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URGENT INTERIM OPINION ON THE BILL AMENDING THE ACT ON THE NATIONAL COUNCIL OF THE JUDICIARY OF POLAND

POLAND

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



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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

As underlined in previous ODIHR opinions on judicial reform in Poland in 2017-2023, while every state has the right to reform its judicial system, such reforms should always comply with the country's constitutional requirements, adhere to the rule of law principles, be compliant with international law and human rights standards, as well as OSCE commitments. These underlying principles should guide the legislative choices to be made by the Polish legislators to execute the judgments against Poland concerning judicial independence. Therefore, with respect to the reform initiative addressing the National Council of the Judiciary (NCJ), it is important that the modalities of reforming the NCJ can be duly justified in light of international law and human rights standards, and that the legal drafters do not lightly invoke the existence of exceptional circumstances to resort to extraordinary measures, as this may run the risk of setting a precedent whereby a changing political majority, which did not approve of the reform, would be tempted to proceed the same way.

The complexity and scale of the reform required to address the systemic deficiencies of the judicial system in Poland as identified by the European Court of Human Right (ECtHR), the Court of Justice of the European Union (CJEU), international organizations, including ODIHR, as well as national observers, requires elaboration of a thorough and coherent policy underpinning the entire reform process. In this context, the reform of the NCJ should be among the priorities as the existing legal arrangement of electing the judge members of the NCJ by the *Sejm* (lower house of the Parliament) constitutes one of the structural dysfunctions which, among others, has led to systemic deficiencies of the judicial appointment system and may further aggravate the situation if not rapidly addressed. A sequenced approach to reform efforts could thus be justifiable in the present circumstances, providing that it is accompanied by an in-depth reflection and a broader, meaningful, inclusive and participatory legislative reform process with a view to address the structural and systemic deficiencies of the judicial system in a more comprehensive, in-depth and systematic manner.

In this context, it is welcome that the Bill Amending the Act on the National Council of the Judiciary of Poland (the Bill) reinstates the principle of s/election of judge members of the NCJ by their peers to restore the NCJ's independence as exhorted by the ECtHR and in accordance with recommendations elaborated at the international and regional levels. In addition, a number of provisions of the Bill contain positive aspects that address some of the recommendations made by ODIHR in its 2017-2023 opinions, particularly with respect to the representativeness of the judiciary at large within the NCJ, the openness and transparency of the election of the judge members and willingness to enhance public inclusion in the processes of the NCJ.

Given the limited time to address the extremely complex issues and challenges of extraordinary nature, this Urgent Interim Opinion does not purport to provide an exhaustive and final legal analysis of these matters. ODIHR intends to elaborate

further its approach, offering additional analysis and recommendations, addressing existing or emerging challenges that may arise during the reform process, and developing a final assessment of the compliance of the proposed measures with international human rights standards and OSCE human dimension commitments. In particular, the Urgent Interim Opinion does not aim to address problematic questions related to the status of the judges appointed or promoted by the NCJ after its composition changed following the 2017 amendments. ODIHR will address the issue in the Final Opinion and/or in other opinions prepared upon request from the Polish authorities.

At the same time, ODIHR concludes that, in the given extraordinary circumstances, and in light of the above-mentioned caselaw of international courts, there is a demonstrated necessity to swiftly reform the composition of the NCJ. Reinstating the modalities of electing the judge members of the NCJ by their peers to restore the independence of the NCJ would avoid perpetuating the systemic dysfunction as established by European courts. It would break the vicious cycle of the NCJ's potentially deficient decisions on judicial appointments and promotions, as well as subsequent judicial challenges, ultimately compromising the independence and functioning of the judicial system.

The Bill provides for the *ex lege* termination of the mandates of judges who have been elected by the Sejm to sit on the NCJ following the 2017 Amendments. It must be stressed that simply invoking a general objective to enhance the independence or efficiency of the judicial self-governing bodies, or bring the legal framework closer to international standards would not in itself be sufficient to justify the early termination of mandates. There should be a clear and demonstrated necessity for the reform, with no other possibility than terminating the mandate of council members to remedy the situation, to achieve the aims of the reform and to ensure compliance with international norms and rule of law principles. As noted above, the Bill under review seeks to reverse the negative impact of the 2017 Amendments, introducing stronger guarantees of independence, thereby restoring the NCJ's ability to uphold the independence of the Polish judiciary as called upon by international courts and bodies. Therefore, this option of *ex lege* termination, as contemplated by Article 2 of the Bill, appears to be valid and justifiable, as long as it remains an exceptional (one-time) measure in the given extraordinary circumstances.

It is acknowledged that judge members of the NCJ elected by the Sejm (in 2018 and then in 2022) could arguably claim an entitlement to protection against early removal from their position as a judge member of the NCJ. However, it could also be argued that the abundant international caselaw questioning the very independence of the NCJ on the basis of the excessive influence of the executive and legislative branches over the composition of the NCJ, serves as a legitimate justification for initiating a reform, potentially impacting the term of office of elected office-holders and potentially their right of access to a court. In the present specific circumstances of an *ex lege* termination due to the above-described reasons, such a right may be restricted to an extent, in line with international standards and caselaw, although this issue should be addressed with great caution. At the same

time, the right of members of the NCJ, whose mandates may be discontinued, to bring claims before administrative courts regarding other issues closely interlinked with the potential discontinuation of their mandates should be guaranteed. The issue of excluding or limiting the right of access to a court will be further elaborated in the Final Opinion.

The Bill also provides as a transitory measure that judges holding posts to which they were appointed or promoted by the NCJ after its composition changed following the 2017 reform are ineligible to the position of judge members of the NCJ, except in the case of promoted judges relinquishing promotion they received during this period. For the reasons described above, in the given extraordinary circumstances, limiting the possibility to stand for election to judges holding posts to which they were appointed before March 2018 would exclude (or bring to minimum) the risk of having the NCJ being composed of judge members whose legal status remains uncertain according to the Polish domestic legal framework but whose appointments have been recognized by the ECtHR to have been made following a defective procedure that inherently affects their independence. This approach may be justifiable as an initial, exceptional transitory measure, prior to resolving the much broader and more controversial issue related to the status of judges appointed or promoted by the NCJ after its composition changed following the 2017 reform. Yet, a less restrictive option would consist of providing all judges appointed by the NCJ before its composition was changed, including those who were promoted or transferred after March 2018, with an opportunity to be elected to the NCJ. Indeed, it would not be justified to automatically limit these members of judiciary in their right to stand for election as judge member of the NCJ.

In addition, a number of recommendations from the 2017 Opinion remain unaddressed, for instance with respect to the requirement of gender balanced composition of the NCJ to be taken into account throughout the nomination and s/election process, as well as the need to ensure the openness, transparency and inclusiveness of the modalities of selecting and appointing/electing *non-judge* members of the NCJ, which could deserve further attention in the Bill or at least in future amendments to the 2011 Act [paras. 31-37]. Some other recommendations were provided in the 2017 Opinion regarding the composition of the NCJ, in particular with respect to having active MPs and the Minister of Justice sitting as NCJ members. These recommendations are reiterated, while acknowledging that any change in this respect would require constitutional amendments and would not be immediately implementable.

These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 21 March 2024, the Chair of the Justice and Human Rights Committee of the Sejm of Poland sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) a request for a legal review of the Bill Amending the Act on the National Council of the Judiciary of Poland (hereinafter “the Bill”) in its version as of 20 February 2024.¹
2. On 28 March 2024, ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of these draft amendments with international human rights standards and OSCE human dimension commitments.
3. Given the short timeline to prepare this legal review as the requestor asked that it be ready by 8 April in light of the planned discussions in the Sejm on 9 April and the fact that the Bill is planned for another reading by the Sejm on 11 April 2024, ODIHR decided to prepare an Urgent Interim Opinion on the Bill.² This Urgent Interim Opinion does not provide a detailed analysis of all the provisions of the Bill but primarily focuses on the most concerning issues relating to the reform of the National Council of the Judiciary (hereinafter “NCJ”). In particular, ODIHR will not address the issue of the status of judges appointed or promoted by the NCJ composed in accordance with the 2011 Act on the NCJ as amended by the Act of 8 December 2017. While acknowledging that more comprehensive reform would be needed to address other fundamental issues pertaining to the rule of law in Poland, ODIHR’s analysis exclusively focuses on certain key aspects of the Bill submitted for review. A more comprehensive and detailed analysis may follow, that may revisit some of the preliminary findings and recommendations contained in the Urgent Interim Opinion and offer a final assessment of the compliance of the proposed measures with international human rights standards and OSCE human dimension commitments. The absence of comments on certain provisions of the Bill should not be interpreted as an endorsement of these provisions and the content of this Urgent Interim Opinion is without prejudice to any written analysis and recommendations that ODIHR may provide in the future.
4. This Urgent Interim Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.³ It should also be read in light of the several opinions on judicial reform in Poland published by ODIHR between 2017 and 2023, in particular ODIHR Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland of 5 May 2017.⁴

1 The Council of Ministers adopted the Bill and submitted it to the Sejm on 20 February 2024; the Bill was adopted in first reading on 7 March 2024, see <[Druk nr 219 - Sejm Rzeczypospolitej Polskiej](#)>.

2 Following the publication of the Urgent Interim Opinion, ODIHR may decide to carry out additional research, consultations and/or expert involvement. If, on this basis, ODIHR considers that significant changes need to be made to the preliminary legal analysis contained therein, then ODIHR will issue a Final Opinion on the Bill.

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

4 *ODIHR Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland* (5 May 2017, also in Polish [here](#)); see also Preliminary Opinion of 22 March 2017, in [English](#) and in [Polish](#); *ODIHR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (30 August 2017), in [English](#) and in [Polish](#); *ODIHR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (proposed by the President, as of 26 September 2017), 13 November 2017, in [English](#) and [Polish](#); *ODIHR Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act*

II. SCOPE OF THE OPINION

5. The scope of this Opinion covers only the Bill submitted for review. Thus limited, the Urgent Interim Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the NCJ in Poland. The Urgent Interim Opinion, although taking into account the existing legal and constitutional framework, does not purport to assess the constitutionality of the Bill, which is a matter falling outside the scope of this legal review and to be decided upon by competent national institutions.
6. The Urgent Interim Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on those provisions that require amendments or improvements than on the positive aspects of the Bill. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The legal analysis also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation of other states, ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.
7. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*⁵ (hereinafter “CEDAW”) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*⁶ and commitments to mainstream gender into OSCE activities, programmes and projects, the Urgent Interim Opinion integrates, as appropriate, a gender and diversity perspective.
8. This Urgent Interim Opinion is based on an unofficial English translation of the Bill commissioned by ODIHR, which is attached to this document as an Annex. Errors from translation may result. Should the Opinion be translated in another language, the English version shall prevail.
9. In view of the above, ODIHR would like to stress that this Urgent Interim Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Poland in the future.

on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019), 14 January 2020, in [English](#) and [Polish](#); ODIHR Urgent Interim Opinion on the Bill Amending the Act on the Supreme Court and Certain other Acts of Poland (as of 16 January 2023), 25 January 2023, in [English](#) and [Polish](#).

5 *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Ukraine deposited its instrument of ratification of this Convention on 30 July 1980.

6 See *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

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

10. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.⁷ The principle is also crucial to upholding other international human rights standards.⁸ More specifically, the independence of the judiciary is a prerequisite to the broader guarantee of every person's right to a fair trial, i.e., to a fair and public hearing by a competent, independent and impartial tribunal established by law and by an accountable judiciary. This independence means that both the judiciary as an institution, but also individual judges must be able to exercise their professional responsibilities without being influenced by the executive or legislative branches or other external sources. The independence of the judiciary is also essential to engendering public trust and credibility in the justice system in general, so that everyone is seen as equal before the law and treated equally, and that no one is above the law.
11. The judiciary must be organized in a way that ensures the personal and institutional independence of judges.⁹ There exists a variety of systems, with a widespread practice of establishing judicial councils or other self-governing bodies or arrangements, that are put in place to support institutional independence and build public confidence in that independence, though with very different composition and mechanisms for appointing the members of such judicial councils or other similar bodies, where they exist.¹⁰ Whatever system is chosen by states, in light of their role in safeguarding judicial independence and in managing the judiciary as a whole, judicial councils and other similar bodies, where they are established, should themselves be independent and impartial,¹¹ i.e., free from interference from the executive and legislative branches.

⁷ See UN Human Rights Council, Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers, [A/HRC/29/L.11](#), 30 June 2015, which stresses “the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles of the Judiciary and other relevant human rights norms, principles and standards”. As stated in the OSCE Copenhagen Document 1990, “the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression” (para. 2).

⁸ See e.g., OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems, 6 December 2005.

