hudoc.exec.coe.int/eng?i=004-59085>, accessed on April 12, 2023.

European Court of Human Rights

The Constitutional Court's decisions declaring the provisions of the Convention incompatible with the Polish Constitution have been assessed by the ECtHR in the judgment in *Juszczyzsyn v Poland*:

'In the light of the Xero Flor judgment, the presence of the judge mentioned above (Mariusz Muszyński – author's explanation) on the five-judge bench of the Constitutional Court which gave the judgment of 10 March 2022 (no. K 7/21) necessarily calls into question the validity and legitimacy of that judgment.'

**Judgment of the ECtHR of October 8, 2022,
Juszczyzsyn v Poland (application 35599/20), para. 207.**

'In view of the foregoing, the Court considers that the Constitutional Court's judgment of 10 March 2022 (in case K 7/20 – author's explanation) cannot have any effect on the Court's final judgments in Broda and Bojara, Reczkowicz, Dolińska-Ficek and Ozimek and Advance Pharma sp. z o.o. (all cited above), having regard to the principle of the binding force of its judgments under Article 46 § 1 of the Convention.'

**Judgment of the ECtHR of October 8, 2022,
Juszczyzsyn v Poland (application 35599/20), para. 209.**

UNITED NATIONS

The problem of the CC was also noticed by the UN Special Rapporteur on the independence of judges and lawyers. He wrote in his report that the 'original sin' was that the then parliamentary majority filled positions that had already been filled. He also stated that the failure to implement the rulings of the legal Court at the end of 2015 was 'a flagrant breach of the principles of judicial independence and the separation of powers, as well as a violation of the Polish Constitution.'⁴⁹

*'Its legitimacy and independence have been seriously undermined and today, the Court cannot ensure an independent and effective review of the constitutionality of legislative acts adopted by the legislator. This situation casts serious doubts over its capacity to protect constitutional principles and to uphold human rights and fundamental freedoms.'*⁵⁰

49 Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, para. 29, <https://digitallibrary.un.org/record/1484929?ln=en>, accessed on April 12, 2023.

50 Ibid, para. 73.

National assessment

Assessment of the last instance courts

The Supreme Administrative Court also expressed its opinion in a similar vein to those quoted above.⁵¹ In its ruling of November 16, 2022, it held that:

'Meanwhile, it is a matter of common knowledge, which is also confirmed in the annual reports of the Constitutional Court, that the Polish Constitutional Court is currently examining cases extremely sluggishly, with some applications waiting for a ruling for more than five years. Hence, suspending administrative court proceedings and waiting for a possible ruling by the CC actually means a significant extension of the proceedings for perhaps many years.'

'The illegality of occupying the position of a CC judge by "stand-in judges" (author's expression) was confirmed by both the Polish Constitutional Court's ruling of December 3, 2015, ref. K 34/15, and the judgment of the European Court of Human Rights of May 7, 2021, in Xero Flor Sp. z o.o. v Poland, ref. 4907/18. The presence of incorrectly appointed judges in the membership of the Constitutional Court means that the whole of the Polish Constitutional Court has been, so to speak, "infected" with illegality, and has therefore lost, in a material sense, its ability to adjudicate in accordance with the law because there is a high degree of probability that at least one of the so-called "stand-ins" will be included in the bench.'

***Judgment of the Supreme Administrative Court
of 16 November 2022, ref. III OSK 2528/21.***

Ordinary courts

The Polish ordinary courts also do not have a straightforward task. In some of their rulings, they also invoke a judgment of the European Court of Human Rights and declare the Constitutional Court's rulings issued with the involvement of stand-in judges defective.

Non-governmental organizations

NGOs have also continuously raised the alarm about irregularities related to the composition of the Constitutional Court.

Already at the beginning of 2017, the Helsinki Foundation for Human Rights issued a statement acknowledging that 'the constitutional crisis has reached a critical point,' which was caused by the admittance of judges to adjudicate without a legal basis and the

⁵¹ The case applied to a complaint regarding the inaction of the Chancellery of the Sejm, which had the objective of suspending the proceedings on making lists with the names of people who supported candidates for the new National Council of the Judiciary available to citizens in the procedure of access to public information. The Chancellery argued, among other things, that the suspension was justified because the proceedings before the Constitutional Court on the constitutionality of the provision of the law on the National Council of the Judiciary obliging the Marshall of the Sejm to disclose lists of support for candidates to the NCJ, had not ended (ref. K 21/19).

election of the president of the Constitutional Court in breach of the provisions of the Act.⁵²

In turn, in a statement of July 18, 2022, the Stefan Batory Foundation concluded that *'we have no doubt that the activities of the current Constitutional Court pose a real threat to the functioning of a democratic state governed by the rule of law, completely distorting the sense and essence of the control of the constitutionality of the law.'*⁵³

The Justice Defense Committee (hereinafter: **'KOS'**) also took a stance on this matter. In an opinion prepared at the request of the KOS, Dr. Tomasz Zalasieński states that Justyn Piskorski, who was also elected to the position of judge of the Constitutional Court in breach of the Polish Constitution, was included in the bench to rule in the case being handled under case number K 12/18.⁵⁴

*'The Justice Defense Committee, KOS, as well as all of its members, have consistently avoided any activity that could in any way contribute to legitimizing the Constitutional Court, which currently offers no guarantee of hearing cases objectively and without the influence of the executive and legislative branches.'*⁵⁵

Assessment of the legal community

Attention is also drawn to the defective composition of the Constitutional Court by representatives of legal studies. Both the Polish Academy of Sciences and the deans of law faculties regularly pass resolutions in which they underline the defects in the Court's judgments.

After the ruling in which the CC declared the provisions of the EU Treaties unconstitutional (ref. K 3/21), the Committee of Legal Sciences of the Polish Academy of Sciences issued a resolution stating that *'(this ruling – author's explanation) is intended to legalize unconstitutional changes in the judiciary after 2015, which are incompatible with EU law and the ECHR, and to put pressure on Polish judges to disregard the CJEU rulings that are binding on them and to refrain, under threat of disciplinary liability, from examining the status of judges appointed by the politicized NCJ (...).'*⁵⁶

52 <https://obserwatoriumdemokracji.pl/wp-content/uploads/2017/02/Oswiadczenie-HFPC-KH-31-01-2017.pdf>, accessed on April 22, 2023.

53 <https://www.batory.org.pl/oswiadczenie/oswiadczenie-zespolu-ekspertow-prawnych-fundacji-im-stefana-batorego-ws-potrzeby-zmiany-podstaw-prawnych-funkcjonowania-trybunalu-konstytucyjnego/>, accessed on April 22, 2023.

54 Dr Tomasz Zalasieński's opinion of March 12, 2019, available at: <https://komitetobronysprawiedliwosci.pl/app/uploads/2019/03/Opinia-prawna-13.03.2019r..pdf>, accessed on April 22, 2023.

55 <https://komitetobronysprawiedliwosci.pl/opinia-prawna-ws-zgodnosci-z-konstytucja-rp-przepisow-wskazanych-we-wnioskach-nowej-krs-i-grupy-senatorow/>, accessed on April 22, 2023.

56 <https://knp.pan.pl/index.php/wykaz-dokumentow-knp-pan-podjetych-w-2021-r/246-m>, accessed on April 22, 2023.

