ASSUMPTIONS OF THE DRAFT OF

THE ACT
OF [...]
ON THE REGULATION OF THE EFFECTS OF THE RESOLUTIONS OF THE NATIONAL COUNCIL OF THE JUDICIARY ADOPTED BETWEEN 2018 AND 2024

assumptions of the draft of

the Act

of [...]

on the regulation of the effects of the resolutions of the National Council of the Judiciary adopted between 2018 and 2024

1. The Act regulates the effects of resolutions of the National Council of the Judiciary (Council) formed pursuant to the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (the "December amendment") .[1]

2. Resolutions on the presentation of an application for appointment to serve as a judge are without legal effect when a judge elected as a member of this Council by the Sejm under the provisions introduced by the December amendment ("Resolution of the Council") participated in their adoption.[2]

3. The official relationship in the position of a judge shall be considered unestablished or unformed if the appointment to the office in that position was based on the proposal presented in the Resolution of the Council.[3]

4. The Act does not apply to, among others, court assessors appointed as district court judges; court assessors in voivodeship administrative courts appointed as judges of voivodeship administrative courts; and persons who, based on special provisions, lost the opportunity to be appointed as district court judges after a certain period of time.[4]

5. The position of judge or assessor filled as a result of the proceedings concluded by the Resolutions of the Council shall be considered a vacant position and a competition shall be held again to fill it.[5]

6. Anyone who meets the requirements for the position can apply for the competition. Persons whose service relationship is considered to be unestablished or untransformed shall take part in

[1] See Article 1 of the draft Act.
[2] See Article 2(1) of the draft Act.
[3] See Article 2(3) of the draft Act.
[4] See Article 2 (4) and (5) of the draft Act.
[5] See Article 3 of the draft Act.

the competition if they submit a statement upholding their application for appointment. In that case, they are bound by the criteria as of the date of application.[6]

7. Competition proceedings are conducted on the basis of new regulations.[7] Appeals against resolutions adopted in competition proceedings are heard by the Chamber of Labor and Social Security of the Supreme Court.[8]

8. Persons who held the position of judge on the date of the Council's Resolutions shall be restored to that position. Such a judge is delegated - under the Act - to perform judicial duties for 2 years from the entry into force of the Act in the general court in which he held the position of a judge of a regional court or court of appeals on the basis of a Resolution of the Council. The president of the appellate court may exempt a judge from this delegation. The period of delegation may be extended for a judge who has maintained participation in the repeated competition, with his consent by the president of the appellate court.[9]

9. Persons who held the position of prosecutor on the date of the Council's Resolutions shall be reinstated in that position.[10]

10. Persons who, on the date of adoption of the Council's Resolutions, were practicing as advocates, attorneys-at-law or notaries are entitled to return to their profession and obtain, respectively, registration in the list of advocates, attorneys-at-law or appointment as notaries.[11]

11. In proceedings pending at the time of the entry into force of the Act, judgments are subject to revocation at the request of parties who, prior to 31 December 2023, raised objections to the independence or impartiality of a participating judge appointed by a Council Resolution. In cases initiated as of 31 December 2023, judgments are subject to revocation at the request of parties who, within 3 months of becoming aware of the composition of the court, raised objections to the independence or impartiality of the person appointed as a judge by the Council Resolution. Proceedings that have been validly terminated are also resumed on these grounds, unless the decision has produced irreversible legal consequences. In such a case, the court is limited to stating that the decision was made in violation of the law, and indicating the circumstances due to which it made such a decision, and the party may claim compensation for

[6] See Article 4 of the draft Act.
[7] See Article 5 of the draft Act.
[8] See Article 6 of the draft Act.
[9] See Articles 7 and 8 of the draft Act.
[10] See Article 7(4) of the draft Act.
[11] See Article 9 of the draft Act.

the damage caused by the decision. The restriction on the possibility of reopening proceedings when the judgment has produced irreversible legal consequences does not apply to criminal and disciplinary cases.[12]

12. Proceedings before the Council in cases of appointment to the office of judge not completed by the date of entry into force of the act shall be discontinued by operation of act.[13]

13. Other individual cases other than those relating to the appointment of a judge decided by Council Resolutions are subject to reconsideration at the request of a participant in the proceedings filed within 3 months of the entry into force of this act.[14]

[12] See Article 12 of the draft Act.
[13] See Article 14 of the draft Act.
[14] See Article 13 of the draft Act.

JUSTIFICATION THE DRAFT ACT ON THE RUGULATING OF THE EFFECTS OF RESOLUTIONS ADOPTED BY THE NATIONAL COUNCIL OF JUDICIARY BETWEEN 2018 AND 2024

1. Object and purpose of the Act

The Act regulates the effects of the resolutions of the National Council of the Judiciary formed pursuant to the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, item 3; hereinafter also referred to as: 'the Act of 8 December 2017'). The solutions adopted therein define these effects as proportionately as possible, considering the result of balancing the various and conflicting values that must be considered in this respect. On the one hand, there is the need to guarantee to the parties and participants in the proceedings that their cases will be heard by an independent and impartial court established by the act. On the other hand, it cannot be overlooked that one of the elements of the right to a court is the stability of final judgments.

The basic assumption was to adopt solutions which, while ensuring the restoration of the state of affairs in line with the Polish Constitution, would guarantee the efficient and possibly undisturbed functioning of the judiciary. This is crucial for ensuring citizens' access to justice. For this reason, inter alia, a system of delegation of common court judges was envisaged, allowing them to complete cases the handling of which they had started in the first place in the newly appointed positions. In addition, regulations will be introduced to ensure that rulings made by judges appointed with the participation of a defectively constituted National Council of the Judiciary will in principle remain in force. Exceptionally, they will only be able to be overturned if the precisely defined conditions are met. In this way, the draft reconciles the stability of court rulings with the protection of the rights of the parties to court proceedings.

