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**COMMISSION STAFF WORKING DOCUMENT**

**2022 Rule of Law Report  
Country Chapter on the rule of law situation in Poland**

*Accompanying the document*

**Communication from the Commission to the European Parliament, the Council, the  
European Economic and Social Committee and the Committee of the Regions**

**2022 Rule of Law Report  
The rule of law situation in the European Union**

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## ABSTRACT

Serious concerns persist related to the independence of the Polish judiciary. Since July 2021, the Court of Justice and the European Court of Human Rights have delivered rulings, confirming a series of concerns identified by the Commission in the context of the procedure under Article 7(1) TEU and previous Rule of Law reports. Under the European Semester the Council, on a proposal of the Commission, recommended to Poland to enhance the investment climate, in particular by safeguarding judicial independence. In its Recovery and Resilience Plan (RRP), Poland committed to undertake reforms of the disciplinary regime regarding judges, to dismantle the Disciplinary Chamber of the Supreme Court, and to create review proceedings for judges affected by decisions of that Chamber aimed at strengthening certain aspects of the independence of the judiciary. Serious concerns related to the independence of the National Council for the Judiciary remain to be addressed. The Constitutional Tribunal issued further rulings directly challenging the primacy of EU law, the provisions of the EU Treaties and the European Convention on Human Rights. In December 2021, the Commission opened an infringement procedure regarding the Constitutional Tribunal and its case law. Concerns regarding the functioning of the prosecution service persist.

The government finished implementing the anti-corruption programme 2018-2020 even though not all of the actions envisaged therein had been completed and no subsequent programme was announced. Key legislative tasks of the programme, such as on asset declarations and lobbying, have not been completed. Concerns exist over the broad scope of immunities for top executives who are also members of Parliament, and impunity clauses for public officials who commit the crime of abuse of office. Risks remain as regards the effectiveness of the fight against high-level corruption, including the threat of selective application of the law and impunity caused by a disparity in the treatment of corruption cases for political purposes. The independence of main anti-corruption institutions remains an issue, considering in particular the subordination of the Central Anti-Corruption Bureau to the executive and the Minister of Justice also being the Prosecutor-General.

The independence of the media regulator is statutorily guaranteed and the legislation transposing the Audiovisual Media Services Directive provided further independency safeguards. Operating licensing practices show risks to media pluralism. Further measures concerning media ownership transparency were introduced, including an obligation to provide additional information on beneficial owners. Concerns over the independence of public service media remain, including over safeguards for appointments to executive positions. The general environment for journalists continues to deteriorate. Several reported lawsuits against journalists have an intimidating effect and journalists continue to be a target of abuse. Restrictions to the right of access to public information have been introduced under the state of emergency.

Legislation carrying out significant reforms continues to be frequently adopted while bypassing procedures that provide for adequate consultations, something which Poland has committed to address through the Recovery and Resilience Plan. Recently proposed initiatives could adversely affect the civic space and there are concerns about measures limiting activities of civil society. The Supreme Audit Office operates under adverse conditions. The newly appointed Ombudsman continues to play a key role as a rule of law safeguard, despite limited resources. Civil society organisations play a crucial role in providing help to refugees arriving in very high numbers from Ukraine to Poland.

## **RECOMMENDATIONS**

In addition to recalling the need to address the serious concerns relating to judicial independence, in particular those set out in the Article 7 TEU procedure initiated by the Commission, as well as the obligation to comply with the rule of law related rulings of the ECJ and the rule of law related infringement procedures referred to in the country chapter, the commitments made under the National Recovery and Resilience Plan relating to certain aspects of the justice system and the checks and balances, and recalling the relevant country-specific recommendations under the European Semester, it is recommended to Poland to:

- Separate the function of the Minister of Justice from that of the Prosecutor-General and ensure functional independence of the prosecution service from the Government.
- Strengthen the existing integrity rules by introducing lobbying rules and a standardised online system for asset declarations of public officials and Members of Parliament.
- Ensure independent and effective investigations and prosecutions, address the broad scope of immunities for top executives and abstain from introducing impunity clauses in legislation in order to enable a robust track record of high-level corruption cases.
- Ensure that fair, transparent and non-discriminatory procedures are adhered to for the granting of operating licences to media outlets.
- Strengthen the rules and mechanisms to enhance the independent governance and editorial independence of public service media taking into account European standards on public service media.
- Ensure a more systematic follow-up to findings by the Supreme Audit Office and ensure a swift appointment of the College Members of the Supreme Audit Office.
- Improve the framework in which civil society and the Ombudsperson operate, taking into account European standards on civil society and Ombuds institutions.

## I. JUSTICE SYSTEM

The Polish justice system is separated in two main branches, administrative and ordinary judiciary. The Supreme Administrative Court and 16 administrative courts exercise control over public administration, including the lawfulness of measures of local government bodies and of territorial organs of government administration. The ordinary judiciary, supervised by the Supreme Court<sup>1</sup>, consists of three levels: 11 appeal courts, 47 regional courts and 318 district courts. Judges are appointed by the President of the Republic at the request of the National Council for the Judiciary. The Constitutional Tribunal, which adjudicates notably on the constitutionality of legislation, is composed of 15 judges chosen by the Sejm (lower chamber of the Parliament) for a term of office of 9 years. The National Council for the Judiciary is tasked by the Constitution to safeguard judicial independence. A particular characteristic of the prosecution system, which is not part of the independent judiciary, is that the Prosecutor General and the Minister of Justice are the same person. The Constitution provides that advocates and legal counsellors can self-regulate their practice.

### Independence

**The level of perceived judicial independence in Poland is now very low among the general public and continues to be very low among companies.** Overall, 24% of the general population and 19% of companies perceive the level of independence of courts and judges to be ‘fairly or very good’ in 2022<sup>2</sup>. According to data in the 2022 EU Justice Scoreboard, the perceived judicial independence among both the general public and companies has consistently decreased since 2016 (45% for the general public and 35% for companies). The perceived judicial independence among the general public has decreased in comparison with 2021 (30%), and has slightly increased or remained stable for companies (18%). The main reason cited<sup>3</sup> by the general public and companies for the perceived lack of independence of courts and judges is the perception of interference or pressure from the Government and politicians.

**Serious concerns related to the independence of the National Council for the Judiciary have not been addressed.** The European Court of Justice confirmed<sup>4</sup> that there are legitimate doubts as to the independence of the NCJ<sup>5</sup>. The Court of Justice further held that, whereas the fact that a body, such as a national council of the judiciary, which is involved in the procedure for the appointment of judges is, for the most part, made up of members chosen by the legislature cannot, in itself, give rise to any doubt as to the independence of the judges appointed at the end of that procedure, the situation may be different where that fact, combined with other relevant factors and the conditions under which those choices were made, leads to

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<sup>1</sup> The Supreme Court also supervises military courts.

<sup>2</sup> Figures 50 and 52, 2022 EU Justice Scoreboard. The level of perceived judicial independence is categorised as follows: very low (below 30% of respondents perceive judicial independence as fairly good and very good); low (between 30-39%), average (between 40-59%), high (between 60-75%), very high (above 75%).

<sup>3</sup> Figures 51 and 53, 2022 EU Justice Scoreboard.

<sup>4</sup> Judgment of the Court of Justice of 15 July 2021, *Commission v Poland*, C-791/19, paragraph 108. Judgment of the Court of Justice of 6 October 2021, *W.Ż.*, C-487/19, paragraph 150.

<sup>5</sup> The method of appointment of judges-members of the NCJ as well as the premature termination of the mandates of its previous judges-members in 2018 is one of the concerns raised by the Commission in its reasoned proposal adopted under Article 7(1) TEU procedure (paragraphs 137-145). On 15 March 2022, the ECtHR found a violation of Article 6(1) ECHR owing to the absence of judicial remedies on the premature termination of the judge-membership of the NCJ: judgment of the European Court of Human Rights of 15 March 2022, *Grzęda v. Poland*, 43572/18.

such doubts being raised.<sup>6</sup> In a number of rulings, the European Court of Human Rights (ECtHR) considered the process of judicial appointments to a bench of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court composed of three judges<sup>7</sup> and a three member bench of the Civil Chamber of the Supreme Court<sup>8</sup> inherently defective on account of the involvement of the NCJ lacking independence from the legislature and executive and the appointment upon the NCJ resolution in a procedure lacking effective judicial protection and despite the stay of the implementation of that resolution. So far, no steps have been taken to address the concerns identified by the ECtHR<sup>9</sup>, even though it has called for a rapid remedial action on the part of Poland<sup>10</sup>. Also, the Supreme Administrative Court established in a significant number of rulings the lack of independence of the NCJ<sup>11</sup>. On 28 October 2021, the European Network of Councils for the Judiciary decided to expel the NCJ from their organisation,<sup>12</sup> essentially for its lack of independence and failure to defend judicial independence against attacks. As regards the exercise of its duty to safeguard judicial independence - except for a resolution issued in support of a Disciplinary Chamber judge - the NCJ has so far not adopted resolution in support to any judge in Poland<sup>13</sup>. Instead, the NCJ has called on the Prosecutor-General to take action against judges based on the content of their rulings<sup>14</sup>. In view of the expiry of the joint term of office of the NCJ judges-members, on 12 May 2022, the Polish Sejm appointed new judges-members of the NCJ<sup>15</sup>. The process was boycotted by the largest associations of judges and organisations of other legal professions, including the National Bar Council and the National Council of Legal Councillors, who called on judges not to apply for election<sup>16</sup>. Former members of the NCJ, appointed thereto in the

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<sup>6</sup> Judgment of the Court of Justice of 22 February 2022, X and Y, C-562/21 PPU and C-563/21 PPU, paragraphs 75-76; see also the judgment of the Court of Justice of 15 July 2021, *Commission v Poland*, C-791/19, paragraph 103; and of 9 July 2020, *Land Hessen*, C-272/19, paragraphs 55 and 56.

<sup>7</sup> Judgment of the European Court of Human Rights of 8 November 2021, *Dolińska-Ficek and Ozimek v Poland*, 49868/19 and 57511/19.

<sup>8</sup> Judgment of the European Court of Human Rights of 3 February 2022, *Advance Pharma sp. z o.o v. Poland*, 1469/20.

<sup>9</sup> The ECtHR remains seized in a number of other cases concerning various aspects of the reorganisation of the Polish judicial system initiated in 2017. These cases concern notably procedures for appointments and promotions of ordinary court judges involving the NCJ following its reform of 2017, and the lack of judicial review of decisions of the President of the Republic concerning such appointments and promotions; see the press release ECHR 039(2021) of 3 February 2022. As regards the 2017 justice reforms in Poland, the ECtHR held that these successive judicial reforms had been aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Tribunal in December 2015, then, in particular, the remodeling of the NCJ and the setting up of new Supreme Court chambers, while extending the Minister of Justice's control over the courts and increasing his role in disciplinary regime for judges; cf. judgment of the European Court of Human Rights of 15 March 2022, *Grzęda v. Poland*, 43572/18, paragraph 348.

<sup>10</sup> See the judgments of the European Court of Human Rights of 3 February 2022, *Advance Pharma sp. z o.o v. Poland*, 1469/20, paragraph 364; of 8 November 2021, *Dolińska-Ficek and Ozimek v Poland*, 49868/19 and 57511/19, paragraph 368.

<sup>11</sup> Press release of the Supreme Administrative Court of 11 October 2021.

<sup>12</sup> The decision was taken by 86 out of 92 votes, see ENCJ press communique of 28 October 2021.

<sup>13</sup> See the 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 8. Notwithstanding the lack of formal resolutions, it should be noted that the NCJ lodged in November 2021 an appeal against a disciplinary court ruling, requesting that a more lenient sanction be imposed (case ASD 4/2018) and negatively assessed a proposal of the Deputy Minister of Justice to dismiss a court vice-president; see written contribution from the NCJ in the context of the country visit to Poland.

<sup>14</sup> Statement of the NCJ of 14 April 2022 (WO 41.4.2022).

<sup>15</sup> Resolution of the Sejm of 12 May 2022.

<sup>16</sup> Statement of 'Iustitia' association of Polish judges of 7 December 2021; a petition of 13 March 2022 signed by a number of legal professions' organisations and largest associations of judges and prosecutors; statement

period of 1989-2018, supported that call<sup>17</sup>. Out of 15 judges-members appointed<sup>18</sup>, all were proposed by the current governing majority in the absence of any proposals from opposition parties, amongst which 11 reappointed members.

**New reforms of the justice system, including a change of the judicial map, have been announced, with several of these already being put forward in draft legislation.** Draft laws<sup>19</sup> were proposed that would introduce the institution of courts of peace, composed of judges of peace<sup>20</sup> selected by the general population in open elections and appointed to a non-renewable six-year term of office by the President of the Republic acting upon recommendation of the NCJ. Whilst initiatives aimed at increasing the effectiveness of the justice system<sup>21</sup> are to be welcomed, the proposed selection method of the judges of peace would give rise to concerns in the light of European standards on selection of judges. In addition, the Government prepared<sup>22</sup> a comprehensive reform of the ordinary courts, including<sup>23</sup> a change of the judicial map aiming at increasing the efficiency of the judiciary<sup>24</sup>. The reform would entail a forced transfer or retirement of ordinary court judges<sup>25</sup> as well as changes in the system of judicial promotions. The Ombudsperson expressed serious concerns on this draft law, noting in particular that it does not address the lack of independence of the National Council for the Judiciary and allows the Minister of Justice to decide on judicial promotions within the new structure of ordinary courts<sup>26</sup>. Whereas the organisation of the judicial system may require certain transfers of judges, it is important that any interferences with the principle of irremovability of judges are justified and proportionate, in line with the case-law of the Court of Justice<sup>27</sup>.

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of the National Bar Council of 13 March 2022, and a statement of the Committee of Human Rights at the National Council of Legal Councillors of 15 March 2022.

<sup>17</sup> An open letter by these former members of 18 January 2022 was published by major media outlets.

<sup>18</sup> Sejm Printout No. 2161. As regards the selection process of judges-members of the NCJ, out of over 10.000 judges in Poland, 19 judges submitted their candidatures.

