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Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
OF THE COUNCIL OF EUROPE
(VENICE COMMISSION)

POLAND

JOINT OPINION

OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE

ON

THE DRAFT LAW "ON REINSTATING THE RIGHT TO A FAIR TRIAL AND HEARING THE CASE WITHOUT UNDUE DELAY", PROPOSED BY THE PRESIDENT OF THE REPUBLIC

Adopted by the Venice Commission
at its 147th Plenary Session
(Venice, 12-13 June 2026)

On the basis of comments by

Mr Richard BARRETT (Member, Ireland)
Mr Martin KUIJER (Member, Netherlands)
Ms Angelika NUSSBERGER (Member, Germany)
Mr Kaarlo TUORI (Honorary President of the Venice Commission)
Mr Gerhard REISSNER (Expert, DGI)

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I. Introduction

1. By letter of 2 March 2026, Mr Włodzimierz Czarzasty, Marshal of the Sejm of the Republic of Poland, requested an opinion of the Venice Commission of the Council of Europe on the draft law "on reinstating the right to a fair trial and hearing the case without undue delay", proposed by the President of the Republic (CDL-REF(2026)012 and CDL-REF(2026)013). This Opinion was prepared jointly with the Directorate General of Human Rights and Rule of Law of the Council of Europe ("DGI").

2. Mr Richard Barrett, Mr Martin Kuijer, Ms Angelika Nussberger and Mr Kaarlo Tuori acted as rapporteurs for this opinion on behalf of the Venice Commission. Mr Gerhard Reissner was appointed as an expert for DGI.

3. On 14-15 April 2026, a delegation of the Commission composed of Mr Richard Barrett, Ms Angelika Nussberger, Mr Kaarlo Tuori and Mr Gerhard Reissner, accompanied by Mr Taras Pashuk, Ms Bettina Spilker-Brillaud and Mr Marco Lo Nardo from the Secretariat of the Venice Commission, conducted a visit to Warsaw, during which it held meetings with the Speaker of the Senate as well as members of the Sejm and Senate, the Minister of Justice, the First President as well as judges of the Supreme Court, the representatives from the President's Chancellery and the Deputy Commissioner of Human Rights. The delegation also met with representatives of civil society organisations and judicial associations. The Commission and DGI are grateful to the authorities of Poland for the excellent organisation of this visit.

4. This opinion was prepared in reliance on the English translation of the draft law. The translation may not accurately reflect the original text in all respects.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the above-mentioned meetings held in Warsaw on 14-15 April 2026. The draft opinion was examined at the joint meeting of the Sub-Commission on Rule of Law and Judiciary on 11 June 2026. Following an exchange of views with Mr Paweł Śliz, Chairperson, Committee on Justice and Human Rights of the Sejm, Mr Dariusz Mazur, Undersecretary of State, Ministry of Justice of Poland, and Mr Karol Rabenda, Undersecretary of State, Chancellery of the President of the Republic of Poland, it was adopted by the Venice Commission at its 147th Plenary Session (Venice, 12-13 June 2026).

II. Background

A. The Polish judiciary

6. Between 2017 and 2023, under the government led by the Law and Justice (PiS) party, Poland's judicial system underwent a series of significant reforms, including notably the transfer of the election of judicial members of the National Council for the Judiciary ("NCJ") by judges to the Sejm – with 23 out of 25 NCJ members subsequently elected by the Sejm. At the time, the Venice Commission concluded that the reform enabled the legislative and executive powers to interfere in a severe manner with the administration of justice, thereby posing a grave threat to judicial independence.[1] Similarly, in the following years, the European

[1] Venice Commission, CDL-AD(2017)031, Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, para. 129.

Court of Human Rights ("ECtHR")[2] and the Court of Justice of the European Union ("CJEU")[3] considered the reformed NCJ not an independent and impartial body. Further reforms within the Supreme Court concerned the Disciplinary Chamber, the creation of a Chamber of Extraordinary Review and Public Affairs, and the promulgation of an Act in 2020 ("2020 Act") which *inter alia* prohibited and classified as a disciplinary offence questioning the legitimacy of a judge and obliged judges to disclose publicly their membership in associations.

7. The 2020 Act was subsequently criticised by *inter alia* the Venice Commission and the CJEU,[4] and some of these changes were reversed in 2022.[5] Nevertheless, key deficiencies remain unresolved, foremost the method for appointing judicial members of the NCJ. In its 2023 pilot judgment *Wałęsa*, the ECtHR found violations stemming from a systemic dysfunction in the Polish legal order and called for rapid action by Polish authorities to restore the independence of the NCJ, including through legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ and addressing the status of all judges appointed under the deficient procedure and of decisions adopted with their participation.[6]

8. In this context, polarisation has emerged within the judiciary. Part of the judicial community, relying on the case-law of European Courts and various Polish courts, contests the legitimacy of the NCJ and deny the validity both of appointments made by the NCJ after its reform and of decisions issued by such appointees; others within the judiciary defend the legitimacy of the reforms, relying on the jurisprudence of the Polish Constitutional Tribunal ("CT") – whose compliance with the European standards has, in turn, been questioned by European Courts.[7] Since the Parliamentary elections of October 2023, the new political majority has tabled a number of proposals aimed at restoring the Rule of Law.

9. Specifically on the present matter, the Minister of Justice in October 2025 introduced a draft law in the Sejm, which categorised judges appointed by the deficient NCJ into three groups, depending on the circumstances that led to their appointment, each facing different treatment and consequences. The draft law was assessed by the Venice Commission and DGI, which recommended amendments in the light of the principles of separation of powers, irremovability of judges, legal certainty and proportionality. In particular, with the possible exception for judges of the Extraordinary Review and former Disciplinary Chambers of the Supreme Court, judges appointed after the 2017 reforms should remain in their posts until the results of new competitions, that assess independence and political neutrality. Decisions from these

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[2] see ECtHR, *Reczkowicz v. Poland*, Application no. 43447/19, Judgment, 22 July 2021 (on appointments to the Disciplinary Chamber of the Supreme Court); *Dolińska-Ficek and Ozimek v. Poland*, Applications nos. 49868/19 and 57511/19, Judgment, 8 November 2021 (on appointments to the Chamber of Extraordinary Review and Public Affairs); *Advance Pharma sp. z o.o v. Poland*, Application no. 1469/20, Judgment, 3 February 2022 (on appointments to the Civil Chamber of the Supreme Court); *Grzęda v. Poland*, Application no. 43572/18, Judgment (Grand Chamber), 15 March 2022 (on interference by the executive and legislature in the judiciary as a result of successive judicial reforms and substantial weakening of its independence).

[3] see CJEU, C-585/18, C-624/18 and C-625/18, Judgment of the Court (Grand Chamber), *A.K. and Others v. Sąd Najwyższy*, 19 November 2019; C-791/19, Judgment of the Court (Grand Chamber), *European Commission v Republic of Poland*, 15 July 2021; and C-204/21, Judgment of the Court (Grand Chamber), *European Commission v Republic of Poland*, 5 June 2023.

[4] see Venice Commission, CDL-AD(2020)017, Poland – Joint Urgent Opinion of the Venice Commission and DGI on Amendments to the Law on the Common Courts, the Law on the Supreme Court and some other Laws; and CJEU, C-204/21 R, Orders of the Vice- President of the CJEU of 14 July 2021 and of 27 October 2021.

[5] Changes included removing disciplinary liability for the content of judgments or for applying EU law. Measures were adopted in the context of Poland's Recovery and Resilience Plan, approved by the Council of the EU in 2022, and positively evaluated by the European Commission; see EU Commission, 2023 Rule of Law Report - Country Chapter on the Rule of Law situation in Poland, pp. 8–9, and Council Implementing Decision of 17 July 2022 on the approval of the assessment of the recovery and resilience plan for Poland (ST 9728/22; ST 9728/22 ADD 1).

[6] ECtHR, *Wałęsa v. Poland*, Application no. 50849/21, Judgment, 23 November 2023, para. 329; similarly, CJEU, C-521/21, Judgment of the Court (Grand Chamber), *MJ v AA*, 24 March 2026, para. 63.

[7] see CJEU, C-448/23, Judgment of the Court (Grand Chamber), *European Commission v Republic of Poland*, 18 December 2025; ECtHR, *Xero Flor w. Polsce sp.z o.o. v. Poland*, Application no. 4907/18, Judgment, 7 May 2021.

competitions should be subject to judicial review; and particular urgency in organisation of new competitions should be given to the positions in the Supreme Court.[8]

10. At the same time, in February 2026, an Act amending the Act on the NCJ was adopted by the Sejm, but not enacted because of the veto of the President of the Republic.[9] Meanwhile, the mandate of the current deficient NCJ has come to an end on 12 May 2026 – the Act on the NCJ not having been enacted, the Sejm proceeded with an alternative approach, whereby it elected NCJ members pre-elected by the judicial community. The Venice Commission had observed that, in light of the ongoing crisis, the *de facto* election of judicial members by their peers could present a step in the right direction.[10]

B. The Draft Law

11. In February 2026, the President of the Republic introduced in the Sejm a draft law on the restoration of the right of access to an independent court and hearing a case without undue delay ("Draft Law"). The background of this Draft Law is the currently prevailing crisis facing the Polish judiciary: 30% of Polish judges (ca. 3,000) have been appointed by the deficient NCJ. The resulting situation is that these judges, and any decisions rendered by them, are regularly subject to challenges. Two approaches emerged: the first, mentioned above and introduced by the Ministry of Justice in 2025, aims to regulate the effects of resolutions of the deficient NCJ, by either confirming such judges or removing them from judicial office, depending upon the circumstances of their appointment.[11] The Draft Law is an alternative approach: in essence, all judicial nominations, including those based on proposals of the deficient NCJ, are considered valid and cannot be called into question or revoked. The Draft Law therefore seeks to limit the scope for courts to challenge judges appointed by the deficient NCJ.

III. Analysis

12. As regards the scope of the present opinion, certain issues raised in the Draft Law have crystallised as particularly concerning. They will accordingly form the focus of the present opinion. Naturally, the fact that the Commission and DGI have not commented on a particular provision should not be taken as a tacit approval thereof.