The Act is intended to restore the state of affairs in accordance with the Polish Constitution, but at the same time to be free of revanchism. It therefore guarantees defectively appointed judges

the possibility of re-entering a competition for a position they have not successfully filled due to the ineffectiveness of resolutions passed by the defectively formed National Council of the Judiciary. This ensures that these individuals have access to effective judicial protection, as resolutions resolving reopened competitions will be subject to appeal to the Supreme Court.

Thus, the draft not only seeks to restore the values of the state under the rule of law as expressed in Article 2 of the Treaty on European Union (Journal of Laws 2004, No. 90, item 864/30, as amended) but is also consistent with them. It restores the guarantees of access to an independent and impartial court established by the act, takes into account the need to ensure the stability of judgments, and provides judges appointed with the participation of the defective NCJ with respect for their right to effective legal protection in reappointments.

In order to achieve the above-mentioned goals, it is not possible to apply the vetting procedure to persons who have taken up office on the basis of resolutions of the current Council. An attempt to assess the vetting of those who have taken up office on the basis of resolutions of the current Council on an individual basis would, in view of the number of appointments, would lead to the paralysis of court proceedings for many years, which could also create the impression that judges are only concerned with their own cases and not with resolving disputes, which is what the judiciary is supposed to do. Within such a procedure, it may prove impossible to separate circumstances which, on the one hand, affect the assessment of a judge's independence and impartiality and, on the other hand, amount to a disciplinary tort. In addition, the reviewing body would at the same time have to have investigative powers in order to ascertain what extrinsic factors influenced the resolution of the defective NCJ, which would - it seems - further prolong the duration of the review. The individual verification procedure also carries the risk of revanchism. These risks can be avoided by repeating the competitions for judicial positions covered by the current Council's resolutions.

The dissimilarity of the situation faced by the judiciary in Poland from the cases of other European countries where this procedure has been resorted to also argues against the use of the vetting procedure. The constitutional crisis and gross violations of domestic law and

international legal obligations of the Republic of Poland in the course of successive changes to the judiciary initiated by the Act of 8 December 2017 have been the subject of numerous proceedings before Polish courts, the European Court of Human Rights, the Court of Justice of the European Union and actions taken by institutions of the European Union, the Council of Europe, the United Nations and the Organisation for Security and Cooperation in Europe. The scale and uniqueness of these violations and their consequences have led some legal scholars to describe the progressing crisis of the rule of law in Poland as threatening to create a system evolving towards a "competitive authoritarianism"(A. Bodnar, *The political system of the Republic of Poland in light of the theory of competitive authoritarianism* [in:] *Around the crisis of the rule of law, democracy and human rights. Jubilee Book of Professor Mirosław Wyrzykowski*, ed. A. Bodnar, A. Ploszka, Warsaw 2020, pp. 146-147). The widely perceived systemic crisis of the rule of law, leading to a disruption of the tripartite division of power, resulting in deficits in the assurance of fundamental rights, including access to an independent and impartial court established on the basis of the act, justifies taking measures different from those assumed by the vetting procedure, which will be more adapted to the situation in which the legal system in Poland finds itself. Vetting procedures are used, however, to assess the fitness for the profession of persons whose correctness of appointment is not questioned.

The National Council of the Judiciary was formed on the basis of the Act of 8 December 2017. (hereinafter also referred to as the ‘current Council’) is not a body identical to the constitutional body, the composition and manner of appointment of which are regulated by the Constitution of the Republic of Poland, in particular in Article 187(1). This has been indicated both by the Supreme Administrative Court (in judgments of 6 May 2021 in cases: II GOK 2/18, LEX no. 3169817, II GOK 3/18, LEX no. 3170844, II GOK 5/18, LEX no. 3170875, II GOK 6/18, LEX no. 3170860, II GOK 7/18, LEX No 3170800; of 21 September 2021 in cases II GOK 8/18, LEX No 3241714, II GOK 10/18, LEX No 3241781, II GOK 11/18, LEX No 3258218, II GOK 12/18, LEX No 3258024, II GOK 13/18, LEX no. 3258253 and II GOK 14/18, LEX no. 3258178, and of 11 October 2021 in cases II GOK 9/18, LEX no. 3267103, and II GOK 15/18, LEX no. 3266778, II GOK 16/18, LEX no. 3267200, II GOK 17/18, LEX no. 3267614, II GOK 18/18, LEX no. 3267720, II GOK 19/18, LEX no. 3267231, II GOK 20/18, LEX no. 3267075), as well as the Supreme Court (e.g. in the decision of 21 May 2019, III CZP 25/19, OSNC 2019/10, item 99; the resolution of the composition of three combined Chambers of 23 January

2020, BSA I-4110-1/20, OSNKW 2020/2, item 7, and the resolution of a panel of seven Supreme Court judges of 2 June 2022, I KZP 2/22, OSNK 2022/6, item 22).

The current Council also does not provide a guarantee of independence from the executive and legislative authorities in the judicial appointment procedure. This has been repeatedly pointed out in the jurisprudence of the European Court of Human Rights, the Court of Justice of the European Union and the national courts - the Supreme Court and the Supreme Administrative Court (see, for example, judgments of the ECtHR of 22 July 2021, Reczkowicz v. Poland, application no. 43447/19; of 8 November 2021, Dolińska-Ficek and Ozimek v. Poland, applications nos. 49868/19 and 57511/19; of 3 February 2022, Advance Pharma sp. z o.o. v. Poland, application no. 1469/20; judgments of the CJEU of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, AK v. National Council of the Judiciary and CP and DO v. Supreme Court, EU:C:2019:982; of 2 March 2021 in Case C-824/18, A.B., C.D., E.F., G.H. and I.J. v. National Council of the Judiciary, EU:C:2021:153; of 6 October 2021, C-487/19, W.Ż., EU:C:2021:798; resolution of the Supreme Court Full Court - Civil, Criminal and Labour and Social Security Chambers of 23 January 2020, BSA I-4110-1/20).

