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COMMISSION STAFF WORKING DOCUMENT

**2021 Rule of Law Report
Country Chapter on the rule of law situation in Poland**

Accompanying the

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**2021 Rule of Law Report
The rule of law situation in the European Union**

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ABSTRACT

The reforms of the Polish justice system, including new developments, continue to be a source of serious concerns as referred to in 2020. Reforms carried out since 2015 increased the influence of the executive and legislative powers over the justice system to the detriment of judicial independence and led the Commission to launch the procedure under Article 7(1) TEU, which is still ongoing. In April 2021, the Commission referred Poland to the Court of Justice in view of a law on the judiciary which undermines the independence of judges and is incompatible with EU law. In July 2021, the Court ordered interim measures in that case. On the same day, the Constitutional Tribunal held that interim measures ordered by the Court of Justice in the area of the judiciary are inconsistent with the Polish constitution. Also in July 2021, the Court of Justice found that the disciplinary regime for judges in Poland is not compatible with EU law. The National Council for the Judiciary continues to operate despite its contested independence and the functioning of the Supreme Court was further affected, including by changes in legislation. In May 2021, the European Court of Human Rights found irregularities in an appointment procedure to the Constitutional Tribunal.

The legal and institutional framework to prevent and combat corruption is largely in place. Yet, there are risks as regards the effectiveness of the fight against high-level corruption, including a risk of undue influence on corruption prosecutions for political purposes. In this context, concerns remain over the independence of the main institutions responsible for the prevention and fight against corruption, considering in particular the subordination of the Central Anti-Corruption Bureau to the executive and the fact that the Minister of Justice is also the Prosecutor-General. The dedicated government anti-corruption programme was implemented in the years 2018-2020, yet key legislative tasks remain unfinished. Structural weaknesses continue to exist as regards the asset declaration system and lobbying.

Regarding media freedom and pluralism, the Government is expected to adopt legislation to transpose the Audiovisual Media Service Directive to strengthen the independence of media regulators. The Polish media market has been so far considered diverse, but stakeholders fear negative impacts of the acquisition of Polska Press by the state-owned company Orlen. While the competition authority (UOKiK) approved the transaction, the Polish Ombudsperson challenged this decision considering that this authority did not examine whether the acquisition would result in restricting press freedom. Concerns were also raised about a draft tax legislation targeting some media groups, in an environment considered as increasingly unwelcoming towards foreign-owned media outlets. Since 2020, journalists' professional environment has deteriorated, with use of intimidating judicial proceedings, growing failure to protect journalists and violent actions during protests, including from police forces.

The system of checks and balances continues to be under considerable pressure. The expedited adoption of legislation continues to be used, also beyond issues linked to the COVID-19 pandemic, including for structural reforms of the judiciary, with no or limited consultation of stakeholders. Some measures introduced by the Government in 2020 to address the COVID-19 pandemic have been considered unlawful by courts in individual cases. The Ombudsperson continues to play a key role as a rule of law safeguard. Following a decision of the Constitutional Tribunal, the continued exercise of core powers by the outgoing Ombudsperson ended in July 2021. Parliamentary proceedings now point to an appointment of a new Ombudsperson with cross-party support. The civil society space is still vibrant but has been affected further by general problems concerning women's rights, and by attacks on LGBTI groups.

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 bodies of local government and of territorial organs of government administration. The ordinary judiciary, supervised by the Supreme Court¹, consists of three levels: 11 appeal courts, 46 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 perception of judicial independence among the general public and companies is low and continues to decrease. Whereas in 2021 29% of the general public perceives independence of courts and judges as ‘fairly or very good’, only 18% of companies share the same perception². The perception of independence has steadily decreased for both the general public and companies during the last five years. As last year, the public debate on the judiciary continues to be marked by strong tensions³. As regards the smear campaign conducted in 2019 against judges who openly criticised the justice reforms⁴, so far no judicial decisions have been taken⁵.

The justice reforms initiated in November 2015 continue to be implemented on the ground. These reforms were carried out through more than 30 laws relating to the entire

¹ The Supreme Court also supervises military courts.

² Figures 47-50, 2021 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%).