However, based on the same ruling, the deans of the law faculties stated that ‘the decision of the Constitutional Court was made in breach of the Constitution of the Republic of Poland with the participation of people who were not authorized to adjudicate, and essentially exceeds the scope of the Constitutional Court’s cognition (...)’.⁵⁷

Furthermore, following the ruling on Article 6 of the ECtHR (ref. K 7/21), the deans of the law faculties expressed their ‘deep disapproval of the instrumental use of legal institutions intended to protect the principle of the supremacy of the Constitution for the purposes of current state policy in the era of Russia’s unprecedented aggression against Ukraine, which places the Republic of Poland in the same rank as the Russian Federation, which stipulated in 2015 that it would respect the judgments of the European Court of Human Rights only if it considered them compatible with its own internal legal order.’⁵⁸

Retired judges of the Constitutional Court also spoke up on the incorrectly appointed judges of the Constitutional Court.

‘Thirdly, the judgment was issued by a five-person bench, while the rapporteur was a person elected to the Constitutional Court to a judicial place that had already been occupied, therefore not a judge, as arises directly from the judgments that directly apply to that person, i.e. the judgment of the Constitutional Court of December 3, 2015 in case K 34/15, as well as the judgment of the ECtHR of May 7, 2021 in the Xero Flor case (4907/18). This circumstance means that the judgment is defective, which results in its non-existence in domestic and international legal transactions.’⁵⁹

Summary

The Constitutional Court is no longer the same body that it was 8 years ago. The road to rebuilding the authority of the CC will be long and more demanding than its destruction, especially as more problems appear on the horizon, even just those related to the term of office of the current president of the Court – Julia Przyłębska. Besides, the ECtHR judgment in *Xero Flor v Poland* has still not been implemented either individually or generally.

57 <https://wpia.uj.edu.pl/documents/41601/148991119/Stanowisko+dziekano%CC%8lw+wydzia%C5%82o%CC%8lw+prawa+polskich+uczelni+w+sprawie+rozstrzygnięcia+TK+z+7-10-2021.pdf/0b138c82-8857-41d9-8ef5-8b6cd0a779cd>, accessed on April 22, 2023.

58 <https://www.rp.pl/sady-i-trybunały/art35934201-dziekani-wydziałów-prawa-przeciwni-wyrokowi-tk>, accessed on April 22, 2023.


59 <https://archiwumosiątkowskiego.pl/wpis-w-debacie/oswiadczenie-sędziów-trybunału-konstytucyjnego-w-stanie-spożynyku-z-13-marca-2022-roku/>, accessed on April 22, 2023.

3. CHANGES IN THE SUPREME COURT


At the end of 2017, the authorities took measures leading to an increase in the influence of the executive and legislative powers on the judiciary, both the ordinary courts and the Supreme Court. The Supreme Court which can be defined as the court of law is an extremely important institution for protecting the rights of citizens and entrepreneurs.

The Supreme Court

The latter used to be called a 'court of law',⁶⁰ because, as a rule, the Supreme Court does not analyze the intricacies of the facts of a case, but mainly the correctness of application of the appropriate laws by the ordinary courts.

	TIMELINE
2018 April 3	Establishment of the Chamber of Extraordinary Control and Public Affairs and the Disciplinary Chamber
2020 January 23	Adoption of the historic resolution of the combined Chambers of the Supreme Court, the Civil, Criminal and the Labour and Social Insurance Chambers, from which it transpires, among other things, that improper staffing of the Supreme Court, the ordinary courts and military courts arises when their bench includes a person selected by the neo-NCJ
2020 February 14	Entry into force of the so-called 'Muzzle Act'
2020 May 26	Appointment of Małgorzata Manowska as First President of the Supreme Court
2021 July 14	Order of the CJEU suspending the Disciplinary Chamber (C 204/21 R)
2021 July 21	Judgment in <i>Reczkowicz v Poland</i> (43447/19)
2021 September 29	Election of a new president of the Civil Chamber of the Supreme Court
2021 November 8	Judgment in <i>Dolińska-Ficek and Ozimek v Poland</i> (49868/19 and 57511/19)

60 J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, Wyd. 5, Beck 2021, Article 523, para. 8.

	TIMELINE
2022 February 3	Judgment in <i>Advance Pharma v Poland</i> (1469/20)
2022 July 15	Replacement of the Disciplinary Chamber with the Chamber of Professional Liability
2023 May 10	Election of a new president of the Criminal Chamber of the Supreme Court

Case study

Advance Pharma v Poland

The legal situation in the Supreme Court is clearly illustrated by the *Advance Pharma* case.

Advance Pharma produces and distributes dietary supplements. The company sued the State Treasury for damages on January 20, 2014.⁶¹ The ordinary courts did not uphold the Company's claims, a cassation complaint needed to be filed with the Supreme Court. People appointed by the new National Council of the Judiciary were appointed to the bench hearing the Company's case.

The Supreme Court dismissed the cassation appeal, which resulted in the Company turning to the European Court of Human Rights. In its application, the Company alleged a breach of Article 6 ECHR, pointing out that the candidacies of all the judges hearing its case were presented to the President by the National Council of the Judiciary that had been formed after 2017.

In a judgment dated February 3, 2022, the European Court of Human Rights found that there had been a breach of the right to 'a court established by law' in the applicant company's proceedings.

'The appointment (of the judges in the bench – author's explanation) was made upon a recommendation of the NCJ, as established under the 2017 Amending Act, a body which no longer offered sufficient guarantees of independence from the legislative or executive powers'

para. 349.

61 The company had to withdraw its flagship product from the market as a result of the decision of the Chief Pharmaceutical Inspector. Therefore, the company disposed of its entire stock of the product and then suspended operations. An appeal against the decision resulted in the Voivodship Administrative Court revoking the decision, which was therefore not enforceable. The company derived its claim on the State Treasury on this basis. The value of the claim was set at PLN 32 million.

'The Court concludes that the formation of the Civil Chamber of the Supreme Court, which examined the applicant company's case, was not a "tribunal established by law".'

para. 350.

'(...) the Court's conclusions (...) will have consequences for its assessment of similar complaints in other pending or future cases (see paragraph 227 above). The deficiencies of that procedure as identified in the present case in respect of the newly appointed judges of the Supreme Court's Civil Chamber, and in Reczkowicz (cited above) in respect of the Disciplinary Chamber of that court, and in Dolińska-Ficek and Ozimek (cited above) in respect of the Chamber of Extraordinary Review and Public Affairs have already adversely affected existing appointments and are capable of systematically affecting the future appointments of judges, not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative courts (...).'

para. 364.

In the body of the ruling, the Court also reiterated that it is the State-party to the Convention that is obliged to draw conclusions from the Court's rulings and take measures to help resolve the problem.

'It will fall upon the respondent State to draw the necessary conclusions from the present judgment and to take any individual or general measures as appropriate in order to resolve the problems at the root of the violations found by the Court and to prevent similar violations from taking place in the future.'

The ECtHR judgment has not been implemented as of the date of publication of this report. In its latest decision, the Committee of the Ministers of the Council of Europe stated that, despite the passage of nearly a year from the date of the Court's ruling, the authorities have not taken any steps to rectify the situation of the defectively constituted National Council of the Judiciary. The Committee also noted that, despite the resumption of the national proceedings in the *Advance Pharma* case, its case will be heard by the Chamber of Extraordinary Control and Public Affairs, which is composed exclusively of judges appointed by the new NCJ.

'It appears necessary for the authorities to adopt comprehensive reforms in various areas'

'(...) stressed that the unconditional obligation to abide by the judgments of the European Court requires rapid payment of the just satisfaction to the applicants in the Dolińska-Ficek and Ozimek and Advance Pharma cases and invited the authorities to explain how restitutio in integrum could be ensured for these applicants in the light of information that the application for reopening of domestic proceedings in the case of Advance Pharma has been allocated for examination to the Chamber of Extraordinary Review which is exclusively composed of judges appointed in deficient procedures (...)'⁶²

62 1451st meeting of the Committee of Ministers, December 6–8, 2022, <https://hudoc.exec.coe.int/eng?i=004-59085>, accessed on April 12, 2023.