A. Prohibitions on challenging judicial appointments, authority of courts and state bodies and refusal of administrative duties (Articles 5-8)

13. As a general remark, the Commission and DGI note that the terminology used for the core elements of a number of provisions is excessively vague, contrary to established ECtHR case-law on the necessity to ensure the quality of the law.[12] The following appear particularly problematic: "*challenging*" (Article 5 §§ 1-3), "*disregarding*" (Articles 5 § 1, 6 § 3) the Constitution, statutes on the structure of courts, or "*undermining*" rulings of the CT (Article 5 § 3) – it is unclear whether the mere interpretation of a norm differing from regular jurisprudence would already be covered by such terms; "*constitutional bodies*" (Article 5 § 2) – it is unclear whether the critical assessment of a legal instrument in a judicial decision could already be

[8] see Venice Commission, CDL-AD(2026)002, Poland – Urgent Joint Opinion of the Venice Commission and DGI on the Draft Law Concerning the Status of Judges Appointed between 2018 and 2025 and on other Related Matters.
[9] Reasons for the veto were outlined in a video address, along with further written justification (see website of the Presidency of Poland); Article 122 § 5 of the Polish Constitution (after a bill has been adopted, the President may refer it to the Sejm for reconsideration. The bill must then be passed by the Sejm by a three-fifths majority for the President to sign it.)
[10] Venice Commission, CDL-AD(2026)002, *op. cit.,* para. 62.
[11] Venice Commission, CDL-AD(2026)002, *op. cit.*.
[12] see ECtHR, *Kudrevičius and others v. Lithuania*, Application no. 37553/05, Judgment (Grand Chamber), 15 October 2015, paras. 108-110; *Navalnyy v. Russia*, Application no. 29580/12, Judgment (Grand Chamber), 15 November 2018, para. 115.

covered, interpreted as amounting to a judge undermining the authority of the government, parliament or president; "*unacceptable*" (Article 6) – the legal value of this term remains unclear. Such terminology may result in arbitrary (and potentially politically motivated) application of the Draft Law in practice.

1. Prohibitions on challenging the Constitution, Constitutional Tribunal, statutes on court structure and constitutional bodies (Articles 5 §§ 1-3, 6 § 1)

14. With these Articles, the Draft Law prohibits judges from challenging the validity of or disregarding the Constitution, statutes regulating the structure of courts and the procedure for appointing judges (Article 5 § 1); the existence or authority of constitutional bodies (Article 5 § 2); the existence or effectiveness of rulings of the CT (Article 5 § 3); the legitimacy of courts, the CT or other constitutional bodies (Article 6 § 1). The Explanatory Memorandum notes that these provisions are intended to "prevent the current unlawful actions of judges questioning the status of other judges, the binding force of constitutional and statutory provisions concerning the system of courts and tribunals, the status of judges and associate judges, as well as judgments of the CT and resolutions of the National Council of the Judiciary." In doing so, the Draft Law aims at "strengthening citizens' trust in the system of justice and the social legitimacy of judicial decisions" and "restor[ing] the balance between the principle of independence of judges and the constitutional principle of legality". The above provisions are thus presented as a "response to unlawful actions of courts and judges".[13]

a. As regards the Polish constitutional framework

15. The Venice Commission and DGI observe that principles upholding the Rule of Law, including the separation of powers, legal certainty and ensuring respect for the law's hierarchy and implementation, are firmly anchored in democratic states governed in accordance with the Rule of Law. It can therefore *prima facie* be concluded that the general prohibitive clauses contained in Articles 5 §§ 1-3, 6 § 1 are within the logic of a constitutional system based on these principles and thus usually not necessary, as they are stated and implied in other constitutional rules and in the hierarchical structure of a constitution.

16. However, should they be adopted, the provisions under scrutiny would curtail judges' competence to adjudicate – in the context of applicable procedural frameworks – certain subject-matters, which may be crucial to a case. This, in turn, would result in the impossibility of judicial review over the exercise of power by executive and administrative authorities, contrary to Rule of Law standards.[14] These limitations also restrict individuals' right to a fair trial, as guaranteed in the Polish Constitution,[15] calling into question whether these measures respect the essence of Article 6 § 1 of the European Convention on Human Rights ("ECHR" or "Convention"),[16] including legitimate aim and proportionality. Such outright prohibitions may thus be inconsistent with the right to an effective remedy and limit the scope of judicial review in effect reducing the judiciary's ability to act as a core check on legislative and executive overreach.

17. Importantly, the provisions under scrutiny could also be understood as raising systemic concerns within the domestic constitutional framework. As access to court is decisive for the

[13] Explanatory Memorandum, pp. 17-18
[14] see Venice Commission, CDL-AD(2025)002, The Updated Rule of Law Checklist, para. 66; ECtHR, *Grędza v. Poland*, Application no. 43572/18, Judgment (Grand Chamber), 15 March 2022, paras. 343, 345-349, noting that « […] on account of the lack of judicial review in this case, the respondent State impaired the very essence of the applicant's right of access to a court."
[15] see Articles 45, 77 § 2, 78 of the Polish Constitution.
[16] ECtHR, *Ernst and Others v. Belgium*, Application no. 33400/96, Judgment, 15 July 2003, para. 48; *Z and Others v. the United Kingdom*, Application no. 29392/95, Judgment, 10 May 2001, para. 93.

effectiveness of constitutional review,[17] the Commission and DGI are concerned that these measures could undermine the constitutional verification procedure applicable in Poland.[18] Pursuant to relevant legislation, the CT adjudicates on the conformity *inter alia* of statutes or legal provisions with the Constitution, whether on the basis of an individual constitutional complaint, or following a question of law posed by any court.[19] Since the Draft Law is also applicable to CT judges by virtue of Article 3(3), it would prevent the latter from assessing *inter alia* statutes regulating the structure of courts and tribunals, the procedure for nominating judges, the existence or authority of constitutional bodies, in the context of such proceedings.

18. The Draft Law could also be interpreted as preventing judges of any lower-level Polish court from raising questions of law, to the extent this would also constitute a prohibited "challenging" covered by Articles 5 §§ 1-3, 6 § 1 of the Draft Law. Given that some form of judicial review of constitutionality – whether concentrated or diffuse – is widely regarded as an effective means of ensuring respect for the constitution and protecting human rights,[20] such an approach risks undermining this principle. Accordingly, the Draft Law appears to run counter to the system of constitutional verification applicable in Poland.

b. As regards ECHR and EU law

19. Any legislative reform should not only be in line with the constitutional framework, but also with the obligations of Poland under international law, *in primis* under the ECHR, as well as under EU law.[21] In this context, the Explanatory Memorandum provides: "the assessment of the effectiveness of the appointment of a judge, in view of the constitutional structure of the [NCJ] under the Polish Constitution goes beyond the matter transferred by Poland under the Treaty of Accession to EU bodies. […] The case-law of the [CJEU] and [ECtHR] has created *ultra vires,* extra-treaty legal norms which constitute the legal basis for actions undertaken by judges contesting the reform of the [NCJ]."[22]

20. Concerning the ECHR, the Venice Commission and DGI consider that the Draft Law is problematic as it appears to ignore the fact that all public authorities in Poland are not only bound by the Polish Constitution but also by the obligations originating from international treaties. Fundamentally, where states have signed a treaty, they are obliged to refrain from acts which would defeat the object and purpose of that treaty and must perform that treaty in good faith. Importantly, a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Therefore, after ratification and entry into force of a treaty, no legal arguments based on national law, including those based on constitutional law, can justify an act or omission in breach of international law – with the exception of a manifest violation of internal law regarding the competence to conclude treaties, which does not appear to be at issue in the present instance.[23] A domestic legal system must ensure that the State abides by

[17] Venice Commission, CDL-AD(2025)002, *op. cit.,* para. 145.
[18] see Act on the Organisation of the Constitutional Tribunal.
[19] Articles 79 § 1 and 193 of the Polish Constitution; Article 33 of the Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal.
[20] Venice Commission, CDL-AD(2025)002, *op. cit.,* para. 132; "Crippling the [Constitutional] Tribunal's effectiveness will undermine all three basic principles of the Council of Europe: democracy […] ; human rights […]; and the Rule of Law […]. Making a constitutional court ineffective is inadmissible and this removes a crucial mechanism which ensures that potential conflicts with European and international norms and standards can be resolved at the national level without the need to have recourse to European or other subsidiary courts, which are overburdened and less close to the realities on the ground." (Venice Commission, CDL-AD(2016)001, Poland – Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, para. 138).
[21] see, Venice Commission, CDL-AD(2020)017, *op. cit.*, para. 20.
[22] Explanatory Memorandum, p. 8.
[23] Articles 18, 26, 27 and 46 of the Vienna Convention on the Law of Treaties; see already Permanent Court of International Justice, Advisory Opinion of 4 February 1932, Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, p. 24: "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law and treaties in force."

its obligations to respect international law and execute judgments of international courts.[24] Further, the Polish Constitution itself regulates that Poland shall respect binding international law and that an international agreement takes precedence if it cannot be reconciled with domestic statutes.[25]

21. Further, it follows from the Convention, its Article 1 in particular, that in ratifying the Convention, Contracting States undertake to ensure their domestic legislation is compatible with it.[26] ECtHR judgments serve not only to decide those cases brought before it, but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting States.[27] Beyond this, the Commission has observed that, while in theory ECtHR judgments are *inter partes* and the *erga omnes* effect is not expressly provided by the ECHR, the principle of *res interpretata de facto* produces such an effect.[28] In the present situation, the provisions under scrutiny are problematic when seen in light of Poland's obligations under the ECHR. The right to a fair hearing, as guaranteed by Article 6 § 1 must be construed in the light of the Rule of Law and requires that all litigants should have an effective judicial remedy enabling them to assert their rights. While this right is not absolute, any limitations set by the relevant State must not restrict a person's access to such an extent that the very essence of the right is impaired.[29] The ECtHR has noted that the effectiveness of a judicial remedy may be impaired if the scope of judiciary scrutiny by a domestic court is insufficient.[30] The provisions under scrutiny, unduly limiting the ability of Polish judges to independently interpret the law, affect not only the functioning of an independent judiciary but also the right to a fair trial, making this legislation incompatible with Article 6 § 1 and preventing judges from considering principles flowing from ECtHR judgments on matters removed from their jurisdiction. Accordingly, the Polish state – both its legislature and its judiciary – would be in violation of its obligations under the ECHR.