⁹ See e.g., CCJE, *Opinion no. 24 (2021) of the CCJE on the Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, CCJE(2021)11; European Network of Councils for the Judiciary (ENCJ), *Distillation of ENCJ Principles, Recommendations and Guidelines* (2004-2016), page 5.

¹⁰ See e.g., Council of Europe DG I, *Comparative Overview on Judicial Councils in Europe*, DCJ (2022)1, 14 March 2022, which notes that there are at least 36 States with judicial councils in Europe, noting that only a few countries do not have one (e.g., Austria, Czech Republic, Germany, Luxembourg, Sweden, Switzerland (no one at the federal level, 5 out of 26 cantons have one), United Kingdom). See also *ODIHR Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland* (5 May 2017, also in Polish [here](#)), paras. 43-46 and references therein, which provides an overview of different systems and modalities of appointments of members of judicial councils, and notes that the great majority of EU Member States which have judicial councils provide for judge members of such bodies to be either elected by their peers or appointed or proposed by their peers, a model that also tends to be followed in so-called new democracies. See also See e.g., ECtHR, *Grzeda v. Poland* [GC], no.43572/18, 15 March 2022, para. 307, noting the “widespread practice, endorsed by the Council of Europe, to put in place a judicial council as a body responsible for the selection of judges”, though noting that the ECHR does not contain “any explicit requirement to this effect”.

¹¹ See ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 1; and *ODIHR Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland* (5 May 2017), para. 37, which provides: “In principle, judicial councils or other similar bodies are crucial to support and guarantee the independence of the judiciary in a given country, and as such should themselves be independent and impartial, i.e., free from interference from the executive and legislative branches. Indeed, interfering with the independence of bodies, which are guarantors of judicial independence, could as a consequence impact and potentially jeopardize the independence of the judiciary in general”. See also Venice Commission Report on Judicial Appointments, [CDL-AD\(2007\)028](#), para. 48: “An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy”; Venice Commission Opinion On The Draft Law On Amendments to the Law On The Judicial Council And Judges (Montenegro), [CDL-Ad\(2018\)015](#), para. 37, which underlines that “the due functioning of the Judicial Council, in

Indeed, interfering with the independence of bodies, which are guarantors of judicial independence, could as a consequence impact and potentially jeopardize the independence of the judiciary in general.

12. In this respect, the manner in which judges are appointed to a judicial council, and particularly the nature of the appointing authorities and the respective procedure is key to assess the independence of the judicial council.¹² At the same time, security of tenure of council members during the term for which they are appointed to serve on the council is also a crucial precondition for the independence of a judicial council. As far as the procedural mechanism for termination of council membership before the expiry of their mandate as council member is concerned, judges appointed to a judicial council should be protected with the same guarantees as those granted to judges exercising jurisdictional functions, including the right to a fair hearing in case of discipline, suspension, and removal.¹³
13. A comprehensive overview of applicable international human rights standards, recommendations and OSCE commitments pertaining to judicial independence and the role of judicial councils that are relevant for this Urgent Interim Opinion can be found in the [ODIHR Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain other Acts of Poland](#), of 5 May 2017.¹⁴ At the same time, many developments at the international and domestic levels have taken place since, which have led to the further elaboration of principles and standards pertaining to judicial councils and safeguards to ensure their independence and perception of independence, including through:
 - the case-law¹⁵ of the Court of Justice of the European Union (hereinafter “CJEU”)¹⁶ and of the European Court of Human Rights (hereinafter “ECtHR”),¹⁷ as well as

those legal systems where it exists, is an essential guarantee for judicial independence”. See e.g., ECtHR, [Grzeda v. Poland](#) [GC], no.43572/18, 15 March 2022, para. 303, which states: “Given the role played by judicial councils, the same considerations should apply as regards the tenure of judges, such as the applicant in the present case, who are elected to serve on them because of their status and in view of the need to safeguard judicial independence, which is a prerequisite to the rule of law”.

12 See e.g., ECtHR, [Olujčić v. Croatia](#), no. 22330/05, 5 May 2009), para. 38; [Oleksandr Volkov v. Ukraine](#), no. 21722/11, 25 May 2013, para. 103.

13 See e.g., CCJE, [Opinion no. 24 \(2021\) on the Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems](#), CCJE(2021)11, para. 37.

14 See here in [English](#) and here in [Polish](#).

15 See for a comprehensive overview of all judiciary-related case-law from the CJEU and the ECtHR with respect to Poland: see [Rule of law cases – Poland – Safeguarding the Rule of Law in the European Union \(euruleoflaw.eu\)](#).

16 In particular, CJEU, [A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy](#) [GC], C-585/18, C-624/18 and C-625/18, 19 November 2019, especially paras. 137-154 regarding the elements to take into account to assess the independence of the judicial council vis-à-vis the executive and the legislative branches; 19 November 2019; and [A.B. and Others v Krajowa Rada Sądownictwa and Others](#), C-824/18, 2 March 2021, paras. 131-139, further elaborating on other relevant contextual factors which may also contribute to doubts being cast on the independence of the NCJ and its role in judicial appointment processes and, consequently, on the independence of the judges appointed at the end of such a process.

17 In particular, especially with respect to the NCJ, ECtHR, [Reczkowicz v. Poland](#), no. 43447/19, 22 July 2021, especially paras. 269-276, concluding that the NCJ lacked sufficient guarantees of independence from the legislature and the executive following the amendments of 8 December 2017 to the 2011 Act on the NCJ, which entered into force on 17 January 2018; [Dolińska-Ficek and Ozimek v. Poland](#), no. 49868/19 and 57511/19, 8 November 2021, para. 353, underlining that the NCJ, as established under the 2017 Amending Act, is “a body which no longer offered sufficient guarantees of independence from the legislative or executive powers” and calling upon Poland under Article 46 of the ECHR to undertake “a rapid remedial action” noting that the 2017 Amendments to the 2011 Act enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, “thus systematically compromising the legitimacy of a court composed of the judges so appointed”; ECtHR, [Advance Pharma sp. z o.o. v. Poland](#), no. 1469/20, 3 February 2022, para. 318, reiterating the “inherent lack of independence of the NCJ” and concluding that “it is an inescapable conclusion that the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuates the systemic dysfunction as established above by the Court and may in the future result in potentially multiple violations of the right to an ‘independent and impartial tribunal established by law’, thus leading to further aggravation of the rule of law crisis in Poland”; ECtHR, [Grzeda v. Poland](#) [GC], no.43572/18, 15 March 2022, para. 307, underlining that where a judicial council is established, “the State’s authorities should be under an obligation to ensure its independence from the executive and legislative powers in order to, *inter alia*, safeguard the integrity of the judicial appointment process”, and paras. 310-322 where the ECtHR concluded that “the fundamental change in the manner of electing the NCJ’s judicial members, considered jointly with the early termination of the terms of office of the previous judicial members [...] means that its independence is no longer guaranteed”; the pilot judgement in the case of [Waleśa v. Poland](#), no. 50849/21, 23 November 2023, para. 329, whereby the Court fully subscribed to and endorsed the indications as to the general measures given to Poland by the Council of Europe Committee of Ministers in the [decision](#) adopted at its 1468th Meeting on 5-7 June 2023, calling upon Poland to “rapidly elaborate measures to (i) restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ”.

reports from regional and international bodies, pertaining to Poland and the consequences of the amendments to the 2011 Act on the National Council of the Judiciary in 2017-2018;

- the Consultative Council of European Judges (CCJE) *Opinion No. 24 (2021) on the evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*,¹⁸ which builds upon Opinion No. 10 (2007) to provide further guidance on essential aspects covering judicial councils as key bodies called upon to safeguard judicial independence and impartiality;
 - the European Network of Councils of the Judiciary (ENCJ) [*Compendium on Councils for the Judiciary*](#) (2021);
 - the *2018 Annual Thematic Report on Judicial Councils* of the UN Special Rapporteur on the independence of judges and lawyers, which offers some recommendations relating to the establishment, composition and functions of judicial councils and seeks to define common principles, general trends and good practices for ensuring the independence of such bodies, where they exist;¹⁹
 - the *2023 ODIHR Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*,²⁰ which elaborate on the 2010 ODIHR Kyiv Recommendations to provide further guidance on judicial councils and other similar bodies of self-governance, their composition, modalities of appointment of judge members and non-judge members and accountability of their members.
14. With respect to the judicial reforms in Poland since 2017 and their impact on judicial independence more generally, ODIHR's Opinions of March, May, August and November 2017, January 2020 and January 2023²¹ are of relevance as are the Venice Commission's Opinions,²² in relation to the proposed amendments to the 2011 Act on the National Council of the Judiciary, to the Act on the Supreme Court, and to the Act on the Organization of Common Courts and some other laws. The [*2021 ODIHR Comparative Note on Models of Judicial Councils as Independent and Self-Governing Bodies*](#) could also serve as a useful reference from a comparative perspective.

2. BACKGROUND

15. The Constitution mandates the NCJ to safeguard the independence of courts and judges (Article 186 (1)). The composition of the NCJ is laid down in Article 187 (1) of the Constitution. The body is composed of 25 members: the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court, a person appointed by the President of the Republic, fifteen members elected from among the judges of the Supreme Court, ordinary courts, administrative courts and military courts, four members elected by the Sejm from among deputies, and two members elected by the Senate from among senators. The term of office of NCJ elected members according to the Constitution is four years (Article 187 (3)).
16. According to Article 187 (4) of the Constitution, the organizational structure, the scope of activity and procedures for the work of the NCJ, as well as the manner of choosing its members, shall be specified by statute. The Act of 12 May 2011 on the National Council

18 See Council of Europe, Consultative Council of European Judges (CCJE), [*Opinion no. 24 \(2021\) on the Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*](#), CCJE(2021)11.

19 Special Rapporteur on the independence of judges and lawyers, [*Annual Thematic Report on Judicial Councils*](#), A/HRC/38/38.

20 ODIHR, [*Recommendations on Judicial Independence and Accountability \(Warsaw Recommendations\)*](#), October 2023.

21 See the list of ODIHR opinions on judicial reform in Poland in *op. cit.* footnote 4.

22 Available at: <[Venice Commission :: Council of Europe \(coe.int\)](#)>.

of the Judiciary, as amended,²³ regulates these matters,²⁴ in particular the modalities of election of the judge members of the NCJ.

17. As part of a series of judicial reforms in 2017-2018, the 2011 Act on the NCJ was amended several times, including by the Act of 8 December 2017 amending the 2011 Act on the NCJ and certain other Acts (hereinafter “2017 Amendments”).²⁵ These amendments introduced changes to, among others, the method of election of the fifteen judge members of the NCJ, the structure and decision-making of the NCJ and the procedure for selecting judges and trainee judges. Following the 2017 Amendments, the new judge members elected by the Sejm took office in March 2018 while the term of office of the judge members elected under the previous provisions terminated the day preceding the term of office of the new judge members of the NCJ (Section 6 of the 2017 Amending Act).
18. As stressed in the May 2017 ODIHR Opinion, the (then) draft amendments to the 2011 Act on the NCJ raised serious concerns with respect to key rule of law principles, in particular the separation of powers and the independence of the judiciary.²⁶ One of the crucial issues underlined by ODIHR relates to the 15 judge members no longer being elected by their peers, but by the *Sejm* (lower house of the Parliament). ODIHR concluded that the (then draft) 2017 Amendments would place “*the procedure of appointing members of the Judicial Council primarily in the hands of the other two powers, namely the executive and/or the legislature (apart from the ex officio members, 21 members would now be appointed by the legislative branch and one by the executive), increase the influence of these powers over the appointment process of its members, thereby threatening the independence of the Judicial Council, and as a consequence, judicial independence overall*”.²⁷ The subsequent abundant case-law of the CJEU and the ECtHR concurred with this initial analysis, confirming that following the change of modalities of electing the judge members of the NCJ, also in light of contextual factors, the NCJ no longer offered sufficient guarantees of independence from the legislative or executive powers.²⁸
19. Further, the (then draft) 2017 Amendments provided for the early termination of mandates of all fifteen judge members of the NCJ following the election of the new judge members by the Sejm. ODIHR noted in this respect that “[*t*]he early termination of the mandate of judges duly elected to a constitutional body, for no legitimate reason other than an amendment to relevant legislation, raises concerns with regard to respect of the

²³ Available at: <[Legal acts \(krs.pl\)](http://legal.acts.krs.pl)>.

²⁴ Next to the competence set out in the Article 186 of the Constitution, NCJ is according to the Article 3 of the 2011 Act responsible for (among all just to mention some), the consideration and evaluation of candidates for office in the positions of judges of the Supreme Court and judicial positions in common courts, administrative courts and military courts, as well as in the positions of court assessors in administrative courts; presentation to the President of the Republic of Poland of proposals for the appointment of judges in the Supreme Court, common courts, administrative courts and military courts, as well as for the appointment of court assessors in administrative courts as well as of proposals for the appointment of examined trainees of the judicial application and prosecutorial application to the positions of court assessors in common courts, amongst others.