<sup>19</sup> The draft laws No. 1760 and 1761 proposed on 4 November 2021 by the President of the Republic.

<sup>20</sup> These judges would be competent to examine minor civil and criminal cases.

<sup>21</sup> Cf. Part II of the explanatory memorandum accompanying draft laws No. 1760 and 1761.

<sup>22</sup> Draft law No. UD322, containing the draft law on the Ordinary Courts Organisation and draft law No. UD 323, containing a draft law implementing the former law; both published by the Government Legislation Centre on 26 and 27 April 2022 respectively.

<sup>23</sup> The reform would furthermore provide for i.a. a uniform status of judge, an e-serving system in judicial proceedings and an extension of access to courts as well as changes of the powers of the Ministry of Justice as regards ordinary court judges, in particular as regards the system of judicial secondments.

<sup>24</sup> The draft law would i.a. seek to decrease the workload incumbent on district court judges (who receive 93,8% of the overall number of cases lodged with courts in Poland). See the statement of reasons accompanying the law draft law No. UD 323.

<sup>25</sup> In accordance with Article 180(5) of the Polish constitution, '[w]here there has been a reorganisation of the court system or changes to the boundaries of court districts, a judge may be allocated to another court or retired with maintenance of his full remuneration'.

<sup>26</sup> The draft law would abolish the current three-level structure of ordinary courts (district, regional and appeal) and substitute it with a two-level structure (regional and provincial). It would empower the Minister of Justice to promote and transfer judges from regional to provincial courts, without the need to base such decision on criteria referring to a judge's qualifications and professional experience. Also, the Minister of Justice would be empowered to designate disciplinary courts of first instance in cases concerning i.a. judges. See the opinion of 16 May 2022 of the Ombudsperson.

<sup>27</sup> See in particular the judgments of the Court of Justice of 24 June 2019, *Commission v Poland*, C-619/18, paragraph 115 ff.; of 5 November 2018, *Commission v Poland*, C-192/18, paragraphs 113 ff.; of 16 November 2021, *Criminal proceedings against W.B. and Others*, joined cases C-748/19 through C-754/19, paragraphs 115 ff.

**Serious concerns have emerged as regards the implementation of certain European Court of Justice rulings on the Polish judiciary.** On 14 July 2021, the Vice-President of the European Court of Justice granted interim measures<sup>28</sup> requested by the Commission in the context of the case C-204/21 R. In that infringement case, the Commission had referred Poland to the Court of Justice in view of concerns related to the law on the judiciary of December 2019 and the continued activities of the Disciplinary Chamber as regards judges<sup>29</sup>. In view of developments on the ground, the Commission considered that Poland had failed to take the necessary measures to fully comply with that order for interim measures. Consequently, on 7 September 2021, the Commission requested the Court of Justice to impose a daily financial penalty<sup>30</sup>. On 27 October 2021, the Vice-President of the Court of Justice imposed EUR 1 million as a daily penalty payment on Poland for as long as the interim measures order of 14 July 2021 has not been fully complied with. So far, Poland has not complied with the interim measures order. On 7 September 2021 the Commission decided to send a letter of formal notice to Poland<sup>31</sup> considering that Poland had failed to take the necessary measures to fully comply with the judgment of the Court of Justice in the case C-791/19, concerning the disciplinary regime for judges in Poland.

**A reform of the disciplinary regime has been adopted by the Sejm with the aim of fulfilling the commitments made under the Recovery and Resilience Plan (RRP).** In the context of the European Semester, on 23 May 2022, prior to finalising its assessment of Poland's RRP, the Council, on a proposal of the Commission, issued a country specific recommendation to Poland to enhance the investment climate, in particular by safeguarding judicial independence<sup>32</sup>. On 1 June 2022, the Commission gave a positive assessment of Poland's RRP. It contains several commitments from Poland to improve the investment climate including a comprehensive reform of the disciplinary regime applicable to Polish judges, aimed at strengthening certain aspects of the independence of the judiciary. First, the reform should ensure that all cases against judges, including disciplinary cases and decisions on the lifting of judicial immunity, will be adjudicated by a court that complies with the requirements under Article 19(1) TEU to be independent, impartial, and established by law. Second, judges cannot be subject to disciplinary liability for submitting a request for a preliminary ruling to the Court of Justice, for the content of their judicial decisions, or for verifying whether another court is independent, impartial, and established by law. Third, procedural rights of parties in disciplinary proceedings are to be strengthened. Fourth, a review procedure must be set allowing all judges affected by rulings of the current Disciplinary Chamber to have these

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<sup>28</sup> The Vice-President of the Court of Justice ordered Poland in particular to immediately, and until the delivery of the final judgment, suspend the provisions by which the Disciplinary Chamber of the Supreme Court can decide on requests for the lifting of judicial immunity, as well as on matters of employment, social security and retirement of Supreme Court judges; suspend the effects of decisions already taken by the Disciplinary Chamber on the lifting of judicial immunity; and suspend the provisions preventing Polish judges from directly applying EU law protecting judicial independence, and from putting references for preliminary rulings on such questions to the Court of Justice. For the scope of the infringement case see the 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland. pp. 4-5.

<sup>29</sup> 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 4.

<sup>30</sup> Commission press release of 7 September 2021 IP/21/4587.

<sup>31</sup> If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court of Justice, it may bring the case before the Court after giving that State the opportunity to submit its observations in reply to the letter of formal notice, under Article 260 of the Treaty on the Functioning of the European Union. The Polish authorities submitted their reply on 8 November 2021. This reply is currently being analysed in view of deciding on next steps.

<sup>32</sup> Recommendation for a Council Recommendation on the 2022 National Reform Programme of Poland and delivering a Council opinion on the 2022 Convergence Programme of Poland (Recital (5)).

rulings reviewed without delay by a court that complies with the requirements of Article 19(1) TEU. The Council endorsed the Commission's positive assessment and adopted an Implementing Decision on the Polish RRP on 17 June. Poland will need to demonstrate that the corresponding milestones have been fulfilled before any disbursement under the RRF can be made. On 9 June 2022, the *Sejm* adopted a set of amendments to the disciplinary regime for judges. The President of the Republic signed the Law of 9 June 2022 amending the law on the Supreme Court and certain laws, which was published in the Journal of Laws on 14 June 2022 and enters into force on 14 July 2022<sup>33</sup>. This reform will be analysed by the Commission.

**Poland committed to dismantle the Disciplinary Chamber which, despite rulings of the Court of Justice, continued to decide on cases concerning judges, including by suspending them in office.** In its RPP, Poland committed that all cases against judges, including disciplinary cases and decisions on the lifting of judicial immunity, will be adjudicated by an independent and impartial court established by law, different from the current Disciplinary Chamber. It also committed to circumscribe the discretionary power to designate the disciplinary court with jurisdiction at first instance in cases concerning judges of ordinary courts. The new law provides for the establishment of a Chamber of Professional Liability, which will be analysed by the Commission. Despite rulings of the Court of Justice, the Disciplinary Chamber decided in several cases to either suspend judges in office in the context of disciplinary proceedings<sup>34</sup>, or to lift their immunity for the purpose of criminal investigation<sup>35</sup>, including in view of the content of their judicial decisions (including Supreme Court judges). These cases were initiated, following the interim measures order of 14 July 2021, by the Minister of Justice or court presidents appointed by him against judges who questioned the status of other judges due to their appointment upon a proposal by the NCJ in its composition based on the rules introduced in 2017<sup>36</sup>. Following the interim measures order of the Court of Justice, the Chamber of Labour Law and Social Security of the Supreme Court allowed one of its judges – suspended in office by the Disciplinary Chamber – to continue adjudicating cases<sup>37</sup>. On 23 May 2022, the Disciplinary Chamber reinstated one of the judges suspended by the Disciplinary Chamber in disciplinary proceedings, who was immediately obliged to take leave, until 19 July 2022, and transferred without his consent to another court division by the president of the district court where he adjudicates<sup>38</sup>. Two court presidents appointed to the office by the Minister of Justice disregarded rulings of national courts obliging them to allow judges, subject to suspension by virtue of resolutions of the Disciplinary Chamber, to continue adjudicating cases<sup>39</sup>. In its ruling of 22 July 2021, the European Court of Human Rights ruled that the procedure for appointing judges to the Disciplinary Chamber

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<sup>33</sup> Journal Of Laws, item 1259.

<sup>34</sup> See notably a press communique of 17 December 2021 in the cases I DO 13/21, I DO 14/21, I DO 16/21. It is also noted that on 23 May 2022, the Disciplinary Chamber overturned one of its decisions whereby it had suspended an ordinary court judge on 4 February 2020. Disciplinary charges concerning among others the content of a judicial decision of the judge concerned remain pending (see press communique of the Supreme Court of 23 May 2022).

<sup>35</sup> See notably cases press communique of 23 September 2021 in the case I DI 20/21; of 4 August 2021 in the case I DO 8/21; and of 16 July 2021 in the case II DIZ 2/21.

<sup>36</sup> The decisions are taken on the basis of Article 130(1) of the Law on the Ordinary Courts Organisation.

<sup>37</sup> Following the interim measures order of 14 July 2021 of the Court of Justice, the Labour Law and Social Security Chamber of the Supreme Court reinstated one of its judges who had his immunity lifted and had been suspended in office by the Disciplinary Chamber of the Supreme Court. Following the reinstatement, a member of the Disciplinary Chamber requested the prosecution service to investigate this decision.

<sup>38</sup> The president of the court concerned, appointed to the office by the Minister of Justice, is a member of the National Council for the Judiciary (since 2018).

<sup>39</sup> This concerns rulings of civil courts issued in cases of two judges suspended in office.



amounted to a fundamental irregularity adversely affecting the whole process and compromising its legitimacy, considering that the Disciplinary Chamber hearing the case was not a tribunal established by law<sup>40</sup>. The European Court of Human Rights (ECtHR) issued a number of interim measures orders to protect judges from having their disciplinary cases examined or their immunity lifted by the Disciplinary Chamber. Furthermore, in spite of a Court of Justice judgment, the President of the Disciplinary Chamber continued to designate<sup>41</sup> disciplinary courts of first instance<sup>42</sup>.

**The Constitutional Tribunal issued a further ruling that directly challenges the primacy of EU law and key provisions of the EU Treaties and continued challenging the ECHR, amidst persisting concerns over its independence and legitimacy.** The Constitutional Tribunal has continued<sup>43</sup> to develop its case-law questioning the compatibility with the Polish Constitution of provisions of the EU Treaties and the ECHR. On 7 October 2021, the Constitutional Tribunal ruled i.a. that Article 19(1) TEU is unconstitutional in so far as, ensure effective legal protection in the fields covered by EU law, it confers on national courts the power to bypass, in the course of adjudication, provisions of the Polish Constitution, and to rule on the basis of provisions which are not binding, repealed or declared unconstitutional<sup>44</sup>. Moreover, in the same ruling the Constitutional Tribunal declared the unconstitutionality of Article 19(1), second subparagraph, and Article 2 TEU, in so far as – to ensure effective legal protection in the fields covered by EU law and to ensure judicial independence – these provisions empower national courts to rule on issues regarding the judiciary<sup>45</sup>. On 22 December 2021, in view of this case law as well as of the concerns related to the Constitutional Tribunal no longer meeting the requirements of an independent and impartial tribunal previously established by law as required by Article 19(1) TEU, the Commission launched an infringement procedure, which is still ongoing<sup>46</sup>. In addition, the Constitutional Tribunal held in rulings of 24 November 2021 and 10 March 2022<sup>47</sup> that Article 6 ECHR is unconstitutional to the extent that it applies to the Constitutional Tribunal and empowers the ECtHR to assess

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<sup>40</sup> Judgment of the European Court of Human Rights of 22 July 2021, *Reczkowicz v. Poland*, 43447/19, see point 2 of the operative part of the judgment.

<sup>41</sup> See e.g. the order issued in the case DO 28/21 of 6 August 2021 and the designation of disciplinary courts in of Łódź (ASD 1/22; ASD 2/22), and of Białystok (ASD 1/22); see also a report of Association of Judges ‘Iustitia’ of 17 August 2021.

<sup>42</sup> On 30 March 2022, the President of the Disciplinary Chamber issued an ordinance No 8/22 setting out rules governing the designation of the disciplinary court competent to hear disciplinary cases of judges in first instance by ballot, seeking to address one of the EU law violations identified by the Court of Justice.

<sup>43</sup> See the ruling of 14 July 2021 in case P 7/20, where the Constitutional Tribunal considered that Article 4(3) second subparagraph TEU read in connection with Article 279 TFEU are unconstitutional to the extent that they oblige Poland to abide by interim measures orders issued by the Court of Justice that affect the organisation and functioning of Polish courts and the procedure before such courts (2021 Rule of Law Report, Chapter on the rule of law situation in Poland, p. 7).

<sup>44</sup> Case K 3/21.

<sup>45</sup> Notably to review the legality of the procedure for appointing a judge, including the examination of the lawfulness of the act of appointment of a judge by the President of the Republic; review the legality of a resolution of the NCJ containing a request to the President for the appointment of a judge; or ascertain that the process of appointing a judge has been defective and, as a result, to refuse to recognise as a judge a person appointed to judicial office in accordance with the Polish Constitution.

<sup>46</sup> See Commission press release of 22 December 2021 IP/21/7070.

<sup>47</sup> Cases K 6/21 and K 7/21. On 4 July 2022, the Polish Ministry of Foreign Affairs transmitted to the media a statement according to which, following the Constitutional Tribunal’s rulings on the unconstitutionality of Article 6(1) ECHR, it would not comply with a recent ruling of the European Court of Human Rights concerning the Polish judiciary and refused to pay damages to certain applicant-judges in cases decided by the ECtHR. See: TOKFM.pl of 4 July 2022 where the statement is reproduced.

the legality of the appointment of Constitutional Tribunal judges and to the extent that, among others, it empowers national courts and the ECtHR to carry out a specific assessment in the context of determining the compliance of other courts with the requirement of a ‘court established by law’<sup>48</sup>. In addition, the Constitutional Tribunal remains seized in a number of other cases contesting the constitutionality of provisions of EU law, notably Article 322 TFEU<sup>49</sup>, and the power of the Court of Justice to impose daily financial penalties on Poland<sup>50</sup>. In view of the rulings on the unconstitutionality of the ECHR, the Secretary General of the Council of Europe formally requested Poland, under Article 52 ECHR, to explain the manner in which its national law ensures the effective implementation of the Convention<sup>51</sup>.