Timeline of the case

2010 September 10	The Chief Pharmaceutical Inspector withdrew the company's product from the market
2013 November 6	The Inspector discontinued the proceedings, stating that they were pointless because the company had destroyed its entire stock of the product
2014 January 20	The company sued the State Treasury (the value of the claim was set at PLN 32,000,000)
2016 February 8	The Regional Court in Warsaw set aside the Company's claim
2017 October 30	The Court of Appeal in Warsaw dismissed the appeal
2019 March 25	The Civil Chamber of the Supreme Court dismissed the cassation appeal
2022 February 3	The ECtHR issued a judgment in <i>Advance Pharma v Poland</i> , finding that the Convention had been breached

This case provides evidence for at least two theses. The first – in its current composition, the Civil Chamber is not an independent court, the second – the Polish Government is disregarding the judgments of the European Court of Human Rights. The judgment has not been implemented either in terms of general measures (the regulations on the National Council of the Judiciary and the status of the people in the Civil Chamber of the Supreme Court have not changed) or individual measures (the company has not received the compensation ordered).

In the expert's opinion

*What significance did the ruling of the European Court of Human Rights in the *Advance Pharma* case have?*

*The ruling in *Advance Pharma* showed that, in the situation where judges appointed in breach of European standards rule on an entrepreneur's legal situation in a Polish jurisdiction, legal protection can be effectively sought in proceedings before the ECtHR. Such protection, provided at the highest level in Poland, will be increasingly difficult to obtain. Already more than 50% of the Supreme Court consists of judges appointed in breach of Article 6 ECHR, which means that the benches which include them do not constitute a court established by law in accordance with the ECHR. In this situation, in a way, the ECHR becomes the last instance for entrepreneurs before which they can obtain reliable legal protection, albeit only with regard to breaches of the ECHR. The subsequent enforcement of the ECtHR judgment at national level remains somewhat of a problem. The trap into which entrepreneurs can fall, and which has been set by the Polish authorities, is best illustrated precisely by *Advance Pharma's* situation. After a favourable judgment of the ECtHR, the company's attorney applied to the Polish*

Supreme Court to reopen the proceedings, hoping that the reopened proceedings would be decided on by a panel of judges satisfying European standards. However, the matter turned out differently. The reopening proceedings are now being decided upon by a judge who was himself appointed in breach of Article 6 ECHR. Therefore, the breach already found by the ECtHR in the Advance Pharma case is now being replicated in the reopening proceedings.

prof. Maciej Taborowski

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Amendment of the Act on the National Council of the Judiciary

A key issue from the point of view of the procedure for selecting judges and related irregularities is the formation of the National Council of the Judiciary.⁶³ An amendment to the Act on the NCJ came into force in 2018, by which the power to appoint the majority of the members of this body was transferred from the judiciary power to the legislative power – the Sejm.

The change in the system of appointing members of the NCJ has encountered highly extensive criticism, both in Poland and abroad.

It was primarily pointed out that such a procedure of appointing members is incompatible with the Polish Constitution.

Polish Constitution

Article 187

The National Council of the Judiciary shall consist of:

1. the first president of the Supreme Court, the minister of justice, the president of the Supreme Administrative Court and an individual appointed by the President of the Republic of Poland;
2. 15 judges chosen from among the judges of the Supreme Court, the ordinary courts, the administrative courts and the military courts;
3. 4 members chosen by the Sejm from among its Deputies and 2 members chosen by the Senate from among its Senators.

The European Court of Human Rights has been critical of this solution in a number of judgements.⁶⁴

⁶³ According to the Polish Constitution, the National Council of the Judiciary safeguards the independence of the courts and judges. Furthermore, the NCJ presents judicial candidates to the President of the Republic of Poland for nomination, both in the ordinary courts and the Supreme Court.

⁶⁴ The ruling of the ECtHR in *Reczkowicz v Poland* (application 43447/19) and *Dolińska-Ficek and Ozimek v Poland* (joint applications 49868/19 and 57511/19), among others, should be mentioned.

'The Court finds that by virtue of the 2017 Amending Act, which deprived the judiciary of the right to nominate and elect judicial members of the NCJ – a right afforded to it under the previous legislation and recognized by international standards – the legislative and the executive powers achieved a decisive influence on the composition of the NCJ (...). The Act practically removed not only the previous representative system but also the safeguards of independence of the judiciary in that regard. This, in effect, enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, a possibility of which these authorities took advantage – as shown, for instance, by the circumstances surrounding the endorsement of judicial candidates for the NCJ.'

Reczkowicz v Poland, judgment of the ECtHR of July 22, 2021, 43447/19.

Similarly, the Court of Justice of the European Union emphasized the problems with the new Council of Judiciary.

The Venice Commission in December 2017⁶⁵ also concluded that: regulations designed in this way could undermine the independence of the National Council of the Judiciary. The negative situation of the new NCJ is also clearly evidenced by the fact that it was expelled from the European Network of Councils for the Judiciary (ENCJ) in 2021. This decision was made practically unanimously;⁶⁶ the Network stated that the current method of selecting judges does not guarantee independence of the executive and legislative branches.

*'In addition, the procedure of nomination of candidates does not protect the NCJ from politicization. Where judges nominate candidates to the council, it is not uncommon for Parliament to make the final choice.'*⁶⁷

In the expert's opinion

Have the changes that affected the National Council of the Judiciary, often referred to as the 'original sin' of the reforms of the Polish judiciary, affected court proceedings involving entrepreneurs? If so, why?

The state of legal uncertainty associated with the recent changes in the judiciary is highly problematic for many entrepreneurs. These changes have led to cases being considered even more slowly and, even in cases where the issue of political independence might not play such a major role, the risk of the membership of the bench being challenged should be expected in the event of the loss of the case. This means that entrepreneurs incur significant costs related to the changes in the judiciary and they cannot count on the efficient and safe handling of their cases.

**Marcin Ciemiński, PhD
Warsaw University**

65 Opinion of the Venice Commission No. 904/2017, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)031-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e), accessed on April 22, 2023.

66 86 votes were cast in favor of expelling the Polish NCJ from the Network, with 6 abstentions.

67 Ibid, para. 26 *in principio*.

The new structure of the Supreme Court

‘NEW CHAMBERS’

Two new chambers – the Chamber of Extraordinary Control and Public Affairs (CECPA) and the Disciplinary Chamber – were created under the Act on the Supreme Court passed in 2017.

According to the new law the CECPA is responsible, among other, for consideration of extraordinary complaints, the confirmation of the validity of parliamentary and presidential elections. The Disciplinary Chamber was created to hear disciplinary cases of judges and representatives of other legal professions.

The legality of both Chambers have been challenged by national and international institutions. As a consequence of these judgments, the Disciplinary Chamber was resolved and a new Chamber of the Professional Liability was created in 2022.

Landmark cases

A.K. v Poland (C-585/18, C-624/18 i C-625/18)

The CJEU has not independently determined whether the Disciplinary Chamber is an impartial and independent court under EU law. The Court signaled which criteria Polish judges should take into account when making their own assessment of the legality of the body in question (the so-called independence test). The CJEU stressed that in order to verify whether the Disciplinary Chamber meets the standards of independence and impartiality set out in EU law, the national court should assess: the systemic changes in the appointment of the members of the NCJ and the degree of its independence from the other authorities, the manner in which it carries out the tasks entrusted to it and the circumstances under which the Disciplinary Chamber was established.