²⁵ The Act Amending the 2011 Act on the NCJ was enacted on 8 December 2017 and entered into force on 17 January 2018, except for certain provisions which became effective earlier; further, the Act of 12 April 2018 amending various acts including the 2011 Act on the NCJ, entered into force on 23 May 2018, and vested in the NCJ the power to decide on the extension of the term of office of a judge beyond retirement age.

²⁶ ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland, of 5 May 2017, here in [English](#) and here in [Polish](#). See also: UN Human Rights Committee, *Concluding Observations on the 7th Periodic Report of Poland*, 23 November 2016, paras 33-34, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPOL%2fCO%2f7&Lang=en>. The UN Human Rights Committee noted with concerns “*the impact on the right to a fair trial and on the independence of judges of recent legislative changes and proposals, in particular the law on prosecution of January 2016 and the draft act on the National Council of the Judiciary, which seek a stronger role for the Government in judicial administration, particularly regarding the appointment of judges and disciplinary sanctions*” and urged Poland to “[*t*]ake immediate steps to protect the full independence and impartiality of the judiciary, guarantee that it is free to operate without interference, and ensure transparent and impartial processes for appointments to the judiciary and security of tenure”.

²⁷ *Ibid.* para. 40.

²⁸ See the references to relevant CJEU and ECtHR case-law mentioned in *op. cit.* footnotes 16 and 17.

independence of such a body, and as a consequence of the judiciary as a whole".²⁹ ODIHR also underlined that "[s]hould the adoption of the Draft Act lead to the automatic termination of the mandates of judge members to the Judicial Council, [without] the means to individually challenge this termination before any national body exercising judicial powers [...] [this] would be a violation of Article 6 (1) of the ECHR".³⁰ In its judgment *Grzęda v. Poland* (15 March 2022), the ECtHR concluded that Article 6 (1) of the ECHR was applicable, since the 2017 Amendments brought about the termination of what the Court considered to be an arguable right under domestic law of *duly elected* judge members of the NCJ to serve for the full duration of their four-year term.³¹ The ECtHR further found that there was no justification in this case for domestic law to exclude access to a court for a review of the termination, since among others, the 2017 Amendments were not a measure that supported the rule of law but rather undermined it and hence could not be justified on objective grounds in the State's interest.³² The ECtHR then held 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 [...] Accordingly, the Court finds that **there has been a violation of the applicant's right of access to a court, as guaranteed by Article 6 § 1 of the Convention***".³³

20. As a result of the aforementioned wide-ranging judicial reform, several other cases were brought against Poland before the CJEU and the ECtHR (see Sub-Section III.1).
21. The 2011 Act also regulates the duration of the *ex officio* mandate of the NCJ members as well as of those elected by the Parliament and appointed by the President.³⁴ Article 9a introduced as part of the 2017 Amendments specifies that the judge members are selected by the Sejm for a "common four-year term of office". Article 14 of the 2011 Act also specifies the list of circumstances that may lead to the early termination of the mandate of the appointed member of the NCJ.³⁵
22. In its recent pilot judgment *Wałęsa v. Poland*,³⁶ with reference to the systemic problems pertaining to the judiciary in Poland, the ECtHR held that it "*fully subscribes to and endorses the indications as to the general measures given to the respondent State by the Committee of Ministers in the above-mentioned decision adopted at its 1468th Meeting, whereby it exhorted Poland to, among other things, rapidly elaborate measures to (i) restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ; (ii) address the status of all judges appointed in the deficient procedure involving the NCJ as constituted under the 2017 Amending Act and of decisions adopted with their participation; and (iii) ensure effective judicial review of the NCJ's resolutions proposing judicial appointments to the President of Poland, including the Supreme Court.*"³⁷

29 [ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland](#), 5 May 2017, para. 81.

30 *Ibid.* para. 84.

31 ECtHR, [Grzęda v. Poland](#) [GC], no.43572/18, 15 March 2022, paras. 285-286.

32 *Ibid.* especially para. 323, and more generally, 295-328.

33 *Ibid.*, paras. 349-350.

34 According to the Article 7, the *ex officio* members (i.e., the First President of the Supreme Court, the President of the Supreme Administrative Court and the Minister of Justice) are members as long as they hold the respective function, while the parliamentary members are elected for a period of four years (Article 9), and the mandate of the person appointed by the President expires at the latest within three months after the end of the term of office of the President or after the office of the President of the Republic of Poland is vacated (Article 8).

35 i.e., "1) death; 2) renunciation of the mandate; 3) expiry of the mandate of the Deputy or Senator; 4) appointment of the judge to another judicial post, except for the appointment of the judge of the district court to the post of the judge of the circuit court, the military judge of the garrison court to the post of the judge of the military circuit court or the judge of the voivodship administrative court to the post of the judge of the Supreme Administrative Court; 5) expiry or termination of the judge's service relationship; 6) when the judge retires or is retired."

36 ECtHR, [Wałęsa v. Poland](#), no. 50849/21, 23 November 2023, para. 329.

37 The decision of the Committee of Ministers of the Council of Europe adopted at its 1468th meeting can be consulted here: <https://www.consilium.europa.eu/pl/meetings/>. Another consequence was the NCJ being suspended from membership in the European Network of Council of the Judiciary (ENCJ) on 17 January 2018 in light of its lack of actual and perceived independence.

23. In February 2024, the Ministry of Justice of Poland presented an action plan aimed at “restoring the rule of law” in Poland.³⁸ The main areas of reform concern the NCJ, the Supreme Court, the Constitutional Tribunal, and the separation of the office of the Minister of Justice and the Prosecutor General. With respect to the NCJ specifically, the authorities aim to “*eliminate the influence of politicians on the composition of the National Council of the Judiciary...*” and the Bill “*...introduces the principle that judge members of the [NCJ] (15 out of 25 members) will be elected by persons of equal rank (other judges) in a universal and secret ballot.*” The action plan also notes a longer-term and more general reform of the NCJ with respect to, among other things, the issue of the status of judicial nominations made on the recommendation of the NCJ in the years 2018-2023.
24. The Explanatory Report to the Bill states that the primary objective of the proposed amendments, is to “*...restore the provisions regulating the method of selecting judges to the National Council of the Judiciary to content that is consistent with the Constitution of the Republic of Poland and to ensure the independence of the National Council of the Judiciary from the legislative and executive branches of government in the procedure for appointing judges.*”³⁹
25. The Bill contains 6 Articles. Article 1 repeals Articles 9a (election of 15 judge members by the Sejm for a common term of office), 11a-11e (on procedure for nomination, selection by parliamentary fractions, election and replacement of judge members before expiry of term of office) introduced by the 2017 Amendments. The Bill supplements the 2011 Act on the NCJ, as amended, with Articles 11f to 11u which provides for a new composition of the NCJ and procedure for nomination of candidate judges and election by their peers. The Bill also aims to amend Article 14 and adds Article 22a, which aims to establish a new body, the “Social Board” (see Sub-Section III.7 below). Articles 2-5 are transitional provisions that provide for the “end of activities” of the persons elected by the Sejm to sit on the NCJ under Article 9a (Article 2), specific provisions for the first election of the judge members of the NCJ and for convening the first meeting of the newly composed NCJ (Article 3), the status of cases initiated but not concluded by the NCJ in its current composition (Article 4) and the modalities of appointing the “Social Board” (Article 5). Article 6 provides that the Bill will enter into force 14 days after promulgation by the President of the Republic of Poland.

3. GENERAL COMMENTS ON THE SCOPE OF THE BILL

26. As underlined in previous ODIHR opinions on judicial reform in Poland in 2017-2023, while every state has the right to reform its judicial system, such reforms should always comply with the country’s constitutional requirements, adhere to the rule of law principles, be compliant with international law and human rights standards, as well as OSCE commitments. Accordingly, and as emphasized by the ECtHR and the CJEU, any reform of the judicial system should not result in undermining the independence of the judiciary and its governing bodies and should comply with rule of law principles and guarantees of judicial independence.⁴⁰ These underlying principles should guide the

38 See: [Polish Minister of Justice presents Action Plan for restoring the rule of law - Ministry of Justice - Gov.pl website \(www.gov.pl\)](https://www.gov.pl/web/ministry-of-justice/polish-minister-of-justice-presents-action-plan-for-restoring-the-rule-of-law).

39 See the Explanatory Report to the Bill available here: [Bill amending the Act on the National Council of the Judiciary - Chancellery of the Prime Minister - Portal Gov.pl \(www.gov.pl\)](https://www.gov.pl/web/chancellery-of-the-prime-minister/bill-amending-the-act-on-the-national-council-of-the-judiciary).

40 See ECtHR, *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, para. 323, where the Court emphasized that “*the Convention does not prevent States from taking legitimate and necessary decisions to reform the judiciary [...] and agrees with the view expressed by, inter alia, the United Nations Special Rapporteur on the Independence of Judges and Lawyers that the power of a government to undertake reforms of the judiciary cannot be called into question. However, any reform of the judicial system should not result in undermining the independence of the judiciary and its governing bodies*”; and CJEU, *Repubblika v Il-Prim Ministru* [GC], C-896/19, 20 April 2021, para. 63, where the CJEU concluded that “*A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU*”.

legislative choices to be made by the Polish legislators to execute the judgments against Poland concerning judicial independence.

27. In particular, it is important that the legislative options chosen to reform the NCJ are duly justified in light of international law and human rights standards, and that the legal drafters do not lightly invoke the existence of exceptional circumstances to resort to extraordinary measures, as this would run the risk of setting a precedent whereby a changing political majority, which did not approve of the reform, would be tempted to proceed the same way.⁴¹ Avoiding the dangers of setting such a precedent is an important task, and here it is crucial to ensure that only compelling reasons and justifications for doing so are recognized. Regarding the scope of any precedent that might be set, it is a significant consideration that Polish authorities were called upon to “*rapidly elaborate measures*” to restore the independence of the NCJ through “*introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ*” in the recent *Wałęsa* pilot judgment of the ECtHR, which built upon a series of ECtHR and CJEU decisions, since these supranational courts are not affected by shifting political majorities in one of their member states. Nevertheless, there is further danger that rapid legislative changes without a proper, inclusive and participatory process and appropriate transitional period may be perceived to be used by the political majority to change the composition of the NCJ to its advantage.⁴² However, regarding the reform under review, the choice of new NCJ judge members is to be made not by the political authorities but, as the Bill proposes, by judges themselves, who will elect candidates to fill these vacancies.
28. As noted above, ODIHR acknowledges that a more comprehensive and in-depth reform would be needed to address fundamental issues pertaining to the rule of law in Poland as shown in previous ODIHR opinions and the above-mentioned abundant caselaw of the ECtHR and the CJEU and various reports and analyses issued by international and regional bodies. In its previous opinions, ODIHR warned against numerous, frequent and piecemeal amendments to legislation on the judiciary which may raise doubts as to whether there is any thorough and coherent policy underpinning the reform process and may create legal uncertainty.⁴³ As specifically noted by the CCJE, too many changes within a short period of time should be avoided if possible, especially in the area of administration of justice.⁴⁴ At the same time, there is urgency in reforming the NCJ since as underlined by the ECtHR, “*the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuates the systemic dysfunction as established above by the Court and may in the future result in potentially multiple violations of the right to an ‘independent and impartial tribunal established by law’, thus leading to further aggravation of the rule of law crisis in Poland*”.⁴⁵ In several of its judgments, the ECtHR has called upon Poland for “*rapid remedial action*”⁴⁶ and to “*rapidly elaborate measures*” to address defective

41 *Ibid.* para. 59 (2019 ODIHR Opinion on Moldova). See also UN Special Rapporteur on the Independence of Judges and Lawyers (UNSRJL), *2005 Annual Report*, UN Doc E/CN.4/2005/60 (2005), para. 45.

42 The Venice Commission raised such a concern in a different context in relation to proposed reforms of the judicial council of Georgia in circumstances where the choice of new NCJ members was to be made by the political authorities; see Venice Commission, [CDL-AD\(2020\)016](#), *Armenia - Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court*, para. 38.

43 See e.g., ODIHR *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (proposed by the President, as of 26 September 2017), 13 November 2017, para. 149; and ODIHR *Urgent Interim Opinion on the Bill Amending the Act on the Supreme Court and Certain other Acts of Poland* (as of 16 January 2023), 25 January 2023, para. 104.