³ TVP Info ‘*Kim jest Agnieszka Domańska? Sędzia zdecydowała o nieprzedłużeniu aresztu Sławomira Nowaka*’ of 12 April 2021; wPolityce.pl ‘<Kasta> wspiera LGBT! Sędzia nie uznaje płci metrykalnych i zwraca się do powoda tak jak on sobie tego życzy. To sąd, czy lewacka pogawędka?’ of 20 April 2021; wPolityce.pl ‘*Ujawniamy. Sędzie ze składu orzekającego ws. Noakowskiego 16 są członkami skrajnie upolitycznionych stowarzyszeń sędziowskich*’ of 19 January 2021. As regards critical statements made by politicians against judges, see Chapter IV of a report prepared by the ‘Iustitia’ association of judges ‘*Judges under pressure*’ of 2020. Similar statements have been made against one of the Advocates General of the Court of Justice: wPolityce.pl ‘*Ujawniamy. Kto steruje antypolską narracją w TSUE? Podwójne standardy i zblatowanie z „kastą” Tancheva – Rzecznika Generalnego TSUE*’ of 26 April 2021; ‘*Ujawniamy. Z rządu Tuska do TSUE! Kim jest rozgrywający, który przydziela polskie sprawy rzecznikowi trzymającemu z polską „kastą”?*’ of 6 May 2021; ‘*Rzecznik TSUE na straży bezkarności „kasty”: ‘Polskie prawo ws. Systemu odpowiedzialności dyscyplinarnej sędziów jest sprzeczne z prawem UE*’ of 6 May 2021. See also the press conference of the Ministry of Justice of 6 May 2021, where the Deputy Minister of Justice stated that two Advocate Generals of the Court of Justice are not impartial (<https://www.pscp.tv/w/1nAJELzqjOYGL>).

⁴ See the 2020 Rule of Law Report: Chapter for Poland – Part I.

⁵ The Disciplinary Officer for ordinary court judges appointed by the Minister of Justice discontinued the investigation concerning a former Deputy Minister of Justice, alleged to have been the main person behind the campaign. Investigations carried out by the prosecution services as regards the campaign have been ongoing since 11 September 2019.

structure of the justice system⁶, including the Constitutional Tribunal, the National Council for the Judiciary, the Supreme Court, the ordinary courts, administrative courts, and the prosecution service. Multiple aspects of the justice reform raise serious concerns as regards the rule of law, in particular judicial independence⁷. This is the main focus of the Article 7(1) TEU⁸ procedure initiated by the Commission, which remains under consideration by the Council⁹. Also the European Parliament reiterated its concerns regarding the situation of the rule of law in Poland in a resolution¹⁰. The safeguarding of judicial independence in Poland is one of the country-specific recommendations addressed in the context of the 2020 European Semester, which remains to be addressed¹¹. Meanwhile, the Polish Government has openly defied the binding nature of an interim measures order issued by the Court of Justice on 21 May 2021 in a case lodged against Poland for breach of EU environmental law¹².

The Court of Justice further clarified EU law requirements relating to judicial independence in the Polish context. On 2 March 2021, the Court of Justice issued a judgment in a preliminary ruling procedure, clarifying the requirements of EU law with respect to judicial appointments to the Supreme Court that took place in 2018¹³. The Court of Justice, while leaving the definitive assessment to the referring court, held that successive amendments to the Polish Law on the National Council of the Judiciary which had the effect of removing effective judicial review of that Council's decisions proposing to the President of the Republic candidates for the office of judge at the Supreme Court are liable to infringe EU law. In that respect, the Court noted that given the decisive role of the National Council for the Judiciary in the procedure of appointment of judges in Poland its degree of independence is relevant for ensuring judicial independence, indicating that the independence of the National Council for the Judiciary is open to doubt¹⁴. On 6 May 2021, the Supreme Administrative Court implemented the above judgment of the Court of Justice, ruling that the current National Council for the Judiciary, in the procedure for appointing judges, does not provide sufficient guarantees of independence from the executive and the legislature and that,

⁶ In the beginning of 2021, the Ministry of Justice announced plans to introduce to the Polish justice system judges of peace. No details of a draft legislation to that end have been so far disclosed (see a press communique of the Ministry of Justice of 18 March 2021).

⁷ It is noted that, according to the Polish Government, the amendments introduced by the Law of 8 December 2017 on the Supreme Court, the Act of 12 May 2011 on the National Council of the Judiciary, the Law of 27 July 2001 on the Ordinary Courts Organisation have in no way restricted or affected judicial independence or the independence of power.