In the judgment of 19 November 2019 the CJEU found that:

‘It follows that, where it appears that a provision of national law reserves jurisdiction to hear cases, such as those in the main proceedings, to a court which does not meet the requirements of independence or impartiality under EU law, in particular, those of Article 47 of the Charter, another court before which such a case is brought has the obligation, in order to ensure effective judicial protection, within the meaning of Article 47, in accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, to disapply that provision of national law, so that that case may be determined by a court which meets those requirements and which, were it not for that provision, would have jurisdiction in the relevant field, namely, in general, the court which had jurisdiction, in accordance with the law then in force, before the entry into force of the amending legislation which conferred jurisdiction on the court which does not meet those requirements.’

para. 166 of the judgment in A. K. case

Reczkowicz v Poland⁶⁸

The case involved a female advocate whose right to practice the profession was suspended. Ultimately, her case was settled by the Disciplinary Chamber. The applicant filed a complaint with the European Court of Human Rights, in which she claimed that her right to have her case heard by a court established by law had been breached.

The ECtHR found for her in a judgment of July 22, 2021. It held that ‘the Disciplinary Chamber does not meet the requirements of a court established by law.’ Furthermore, the Court found that there had been an obvious breach of national law which adversely affected the procedure of appointing judges to rule on disciplinary cases.

W. Ż. v Poland (C-487/19)

The CJEU left it to the national court to assess whether the neo-judges of the Chamber of Extraordinary Control and Public Affairs meet the standards under EU law. However, it pointed to the circumstances of the appointment that the national court should take into account in making this assessment (including the lack of independence of the NCJ, the violation of a final order of the Supreme Administrative Court that suspended the execution of the NCJ’s resolutions). The CJEU ruled that in order to guarantee the primacy of EU law, a national court may declare rulings issued by a neo-judge of the Chamber of Extraordinary Control and Public Affairs null and void if it finds that the appointment of such a person was made in flagrant violation of the law.

Dolińska-Ficek and Ozimek v Poland⁶⁹

On 8 November 2021 a judgment was passed on the application of Judge Dolińska-Ficek and Judge Ozimek. This case, in turn, focused on appointments made by the new National Council of the Judiciary and the body that considered appeals against its resolutions – the Chamber of Extraordinary Control and Public Affairs. The new NCJ rejected the candidacies of the Applicants to serve as judges in higher courts. Therefore, they appealed against these decisions to the CECPA, which set aside their appeals. The judges filed applications with the European Court of Human Rights on this basis, also alleging a breach of Article 6 of the Convention.

In its judgment in this case, the Court found the allegations of the Applicants to be reasonable, stating that the right to a trial by a court established by law had been breached by the fact that people who were members of the bench had been appointed as a result of their nomination by a body that no longer provided sufficient guarantees of independence from the legislative or executive branches, i.e., the NCJ, appointed under the Amending Act of 2017.

In the ruling, the Court also emphasized that the defective procedure for appointing judges could further adversely affect future judicial appointments, not only in the Supreme Court, but also in the ordinary courts.

68 Judgement of the European Court of Human Rights, application 43447/19.

69 Judgement of the European Court of Human Rights of November 8, 2021, joint applications 49868/19 and 57511/19.

'The deficiencies of that procedure as identified in the present case in respect of the Supreme Court's Chamber of Extraordinary Review and in Public Affairs and in Reczkowicz (cited above), in respect of the Disciplinary Chamber of that court, have already adversely affected existing appointments and are capable of systematically affecting the future appointments of judges not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative courts'

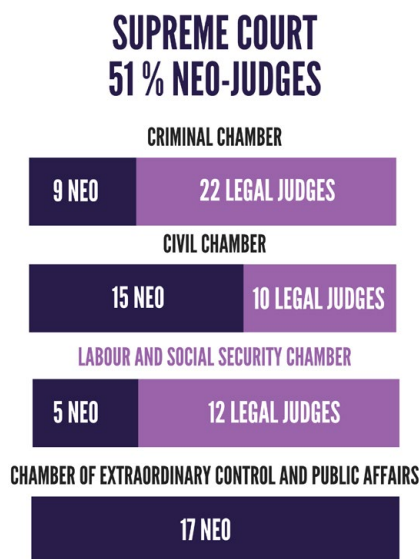
para. 368 of the judgment in the Dolińska-Ficek and Ozimek case

Composition of the Supreme Court

Currently, already more than half of the members adjudicating in the Supreme Court are members appointed with the participation of the new National Judicial Council – a body which, as has been repeatedly emphasized,⁷⁰ has been staffed in breach of the Polish Constitution. Therefore, the resolutions passed by the new NCJ on presenting judges for nomination to the President of the Republic of Poland are defective.

The charts below present the composition of the chambers of the Supreme Court, distinguishing the legal judges from those appointed with the participation of the new National Council of the Judiciary (referred to as neo-judges).

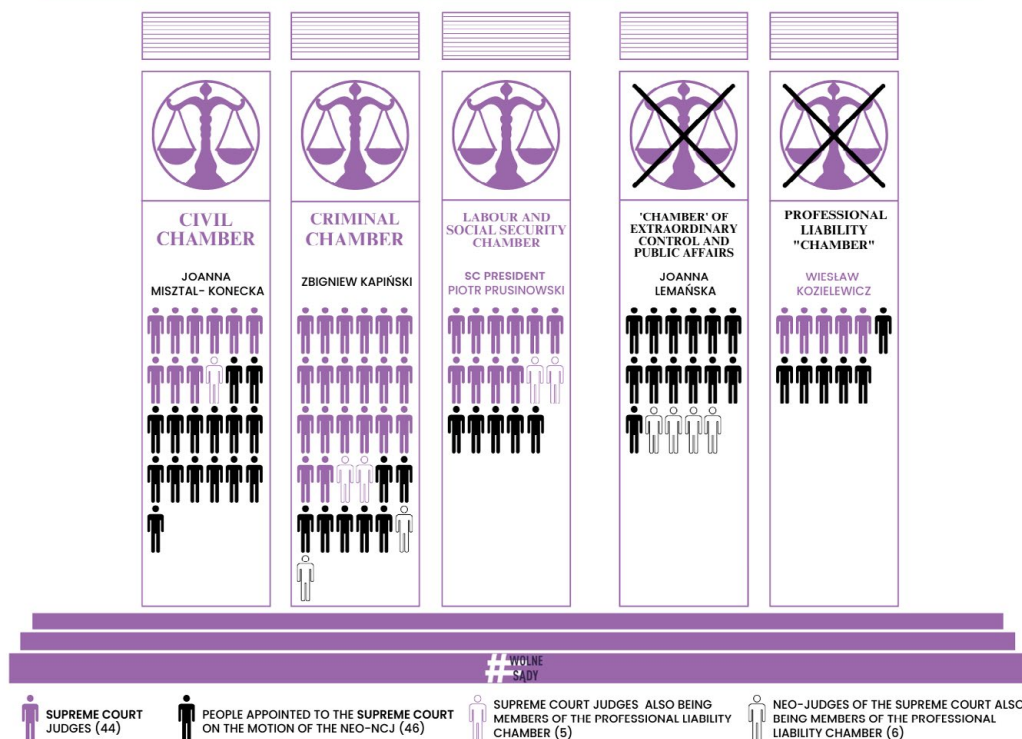
Note: To avoid 'duplication' of judges, the first chart does not include the Professional Liability Chamber, because judges, who adjudicate in it, adjudicate concurrently also in other chambers of the Supreme Court.