22. Concerning EU law, the Commission has noted that under EU law, any court in EU Member States must respect the rights and obligations stemming from EU law, including the principle of primacy of EU law and, where member states act within the scope of EU law, the Charter of Fundamental Rights of the EU.[31] The Commission has noted that provisions aimed at nullifying the effects of CJEU rulings pose a serious challenge to the primacy of EU law.[32] The CJEU has, for its part, recalled "settled case-law that the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State without, inter alia, provisions of domestic law, including constitutional provisions, being able to prevent that."[33] Going beyond,

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[24] Venice Commission, CDL-AD(2026)004, Peru – Opinion on a Set of Constitutional and Legislative Reforms Concerning the Judiciary, para. 72.
[25] Articles 9 and 91 § 2 of the Polish Constitution.
[26] ECtHR, *Maestri v. Italy*, Application no. 39748/98, Judgment (Grand Chamber), 17 February 2004, para. 47; *Scordino v. Italy (No. 1)*, Application no. 36813/97, Judgment (Grand Chamber), 29 March 2006, para. 234.
[27] ECtHR, *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Judgment, 7 January 2010, para. 197, noting that "Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby […] extending human rights jurisprudence throughout the community of the Convention States"; see also ECtHR, *Opuz v. Turkey*, Application no. 33401/02, Judgment, 9 June 2009, para. 162, noting that "since it provides final authoritative interpretation of the Convention, [the Court] must consider in its judgments whether national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States."
[28] Venice Commission, CDL-AD(2024)035, Poland – Opinion on the Draft Constitutional Amendments Concerning the Constitutional Tribunal and two Draft Laws on the Constitutional Tribunal, footnote 52.
[29] see ECtHR, *Naït-Liman v. Switzerland*, Application no. 51357/07, Judgment (Grand Chamber), 15 March 2018, paras. 113-116.
[30] ECtHR, *Hatton and others v. United Kingdom*, Application no. 36022/97, Judgment (Grand Chamber), 8 July 2003, paras. 141-142.
[31] Venice Commission, CDL-AD(2025)002, *op. cit.*, para. 151.
[32] Venice Commission, CDL-AD(2020)017, *op. cit.*, para. 37.
[33] CJEU, C-225/22, Judgment of the Court (Fourth Chamber), *'R' S.A. v AW 'T" sp. z o.o.'*., 4 September 2025, para. 58; Case C-430/21, Judgment of the Court (Grand Chamber), *Proceedings brought by RS*, 22 February 2022, para. 51

the CJEU most recently held that "a Polish court is required to disregard the rulings in the judgment of the [Constitutional Tribunal], in so far as that judgment upholds the prohibition, for a national court, on ascertaining whether another body meets the requirements of EU law as regards the guarantee of an independent and impartial tribunal previously established by law."[34]

23. Concretely, Article 5 §§ 1, 3 of the Draft Law would prohibit courts from questioning *inter alia* the constitutionality of statutes on the structure of courts and procedures for appointing judges, or the compatibility of rulings of the CT with EU law. Thereby, the legislative drafters emphasise the final adjudicating competence of the CT concerning not only the constitutionality of legal acts, but also their compatibility with EU law. Crucially, the Commission and DGI recall that according to the CJEU, the guarantee of an independent and impartial tribunal forms a core part of EU law.[35] The provisions under scrutiny therefore openly challenge the primacy of EU law and the status granted to the CJEU by Article 19(1) of the TEU, namely that the latter ensures that EU law is observed in the interpretation and application of the Treaties.[36] In effect, a Polish judge would be placed in the impossible position of either following the Draft Law, placing CT findings on matters concerning EU law above those of the CJEU and perpetuating violations of EU law; or abiding by the primacy of EU law and CJEU case-law, disregarding such CT rulings and thus placing themselves at risk of disciplinary or even criminal measures.

24. The Venice Commission and DGI doubt the compatibility of the above provisions with Poland's constitutional framework, and in any event conclude that they are incompatible with European legal standards and Poland's obligations in this respect. The Commission and DGI accordingly recommend not to adopt these provisions.

2. Prohibitions on assessing the legality of judges' appointments (Articles 5 § 4, 6 § 2)

25. Articles 5 § 4 and 6 § 2 represent the core of the Draft Law: they provide the prohibitions to assess the effectiveness of NCJ resolutions adopted between 2018 and 2026; or the legality of appointment of a judge and the resulting authority to perform judicial functions. These prohibitions must be read in conjunction with Articles 17 § 1, 18 § 4, 19 § 2, 21 § 2 of the Draft Law, seeking to remove the so-called "Independence Tests", which had been introduced in the Polish judiciary in 2022 to remedy some problematic provisions introduced in the 2020 Act.[37] Under the Draft Law, there would no longer be *any* judicial body competent for such reviews under Polish legislation and *any* court would be prohibited from assessing judges' appointments. The declared aims of these provisions are to guarantee the irremovability of judges and to protect the prerogative of the President to appoint judges on motion of the NCJ.[38]

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[34] CJEU, C-521/21, *op. cit.*, para. 56; The Commission remains mindful of the *ultra vires* and constitutional identity doctrines developed in the case-law of constitutional jurisdictions of some European States, and is aware of the ongoing judicial dialogue between the CJEU and national constitutional and supreme courts. Nevertheless, the provisions under scrutiny cannot be seen as falling within such a dialogue as they would present an open defiance of the primacy of EU law. (see already Venice Commission, CDL-AD(2020)017, *op. cit*., para. 38).

[35] CJEU, C-64/16, Judgment of the Court (Grand Chamber), 27 February 2018.

[36] see Venice Commission, CDL-AD(2020)017, *op. cit*., para. 38; see already CJEU, C 6-64, *Flaminio Costa v. E.N.E.L,* Judgment, 15 July 1964.

[37] The 2020 Act was subject of Venice Commission, CDL-AD(2020)017, *op. cit*.. Following a change of government and in order to alleviate the impact of the 2020 Act, mitigating "counter-measures" were adopted in 2022 with the introduction of so-called "independence tests", allowing parties to seek an assessment as to whether a judge or court meets the requirements of independence and impartiality. Articles 17 § 1, 18 § 4, 19 § 2, 21 § 2 of the Draft Law now proposes to repeal the "Independence Tests", which are currently found in Articles 23a §§ 4-15 of the Law on the System of Military Courts, 42a §§ 3-14 of the Law on the System of Common Courts; 5a of the Law on the System of Administrative Courts; Article 29 §§ 5-25 of the Law on the Supreme Court.

[38] Explanatory Memorandum, pp. 20-21, referencing Article 179 of the Polish Constitution. In this context, it is noted that the ECtHR, in a case concerning the President of Poland's refusal to appoint judges, recently held that the

a. As regards ECHR and EU law

26. The Commission and DGI have already assessed similar prohibitions in 2020 and see no reason to depart from their reasoning. At the time, they had reasoned that judicial review should involve the examination of *all* relevant aspects of the independence of the tribunal, including institutional ones, and that a national judge must not be prevented from examining *any* aspect of the case which may affect the independence and impartiality requirement under Article 6 § 1 ECHR. Indeed, the composition of the body which appoints judges is relevant from the standpoint of the requirements of independence and impartiality of a tribunal established by law. [39] This is in line with ECtHR case-law, which establishes that Article 6 § 1 ECHR imposes an *obligation* on every court to check whether, as constituted, it is "an impartial tribunal" within the meaning of that provision where this is disputed on a ground that does not immediately appear to be manifestly devoid of merit.[40]

27. Concerning the ECHR, in its pilot judgment *Wałęsa,* the ECtHR required Poland to take appropriate legislative measures to secure compliance with the requirements of an "independent and impartial tribunal established by law",[41] endorsing the Committee of Ministers' position that Poland should address the status of judges appointed by the deficient NCJ and ensure effective judicial review of NCJ appointment resolutions.[42] The Draft Law would prohibit precisely such judicial assessments, perpetuating the systemic problems identified in *Wałęsa* and countering Poland's obligations under that judgment.

28. At the level of EU law, the relevant provisions of the Draft Law are also in defiance of the primacy of EU law, seeking to nullify the effects of a series of key CJEU rulings.[43] Importantly, on the 2020 Act, the CJEU held that Poland failed to fulfil its obligations under relevant EU law, including the principle of primacy of EU law, by adopting “legislation prohibiting any national court from verifying compliance with the requirements stemming from EU law relating to the guarantee of an independent and impartial tribunal previously established by law.”[44] More recently, the CJEU held that Member States must ensure that there is “effective judicial review enabling, where appropriate, the lawfulness of the judicial appointment procedure to be reviewed” and confirmed that it is for a domestic court to rule, on a case-by-case basis, on the question of the nature of a judge as an “independent and impartial tribunal previously

applicants’ right of access to a court under Article 6 § 1 ECHR was impaired, where (i) the applicants had a domestically-established general right of equal access to public service within the judiciary; (ii) the general right in question took the form of the right to a fair procedure in the examination of an application for a judicial post, including the right to be protected against arbitrary rejection; (iii) the applicants were not informed of the reasons for the President’s decision refusing their appointment and not afforded access to any subsequent review, thus not being afforded the necessary protection against what could legitimately be suspected as arbitrariness in the contested decision of the President. Notably, the Court held that “[w]hile preserving the proper balance between the executive and the judiciary and taking account of the democratic legitimacy of the President are undoubtedly legitimate aims, they cannot, in and of themselves, warrant placing decisions on judicial appointments entirely beyond judicial scrutiny. In the Court’s view, a review of the lawfulness and non-arbitrary character of such decisions does not upset the institutional balance or negate presidential powers; on the contrary, it reinforces the principle of the rule of law and the appearance of independence of the judiciary.” (*Sobczyńska and others v. Poland*, Applications no. 62765/14 and others, Judgment, 21 May 2026, paras. 186, 159).

[39] see Venice Commission, CDL-AD(2020)017, *op. cit.*, para. 36, referring to ECtHR, *Oleksandr Volkov v. Ukraine*, Application no. 21722/11, Judgment, 6 February 2018, paras. 109-117, 130; *Özpinar v. Türkiye*, Application no. 20999/04, Judgment, 19 October 2010, paras. 78-79.

[40] ECtHR, *Remli v. France,* Application no. 16839/90, Judgment, 23 April 1996, para. 48; see also *Cosmos Maritime Trading and Shipping Agency v. Ukraine*, Application no. 53427/09, Judgment, 27 June 2019, paras. 78-82.

[41] ECtHR, *Wałęsa v. Poland, op. cit.*, operative para. 7.

[42] ECtHR, *Wałęsa v. Poland, op. cit.*, para. 329.