⁸ Commission IP/17/5367.

⁹ The most recent hearing under Article 7(1) TEU procedure took place on 22 June 2021.

¹⁰ European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law; see also the resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary; resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland; resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland.

¹¹ Council Recommendation of 20 July 2020 on the 2020 National Reform Programme of Poland and delivering a Council opinion on the 2020 Convergence Programme of Poland, p. 15 (OJ C 282/21); see also European Commission, Country Report Poland 2020, SWD(2020) 520 final, p. 6 and 36.

¹² Order of 21 May 2021 of the Vice-President of the Court of Justice issued in case C-121/21 R, *Czech Republic v Poland*, obliging Poland to immediately cease lignite extraction activities in the Turów mine. According to statements of top officials, including a statement of the Prime Minister of 25 May 2021, Poland will not comply with the order concerned, invoking reasons related to energy security.

¹³ Judgment of the Court of Justice of 2 March 2021, *AB*, C-824/18.

¹⁴ It is noted that, according to the Polish Government, the question of the existence of judicial councils, their composition, the procedure for appointing their members and the role of those bodies in the process of appointing judges does not fall within the competence of the European Union.

consequently, the Council's resolutions giving rise to appointments to the Criminal and Civil Chambers of the Supreme Court in 2018 are annulled¹⁵. A number of additional requests for preliminary rulings by various Polish Courts relating to the justice reforms of 2017 and 2018 are still pending before the Court of Justice¹⁶. On 15 July 2021, in the context of an infringement procedure launched by the Commission, the Court of Justice found¹⁷ that the disciplinary regime for judges in Poland is not compatible with EU law. Notably, the Court of Justice found that the Disciplinary Chamber of the Supreme Court does not provide all the guarantees of impartiality and independence and is not protected from the direct or indirect influence of the Polish legislature and executive¹⁸.

The Commission decided on 31 March 2021 to refer Poland to the Court of Justice in view of concerns related to the law on the judiciary of December 2019¹⁹. The Commission considers that the contested Polish legislation undermines the independence of Polish judges in breach of Article 19(1) TEU and the primacy of EU law. The law prevents Polish courts, including by threatening with disciplinary proceedings, from directly applying EU law protecting judicial independence as well as from referring questions to the Court of Justice for preliminary rulings. Moreover, the Disciplinary Chamber of the Supreme Court – the independence of which is not guaranteed²⁰ – continues to take decisions which have a direct impact on judges and the way they exercise their function. This includes cases of the lifting of immunity of judges to allow criminal proceedings against them or to detain them, and the consequent temporary suspension from office and reduction of their salary. The mere prospect of having to face proceedings before a body whose independence is not guaranteed creates a 'chilling effect' for judges and can affect their own independence. This seriously undermines judicial independence in Poland, effective judicial protection for citizens in Poland and the EU legal order as a whole. The Polish Government considers that the Commission is exceeding its competences under the Treaty and rejects the position the Commission has taken in this infringement procedure. The Commission has asked the Court

¹⁵ See judgment in case II GOK 2/18, in particular point 7.6 and 8.3. According to the judgment, the Supreme Administrative Court did not rule on the systemic validity and the effectiveness of the acts of judicial appointments made by the President of the Republic as the Supreme Administrative Court lacks such power (see point 9 of the judgment).

¹⁶ See cases C-491/20 – C-496/20, C-506/20, C-509/20 and C-511/20 *Supreme Court et al.*; case C-615/20 *Y.P. et al.*; case C-671/20 *M.M. et al.*; C-181/21, *G.*; C-269/21, *BC and DC*.

¹⁷ Judgment of the Court of Justice of 15 July 2021, *Commission v Poland*, C-791/19.

¹⁸ The Court criticised the process for appointing judges to the Supreme Court, including the members of the Disciplinary Chamber, as being determined by a body, the National Council of the Judiciary, whose independence may give rise to reasonable doubts, emphasising also that this Chamber is made up exclusively of new judges who were not already sitting at the Supreme Court and enjoy a high degree of autonomy. The Court furthermore held that the disciplinary regime allows the content of judicial decisions adopted by judges of the ordinary courts to be classified as a disciplinary offence, which could be used to exert political control over judicial decisions or to exert pressure on judges, and could undermine the independence of the courts concerned. The Court also held that national judges are exposed to disciplinary proceedings as a result of the fact that they have decided to make a reference for a preliminary ruling to the Court of Justice, which undermines their right or, as the case may be, their obligation to put questions to the Court, as well as the system of judicial cooperation between the national courts and the Court of Justice established by the Treaties.