⁷⁰ Cf., among others, the CJEU ruling in *A. K. v. Krajowa Rada Sądownictwa*; Judgment of the Chamber of Labor and Social Security of the Supreme Court of December 5, 2019 (ref. III Po 7/19).

SUPREME COURT

MAŁGORZATA MANOWSKA



In the expert's opinion

How the changes in Supreme Court affected court proceeding involving entrepreneurs?

From the point of view of many entrepreneurs, the functioning of the Supreme Court has been paralysed. I can state from experience that the time for considering cases has increased significantly. Furthermore, in some cases, entrepreneurs have been deprived of certain solutions from which they previously benefited. For example, I am aware of cases where entrepreneurs are waiting for the Supreme Court to issue important resolutions in their cases (resolving differences in the interpretation of the law in larger benches), but these resolutions are not being issued, while cases requiring resolutions are constantly being deferred. In practice, this means that entrepreneurs are deprived of the Supreme Court's ability to issue resolutions. Additionally, the lack of these resolutions is a significant problem for the whole of the judiciary, which cannot rely on the Supreme Court for support.

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Election of the president of the Civil Chamber of the Supreme Court

The Civil Chamber of the Supreme Court is undoubtedly the most important from the perspective of an entrepreneur. It is the one that deals with civil, commercial, registration and intellectual property cases.⁷¹

The term of office of the previous president of the Supreme Court in charge of the chamber expired on August 30, 2021. Joanna Misztal-Konecka, who received her nomination to the office of judge of the Supreme Court from the new National Council of the Judiciary, replaced the legal judge of the Supreme Court, Dariusz Zawistowski.

The Assembly of Judges of the Civil Chamber of the Supreme Court met at the end of June 2021 to select candidates for president of the chamber. At that time, the assembly passed a resolution to postpone the selection of candidates until the Court of Justice of the European Union completes its proceedings on the status of judges of the Supreme Court.⁷² The resolution was openly criticized by the first president of the Supreme Court, Małgorzata Manowska (who had also been appointed to the Supreme Court in a procedure involving the New National Council of the Judiciary).⁷³

When Judge D. Zawistowski's term ended, President Andrzej Duda temporarily entrusted M. Manowska with the duties of president of the Civil Chamber. That same day, M. Manowska issued an order to hold an election assembly.

The legal judges of the chamber refused to attend the assembly, claiming that it was not permissible to call an assembly because the resolution passed in June was valid.⁷⁴

The abandonment of the assembly meant there was no quorum (2/3 of the chamber's members). At the next assembly that was called, the legal judges of the Civil Chamber upheld their position and also left the assembly. A quorum could not be reached at that time either.⁷⁵

71 Article 23 of the Act on the Supreme Court.

72 These proceedings before the CJEU are the case referred by the European Commission regarding the Disciplinary Chamber (ref. C-791/19) and two questions requesting preliminary rulings referred by the Supreme Court regarding, respectively, the correctness of the staffing of the Supreme Court and the establishment of whether a Supreme Court judge appointed by the New National Council of the Judiciary is officially in office (ref. C-487/19 and C-508/19), https://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/Uchwa%C5%82y%20Zgromadze%C5%84%20Izby%20Cywilnej%20z%20dnia%2029%20czerwca%202021%20r_zanom.pdf, accessed on April 22, 2023.

73 Statement of the First President of the Supreme Court of June 29, 2021, <http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=766-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia>, accessed on April 22, 2023.

74 Statement of the Judges of the Civil Chamber of the Supreme Court of September 7, 2021, <http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=766-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia>, accessed on April 22, 2023.

75 Even so, according to Article 15 § 2 of the Act on the Supreme Court, the quorum is reduced with each subsequent assembly of judges of the chamber to elect candidates for a new president of the chamber.

The situation repeated itself at the next assembly, but, because the quorum then amounted to 1/3 of the members of the chamber, three candidates were selected – M. Łochowski, M. Łodko and J. Misztal-Konecka.⁷⁶

Ultimately, President Andrzej Duda appointed J. Misztal Konecka to the office of president of the Civil Chamber of the Supreme Court.⁷⁷

Therefore, it should be concluded that the course of the process of selecting a new president heading the work of the Civil Chamber clearly demonstrates the problems of the functioning of this Chamber, which is so important from the point of view of the day-to-day functioning of entrepreneurs. Currently, the presidents of all Chambers (except the Chamber of Labour and Social Security) are members nominated with the involvement of the new NCJ.

Description of the cases

On February 15, 2023 the ECtHR presented more than 30 cases to the Polish Government. The vast majority of those communicated on that day apply to rulings issued by incorrectly appointed members of the Civil Chamber of the Supreme Court. We have presented the cases below from the group that applies to cases of entrepreneurs.

The case of Toyota Bank Polska S.A.⁷⁸

- ▶ Civil proceedings regarding a pecuniary claim against the applicant company. The Regional Court in Warsaw accepted the claim on April 4, 2019. The Court of Appeal in Warsaw dismissed the applicant company's appeal on November 13, 2020.
- ▶ On January 28, 2022, the Supreme Court refused to entertain its cassation appeal (case I CSK 108/22). It held a session *in camera* with a judge appointed to the court by the Polish President on October 10, 2018, on the recommendation of the NCJ (resolution 330/2018 of August 28, 2018).

The case of Hotel Antonio Conference Sp. z o.o.⁷⁹

- ▶ Civil proceedings regarding contractual matters initiated against the applicant company. The Regional Court in Opole accepted the claim on September 18, 2019. The Court of Appeal in Wrocław dismissed the appeal on February 24, 2020.

At the first assembly, the quorum is 2/3 of the members of the chamber. If there is no quorum, only 1/2 of the chamber members are required at the next assembly. However, only 1/3 of the members of the chamber are needed at the third assembly to elect candidates.

76 <https://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=784-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia>, accessed on April 22, 2023.

77 <https://www.prezydent.pl/aktualnosci/nominacje/joanna-misztal-konecka-prezesem-izby-cywilnej-sn35880>, accessed on April 22, 2023.

78 <https://hudoc.echr.coe.int/eng?i=001-223549>, accessed on April 22, 2023.

79 Ibid.

- ▶ On December 9, 2021, the Supreme Court dismissed its cassation appeal (V CSKP 276/21, notified on February 4, 2022). It held a session *in camera* with a bench of three judges appointed to the court by the Polish President on October 10, 2018, on the recommendation of the NCJ (resolution 330/2018 of August 28, 2018).

The case of Badania i Ekspertyzy Środowiska Sepo Sp. z o.o.⁸⁰

- ▶ Civil proceedings regarding contractual obligations between two companies. The Regional Court in Warsaw accepted the claim on December 13, 2018. The Court of Appeal in Warsaw dismissed the applicant company's appeal on January 29, 2020.
- ▶ On June 17, 2021, the Supreme Court refused to entertain its cassation appeal (case I CSK 15/21, notified on August 12, 2021). It held a session *in camera* with a judge appointed to the court by the Polish President on October 10, 2018, on the recommendation of the NCJ (resolution 330/2018 of August 28, 2018).

The case of Cukiernia Kawiarnia Monika Turzyński, Kalnik, Oriol Sp. J.⁸¹

- ▶ Civil proceedings regarding the applicant company's monetary claim. The Regional Court in Warsaw Gdańsk dismissed the claim on March 19, 2020. The Court of Appeal in Gdańsk dismissed the appeal on November 16, 2020.
- ▶ On June 24, 2021, the Supreme Court refused to entertain the applicant company's cassation appeal (case I CSK 216/21, notified on November 17, 2021). It held a session *in camera* with a judge appointed to the court by the Polish President on October 10, 2018, on the recommendation of the NCJ (resolution 331/2018 of August 28, 2018).