In the judgment of the European Court of Human Rights in the case of Wałęsa v. Poland (judgment of 23.11.2023 in case 50849/21), Poland was obliged to take legislative action to restore "an independent and impartial court established by the act". The European Court of Human Rights found that the current method of appointing Supreme Court judges is systemically flawed due to the formation of the National Council of the Judiciary by the law of 8 December 2017. The Court found that the Act deprived the judiciary of the power to select the members of the Council and allowed interference by the political power in the appointment of judges. The amendments adopted in the Act of 8 December 2017 therefore undermined the legitimacy of the court composed of persons appointed at the request of the current Council. Given that the same problem exists in several hundred cases pending before it, the Court applied the pilot judgment procedure to Poland. This means that each subsequent case concerning the status of new Supreme Court judges will be examined in an analogous manner. Importantly, the Court emphasized that the identical systemic defect also applies to the appointment of judges of common courts, administrative courts and military courts when the current Council

is involved in their appointment. The considerations contained in this judgment and concerning Supreme Court judges therefore apply mutatis mutandis to all judges appointed on the proposal of the current Council. In addition, the right to effective judicial protection was not ensured in the process of selecting these judges, as appeals against the Council's resolutions were heard by the Supreme Court in the Chamber for Extraordinary Control and Public Affairs. On the other hand, the Court of Justice of the European Union stated that the formations of judges in this Chamber do not have the status of an independent and impartial court (judgment of 21 December 2023, C-718/21, LG v. National Council of the Judiciary, EU:C:2023:1012).

The finding that the current Council is not the same body as the National Council of the Judiciary as a constitutional body, and that its participation in the procedure for the appointment of judges is a source of fundamental doubts as to the independence and impartiality of persons appointed to the office of judge at its request, justifies regulation of the effects of its resolutions. The need for the legislator to act was clearly indicated by the European Court of Human Rights in the case cited above Wałęsa v. Poland judgement. Only through comprehensive regulation of the effects of the current Council's resolutions by the act is it possible to ensure that the legal order complies with the requirements of an “independent and impartial court established by the act” and the “principle of legal certainty”, enshrined in the provisions of both the Constitution of the Republic of Poland, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights. Failure to do so will exacerbate the situation where Poland does not guarantee access to an independent and impartial court established by the act in every case. It is therefore, necessary, in accordance with the provisions of the Constitution of the Republic of Poland and in compliance with the legal and international obligations of the Republic of Poland, to make a statutory ruling on the status of resolutions of the current Council, persons appointed to judicial positions with its participation and judgements issued with the participation of these judges. The draft Act contains a comprehensive regulation of these issues, which is based on the following assumptions:

– as the National Council of the Judiciary has lost its constitutional identity, resolutions passed with the participation of judges elected as members of the Council by the Sejm of the Republic of Poland on the submission of motions for appointment to judicial office are devoid of legal effect and as a result the decisions of the President of the Republic of Poland on the appointment

to judicial office of persons indicated in those motions do not have the effect referred to in Article 179 of the Constitution of the Republic of Poland;

– the restoration of the right to an independent and impartial court established on the basis of the law requires that the judicial appointment procedures concluded by resolutions of the Council in its current form be re-conducted;

– the re-examination should be open to persons who were previously in office as a result of the re-examination, provided that they maintain their application for appointment; participation in the re-examination makes it possible to submit the retention or loss of the position held at the time the Act entered into force to judicial review; the re-examination should also be open to persons who refrained from participating in proceedings before the current Council;

– in order to preserve the smooth functioning of the judiciary during the period of re-examination, it is envisaged that the system of delegation of judges of common courts to the courts in which they occupied positions on the date of entry into force of the Act, until the completion of the cases they started to handle in those positions, and for a period of 2 years;

– parties to proceedings who have raised objections to a judge's impartiality or independence arising from his or her appointment at the request of the current Council should be able to challenge rulings made with the participation of those judges.

The detailed solutions contained in the draft are a consequence of the above-mentioned assumptions.

2. Effectiveness of the resolutions of the current Council

Pursuant to Article 179 of the Constitution of the Republic of Poland, judges are appointed by the President of the Republic of Poland on the motion of the National Council of the Judiciary. This means that the system of appointing judges is a ”limited system, as a person who meets the qualifications for judge may be appointed to the office of judge by the President only on a motion of the NCJ” (K. Weitz [in:] *Constitution of the Republic of Poland. Commentary*, vol. 2, ed. M. Safjan, L. Bosek, Warsaw 2016, p. 1041). In the light of Article 179 of the Constitution

of the Republic of Poland, two constitutional bodies - the National Council of the Judiciary and the President of the Republic of Poland - cooperate in the process of appointing judges in a specific order. Thus, "the participation of each of them in the nomination is (...) absolutely necessary. Their competencies complement each other, which does not mean that the role of both organs in the nomination process is equal" (K. Weitz [in:] *Konstytucja*..., eds. M. Safjan, L. Bosek, p. 1041). It is clear from the Constitution of the Republic of Poland that only the National Council of the Judiciary has the competence to apply for the appointment of a judge and only the application coming from it can be the basis for the appointment of a judge by the President of the Republic of Poland.

The provision of Article 179 of the Constitution of the Republic of Poland assumes that the motion constituting the basis for the appointment of a judge by the President of the Republic of Poland comes from the National Council of the Judiciary - i.e. from a body formed in accordance with the provisions of the Constitution of the Republic of Poland, including, by virtue of Article 9 of the Constitution of the Republic of Poland, also with the international legal obligations of the Republic of Poland, The appointment of a judge can only be based on a proposal from a body with specific constitutional and treaty features. The basis for the appointment of a judge may only be a proposal coming from a body with specific constitutional and treaty characteristics. In defining the constitutional system of appointing judges, the Constitutional Tribunal in the verdict of 8 May 2012, K 7/10, OTK-A 2012/5, item 48, unequivocally stated that the appointment of judges within the meaning of Article 179 of the Constitution of the Republic of Poland is based on cooperation between the President of the Republic of Poland, as an organ holding a direct mandate from the public, and the National Council of the Judiciary, i.e. the body intended by the legislator to safeguard the independence of the courts and the independence of judges. This requirement is not met by the current Council.