44 See CCJE, *Opinion no. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy*, para. 45.

45 See ECtHR, *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022, para. 318.

46 See ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, no. 49868/19 and 57511/19, 8 November 2021, para. 353.

- procedure for judicial appointments including by restoring the independence of the NCJ,⁴⁷ as also echoed by other regional and international bodies.⁴⁸
29. In light of the foregoing, it is demonstrated that the need to reform the NCJ and to review the composition and modalities of election of the NCJ's judge members is urgent, as the passing of time simply leads to the perpetuation of the systemic flaws of the judicial system and to further potential violations. The Action Plan presented by the Minister of Justice and the regulatory impact assessment that accompanies the Bill tend to suggest that there is a certain coherence and willingness to carry out a more comprehensive and in-depth reform, including of the NCJ, in the longer run. Consequently, it would appear acceptable under the current circumstances in Poland to consider a staggered approach to judicial reform, providing that the adoption of the Bill is accompanied by a broader, meaningful, inclusive and participatory legislative reform process addressing the structural and systemic deficiencies of the judicial system in a more comprehensive, in-depth and systematic manner.
30. Finally, it is important to acknowledge at the outset that by reinstating the principle of s/election of judge members of the NCJ by their peers, the Bill addresses one of the fundamental deficiencies of the Polish justice system and is to be welcome. In addition, a number of provisions of the Bill contain positive aspects that address some of the recommendations made by ODIHR in its 2017 opinions, particularly with respect to:
- introducing measures to ensure that judges from first instance courts (district courts) are also represented among the judge members of the Judicial Council, while respecting a certain proportion between all instances of courts and all branches of the judiciary;
 - increasing the openness and transparency of the election of the judge members; and
 - enhancing the public inclusion in the processes of the NCJ, which is done through the establishment of the Social Board contemplated in the Bill, as an advisory body to the NCJ (see Sub-Section III.7 below).
31. At the same time, a number of recommendations from the 2017 Opinion remain unaddressed, for instance with respect to **the requirement of gender balanced composition of the NCJ** to be taken into account throughout the nomination and s/election process, as well as the need **to ensure the openness, transparency and inclusiveness of the modalities of selecting and appointing/electing the other, non-judge members of the NCJ**, which could deserve further attention in the Bill or at least in future amendments to the 2011 Act. In particular, **the involvement of external autonomous entities/bodies (e.g., universities, non-governmental organizations, bar associations, etc.) and/or civil society representatives in the process of nominating candidates to become non-judge members of the NCJ could be considered.**⁴⁹ It would also be important to envisage providing that **the term of office of the members nominated by the Sejm and the Senate are different or at least not start at the same**

47 See ECtHR, *Walesa v. Poland*, no. 50849/21, 23 November 2023, para. 329.

48 See e.g., Venice Commission, *Poland - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws*, CDL-AD(2020)017-e, para. 61, calling upon Poland to “return to the election of the 15 judicial members of the National Council of the Judiciary (the NCJ) not by Parliament but by their peers”; *Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*, A/HRC/38/38/Add.1, 5 April 2018, para. 85; European Commission, *2023 Rule of Law Report Country Chapter on the rule of law situation in Poland*, pp. 5-6; Universal Periodic Review, *Report of the Working Group* (2023); ENCJ's *Decision* of 28 October 2021 to expel the NCJ from the ENCJ. See also Council of Europe's Group of States against Corruption (GRECO), *Second Interim Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Poland*, GrecoRC4(2023)4, paras. 41 and 47.

49 ODIHR *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, para. 51. See also ODIHR, *Recommendations on Judicial Independence and Accountability (Warsaw Recommendations)*, October 2023, para. 6; and Venice Commission, *Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary in Albania*, CDL-AD(2016)009, 14 March 2016, paras. 15-16.

time, in order to safeguard the independence of the NCJ and protect it from any or any perceived political influence represented by the majority of the selection/appointing body, and no renewal of the Councils members should take place following parliamentary elections.⁵⁰ The Bill is also silent with respect to **potential mechanisms to strengthen the accountability of the NCJ as an essential element to rebuild public trust in this institution**. Regarding this last point, the recently published ODIHR Warsaw Recommendations along with the CCJE Opinion no. 24 (2021) could serve as useful guidance (see further elaboration on some of the above-mentioned gaps in below Sub-Sections).

4. COMPOSITION OF THE NATIONAL COUNCIL OF THE JUDICIARY

4.1. Representativeness of the Judiciary at Large

32. Proposed Article 11f (1) provides that the fifteen judge members should include one Supreme Court judge, two appellate court judges, three regional court (*sąd okręgowy*) judges, six district court (*sąd rejonowy*) judges, one military court judge, one Supreme Administrative Court judge, and one regional administrative court judge. This provision will help ensuring a better representation of the judiciary at large, including judges from first level (district) courts, in line with international recommendations and good practices.⁵¹

4.2. Gender and Diversity Considerations

33. The *ODIHR Warsaw Recommendations* (2023) emphasize that the rules on the composition of judicial councils or similar bodies and on the selection and appointment of their members should be designed in a way that ensures gender balance and diversity.⁵² *CCJE Opinion No. 24 (2021) on the evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems* also expressly state that composition of the judicial council should reflect “*diversity of gender and regions*”.⁵³
34. The Bill is silent on how gender-balanced representation will be ensured and diversity will be promoted throughout the nomination and election process. To achieve such a goal, it is recommended that gender requirements be introduced in both the nomination process to identify candidates, as well as in the respective rules and procedures governing the process of electing judge members of the NCJ by judges.⁵⁴ While it is recognized that it may be challenging to ensure gender balanced nominations, it would be beneficial for the legislation to provide clear guidance in this respect. This could be achieved e.g., by requiring that two nominees of each sex for candidates nominated by the groups of judges

50 See ENCJ, [Compendium on Councils for the Judiciary](#) (2021), p. 8.

51 See e.g., ODIHR, [Recommendations on Judicial Independence and Accountability \(Warsaw Recommendations\)](#), October 2023, para. 2. See also ENCJ, [Compendium on Councils for the Judiciary](#) (2021), p. 6, which recommends the “*the widest possible representation of courts, instances, levels and regions, as well as diversity of gender*”.

52 ODIHR, [Recommendations on Judicial Independence and Accountability \(Warsaw Recommendations\)](#), October 2023, para. 3; see also para. 40, which provides: “*Executive, legislative and judicial authorities should adopt measures to ensure gender parity in judicial self-governing bodies and in senior positions in the judiciary*”. See also ODIHR publication “[Gender, Diversity and Justice: Overview and Recommendations](#)” (2019); and the OSCE Athens Ministerial Council Decision on Women’s Participation in Political and Public Life (2009), which calls on participating States to “*consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies*”.

53 See *CCJE Opinion No. 24, Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, 2021, para. 30. See also ENCJ, [Compendium on Councils for the Judiciary](#) (2021), p. 6; and [Beijing Platform for Action](#), Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), para. 190 under Strategic Objective G.1. “*Take measures to ensure women’s equal access to and full participation in power structures and decision-making*”, which urges states to establish the goal of gender balance in the judiciary.

54 See e.g., similar recommendation made in the context of nominating and electing the members of the Disciplinary Commission in charge of investigating disciplinary cases against judges, in ODIHR-Venice Commission, [Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#) (2014), para. 73.

are proposed⁵⁵ and/or adapting voting modalities.⁵⁶ For instance, instead of selecting the longer-serving judge in case of a tie in the voting results (Article 11f(3)), the tie-breaking rule could first contemplate the selection of the candidate from the under-represented sex if the two candidates are not of the same sex. Public authorities should consider adopting similar measures to ensure the adequate representation of minorities within judicial self-governing bodies.⁵⁷ **It is recommended that the Bill integrates specific guidance and/or offers modalities throughout the process of nominating candidates and electing the judge members of the NCJ to ensure gender balanced composition and adequate representation of diverse groups.**

4.3. Other Comments on the Composition of the National Council of the Judiciary

35. It is acknowledged at the international level that while judicial councils or other similar independent bodies should be composed of at least a small majority of judge members elected by their peers, they should not be composed completely or over-prominently by members of the judiciary, so as to prevent self-interest, self-protection, cronyism and also the perceptions of corporatism.⁵⁸ In that respect, the composition of the Judicial Council as envisaged in Article 187 of the Constitution and in the 2011 Act ensures a mixed membership with representatives of the judiciary and non-judicial members. At the same time, international and regional bodies, including ODIHR, generally recommend a greater inclusion of lay members in such bodies to avoid the risk of corporatism and add a certain level of external, more neutral control.⁵⁹ The ODIHR Warsaw Recommendations (2023) specifically recommend judicial councils to “*have a pluralistic composition with a diverse representation of legal professionals, including law professors, representatives of the Bar, and experienced and respected members of civil society with a demonstrated long record of fostering judicial independence and accountability*”.⁶⁰ While acknowledging that such a change in the composition of the NCJ would require an amendment to Article 187 of the Constitution since membership of legal professionals or lay members is not contemplated therein, such an option should be kept in mind should a constitutional reform be possible and undertaken in the future.
36. As ODIHR noted in its 2017 Opinion, regional and international bodies, such as the CCJE, GRECO, the Venice Commission and the UN Special Rapporteur on the Independence of Judges and Lawyers, have questioned the practice of having active members of parliament or of the executive, especially the Minister of Justice, sit on judicial councils at all.⁶¹ At the same time, any change in this respect would in principle

55 For instance, in cases where public bodies or organizations nominate candidates for appointment, certain countries have introduced an obligation to always propose two nominees, a woman and a man (e.g., the example in Denmark, Appendix IV to the [Explanatory Memorandum on CoE Recommendation CM/Rec\(2003\)3](#)).

56 See e.g., ODIHR-Venice Commission, [Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic](#) (2014), footnote 72, suggesting for instance to state in the Draft Law that each elector is required to vote for at least one candidate from list A (one gender) and one candidate from list B (other gender).

57 See ODIHR, [Recommendations on Judicial Independence and Accountability \(Warsaw Recommendations\)](#), October 2023, para. 40.

58 See e.g., CCJE, [Opinion no. 24 \(2021\) on the Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems](#), para. 20. See also e.g., Venice Commission, [Opinion on the Seven Amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones](#), CDL-AD(2014)026-e, paras. 68-76.

59 See [ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland](#), 5 May 2017, para. 38; and ODIHR, [Recommendations on Judicial Independence and Accountability \(Warsaw Recommendations\)](#), October 2023, para. 2. See also, Venice Commission, [Rule of Law Checklist](#), CDL-AD(2016)007, para. 82; and ENCI, [Compendium on Councils for the Judiciary](#) (2021), p. 6.

60 ODIHR, [Recommendations on Judicial Independence and Accountability \(Warsaw Recommendations\)](#), October 2023, para. 2.

61 See ODIHR, [Recommendations on Judicial Independence and Accountability \(Warsaw Recommendations\)](#), October 2023, para. 3; and [ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland](#), 5 May 2017, para. 51. See also [Compendium on Councils for the Judiciary](#) (2021), p. 7, noting that “*the presence of the Minister for Justice as a member of the Council for the Judiciary is not considered appropriate as it clearly entails the risk of the executive power affecting the debates and choices made by the judicial order and may effectively constrain the frankness of debate and discussions*”.

require amendments to the Constitution of Poland.⁶² Should such an option be pursued and become feasible in terms of majority required for constitutional reform, it would also be advisable **to consider introducing in the Constitution certain safeguards to further strengthen judicial independence, including the independence and impartiality of the NCJ, and ultimately to prevent potential democratic backsliding in the future.**

37. Finally, as underlined in the ODIHR Warsaw Recommendations (2023), for the purpose of gaining and maintaining the trust of society, **judicial councils and other self-governing bodies should develop a culture of accountability**, meaning that they should account for their actions, even without a legal duty to do so.⁶³ In particular, **they should make public as wide a range of information as possible, engage in frequent and regular dialogue with civil society, the media and the public at large, and the members of judicial councils should be subject to disciplinary proceedings, presenting the same procedural guarantees as for those applicable to judges subject to such proceedings.**⁶⁴

RECOMMENDATIONS

To consider introducing new provisions in the Bill (or in future amendments to the 2011 Act on the NCJ) to further enhance the independence, impartiality and accountability of the NCJ including by:

- ensuring the openness, transparency and inclusiveness of the modalities of selecting and appointing/electing the *non-judge* members of the NCJ;
- providing that the term of office of the members nominated by the Sejm and the Senate are different or at least not start at the same time;
- considering including mechanisms to strengthen the accountability of the NCJ as an essential element to rebuild public trust in this institution;
- should constitutional reform be contemplated, revising the composition of the NCJ to ensure a more diverse representation of legal professionals, including representatives of academia, representatives of the Bar, civil society with relevant experience and demonstrated record of fostering judicial independence and accountability, while ensuring that a majority of the members are judges appointed by their peers, which should be explicitly provided; and reconsidering having members of parliament or of the executive sit on the NCJ at all or at least limit the scope of their powers.