Summary

The circumstances described above confirm that the Supreme Court's position has been weakening in recent years.

This is mainly due to two factors:

- ▶ first, the introduction of unconstitutional changes regarding the appointment of judges and the politicization of the National Council of the Judiciary, which means that the rulings issued by the 'new judges' cannot constitute binding decisions about the legal position of citizens and are also a source of applications to the European Court of Human Rights.
- ▶ Secondly, an equally important element was the establishment of new chambers and the powers granted to them.

However, these doubts do not apply to all judges of the Supreme Court. The correctly appointed judges guarantee that some of the cases of citizens and entrepreneurs can still be handled by a court that complies with constitutional, European and international

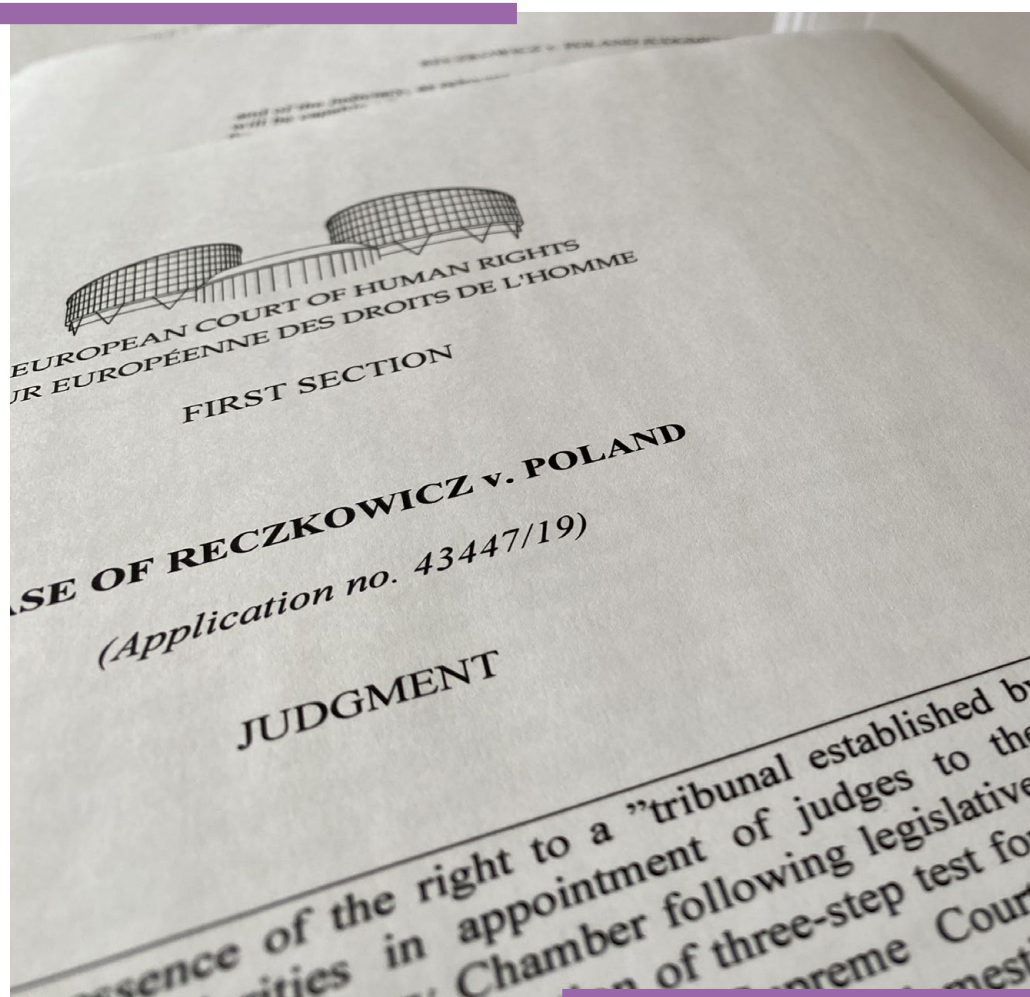
80 Ibid.

81 Ibid.

requirements and, secondly, that the rulings of European courts issued to date regarding the status of the people appointed by the new NCJ will be applied in practice.

Even so, the Supreme Court is increasingly losing its attribute as a 'court established by law'.

This lack of certainty on the part of citizens and entrepreneurs as to who will hear their case is the biggest threat.



4. EXTRAORDINARY COMPLAINT IN PROCEEDINGS OF ENTREPRENEURS

The extraordinary complaint – a new instrument which allows final proceedings to be overturned appeared in 2018. The competence to consider such cases belongs to the Chamber of Extraordinary Control and Public Affairs in the Supreme Court (doubts about the functioning of which have already been described above).

Description of the case

Extraordinary complaint of the Ombudsman for Small and Medium-Sized Enterprises

The Ombudsman for Small and Medium-Sized Enterprises (Rzecznik Małych i Średnich Przedsiębiorstw), whose main task is to protect small and medium-sized entrepreneurs in disputes with state authorities or local governments, was established in 2018. The Ombudsman also became one of the few entities authorized to file an extraordinary complaint.

The Ombudsman decided to file a complaint in 2020. As stated by the media, *‘the need to refund the co-financing to the Agency for Modernization and Restructuring was the disputed injustice because the agency changed the criteria in the rules of procedure that did not apply when the application for aid was being submitted.’*⁸²

However, this attempt proved unsuccessful – the Chamber of Extraordinary Control and Public Affairs dismissed the complaint, accepting that, when considering an extraordinary complaint, it is the final rulings that are ‘genuinely unjust’ which should be eliminated, and not those in which formal breaches took place. The Chamber stated that the Supreme Court cannot be made a third instance court.⁸³

‘The structural premise of the extraordinary complaint is that its premises are defined in such a way that it serves to eliminate final court rulings, which have defects of fundamental significance, from legal transactions. It is admissible when it is not possible, at the time it is filed, to repeal or change the final judgment through a procedure of other extraordinary appeals.’

General assumptions of the institution of an extraordinary complaint

According to the authors, the extraordinary complaint was intended to ‘remove final judgments that are grossly unjust, or misinterpreted laws, based on findings that are in conflict with the evidence gathered in the case.’ The drafters of the bill pointed

82 <https://www.prawo.pl/biznes/skarga-nadzwyczajna-rozczarowala-przedsiębiorców,501342.html>, accessed on April 27, 2023.

83 Ibid.

out that the most important role of this mechanism is to correct erroneous rulings that have ended proceedings in a final ruling.⁸⁴

*'One of the main motives for reforming the judiciary, including the Supreme Court, is the very low confidence of citizens in the judiciary. Various circumstances have led to this state of affairs, including, primarily, a number of rulings that not only give rise to legitimate legal doubts, but also grossly breach the principles arising from the principle of justice.'*⁸⁵

Therefore, the range of cases in which this mechanism can be used is very broad.⁸⁶

An extraordinary complaint can be filed with the Supreme Court in situations where:

1. the judgment breaches the principles or freedoms and rights of a person and a citizen, which are specified in the Constitution;
2. the ruling grossly breaches the law through its misinterpretation or misapplication;
3. there is an obvious conflict between the court's significant findings and the content of the evidence gathered.⁸⁷

Practical problems

Certain features of the extraordinary complaint affect the usefulness of this remedy in cases of entrepreneurs. More will be presented below.