**The Supreme Court has been subject to rulings of the European Courts and has undergone further changes in its management.** On 6 October 2021, the Court of Justice clarified in specific circumstances the impact of irregularities in a judicial appointment procedure of a Supreme Court judge on the fulfilment by that judge of the requirements stemming from Article 19(1) TEU<sup>52</sup>. The impact of irregularities in judicial appointments to the Supreme Court was also addressed in rulings of the European Court of Human Rights<sup>53</sup>. On 30 September 2021, the President of the Republic appointed<sup>54</sup> a new President of the Civil Chamber<sup>55</sup> following a contested procedure<sup>56</sup>. It is noted that this new President of the Civil Chamber changed the composition of the referring court responsible for the implementation of a preliminary ruling of the Court of Justice relating to irregularities in the appointment of a Supreme Court judge<sup>57</sup>. The First President of the Supreme Court publicly stated that the implementation of Court of Justice rulings concerning the judiciary constitutes a breach of Polish law, calling on the political authorities to address the situation through a legislative

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<sup>48</sup> These rulings were issued following motions of the Prime Minister (as regards the case K 3/21 in which the Constitutional Tribunal ruled on 7 October 2021) and the Prosecutor-General (as regards cases K 6/21 and K 7/21) who is at the same time the Minister of Justice.

<sup>49</sup> Which is the legal basis for Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. Case K 1/22.

<sup>50</sup> Case K 8/21. A similar motion was also submitted by a group of Members of Parliament of the governing majority (case K 5/21).

<sup>51</sup> Article 52 of the Convention stipulates that ‘on receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention’. See press communique of the Council of Europe Secretary General of 7 December 2021.

<sup>52</sup> Judgment of the Court of Justice of 6 October 2021, *W.Ż.*, C-487/19, where the Court of Justice held that the order by which a court, ruling at last instance and sitting as a single judge, dismissed the action of a judge transferred against his will, must be declared null and void if the appointment of that single judge took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned and the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned.

<sup>53</sup> See the paragraph on the National Council for the Judiciary and the Disciplinary Chamber (above).

<sup>54</sup> On 2 September 2021, 10 and 24 February 2022, the President of the Republic appointed, respectively, a President of the Labour Law and Social Security Chamber, a President of the Chamber of Extraordinary Control and Public Affairs and a President of the Disciplinary Chamber of the Supreme Court.

<sup>55</sup> The judge holding the office of the Civil Chamber President has been appointed to the judicial office in a procedure that was found irregular by the ECtHR in *Advance Pharma* (see above).

<sup>56</sup> On 27 September 2021, an official statement was published by the Supreme Court referring to the position of a majority (14) judges of the Civil Chamber who contested the selection procedure (see press communique of the Supreme Court).

<sup>57</sup> This concerns the implementation of the judgment of the Court of Justice issued on 6 October 2021 in the case C-487/19 *W.Ż.* See in particular an order of the judge rapporteur of 30 December 2021 in the case *III CZP 25/19*; an order of the President of the Civil Chamber of 5 January 2022; and a written statement of 1 February 2022 of the judge removed from the bench.

proposal. The First President also publicly criticised<sup>58</sup> decisions of other Supreme Court judges whereby they annulled rulings of lower instance courts or decided on the recusal of judges in defiance of the case law of the Constitutional Tribunal<sup>59</sup>. The First President also requested, that a disciplinary investigation be opened against Supreme Court judges in view of the content of a judicial decision they took, of the composition of the bench, and of doubts as to their impartiality<sup>60</sup>.

**Concerns regarding the functioning of the prosecution service persist.** The offices of Minister of Justice and Prosecutor-General continue to be occupied by the same person<sup>61</sup>. The practice of seconding<sup>62</sup> prosecutors, already considered by Polish courts to be a form of demotion and discrimination<sup>63</sup>, continues to be used by superior prosecutors<sup>64</sup>. Instructions binding on prosecutors reportedly continue to be issued in concrete cases<sup>65</sup>. The instrumentalisation of the prosecution service is further exemplified in cases in which a preliminary ruling request was made<sup>66</sup> and by the opening of a criminal investigation in a case concerning judges of the Court of Justice<sup>67</sup>. Furthermore, the National Prosecutor's Office

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<sup>58</sup> Statement of the First President of the Supreme Court of 22 October 2021.

<sup>59</sup> The rulings were issued following the interim measures order of the Court of Justice 14 July 2021 in the case C-204/21 R. See notably cases I KZ 29/21, V KZ 47/21.

<sup>60</sup> The President of the Criminal Chamber indicated that the First President's decision appears to be aimed at exerting influence on the judges adjudicating in a concrete case. See press communique of the Supreme Court of 29 March 2022. A judge of the Supreme Court decided to recuse himself from cases in view of the ECtHR the ruling *Dolińska-Ficek and Ozimek v Poland*. See a communique issued on 29 November 2021 in the case I CSKP 524/21.

<sup>61</sup> Following the merging in the context of the reforms in 2016 of the positions of Prosecutor General and Minister of Justice, the Minister of Justice directly wields the powers vested in the highest prosecutorial office, including the authority to issue instructions to prosecutors in specific cases and to transfer prosecutors. His power has been subject to criticism including by the Venice Commission and by the Commission in its Reasoned Proposal adopted under the Article 7(1) TEU procedure on the rule of law in Poland. See the 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 12.

<sup>62</sup> The National Prosecutor sued the President of the association of prosecutors 'Lex Super Omnia' for her allegations related to harassment of prosecutors through secondments without their consent. See press communique of the National Prosecutor's Office of 24 February 2021.

<sup>63</sup> E.g. rulings of 28 February 2022, the Regional Court in Warsaw which ruled that the secondment of a prosecutor constituted unequal treatment and could be perceived as a discriminatory act. On 16 June 2021, the Supreme Court ruled that a prosecutor seconded to another unit for indefinite time cannot be revoked from the secondment without prior notification (case No. III PSKP 23/21).

<sup>64</sup> E.g. as reported by the association of prosecutors 'Lex Super Omnia', prosecutors from Świnoujście city complained about their workload and the lack of support to that end by their hierarchy. A supervising prosecutor decided on 31 March 2022 to immediately second these prosecutors to prosecutorial units in different towns. See Prawo.pl of 5 April 2022, 'Prosecutors complained about work overload and... ended up on punitive secondments'. For multiple other examples see a report by the Committee for the Defence of Justice, of 18 November 2021; a report of the association of prosecutors 'Lex Super Omnia' of 27 June 2021.

<sup>65</sup> This was confirmed in an interview by the President of the Association of Prosecutors 'Lex Super Omnia', who stated that in politically sensitive cases, instructions are not given in a written form and often superior prosecutors use other means to ensure lower prosecutors' compliance. The interview is found in Gazeta Wyborcza of 6 February 2022, 'Prosecutors in Poland are defenceless in the face of repression by their management'.

<sup>66</sup> See case C-269/21, where, following the referral of a set of questions to the Court of Justice, the public prosecutor's office joined the case as a party and, on 28 September 2021, requested the recusal of the judge making the referral, submitting to that end that the referring judge is not impartial. The motion for recusal was rejected. See a report of 25 January 2022 of the association of judges 'Themis'.

<sup>67</sup> As confirmed by the spokesperson of the Regional Prosecutor's Office in Warsaw. The investigation concerns allegations of the abuse of competences and failure to carry out duties by members of the European Court of Auditors and judges of the Court of Justice. TVP.info of 25 January 2021 where a statement of the public

issued instructions binding on all prosecutors recalling the allegedly non-binding force of judgments of the European Court of Justice and of the ECtHR<sup>68</sup> as well as requesting prosecutors to report to the National Prosecutor's office and to the Disciplinary Officer cases in which judges question the status of other judges<sup>69</sup>. Prosecution services are also seized in the context of actions undertaken by judges<sup>70</sup>. Whilst the European Public Prosecutor's Office (EPPO) currently has 23 ongoing investigations involving Poland, the Polish prosecution services refuse to cooperate with the EPPO<sup>71</sup>. Furthermore, as regards the environment for legal professions, no measures were taken to remove the power of prosecutors to suspend a lawyer's licence without prior consent of the court<sup>72</sup>. Also, disciplinary actions were undertaken against a legal councillor who submitted requests for recusal of judges on account of their possible irregular appointment<sup>73</sup>.

## Quality

**Poland is progressing well as regards digitalisation of the justice system, while room for improvement remains.** Administrative cases benefit from a comprehensive set of IT tools. Such tools could be further improved, notably as regards civil cases<sup>74</sup>. This could ensure that distance communication technology can be used to contact relevant parties to proceedings in all types of civil cases, to provide for a possibility of filing a claim online and to ensure that access to the electronic file of ongoing cases exists in all types of civil and commercial cases<sup>75</sup>. The current rules, measures and technological tools allow for a remote hearing; in addition, business and debt registers are kept in full electronic form and traders are handled electronically; also, since July 2021, the service of judicial documents via the Information Portal of the Common Courts has been operational; moreover, legislative work is underway at the Ministry of Justice with a view to using information technology enabling, inter alia, parties' access to procedural documents and with a view to shortening court proceedings<sup>76</sup>. Further improvement would be needed to introduce electronic case files both in ordinary courts and in

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prosecutor's office is reproduced. See also a decision of 15 December 2021 No. 3041-1.Ds.90.2021 of the Regional Prosecutor's Office in Warsaw (I Criminal Division).

<sup>68</sup> Instruction No. 1001-4.430.1.2021 of 13 December 2021. The instruction considers rulings of the Court of Justice and of the ECtHR to be of declaratory nature and cannot become a basis of rulings delivered by Polish courts.

<sup>69</sup> Instruction No. 1001-4.433.2.2021 of 22 December 2021. The instruction applies retroactively to 'cases, in which the present obligation has so far not been abided by'.

<sup>70</sup> On 1 October 2021, a member of the Disciplinary Chamber of the Supreme Court informed prosecution services about a possible commitment of a criminal offence by four Supreme Court judges. The information concerns a judge who had been suspended in office by the Disciplinary Chamber who continued to adjudicate cases (following the interim measures order of the Court of Justice of 14 July 2021 in case C-204/21 R) and three other judges who made this possible. Also, the Internal Affairs Department of the National Prosecutor's Office opened criminal investigation against two judges who gave an interview to the Polish media, underlining the importance of ensuring a full implementation of the rulings of the Court of Justice and of the ECtHR. See TVP.Info of 1 October 2021, 'Scandal at the top levels of the EU. The Polish prosecutor's office has opened an investigation'; also: See a report of 25 January 2022 of the association of judges 'Themis'.

<sup>71</sup> On 16 February 2022, the European Public Prosecutor's Office (EPPO) sent a letter to the Commission on the lack of cooperation by Poland. Given that whenever the EPPO is carrying out a criminal investigation of a cross-border nature, it is unable to obtain evidence located in Poland, the EPPO's ability to counter criminality affecting the Union budget is systematically hindered.

<sup>72</sup> See also the 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 12.

<sup>73</sup> Decision of 28 October 2021 of the Deputy Disciplinary Officer for Ordinary Court Judges; see a report of 25 January 2022 of the association of judges 'Themis'.

<sup>74</sup> Figures 42, 2022 EU Justice Scoreboard.

<sup>75</sup> Figures 46, 2022 EU Justice Scoreboard.

<sup>76</sup> Written comments from the Polish authorities.

the Supreme Court, thus facilitating the circulation of files between courts<sup>77</sup>. Work is ongoing to introduce a uniform IT system for all courts in Poland<sup>78</sup>. At the same time, no steps have been taken to revise the system of case allocation that was found to be prone to abuse, in spite of concerns expressed to that end by the Supreme Audit Office<sup>79</sup>.

## Efficiency

**The overall performance of ordinary and administrative courts remains stable.** As regards ordinary courts, their overall performance remains average. In 2020, there was a decrease in the estimated time needed to resolve litigious civil and commercial cases at all three instances, and the rate of resolving such cases at first instance improved<sup>80</sup>. Poland remains under enhanced supervision of the Committee of Ministers of the Council of Europe for the length of civil and criminal proceedings<sup>81</sup>. As regards administrative courts, their performance remains above average<sup>82</sup>.

## II. ANTI-CORRUPTION FRAMEWORK

Several authorities are responsible for anti-corruption in Poland, including the Prosecutor-General, who is also the Minister of Justice, and the Minister of Internal Affairs and Administration who is in charge of prevention aspects, such as the lobby register for public officials. The Central Anti-Corruption Bureau is the specialised law enforcement body combating corruption in the public and the private sector alongside the Central Police Investigation Bureau and the regular police, the Internal Security Agency and the Prosecution Service<sup>83</sup>. The Central Anti-Corruption Bureau combines intelligence and police functions, and can trigger both administrative and criminal proceedings. It has also been tasked with policy coordination<sup>84</sup> and corruption prevention, including educational awareness-raising activities against corruption and an e-learning platform<sup>85</sup>. The Supreme Audit Office (NIK) has a preventive role monitoring the public spending of the government administration bodies, including the National Bank of Poland and state legal persons<sup>86</sup>.

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<sup>77</sup> Written contribution from the Supreme Court for the 2022 Rule of Law Report.

<sup>78</sup> Press release of the Ministry of Justice of 12 October 2021.

<sup>79</sup> See the 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p 13 footnote 94. Cf. press release of the Ministry of Justice of 16 September 2021, in which the concerns of the Supreme Audit Office were not referred to.

<sup>80</sup> No data available as regards the remaining two instances. Whereas in 2019 the rate amounted to approximately 98%, in 2020 it passed the threshold of 100%; figure 12, 2022 EU Justice Scoreboard.