It is clear from the rulings of the European Court of Human Rights, the Court of Justice of the European Union and the national courts - the Supreme Court and the Supreme Administrative Court - cited in point 1 above, that the current Council is not a body identical to a constitutional body due to the way it was shaped in the Act of 8 December 2017.

The Constitution of the Republic of Poland defines the composition of the National Council of the Judiciary in such a way that the Council consists of fifteen members elected from among judges of the Supreme Court, common courts, administrative courts and military courts (Article 187(1)(2)). The legislature is represented in the composition of the Council by four members elected by the Sejm from among the deputies and two members elected by the Senate from among the senators (Article 187(1)(3)). The Constitution of the Republic of Poland makes it clear that the Council is composed of representatives of the judiciary - elected judges of the Supreme Court, common courts, administrative courts and military courts. Regulations concerning election of judges to the Council are therefore constitutionally established (cf. the judgment of the Constitutional Tribunal of 8 May 2012, K 40/07, OTK-A 2008/3, item 44).

The change made by the Act of 8 December 2017 in the manner of electing judicial members of the National Judicial Council by granting the competence to elect Council members to the legislature led to an extra-constitutional increase in the number of Council members coming from the nomination of political forces. This change constituted a clear violation of Article 187(1)(3) of the Constitution of the Republic of Poland, which limits the role of the Sejm in creating the members of the National Council of the Judiciary to the election of four members from among the deputies. Thus, by virtue of an ordinary act, Article 187(2) of the Polish Constitution was amended, resulting in the National Council of the Judiciary losing its constitutional identity. Indeed, a body that corresponds in name alone to a constitutional body does not need to be identical to it when it does not meet the requirements set out in the Polish Constitution.

Pursuant to Article 10(1) of the Constitution of the Republic of Poland, the system of the Republic of Poland is based on the separation and balance of the legislative power, the executive power and the judicial power. In doing so, the judicial power is to remain independent and separate from other authorities and is appointed to control them. Instead, the way in which the National Council of the Judiciary is shaped, as adopted in the Act of 8 December 2017, will lead to political power gaining influence over the judicial appointment process not provided for

by the Polish Constitution. The European Court of Human Rights, in its judgment of 22 July 2021 in the Reczkowicz v. Poland case (complaint no. 43447/19) unequivocally stated that “the violation of national law, (...) resulting from the failure to respect the principle of the separation of powers and the independence of the judiciary, irreversibly tainted the contested appointment procedure because, as a consequence of this violation, the recommendation of candidates for judges (...) - a necessary condition for appointment by the President of the Republic of Poland - was entrusted to the NCJ, a body which does not provide sufficient guarantees of independence from the legislative and executive powers”. One illustrative example may be the statement made by the Minister of Justice on 15 January 2020 regarding the election of judges - members of the National Judicial Council, in which, addressing the representatives of the opposition, the Minister stated: "if you win the democratic elections, you will be able to elect those judges whom you consider to be the right representatives of the judicial community" (Stenographic Report of the 3rd sitting of the Senate of the Republic of Poland of the 10th term, 15 January 2020, https://www.senat. gov.pl/prace/sittings/przebieg,534,1.html).

The violations indicated apply to judicial appointments to all courts. In the judgment of 8 November 2021 in the case of Dolińska-Ficek and Ozimek v. Poland (Applications nos. 49868/19 and 57511/19), the European Court of Human Rights emphasized that "the violation of the applicants' rights resulted from amendments to Polish legislation which deprived the Polish judiciary of the right to elect judges-members of the NCJ and allowed the legislative and executive authorities to interfere directly or indirectly in the procedure for the appointment of judges, thus systematically undermining the legitimacy of the court composed of judges so appointed". The deficiencies found in the case were considered by the Court to be valid not only for the Supreme Court, but also for the ordinary, military and administrative courts. This thesis was further developed in the judgment of 3 February 2022, Advance Pharma sp. z o.o. v. Poland (Application no. 1469/200), in which the Court stated that “the continued functioning of the NCJ in the form given to it by the 2017 Amending Act and its involvement in the judicial appointment procedure perpetuates the systemic dysfunction identified above by the Court and may in the future result in a potentially repeated violation of the right to an independent and impartial court established by the act”, thus leading to a further deepening of the rule of law

crisis in Poland'. The systemic nature of the defects in the nomination process was confirmed by the European Court of Human Rights in its pilot judgment in the case of Wałęsa v. Poland.

Dependence on political power deprives the National Council of the Judiciary formed on the basis of the Act of 8 December 2017 of its constitutional identity which is defined by Article 186(1) of the Constitution of the Republic of Poland, stipulating that the Council's systemic task is to ”uphold the impartiality and independence of judges'. This role cannot be fulfilled by a body that does not itself provide guarantees of impartiality and independence from political power.

The loss of constitutional identity by the National Council of the Judiciary, both in terms of its composition and its ability to uphold the independence and impartiality of judges, means that resolutions concerning the submission of motions for the appointment of judges to the President of the Republic of Poland are devoid of legal effect. This circumstance should be taken into account by the President of the Republic, who under Article 126 of the Constitution of the Republic of Poland is obliged to ensure that the Constitution is observed. If, despite this, the President of the Republic takes into consideration a motion coming from a body that is not the National Council of the Judiciary within the meaning of Article 186(1) of the Constitution of the Republic of Poland, such a motion has a basis only in provisions of statutory rank, and the act of appointment of a judge by the President of the Republic of Poland made on its basis is not an appointment within the meaning of Article 179 of the Constitution of the Republic of Poland.