[43] see Venice Commission, CDL-AD(2020)017, *op. cit.*, para. 37. At the time, the CJEU had just held that it was a “duty” of the referring court to examine the question of independence of the Disciplinary Chamber, in particular by looking at the composition of the NCJ as selecting body.

[44] CJEU, C-204/21, *op. cit.*, para. 389(3).

established by law" within the meaning of EU Law.[45] Such an assessment could not take place by virtue of the Draft Law; its provisions would thus perpetuate the violations of EU law identified in the above judgments.

b. As regards procedural avenues

29. With the Draft Law and its suppression of "Independence Tests", parties to proceedings and judges are effectively left without *any* legal fora – as opposed to a defective one as envisaged in 2020[46] – to raise issues related to the independence and impartiality of a court, where they relate to the appointment of a judge or panel, both as far as NCJ resolutions between 2018 and 2026 are concerned (Article 5 § 4) as well as in general regarding any appointment (Article 6 § 2). Considering Polish courts have the obligation, under the ECHR and EU law, to ensure that only courts fulfilling the requirements of independence and impartiality may adjudicate cases,[47] the prohibitions under scrutiny would prevent such a verification from taking into account key elements of potential relevance to this verification, namely the legality of appointment of a judge, or the effectiveness of resolutions of the NCJ. More concretely, this would infringe upon:[48] a party's right to challenge the independence or impartiality of the judge;[49] a judge's duty to recuse themselves where they assess that they are unable to decide a matter independently and impartially;[50] and a judge's right to assess *ex officio* the independence and impartiality of a panel when seized of a case.[51] This being noted, the Commission and DGI deem it important to stress that any assessment of "independence and impartiality" of a court must take place within a clear procedural framework and only if there are elements reasonably justifying a suspicion, lest this indeed could generate a challenging situation. This had already been stressed in 2020[52] and remains true.

30. Certain interlocutors argued that the "Independence Tests" were redundant in light of the existing recusal mechanisms provided in other domestic procedural codes.[53] However, given their narrower scope (focussing on *impartiality*[54]), these recusal mechanisms do not guarantee

[45] CJEU, C-521/21, *op. cit.*, paras. 41, 50, 79.
[46] Under the 2020 Act, the Polish legislator had proposed to centralise the review of the independence and impartiality of judges with the Chamber of Extraordinary Review and Public Affairs. Whilst the Commission and DGI noted that such an idea would not be devoid of merit, they had discarded this solution at the time, noting that this Chamber itself could be seen as lacking the requirements of independence and impartiality (Venice Commission, CDL-AD(2020)017, *op. cit.*, para. 40).
[47] Venice Commission, CDL-AD(2020)017, *op. cit.*, para. 39.
[48] The three procedural avenues set out below are also reflected in relevant codes of procedures in respect of judges' recusal, namely at Articles 42 § 1 of the Code of Criminal Procedure (Dz. U. 1997 Nr 89 poz. 555) and 24 § 3 of the Law on Proceedings before Administrative Courts (Dz. U. 1960 Nr 30 poz. 168).
[49] see ECtHR, *Agrokompleks v. Ukraine*, Application no. 23465/03, Judgment, 6 October 2011, para. 136, noting that "the scope of the State's obligation to ensure a trial by an 'independent and impartial tribunal' under Article 6 § 1 of the Convention is not limited to the judiciary"; and *Sigríður Elín Sigfúsdóttir v. Iceland*, Application no. 41382/17, Judgment, 25 February 2020, para. 35, implying that an objection by a party to a judge's participation in a trial on account of alleged lack of impartiality could constitute an effective remedy against violations of Article 6 § 1 ECHR.
[50] see Recommendation of the Committee of Ministers on judges: independence, efficiency and responsibility, CM/Rec(2010)12, para. 61 ("Judges […] should withdraw from a case or decline to act where there are valid reasons defined by law, and not otherwise."); see also Principle 2.5. of the Bangalore Principles of Judicial Conduct; ECtHR, *Sigríður Elín Sigfúsdóttir v. Iceland*, *op. cit.*, para. 35; ECtHR, *Micallef v. Malta*, op. cit., paras. 93-100; Such procedural avenues are foreseen under the above-mentioned Mechanisms in case of recusal for lack of impartiality (Article 42 §§ 1, 2 of the Code of Criminal Procedure; Article 48 § 1 of the Code of Civil Procedure).
[51] ECtHR, *Remli v. France*, *op. cit.*, para. 48; see also *Cosmos Maritime Trading and Shipping Agency v. Ukraine*, *op. cit.*, paras. 78-82; on the basis of the obligation imposed by Article 6 § 1 ECHR on every national court to check whether, as constituted, it is "an impartial tribunal" within the meaning of that provision where this is disputed on a ground that does not immediately appear to be manifestly devoid of merit.
[52] Venice Commission, CDL-AD(2020)017, *op. cit.*, para. 36.
[53] Articles 40-42 of the Code of Criminal Procedure; Articles 48-49 of the Code of Civil Procedure (Dz. U. 1964 Nr 43 poz. 296); Articles 18-24 of the Law on Proceedings before Administrative Courts.
[54] Although the concepts of "independence" and "impartiality" are closely linked, each builds upon distinct criteria, which, although at times overlapping, may warrant a discrete assessment. On "independence", the ECtHR considers criteria such as the manner of appointment of members, duration of term of office, the existence of

that a party's right to challenge the independence or impartiality of a judge is fully preserved, particularly if coupled with the Draft Law's prohibition of the legality assessment of judges' appointment and removal of the "Independence Tests".

31. The Commission and DGI are mindful of the complex and entrenched situation currently facing the Polish judiciary, characterised by a polarised judicial community. They understand that solutions must be found to avoid further destabilisation of Poland's judiciary and to allow judges to focus on the substantive aspects of the cases brought before them. In this spirit, the Commission and DGI wish to stress one fundamental element, deriving from both its own doctrine[55] as well as recent CJEU rulings[56]: the *mere fact* that a judge had been appointed by the deficient NCJ *does not in and of itself suffice* to establish that the judge at issue is not an independent and impartial tribunal established by law. Whilst this qualification does not remove a judge's right – and obligation – to examine all aspects possibly affecting the independence or impartiality of a given judge or panel, this position must be borne in mind at all times. It is recalled that provisions reflecting this principle had been included in the legislation, which the Draft Law now seeks to repeal: "*The circumstances surrounding a judge's appointment may not constitute the sole basis for challenging a judgment issued with the participation of that judge or for questioning the judge's independence and impartiality*".[57] While the Commission and DGI cannot support efforts such as this Draft Law to curtail the judges' right to conduct verifications of the independence and impartiality of a tribunal, to avoid the above-mentioned challenging situation, the law should regulate what *cannot* constitute a sufficient ground to question judges' independence and impartiality. The Commission and DGI thus recommend retaining the above-mentioned provisions that the Draft Law is seeking to repeal. In addition, the principle should be incorporated and implemented throughout the Polish court system that the mere nomination of a judge by the deficient NCJ does not suffice to establish that they do not comply with the principle of an independent and impartial tribunal established by law.[58]

32. As they currently stand, the provisions under scrutiny would be in violation of Poland's obligation under both the ECHR and EU law, and the Commission and DGI recommend not to adopt them.

3. Prohibitions on refusing administrative duties (Article 8)

33. Pursuant to Article 8, a judge shall not refrain from performing administrative duties by invoking the principle of independence if such duties are part of their judicial responsibilities under the law. The Commission and DGI observe that the scope of this provision remains unclear. This being noted, where it could be interpreted as preventing judges from recusing themselves when alleging lack of independence and impartiality of a panel they are assigned to, the same considerations as above apply: this would be in violation of the judges' duty to

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guarantees against external pressure and whether the body presents an appearance of independence (see ECtHR, *Kleyn and others v. The Netherlands*, Applications no. 39343/98, 39651/98, 43147/98 and 46664/99, Judgment, 6 May 2003, para. 190; *Langborger v. Sweden*, Application no. 11179/84, Judgment, 22 June 1989, para. 32); On "impartiality", the ECtHR has developed criteria on a subjective (personal conviction and behaviour of a judge) and objective (ascertainable facts which may raise doubt to impartiality) test (see ECtHR, *Micallef v. Malta*, Application no. 17056/06, Judgment (Grand Chamber), 15 October 2009, paras. 93-99).

[55] see Venice Commission, CDL-AD(2026)002, *op. cit.,* para. 30 with further references.

[56] CJEU, C-521/21, *op. cit.*, para. 67-94, 95(2), in particular para. 83: "However, it is also clear from the case-law of the Court that the fact that the [NCJ] in its new composition does not provide sufficient guarantees of independence to dispel all reasonable doubt as to the regularity of the procedures for the appointment of judges in which it is involved does not suffice, in itself, to support the conclusion that the requirements inherent in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter have not been met."

[57] See Articles 17 § 1, repealing Articles 23a § 3 of the Law on the System of Military Courts; and Article 19 § 1, repealing Article 5 § 1c of the Law on the System of Administrative Courts; see similarly, Article 18 § 4, repealing Article 42a §§ 2-3 of the Law on the System of Common Courts; Article 21 § 2, repealing Article 26 § 4 of the Law on the Supreme Court.

[58] Venice Commission, CDL-AD(2026)002, *op. cit.,* para. 30 with further references; CJEU, C-521/21, *op. cit.*, para. 67-94, 95(2), in particular para. 83.

recuse themselves where they assess that they are unable to decide a matter independently and impartially, and would therefore infringe upon judicial independence. The Venice Commission and DGI also recall the above-mentioned underlying principle that the mere fact that a judge has been appointed by the deficiently composed NCJ does not suffice to establish that the judge or panel at issue is not an independent and impartial tribunal, which – once incorporated into legislation – would also be applicable in this context.

34. As it currently stands, the Commission and DGI recommend not to adopt this provision.

4. Prohibition on revoking rulings (Article 6 § 3)

35. Article 6 § 3 prohibits a court from revoking, declaring invalid or disregarding a ruling issued with the participation of a judge on the basis of findings concerning the appointment of that judge. A judge's appointment may undoubtedly be one factor which could be considered in such an assessment of independence and impartiality and, where a finding of lack of impartiality and independence is thus *inter alia* based on matters concerning the appointment of a judge, a court would be prevented from revoking the ruling of such a court.