¹⁹ Commission press release of 31 March 2021 IP/21/1524. Case registered as C-204/21. These infringement proceedings were launched on 29 April 2020 (see 2020 Rule of Law Report: Chapter for Poland – Part I). In the context of these infringement proceedings the Commission issued an additional letter of formal notice and an additional reasoned opinion taking issue with the continued functioning of the Disciplinary Chamber of the Supreme Court as regards cases concerning judges other than disciplinary cases.

²⁰ This has been confirmed by the Court of Justice as regards disciplinary cases concerning judges in its judgment of 15 July 2021, *Commission v Poland*, C-791/19.

of Justice to issue interim measures to suspend judicial activities of the Disciplinary Chamber with regard to judges, in particular concerning the lifting of judicial immunity, in order to avoid serious and irreparable harm to judicial independence and the EU legal order. On 14 July 2021, the Vice-President of the Court issued an Order for interim measures in case C-204/21 R, granting in full the Commission's request²¹.

The European Court of Human Rights, seized in a number of cases related to the functioning of the Polish justice system, held that a 2015 appointment to the Constitutional Tribunal led to a breach of the requirement of 'a tribunal established by law'. In February 2021, the European Court of Human Rights communicated that there are currently 27 cases pending before it which raise various issues relating to the justice reforms of 2017 and 2018²². So far, in 21 of the cases lodged, notice has been given to the Polish Government. On 7 May 2021, the European Court of Human Rights ruled²³ that a bench including a judge appointed to a judicial post that had already been filled in by the legislature of 2011-2015 did not constitute a 'tribunal established by law'²⁴. These irregularities in the appointment procedure of judges to the Constitutional Tribunal have been raised as a serious concern in the Reasoned Proposal adopted by the Commission under Article 7(1) TEU procedure²⁵. The Constitutional Tribunal ruled that this judgement is 'non-existent'²⁶. On 29 June 2021, the European Court of Human Rights issued a ruling²⁷ concerning the premature removal by the Minister of Justice of judges from their post as vice-presidents of ordinary

²¹ 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.

²² See in that respect a press release of the ECtHR ECHR 066(2021) of 18 February 2021 and ECtHR ECHR 140(2021) of 10 May 2021. The cases concern inter alia the status of the Constitutional Tribunal in view of the requirement of being a 'tribunal established by law'; the premature termination of offices of members of the National Council of the Judiciary; the independence of the National Council for the Judiciary and its involvement in the procedure of judicial appointments and transfers of judges, the premature dismissal of court presidents; the disciplinary regime for judges and prosecutors, and the lowering of the retirement age for ordinary court judges.

²³ Judgment of 7 May 2021 *Xero Flor w Polsce sp. z o.o. v. Poland* (application no. 4907/18) not yet final.

²⁴ Following the judgment, the President of the Constitutional Tribunal announced that the Court of Human Rights lacks competence to issue such judgments and that the judgment concerned shall have no effect in the Polish justice system (see e.g. doRzeczy.pl 'Przylębska o wyroku ETPCz. Padły mocne słowa' of 7 May 2021).

²⁵ Cf. paras 92 – 96 of the Reasoned Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM/2017/0835 final - 2017/0360 (NLE)) (Reasoned Proposal). According to the Commission the independence and legitimacy of the Constitutional Tribunal are seriously undermined and the constitutionality of Polish laws can no longer be effectively guaranteed.

²⁶ On 16 June 2021, the Constitutional Tribunal ruled that the judgment of the European Court of Human Rights is 'non-existent'. In particular, the Constitutional Tribunal held that it had been issued without the legal basis and in violation by the European Court of Human Rights of its competences, thereby constituting an unlawful interference with the national legal order in matters which remain outside the competence of that Court (see the decision issued in case P 7/20).