5. ROLE OF THE NATIONAL ELECTORAL COMMISSION

38. Article 1 of the Bill introduces a new Article 11g which accords a central role to the National Election Commission (NEC) for supervising the conduct of the election of judge members to the NCJ. The Bill provides that the election shall be ordered by resolution of the NEC published in the Official Journal (Article 11g (1)). All the key aspects of the

⁶² Another option could be to consider limiting the powers of the Minister of Justice as done, for instance, in Moldova where s/he is an ex officio member of the Judicial Council but cannot vote on matters regarding career, discipline, sanction and dismissal of judges (see Article 24 [LP947/1996 \(legis.md\)](#)).

⁶³ ODIHR, [Recommendations on Judicial Independence and Accountability \(Warsaw Recommendations\)](#), October 2023, para. 9.

⁶⁴ *Ibid.* paras. 9-14.

electoral process are set out in a Resolution that the NEC adopts and publishes no later than four months before the expiry of the joint term of office of the judge members of the NCJ, which shall include a number of essential information including the deadline for candidate nomination (21 days from the date on which the resolution is adopted and no later than two months before the election date) but also a specimen nomination form for candidates and a specimen list of judges supporting nomination. This means that such needed documentation and specimens will be prepared early enough to be conducive for ensuring the due process.

39. The NEC shall verify the correctness of nominations of candidates for judge members of the NCJ (Article 11k (1)). A resolution of the National Electoral Commission refusing to accept the nomination of a candidate for a member of the Council may be appealed by the attorney to the Supreme Administrative Court within three days from the date the resolution is published (Article 11k (8)). The NEC should then announce in the NEC Public Information Bulletin the list of candidates and related information. The NEC also oversees the preparation of ballots (Article 11n) and shall hold a public hearing of the candidates (Article 11o), which shall be conducted by the Chairperson of the NEC or a person authorised by him or her (see also Sub-Section III.6.2 below on public hearings). Following the vote, the NEC shall count the votes and draw up an election report (Article 11q). At the request of a judge who stood for election as a member of the Council, the NEC shall promptly make available for inspection documents related to the election (Article 11r).
40. The modalities of election of the judge members of the NCJ prior to the 2017 Amendments provided that the assemblies of judges of a given level of jurisdiction were to elect the judge members from the respective level of jurisdiction.⁶⁵ The Bill does not reinstate the previous system. The Explanation of the Draft Law does not provide the *rationale* for such a legal choice, although such election modalities are not *per se* against the OSCE and CoE recommendations. Overall, the election process as contemplated in the Bill appears extremely and unnecessarily complicated. It could be organized instead within the judiciary as it used to be the case before the 2017 Amendments, unless there exist specific justifications for not doing so.
41. It is noted that currently, the NEC consists of two judges nominated for nine years by the Constitutional Tribunal and the Supreme Administrative Court and seven members nominated for a four-year term by political parties in proportion to their representation in the *Sejm*. No parliamentary group can nominate more than three members. The political appointees for the NEC must qualify as a judge *or* have a professional or academic legal background. Until the beginning of 2020, the NEC was composed of nine active or retired judges appointed by the President, with three members nominated from each of the Constitutional Tribunal, Supreme Court and Supreme Administrative Court. While it goes beyond the scope of this Urgent Interim Opinion to assess to what extent the NEC is an independent and impartial body, it is fundamental that this body fulfils the requirements of independence and impartial functioning to ensure the guarantees of a process that respects transparency, rule of law, and aims to uphold the independence of the judiciary. As underlined by ODIHR in its Limited Election Observation Mission Final Report on the Parliamentary Elections that took place on 15 October 2023, “[t]he election administration generally enjoyed the trust of most ODIHR LEOM interlocutors.

65 2011 Act on the NCJ, as in force until 17 January 2018.

However, some raised questions about their impartiality due to the more political composition of the NEC.⁶⁶ It is also noted that the NEC consists of only men.⁶⁷

42. Whatever the body in charge of supervising the conduct of the election of judge members to the NCJ, it is important that such a body presents all guarantees of independence and impartiality. In any case, with the expansion of the NEC's functions in this field, it should also be given sufficient human and financial resources to carry out its additional mandate without any hindrances (see also additional comments in Section 6 below regarding the publication of list of nominating judges by the NEC, the hearing of candidates by the NEC and the voting modalities).

6. NOMINATION AND ELECTION OF JUDGE MEMBERS OF THE NATIONAL COUNCIL OF THE JUDICIARY

43. At the outset, as noted above, it is welcome that the Bill reinstates the principle of s/election of judge members of the NCJ by their peers, which addresses one of the fundamental deficiencies of the Polish justice system as underlined in the caselaw of the CJEU and the ECtHR, as well as in previous ODIHR Opinions.

6.1. Nominating Entities

44. The nomination process is laid out in Article 1 of the Bill in a detailed manner (proposed new Articles 11i and 11j of the Act on the NCJ) and presents a number of features that aim at ensuring the openness and transparency of the process. Indeed, all documents are available to the public, including the lists of judges supporting the nominations (Article 11l). A public hearing of all the candidates is open to the public, and is broadcasted and recorded using audio and video recording equipment, and its recording shall be published (Article 11o). This is overall in line with the recommendations made in previous opinions to consider modalities for ensuring greater openness and transparency of the process.⁶⁸
45. According to proposed Article 11i (1), the right to nominate a candidate judge member of the NCJ requires the support of 10 judges among all eligible judges, except regional court (*sąd okręgowy*) judges who are nominated by 25 judges and 40 judges in the case of a district court (*sąd rejonowy*) judge. These groups may only nominate one candidate for membership in the NCJ (proposed Article 11i (2)). Retired judges shall not have the right to support the nomination of a candidate for a judge member of the NCJ (proposed Article 11i (3)). On the basis of the proposed changes, the nomination process for the judge members would solely lie with the judiciary. In contrast, Article 11a of the 2011 Act, as amended in 2017, provides that the Supreme Bar Council, the National Council of Legal Advisers, the National Council of Prosecutors at the Prosecutor General, universities and a group of at least 2,000 citizens could nominate candidates.
46. Proposed Article 11k provides that the NEC shall verify the correctness of nominations of candidates. In this respect, it requests the Minister of Justice, the first President of the Supreme Court, and the President of the Supreme Administrative Court to provide information on whether the candidate is a judge who is eligible to stand for election as a judge member of the NCJ (see Sub-Section 8.2 below), and whether the persons supporting the nomination are judges eligible to support a candidate for a member of the NCJ (Article 11k (2)). It is important that the NEC may be able to verify from a reliable

66 See ODIHR, [Republic of Poland - Limited Election Observation Mission Final Report, Parliamentary Elections of 15 October 2023](#) (27 March 2024), p. 8.

67 *Ibid.*

68 See e.g., [ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland](#), 5 May 2017, para. 51.

source whether a judge is eligible to stand for election and whether a judge is eligible to support a candidate. At the same time, the CCJE has expressly stated that it “*does not advocate [for] systems that involve political authorities such as the Parliament or the executive at any stage of the selection process [of judge members of Judicial Councils]*”.⁶⁹ **As the Bill is intended to address the adverse impact on the independence of the judiciary in Poland as a result of, among others, the politicization of the NCJ, it would be advisable not to involve the executive power in this matter.** At the same time, if the Ministry of Justice is the only holder of reliable information on the status of judges and given that this role of verifying the eligibility status of judges would be rather formal, such an involvement could be considered acceptable as a transitory measure for first election of judge members by the judiciary after the entry into force of the Bill.

47. As it is, the contemplated process requires submissions in written form. While this may serve a particular purpose, the authorities could consider digitalizing the nomination and voting process for the purpose of effectiveness and efficiency, as long as safeguards remain in place to respect and uphold the integrity of the nomination and election process.

6.2. Hearing of Candidates

48. Proposed Article 11o provides that the NEC shall hold a public hearing of the candidates for judge members for the NCJ at least seven days prior to the elections. The procedure thereto foresees an announcement of the list of candidates and provides the possibility for natural persons to submit applications to take part in the public hearings, subject only to limitation for reasons related to the size of the premises or for technical reasons. Any individual can apply to participate in the public hearing, provided they submit their first and last names, residential address, specify the candidates they wish to address, and indicate the number of questions they intend to ask (Article 11o (4)). These hearings shall be broadcasted and recorded.
49. In principle, this is a welcome feature of the Bill that may contribute to enhanced openness and transparency of the process, as also recommended in the 2017 ODIHR Opinion.⁷⁰ At the same time, the purpose of such hearings is unclear. It is presumed that they aim to offer an opportunity for the candidates to inform other judges/voters and allegedly the public about their platforms. While such transparency is desirable for public confidence in the candidates and the process, the modalities of such public hearings may to some extent appear to unnecessarily burden the process. This model may also prove unpractical for candidates/voters from remote locations who would need to travel to the location of the NEC to participate in the public hearing. Also, the possibility to participate remotely is not expressly provided.
50. It is also unclear what the scope of the hearings would be, especially as the membership in the judicial council is not tied to any particular merit criteria in the Bill or the current 2011 Act on the NCJ, as amended,⁷¹ nor to the presentation of a programme of the candidate that would have been made public in advance, ahead of the public hearing. The kind of information the candidates are expected to provide and types of questions that may be asked to them are not clearly determined. During the course of the public hearing, participants may also wish to direct questions to a different candidate than initially anticipated and may want to ask follow-up inquiries.

69 See CCJE, *Opinion No. 10 (2007) on the Council for the Judiciary at the Service of Society*, para. 31.

70 See e.g., *ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, para. 51.

71 See the Act of 12 May 2011 on the National Council of the Judiciary, as amended, available at: <[Legal acts \(krs.pl\)](#)>.

51. **In any case, the hearing of judge candidates should be held with due consideration of the principles of an objective, fair, and orderly hearing process, respect for judicial independence and for the right of the candidate to the protection of their honour, privacy and reputation as guaranteed under Article 17 of the ICCPR and Article 8 of the ECHR.** For that purpose, it may also be useful for the Bill or in subordinate documents that may be developed to regulate the process, to specify the nature of questions that may not be asked to the candidates during the public hearing, e.g., information pertaining to the private and family life of the candidate or health status.
52. More generally, it may be questionable to include such overly detailed provisions regarding the public hearing in the 2011 Act itself. The technical issues related to public hearings could be removed from the Bill while empowering the NEC to regulate this aspect in its bylaws. This approach would contribute to enhancing the clarity of the legal text and enable the NEC to improve the technical issues if necessary in a faster and more flexible manner.

6.3. Voting Modalities for the Candidates to the NCJ

53. Article 11f(2), which the Bill proposes to insert into the 2011 Act, provides that the right to elect the judge members shall be vested in judges of the Supreme Court, judges of common courts, judges of military courts and judges of administrative courts who are serving judges on the election date. Each judge has only one vote (Articles 11f(2)), meaning that a judge member can be elected with the plurality of votes and no majority is needed. The wording of the provision is rather unclear. Unless an issue of translation, it is uncertain whether judges of a certain category or level of court may only elect candidates from the same category or level of court they belong to, or may elect a judge from any category or level. If the former, such a modality may be unduly inflexible since judges from a given level or category may be willing to be represented within the NCJ by a judge member from another category or level. If the latter, it cannot be excluded that for a given slot, only a few judges will vote. Such voting modalities may be problematic in terms of the legitimacy of the mandate of the elected members, both in the eyes of other judges and the general public. To prevent this risk, the voting modalities could be adjusted, for instance by providing that each judge may cast one vote per each level of the judiciary although this also runs the risk of uninformed vote as the voters may not necessarily know the candidates. **It is recommended for the legal drafters to re-assess and clarify the proposed voting modalities while ensuring that the choice made ensures the legitimacy of the judges who are elected as judge members of the NCJ.**
54. The Bill is silent in relation to the election of the six non-judge members made by the Sejm and the Senate (Article 9 of the 2011 Act on the NCJ) and the appointment of one member by the President of the Republic. With respect to the election by the Parliament, the Bill could provide that **non-judge members are elected by a qualified majority of the respective chambers of the Parliament to ensure significant support or alternatively, as done in some other countries, by providing in the legislation that representatives of the Parliament should be equally representative of the majority and the opposition.**⁷² Generally, such qualified majorities aim to ensure broad agreement