<sup>81</sup> Council of Europe CM/Del/Dec(2018)1331/H46-19: H46-19 Bąk (Application No. 7870/04), Majewski (Application No. 52690/99), Rutkowski and Others (Application No. 72287/10) and Jan Załuska, Marianna Rogalska and 398 other applications (Application No. 53491/10) v. Poland.

<sup>82</sup> Figures 5, 9, 13, 2022 EU Justice Scoreboard.

<sup>83</sup> Cf. Law of 9 June 2006 on the Central Anti-Corruption Bureau. The Law of 24 May 2002 on the Internal Security Agency and Foreign Intelligence Agency. The Law of 28 January 2016 on the Prosecution Service. Law of 6 April 1990 on the police. Within the police, the Police Internal Affairs Bureau is appointed to combat and reduce corruption within the police itself. According to the Bureau's 2019 report, 25% of accusations against police officers concern corruption crimes (see statistical data provided by the Internal Affairs Bureau of the Police).

<sup>84</sup> The Central Anti-Corruption Bureau replaced the Minister of Interior and Administration in the overall coordination of the Governmental Anti-Corruption Programme.

<sup>85</sup> Educational website of the Central Anti-Corruption Bureau, and its e-learning platform.

<sup>86</sup> Law of 23 December 1994 on the Supreme Audit Office.

**The perception among experts and business executives is that the level of corruption in the public sector remains relatively high.** In the 2021 Corruption Perceptions Index by Transparency International, Poland scores 56/100 and ranks 13<sup>th</sup> in the European Union and 42<sup>nd</sup> globally<sup>87</sup>. This perception has deteriorated over the past five years<sup>88</sup>. The 2022 Special Eurobarometer on Corruption shows that 55% of respondents consider corruption widespread in their country (EU average 68%) and 39% of respondents feel personally affected by corruption in their daily lives (EU average 24%)<sup>89</sup>. As regards businesses, 44% of companies consider that corruption is widespread (EU average 63%) and 19% consider that corruption is a problem when doing business (EU average 34%)<sup>90</sup>. Furthermore, 47% of respondents find that there are enough successful prosecutions to deter people from corrupt practices (EU average 34%)<sup>91</sup>, while 19% of companies believe that people and businesses caught for bribing a senior official are appropriately punished (EU average 29%)<sup>92</sup>.

**The audit<sup>93</sup> of the Government Anti-Corruption Programme 2018-2020 found that the programme was partly implemented<sup>94</sup>.** The government has finalised the implementation of the programme<sup>95</sup> and reported that more than 57.5% of the planned actions were implemented in adverse circumstances. The programme aimed to raise awareness about and reduce corruption with the specific goals of (i) strengthening preventive and educational activities, (ii) improving the monitoring of corruption risks and anti-corruption regulation, and (iii) enhancing the cooperation and coordination between law enforcement authorities at national and international level. The implementation was coordinated by the Intersectoral Group of the Central Anti-Corruption Bureau<sup>96</sup> and was audited by the Supreme Audit Office<sup>97</sup> with the focus on the extent of the implementation, the conditions for the implementation, including the

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<sup>87</sup> Transparency International (2022), Corruption Perceptions Index 2021. The level of perceived corruption is categorised as follows: low (the perception among experts and business executives of public sector corruption scores above 79); relatively low (scores between 79-60), relatively high (scores between 59-50), high (scores below 50).

<sup>88</sup> In 2017 the score was 60, while in 2021 the score is 56. The score significantly increases/decreases when it changes more than five points; improves/deteriorates (changes between 4-5 points), and is relatively stable (changes from 1-3 points) in the last five years.

<sup>89</sup> Special Eurobarometer 523 on Corruption (2022). The Eurobarometer data on citizens' corruption perception and experience is updated every second year. The previous data set is the Special Eurobarometer 502 (2020).

<sup>90</sup> Flash Eurobarometer 507 on Businesses' attitudes towards corruption in the EU (2022). The Eurobarometer data on business attitudes towards corruption as is updated every second year. The previous data set is the Flash Eurobarometer 482 (2019).

<sup>91</sup> Special Eurobarometer 523 on Corruption (2022).

<sup>92</sup> Flash Eurobarometer 507 on Businesses' attitudes towards corruption in the EU (2022).

<sup>93</sup> The audit was planned for the first quarter of 2022, see Supreme Audit Office (2020), Workplan for 2021, p. 9. Supreme Audit Office (2022), Post-audit presentation of the audit Implementation of the Government Anti-Corruption Programme for 2018-2020. The Supreme Audit Office positively assesses the implementation of the programme with regard to the measures for the Ministry of Development and Technology, while referencing also the lack of implementation of actions.

<sup>94</sup> See in this context also the Central Anti-Corruption Bureau (2021), Final report on the implementation of the 'Government Anti-Corruption Programme 2018-2020. Written comments from Polish authorities.

<sup>95</sup> The programme is based on resolution No. 207 of 19 December 2017 of the Council of Minister – the Governmental Anti-Corruption Programme for years 2018-2020, (M.P. z 2018 r. poz. 12). The Programme was accompanied by an Action Plan, Governmental Anti-Corruption Programme for years 2018-2020.

<sup>96</sup> The Intersectoral Group is led by the Central Anti-Corruption Bureau, according to information received from the Government for the 2022 Rule of Law report.

<sup>97</sup> Notably, in support of the prevention of corruption and other irregularities, the Supreme Audit Office has created a special department for ad hoc inspections, which is designed to respond quickly to signals of irregularities from citizens, journalists and members of the parliament. Information received by the Supreme Audit Office in the context of the country visit to Poland.

pandemic, as well as the results and impact of the Programme<sup>98</sup>. While most of the objectives to provide educational material and trainings have been met, the implementation of important legislative initiatives specified in the programme has not been completed. These include, in particular, the bill on Liability of Collective Entities, the reform of the asset declaration system, and the revision of the lobbying legislation<sup>99</sup>. No public announcement was made for the adoption of a new anti-corruption strategy beyond 2020<sup>100</sup>.

**The legal framework to fight corruption has been reinforced, yet gaps remain.** The Polish Criminal Code broadly criminalises corruption<sup>101</sup>. Amendments of the Criminal Code to fight corruption in public life<sup>102</sup> entered into force on 1 January 2022 to counter corruption practices and increase transparency of public life by introducing new tools to address conflicts of interest of public office holders<sup>103</sup> and stricter criminal sanctions for corruption<sup>104</sup>. Among the new tools are the registers to enhance transparency in political party finance<sup>105</sup> and a ban for public officials, including local government representatives, to take up positions in state-owned enterprises<sup>106</sup>. However, the ban on secondary activities does not extend to current deputies

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<sup>98</sup> Implementation of the Government Anti-corruption Programme for 2018-2020. The Supreme Audit Office has presented four general observations on the measurement, monitoring and reporting of the level of implementation of the Programme, according to information received by the Government for the 2022 Rule of Law report.

<sup>99</sup> Central Anti-Corruption Bureau (2020), Implementation report of the Governmental Anti-Corruption Programme for 2018-2020 in 2019; p. 2, on the suspension of work regarding asset declarations). According to information received from the Batory Foundation/ Helsinki Foundation in the context of the country visit to Poland, the Ministry of Justice discontinued the work on the bill on Liability of Collective Entities, for which a draft, currently still internal bill was prepared, while the Ministry of Internal Affairs and Administration does not currently pursue the work on lobbying. For more information on these specific aspects, see also further below the section on lobbying.

<sup>100</sup> According to the government, preparatory work for a new national strategy to prevent and combat corruption was already underway in the first half of 2021, which should take into account the recommendations of the EU, the Group of States against Corruption (GRECO), the OECD, and the UN. See 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 16.

<sup>101</sup> GRECO confirms that the legislation in place broadly complies with the Council of Europe's Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191), GRECO - Third Round Evaluation Report. The key offence penalised by the Criminal Code is bribery of public officials in its passive (accepting a bribe) and active (offering a bribe) forms. The term 'person holding a public position' as defined by law has a broad scope, including among others the President of the Republic of Poland, members of Parliament, judges, notaries, officers of a public authority, members of local authorities, etc.

<sup>102</sup> Law amending the Criminal Code and certain other acts (14 October 2021).

<sup>103</sup> The Law amends the 1997 Law on Restriction on Conduct of Business Activities by Persons Performing Public Functions and the 1996 Law on the Exercise of the Mandate of a Deputy and Senator.

<sup>104</sup> The Law introduces three significant changes in this regard, including new criminal sanctions that can be imposed between 1 and 15 years, or for life in case of (apart from the already existing prohibition to hold a public function after a corruption conviction) with the underlying objective to counter corrupt practices and to increase openness and transparency in public life.

<sup>105</sup> For more details, see section below on political party finance.

<sup>106</sup> The amendment stipulates that during the exercise of their mandate deputies, senators and mayors may not be employed or engaged in any other occupation in commercial companies, in which the State Treasury or a local government hold, directly or indirectly through other entities, at least 10% of shares. In general, Poland has broadly criminalised corruption in line with the Council of Europe's Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191), as confirmed by the Group of States against Corruption; See GRECO Third Evaluation Round – Evaluation Report. The key offence penalised is bribery of public officials in its passive and active forms (accepting or offering a bribe). The term 'person holding a public position' as defined by law has a broad scope, including among others the President of the Republic of Poland, members of Parliament, judges, notaries, officers of a public authority, members of local authorities, etc.

and senators or municipality-owned enterprises<sup>107</sup>. Apart from the prohibition to hold public functions following corruption convictions, the reform introduces criminal sanctions for corruption ranging from one to 15 years, including a life sentence for repeat corruption offences<sup>108</sup>, which raises questions concerning its proportionality<sup>109</sup>. The fight against corruption, including in key areas of public administration, has been included as a priority for the police for 2021-2023<sup>110</sup>. Priority areas include the enhancement of police operations in combating key types of crime, including corruption crimes.

**Concerns regarding the effectiveness in fighting foreign bribery still need to be addressed<sup>111</sup>.** As regards foreign bribery, the OECD had called on Poland to remove the Criminal Code provision that allows the perpetrators of bribery to avoid legal sanctions if they notify the responsible authorities about the crime and disclose all circumstances before the authorities learn about it, as it leads to impunity<sup>112</sup>. Deficiencies have also been highlighted with regard to the effective enforcement to tackle foreign bribery<sup>113</sup> since a private company can only be held criminally liable for foreign bribery after the individual who committed the bribe was convicted in final instance. The level of sanctions in this regard with too low fines for companies are not considered effective, proportionate or dissuasive<sup>114</sup>. A draft law is being discussed in the Parliament that would amend provisions defining passive and active bribery, including foreign bribery<sup>115</sup>.

**Obstacles to the effective repression of corruption, including high-level corruption, remain.** Corruption investigations and prosecutions tend to be lengthy, partly due to the need

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<sup>107</sup> *Ibid*, as also confirmed by information received from the Batory Foundation in the context of the country visit to Poland.

<sup>108</sup> Article 43 of the Criminal Code. The criminal sanctions will be mandatory for public officials committing the corruption crimes specified in the criminal code and possible for any other individual committing specific corruption crimes. See also Article 41(1)(b) of the Criminal Code.

<sup>109</sup> Information received from the Association of judges and prosecutors, and the Batory Foundation/ Helsinki Foundation in the context of the country visit to Poland. See in this context also the opinion of the Supreme Court on the draft Law of 29 July 2021.

<sup>110</sup> See Priorities of the Commander-in-Chief of the Police for 2021-2023. Details on how these priorities will be implemented and on the concrete, expected results are not published. In detail, these tasks include the strengthening of police activity in counteracting economic crime in the areas of tax crime, crimes against the fundamental interests of the European Union and crimes in the area of public procurement; as well as increasing police effectiveness in combating corruption in key areas of public administration activity.

<sup>111</sup> Cf. 2021 Rule of Law Report: Country Chapter on the rule of law situation in Poland, p. 17.

<sup>112</sup> OECD (2015), Poland: Follow-Up to the Phase 3 Report & Recommendations, p. 4. Cf. also OECD (2018), Poland must make urgent legislative reforms to combat foreign bribery.

<sup>113</sup> In the period between 2016-2019, Poland opened at least three investigations into foreign bribery, initiated no prosecution and concluded no case with sanctions, according to Transparency International (2020), Exporting Corruption, p. 96, with further reference to cases. See also OECD (2021), Poland's lack of progress in implementing reforms to boost fight against foreign bribery remains a serious concern, indicating that Poland's proposed, recent Action Plan on the subject-matter could be seen as a step in the right direction, although Poland needs to still add concrete activities, specific deadlines, and measurable indicators to the proposed measures to be able to determine their effectiveness. Furthermore, OECD (2020), Poland should urgently implement reforms to boost the fight against foreign bribery and preserve independence of prosecutors and judges. More information can also be found in the OECD (2022), Poland: Phase 4 Evaluation (scheduled for June 2022).

<sup>114</sup> OECD (2020), Poland should urgently implement reforms to boost the fight against foreign bribery and preserve independence of prosecutors and judges.

<sup>115</sup> The draft law amending the Criminal Code and certain other laws (draft no. 2024) of 22 February 2022, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2024>.



for additional human and technical resources to the prosecution service<sup>116</sup>. The level of specialisation and digitalisation of the services involved is not always sufficient to carry out their tasks to combat corruption effectively<sup>117</sup>. Regarding high-level corruption cases, concerns remain about institutionalised corruption<sup>118</sup> and a risk of impunity caused by a disparity in the treatment of corruption cases for political purposes, which potentially breaches the principle of equality before the law<sup>119</sup>. These concerns are based on the increased influence of the executive branch of power over the judiciary, the prosecution and police with the entire chain of criminal proceedings being exposed to risks of political interference, undermining the effectiveness of anti-corruption efforts in respect of persons in top executive functions<sup>120</sup>. Concerns regarding the broad scope of immunities of persons exercising top executive functions who are also members of Parliament have not been addressed, preventing criminal accountability for corruption crimes regardless of whether they are related to the members' official duties<sup>121</sup>. The fact that the Minister of Justice continues to serve also as Prosecutor-General adds to the concerns over the independence of the Central Anti-Corruption Bureau from the executive power<sup>122</sup>. The increased supervisory powers of the Prosecutor-General, who can issue instructions in individual cases, including not to prosecute, and take over corruption cases of his subordinate prosecutors, provides avenues to influence anti-corruption prosecutions politically, which has also been the case on several occasions<sup>123</sup>. In this context, concerns exist about the risks of politically motivated investigations and wiretapping of public officials,

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<sup>116</sup> Information received by the representatives of the National Council of the Bar and of the National Council of Legal Councillors in the context of the country visit to Poland.