²⁷ Applications no. 26691/18 and 27367/18, not yet final. On 30 June 2021, the Secretary General of the Council of Europe sent an open letter to the Polish Minister of Justice, expressing concern and disappointment about recent statements from the Polish authorities contesting the authority of the European Court of Human Rights and the credibility of the system of the European Convention on Human Rights as a whole.

courts. The Court emphasised the importance of safeguarding the independence of the judiciary and respect for procedural fairness in cases concerning the careers of judges, and held that, as their premature removal as vice-president of the court had not been reasoned nor examined either by an ordinary court or by another body exercising judicial duties, without there being any serious reason for the lack of judicial review, Poland had infringed the right of access to a court²⁸.

Concerns over the independence and legitimacy of the Constitutional Tribunal, raised by the Commission under the Article 7(1) TEU procedure, have still not been resolved²⁹.

This is also illustrated by the judgment of the European Court of Human Rights of 7 May 2021³⁰. In 2020, the Ombudsperson continued to express concerns about the functioning and legitimacy of the Constitutional Tribunal, including as regards changes made to already designated hearing panels and dismissals of requests for recusal of judges in view of their alleged lack of impartiality or contested status³¹. Also the Council of Europe expressed similar concerns³². Meanwhile, the Constitutional Tribunal continues to be seized on cases concerning the justice reforms not only by the Prime Minister, the Marshal of the Sejm, the National Council for the Judiciary and the newly created Disciplinary Chamber of the Supreme Court³³, but also by other (newly appointed) Supreme Court judges³⁴ and the newly appointed First President of the Supreme Court³⁵. Three cases initiated at the Constitutional Tribunal by the Prosecutor General, the Prime Minister, and a group of members of the Sejm seek an assessment of the compatibility with the Constitution of EU Treaty provisions and a declaration of the precedence of the Polish Constitution over EU law³⁶. The Commission expressed its concerns about the motion lodged by the Prime Minister as it contests the fundamental principles of EU law, in particular the primacy of EU law³⁷. Despite clear case

²⁸ The issue of dismissal of court presidents and vice-presidents had also been raised in the Commission's Reasoned Proposal under the Article 7(1) TEU procedure.

²⁹ Cf. paras 92-113 of the Reasoned Proposal. See the 2020 Rule of Law Report: Chapter for Poland – Part I.

³⁰ See preceding paragraph.

³¹ Ombudsperson's statement '*Bezprawna manipulacja składem TK ws. kadencji RPO. Wniosek Rzecznika o wyłączenie Julii Przyłębskiej*' of 9 April 2021. This concerns in particular the decision of the Constitutional Tribunal concerning the abortion legislation (see, to that effect, part IV below) and the decision concerning the Ombudsperson's office.

³² PACE Resolution 2359(2021) adopted on 26 January 2021 (3rd sitting) which considers that the Constitutional Tribunal '*seems to be firmly under the control of the ruling authorities, preventing it from being an impartial and independent arbiter of constitutionality and the rule of law*'.

³³ See the 2020 Rule of Law Report: Chapter for Poland – Part I. The rulings of the Constitutional Tribunal concerned appear to indicate that judicial appointments carried out since 2018 at the request of the newly composed National Council for the Judiciary ensure full independence of the judges appointed at its request. See the decisions and reasoning in cases P 22/19, U 2/20, Kpt 1/20, K 5/20, K 2/20, P 13/19.

³⁴ Case on the constitutionality of the power for Polish courts to decide on requests for recusal of judges based on the fact that such judges were appointed at the request of the National Council for the Judiciary in its composition as of 2018 (case P 13/19).

³⁵ See below.

³⁶ Cf. Cases K 7/18 K 5/21, K 3/21 (the hearing was postponed until 3 August 2021. In his motion in case K 3/21, the Prime Minister requested the Constitutional Tribunal to review the constitutionality of the first and second subparagraph of Article 1 and the second subparagraph of Article 19(1) of the Treaty on European Union (TEU), read in conjunction with Articles 2 and 4(3) TEU, in so far as those provisions, as interpreted by the Court of Justice of the European Union, in particular in its judgment of 2 March 2021 in Case C-824/18, A.B. and Others, may require national authorities to set aside conflicting provisions of national law, even those of a constitutional nature.