36. As far as *regular appellate proceedings* are concerned, the above prohibition cannot stand as it means that – even if a party was able to successfully raise issues relating to a judge's appointment in the context of a challenge to the independence and impartiality of a tribunal – it would effectively prevent the adjudicating court from adequately addressing such a deficiency by overturning the relevant decision, violating a party's right to a fair trial and thus impairing the essence of Article 6 § 1 of the ECHR.

37. In the context of an *extraordinary appeal* against a final judgment, it is clear that the principle of legal certainty would be under undue pressure through the possibility of reopening proceedings at any time due to irregularities in appointment.[59] However, the opposite is also true in respect of fair trial rights: where – as per the present prohibition – it is made procedurally impossible to overturn a judgment *inter alia* because of findings concerning a panel's appointment, this would be a fundamental violation of a party's fair trial rights. As the Commission and DGI have advised, an assessment as to whether such a final judgment should be overturned must be made on a case-by-case basis bearing in mind fundamental safeguards so as to strike this very balance between legal certainty and fair trial rights. Instead of the present prohibition, regulations should be introduced in light of the relevant recommendations of the Commission and DGI that such remedy may only be invoked within a specific time-limit and that the parties must be required to demonstrate that the initial proceedings were materially affected by the involvement of a deficiently appointed judge, and that the argument was already put forward then.[60] Finally, it is noted that the CJEU has also developed case-law on this matter, which may provide further guidance.[61]

38. As it currently stands, the Commission and DGI recommend not to adopt the present provision.

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[59] see in this very context, Venice Commission, CDL-AD(2024)029, Poland - Joint Opinion of the Venice Commission and the Directorate General Human Rights and Rule of Law on European standards regulating the status of judges, paras. 41-45, with further specifics at Venice Commission, CDL-AD(2026)002, *op. cit.*, paras. 67-72; The Commission has also stressed that in certain circumstances, *eg* in the context of the restoration of the Rule of Law, the obligation to execute judgments of international courts could justify a departure from the principle of *res iudicata*. It will, however, be essential that safeguards are put into place to guarantee an adequate balance between the principles engaged (*ie*, the right to a fair trial before an independent tribunal and the principle of *res iudicata* as element of the right to legal certainty). (Venice Commission, CDL-AD(2025)002, *op. cit.,* para. 58).

[60] Venice Commission, CDL-AD(2024)029, *op. cit.*, paras. 41-45; Venice Commission, CDL-AD(2026)002, *op. cit.*, paras. 67-72.

[61] In C-487/19, the CJEU for the first time opened to the possibility of declaring a decision issued by a judge deemed not independent 'null and void', attaching several conditions thereto (paras. 160-161). In subsequent C-225/22, the CJEU seems to have broadened the scope of application of this remedy (para. 68).

5. Determination of nullity of decisions (Article 7)

39. Pursuant to Article 7 of the Draft Law, judicial decisions are *ex lege* determined null and void, *inter alia* where they are based on disputing the appointment of a judge. The Commission and DGI duly note the fundamental principle that "the executive and legislative powers should not take decisions which invalidate judicial decisions"[62] and recall that some of the most common features by virtue of which domestic law may undermine judicial independence includes the nullifying of judicial decisions.[63] They also note that where judicial decisions are final, such an *ex lege* determination of nullity would be in violation of the principles of legal certainty and *res iudicata.* Further, the Commission and DGI are concerned that the present provision creates legal uncertainty as the nullity *ex lege* fails to define which instance should spell out the nullity, so as to make it clear for the ordinary citizen. They are therefore of the view that the declaration of a judicial decision to be null and void by virtue of law would be in violation of the fundamental principles of separation of powers, the independence of the judiciary and legal certainty. They therefore recommend not to adopt this provision.

B. Prohibitions on judges' freedoms of association and expression (Articles 9, 11)

1. Prohibitions of association membership and public activities (Article 11 § 2)

40. Article 11 provides that judges may not belong to political parties, trade unions, or certain associations, and that they shall not engage in public activities incompatible with the principle of independence. As regards political parties and trade unions, it is acknowledged that the prohibition on membership reflects a principle enshrined in the Polish Constitution.[64] Concerning membership in associations, Article 11 § 2 prohibits judges from belonging to "any association, including professional and political associations, whose statutes require their members to comply with the resolutions of the bodies or authorities of that association."

41. Given that judges enjoy freedom of association,[65] in the interest of the judge personally and that of the whole judiciary,[66] this provision could unduly restrict Article 11 ECHR. First, it appears ambiguous and broad, covering any kind of association, professional and not professional. It thus also affects judges in their private capacities in an undue manner. Second, the Venice Commission and DGI observe that in exercising their right to freedom of association, judges must always conduct themselves in such a manner as to preserve the independence and impartiality of the judiciary.[67] Article 11 § 2 of the Draft Law thus raises complex questions of interpretation of Article 11 ECHR. Whilst the latter may be restricted in

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[62] CM/Rec(2010)12, *op. cit.*, para. 17.
[63] Venice Commission, CDL-AD(2025)002, *op. cit.*, para. 102, footnote 124.
[64] see Article 178 § 3 of the Polish Constitution; European standards on these matters differ: while it is not unusual to foresee restrictions on judges' participation in political parties (see CCJE Opinion No. 3 on ethics and responsibility of judges, paras. 30-33); in general judges should be able to form trade unions and join trade unions' (see CCJE Opinion No. 23 on the role of associations of judges in supporting judicial independence, paras. 66-69; CCJE Opinion No. 3, *op. cit.*, para. 34; CCJE Magna Carta of Judges, para. 12). This being noted, in respect of the membership in political parties, the Commission has noted in the past that such a prohibition seems appropriate in light of the communist past of Poland (Venice Commission, CDL-AD(2020)017, *op. cit.*, para. 28). Similarly, the ECtHR in *Rekvényi v. Hungary* concluded that a prohibition of political party membership for police officers answered "a pressing social need" in a democratic society, especially against Hungary's historical background and with the aim to protect the police force from the direct influence of party politics (ECtHR, *Rekvényi v. Hungary*, Application no. 25390/94, Judgment (Grand Chamber), 20 May 1999, paras. 44-50, 61)
[65] Principle IV of Council of Ministers Recommendation Rec(94)12 on the Independence, Efficiency and Role of Judges; Principle 1.7 of the European Charter on the Statute for Judges; Principle 9 of the United Nations Basic Principles on the Independence of the Judiciary; Principles 4-6 of the Bangalore Principles of Judicial Conduct; Article 3-5 of the Universal Charter of the Judge, International Association of Judges.
[66] CCJE Opinion No. 23, *op. cit.*, para. 14.
[67] Principle 8 of the United Nations Basic Principles on the Independence of the Judiciary.

certain situations, any such restrictions must be assessed on case-by-case basis and on the basis of the principle of proportionality.

42. Be that as it may, in the specific case at hand, the Commission and DGI's meetings with various interlocutors suggest that this provision targets a specific association of judges – which, like any other association, is protected by Article 11 ECHR.[68] The Commission and DGI are therefore concerned that a statutory prohibition *de facto* targeting a specific association, as interlocutors claim, would not only conflict with the principle of separation of powers by constituting an intrusion of the legislature into the functioning of the judiciary – it would *de facto* constitute a piece of *ad hominem* legislation, an abusive practice criticised by the Commission.[69] Further, this provision appears to represent an illegitimate restriction of Article 11 ECHR: considering its aim of preserving the independence of judges, and while some limitations are generally considered acceptable[70], a wholesale ban on membership in a specific judicial association cannot be deemed necessary in a democratic society, as it does not seem to be sufficiently tailored to justify a departure from the general principle that judges should be free to join associations.[71] Finally, a provision targeting a specific association could cause a chilling effect, also for other judges' associations.

43. Turning to a different issue, Article 11 § 2 of the Draft Law also prohibits judges from engaging in "public activities that are incompatible with the principles of judicial independence". Noting that this provision reiterates a constitutional principle,[72] the Commission and DGI observe that the Draft Law not only operationalises this principle, but also links it to Article 13 § 9, making its violation a ground for disciplinary sanctions. Constitutional principles and legislative provisions are different in nature and demand different drafting: the former can be abstract and general; the latter, especially when tied to disciplinary responsibility, must be narrow, clear and predictable. And while it is generally accepted that, in view of judges' role, their freedom of expression may be subject to certain restrictions,[73] the Commission and DGI are concerned that the present wording may be too vague and ambiguous, thus opening it to abusive interpretations. In a similar context, the Commission and DGI have noted that laws should explicitly allow judges and their associations to participate in public debates on matters related to the administration of the judiciary and criticise legislative amendments or Government's policies concerning the judiciary.[74] Article 11 § 2 of the Draft Law could be used to defeat this very purpose.

[68] *ex multis*, ECtHR, *United Communist Party of Turkey and others v. Turkey*, Application no. 19392/92, Judgment (Grand Chamber), 30 January 1998; and *Socialist Party and Others v. Turkey*, Application no. 21237/93, Judgment (Grand Chamber), 25 May 1998.
[69] Venice Commission, CDL-AD(2017)022, Hungary – Opinion on Article XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education, paras. 22, 102; CDL-AD(2021)012, Montenegro – Opinion on the Draft Amendments to the Law on the Sate Prosecution Service and the Draft Law on the Prosecutor's Office for Organised Crime and Corruption, para. 28.
[70] see, *eg*, membership in political parties (CCJE Opinion No. 3, *op. cit.*, para. 30).
[71] see, *ex multis*, Principles 8-9 of the United Nations Basic Principles on the Independence of the Judiciary.
[72] Article 178 § 3 of the Polish Constitution.
[73] ECtHR, *Baka v. Hungary*, Application no. 20261/12, Judgment (Grand Chamber), 23 June 2016, paras. 162-163; *Albayrak v. Turkey*, Application no. 38406/97, Judgment, 31 January 2008, para. 42; *Danileț v. Romania*, Application no. 16915/21, Judgment (Grand Chamber), 15 December 2025, para. 118; see also CCJE Opinion No. 25 on Freedom of Expression of Judges, paras. 13-18.
[74] Venice Commission, CDL-AD(2020)017, *op. cit.*, para. 30.

2. Disclosure obligations (Article 9)

44. Article 9 requires that, at the request of an entitled person,[75] a judge must submit a written statement listing current memberships in associations and foundations, as well as previous memberships in political parties. The provision largely recalls provisions from the 2020 Act, heavily criticised by the CJEU[76] and by the Venice Commission and DGI,[77] the key difference being that statements are now produced upon request and remain in the case file whereas they were public in the 2020 Act. While Article 9 *prima facie* appears more narrowly tailored, it still requires careful assessment.