⁷² It is noted that, currently, two out of four deputies of the *Sejm* belong to the parliamentary majority, as do the two representatives of the Senate to the Judicial Council; see <<http://www.krs.pl/pl/o-radzie/sklad-i-organizacja>>. Pursuant to Article 26-31 of the Rules of Procedure of the *Sejm* (available at <<http://www.sejm.gov.pl/prawo/regulamin/kon7.htm>>), candidates may be proposed by the Marshal of the *Sejm* or at least 35 MPs; the representatives of the *Sejm* to the Judicial Council are chosen by an absolute majority. The two representatives of the Senate to the Judicial Council are also elected by an absolute majority with at least half of all Senators being present, among candidates proposed by at least seven Senators (see Articles 92-95 of the Rules of Procedure of the Senate, available at <<https://www.senat.gov.pl/o-senacie/senat-wspolczesny/wybrane-akty-prawne/regulamin-senatu/>>). See *op. cit.* footnote 7, par 32 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); and *op. cit.* footnote 22, par 32 (2007 Venice

and consensus, ensuring in principle that the majority will seek a compromise with the minority. However, such a mechanism also increases the risk of a stalemate for which an effective anti-deadlock mechanism should be devised.⁷³ More generally, it is also recommended to consider involving external autonomous entities/bodies (e.g., universities, non-governmental organizations, bar associations, etc.) and/or civil society representatives in the process of nominating candidates to become non-judge members of the council.⁷⁴

6.4. Appeals against the Resolutions of the NEC on Nominations and Election of a Judge Member

55. Draft Article 11k (7) provides that a resolution adopted by the NEC refusing to accept the nomination of a candidate together with the reasons shall published in the Public Information Bulletin of the NEC and shall also be served on the attorney (one of the nominating judges nominated by the candidate by power of attorney, Article 11j (4)). The NEC resolution refusing the nomination may be appealed to the Supreme Administrative Court within three days of publication in the Bulletin. The Supreme Administrative Court will consist of a bench of three judges who will examine the appeal in closed session and can either amend or uphold the resolution. There is no legal remedy against this ruling.
56. It is welcome that a legal remedy is provided to those judges whose nominations may have been rejected. In general, in electoral matters, a time limit of three to five days both for lodging appeals and making rulings seems reasonable for decisions to be taken before an election in order not to unduly delay the election process while also being long enough to make an appeal possible and guarantee the exercise of rights of defence.⁷⁵ The three-day time limit to lodge the appeal against the resolution of the NEC is rather short but not *per se* inconsistent with international good practices in electoral matters. Article 11k (7) implies that the resolution of the NEC should be reasoned, which is essential to allow the candidates to challenge it effectively. It is however unclear what the scope of assessment by the Supreme Administrative Court is and whether this would refer to a review on both substantive and procedural grounds, which should be the case, although this is allegedly addressed in the Law of 30 August 2002 on Proceedings before Administrative Courts cross-referenced in Article 11k (10).⁷⁶ It is also unclear what consequences an ‘amended’ resolution would have, presumably that the nomination will be valid. **These matters should be clarified to ensure an effective remedy.**
57. Draft Article 11s (1) provides that a judge who stood for election as judge member of the NCJ may lodge a protest with the Supreme Administrative Court against the validity of

Commission’s Report on Judicial Appointments). See also, for instance, Article 124 of the Constitution of Croatia, which states that “[t]he National Judicial Council shall consist of eleven members, of whom seven shall be judges, two university professors of law and two members of Parliament, one of whom shall be from ranks of the opposition”, <<http://www.legislationline.org/documents/section/constitutions/country/37>>.

73 Any anti-deadlock mechanism needs to be devised carefully in order to be effective and not to be perceived as undermining an objective of seeking consensus. The primary function of the deadlock-breaking mechanism is to push the majority and the minority to find a compromise to avoid the crisis or malfunctioning of an institution; therefore such a mechanism should continue to incentivise the majority and the minority to seek an agreement, which may not be the case with rapidly decreasing a requirement for a qualified majority. The challenges of designing appropriate and effective anti-deadlock mechanisms must be acknowledged as there is no single model. Various solutions could be explored in this respect. For example, the participation in the vote could be made mandatory in order to have the required quorum. As underlined by the Venice Commission, beyond decreasing majorities in subsequent rounds of voting, which may not reach the intended goal, it is also possible to have recourse to the involvement of other, independent or more neutral institutional actors or consider establishing new relations between state institutions but each state has to devise its own formula; see Venice Commission, *Compilation of Opinions and Reports Relating to Qualified Majorities and Anti-Deadlock Mechanisms* (2023).

74 See e.g., ODIHR *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, para. 51. See also Venice Commission, *Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary in Albania*, CDL-AD(2016)009, 14 March 2016, paras. 15-16.

75 See e.g., Venice Commission, *Code of Good Practice in Electoral Matters* (2002), Explanatory Report, p. 39.

76 Available at: <[Law on Proceedings Before Administrative Courts. - OJ 2023.1634 i.e. - OpenLEX](#)>.

the election of a judge member. This right “to protest” is limited to those who stood for election. In principle, in electoral dispute matters, standing should be granted as widely as possible, at least for every candidate and for voters, although for the latter, a reasonable quorum may be imposed.⁷⁷ **Limiting the possibility to lodge “a protest” exclusively to the candidate would be a restriction of the general right to seek remedy and should be reconsidered. It would also be beneficial to specify in the Law the procedural rights of the candidate who lodges an appeal.** In addition, to ensure effective legal redress and enhance the transparency of the process, **the Supreme Administrative Court could consider holding the appeal in an open session instead of a closed one, as currently provided in Article 11k(9).**⁷⁸

58. Finally, as underlined by ODIHR in its 2023 Urgent Interim Opinion, since about 30% of the Supreme Administrative Court judges have been appointed by the reformed NCJ, it is very likely that some of them may be hearing such appeal/protest cases.⁷⁹ It is therefore probable that due to the deficient modalities of judicial appointments by the reformed NCJ, independence and impartiality of judges hearing these cases may also be questioned. As recommended before, a mechanism ensuring that only judges whose independence may not be questioned on the basis of their appointment by the reformed NCJ should be considered, for instance by requiring, at least temporarily, a minimum number of years of serving as a judge of the SAC, such as ten years.⁸⁰

7. SOCIAL BOARD

59. The Bill would introduce a new Article 22a that provides for the establishment of a Social Board attached to the NCJ, which may give opinions to the NCJ particularly in relation to appointments to judicial office. The Social Board would be composed of nine members, with six members appointed respectively by the Supreme Bar Council, National Council of Legal Counsels, National Council of Notaries, General Council for Science and Higher Education, Commissioner for Human Rights, National Council of Public Prosecutors within the Office of the Prosecutor General plus three representatives of non-governmental organizations designated by President of the Republic of Poland (Article 22a (2)). The Social Board’s composition would provide a limited form of involvement of external stakeholders, including legal professionals and civil society representatives, which may be an attempt to overcome the weakness of the NCJ membership not having such external members(see Sub-Section III.4.3 above).
60. At the same time, the establishment of a new body connected to the NCJ should be the subject of fairly careful scrutiny, considering the importance of the independence of the NCJ. In particular, if the establishment of this new body is pursued, there should be strong safeguards in place to ensure the independence, impartiality and accountability of its members, and effectiveness of its work, with clear, predefined criteria and procedure for suspending or removing members of the Social Board who would not comply with such requirements, in order to avoid the risk of potential undue external influence through this body on the work of the NCJ, or on the judiciary as a whole.⁸¹

77 See e.g., Venice Commission, *Code of Good Practice in Electoral Matters* (2002), Explanatory Report, p. 40.

78 See 2010 *ODIHR Kyiv Recommendations on Judicial Independence*, para. 22. See also, *Opinion n°17 on the evaluation of judges’ work, the quality of justice and respect for judicial independence*, para 41.

79 See *ODIHR Urgent Interim Opinion on the Bill Amending the Act on the Supreme Court and Certain other Acts of Poland* (as of 16 January 2023), 25 January 2023, in [English](#) and [Polish](#), paras. 17-18.

80 *Ibid.* para. 18.

81 See e.g., as a comparison, on the recommended safeguards pertaining to the status, composition, role and safeguards pertaining to the Public Integrity Council of Ukraine (composed of 20 members, representatives of human rights civic groups, law scholars, attorneys, and journalists) as an advisory body to the High Qualifications Commission in order to determine the eligibility of a judge or judicial candidate following the criteria of professional ethics and integrity, in *ODIHR Opinion on the Law of Ukraine on the Judiciary and Status of Judges* (2017), paras. 64-76.

8. TRANSITIONAL PROVISIONS

8.1. Removal of the Judges Elected by the Sejm to Sit on the NCJ (Article 2 of the Bill)

61. Article 2 of the Bill provides that upon announcement of the results of election of the new judge members, “*the activity in the National Council of the Judiciary of the persons elected by the Sejm to the National Council of the Judiciary under Article 9a(1) of the Law amended in Article 1 in its wording to date shall cease*”. It is noted that a previous version of the Bill (as of 11 January 2024) was mentioning the cessation of the “mandate” of the judge “members” elected by the Sejm. It is understood that the change of terminology aims to reflect the view that such persons were not elected in compliance with the Constitution and hence never hold a mandate as a NCJ judge member.⁸² It is not for this Urgent Interim Opinion to assess the constitutionality of the election/appointment of the judge members of the NCJ according to the 2011 Act as amended in December 2017 and pronounce itself on the status of such individuals as judge members of the NCJ or not. This should be a matter for the competent jurisdictions of Poland to pronounce themselves.
62. The above-mentioned caselaw of the CJEU and the ECtHR is about the lack of independence of the NCJ, and does not pronounce itself on the status of the judge members of the NCJ as a matter of Polish law. To remedy this situation, the caselaw does not specifically and explicitly state that it requires the termination of the terms of office of the sitting judge members of the NCJ as elected by the Sejm. As far as the ECtHR is concerned, the lack of such an explicit finding is consistent with the ECtHR’s commitment to subsidiarity in relation to judicial reform, with the effect that it does not prescribe to member states the means by which they are to achieve the strengthening of judicial independence and the rule of law.⁸³ However, the ECtHR when pronouncing itself on the measures to be adopted to implement its judgments with respect to Poland underlined the need to rapidly adopt measures to “*restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ*”.⁸⁴

8.1.1. Security of Tenure of Members of Judicial Councils as a Key Guarantee of Judicial Independence

63. From the international perspective, as underlined above, the CJEU, the ECtHR and various international, inter-governmental and regional organizations and bodies have recognized that the change of appointment modalities for the judge members of the NCJ and thus the composition of the council, contrary to international recommendations, have put into question the very independence of the NCJ, which constitutes a key guarantee of independence of the judiciary and of individual judges.⁸⁵ At the same time, as underlined

82 The Explanatory Report to the Bill provides the following reasoning thereto: “...*The provisions of the Law of December 8, 2017 amending the Law on the National Council of the Judiciary and certain other laws introduced a mode of election that violated constitutional norms, in particular the interruption of the then ongoing, four-year term of office of the members of the NCJ (Article 187(3) of the Polish Constitution), as well as the taking over by the Sejm of the Republic of Poland of the election of 15 judges - members of the NCJ, contrary to Article 187(1) in connection with Article 7, Article 10 and Article 186(1) of the Polish Constitution. Therefore, persons elected in an unconstitutional manner, in flagrant violation of the law, cannot at the same time invoke the constitutional protection of the permanence of the four-year term of an elected member of the NCJ (Article 187(3) of the Polish Constitution). However, in order to ensure the continuity of a constitutional body such as the NCJ, the termination of their activities shall not take place by operation of law on the date of entry into force of this Law, but on the date of announcement, by means of the announcement referred to in Article 11q, paragraph 2 of the Law amended by Article 1, of the results of the first election of judges - members of the NCJ, the regulation of which is provided for in Article 3, paragraph 1 of this Law...*”

83 See e.g., ECtHR, *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, para. 324.

84 See e.g., ECtHR, *Waleśa v. Poland*, no. 50849/21, 23 November 2023, para. 329.

85 EU Commission Recommendation 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, paras. 27-35, where the European Commission noted in this respect that “...*Until the adoption of the law on the National Council for the Judiciary, the Polish system was fully in line with these*

above, the security of tenure of the members of a judicial council is a key safeguard of its independence. In its Opinion no. 24, the CCJE dealt with security of tenure after reaffirming its previous principles on the composition and modalities of appointment of a judicial council, including the presence of a majority of peer-elected judges, to ensure that the selection of council members “*supports the independent and effective functioning of the Council and the judiciary and avoid any perception of political influence, self-interest or cronyism*”.⁸⁶ The CCJE specifically recommends that members of judicial councils should be appointed “*for a fixed time in office and must enjoy adequate protection for their impartiality and independence*”, and that, except, in cases of death, retirement or removal from office, for example as a result of disciplinary action for proven serious misconduct, a member’s term should only end upon the lawful election of a successor to ensure that the Council is able to continue exercising its duties lawfully even if the appointment of new members takes time.⁸⁷ The CCJE has also underlined “*the importance that procedures which may lead directly or indirectly to termination of office are not misused for political purposes but respect fair trial rights. In this respect, this Opinion amplifies Opinion No. 10 (2007)*.”⁸⁸

64. Article 187 of the Constitution of the Republic of Poland specifically refers to the four year term of judge members of the NCJ, which in principle protects at the constitutional level the security of tenure of the judge members of the NCJ, which is welcome. In this respect, the controversies in domestic law about whether NCJ members appointed under the 2017 Amendments should qualify for this protection should be reiterated.⁸⁹ Article 14(1) of the 2011 Act provides for an exhaustive list of termination grounds for council members i.e., in case of death; relinquishing the mandate, expiry of the mandate of deputy or senator, expiry or termination from a judge’s office or retirement as a judge.
65. The ECtHR looked at the issue of possible *ex lege* termination of the mandates of judicial council members and state practice across Europe in the case of *Grzęda v. Poland*. The ECtHR noted that early termination of judicial council membership has only happened in very few instances but that otherwise, there is no clear consensus in favour or against the possibility of legislative reform leading to such an early termination. The Court concluded that “[t]he justification of such reform in a concrete situation and the existence of safeguards preserving the independence of courts and the judiciary, including transitional provisions, are relevant factors”, underlining that “[u]ltimately, the balance between the benefit of the reform for the functioning of democratic institutions and the security of tenure plays an important role”.⁹⁰ The European Network of Councils of the Judiciary (ENCJ) has also specifically recommended that “[c]hanges to the legal framework for the operation of judicial councils should not lead to the early termination of the mandates of persons elected under the previous framework, except when the change of the legal framework aims to reinforce the independence of the council’s composition to bring it in line with European Standards”, noting that such

standards since the National Council for the Judiciary was composed of a majority of judges chosen by judges... the new rules on appointment of judges-members of the National Council for the Judiciary significantly increase the influence of the Parliament over the Council and adversely affect its independence in contradiction with the European standards.”