³⁷ On 9 June 2021, the Commission expressed its concerns in a letter to the Polish authorities, requesting the withdrawal of the motion and reserving the right to initiate appropriate proceedings under the Treaties, where necessary. Poland replied on 29 June 2021, rejecting the Commission's position.

law of the Court of Justice³⁸, the Constitutional Tribunal already indicated in an *obiter dictum* that the Court of Justice lacks competence to issue rulings as regards the justice systems of the Member States³⁹. In spite of the concerns referred to above, the Constitutional Tribunal delivered decisions with a significant impact both on individuals and the institutional framework. In particular, on 22 October 2020 and on 15 April 2021 respectively, the Constitutional Tribunal issued decisions regarding the right to abortion and the situation of the Ombudsperson⁴⁰. These decisions sparked strong criticism within Poland and beyond⁴¹. Moreover, on 14 July 2021 – following the issuance of an interim measures order by the Vice-President of the Court of Justice⁴² – the Constitutional Tribunal held⁴³ 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. In a public statement, the Commission expressed its deep concern about this decision of the Constitutional Tribunal⁴⁴.

The National Council for the Judiciary continues to be composed mainly of politically appointed members. It is recalled⁴⁵ that the 2018 justice reform changed the procedure for the appointment of judges-members of the National Council for the Judiciary (NCJ)⁴⁶. In its judgment of 2 March 2021, upon a preliminary reference of the Supreme Court, the Court of Justice reiterated that for the participation of a Council for the Judiciary in making the appointment process of judges by political organs more objective, such body must itself be sufficiently independent of the legislature and executive and of the body to which it gives an opinion⁴⁷. On 6 May 2021, the Supreme Administrative Court ruled that the current NCJ does

³⁸ See, most recently, judgment of the Court of Justice of 2 March 2021 in case C-824/18 *AB* para. 68 and the case law cited therein.

³⁹ See the statement of reasons in case Kpt 1/20 of 21 April 2020, paras 329-348, and in case U 2/20 of 20 April 2020.

⁴⁰ See cases K 1/20 and K 20/20 (see also part IV below). The decisions in these two cases further show that the publication of the Constitutional Tribunal's findings is based on political decision of the Prime Minister. On 27 January 2021, the Prime Minister published the decision concerning the abortion legislation (issued on 22 October 2020), explaining the delay by the fact that the decision lacked written motives. The decision of the Constitutional Tribunal *de facto* removing the incumbent Ombudsperson from office was published on the day of its delivery (15 April 2021), even if the judgment was not accompanied by written motives.

⁴¹ See for references Part IV of the present chapter.

⁴² Order of the Vice-President of the Court of Justice of 14 July 2021 issued in case C-204/21 R, *Commission v. Poland*. See also above.

⁴³ In Case P 7/20, brought by the Disciplinary Chamber of the Supreme Court.

⁴⁴ See the Commission's statement of 15 July 2021; statement/21/13726.

⁴⁵ See the 2020 Rule of Law Report: country chapter for Poland – Part I.

⁴⁶ The judges-members, who constitute the majority of the members of the NCJ, are now directly appointed by the Sejm instead of by their peers as previously. The new composition of the NCJ did not take into account the Council of Europe recommendations and is one of the concerns raised by the Commission in its Reasoned Proposal adopted under the Article 7(1) TEU procedure relating to the rule of law in Poland (see Recommendation CM/Rec(2010)12 of the Committee of Ministers, para 27 and Paras 137-145 of the Reasoned Proposal). See also Parliamentary Assembly of the Council of Europe, Report on the Functioning of Democratic Institutions in Poland of 6 January 2020 (2359(2021)) of 26 January 2021.

⁴⁷ Judgment of 2 March 2021 in case C-824/18 *AB*, paras 133-139. The Court reiterated its legitimate doubts as to its independence in its judgment of 15 July 2021, *Commission v Poland*, C-791/19, paras. 104-108. It is recalled that a resolution of three joined Chambers of the Supreme Court of 23 January 2020 had already stated that the newly composed NCJ is not independent and asserted that new Supreme Court judges selected by it are not allowed to adjudicate cases. The resolution was subsequently found to be inconsistent with the Constitution and with EU law by the Constitutional Tribunal, adjudicating upon request of the Prime Minister and the Marshal of the Sejm, supported by the President of the Republic and by the Prosecutor

not provide sufficient guarantees of independence from the executive and the legislature in the procedure for appointing judges⁴⁸. Despite the serious concerns also expressed by a number of other Polish courts⁴⁹ pointing to its lack of independence, the NCJ continues to propose candidates for judicial appointments to the President of the Republic which are systematically appointed⁵⁰. Throughout 2020 and 2021, the NCJ has issued one resolution to protect the independence of a Polish judge, namely to express support to a member of the Disciplinary Chamber of the Supreme Court⁵¹, while refusing to express similar support to judges targeted by criminal investigations carried out by the prosecution services in the same period⁵². The NCJ also provided statements in support of certain aspects of the justice reforms criticised by the Commission⁵³.