► The possibility of challenging judgments that were made back in the previous century⁸⁸

The solution adopted by the legislator weakens the stability of judgments and the certainty of the situation of the parties to the proceedings. The law gives the Ombudsman and prosecutor general a right by which they can file a complaint against judgments that became final in 1997. The time limit on the ability to use this solution is far too long, which shatters the citizen's certainty as to the decisions made in his cases. It is difficult to have peace of mind knowing that, despite proceedings ending in a final judgment more than two decades ago, the prosecutor general may make it necessary to appear in court again by filing a complaint.

84 Justification of the bill, p. 6, available at: <https://orka.sejm.gov.pl/Druki8ka.nsf/0/5AB89A44A6408C3CC12581D800339FED/%24File/2003.pdf>, accessed on April 27, 2023.

85 Op. cit.

86 The only exceptions are family proceedings (including proceedings to determine that a marriage exists or has been declared non-existent) and proceedings for misdemeanors and fiscal misdemeanors. Lawyers point out that the extent of the ability to file a complaint is too broad, which can cause excessive interference by the public authorities in the private proceedings of citizens (see Tadeusz Ereciński and Karol Weitz, 'Skarga nadzwyczajna w sprawach cywilnych' [Extraordinary complaint in civil cases], *Court Review*, Wolters Kluwer 2/2019, pp. 7–19).

87 The Act on the Supreme Court of December 8, 2017 (Journal of Laws of 2021, item 1904, consolidated text, as amended).

88 Cf. Article 89 § 3 in connection with Article 115 § 1 of the Act on the Supreme Court.

► Imprecisely defined premises for the ability to file an extraordinary complaint

According to the provisions of the Act on the Supreme Court, a complaint can be filed *'if it is necessary to ensure compliance with the principle of a democratic state governed by the rule of law implementing the principles of social justice.'* This is a reference to the content of Article 2 of the Polish Constitution, the role of which is to set the direction of democracy in Poland. This premise, which is the main premise for the ability to file a complaint, is defined vaguely, which, by definition, adversely affects the quality of judgments issued on its basis, as well as their uniformity.⁸⁹

► Limited list of entities entitled to file a complaint

The Act on the Supreme Court specifies a list of entities that are entitled to file a complaint. Among them are the prosecutor general, the Ombudsman and the President of the OCCP.⁹⁰ Therefore, a party to the proceedings is not an entity that is entitled to file a complaint. It can only request the bodies specified above to file a complaint in its case.⁹¹

► The ability of authorized entities to file a complaint *ex officio*

The introduction of the possibility of filing a complaint *ex officio* means that a participant in the proceedings ceases to be a party to the proceedings and becomes more of a petitioner, regardless of whether he is a claimant or a respondent in the proceedings. Depriving litigants of influence over the initiation and conduct of extraordinary complaint proceedings constitutes a breach of the right to a fair trial.⁹²

► Extraordinary complaints are considered by the Chamber of Extraordinary Control and Public Affairs

The status of the CECPA and the method of appointment of its members have been questioned since this Chamber was established. Equally, the European Court of Human Rights, the Court of Justice of the European Union⁹³ and the Supreme Court have already unequivocally ruled on its status, method of establishment and operation. The conclusion from these rulings is unequivocal – the review of cases by the CECPA does not guarantee an individual the protection of his right to a court established by law.

89 K. Szczucki, *Ustawa o Sądzie Najwyższym. Komentarz*, 2nd edn, Wolters Kluwer 2021, Article 89, thesis 9.

90 Article 89, § 2 of the Act on the Supreme Court.

91 Ruling of the Supreme Court of 29 October 2019, I NSNc 33/19, *LEX* no. 2734433.

92 T. Zembruski, *Skarga nadzwyczajna w polskim postępowaniu cywilnym*, PiP 2019, no. 6, pp. 123–138.

93 Cf. Ruling of the CJEU in W.Ż. of October 6, 2021 ref: C-487/19.

European Court of Human Rights and the extraordinary complaint

Applications have already been submitted to the European Court of Human Rights about the operation of the extraordinary complaint and its instrumental use by the Prosecutor General. This is demonstrated, among others, by the case of former Polish President Lech Wałęsa.⁹⁴

Description of the case

Lech Wałęsa won a personal rights case in 2011, with a final verdict from the Court of Appeal in Gdańsk, against Krzysztof Wyszowski, who accused him of collaborating with the Security Services under the pseudonym 'Bolek'. The court held that Wyszowski had overstepped the bounds of freedom of speech and ordered him to publish an apology.

However, in 2020 (9 years after the proceedings ended with a final judgment) the prosecutor general exercised his right and filed an extraordinary complaint contesting the judgment of the Court of Appeal in Gdańsk. In the complaint, he argued that the Court of Appeal breached the principle of proportionality 'in protecting the claimant's right to honor and reputation, as specified in Article 47 of the Polish Constitution, at the expense of the defendant's freedom of expression protected by Article 54 of the Polish Constitution'.⁹⁵

In response to the complaint, Lech Wałęsa stated that the reopening of a case that had ended in a final judgment almost 10 years earlier is a violation of the principle of a fair trial and the principle of legal certainty.⁹⁶

In a judgment of April 21, 2021, the Chamber of Extraordinary Control and Public Affairs overturned the contested judgment, agreeing with the arguments of the prosecutor general.

The CECPA's decision prompted the former Polish President to file a complaint with the European Court of Human Rights. Most significantly in this context, he alleges that the prosecutor general's extraordinary complaint was based on legal provisions that breach the principle of legal certainty.⁹⁷

In questions to the parties to the proceedings, the ECtHR examines whether there are grounds for initiating the pilot judgment procedure in proceedings regarding extraordinary complaints, namely recognizing that a systemic problem has arisen.⁹⁸ This

94 Application 50849/21.

95 Judgment of the Chamber of Extraordinary Control and Public Affairs of April 21, 2021, ref.: I NSNc 89/20, p. 2, available at: <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/i%20nsnc%2089-20-1.pdf>, accessed on April 27, 2023.

96 Communication of *Wałęsa v Poland*, para. 18, available at: <https://hudoc.echr.coe.int/eng?i=001-220105>, accessed on April 27, 2023.

97 Ibid, para. 37.

98 According to Rule 61 of the Court's Rules of Court, 'The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party

question of the Court is evidence that the Court will be analyzing this case in a broader dimension, and that the decision that is reached in this case may be relevant to others that are or will be pending before the Court in the future.

An extraordinary complaint in practice: analysis of statistical data

The number of requests to refer an extraordinary complaint to the Chamber of Extraordinary Control and Public Affairs undoubtedly proves that citizens have placed high hopes in this instrument⁹⁹ This is most probably the effect of how the representatives of the authorities presented the principles of this institution to the public.

THE OMBUDSMAN

In 2018–2023,¹⁰⁰ the Ombudsman's Office:

- ▶ received **14,179** requests from citizens to file an extraordinary complaint;
- ▶ gave explanations or refusals to a total of **11,311** applicants;
- ▶ filed complaints in **120** cases, including in:
 - ▷ 51 civil cases for payment;
 - ▷ 12 civil cases of other categories (including lifting co-ownership) 35 inheritance cases, in particular, on the division of an inheritance;
 - ▷ 4 family law cases;
 - ▷ individual labor and criminal cases.

The CECPA:

- ▶ accepted a total of **46** complaints (approx. 38% of the complaints filed);
- ▶ dismissed **22** complaints, and discontinued one case;
- ▶ more than **50** cases are still pending.

concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.'