86 [CCJE Opinion No. 24, Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems](#), 2021, para. 27, and see further paras. 28-35.

87 [CCJE Opinion No. 24, Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems](#), 2021, paras 36-37.

88 [CCJE Opinion No. 24, Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems](#), 2021, para 38.

89 See e.g., ECtHR, [Grzęda v. Poland](#) [GC], no.43572/18, 15 March 2022, para. 312-320

90 See e.g., ECtHR, [Grzęda v. Poland](#) [GC], no.43572/18, 15 March 2022, para. 171.

reforms could otherwise be used as a justification for replacement of the judicial council in place with a new one with a certain political influence.⁹¹

66. Hence, both the ECtHR and the ENCJ suggest that early termination of membership in a judicial council in case of legislative reform is not completely excluded. However, such measures require clear justification. In this respect, the aim of reforming the legislation that contradicts international human rights and rule of law standards, the benefit of the reform in terms of judicial independence, the ultimate necessity for such changes, as well as existence of appropriate safeguards, including transitional provisions, should be taken into account to justify the reform. However, simply invoking a general objective to enhance the independence or efficiency of the judicial self-governing bodies, or bring the legal framework closer to international standards would not in themselves be sufficient to justify a termination of mandates. There should be a clear and demonstrated necessity for the reform with no other possibility than terminating the mandate of council members to remedy the situation, to achieve the aims of the reform and to ensure compliance with international norms and rule of law principles.

8.1.2. *Existence of an Arguable Right under Article 6 (1) of the ECHR and Access to a Court*

67. In light of the applicable Polish legal framework when the existing judge members of the NCJ were elected by the Sejm (in 2018 and then in 2022), such members could arguably claim an entitlement under Polish law to protection against removal from position as a judicial member of the NCJ during the four-year period.⁹² The Court in *Grzęda* held that the applicant could arguably claim in light of the domestic legal framework in force at the time of election as judge member and during term of office, “an entitlement under Polish law to protection against removal from his position as a judicial member of the NCJ during that period”.⁹³ At the same time, it could be argued that the abundant international caselaw questioning the very independence of the NCJ due to the change in the modalities of election of the judge members (including several decisions given before their election in 2022) may serve as a legitimate ground for initiating a reform, potentially impacting the term of office of elected office-holders. Furthermore, as a matter of domestic law, it is noted that the constitutionality of the 2017 Amendments authorizing the election of judge members of the NCJ by the *Sejm* is a controversial issue in light of the series of decisions of the Supreme Court in December 2019 and January 2020, followed by a resolution the joined chambers of the Supreme Court,⁹⁴ and subsequent decisions of the Supreme Administrative Court.⁹⁵
68. In any case, it remains to be considered whether the lack of access to a court in such specific circumstances, in case of *ex lege* termination of mandates of judicial members elected by the Sejm, complies with the individual rights of incumbent judge members according to Article 6 (1) of the ECHR. In general, once an applicant has demonstrated an arguable civil right – in this case the right of judicial members of the NCJ to serve for four years, there is a presumption that Article 6 of the ECHR applies, unless the government demonstrates that (i) the domestic law contains an explicit or implicit (in the latter case in particular where it stems from a systemic interpretation of the applicable

91 See ENCJ, *Compendium on Councils for the Judiciary* (2021), pp. 8-9. See also similar concerns raised in e.g., Venice Commission, [CDL-AD\(2013\)007](#), Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, paras. 71-72, where the Venice Commission, with respect to proposals to terminate the mandates of existing council members in the context of reforming the judicial council of Georgia, had raised concerns about the adoption of measures which may jeopardize the continuity in membership of a judicial council, warning that “[r]emoving all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council.”

92 *Ibid.* [Grzęda v. Poland](#) [GC], para. 268. See also ECtHR, *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, para. 109.

93 See ECtHR, [Grzęda v. Poland](#) [GC], no.43572/18, 15 March 2022, para. 268.

94 See references to decisions of the Supreme Court in [Grzęda v. Poland](#) [GC], para. 100-116.

95 See references to decisions of the Supreme Administrative Court in [Grzęda v. Poland](#) [GC], para. 117-119.

legal framework or the whole body of legal regulation) exclusion from access to a court; and (ii) the exclusion of access to a court should be “*justified on objective grounds in the State’s interest*”⁹⁶ (so-called “*Eskelinen test*” as further developed in *Grzęda v. Poland*).

69. As to the first requirement, the Court in *Grzęda* left the question open given the opposing views of the parties to the case, noting however that access to a court should be excluded under domestic law prior to the time, rather than at the time, when the impugned measure concerning the applicant was adopted, as this would otherwise open the way to abuse.⁹⁷ This is an issue that goes beyond the scope of this legal analysis as this relates to the interpretation of Polish legislation. Regarding the second requirement, to assess whether the exclusion of access to a court in case of *ex lege* termination of a public fixed-term mandate may have been justified in the specific circumstances, the Court in *Grzęda* considers whether the exclusion is in the interest of State governed by the rule of law.⁹⁸ Where the public mandate in question is membership of a judicial council, the most relevant component of the rule of law is judicial independence and specifically the independence of judicial councils (where they are established) which are responsible for judicial selection and other sensitive aspects of institutional governance.⁹⁹ The ECtHR concluded, based on the impact that replacing the *duly and lawfully* peer-elected judge members of the NCJ with judge members elected by the legislature would have on the independence of the NCJ and in turn its ability to uphold judicial independence in the legal system as a whole, that “*the exclusion of the applicant from a fundamental safeguard for the protection of an arguable civil right closely connected with the protection of judicial independence cannot be regarded as being in the interest of a State governed by the rule of law*”; it further noted that “*Members of the judiciary should enjoy – as do other citizens – protection from arbitrariness on the part of the legislative and executive powers, and only oversight by an independent judicial body of the legality of a measure such as removal from office is able to render such protection effective*”.¹⁰⁰ In *Grzęda v. Poland*, one of the determining factors was that the law itself was unjustifiable as it was undermining rule of law and judicial independence.
70. By contrast, the Bill under review seeks to restore the independence of the NCJ, reversing the negative impact of the 2017 Amendments, by reinstating the modalities of s/election of judge members of the NCJ by their peers and hence introducing stronger guarantees of independence, thereby restoring the NCJ’s ability to uphold the independence of the Polish judiciary as called upon by international courts and bodies. It should also be recalled that the ECtHR and European Commission have specifically requested the Polish authorities to rapidly adopt measures to restore the independence of the NCJ through legislative reform reinstating the election of judicial members of the NCJ by their peers.¹⁰¹ Under Article 46 of the ECHR, a member state remains free to choose the means by which it will discharge its obligations arising from the execution of the judgments of the ECtHR. It is clear from the caselaw of the ECtHR and CJEU that the NCJ would not be able to regain its independence if the current model of electing judge members by the parliament remains unchanged. As noted above, the need to reform the NCJ is urgent, as the passing of time simply leads to the perpetuation of the systemic flaws of the judicial system, judicial appointments made by the NCJ in its current composition and to further potential violations of international standards, as the abundant ECtHR and CJEU caselaw

96 See ECtHR, *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19 April 2007, para. 62.

97 See ECtHR, *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, paras. 290 and 294.

98 See ECtHR, *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, para. 326. See also ECtHR, *Żurek v. Poland*, no. 39650/18, 16 June 2022, para. 148, which states: “*the Court considers it necessary to take into account the strong public interest in upholding the independence of the judiciary and the rule of law*”.

99 See ECtHR, *Grzęda v. Poland* [GC], no.43572/18, 15 March 2022, paras. 304-308.

100 *Ibid.* *Grzęda v. Poland* [GC], paras. 326-327. See also e.g., ECtHR, *Pajqk and Others v. Poland* [GC], no. 25226/18 and 3 others, 24 October 2023, para. 139.

101 ECtHR, Judgement, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 329.

has highlighted. Given this stark distinction, there is reason to believe that the second limb of the *Eskelinen* test would be satisfied by a measure that seeks urgently to restore the independence of the NCJ, so that it will not be necessary to wait until 2026 when the current cohort of judicial members elected by the Sejm reach the end of their four-year terms.

71. Even if one of the two conditions of the *Eskelinen* test would be considered not to be fulfilled and the application of Article 6 (1) therefore not excluded in the specific circumstances of *ex lege* termination provided by the Bill, it is worth noting that the right of access to a court is not absolute and may be subject to limitations that pursue a legitimate aim, providing that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved, and that the said limitations do not reduce the access left to the individual in such a way or to such an extent that the very essence of the right of access to a court is impaired.¹⁰²
72. As underlined above, the contemplated reform pursues a legitimate aim, restoring the independence of the NCJ by changing the modalities of s/election of the judge members as called upon by international court and bodies. The abundant caselaw of the CJEU and ECtHR, in addition to the above-mentioned domestic caselaw, accompanied by multiple reports of international and regional bodies, finding that the NCJ, as it is currently composed lacks independence, provide strong justification to undertake such a reform. It remains to be assessed whether the early termination *ex lege* of council membership and the absence of access to a court to contest such a termination would be a proportional measure. From the above, there seems to be no possibility of alternatives to the early termination *ex lege* since the NCJ would not be able to regain its independence if the current model of electing judge members by the parliament remains unchanged and the NCJ continues to function in its current composition. At the same time, the rights of members of NCJ whose mandates may be discontinued to bring claims before administrative courts regarding other issues closely interlinked with the potential discontinuation of their mandate (e.g., with respect to the guarantee to return to the previous position, level of remuneration in the new position, counting the term of service towards general working experience relevant for pension etc.) should be guaranteed. This issue of excluding or limiting the right of access to a court in the specific circumstances of an *ex lege* termination due to the above-described reasons will be further elaborated in the Final Opinion.