Pursuant to Article 179 of the Polish Constitution, judges are appointed by the President of the Republic of Poland on the motion of the National Council of the Judiciary. This means that the President cannot appoint a judge at the request of another body. However, such a situation has been in place since the entry into force of the Act of 8 December 2017 as a result of which the National Council of the Judiciary is not a body identical to a constitutional body (Resolution of a panel of seven judges of the Supreme Court of 2 June 2022, I KZP 2/22, OSK 2022/6, item 22). It is pointed out that ”not everybody using the name of the National Council of the Judiciary

is in fact such, but only the one that guards the independence of courts and the independence of judges" (R. Piotrowski, *Ex iniuria iudex non oritur. Notes on the systemic significance of the constitutional identity of the National Council of the Judiciary* [in:] *Around the rule of law crisis*, ed. A. Bodnar, A. Ploszka, p. 296). Consequently, an appointment made by the President of the Republic of Poland at the request of an entity which is not the National Council of the Judiciary is not an appointment to the position of judge in the constitutional sense. This is because it takes place outside the competence and in a manner not provided for by the law, as there is no required motion coming from a constitutional body. This defect cannot be remedied by the mere participation of the President of the Republic in the process of appointing judges, since a necessary condition for the prerogative to be exercised is that the proceedings must be initiated by the National Council of the Judiciary (M. Wrzołek-Romańczyk, *Legal status of a person formally appointed to the office of a judge as a result of a recommendation given by the National Council of the Judiciary in its current composition - comments against the background of the CJEU judgment of 19.11.2019 and the judgments of the Supreme Court being a consequence of this ruling*, "The Bar" 2020/5, p. 86). The President of the Republic of Poland may not appoint any person who meets the requirements for candidates for judges, but only such a person whose candidacy was previously considered by the National Council of the Judiciary and subsequently indicated by it (see L. Garlicki [in:] *The Constitution of the Republic of Poland. Commentary*, v. 2, ed. L. Garlicki, Warsaw 2001, article 179, remark 5). In view of the current Council's failure to meet the requirements set out in the Constitution of the Republic of Poland. However, there was no motion that could provide a basis for the President of the Republic of Poland to exercise the prerogative and no effective exercise of the prerogative could take place (M. Wrzołek-Romańczyk, *Legal status...*, p. 100; A. Kappes, J. Skrzydło, *Are neo-judges' judgments valid? - considered against the background of the resolution of the three combined Chambers of the Supreme Court of 23.01.2020*. (BSA I-4110-1/20), The Bar 2020/5, p. 135). Thus, with regard to the resolutions of the current Council on the presentation of a motion for appointment to the position of a judge, it is pointed out that "Since the National Council of the Judiciary in its current composition is not a body established by the Constitution of the Republic of Poland, the judges appointed by the President of the Republic of Poland are not judges in the constitutional sense. Thus, the right to court referred to in Article 45 of the Constitution of the Republic of Poland is thus undermined" (R. Piotrowski, *Ex iniuria iudex...*, p. 300).

In the current legal state, there were no legal instruments to fully consider the consequences of the above violations in the sphere of both judicial appointments and the protection of individual rights. Instead, there were provisions in the legal system which, on the one hand, excluded the admissibility of the courts' examination of the legitimacy of "courts and tribunals, constitutional state bodies and bodies for the control and protection of the law" (see, for example, Article 29 § 2 of the Act of 8 December 2017 on the Supreme Court, Journal of Laws of 2023, item 1093, as amended, and Article 42a of the Act of 27 July 2001. - Law on the System of Common Courts, Journal of Laws of 2023, item 217 as amended) and, on the other hand, introduced disciplinary liability for ‘actions that question the existence of a judge’s official relationship, the effectiveness of a judge's appointment, or the legitimacy of a constitutional organ of the Republic of Poland” (Article 72 § 1(3) of the Supreme Court Act and Article 107 § 1(3) of the Act Law on the System of Common Courts). The domestic courts were therefore not in a position to assess the constitutional validity and effectiveness of appointments to judicial positions on the basis of the resolutions of the current Council in the proceedings pending before them (see, e.g., judgment of the Supreme Administrative Court of 6 May 2021, II GOK 2/18).

The perspective adopted in the jurisprudence of the Court of Justice of the European Union was in turn directed towards ensuring the right to a court and effective judicial protection. Indeed, the European Union is a union of rights, freedoms and democracy, based on the Union's fundamental values as indicated in Article 2 TEU, among which the rule of law is of paramount importance. As a condition for their existence, the principle of the division and balance of powers, as part of the common constitutional tradition of the Member States, defines the framework for the organisation of the judiciary. Thus, although the organisation of the judiciary, including the process of appointing judges, falls within the competence of these Member States, they are obliged to respect the obligations arising for them under Union law when exercising that competence (CJEU judgment of 5 June 2023, C-204/21, European Commission v. Poland, EU:C:2023:334).

Thus, membership of the European Union imposes a clear and precise obligation on Poland to achieve a result that is unconditional as regards the independence and impartiality of the courts to which the interpretation and application of Union law belongs, and the requirement that these courts must first be established by the act (cf. CJEU judgment of 5 June 2023, C-204/21, European Commission v. Poland). The determination of the manner in which this state of affairs is to be achieved, bearing in mind both the international legal obligations of the Republic of Poland and the provisions of the Constitution of the Republic of Poland, should be made by way of legislation.

The above mentioned idea is reflected in Article 2(1) of the draft act, stipulating that resolutions in the adoption of which a judge elected as a member of the National Council of the Judiciary by the Sejm of the Republic of Poland took part are devoid of legal effects if they were issued on the submission of an application for appointment to perform an office on the position of a court assessor in a provincial administrative court or the position of a judge. The list of resolutions which have not produced legal effects is subject to publication by the Minister of Justice in the Official Journal of the Republic of Poland "Monitor Polski" within one month of the date of entry into force of the Act (article 2(2)).