<sup>117</sup> Cf. 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 18, with a reference to information received from the government. In this context, in particular the restrictions to access financial data can present an obstacle for the detection and prosecution of corruption.

<sup>118</sup> As a strategic and systemic, legal and or ethical influence undermining institutions' effectiveness by diverting it from its purpose or weakening its ability to achieve its purpose, including the weakening of the public's trust. See Helsinki Foundation (2022), A state of accusation: Polish prosecution service 2015-2022, and Batory Foundation (2020), Laying the groundwork for 'grand corruption': the Polish government's (anti-corruption activities in 2015-2019). In this context, see also Part IV, p. 27, regarding the concerns about the lack of effective follow-up by the prosecution services to requests made in the aftermath of audits of the Supreme Audit Office, and also Part I, p. 9 and Part II, p. 17 (elections) and p. 18 (Covid section).

<sup>119</sup> *Ibid.* Information received from Batory Foundation/Helsinki Foundation in the context of the country visit to Poland; see also GRECO Fifth Evaluation Round – Evaluation Report, paragraph 91. See also 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 17.

<sup>120</sup> GRECO Fifth Evaluation Round – Evaluation Report, paragraph 91. See also 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 17.

<sup>121</sup> GRECO Fifth Evaluation Round – Compliance Report, paragraphs 54-63; and GRECO Fifth Evaluation Round – Evaluation Report, paragraphs 82-91, reiterating its recommendation that in respect of persons exercising top executive functions, an in-depth reform of the system of immunities be carried out with a view to facilitating the prosecution of corruption offences by excluding these from the scope of immunities and by ensuring that the procedure for the lifting of the immunity is transparent and based on objective and fair criteria used effectively in practice (see paragraph 87). See also 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 17.

<sup>122</sup> As reported in the 2020 and 2021 Rule of Law Reports, Country Chapters on the rule of law situation in Poland, p. 8 and 11 (for 2020) and 18 (for 2021) ; GRECO Fifth Evaluation Round – Evaluation Report, paragraph 78.

<sup>123</sup> Helsinki Foundation (2022), A state of accusation: Polish prosecution service 2015-2022, and information received from the Batory Foundation in the context of the country visit to Poland and as reported, with more details, in the 2020 Rule of Law Report, Country Chapter on the rule of law situation in Poland, pp. 8 and 11. In this context, see also the concerns raised by the Venice Commission (opinion CDL-AD(2017)028).

prosecutors and defence lawyers by the Central Anti-Corruption Bureau's Pegasus surveillance spyware<sup>124</sup>.

**The Polish Government has analysed the effectiveness of its lobbying rules but the findings have not been made public.** A legislative amendment to the current lobbying regulation<sup>125</sup> dating back to 2005 was one of the objectives set out in the Government's Anti-Corruption Programme for 2018-2020<sup>126</sup>. Yet, no legislative amendments have been proposed. The applicable law defines lobbying, establishes a public register as well as determines obligations and sanctions for unregistered lobbyists. In this context, Poland does not have lobbying rules obliging persons exercising top executive functions to transparently disclose their contacts with interest representatives<sup>127</sup>. In practice, however, there are three lobby registers in place, one for the Government (based on the lobbying regulation), one for the lower chamber of Parliament (Sejm), and one covering its higher chamber (Senate)<sup>128</sup>. For lobbying activities towards the government, the Minister of Internal Affairs and Administration is the supervisory body<sup>129</sup>. For members of Parliament, the two chambers have supervisory tasks over lobbying activities<sup>130</sup>. Concerns persist as to the effectiveness of these registers with low and declining registration rates.<sup>131</sup> The oversight is not systematic and no information is available on whether sanctions have been applied to unregistered lobbyists<sup>132</sup>. Post-employment ('revolving doors') rules exist for top-level officials but do not extend to members of Parliament and are limited to entities that the respective public official dealt with professionally or issued specific decisions<sup>133</sup>.

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<sup>124</sup> As also reported in Part IV below, p. 24. Contribution by the Supreme Audit Office for the 2022 Rule of Law Report, p. 1; contribution from the Marshal of the Senate of the Republic of Poland for the 2022 Rule of Law Report, p. 1. See in this context also Prosecutor Wrzosek under surveillance with Pegasus? The prosecutor's office refused to initiate proceedings (29 Dec. 2021). Reportedly, also opposition lawyer Roman Giertych was under surveillance by the Pegasus software, who used his phone also for professional conversations subject to the attorney's secrecy, see Roman Giertych under surveillance with Pegasus (21 Dec. 2021). The same software was used in the case of Senator Krzysztof Brejza, see Brejza – another victim of Pegasus: The KO Chief of Staff was surveilled during the election campaign (23 December 2021).

<sup>125</sup> The Law of 7 July 2005 on Lobbying in the law-making process was one of Europe's first lobbying regulations.

<sup>126</sup> The resolution No. 207 of 19 December 2017 of the Council of Ministers – the Governmental Anti-Corruption Programme for years 2018-2020, (M.P. z 2018 r. poz. 12). See also above in the section on the Anti-Corruption Programme, p. 12.

<sup>127</sup> GRECO Fifth Evaluation Round - Compliance Report, paragraphs 32-36.

<sup>128</sup> While the two separate parliamentary registers require lobbyists to provide information about the entities they represent as well as their specific interests, the information contained in the Government register is limited to personal data.

<sup>129</sup> Law of 7 June 2005 on lobbying activities in the law-making process.

<sup>130</sup> See above, Law of 7 June 2005 on lobbying activities in the law-making process.

<sup>131</sup> The number of lobbyists registered in the Sejm decreased between 2015-2018 from 31 to 20 lobbyists, see <https://konkret24.tvn24.pl/polityka,112/kim-jest-lobbysta-sprawdzamy-przepisy,950341.html>, and continued to decline in 2019 and 2020, see <https://klubjagiellonski.pl/publikacje/ficjacja-jawnosci-dzialalnosc-lobbingowa-w-sejmie-rp-w-latach-2006-2019/>. In 2021, only 14 professional lobbyists (i.e. 2.82%) were represented in the Sejm without presenting their position, according to information by the Sejm, [https://www.sejm.gov.pl/lobbing/informacja\\_roczna\\_2021.pdf](https://www.sejm.gov.pl/lobbing/informacja_roczna_2021.pdf). Cf. 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, pp.18-19. See also the still valid assessment conducted by Frank Boldt Foundation (2016), 'Lobbying – a risk or an opportunity? – Lobbying regulation in the Polish, Slovak, and Czech perspective'. On the need to enhance transparency in the interactions by parliamentarians with lobbyists and other third parties who seek to influence the legislative process is also a long-standing recommendation of GRECO that has so far not been met by Poland, see GRECO Fourth Evaluation Round - Interim Compliance Report, pp. 3-5.

<sup>132</sup> *Ibidem*, cf. also 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 19.

<sup>133</sup> GRECO Fifth Evaluation Round – Evaluation Report, recommendation viii and paragraph 65.

**There are various systems for asset declarations and controls but the initiative to standardise them is not being pursued**<sup>134</sup>. The creation of a uniform system for the submission and analysis of asset declarations for public officials was one of the measures of the Government Anti-Corruption Programme 2018-2020<sup>135</sup>. The Central Anti-Corruption Bureau prepared a draft regulation, however, it has not been made public<sup>136</sup>. The technical work towards a more standardised, electronic system was suspended until appropriate legislative steps are taken<sup>137</sup>. Until then, a centralised submission and monitoring system is lacking, while the level of digitalisation of politicians' asset declaration continues to be low<sup>138</sup>. Most declarations are still filled out by hand, with various declaration forms being in use<sup>139</sup>. The scope of data to be disclosed is similar but not streamlined for every public official required to submit declarations.

**Whistleblowers can report corruption in an official online reporting system, while dedicated legislation for whistleblowers' protection is in preparation.** The Central Anti-Corruption Bureau hosts a helpline system for anonymous disclosures by citizens<sup>140</sup>. There is no analytical data available on the use and effectiveness of this hotline in practice<sup>141</sup>. A new draft law on whistleblower protection is in preparation to transpose the relevant EU directive<sup>142</sup>. The legislative process is still at governmental level and no timeline for adoption is available<sup>143</sup>. Until amendments are introduced to the current whistleblower framework, whistleblowers' protection is provided for in different legal provisions<sup>144</sup>.

**New measures aim at increasing transparency in political party finance rules, while concerns have arisen regarding election campaigns.** The law on the Political Parties was revised by criminal code amendments<sup>145</sup> introducing the obligation for political parties to

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<sup>134</sup> Cf. 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 19, when technical work towards a standardised system were already undertaken but then suspended.

<sup>135</sup> The resolution No. 207 of 19 December 2017 of the Council of Ministers – the Governmental Anti-Corruption Programme for years 2018-2020 (O.J. 'M.P.' of 2018 r. item. 12).

<sup>136</sup> Poland's new anti-corruption law was reportedly accompanied by a new regulation on asset declaration. Access to document requests by stakeholders regarding the regulation were declined, according to information received in the context of the country visit to Poland.

<sup>137</sup> Implementation of the Government Anti-corruption Programme for 2018-2020.

<sup>138</sup> GRECO Fifth Evaluation Round – Evaluation Report, recommendations x and xi, paragraphs 72 and 78.

<sup>139</sup> *Ibid.* Cf. 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 19, where it was reported that, at least, 16 different forms are in use. Provisions on asset declarations are scattered among several legislative acts.

<sup>140</sup> Input received from Poland for the 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 24. No data was submitted regarding the effectiveness and use of the hotline.

<sup>141</sup> According to information received by the Government for the 2022 Rule of Law report, the Central Anti-Corruption Bureau communicates its anti-corruption activities, including information on the effectiveness of all reporting channels supported by the Agency, in its annual report, which is sent to the Polish supreme executive institutions and is publicly available.

<sup>142</sup> In October 2021 a governmental inter-service consultation was launched for the draft law.

<sup>143</sup> Draft Law on the protection of persons who report violations of the law. Poland has yet to transpose the EU Whistleblower Directive. The deadline for transposition by Member States lapsed on 17 December 2021.

<sup>144</sup> Poland reported that whistleblowers are subject to protection on the basis of general principles of labour law and provisions protecting employees-whistleblowers from retaliation, such as anti-discrimination provisions and the provisions that prohibit mobbing in the place of employment, while reviews found that the effectiveness of the labour code provisions in practice is low and only covering part of the working population. See UN Conference of the State Parties to the UN Convention against Corruption (2015), Implementation Review Group – Poland, p. 5, and OECD (2015), Poland: Follow up to the Phase 3 Report and Recommendations (2015), pp. 5 and 29.

<sup>145</sup> Act amending the Criminal Code and certain other acts (14 October 2021).

maintain up-to-date a register of donations<sup>146</sup> and a register of contracts of political parties<sup>147</sup>. Overall, stakeholders assess the registers' potential to increase transparency in political party finances as a step in the right direction<sup>148</sup>. Concerns have, however, been raised by the Personal Data Protection Office that the disclosure of the donors' identity in the register of donations would allow the identification of the donors' political affiliation<sup>149</sup>. Furthermore, the exclusion from the register of individual donations to the Electoral Fund have raised questions as to the new rules' impact in practice<sup>150</sup>, as the Electoral Fund is the only source of funds used to finance election campaigns. The revised law on the Political Parties entered into force on 1 July 2022<sup>151</sup>. Furthermore, in September 2021, a court ruled that the prosecutor's office is to resume the investigations into the so-called envelope elections of May 2020 that concern allegations of misuse of public funds<sup>152</sup>.

**'Impunity clauses' in public procurement rules, first introduced during the COVID-19 pandemic, continue to raise concern of corruption risks.** Several temporary exemptions from criminal and disciplinary responsibility for the abuse of power by public officials ('impunity clauses') who manage public funds or purchase equipment, services, and other resources were introduced during the pandemic<sup>153</sup>. Following the failure to adopt extensions of

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<sup>146</sup> New Article 25(6)-(13) of the Political Parties Act. The register of donations is in electronic form, searchable and made available in a public information bulletin operated by the political parties, including information only on those donations exceeding the amount of approximately EUR 2,500 (i.e. PLN 10,000) of a person in a single year, excluding membership fees. In case of failure of compliance with the new obligation, an administrative monetary sanction is applied (equal to 50% of the amount of payments made).

<sup>147</sup> New Articles 27(a)-(c) of the Political Parties Act; Article 4 of the Law amending the Criminal Code and certain other acts (14 October 2021). The register of contracts is in electronic form and made public. The register includes information on the contract number, data and place of the contract signature, contract period, parties to the contract and their representatives, the subject, value and mode of the contract. In case of failure of compliance with the new obligation, the same administrative monetary sanctions apply as for the register of donations, see footnote above.

<sup>148</sup> The positive potential, particularly for the register of contracts, is seen for cases where access to document requests would not lead to the disclosure of public information. Information received from the Batory Foundation in the context of the country visit to Poland. See in this context also the related publication Batory Foundation (2017), 'Finances of Polish parties', p. 151.

<sup>149</sup> See letter of the President of the Personal Data Protection Office to the Chancellery of the Sejm of 30 June 2021. The register includes personal data, including the name and address of the donating individual, the date and the amount of the donation.

<sup>150</sup> While individual donations to parties have rarely exceeded 10% of the annual revenue of political parties, individual donations to the Electoral Fund have played a more important role in the financing in the past, having accounted to approximately 40% of the Funds' revenues in the years of 2011-2016, according to the Batory Foundation (2017), p. 146.

<sup>151</sup> Article 15 of the Law amending the Criminal Code and certain other acts (14 October 2021).