45. Judges must be presumed to be independent and impartial, and the ECtHR has clarified that it is a judge's responsibility to identify impediments to their participation in proceedings, and to either withdraw or bring the matter to the parties' attention.[78] The responsibility to identify such impediments rests with the judge. Therefore, this necessarily presupposes that they are impartial and would disclose the relevant information, if need be. Article 9 appears in essence to reverse this presumption, assuming that judges "may have something to hide" and establishing a mechanism that would allow parties – without *any* justification – to seek this information from a judge. This would constitute an interference with judges' rights under Articles 8 and 11 of the ECHR.

46. Under the Convention, interferences with these rights could be justified "for the protection of the rights and freedom of others" – in this case, the parties' right to a fair trial under Article 6 ECHR. However, Article 9 of the Draft Law entails a disproportionate interference. Firstly, the interference is unduly broad: parties are not required to present any *prima facie* justification for their request. The Commission and DGI are also of the view that Article 9 § 8 of the Draft Law, which imposes upon the disciplinary commissioner the obligation to initiate disciplinary proceedings against a judge if, upon a party's request, they fail to submit the statement required under Article 9 § 1 of the Draft Law, fails to meet the proportionality test.

47. Secondly, requests may cover *any* aspect of the life of the judge ("membership in an association") – including matters of a purely private nature that would be wholly irrelevant to the proceedings. The ECtHR has noted that "freedom of association is of such importance that it cannot be restricted in any way […] so long as the person concerned does not himself commit any reprehensible act by reason of his membership of the association".[79] Article 9 would, instead, restrict freedom of association in a disproportionate manner and irrespective of any misconduct by the judge. In a related context, the ECtHR found that the mere duty to declare membership in an association for public offices holders does not *per se* amount to a violation of Article 11. Importantly, the Court in this case took into account the absence of evidence that such a declaration would lead to adverse social judgments.[80] In the present context, the situation is materially different, and the proposed framework could give rise to such negative consequences for concerned judges: since Article 9 § 6 provides that a copy of the judge's declaration must be submitted to the president of the respective court, over time, this mechanism would enable court presidents to accumulate information concerning all judges –in a polarised judiciary such as Poland's, such information could be abused and jeopardise the safeguards of judges' internal independence. In addition, where judicial associations play a significant role in a divided judicial environment such as the Polish one,

[75] By 'entitled person', the act refers to a party or other participants to proceedings specifically defined in Article 9 § 2 of the Draft Law.
[76] CJEU, C-204/21, *op. cit.*.
[77] Venice Commission, CDL-AD(2020)017, *op. cit.*, para. 29, whereby the disclosure obligation was generalised and statements were immediately made public.
[78] ECtHR, *Sigríður Elín Sigfúsdóttir v. Iceland*, Application no. 41382/17, Judgment, 25 February 2020, para. 35
[79] ECtHR, *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, Application no. 35972/97, Judgment, 2 August 2001, para 26.
[80] ECtHR, *Siveri and Chiellini v. Italy*, Application no. 13148/04, Decision on Admissibility, 3 June 2008, p. 11.

membership in one or another association is a matter of significant importance and may lead to a judge being perceived in a certain manner by the parties – and beyond, if the information is further disseminated – which may also give rise to negative consequences for the judge.

48. Thirdly, the ECtHR has held that individuals should not be discouraged from exercising their right of association for fear that their applications for public office might be rejected on such occasions.[81] The Commission and DGI consider that similar considerations apply here: Article 9 is of such nature that it could discourage judges from exercising their freedom of association for fear that parties will subsequently seek their recusal, on the basis of information on association membership. In the opinion of the Commission and DGI, this cannot be considered to be in line with European standards.

49. Finally, it is questionable whether the mechanism under Article 9 differs significantly from the one previously criticised by the Commission and DGI, and by the CJEU regarding the publicity of information: as a rule, proceedings are public and accessible,[82] and, absent specific safeguards, it is reasonable to assume that a judge's declaration provided to the parties could be discussed in a public hearing, particularly in the context of a motion for recusal; also, it is not clear that parties would be prevented from publicly disclosing the contents of a judge's statement. Therefore, it is considered that Article 9 of the Draft Law could amount to a breach of Article 8 ECHR and Articles 7, 8 Charter of Fundamental Rights of the EU, as noted by the CJEU in 2023 in respect of the 2020 Act.[83]

50. As such, it is recommended that neither Article 11 § 2 nor Article 9 of the Draft Law be adopted.

C. Dismissal by virtue of law (Article 10)

51. Article 10 § 1 of the Draft Law provides that an "intentional refusal to administer justice" shall be tantamount to a "resignation" from the position of judge. Article 10 § 2 defines three situations which would amount to such an "intentional refusal": a judge's refusal to participate in a panel composed of judges on the grounds of the determination of the non-existence or assessment of their status[84]; the revocation or disregarding of a ruling issued with the participation of a judge on the grounds of an assessment of their appointment; the exclusion of another judge based on the assessment of their appointment or of their independence or impartiality resulting from a nomination by the President at the request of the NCJ.

52. Aside from its unclear wording, this provision is problematic from a number of perspectives: firstly, the *ex lege* removal of judges amounts to a fundamental violation of the principle of irremovability of judges enshrined in Article 180 § 2 of the Polish Constitution, pursuant to which any recall of a judge from office may only occur by virtue of a court judgment. Secondly, it would constitute a direct intrusion of the legislature into the competences of the judiciary and thus a violation of the principle of separation of powers.[85] The *de facto* consequence of Article 10 being dismissal, it may be seen as a covert disciplinary sanction. In that respect, the Commission and DGI recall that a disciplinary system should fulfil the requirements of

[81] ECtHR, *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, Application no. 35972/97, *op. cit.*: "The proportionality principle demands that a balance be struck between the requirements of the purposes listed in Article 11 § 2 of the Convention and those of the free exercise of freedom of association. The pursuit of a just balance must not result in individuals being discouraged, for fear of having their applications for office rejected, from exercising their right of association on such occasions."
[82] see Article 45 § 2 of the Polish Constitution.
[83] see in respect of the 2020 Act, CJEU, C-204/21, *op. cit.*.
[84] This is understood as encompassing a judge's refusal to participate in a panel on the basis of a determination that said panel has not been validly appointed.
[85] see similarly, Venice Commission, CDL-AD(2024)029, *op. cit.*, para. 22.

procedural fairness.[86] In the present instance, Article 10 fails to provide *any* form of procedural safeguards in its application. Thirdly, it remains unclear from the wording of the provision which instance would be competent to establish that the relevant conduct has taken place and, incidentally, that it has resulted in resignation. Not only does this leave a concerned judge without any legal avenue to raise procedural challenges, the uncertainty as to whether the conduct has resulted in resignation may also have a chilling effect and undermine judicial independence. Finally, bearing in mind that the dismissal of a judge should only be ordered in exceptionally serious cases as a last resort,[87] it appears *a fortiori* fundamentally problematic to regulate the dismissal of a judge without providing for a proper assessment of the relevant facts.[88]

53. In the light of the above, it is recommended that such a provision not be adopted.

D. Disciplinary liability (Articles 13-14)

54. Article 13 introduces a supplementary disciplinary regime, which the Draft Law adds to preexisting regimes referenced at Article 14 § 3 and found in the laws applicable in the Polish judiciary. At the same time, the Draft law removes provisions from relevant laws which had excluded the examination of compliance with requirements of independence and impartiality from constituting a disciplinary offence.[89]

55. As a general observation, the Commission and DGI recall that "there is no uniform approach to the organisation of the system of judicial discipline and that practice varies greatly in different countries with regard to the choices between defining in rather general terms the grounds for the disciplinary liability of judges and providing an all-inclusive list of disciplinary violations."[90] However, the Venice Commission does favour specific and detailed descriptions of grounds for disciplinary offences, so as to enable the concerned person to foresee the consequences of their actions and thereupon regulate their conduct.[91] In the present instance, it is unclear how the above-mentioned regimes relate to one another as well as to the *de facto* disciplinary sanction of dismissal introduced in Article 10 of the Draft Law. This lack of clarity runs the risk that regimes be applied in a cumulative manner. In addition, it is concerning that the *chapeau* of Article 13 applies disciplinary liability to "acts and omissions *unrelated* to the administration of justice", thus unduly extending liability in an unclear manner and potentially violating judges' freedom of expression under Article 10 ECHR.

56. Turning to the disciplinary offences themselves, Article 13 §§ 1-7 introduces disciplinary liability on the basis of the *content* of judicial decisions. The Commission and DGI recall that disciplinary proceedings should deal with gross and inexcusable professional misconduct, but

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[86] Venice Commission, CDL-AD(2025)002, *op. cit.*, para. 107; CDL-AD(2014)031, Joint Opinion of the Venice Commission and DGI on the Draft Law on Amendments to the Organic Law on General Courts of Georgia, para. 72; CM/Rec(2010)12, *op. cit.*, para. 69.

[87] see, *eg*, Venice Commission, CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", para. 113; CCJE Opinion No. 27 on disciplinary liability of judges, para. 40.

[88] The Commission has provided guidance in the past on the necessary procedural safeguards in the context of disciplinary proceedings, including that disciplinary sanctions should comply with the principle of proportionality (see Venice Commission, CDL-AD(2025)002, *op. cit.,* para. 107).

[89] Articles 17(1) (repealing Article 37 § 4 (3) of the Law on the System of Military Courts); 18(5) (repealing Article 107 § 3 (3) of the Law on the System of Common Courts), 19(4) (repealing Article 48 § 6 (3) of the Law on the System of Administrative Courts); 21(4) (repealing Article 72 § 6 (3) of the Law on the Supreme Court).

[90] Venice Commission, CDL-AD(2014)018, Joint Opinion of the Venice Commission and OSCE/ODIHR on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic, para. 23.