The construction adopted makes it possible to take into account that the appointments made by the President of the Republic of Poland at the request of the current Council did not constitute judicial appointments within the meaning of Article 179 of the Constitution of the Republic of Poland, and that the established or transformed service/employment relations under this procedure were not service relations of judges in the constitutional sense. This was because there was no constitutive element of appointment in the form of the submission of a proposal by the National Council of the Judiciary, which is a constitutional body capable of upholding the independence and independence of judges. Such an assessment is reflected in the judgment of 8 May 2012, K 7/10, OTK-A 2012/5, item 48, in which, examining the compliance with the provisions of the Constitution of the Republic of Poland of the Act abolishing the so-called horizontal promotions, the Constitutional Tribunal stated that the act of appointment of a judge by the President of the Republic of Poland carried out at the request of the National Council of the Judiciary, whose role was limited by the act, does not correspond to the constitutional

category of appointment under Article 179 of the Constitution of the Republic of Poland. It is therefore all the more necessary to recognise that when the current Council is not an body identical to the National Council of the Judiciary as a constitutional body, the exercise of a prerogative by the President of the Republic does not result in an appointment in the constitutional sense. The interaction of the current Council with the President of the Republic of Poland leads to the creation or transformation of official relations having a basis only in the law, but not in Article 179 of the Constitution of the Republic of Poland. Thus, the guarantees of non-removability in Article 180 of the Constitution of the Republic of Poland do not apply to persons appointed at the request of the current Council, as these apply only to judges in the constitutional sense. It is, therefore, permissible to regulate by statute the effects of appointments which occurred on the basis of a law, but which did not constitute appointments within the meaning of Article 179 of the Constitution of the Republic of Poland.

With regard to other resolutions of the National Council of the Judiciary adopted in individual cases, the draft act provides in Article 13 for the re-examination of the case at the request of a participant in the proceedings submitted within 3 months from the date of entry into force of the draft act.

3. Establishment or transformation of the service relationship of a judge

The consequence of the ineffectiveness of the current Council's resolutions on the presentation of a request for appointment to office is to consider that, on the basis of such resolutions, there has been no establishment or transformation of service relationship in the position of a judge of the Supreme Court, a judge of a court of appeal, a judge of a regional court, a judge of a district court, a judge of the Supreme Administrative Court, a judge of a voivodeship administrative court, a court assessor at a voivodeship administrative court, a judge of a military district court or a judge of a military garrison court (Article 2(3) of the draft Act).

Statistical analyses show that from 2018 to August 2023, there were 2205 appointments at the request of the current Council, of which nearly 422 appointments included the appointment of court assessors to judicial posts in district courts, 248 appointments of registrars and 110

appointments of judicial assistants (Helsinki Foundation for Human Rights, *Appointments in 2018-2023 at the request of the so-called "new" National Judicial Council*, p. 11). The group of those appointed to the office of judge therefore included persons whose decision to go through the nomination procedure before the current National Judicial Council was dictated by a particular legal situation. This applies, in the first instance, in particular to registrars and assistant judges who had passed the judicial or prosecutorial examination and whose eligibility to participate in the competition for a vacant judicial post was of a temporarily limited nature and had expired (cf. Articles 18 and 20(1) of the Act of 11 May 2017 amending the Act on the National School of Judiciary and Public Prosecution, the Act the Law on the system of common courts and certain other acts, Journal of Laws of 2017, item 1139, as amended; hereinafter referred to as: "the Act of 11 May 2017"). In the case of court assessors, however, it should be taken into account that the role of the National Council of the Judiciary in the process of their appointment to the position of a judge of a district court is limited. Indeed, an assessor's position is transformed by operation of the law into a judge's position upon the appointment of the court assessor occupying it to perform an office as a judge. This group of persons was also in a coercive situation, as the service relationship of a court assessor terminated if the court assessor failed to apply for appointment to perform the office of a judge within four years from the date of taking up the assessor's position.

The draft act takes the above circumstances into account. The declaration of the ineffectiveness of the resolutions of the current Council does not apply to such resolutions on the basis of which a judicial assessor or a person referred to in Article 18 or 20(1) of the Act of 11 May 2017 has been appointed to hold office as a district court judge (Article 2(4) of the draft act). At the same time, the draft assumes that persons who have not held the position of a court assessor prior to their appointment to the post of a district court judge will be subject to periodic assessments. This will make it possible, in particular, to examine the substantive level of jurisprudence and the efficiency and effectiveness of undertaken activities and organisation of work, as well as the culture of officiating, including in particular respect for the rights of parties or participants to the proceedings when hearing cases or performing other tasks or functions entrusted to them (Article 2, (5) and (6) of the draft act). Periodic evaluations will also be able to take into account their maintenance of standards of impartiality and independence.

4. Repetition of proceedings for appointment to the office of judge

The declaration of the ineffectiveness of the resolutions of the National Council of the Judiciary on the presentation of a request for appointment makes it necessary to conduct the proceedings again (hereinafter also referred to as: "competitions") in respect of positions which have been filled despite the lack of an effective resolution of the NCJ (Article 3(1)). The draft assumes that, irrespective of the type of court, vacancies should be announced by the Minister of Justice (Article 3(2)). The need to coordinate the numerous proceedings for positions in different courts justifies concentrating the competence to announce vacancies in one body. Ensuring the efficient conduct of these competitions is further served by the solution adopted in Article 3(3). The provision provides for the consolidation of all competitions conducted for the same court or the same chamber of the Supreme Court or the Supreme Administrative Court by announcing them jointly. This will make it possible to limit the number of competitions announced, to decide jointly on the candidates applying for positions at the same court, and finally to announce competitions for particular courts in stages. This means

This means, for example, that the Minister of Justice will be able to announce vacant positions first in courts within one appellate jurisdiction, and only after candidates apply or proceedings are completed, announce vacant positions in courts within another appellate jurisdiction. In this way, the planned solutions minimise the negative impact of repeated competitions on the efficiency of court proceedings. It is not required that all vacant positions filled as a result of repeated procedures be announced at the same time.

The proposed solutions allow for the participation in competitions not only of persons whose service relationships are deemed not to have been established or transformed, but also of other candidates who meet the requirements for filling a given post - regardless of whether they took part in the original competitions or not (Article 4(1)). This will allow those who refrained from participating in the competitions due to the current Council losing its constitutional identity to participate. It should not be lost sight of the fact that from 2018 to August 2023, only one

candidate applied in over 557 competitions. As many as 45% of such competitions were conducted for the courts of appeal (Helsinki Foundation for Human Rights, *Appointments between 2018 and 2023 at the request of the so-called 'new' National Council of the Judiciary*, pp. 7-8). Only competitions conducted in open competition will allow candidates meeting the highest criteria to be presented to the President of the Republic of Poland for the position of judge.