<sup>152</sup> See the 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 26. This ruling of 29 September 2021 overturns the decision of the District Prosecutor's Office in Warsaw not to initiate investigations into the allegations of the Prime Minister and others exceeding their powers by unlawfully ordering preparations for the presidential election and causing damage of great proportion and ballot rigging. See also the Supreme Audit Office (2021), Report, finding that the organisation and preparation of the elections had no sufficient legal basis. The Supreme Audit Chamber sent notification to the prosecution service regarding the suspicion of the commission of crimes in the organisation of the presidential elections involving individuals performing top executive functions. Several attempts to launch investigations were subsequently hindered, including also by the launch of disciplinary procedures against proactive prosecutors. The allegations concern the spending of public funds of approximately EUR 15 million (PLN 70 million).

<sup>153</sup> The Central Anti-Corruption Bureau is in charge of the anticorruption-related aspects of the Government Anti-Crisis Shield providing financial support to micro, small and medium-size and large enterprises to combat the effects of the COVID-19 pandemic. Exemptions from criminal responsibility were included, in particular: in Article 10(c) of the Law amending the Law of 31 March 2020 on Specific Measures to Prevent, Counteract and Combat COVID-19 and Other Contagious Diseases and Associated Crisis Situations and Certain Other

those temporary exemptions beyond the previously introduced limited scope of time, a case was brought before the Constitutional Tribunal and is still pending to examine whether the crime of abuse of power by public officials, as laid down in the Criminal Code, is constitutional in such circumstances<sup>154</sup>. A similar impunity clause was also proposed in the recent draft law on aid for Ukrainian refugees<sup>155</sup>, excluding criminal liability during war times, which was, however, discarded due to increased public and media attention<sup>156</sup>. Such exemptions from criminal responsibility introduce corruption risks and may foster the abuse of political and administrative power due to the lack of deterrence and perception of impunity.

### **III. MEDIA FREEDOM AND MEDIA PLURALISM**

According to the Constitution, the public interest regarding radio broadcasting and television is safeguarded by the National Broadcasting Council (KRRiT) whose members are appointed by the Sejm, the Senate and the President of the Republic. Freedom of the press and other means of social communication are constitutionally protected. The Law on Broadcasting and the Press Law provide, respectively, a legal framework for the media regulator - the KRRiT and safeguards for journalistic independence. The Law on Broadcasting was amended to transpose the revised Audiovisual Media Services Directive<sup>157</sup> and included further provisions relevant for the transparency of media ownership<sup>158</sup>.

**Changes in the legal framework contributed to the strengthening of the statutory safeguards for the independence of the media regulator.** Legislation transposing the revised Audiovisual Media Services Directive (AVMSD) was adopted on 11 August 2021, through an amendment of the Broadcasting Act. The revision included provisions pertinent to the independence of the media regulator, in particular by making the procedure for dismissing its members more rigid<sup>159</sup>. To this end, it introduced an obligation to require the President of the Republic to confirm the expiry of the KRRiT members' term of office, following a negative

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Laws, adopted in March 2020 (in force for 180 days between 8 March 2020 and 4 September 2020); in Article 76 of the Law on special support instruments in connection with the spread of SARS-COV-2 virus, adopted in April 2020; and in Article 10(d) of the Law amending the Law of 31 March 2020 on Specific Measures to Prevent, Counteract and Combat COVID-19 and Other Contagious Diseases and Associated Crisis Situations and Certain Other Laws, proposed in August 2020 (not adopted).

<sup>154</sup> The case was initiated by a group of members of Parliament regarding articles 231 and 296 of the Criminal Code, see for more information, the website of the Constitutional Tribunal. Should the provisions be found unconstitutional, such a judgment risks to have far-reaching consequences for anti-corruption regulations, setting a significant precedent.

<sup>155</sup> Amendment to the law on assistance to Ukrainian citizens in connection with the armed conflict on the territory of the country (March 2022), entered into force on 26 March 2022 with retroactive effect from 24 February 2022.

<sup>156</sup> Information received from Amnesty International, Forum Obywatelskiego Prawa i Społeczeństwa, Helsinki Foundation for Human Rights, Batory Foundation, Ombudsperson, Bar Association in the context of the country visit to Poland.

<sup>157</sup> Complete transposition of the Audiovisual Media Services Directive was notified to the Commission in November 2021.

<sup>158</sup> Poland ranks 66th in the 2022 Reporters without Borders World Press Freedom Index compared to 64th in the previous year.

<sup>159</sup> In accordance with the Law of 29 December 1992 on television and radio broadcasting, members of the KRRiT may be removed from office by the respective appointing authority in case the member concerned resigns, suffers from an illness barring him or her from exercising the office, is found guilty of a criminal offence prosecutable by a public indictment, submits a lustration declaration that has been found false by the court, is found by the Tribunal of State to have violated law.

vote by the two Chambers of Parliament. Both the resolutions, as well as any confirmation by the President, need to be reasoned. Despite the legal safeguards being in place, as noted by different stakeholders, challenges relate to close political ties of some members of the KRRiT to the governing party, which may undermine its independence<sup>160</sup>. This is also reflected by the 2022 Media Pluralism Monitor, which states that the existing appointment procedures do not ensure effective limitation of political influence<sup>161</sup>. Also, the list of responsibilities of the media regulator has been widened to align it with the revised AVMSD, for instance when it comes to actions related to video sharing platforms.

**Recent developments concerning operating licensing show existing risks to media pluralism.** As noted in last year's Rule of Law Report<sup>162</sup>, there are concerns related to reducing media pluralism through modification of requirements for obtaining a licence. Proposed legislative amendments<sup>163</sup>, allowing not to grant broadcasting concessions to operators directly or indirectly controlled by persons registered outside the EEA, were subject to a Presidential veto and, therefore, did not become part of the Polish legal order. Concerns were also raised regarding the lack of transparency of the legislative process of these amendments<sup>164</sup>. Controversies around the extension of the broadcasting licences for both TVN24 and TVN7 channels<sup>165</sup> show risks in relation to the operation of independent media actors<sup>166</sup>. In the case of TVN24, KRRiT decided to extend its licence but only after 18 months and the TVN7 licence was extended after more than 12 months from the extension request being made. While both licences were ultimately extended for the period of 10 years, the administrative proceedings by the KRRiT were considered as particularly long, although the Broadcasting Law provides for a simplified examination procedure in the case of a request for license renewal<sup>167</sup>. Moreover, when extending the TVN24 license, KRRiT issued a resolution mirroring the rationale of the above-mentioned problematic legislative proposal<sup>168</sup>.

**Further obligations concerning media ownership transparency have been adopted.** The 2022 Media Pluralism Monitor reports medium risk in relation to the media ownership transparency, noting that the public has less readily-available access to the relevant ownership or financial data than authorities. The 2021 amendment of the Broadcasting Law, which transposes the revised AVMSD, expanded the scope of the transparency obligations for media service providers<sup>169</sup>. The new rules include an obligation to provide information on beneficial

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<sup>160</sup> Contribution from Liberties for the 2022 Rule of Law Report; Contribution from the European Federation of Journalists for the 2022 Rule of Law Report; Contribution from Civicus for the 2022 Rule of Law Report.

<sup>161</sup> 2022 Media Pluralism Monitor, country report on Poland, p. 12.

<sup>162</sup> 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p 21.

<sup>163</sup> Draft law amending the law on the radio and television broadcasting, submitted to the Sejm on 7 July 2021.

<sup>164</sup> Contribution from Liberties for the 2022 Rule of Law Report.

<sup>165</sup> Owned by TVN group, which is owned by U.S. company Discovery.

<sup>166</sup> Under the Broadcasting Law, the applicant has to submit a request no later than 12 months before expiry of the current licence. The Law does not specify a time limit for the media regulator to decide. One could expect the national media regulator to issue its decision regarding a new broadcasting licence before the expiry of the current licence. There are also alternative interpretations concerning the procedures and deadlines envisaged for the renewal of a broadcasting licence. See International Press Institute of 4 March 2022, *How 'licence wars' curb Poland's free media (Gazeta Wyborcza)*.

<sup>167</sup> Contribution from Liberties for the 2022 Rule of Law Report. See also Gazeta Prawna (2021), 'Can we really afford further price violations of the law?'

<sup>168</sup> Business Insider (2022), 'Polish TVN24 licence extended. The National Broadcasting Council adopted a resolution whose aim is the same as that of the lex TVN'.

<sup>169</sup> Written contribution from KRRiT received in the context of the country visit to Poland.

owners and include it in the National Judicial Register and the Central Register of Beneficial Owners<sup>170</sup>.

**There are concerns regarding the independence of Polish public service media.** Following the 2016 reform<sup>171</sup>, the competences related to public service media are distributed between the National Media Council (RMN)<sup>172</sup> and National Broadcasting Council (KRRiT). Under the current legal framework, the RMN is competent for the appointment and removal of the management and supervisory boards of the Polish Television (TVP), the Polish Radio and the Polish Press Agency<sup>173</sup>. The 2022 Media Pluralism Monitor reports high risks in relation to independence of public service media governance and funding, referring to the support of the public service media management towards growing political partisanship as well as points the issues related to the justification and opaqueness of the public service media funding. Concerning the media regulator, KRRiT has powers related to the charters of duties of public service media and their yearly programming as well as financial plans, and to the assessment of yearly reports regarding performance of their public service remit. However, as reported by stakeholders and the Media Pluralism Monitor, KRRiT appears to be unwilling to react against imbalanced reporting on public services media, which stands out in comparison to cases of harsh reactions towards reporting disseminated by independent private media<sup>174</sup>. As pointed out by a stakeholder, the existing division of competences between KRRiT and RMN limits KRRiT's capacity to carry out its constitutional mission of safeguarding the freedom of speech and the right to information and public interest in radio and television broadcasting<sup>175</sup>. No legislative developments concerning the distribution of state advertisements were reported in 2021, however as confirmed by the 2022 Media Pluralism report challenges persist over its fair and transparent distribution<sup>176</sup>. These concern, in particular, channeling state advertising to government-sympathetic media outlets<sup>177</sup>.

**Introduction of the state of emergency negatively affected the right of access to information, in particular by humanitarian organisations and journalists.** Following the introduction on 2 September 2021 of a state of emergency in the area adjacent to the Polish-Belarusian border, the area was excluded from any media scrutiny, and no provision was made for a system of accreditation allowing access for journalists. There were reports of journalists being apprehended<sup>178</sup>, and in several instances journalists were informed by the police that they

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<sup>170</sup> Ibidem. The Register is available online and can be consulted under the following address: <https://www.gov.pl/web/mswia/dzialalnosc-lobbingowa>.

<sup>171</sup> Sejm's official communique of 7 July 2016.

<sup>172</sup> According to the law, the Council consists of five members, three of them appointed by the Sejm and two by the President of the Republic for term of six years. The President appoints members of the Council from candidates nominated by the largest parliamentary opposition groups.

<sup>173</sup> In December 2016, the Polish Constitutional Tribunal considered the exclusion of KRRiT from the process of appointment of the public media's management as unconstitutional. See Judgment of the Constitutional Tribunal of 13 December 2016 in case K 13/16.

<sup>174</sup> 2022 Media Pluralism Monitor, country report on Poland, p.8; Contribution from Liberties for the 2022 Rule of Law Report; Contribution from the European Federation of Journalists for the 2022 Rule of Law Report, p. 80.

<sup>175</sup> See report of the Batory Foundation (2021), The politicisation of the National Polish Broadcasting Council.

<sup>176</sup> 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland; 2022 Media Pluralism Monitor, country report for Poland, p. 17 and Contribution from Liberties for the 2022 Rule of Law Report 2022.

<sup>177</sup> 2022 Media Pluralism Monitor, country report on Poland, p. 17.

<sup>178</sup> Media and NGOs also reported on other instances of 'brutal' apprehension of journalists in the area that were videotaped. See in particular Onet.pl of 21 November 2021, 'Recordings of the journalists' apprehension. <You will fu\*\*ing not feel like snapping photos> containing a video recording, and a statement of the Helsinki

would face criminal charges for reporting from the emergency zone<sup>179</sup>, and some were fined for their activities<sup>180</sup>. The Supreme Court acquitted journalists found in breach of these rules, considering the prohibition introduced by the Government as disproportionate and unconstitutional<sup>181</sup>. Another law concerning the situation at the Belarussian border<sup>182</sup>, empowered the border guard to grant the access to the zone to selected media, whilst retaining full control over the movement of journalists in that zone<sup>183</sup>. Overall, these restrictions were considered to be a risk to press freedom by the Commissioner for Human Rights of the Council of Europe, the Ombudsperson<sup>184</sup> as well as by the representatives of media and journalists associations who issued an open statement to that end<sup>185</sup>.

**The professional environment for journalists continues to deteriorate<sup>186</sup>.** The Law on Broadcasting and the Press Law<sup>187</sup> provides for safeguards of journalistic independence. Self-regulatory mechanisms are not developed within the journalistic community, which, as noted by stakeholders, does not improve the working environment for journalists<sup>188</sup>. While journalists remain exposed to cases of physical and verbal abuse, including when covering public protests<sup>189</sup>, the 2022 World Press Freedom Index reports that the level of violence has decreased. However, it considers that the protection of journalists and their rights during protests remains insufficient<sup>190</sup>. The news media community continues<sup>191</sup> to be exposed to threats stemming from strategic lawsuits against public participation (SLAPPs)<sup>192</sup>. Since July 2021, 24 alerts have been published on the Mapping Media Freedom platform and 14 of them

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Foundation of Human Rights (2021), 'Brutal detention of journalists by soldiers near Michałow. The HFHR writes to the Minister of National Defence.

<sup>179</sup> Specifically, for staying in the prohibited area and for allegedly filming the border infrastructure, European Federation of Journalists, contribution to the Rule of Law Report, 2022, p. 83. Reporters without Borders (2021), 'Polish soldiers cannot treat journalists as if it were a military dictatorship', See also Part IV below.

<sup>180</sup> On 27 September 2021, journalists were caught while following a Border Guard bus transporting migrants towards the border, presumably in order to bring the group back to the territory of Belarus; as reported i.a. by the European Federation of Journalists; See contribution from the European Federation of Journalists for the 2022 Rule of Law Report, p. 83.