[91] see, *eg*, Venice Commission, CDL-AD(2017)018, Bulgaria – Opinion on the Judicial System Act, para. 108; CDL-AD(2019)024, Armenia – Joint Opinion of the Venice Commission and DGI on the Amendments to the Judicial Code and Some Other Laws, para. 40; CDL-AD(2015)042, *op. cit.*, para. 16; see also ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, Judgment, 9 January 2013, paras. 175 *et seq*..

should never extend to differences in legal interpretation of the law or judicial mistakes.[92] Indeed, the legal interpretation provided by a judge in contrast with established case-law, by itself, should not become a ground for disciplinary sanction unless it is done in bad faith, with intent to benefit or harm a party or as a result of gross negligence.[93] It is striking that no such qualification in respect of a judge's *mens rea* is included in the Draft Law. Disciplinary offences linked to specific contents of judgments are clearly incompatible with the idea of the independence of the judiciary. Potential mistakes in the decision-making process should be corrected with the system of appeals, but not on the basis of disciplinary procedures. As noted above, bearing in mind the obligations of Poland – including its judiciary – to implement the ECtHR and CJEU case-law on the assessment of the independence and impartiality of judges, such provisions would leave judges in the untenable position of abiding by the Draft Law and perpetuating violations of ECHR and EU law, or implementing obligations under ECHR and EU law, violating the Draft Law and risking severe disciplinary consequences.

57. Concerning the remaining disciplinary offences at Article 13 §§ 8-9, targeting membership in political parties, trade unions and associations as well as "public activities that conflict with the principle of independence of judges", the Commission and DGI reiterate the above concerns that the literal implementation of an abstract constitutional principle into a legislative rule, particularly one that includes grounds for disciplinary liability, is problematic. Similarly opening the door to potential abuses, it is unclear whether the wording of Article 13 § 9 ties the membership in *any* association to disciplinary sanctions, or only those whose statutes require members to comply with decisions of governing bodies.

58. As a final note, the Commission and DGI observe that Article 14 §§ 1-2 introduces periods of limitation of eight or ten years for the institution of disciplinary proceedings pursuant to Article 13. The Commission and DGI note that these periods go beyond those found in other disciplinary regimes in the Polish system,[94] which could lead to legal uncertainty should there be overlap in disciplinary liability. In addition, considering that limitation periods ensure legal certainty and finality, prevent infringement on rights of defendants,[95] and that those for disciplinary proceedings typically involve shorter timeframes than for criminal proceedings,[96] such limitation periods appear unduly extensive, particularly considering the difficulties that may arise for a judge seeking to defend himself against allegations after such a long timespan.

59. Accordingly, it is recommended that Articles 13 and 14 not be adopted.

E. Civil liability (Article 12)

60. Article 12 introduces civil liability for judges who participated in rulings referred to in Article 7 of the Draft Law, *ie* rulings based on disputing the appointment of a judge, or violating the laws governing the jurisdiction of the chambers of the Supreme Court or Supreme Administrative Court. This provision must be read in conjunction with a set of amendments,

[92] see, *eg*, Venice Commission CDL-AD(2011)012, Joint Opinion of the Venice Commission and OSCE/ODIHR on the Constitutional Law on the Judiciary System and Status of Judges of Kazakhstan, para. 60, with further references.
[93] Venice Commission, CDL-AD(2014)006, Joint Opinion of the Venice Commission and OSCE/ODIHR on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova, para. 22; see also CCJE Opinion No. 27, *op. cit.*, para. 13(b), 28, recalling the principles that disciplinary liability must not undermine the independence of the judiciary, and that a judge's decision must not give rise to disciplinary liability, except in cases of malice, wilful default or serious misconduct.
[94] see Article 108 § 1 of the Law on the System of Common Courts (five years from commission; eight years if proceedings instituted), applicable to military courts by virtue of Article 70 § 1 of the Law on the System of Military Courts and to administrative courts by virtue of Article 29 § 1 of the Law on the System of Administrative Courts.
[95] ECtHR, Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment, Request no. P16-2021-001, Advisory Opinion (Grand Chamber), 26 April 2022, para. 72.
[96] see OSCE/ODIHR, Note on certain aspects related to suspension of limitation periods for disciplinary and criminal offences committed by Judges and Prosecutors – Poland, Opinion-Nr. JUD-POL/545/2025, 31 July 2025.

which in effect introduce strict liability of judges in such contexts. The latter is only excluded if the party filing a complaint for length of proceedings is itself responsible for the prolongation of the proceedings. In addition, the amendments double the sum awarded to a complainant from up to 20,000 Zlotys (ca. 4,700 EUR) to up to 40,000 Zlotys (ca. 9,400 EUR).[97] The average gross monthly salary of a novice Polish judge is ca. 2,200 EUR.[98]

61. Considering that it is not appropriate for a judge to be exposed to any personal liability in respect of the purported exercise of judicial functions, except in case of wilful default,[99] the proposed provision goes against this standard in imposing a sweeping strict liability of judges for the rendering of specific decisions. In doing so, the provisions appear intended to have a chilling effect on judges exercising their judicial activities. Aside from the fact that no determination of wilful default appears required in the application of this provision, Article 12 is particularly concerning as the decisions referenced in Article 7 § 1 are those which would in effect be applying standards set out by the ECtHR and CJEU – as they concern the assessment of the independence and impartiality of judges – and would lead to a situation where judges would be subjected to civil liability for abiding by such standards. In respect of decisions violating "the laws governing the jurisdiction of the Chambers of the Supreme Court or Supreme Administrative Courts", it is noted that whether this is the case will necessarily be a matter of judicial interpretation. In this context, it is difficult to conceive that such decisions could constitute "repeated, serious or gross negligence" or be qualified as deliberate "abuse", as required by relevant standards.[100]

62. In light of these considerations, it is recommended that Article 12 not be adopted.

F. Criminal liability (Articles 15, 16)

63. Articles 15-16 of the Draft Law introduce a set of criminal offences in case of violations of the prohibitions set out at Articles 5-6 of the Draft Law, applicable to *inter alia* judges as public officials.[101] Article 15 § 1 concerns the persistent disputing of the constitutional and statutory powers of the President and NCJ, acts issued by or constitutional and statutory activities performed by these bodies. Article 16 § 1 concerns the persistent disputing of the effectiveness of the Constitution, statutes regulating the system of courts and procedures for appointing judges, while Article 16 § 2 concerns the assessment of the legality of appointment of a judge. Each provision carries sentences of up to five years of imprisonment.[102]

64. European standards accept only very exceptionally criminal liability for judicial decision-making, requiring an extraordinarily high threshold. The Commission has clarified that judges should not be held liable merely for differences in the interpretation of the law, for decisions that may be disputed by another court or for departing from well-established case-law.[103]

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[97] see Article 20 §§ 2, 4 of Draft Law, introducing Article 2.3 and amending Article 12.4 of the Act on complaints regarding the violation of a party's right to have a case heard in preparatory proceedings conducted or supervised by a prosecutor and court proceedings without undue delay of 17 June 2004.

[98] Calculated on the basis of data collected and compiled by CEPEJ (European judicial systems CEPEJ Evaluation report, Part 2 – Country profiles, 2024 Evaluation cycle (2022 data), p. 139, referencing an absolute gross salary of 26,931 EUR for judges at the beginning of their career).

[99] CCJE Opinion No. 3, *op. cit.*, para. 75, referenced at Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System – Part I: The Independence of Judges, para. 59; see also CDL-AD(2017)002, Republic of Moldova – *Amicus Curiae* for the Constitutional Court on the Criminal Liability of Judges, para. 53.

[100] CDL-AD(2017)002, *op. cit.*, para. 53, noting that "only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to […] civil liability."

[101] see Article 115 § 13 of the Polish Criminal Code.

[102] The sentence is increased up to 10 years where an act under Article 16 § 1 is committed to obtain financial or personal gain of the perpetrator.

[103] see Venice Commission, CDL-AD(2026)010, Slovak Republic – Joint Opinion of the Venice Commission and DGI on the Draft Legislative Amendments Regarding the Criminal Offence of Abuse of Law, para. 15, CDL-AD(2017)002, *op. cit.*, paras. 19, 27; CDL-AD(2019)028, Republic of Moldova – *Amicus Curiae* Brief on the Criminal Liability of Constitutional Court Judges, paras. 25-26; CM/Rec(2010)12, *op. cit.*, paras. 67-68; CDL-AD(2010)004,

Deserving particular note here is the impact of the primacy of EU law and CJEU case-law: as noted above, the CJEU requires that a court disregard rulings of the CT "insofar as that judgment upholds the prohibition, for a national court, on ascertaining whether another body meets the requirements of EU law as regards the guarantee of an independent and impartial tribunal previously established by law." [104] The criminal offences found at Article 15 § 1 of the Draft Law would in effect attach criminal responsibility to a judge abiding by this CJEU ruling. The same consideration would apply to Article 16 §§ 1, 2 as they appear to directly target judges that *inter alia* "disregard" the procedure for appointing judges or assess the legality of such an appointment, *ie* judges who adjudicate challenges to the independence and impartiality of courts or who recuse themselves from panels by *inter alia* raising issues related to the appointment procedure for judges.

65. Attaching criminal responsibility to a judge who is required to evaluate acts or actions from one of the listed authorities, or on one of the subject-matters, is a clear threat to judicial independence. The Commission and DGI do acknowledge that Articles 15 § 3, 16 § 3 appear to provide for a caveat that actions shall not constitute a crime where the relevant public official "acts within the scope of their constitutional or statutory powers". According to the Explanatory Memorandum, this caveat concerns situations "where a proper and competent body examines, *eg*, legal remedies submitted in the prescribed procedures". The CT ruling on the conformity of a statute with the Constitution is listed as one example.[105] However, it is unclear how this is reconcilable with the fact that the prohibition expressed in Article 5 § 1 (judges shall not challenge the validity of statutes regulating the structure of courts and tribunals) is also applicable to CT judges. The Commission and DGI are concerned that the broad language used in this caveat opens the door to subjective interpretation and fails to alleviate the threat to judicial independence.

66. Such a criminalisation would also contradict CJEU case-law, which indicates that EU member states are required to ensure that there is effective judicial review enabling the lawfulness of the judicial appointment to be reviewed.[106] Where such review is criminalised, the primacy of EU law is fundamentally challenged. And, where turning a challenge to the independence and impartiality of a judge into a disciplinary offence is a violation of EU law,[107] the same must *a fortiori* apply where the latter is made a criminal offence.

67. More generally, from the perspective of Article 7 of the ECHR, the Commission and DGI are also concerned that the use of unprecise terms (*eg*, "persistently dispute" or "determines or assesses") may be in violation of the principle of *nullum crimen sine lege* since it involves the use of such broad notions and vague criteria that these provisions could be seen as below the quality required under the Convention in terms of clarity and foreseeability of its effects.[108] Equally, the broad language used could also engage the freedom of expression of judges, and – where the intention of these provisions could be seen as intimidating dissident judges – it may amount to a violation of Article 10 in conjunction with Article 18 of the ECHR.[109]

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op. cit., para. 61; CDL-AD(2018)017, Romania – Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004, on the Superior Council for Magistracy, para. 115.