With regard to persons whose service relationships are deemed not to have been established or transformed, the draft allows for their automatic participation in the competition, provided that the person submits a timely declaration of sustaining the application for appointment to the position of judge or court assessor in the court in which he or she took up the position (Article 4(2)). In order to guarantee the rights of these persons and the peculiarity of their situation, it has been assumed that in their case the requirements concerning the length of professional experience necessary for taking up the position are subject to assessment on the basis of the regulations in force on the date of filing the application. The draft therefore guarantees access to the competition regardless of changes in the requirements for taking up office.

If the declaration is not submitted within the deadline - which depends on the will of the entitled persons - the National Council of the Judiciary discontinues the proceedings on the appointment to the post of judge in relation to the interested person (Article 4(4)).

In addition, the proposed solutions take into account changes in the structure of the Supreme Court leading to the abolition of the Supreme Court chamber in which a judicial post was originally filled by allowing a candidate to apply in a competition announced for a vacant post in another Supreme Court chamber (Articles 3(2), 4(3)).

In order to limit the number of competitions held and the need to evaluate the same candidates more than once, the draft provides that persons who have applied for vacancies in repeatable

competitions may not apply for other judicial vacancies until the competitions are completed (Article 4(5)).

Proceedings for appointment to the office of a judge are, as a rule, conducted in accordance with the separate acts (article 5; article 6(1)). The solutions adopted therein guarantee that the competitions are conducted on the basis of objective substantive criteria and fair procedural rules, so as to ensure the selection of the best-qualified candidates in terms of both their professional competence and impeccable character, which, in light of the case law of the European Court of Human Rights (judgment of 1 December 2020, Guðmundur Andri Ástráðsson v Iceland, Application no. 26374/18) and the Court of Justice of the European Union (judgment of 26 March 2020, C-542/18, RX-II, and C-543/18, RX-II Simpson and HG, EU:C:2020:232; judgment of 19 November 2019, C-585, 624 and 625, A.K. and Others, and Cases C-508/19, C-487/19, EU:C:2022:201) constitutes the primary requirements for the existence of a court established by the act within the meaning of Article 6(1) of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights.

The solutions adopted in the Act with regard to the recognition of service relationships as unestablished make it so that appeals against resolutions of the National Council of the Judiciary issued in re-investigated proceedings will be heard without the participation of persons who have stood for vacant judicial positions on the Supreme Court in proceedings that are currently subject to repetition. This corresponds to the generally accepted principle of nemo iudex in causa sua. Appeals will be heard in the Chamber of Labour and Social Security, which, prior to the entry into force of the Supreme Court Act, had jurisdiction over appeals against resolutions of the National Council of the Judiciary. The departure from the jurisdiction of the Chamber of Extraordinary Control and Public Affairs is primarily justified by the fact that the composition of this Chamber is entirely made up of persons who were submitted to the President of the Republic of Poland for appointment to the office of judge at the request of the National Council of the Judiciary formed on the basis of the Act of 8 December 2017.

The possibility of appealing against the resolutions of the National Council of the Judiciary in reappointment proceedings ensures that persons whose service relationships are deemed to have been unestablished or untransformed have access to court and an effective legal remedy in reappointment competitions. This solution is of a guarantee nature and provides grounds for judicial review of the procedure for reappointment of judges' positions adopted by the Act.

5. Status of persons whose service relationship is deemed to have been unestablished or untransformed

The ineffectiveness of resolutions of the National Council of the Judiciary concerning the submission of a motion for appointment to the office of a judge of the Supreme Court, a judge of an appellate court, a judge of a circuit court, a judge of a district court, a judge of a district court, a judge of the Supreme Administrative Court, a judge of a voivodship administrative court, of a court assessor at a voivodeship administrative court, a judge of a military circuit court or a judge of a military garrison court, means that pending the outcome of reappointment proceedings, persons who immediately prior to their appointment did not occupy the office of a judge are deprived of the right to vote as a judge and may not exercise the administration of justice. In view of the fact that their professional relationship is deemed to be unestablished, the draft provides in Article 9 that persons have the right to return to their profession and to be entered in the register of advocates or attorneys-at-law or to be appointed as a notary, respectively. In order to achieve the objectives of the draft, no statutory interference with the freedom to choose a profession or to remain in an employment relationship is necessary.

With regard to persons who held the position of judge immediately prior to their appointment, the draft provides for their reinstatement to the office of judge in that position. The service relationship of a judge in the reinstated position is deemed to be continuous (Article 7). This solution is to be appropriately applied also to persons who, at the time of their appointment to the office of judge, held the position of prosecutor (Article 7(3)). This means that persons in such a situation under the Act will be reinstated to the previously held prosecutor's position.

Article 8, for judges restored to their previous position, provides for a statutory delegation to perform judicial duties in the common court in which they took up the position of a judge of a regional court or a court of appeal on the basis of a resolution of the National Judicial Council shaped on the basis of the Act of 8 December 2017. According to the draft, this delegation is to last for a period of 2 years from the entry into force of the Act. This type of solution can be adopted as it applies to persons who were previously appointed to the office of a judge of a common court in a correct procedure and therefore have a vote of the judge. At the same time, the draft provides that the president of the appellate court may dismiss from the delegation. This will enable presidents of courts of appeal to shape correct staffing of courts from the area of appeal as competitions are settled.

After the expiry of the 2-year delegation, a judge who has sustained the application for appointment to a vacant judicial post in a general court may be delegated, with his or her consent, by the president of the court of appeal to continue to perform judicial functions in that court (Article 8(4)). The provision allows judges who have decided to participate in repeated proceedings, to continue to adjudicate in the court in which they have taken up their post, pending the outcome of the competition, if this is justified by the needs of justice and the will of the very judge.

In an effort to ensure the smooth functioning of the judiciary during the period of reconducting the proceedings, the draft further provides that a judge delegated to act should complete his or her cases even after the expiry of the period of delegation. It has therefore been assumed that after the expiry of this period, the judge shall be delegated to act in respect of all cases assigned to him or her until their completion (Article 8(2)).