<sup>181</sup> Judgment of 18 January 2022 in the case I KK 171/21 (see also part IV below). The Supreme Court considered as too broad the measures detailed in a governmental decree, based on the ordinance of the President of the Republic on the state of emergency.

<sup>182</sup> Law of 14 October 2021 on Erecting Protective Measures on the State Border.

<sup>183</sup> Press release of the Border Control Guard of 1 December 2021. There are no clear criteria governing the final decision taken in that respect.

<sup>184</sup> Contribution from the Commissioner for Human Rights for the 2022 Rule of Law Report, p.10; Open letter of the Ombudsperson of 6 September 2021 addressed to the President of the Republic and the Prime Minister; Reporters without Borders.

<sup>185</sup> Association of journalists issued an open statement raising concerns on this issue; see e.g. Tygodnik Powszechny of 14 September 2021, where the statement is reproduced.

<sup>186</sup> See the 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland pp. 23-24.

<sup>187</sup> In particular, Article 10(2) of the Press Law of 26 January 1984 stipulates that 'a journalist has the right to reject an instruction from his or her superior if he or she is expected to publish a text that contradicts the principles of fairness, objectivity and professional accuracy'.

<sup>188</sup> 2022 Media Pluralism Monitor, country report on Poland, p.17, and contribution from the European Federation of Journalists for the 2022 Rule of Law Report, p. 84.

<sup>189</sup> Commissioner for Human Rights, Contribution from the Commissioner for Human Rights for the 2022 Rule of Law Report 2022, p 9; Contribution from Liberties for the 2022 Rule of Law Report, p. 17.

<sup>190</sup> Reporters without Borders, Poland.

<sup>191</sup> See the 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 24.

<sup>192</sup> For instance, Gazeta Wyborcza's journalists were targeted by 63 lawsuits issued by a person with close ties to the ruling party. Similarly, according to Onet.pl data, media outlets run by Ringier Axel Springer were sued 79 times and were faced with 17 criminal cases launched by people or institutions with close ties to the ruling party since 2015. See contribution from Liberties for the 2022 Rule of Law Report.



concerned legal incidents related to journalists. In this period, the Council of Europe’s Platform to promote the protection of journalism and safety of journalists published 17 alerts, 14 of them related to legal incidents and five to harassment and psychological abuse<sup>193</sup>. The 2022 Media Pluralism Monitor assesses the risks related to the journalistic profession, standards and protection at medium level<sup>194</sup>. In addition, a recent legislative draft of the Ministry of Justice risks affecting the freedom of speech on the Internet, giving rise to editors’ concerns<sup>195</sup>. The law would *inter alia* establish a public authority which would act as an appeal body for content moderation decisions taken by online platforms<sup>196</sup>.

#### **IV. OTHER INSTITUTIONAL ISSUES RELATED TO CHECKS AND BALANCES**

Poland is a representative democratic republic with a directly elected President, a bicameral Parliament (Sejm and Senate) and a Constitutional Tribunal in charge of constitutional review of laws. The Sejm has the final decision-making power when adopting laws. The President of the Republic, the Senate, a group of 15 deputies, the Council of Ministers and a group of at least 100 000 citizens have the right to propose new legislation. The independent Ombudsperson is tasked with safeguarding the freedoms and rights of persons and citizens specified in the Constitution and other normative acts. The Supreme Audit Office is the chief organ of state audit, subordinate to the Sejm, acting in accordance with the principles of collegiality.

**Significant reforms continue to be frequently adopted through the by-passing of procedures that require adequate consultations.** Practice shows that the governmental legislative track, which entails the obligation of public consultations, is often not used, and laws are regularly tabled by groups of Members of Parliament<sup>197</sup>. Such an approach results in a high share of laws not being subject to adequate public consultation<sup>198</sup>. This practice practically prevents stakeholders from submitting their opinions on the draft legislation, and often postpone taking a position until the law has been transmitted to the Senate<sup>199</sup>. Together, this increasingly affects the quality of the legislation. This issue was raised in the context of

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<sup>193</sup> Link and data will be updated Mapping Media Freedom - European Centre for Press and Media Freedom (ecpmf.eu).

<sup>194</sup> 2022 Media Pluralism Monitor, country report on Poland, p. 11.

<sup>195</sup> See an open statement of 12 human rights and business organisations calling on withholding works on the law governing the freedom of speech in social media. Prawo.pl of 24 January 2022, Organisations don’t want a “free speech on the internet” law, reproducing statements of business representatives and NGOs on the above issue.

<sup>196</sup> E.g. the law would also make it possible to force online platforms to remove, at the request of the State authorities, specific content or block activities of social media users. In addition, the Public Prosecution Service would be able to block the content that infringes the law in force. Concerns have been raised that the draft law, could introduce a form of censorship of the internet as well as with regards to its compatibility with the EU framework. See the press release of 7 January 2022 of the Ministry of Justice. The draft law is still subject to governmental approval (cf. draft law UD293). See also Rzeczpospolita of 24 January 2022; Prawo.pl of 24 January 2022, reproducing statements of business representatives and NGOs on the above issue.

<sup>197</sup> In 2021, 22% of the laws were passed using the MP-based legislative track, and 56% of the laws using the Government-based track were not consulted. Cf. Grant Thornton, ‘Law barometer. Analysis of the legal environment’s stability in the Polish economy’ 2022 Edition (the report analyses the stability of the legal environment in the Polish economy).

<sup>198</sup> Grant Thornton, 2022 Edition. A prominent example is the recent tax reform where, as of February 2022, in the case of eight out of nine laws constituting the reform there is no evidence of public consultations. See: a statement of 12 October 2021 of Pracodawcy RP.

<sup>199</sup> This was confirmed by representatives of the Ombudsperson’s Office in the context of the virtual country visit to Poland, held on 14-16 March 2022. ENHRI contribution to the 2022 Rule of Law Report, p. 408.

the 2019 and 2020 Country Specific Recommendations under the European Semester<sup>200</sup>. As part of its RRP, Poland made a commitment to adopt an amendment to the Rules of Procedure of the Sejm, the Senate and the Council of Ministers, which shall introduce a mandatory impact assessment and public consultation for draft laws proposed by deputies and senators and limit the use of fast-track procedures to well-specified and exceptional cases, with a view to a better and more stable regulatory framework. In this context, it is noted that the perceived level of effectiveness of investment protection by the law and courts is very low among companies<sup>201</sup>.

**On 1 January 2022, Poland had 38 leading judgments of the European Court of Human Rights pending implementation<sup>202</sup>. At that time, Poland's rate of leading judgments from the past 10 years that remained pending was at 48% and the average time that the judgments had been pending implementation was 5 years and 10 months<sup>203</sup>. The oldest leading judgment, pending implementation for 17 years, concerns the excessive length of proceedings before administrative bodies and courts and absence of an effective remedy<sup>204</sup>. On 1 July 2022, the number of leading judgments pending implementation increased to 45<sup>205</sup>.**

**The new Ombudsperson continues to play a key role as a rule of law safeguard, while constrained by limited resources.** On 8 and 21 July 2021 respectively, the Sejm appointed and the Senate approved the appointment of a new Ombudsperson with bi-partisan support<sup>206</sup>. As in previous years since 2016, the public authorities have not increased the budget allocated to the Ombudsperson's office for the year 2022, thereby limiting its capacity to exercise its role<sup>207</sup>, even though the Office is intensely involved in the humanitarian situation at the Polish-Belarusian border and provides assistance to refugees from Ukraine<sup>208</sup>. The Ombudsperson's cooperation with state authorities remains difficult, including due to the authorities' refusal to react to the Ombudsperson's statements or to take into account his comments and recommendations as regards legislative drafts<sup>209</sup>. The Ombudsperson retains 'A' status,

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<sup>200</sup> This was confirmed by representatives of the Ombudsperson's Office in the context of the virtual country visit to Poland. See also the ENHRI contribution to the 2022 Rule of Law Report, p. 408.

<sup>201</sup> Only 24% of companies are very or fairly confident in the effectiveness of investment protection in Poland, whereas 65% of companies are either fairly unconfident or very unconfident. The main reasons invoked by companies in that respect are frequent changes in legislation or concerns about quality of the law-making process as well as unpredictable, non-transparent administrative conduct and difficulty to challenge administrative decisions in courts; concerns about quality, efficiency or independence of justice also play a role in that respect, see figures 54 and 55, 2022 EU Justice Scoreboard.

<sup>202</sup> The adoption of necessary execution measures for a judgment by the European Court of Human Rights is supervised by the Committee of Ministers of the Council of Europe. It is the Committee's practice to group cases against a State requiring similar execution measures, particularly general measures, and examine them jointly. The first case in the group is designated as the leading case as regards the supervision of the general measures and repetitive cases within the group can be closed when it is assessed that all possible individual measures needed to provide redress to the applicant have been taken.

<sup>203</sup> All figures are calculated by the European Implementation Network and are based on the number of cases that are considered pending at the annual cut-off date of 1 January 2022. See the Contribution from the European Implementation Network for the 2022 Rule of Law Report, p. 61-62.

<sup>204</sup> Judgment of the European Court of Human Rights of 1 February 2005, *Beller v. Poland*, 51837/99.

<sup>205</sup> Data according to the online database of the Council of Europe (HUDOC).

<sup>206</sup> Press release of the Ombudsperson's Office of 23 July 2021.

<sup>207</sup> Statement of the Ombudsperson's Office submitted and included in the contribution from ENNHRI for the 2022 Rule of Law Report.

<sup>208</sup> Information presented in the context of the virtual country visit to Poland by the representatives of the Ombudsperson's office. See also contribution from ENNHRI for the 2022 Rule of Law Report pp. 407-408.

<sup>209</sup> See contribution from ENNHRI for the 2022 Rule of Law Report.

awarded in November 2017 by the UN Global Alliance of National Human Rights Institutions (GANHRI)<sup>210</sup>.

**Despite allegations related to the use of Pegasus and equivalent spyware surveillance software, no investigation was launched by the prosecution service.** On 21 December 2021, media reported<sup>211</sup> that a barrister had been targeted by Pegasus software<sup>212</sup>. Using such software against barristers may compromise the lawyer's secrecy. Prosecution services declined to conduct an investigation into these matters<sup>213</sup>. Stakeholders expressed serious concerns in that respect, pointing at the likelihood that more lawyers were targeted in this specific way<sup>214</sup>. Amongst the alleged targets there was reportedly also a prosecutor and two members of opposition parties and a business representative<sup>215</sup>. Reportedly, the Pegasus surveillance software<sup>216</sup> was purchased for the Central Anti-Corruption Bureau, which raises further concerns regarding the use of corruption investigations for political purposes. The Minister of National Security and Defence Matters confirmed that the Pegasus software had been acquired<sup>217</sup>. Representatives of the governing coalition submitted that no surveillance method can be imposed without prior consent of the court<sup>218</sup>. The Ombudsperson submitted that judicial control in that respect is insufficient and courts do not know what type of

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<sup>210</sup> Global Alliance of National Human Rights Institutions (GANHRI), Sub-Committee on Accreditation (SCA), Accreditation Report of 27 April 2022.

<sup>211</sup> The initial statement on this development was published by the Associated Press (2021), AP Exclusive: Polish opposition due hacked with NSO spyware.

<sup>212</sup> The barrister concerned specialises in representing interests of politicians, including of a former President of the European Council, before Polish courts. See also the 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 12, footnote 90.

<sup>213</sup> On 29 December 2021, the public prosecutor's office informed the prosecutor reportedly affected by Pegasus attacks that her allegations are based on the information received from her phone's manufacturer. The prosecutor declined the request to submit her phone device for further examination by the prosecution services. See RadioZet of 29 December 2021 where a statement of the prosecutor concerned is reproduced together with press statement of the public prosecutor's office.

<sup>214</sup> Including by pointing at the likelihood that more lawyers were targeted in this specific way. See Statement of 1 February 2022 of the Council of Bars and Law Societies of Europe. See also the Council of Bars and Law Societies of Europe contribution submitted in the context of the Rule of Law Report preparation.

<sup>215</sup> The prosecutor concerned is a member of the association of prosecutors 'Lex Super Omnia' who initiated a criminal investigation in the case concerning the organization of the presidential elections in 2020 via post (see the 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 26, footnote 217). As confirmed in the Senate, one of the members of the opposition concerned, at the time of the alleged Pegasus-based surveillance, was the main person responsible for the parliamentary electoral campaign in 2019. The business representative allegedly targeted was the President of the association 'Employers of the Republic of Poland'; see Onet.pl of 19 April 2022, Citizen Lab: another Pegasus victim in Poland.

<sup>216</sup> Amnesty International (2022), Poland: Use of Pegasus spyware to hack politicians highlights threat to civil society; Amnesty International (2021), Pegasus Project: massive data leak reveals Israeli NSO group's spyware used to target activists, journalists, and political leaders globally.

<sup>217</sup> Wpollyce.pl of 7 January 2022, containing an interview in which the admission was made. On 14 January 2022, the Supreme Audit Office disclosed to the media two invoices which were assigned to the Central Anti-Corruption Bureau from the 'Justice Fund' – operated by the Ministry of Justice – to acquire 'means of special technique'. On 7 February 2022, the Supreme Audit Office organized a press conference where it informed the public that over 7000 'possibly dangerous' attacks had been conducted on electronic devices in possession of the Office's staff, including the President of the Supreme Audit Office. The Office has not confirmed that any of these alleged attacks had been carried out by means of the Pegasus software. According to the Office, financial means from the 'Justice Fund' could not be used for any such purchase in accordance with law. See minutes of the Senate's special Committee session of 18 January 2022.

<sup>218</sup> It is also noted that under the Polish law, surveillance techniques can be used against persons suspected of committing a criminal offence. However, the prosecutor allegedly targeted by the Pegasus software was not a suspect or subject to any criminal proceedings in the period concerned.

surveillance would eventually be imposed by the state bodies<sup>219</sup>. The Senate set up an extraordinary committee to conduct an inquiry into these developments<sup>220</sup>.