8.1.3. Concluding Comments

73. In light of the foregoing, there is a demonstrated necessity to swiftly reform the composition of the NCJ. Reinstating the modalities of electing the judge members of the NCJ by their peers to restore the independence of the NCJ, this would avoid perpetuating the systemic dysfunction as established by European courts and break the vicious cycle of NCJ's potentially deficient decisions on judicial appointments and promotions, as well as subsequent judicial challenges. Hence, **the comprehensive overhaul of the NCJ, with possible early removal of the judges who have been elected by the Sejm to sit on the NCJ following the 2017 Amendments, contemplated by Article 2 of the Bill, appears to be a valid and justifiable policy option, as long as it remains an exceptional (one-time) measure in the given extraordinary circumstances.** To underline the exceptional nature of the proposed amendments and emphasize that they are “in the interest of a State governed by the rule of law”, **the legal drafters could consider supplementing the Bill by a Preamble elaborating the *rationale* for**

102 See e.g., ECtHR, *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, para. 120.

introducing such wide-ranging reform, including to execute the judgments of regional tribunals. The final

74. As an alternative to *ex lege* termination and in the spirit of judicial self-governance, **the legal drafters could also explore whether other viable options may exist such as a transitory measure providing for the possibility for the assemblies of judges** (those who are eligible to stand for or nominate candidates to NCJ) **to vote individually on the early removal of the judges elected by the Sejm to sit on the NCJ, as a first step before, or in parallel to an election of new NCJ members by assembly of judges. Such votes could be made with respect to all or some of the positions of judge members that may have become vacant as the result of this process.**

8.2. Ineligibility of Judges Appointed or Promoted by the President following their Nomination by the NCJ as formed pursuant to Article 9a of the 2011 Act on the NCJ

75. Article 3 (2) of the Bill deals with the question of whether judges appointed or promoted by the President following their nomination by the NCJ as formed pursuant to Article 9a of the 2011 Act (inserted by the 2017 Amendments), i.e., judges whose appointment or promotion was decided by the NCJ after its composition changed to include judicial members chosen by the Sejm, may be candidate as NCJ Judge Members. It provides that for the purpose of the first election of members following the removal of judges elected by the Sejm to serve in the NCJ pursuant to Article 9a, judges who were appointed or promoted in this way “*shall not be eligible to stand as candidates for members of the [NCJ], except for judges who returned to their judicial posts and the positions previously held, provided that they took up the positions previously held otherwise than as a result of a motion for appointment of a judge presented to the [President ... of Poland] by the [NCJ] formed pursuant to Article 9a of the Law...*” In essence, this proposed amendment aims to prevent judges who have been appointed or promoted by the newly composed NCJ following the 2017 Amendments from becoming candidates to the post of judge member of the NCJ; however, these judges can vote for a candidate. Furthermore, there is an exception, as explained below, for judges who renounce any promotion they received following a decision of the NCJ during this period.
76. This dual approach shows that the legal drafters are yet to address the status of these judges appointed or promoted by the NCJ as formed after the 2017 Amendments, an issue on which this Urgent Interim Opinion does not pronounce itself. At the same time, the Bill would statutorily entitle them to exercise certain prerogatives that pertain to judges only, thereby introducing a differential treatment between judges impacted by different types of decisions made by the NCJ since March 2018 and other judges appointed before March 2018. The impossibility of running for membership in the new NCJ for these judges impacted by different types of NCJ decisions introduces a difference in the exercise of their profession (Article 8 of the ECHR). In order to be justified, such differential treatment should be founded “*on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention*”.¹⁰³ In this case, the difference is made on factual grounds, i.e., difference between a judicial appointment or promotion carried out by the newly composed NCJ since March 2018 and those appointed or promoted before March 2018.

103 See e.g., ECtHR, *G.M.B. and K.M. v. Switzerland* (dec.), no. 36797/97, 27 September 2001; *Zarb Adami v. Malta*, no. 17209/02, 20 June 2006, para. 73.

77. It may be questioned whether as long as no determination has been made as to the status of the judges appointed or promoted by the newly composed NCJ after March 2018, a discussion that is currently pending, their respective rights and prerogatives could be reduced in the manner envisaged by the current Bill.
78. At the same time, and as mentioned above, there have been numerous judgments by CJEU and ECtHR acknowledging the serious defects in the functioning of the judiciary in Poland, which stems from the 2017 reforms, amongst others, especially with respect to judicial appointments and promotions by the newly composed NCJ as from March 2018 in light of the decisive influence of the legislative and executive powers on the composition of the NCJ, and as a consequence on the appointment of judges carried out by this body.¹⁰⁴ For these judges to be able to cast a vote, without providing a possibility to be eligible as candidate, could be seen as a temporary solution aiming to not compound further the systemic problems of the dysfunction of the Polish judicial system. Further, this would exclude the risk of having the NCJ being formed in a way that includes judge members whose legal status (as a judge in general or as a judge of a specific level of courts) according to the Polish domestic legal framework may be uncertain and whose appointments have been recognized by the ECtHR to have been made as a result of “defective procedure” that “inherently and continually affects the independence of judges so appointed”.¹⁰⁵ Indeed, it would appear unpractical and overly lengthy to postpone the election of the judge members to the NCJ according to the new rule until there is clarity as to the status of all the neo-judges and whether they should be able to stand for election to become members of the NCJ. As mentioned above, the Polish authorities have been requested to “rapidly elaborate measures to restore the independence of the NCJ through introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ” as called upon by the ECtHR, which endorsed the approach of the CoE Committee of Ministers.
79. It is noted that the legislative option would only be applicable for the first election of the NCJ in accordance with the new rules, and thus limited in time. The Bill also offers the possibility for those judges who have been promoted by the newly composed NCJ from March 2018 to voluntarily renounce their promotion in order to be eligible to stand as candidates. By not ruling out completely the candidacy of all judges promoted since 2018, the legal drafters seem to aim to limit the personal scope of the ineligibility to stand for election as NCJ judge members.
80. At the same time, it may be questioned whether excluding all these judges, even those who had been duly appointed before March 2018, is proportionate since even if their promotion could be reconsidered later on by competent Polish bodies, they would still retain their status as a judge. A less restrictive alternative could consist of allowing them to stand for election. Indeed, it would not be justified to automatically limit these members of judiciary in their right to stand for elections as judge member of the NCJ. Potential future change of their position as a result of a re-assessment or invalidation of their promotion, should not automatically alter their membership in the NCJ and it should be for the 2011 Act or other applicable legislation to clarify the consequences of a change of position during their mandate on their membership in the NCJ. This should also be clarified with respect to other changes of position such as promotion to higher courts. The alternative of letting all judges, even those appointed by the NCJ after March 2018, stand for elections with the uncertainty as to their very status as a judge and the possibility of having their status of judge member of the NCJ being challenged any time, potentially putting into question the validity of the NCJ decisions adopted by the newly composed

104 See e.g., ECtHR, Judgement, *Waleśa v. Poland*, no. 5089/21, 23 November 2023, para. 173.

105 See e.g., ECtHR, Judgement, *Waleśa v. Poland*, no. 50849/21, 23 November 2023, para. 324.

NCJ, runs the risk of perpetuating uncertainties and systemic dysfunction in the NCJ that may justify not retaining such a policy option.

81. In light of the above, **the transitory solution provided in Article 3 of the Bill may be considered objectively justified as an exceptional transitory measure. Yet, a less restrictive option would consist of providing that all judges appointed by the NCJ before its composition was changed in March 2018 are eligible, even those who were promoted or transferred after March 2018.** In that case, the applicable legislation should clarify the consequences of a potential future change of their position as a result of a re-assessment or invalidation of their promotion in terms of their membership in the NCJ. Limiting the possibility to stand for election to judges holding posts to which they were appointed by the NCJ before March 2018, would exclude (or bring to minimum) the risk of having the NCJ being composed of judge members whose legal status as a judge remains uncertain according to the Polish domestic legal framework and whose appointments have been recognized by the ECtHR to have been made according to a defective procedure that inherently affects their independence. **This approach may be justifiable as an initial, exceptional transitory measure applicable for the first election of the NCJ in its new composition, prior to resolving the much broader and more controversial issue related to the status of judges appointed or promoted by the NCJ after its composition changed following the 2017 reform.** In addition, as mentioned above, the adoption of the Bill should be accompanied by a more comprehensive reform of the judiciary to address the systemic deficiencies of the judicial system in Poland and the status of all judges appointed in the deficient procedure involving the NCJ as composed after the 2017 Amendments.

9. RECOMMENDATIONS RELATED TO THE PROCESS OF PREPARING AND ADOPTING THE BILL AND OTHER RULE OF LAW-RELATED LEGISLATIVE INITIATIVES

82. As noted above, the scale of the needed reform to address the systemic deficiencies of the judicial system in Poland is immense and requires a thorough and coherent policy underpinning the reform process to prevent a piecemeal and fragmented approach to legislative changes that may be detrimental to reform efforts. At the same time, given the urgency to address certain systemic dysfunctions in order not to further aggravate the situation, a sequenced approach to legislative reform could be justifiable in the circumstances, providing that it is accompanied by an in-depth reflection on a comprehensive reform of the judicial system that is prepared in a participatory and inclusive manner, including with active and meaningful involvement of representative of the judiciary, civil society and the public, ensuring that the contemplated policy and legislative options are debated at length.¹⁰⁶
83. Indeed, OSCE participating States have committed to ensure that legislation will be “*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*” (1990 Copenhagen Document, para. 5.8).¹⁰⁷ Moreover, key commitments specify, “[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (1991 Moscow Document, para. 18.1).¹⁰⁸
84. As done in previous opinions, ODIHR would like to reiterate that is a good practice when initiating fundamental reforms of the judicial system, for the judiciary and civil society to be consulted and play an active part in the process. With regard to the judiciary’s

106 See ODIHR, *Guidelines on Democratic Lawmaking for Better Laws* (2024), Principle 8.

107 See *1990 OSCE Copenhagen Document*.

108 See *1991 OSCE Moscow Document*.

involvement in legal reform affecting its work, the CCJE has expressly stressed “*the importance of judges participating in debates concerning national judicial policy*” and the fact that “*the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system*”.¹⁰⁹ The 1998 European Charter on the Statute for Judges also specifically recommends that judges be consulted on any proposed change to their statute or other issues affecting their work, to ensure that judges are not left out of the decision-making process in these fields.¹¹⁰ Public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.¹¹¹ Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation; the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions.¹¹² To guarantee effective participation, consultation mechanisms should allow for input at an early stage, from the initial policymaking phase *and throughout the process*,¹¹³ meaning not only when the draft is being prepared but also when it is discussed before Parliament, be it during public hearings or during the meetings of the parliamentary committees. Given the sensitivity and importance of such a wide-ranging reform, it is fundamental that all voices are heard, even those that may be critical of the proposed initiatives with a view to address the issues being raised and achieve broad political consensus and public support within the country about such a reform. Ultimately, this tends to improve the implementation of laws once adopted, and enhance public trust in public institutions in general.

85. It will be useful to initiate a more in-depth reflection of the necessary changes to avoid multiple amendments to legislation with appropriate transitional period allowing for a gradual change to prevent that it is used or perceived to be used by the political majority to reform the system to its advantage.¹¹⁴ This is notwithstanding potential imminent changes that may be required exceptionally, as mentioned above. However, in all cases, respect for the principle of judicial independence should be upheld and an open, transparent, inclusive and participatory process throughout the development of policy and legislative options should be ensured, whilst these changes should be implemented in line the constitutional provisions and norms of international law.
86. It is understood that the Bill that has been initiated by the Ministry of Justice has been subject to some form of public consultations and a number of submissions/opinions have been made by various institutional and other stakeholders, which is welcome.¹¹⁵ At the same time, based on information available, ODIHR has not been able to assess to what extent such public consultations have been inclusive and meaningful and whether contributions received have been reflected in the revised Bill or not. At the parliamentary stage, it is welcome that a public hearing was organized on 26 March 2024, in which 45

109 [CCJE Opinion no. 18 \(2015\)](#), para. 31, which states that “*the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system*”.

110 European Association of Judges, [European Charter on the Statute for Judges](#) (Strasbourg, 8-10 July 1998), para. 1.8. See also 2010 CCJE Magna Carta of Judges, para. 9, which states that “[t]he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)”; and ENCI, [2011 Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate](#), Recommendation 5, which states that “[j]udiciaries and judges should be involved in the necessary reforms”.

111 See [Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes](#) (from the participants to the Civil Society Forum organized by ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

112 See ODIHR, [Guidelines on Democratic Lawmaking for Better Laws](#) (2024), Principle 7.

113 See ODIHR, [Guidelines on Democratic Lawmaking for Better Laws](#) (2024), Principle 7.

114 See e.g., Venice Commission, [CDL-AD\(2020\)016, Armenia - Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court](#), para. 38.

115 See [Projekt \(rcl.gov.pl\)](#).

persons, including representatives of judicial associations, bar council and civil society organizations, were registered to participate.¹¹⁶ It is understood that the outcome of the public hearing will be discussed by the Sejm on 9 April 2024. This is welcome in principle.

87. The upcoming reform process relating to the judiciary, especially of this scope and magnitude, **should be open, transparent, inclusive, and involve effective and extensive consultations, including with representatives of the judiciary, professional community of judges and of lawyers, the academia, civil society organizations and the public, should allow sufficient time for meaningful discussions in the legislative body and should involve a full impact assessment including of compatibility with relevant international human rights and rule of law standards, according to the principles stated above. Adequate time should also be allocated for all stages of the policy- and law-making process.** It would be advisable for relevant stakeholders to follow such principles in future rule of law reform efforts. ODIHR remains at the disposal of the authorities for any further assistance that they may require in any legal reform initiatives pertaining to the judiciary.

RECOMMENDATION

To ensure that the upcoming reform process relating to the judiciary is based on thorough and coherent policy, evidenced by a full impact assessment including of compatibility with relevant international human rights and rule of law standards, and involves open, transparent, inclusive, effective and extensive consultations, including with representatives of the judiciary, professional community of judges and of lawyers, the academia, civil society organizations and the public, while allowing sufficient time for meaningful discussions at all stages of the policy- and law-making process.

[END OF TEXT]

116 See <[List of persons nominated to participate in the public hearing in the Sejm - Sejm of the Republic of Poland](#)>.