The proposed delegation arrangements will enable the judiciary to function smoothly during the period when the competitions are being held again.

6. Status of retired persons whose service relationship is deemed to have been unestablished or untransformed

Recognition of service relationships as having been unestablished or untransformed affects the status of judges who retired, having occupied positions covered as a result of an ineffective resolution of the current Council.

The draft provides for retention of the right to retired status for persons who immediately prior to assuming the position occupied the position of a judge or a prosecutor. However, the remuneration is reduced to 75% of the basic salary and length-of-service increment which a judge or prosecutor would have received on the day of retirement or transfer to retired status in the previously held position (Article 10). This corresponds symmetrically to the assumption made with regard to judges in active status that they will return to their previously held judicial position (Article 7).

The draft adopts a different solution with regard to persons who have not held the position of judge or prosecutor. This is a group of persons who, prior to assuming the position as a result of a non-competitive resolution of the current Council, did not acquire the right to the status of a judge. In view of the recognition of service relations as unestablished or untransformed, the proposed act provides for the expiry of the right to retired status and the acquisition of the right to a pension on general principles (article 11). In return, it provides for the supplementation of social security contributions in the general system for these persons.

The draft act also regulates the status of persons appointed to the Disciplinary Chamber of the Supreme Court who were subsequently retired in connection with the liquidation of that Chamber pursuant to Article 10(4) of the Act of 9 June 2022 amending the Act on the Supreme Court and certain other acts (Journal of Laws of 2022, item 1259). The need to introduce a separate regulation is dictated by the special status of this Chamber of the Supreme Court. Numerous rulings by both national courts and international tribunals have determined that this

Chamber lacked the status of a court. Appointments to it were made solely at the request of the National Council of the Judiciary formed by the act of 8 December 2017. Therefore, there is no reason whatsoever to treat persons who have retired while holding a position in the Disciplinary Chamber differently from the previously mentioned categories of persons. The draft therefore provides that, as of the date of entry into force of this Act, the entitlement to retired status of persons who were transferred to retired status pursuant to Article 10(4) of the Act of 9 June 2022 amending the Act on the Supreme Court and certain other acts (Journal of Laws of 2022, item 1259) shall cease if, as of the date of entry into force of this Act, they are not entitled to retired status pursuant to separate provisions. Persons who immediately prior to their appointment held the position of a judge or a prosecutor shall be reinstated in these positions. In turn, persons exercising the profession of an advocate, an attorney-at-law or notary public have the right to return to the exercised profession and to be entered in the register of advocates or attorneys-at-law or appointment to the position of notary public, respectively, on the principles set forth in Article 9 of the draft.

7. Specific grounds for overruling a decision

The draft act provides parties or other participants in court proceedings with a specific legal remedy allowing them to overturn judgments issued with the participation of judges appointed to hold office in connection with a resolution of the Council in the adoption of which a judge elected as a member of the Council by the Sejm of the Republic of Poland participated. The draft refers to the overruling of judgments or rulings adjudicating on the merits of a case in both pending proceedings and proceedings that had been finally concluded before the date of entry into force of the Act. It was assumed that this remedy should be available to the parties and other participants who, prior to 31 December 2023, for these reasons demanded a declaration of the unlawfulness of the appointment of a person participating in the panel of the court as a judge or raised the resulting objections to the independence of the court.This solution makes it possible, on the one hand, to uphold judgments when the parties directly concerned by their consequences did not raise the above objections in the course of the proceedings and, on the other hand, to enable those who formulated such objections to have the case heard anew in a court composition properly staffed and free of doubts as to the judge's impartiality and

independence due to the manner of his or her appointment. This is based on balancing, considering the specifics of the cases, two values: on the one hand, ensuring the right to have the case heard by a properly seated court and, on the other hand, protecting the stability of final judgments, which also constitutes an element of the right to a court.

The proposed solution refers to the position expressed in the justification of the resolution of the composition of three chambers of the Supreme Court of 23 January 2020, BSA I-4110-1/20, that ”the attitude of the parties presented in the course of the proceedings and indicating the lack of reservations as to the maintenance of independence and impartiality of the judge cannot remain unaffected by the subsequent assessment as to whether the standard of impartiality and independence of the court conducting the proceedings was infringed, with the effect of acknowledging that the court was staffed in an unlawful manner”. It must be borne in mind, however, that to adopt a different solution would entail the need to set aside all judgments made with the judges appointed in connection with the resolutions of the current Council. This would have a drastic social impact, as it would undermine the stability of judgments and negatively affect citizens' trust in the judiciary. Indeed, the reconducting of such a large number of court cases would not only be an organizational problem for the courts, but above all for the parties to the proceedings, which would also entail additional financial costs for them. For these reasons, the draft envisages limiting the possibility of challenging judgments only to those parties and participants who raised objections to the independence or impartiality of a judge in connection with his or her appointment.

Excluding cases adjudicated under the Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws of 2024, item 37 as amended), the Act of 24 August 2001 – the Code of proceedings in misdemeanour cases (Journal of laws of 2022, item 1124 as amended) and the Act of 10 September 1999 – the Fiscal Penal Code (Journal of Laws of 2023, item 654, as amended), in order to protect the stability of judgments, it has been assumed that if a final judgment or decision adjudicating the merits of a case has had irreversible legal consequences, the court is limited to stating that the judgments were issued in violation of the law and indicating the circumstances due to which it issued such a decision. In such a case, however, a

party will be able to claim compensation for the damage caused by the issuance of such a ruling without first establishing the unlawfulness of the ruling.

A further limitation is temporal in nature and relates to the adoption of a date by which such doubts should have been formulated. It was assumed that the limiting moment should be after the issuance of the ECtHR's pilot judgment in the Wałęsa v. Poland case. It was issued on 23 November 2023, so adopting the date of 31 December 2023 gives the parties and participants in the proceedings a reasonable time to take the relevant procedural steps.