**Government action on the Polish-Belarussian border under a state of emergency sparked concerns of stakeholders as to constitutionality and restriction of fundamental rights and freedoms.** On 31 August 2021, in view of the crisis at the Polish-Belarussian border, the Government requested the President of the Republic to introduce a state of emergency on the territory of two Polish regions adjacent to the Belarussian border, limiting a number of constitutional rights and freedoms<sup>221</sup> (until 1 December 2021). Without questioning as such the state of emergency, the Ombudsperson raised concerns related to the disproportionate limitation of constitutional freedoms in that respect. Meanwhile, as the state of emergency could not be constitutionally prolonged past 1 December 2021, the Sejm adopted on 17 November 2021 a law empowering the Minister of Interior to impose a prohibition incumbent on any person to stay or move within the border-adjacent area<sup>222</sup>. According to the Ombudsperson, another law concerning the situation at the Belarussian border raises severe constitutionality concerns notably related to the suspension of constitutional rights and freedoms<sup>223224</sup>.

**The Supreme Audit Office continues its operation under adverse conditions.** As of 2021, the Marshal of the Sejm has been refusing to appoint Members of the SAO College, thus hampering the effective functioning of the Office<sup>225</sup>. The Prosecutor-General has made a request to deprive the President of the SAO of his immunity, which is currently under examination of the Sejm<sup>226</sup>. Representatives of the SAO raised concerns about the lack of effective follow-up by the prosecution services to its requests made in the aftermath of

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<sup>219</sup> Press communique of the Ombudsman's Office of 12 January 2022. The Ombudsperson considers that the use of any system of total invigilation, such as the one offered by the Pegasus software, would be incompatible with Polish law.

<sup>220</sup> This committee has no inquisitorial competences. A motion to convene an inquisitorial committee remains pending before the Sejm. As regards the Senate, see the press release of 17 January 2022. As regards the Sejm, reference is made to draft motions lodged with the Sejm on, respectively, 11 January 2022 and 10 February 2022.

<sup>221</sup> According to the Polish constitution, a state of emergency may be introduced for a definite period no longer than 90 days and be extended once only for a period no longer than 60 days; press release of the government of 31 August 2021. According to the ordinance of the President of the Republic, the state of emergency entailed i.a. the suspension of the right to organise and hold assemblies and cultural events, the prohibition of staying in designated places, objects and areas, and the limitation of the access to public information as regards actions conducted in the area covered by the state of emergency; press release of the President of the Republic of 1 October 2021.

<sup>222</sup> Law of 17 November 2021 amending the Law on the Protection of the State Border and certain other laws. The set of prohibitions introduced was lifted as of 1 July 2022. According to the Polish government, these measures were introduced in order to ensure security or public order.

<sup>223</sup> Law of 14 October 2021 on Erecting Protective Measures on the State Border. Press release of the Ombudsperson of 21 October 2021.

<sup>224</sup> Press release of the Border Control Guard of 1 December 2021. There are no clear criteria governing the final decision taken in that respect.

<sup>225</sup> See the call of the President of the SAO addressed to the Marshal of the Sejm, reiterating the request for appointment of a number of new SAO College members, dated 3 August 2021. See also the minutes of the sitting of the Sejm's Committee for the State Audit of 8 March 2022 where the situation was discussed. For additional background, see also Tok.Fm of 23 September 2021. It is noted that in June 2022, the SAO College consisted of 9 members while 19 posts exist according to the law.

<sup>226</sup> Press release of the National Prosecutor's Office of 23 July 2021. The request has been made due to i.a. allegedly incorrect information provided in asset declarations by the President of the Supreme Audit Office.

audits<sup>227</sup>. Furthermore, the chief office-holders in Poland refuse to cooperate with the SAO in the context of audit reports<sup>228</sup>. Since 2021, the Supreme Audit Office ('SAO') has produced a number of audit reports raising concerns regarding possible instances of public funds' embezzlement and mismanagement by public authorities, notably by the Ministry of Justice<sup>229</sup> and bodies responsible for implementing the state budget<sup>230</sup>. While the SAO raised concerns about developments adversely affecting its own independence at the forum of the European Organisation of Supreme Audit Institutions<sup>231</sup>, no steps have so far been taken by the state authorities to rectify the situation.

**Civil society plays a crucial role in providing help to refugees from Ukraine, following the Russian war of aggression against Ukraine.** NGOs have been very active in providing psychological and medical support, interpretation services, and in supplying food and clothes to over three million refugees. In addition, the self-government of legal professions has been active in providing refugees with legal assistance free of charge<sup>232</sup>. The Government has facilitated the process of financial donations to selected NGOs in this context and assigned about EUR 10 million to the NGOs assisting with the situation on the ground<sup>233</sup>. A group of 40 NGOs signed an open statement to the European Commission and the Council voicing concerns as regards the Polish Government's initiatives to disburse additional EU funds aimed at helping the refugee crisis and the fact that funds do not reach local authorities and civil society<sup>234</sup>.

**The civic space has further deteriorated.** Poland continues to have a broad and vibrant civil society, consisting of more than 120 000 different NGOs. However, in view of the lack of action to address a continued deterioration in civic freedoms, assessments now characterise

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<sup>227</sup> Information presented by the Supreme Audit Office during the country visit to Poland held in the context of the 2022 Rule of Law Report preparation. See also the Audit report No. P/20/037 of 30 September 2021.

<sup>228</sup> The Marshal of the Sejm refused to appear before the SAO twice. See the statement of the Marshal of the Sejm of 16 February 2022.

<sup>229</sup> Audit report No. P/20/037 of 30 September 2021 on the 'Implementation of the tasks of the Victims' Assistance and Post-penitentiary Assistance Fund – Justice Fund'. The report states that only 38% of resources under the Fund were used in a manner that is consistent with the Fund's statutory aims, i.e. to provide help to victims of crimes. The remainder of resources allocated to the Fund was used to finance other activities giving rise to concerns of the SAO. Overall, subject to a possible embezzlement were PLN 280 million (ca. EUR 63 million). According to the SAO, in spite of a request to follow up on the audit's findings and the expiry of the statutory deadlines, neither the Prime Minister nor the Deputy Prime Minister reacted to the request to undertake action. The Head of the Central Anti-Corruption Bureau stated that it is not competent to act. A possible embezzlement related to the Justice Fund – under the sole remit of the Minister of Justice – would need to be followed up by the prosecution services, headed by the Minister of Justice in his capacity of the Prosecutor-General.

<sup>230</sup> The 2020 State Budget Discharge Report presented on 22 July 2021 before the Sejm. According to the SAO, this was the first time in the history of Poland that it was not possible to give a positive assessment of the budget's implementation. Notably, according to the SAO findings, instances of absconding of large financial operations outside the legal framework of the Budget Law were detected. These operations resulted in a significant financial imbalance of the State in 2020 and an increase of almost EUR 100 billion in public debt. Calculated according to the same methodology, the previous increase of the public debt by a similar value had taken almost 10 years.

<sup>231</sup> TVN 24 of 18 May 2021 presenting a letter of the SAO President. SAO press release of 8 June 2021 concerning a discussion held among Heads of European Supreme Audit Institutions.

<sup>232</sup> The National Bar Council and the National Council of Legal Councillors contributed to an internet platform containing relevant information related to the situation of refugees from Ukraine. See the press release of the National Bar Council of 14 April 2022.

<sup>233</sup> Press release of the Government of 28 February 2022, of 11 March 2022, and of 8 April 2022.

<sup>234</sup> Tok.fm of 14 March 2022, where the letter in question is reproduced.

Poland's civic space as 'obstructed'<sup>235</sup>. LGBTIQ people and relevant NGOs continue being targeted by draft legislative initiatives<sup>236</sup>. Furthermore, no measures have been undertaken to address the concerns raised by NGOs as regards their access to public funding<sup>237</sup>. A number of the so-called 'LGBTIQ-ideology free' zones have been annulled by courts<sup>238</sup>, while three regional and several local governments decided to repeal these declarations on their own<sup>239</sup>. On 30 March 2022, a draft law was proposed<sup>240</sup> aiming at ensuring 'transparency of non-governmental organisations'<sup>241</sup>, giving rise to concerns of stakeholders; the draft law would create a national registry of NGOs "financed from abroad" (with an exception for NGOs receiving EU funds), which would also in specific circumstances be under an obligation to disclose the list of donors and indicate the origin of their funding on promotional materials<sup>242</sup>. Stakeholders have also expressed concerns on a draft law amending the regime governing the offence of religious beliefs<sup>243</sup>. Moreover, a law was introduced to the Sejm seeking to substantially increase the control over schools' functioning by central government's representatives who would be in position to notably decide on admitting or refusing access of individual NGOs to extracurricular activities of schools<sup>244</sup>.

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<sup>235</sup> CIVICUS update of 8 February 2022. Rating given by CIVICUS. Ratings are on a five-category scale defined as: open, narrowed, obstructed, repressed and closed. In 2020 and 2021, civic space was considered as 'narrowed'.

<sup>236</sup> E.g. draft law submitted on 9 August 2021 as citizens' legislative initiative amending the Law on Assemblies and certain other laws (pending), seeking to outlaw the promotion of civil partnerships and same-sex marriages. On 13 January 2022, the Sejm adopted a Law amending the Law on Passport Documents which makes it substantially difficult or even blocks the possibility to receive a Polish passport by children born into same-sex couples. See Contribution from ILGA Europe and International Planned Parenthood Federation European Network's for the 2022 Rule of Law Report. Also, Poland has been ranked last in the EU as regards the treatment of LGBTIQ groups, see Kampania Przeciw Homofobii, statement of 12 May 2022, referring to ILGA-Europe 2022 Rainbow Europe Map (<https://www.rainbow-europe.org/>).

<sup>237</sup> Concerns refer to the functioning of the National Institute of Freedom – Centre for Civil Society Development responsible for the distribution of government funding, as well as nationally attributed EU funding, to NGOs. See the 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, p. 27.

<sup>238</sup> Press release of the Ombudsperson's office of 29 March 2022 and further references contained therein.

<sup>239</sup> Press release of the Ombudsperson's office of 10 January 2022.

<sup>240</sup> A similar initiative was tabled on 7 August 2020.

<sup>241</sup> Submission No. EW-020-860/22 (not yet registered formally in the legislative procedure) of 30 March 2022.

<sup>242</sup> See statements of representatives of Helsinki Foundation of Human Rights, Batory Foundation, Klan/Jawor, Watchdog Polska in Prawo.pl of 1 April 2022.

<sup>243</sup> Statement of Instytut Spraw Społecznych of 12 April 2022. The draft tabled on 14 April 2022 would exacerbate possibilities to impose sanctions for the offence of religious beliefs and broaden the protection of professing such beliefs publically. It would i.a. extend the scope of criminal liability to any act of 'publically offending the Church or other religious association' and of 'interfering with the public performance of a religious act' (where, under the current regime, such acts must be made 'maliciously'). See Polish Press Agency (2022), Solidarity Poland proposes to tighten the rules on offending religious feelings. The Ombudsperson considers that criminal provisions on the offence of religious beliefs should be abolished; cf. press release of the Ombudsperson of 15 April 2021.

<sup>244</sup> The law of 13 January 2022 amending the Law on Education and certain other laws. This law was vetoed by the President of the Republic on 2 March 2022. On 3 June 2022, the Minister of Education stated that the same law was proposed anew and is now consulted with the Chancellery of the President of the Republic in view of its entry into force by September 2022. See press release of the President of the Republic of 2 March 2022 and the statement of the Minister of Education (in [Edukacja.dziennik.pl](http://Edukacja.dziennik.pl) of 3 June 2022). One of such representatives already used the so-called 'black list' of NGOs to block their access to schools. The list, including prominent NGOs functioning also on global scale, was created with the intention to identify entities that spread 'harmful content' and views allegedly inconsistent with the school curricula. See WP.pl, of 24 January 2022; *Głos Nauczycielski* of 8 February 2022.

## Annex I: List of sources in alphabetical order\*

\* The list of contributions received in the context of the consultation for the 2022 Rule of Law report can be found at [https://ec.europa.eu/info/publications/2022-rule-law-report-targeted-stakeholder-consultation\\_en](https://ec.europa.eu/info/publications/2022-rule-law-report-targeted-stakeholder-consultation_en).

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## Annex II: Country visit to Poland<sup>245</sup>

The Commission services held virtual meetings in March 2022 with:

- Amnesty International
- Association of Judges ‘Iustitia’ and ‘Themis’
- Association of Judges ‘Themis’
- Association of Prosecutors ‘Lex Super Omnia’
- Fundacja Batorego
- Forum Obywatelskiego Rozwoju
- Free Courts – Wolne Sądy
- Fundacja bona Notitia
- Helsinska Fundacja Praw Człowieka
- Instytut Prawa i Społeczeństwa
- Instytut Sobieskiego
- Izba Wydawców Prasy
- Klub Jagielloński
- National Television and Radio Broadcasting Council
- Logos
- Fundacja Mamy i Taty
- Ministry of Culture
- National Council for the Judiciary
- National Council of Legal Councillors
- Ombudsman’s Office
- Ordo Iuris
- Rada Mediów Narodowych
- Stowarzyszenie Polskie Telewizje Lokalne i Regionalne
- Stowarzyszenie Polskich Mediów
- Supreme Administrative Court
- Supreme Audit Office
- Supreme Bar Council
- Supreme Court
- Towarzystwo Dziennikarskie
- Towarzystwo Dziennikarzy Polskich
- Watchdog Polska

\* The Commission also met the following organisations in a number of horizontal meetings:

- Amnesty International
- Article 19
- Civil Liberties Union for Europe
- Civil Society Europe
- European Centre for Press and Media Freedom
- European Civic Forum
- European Federation of Journalists
- European Partnership for Democracy
- European Youth Forum

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<sup>245</sup> The Polish government did not provide written input and decided not to participate in relevant meetings of the country visit. However, it commented on the draft country chapter.



- Free Press Unlimited
- Human Rights Watch
- ILGA Europe
- International Federation for Human Rights (FIDH)
- International Press Institute
- Open Society European Policy Institute ( OSEPI)
- Osservatorio Balcani e Caucaso Transeuropa
- Philea
- Reporters Without Borders
- Transparency International Europe