99 The information below was made available as a result of our requests for access to public information under the Act on access to public information of September 6, 2001. In our work on this Report, we made requests to all bodies that are entitled to file an extraordinary complaint under the Act on the Supreme Court (i.e., the Ombudsman [request of April 12], the Prosecutor General [request of April 14], the President of the Office of Competition and Consumer Protection [request of April 13], the Chairman of the Polish Financial Supervision Authority [request of April 13], the Ombudsman for Small and Medium-Sized Entrepreneurs [request of April 12] and the Financial Ombudsman [request of April 13]. Furthermore, on April 12 of this year, we sent a request to the Supreme Court to provide access to public information on resolutions of extraordinary complaint proceedings. We received responses from the Ombudsman, the Prosecutor General, the President of the Office of Competition and Consumer Protection and the OSME by the time the Report was completed.

100 Data as of 31 March 2023.

The Ombudsman has only filed 120 complaints with the Chamber of Extraordinary Control and Public Affairs.

PROSECUTOR GENERAL

In 2018–2023,¹⁰¹ the prosecutor general:

- ▶ received **13,176** requests from citizens to file an extraordinary complaint;
- ▶ gave explanations or refusals to a total of **12,014** applicants;
- ▶ filed complaints in **629** cases (5% of requests).

The CECPA:

- ▶ accepted a total of **210** complaints (approx. 33% of the complaints filed);
- ▶ dismissed **120** complaints;
- ▶ discontinued **27** proceedings.

One out of every three extraordinary complaints filed by the prosecutor general is upheld. Less than 5% of citizens' requests ended with the prosecutor general taking action on their cases.

However, a problematic issue, which has already been discussed in this report on pages 55–56, arises with regard to the type of cases in which the prosecutor general undertakes to file a complaint *ex officio* (namely without a citizen's request).¹⁰² We are eagerly awaiting the further course of the proceedings in *Wałęsa v Poland* and the ECtHR's assessment of the prosecutor general's activities.

OMBUDSMAN FOR SMALL AND MEDIUM-SIZED ENTERPRISES

In 2018–2023,¹⁰³ the OSME's Office:

- ▶ received **191** requests from citizens to file an extraordinary complaint;
- ▶ gave explanations or refusals to a total of **137** applicants;
- ▶ complaints were filed in **17** cases (9% of requests).

The CECPA:

- ▶ accepted just **1** complaint;
- ▶ dismissed **17** complaints;
- ▶ **1** case is still pending.

¹⁰¹ Data as of 31 March 2023.

¹⁰² The possibility of authorized entities filing an extraordinary complaint *ex officio* was addressed on page 56 of this report.

¹⁰³ Data as of 31 March 2023.

The analysis of this data shows that the Ombudsman for Small and Medium-Sized Enterprises has positively reviewed a higher percentage of requests for extraordinary complaints on behalf of entrepreneurs than the Ombudsman. However, the reason for this is most probably the fact that a dramatically small number of requests have been received by the OSME over the last 5 years.

Even so, only one extraordinary complaint filed by the Ombudsman for Small and Medium-Sized Enterprises was accepted by the CECPA, which lead to the conclusion that this mechanism is ineffective for protecting the rights of entrepreneurs.

PRESIDENT OF THE OFFICE OF COMPETITION AND CONSUMER PROTECTION

In 2018–2023,¹⁰⁴ the President of the OCCP:

- ▶ received **67** requests from citizens to file an extraordinary complaint;
- ▶ gave explanations or refusals to a total of **45** applicants;
 - ▷ filed complaints in **3** cases (4% of requests).

The CECPA:

- ▶ accepted just **1** complaint;
- ▶ has not dismissed **any** cases;
- ▶ **2** cases are still pending.

The President of the Office of Competition and Consumer Protection is not a frequent recipient of requests for extraordinary complaints. This could primarily arise from the fact that the President of the OCCP handles highly specialized areas of law, such as merger control of entrepreneurs and monopoly proceedings.

CHAIRMAN OF THE POLISH FINANCIAL SUPERVISION AUTHORITY

In 2018–2023¹⁰⁵ the Chairman of the PFSA:

- ▶ received **31** requests from citizens to file an extraordinary complaint;
- ▶ gave explanations or refusals to **all** the applicants;
- ▶ filed **0** complaints in these cases.

For 6 years of the existence of an extraordinary complaint in the legal system, the Chairman of the PFSA did not intervene in any case that was reported to him.

¹⁰⁴ Data as of 31 March 2023.

¹⁰⁵ Data as of 31 March 2023.

In response to our request, the PFSA Office indicated that *'In all cases, the Chairman of the PFSA informed the applicant that the case in which the complaint would be filed does not fall within the competence of the PFSA'*. This data must lead to the conclusion that this instrument is not a useful instrument from the perspective of the PFSA, but also ineffective from the point of view of persons and entities that report to the Chairman of the PFSA.

Conclusions

The problems discussed above unequivocally disqualify the extraordinary complaint as an instrument in light of the rule of law. In addition, such an assessment is confirmed by the statistics cited above related to the activities of entities entitled to take advantage of this instrument. Therefore, in answering the question posed in the introduction, it should be stated that the extraordinary complaint is not a mechanism that effectively serves to protect the rights of entrepreneurs and citizens, even though a part of the public has placed high hopes in it.



SUMMARY

The difficulties described in this report with the credibility of the Polish judiciary, the independence of the courts, the enormous power and political supervision over state institutions, the lack of transparency and fairness of the legislative process, the lack of real, systemic constitutional control of laws passed by the parliament, ignoring of the rulings of the European courts by the government and, more broadly, ignoring of common principles concerning the European legal order, affect the security of economic transactions, domestic and foreign investments, as well as cooperation within the judiciary of countries belonging to the European Union.

The existence of about 3,000 so-called neo-judges in the Polish justice system, which constitutes almost 1/3 of the entire composition of Polish courts, creates huge problems and chaos, which is not conducive to the security of legal transactions, legal certainty and trust in the state. These people, adjudicating in the panels of judges, issue hundreds of rulings every day, which can be undermined and appealed against, among others to the European Court of Human Rights.

It is particularly dangerous that neo-judges, appointed in a politicized procedure, often pass decisive judgments, also in commercial disputes. At the same time, the Supreme Court is already under almost complete control of the executive power through neo-judges, who constitute over 51% of the composition, and this number is constantly increasing. The chambers of the Supreme Court that decide on verdicts in business and commercial matters, licenses and permits are the Civil Chamber and the Extraordinary Control and Public Affairs Chamber, which are under full political supervision of the government. Practice shows that it is currently highly unlikely, to win a dispute with the State Treasury or any body or entity associated with the ruling party. Even the judgments of the ECtHR, which declare a violation of the Convention by adjudicating cases by neo-judges, are not respected.

This creates an image of Poland in the context of a systemic and political environment that might be unstable for locating investments and conducting economic transactions.

ABOUT FREE COURTS

The Free Courts is a non-governmental organization founded by a group of Polish lawyers: Maria Ejchart – Dubois, Sylwia Gregorczyk – Abram, Paulina Kieszkowska – Knapik and Michał Wawrykiewicz in July 2017. As professionals, realizing the significance of harmful changes introduced in the Polish legal system, leading to the politicization of the independent courts, they undertake numerous activities aiming to legally educate their fellow citizens on the rule of law. Attorney Katarzyna Wiśniewska, PhD became a new member of the #FreeCourts in October 2022. Also, 5 junior lawyers are part of the team. The Initiative is constantly working on ensuring that the courts are independent, by preparing films, infographics and live reports, as well as organizing protests, demonstrations, debates and conferences. The Foundation has extensive experience in handling strategic litigation before the ECtHR. It already handles nearly 100 cases on behalf of Polish judges. The lawyers from the Free Courts have obtained several landmark judgments, which have an impact on the functioning of the whole legal system. The measures obtained by the Foundation's lawyers before the European Court of Human Rights have slowed down further suspensions and the lifting of immunity of Polish judges.



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