[104] CJEU, C-521/21, *op. cit.*, para. 56; As noted above, in this respect, the Commission is mindful of the *ultra vires* and constitutional identity doctrines developed in the case-law of constitutional jurisdictions of some European States, and is aware of the ongoing judicial dialogue between the CJEU and national constitutional and supreme courts. Nevertheless, the provisions under scrutiny do not fall within such a dialogue as presenting an open defiance of the primacy of EU law. (see already Venice Commission, CDL-AD(2020)017, *op. cit.*, para. 38).

[105] Explanatory Memorandum, p. 29.

[106] CJEU, C-521/21, *op. cit.*, para. 50.

[107] CJEU, C-204/21, *op. cit.*, para. 389(2).

[108] see, eg, ECtHR, Liivik v. Estonia, Application no. 12157/05, Judgment, 25 June 2009, para. 101.

[109] see similarly, ECtHR, Miroslava Todorova v. Bulgaria, Application no. 40072/13, Judgment, 19 October 2021, para. 213, finding a violation of Article 18 in conjunction with Article 10, having established that "the primary aim of the disciplinary proceedings brought against the applicant and the sanctions imposed on her by the [Court] was

68. Accordingly, it is recommended that Articles 15-16 not be adopted.

G. Disciplinary liability beyond retirement (Article 4 § 4)

69. Article 4 § 4 imposes upon a judge in retirement the obligation to maintain the dignity of the judicial office, and subjects them to disciplinary action for any breach of dignity after retirement.[110] The Commission has noted on this matter that it may be appropriate to expand certain specific areas of judicial ethics to judges in retirement, to the extent that their behaviour may still affect the image of the judiciary, referencing in particular upholding the secrecy of deliberations and confidentiality obligations. At the same time, it also stressed that the requirements for a former judge cannot be the same as for a judge in office. Restrictions on freedom of expression and political activities must be less stringent with regard to individuals once they cease to hold judicial office. In terms of freedom of speech, the approach should be that no restrictions apply unless carefully justified by the necessity of preserving *inter alia* the reputation of the judiciary.[111] Elsewhere, the Commission has noted that the involvement in public life is probably one of the areas where drastic limitations which may be justified for serving judges are not necessary in respect of retired ones.[112]

70. As a general point, the Commission has recalled in the past that the concept of "indignity" should be avoided altogether as a basis for disciplinary action.[113] Where it was noted in respect of tenured judges that the "infringement of the dignity of the office" amounts to an overbroad and open-ended definition which threatens the principle of legality,[114] the same must *a fortiori* be true when the judge is retired and the extent of the "dignity of the office" is even more difficult to ascertain.

71. More specifically on the matter of disciplinary accountability after retirement, bearing in mind the rationale for having a system of judicial discipline[115], it is questionable whether judicial discipline should be activated in respect of judges' behaviour in retirement, if there is no direct link between the behaviour giving rise to disciplinary liability and ensuring the judiciary's accountability. It appears difficult to conceive of a situation where the accountability of the judiciary is still relevant in respect of a retired office holder. In any event, the above standards appear to indicate that a nuanced approach is needed when it comes to the obligations of retired judges. This is all the more relevant where – as it is the case here – obligations go beyond soft law, and violations thereof are tied to disciplinary proceedings. Formulated as they are, the restrictions could also have a chilling effect on judges' freedom of expression against the standards expressed above. Further, it remains unclear for how long after retirement a former office holder could still face the initiation of disciplinary proceedings on this ground.

72. In light of the above and as currently formulated, the Commission and DGI recommend not to adopt this provision. However, should some form of disciplinary responsibility post-

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not to ensure compliance with the deadlines for closing cases, but rather to punish and intimidate her on account of her critical stance towards the [Supreme Judicial Council] and the executive branch."

[110] The Commission is mindful that an identical provision is included at Article 38 § 1 of the Act on the Constitutional Tribunal (see CDL-REF(2024)037rev). It did not take a position on this provision in relevant opinion CDL-AD(2024)035, *op. cit.*).

[111] Venice Commission, CDL-AD(2024)004, Bulgaria - Joint Opinion of the Venice Commission and DGI on the Code of Ethical Conduct for Judges, para. 31.

[112] Venice Commission, CDL-AD(2016)013, Republic of Kazakhstan - Opinion on the Draft Code of Judicial Ethics, para. 42.

[113] Venice Commission, CDL-AD(2015)042, *op. cit.*, para. 36.

[114] Venice Commission, CDL-AD(2020)017, *op. cit.*, para. 44.

[115] *ie*, striking a balance between, on the one hand, judicial independence, to avoid political interference by the executive; and, on the other, the necessary accountability of the judiciary, averting possible negative effects of corporatism within the judiciary.

retirement be deemed necessary by the legislator, the Commission and DGI recommend adopting provisions that ensure the above-mentioned nuanced approach is reflected.

H. Shifting of competences from Ministry of Justice to President

73. Lastly, Article 18 § 2 of the Draft Law seeks to move the competence for the opening of judicial vacancies in the system of common courts from the Ministry of Justice to the President of the Republic.[116] In this context, the Commission and DGI were informed that the Ministry of Justice has for the past two years not opened judicial vacancies. At this point, around 1,000 (10%) judicial positions are vacant in the Polish judiciary.[117] The Commission and DGI understand that the opening of new judicial positions will take place in June 2026, upon the appointment of the new NCJ (scheduled for May 2026), so as to avoid a perpetuation of the current situation.

74. Proponents of this shift argue that the competences to open vacancies would appropriately be moved to an organ bearing a higher political legitimation than the Minister, the President having been directly elected. The Commission and DGI take due note of this and observe that the Constitution appears to be silent on this matter. It therefore appears appropriate to address this question from a policy point of view, with the purpose to find a practicable solution to the issue. In this context, the Commission and DGI are not convinced that the issue of avoiding a delay in the opening of recruitments would be resolved by moving this competence from one political organ to another. Eventually, this could result in the exact same situation, simply with another entity refusing to open vacant positions for other political motives. The Commission and DGI accordingly recommend that Article 18 § 2 of the Draft Law not be adopted.

75. The Commission and DGI are mindful of the serious situation currently faced by the lack of staffing of the Polish judiciary, stressed by multiple interlocutors who noted the impact on the speed and efficiency of adjudication, and are of the view that the opening of judges' positions should not be left to a political decision-maker, lest this risk seriously undermining the efficiency and independence of the judiciary. Rather, the Commission and DGI recommend to regulate an obligation to open recruitment procedures for vacant judges positions within a certain period after the occurrence of vacancies or when the latter are evident due to expected retirement. This would prevent the politicisation of such a decision, whilst guaranteeing adequate staffing of courts and tribunals at all times.

IV. Conclusion

76. At the request of the Marshall of the Sejm, the Venice Commission and DGI examined the draft law on the restoration of the right of access to an independent court and hearing a case without undue delay, presented by the President of the Republic.

77. The Draft Law must be assessed in the context of the currently prevailing crisis facing the Polish judiciary: 30% of Polish judges (roughly 3,000) have been appointed by the deficient NCJ. The resulting situation is that these judges, and any decisions rendered by them, are regularly subject to challenges. In this context, two approaches have emerged: the first, introduced by the Ministry of Justice in October 2025, aims to regulate the effects of resolutions of the deficient NCJ, by either confirming such judges or removing them from judicial office, depending upon the circumstances of their appointment. The present Draft Law is an alternative approach, seeking to limit the scope for courts to challenge judges appointed by the deficient NCJ, rather than addressing the status of judges appointed pursuant to such resolutions. In essence, all judicial nominations, including those based on proposals of

[116] see Article 18 § 2 of the Draft Law, amending Articles 20a-b of the Law on the System of Common Courts.
[117] Information to that effect was also provided by a range of interlocutors during the mission.

the deficient NCJ, are considered valid and, under the threat of legal sanctions, cannot be called into question or revoked.

78. However, already in 2020, the Commission and DGI expressed their views in respect of a similar legislative endeavour and see no reason to depart from their approach at the time. In many instances, the impact of the Draft Law on the Polish judiciary would be even more detrimental than the 2020 Act. The vast majority of measures proposed in the Draft Law will severely restrict judges' competence to verify the independence and impartiality of tribunals. More fundamentally, the Draft Law will further complicate the Rule of Law crisis in Poland as it is essentially aimed at shielding defective judicial appointments from effective review through the neutralisation of the practical effect of ECHR and CJEU case-law in the domestic legal order, and disregarding the Rule of Law standards.

79. In light of the multiple fundamental difficulties with (the totality of the) assessed provisions of the Draft Law, the Venice Commission and DGI recommend that the Polish authorities should not pursue it.

80. The Venice Commission and DGI recommend that instead, when developing the legislation on the subject-matters concerned, the following recommendations be taken into account by the Polish legislator:

i) On assessing the legality of judges' appointments: the principle that the mere fact that a judge has been appointed by the deficient NCJ does not in and of itself suffice to establish that the judge at issue is not an independent and impartial tribunal established by law, should be incorporated and implemented;
ii) On revoking rulings in the context of extraordinary appeals: the recommendations previously expressed by the Venice Commission and DGI, that final rulings may be revoked only within a specific time-limit, with parties required to demonstrate that the specific proceedings were materially affected by the involvement of a deficiently appointed judge, and that the argument was already put forward then, should be followed;
iii) On disciplinary liability beyond retirement: any provision to this effect should be narrowly formulated, duly taking into account the specific position of a retired judge;
iv) On shifting of competence to open judicial vacancies from the Ministry of Justice to the President: an obligation should be introduced to open recruitment procedures for vacant judges' positions within a certain period after the occurrence of vacancies or when the latter are evident due to expected retirement.

81. The Commission and DGI are concerned that the current stand-off between polarised political forces in Poland is leading to a situation where access to justice is no longer guaranteed. This constitutes such a serious threat to the Rule of Law in the country that it is imperative to find a way out of the impasse. However, the Draft Law as it stands cannot be seen as a solution. Instead, the country is in dire need of a constructive interinstitutional dialogue and cooperation between state institutions.

82. The Commission and DGI stand ready to support this process and remain at the disposal of the Polish President and authorities for further assistance in this matter.