The Supreme Court, following changes in 2020, was subject to further reforms regarding its functioning. On 1 April 2021, the President of the Republic signed into law the bill of 30 March 2021 amending the law on the Supreme Court. The new law lowers the quorum requirements for judges to select candidates to the post of President of a Chamber and allows the President of the Republic to appoint an ‘acting’ President of the Chamber if such requirements are not met. Moreover, the law grants the First President of the Supreme Court control over sittings of joined Chambers gathered to settle legal issues, convened either by the First President on her own motion or at the request of i.a. the Prosecutor General or the Ombudsperson. The new law also changes the rules governing the extraordinary appeal procedure by prolonging by 2 years the period to make extraordinary appeals against all rulings of all Polish courts that became final after 17 October 1997⁵⁴. The Ombudsperson and the National Bar Council expressed critical views on the new law, underlining that it would

General (see rulings of 20 April 2020 in case U 2/20 and of 21 April 2020 in case Kpt 1/20). The Supreme Court, however, has continued to apply its resolution (e.g. a decision of the Criminal Chamber of 25 June 2020 in case I KZP 1/20).

⁴⁸ See judgment in case II GOK 2/18, in particular point 8.3. This judgment implemented the Court of Justice judgment of 2 March 2021 in case C-824/18 *AB et al.* See also above.

⁴⁹ See in particular judgment of the Supreme Court of 5 December 2019 in case III PO 7/18 and two decisions of 15 January 2020 in cases III PO 8/18 and III PO 9/18. See also judgments of the Supreme Administrative Court of 6 May 2021 in cases II GOK 2/18 through 7/18 and judgment of 13 May 2021 in case II GOK 4/18.

⁵⁰ Since the publication of the 2020 Rule of Law report, the President of the Republic made judicial appointments on 6 October, 26 November 18 December 2020, and on 26 January, 4 February, 18 March and 26 April 2021.

⁵¹ Resolution of 26 March 2021. The NCJ resolution was motivated by the fact that the judge was subject to undue pressure by staff of a Polish University which formally condemned the judge’s involvement in a case concerning the lifting of immunity of an ordinary court judge.

⁵² See the Resolution of 15 April 2021. The judges concerned were called to appear before the prosecutor as witnesses in a criminal investigation concerning the judicial decision they rendered, based on labour law, invalidating the National Prosecutor’s decision on a secondment of a prosecutor. On 13 January 2021, the Ombudsperson announced his intervention in the above case, considering that the actions undertaken by the prosecution services may violate judicial independence (see the press release of the Ombudsperson of 13 January 2021).

⁵³ See notably the statements of the NCJ (WW.023.1.2021 and WP 024-13/19) of 12 March 2021 in cases *Advance Pharma sp. z o. o. v Poland* and *Grzęda v Poland* (in these cases concerns related to the abrupt termination of mandates of the former judges-members of the NCJ as well as the new method of appointment of the current judges-members of the NCJ by the Sejm are examined). As regards the concerns of the Commission in that respect, see in particular the reasoned proposal of 20 December 2017 adopted under the Article 7(1) TEU procedure.

⁵⁴ In spite of concerns expressed by the Commission in its Reasoned Proposal adopted under Article 7(1) TEU procedure as regards the introduction of the extraordinary appeal procedure to the Polish justice system (see also Part IV below). For further information on the procedure; see the 2020 Rule of Law Report: Chapter for Poland - Part IV.

further affect the independence of the Supreme Court⁵⁵. The current First President of the Supreme Court, appointed⁵⁶ as reported last year⁵⁷ following a contested procedure, has taken decisions giving rise to concerns, in particular seizing the Constitutional Tribunal on controversial issues, including to limit the right to access to documents⁵⁸ and requesting to shield newly appointed Supreme Court judges - including herself - from having their status contested in cases pending before the Supreme Court⁵⁹. The First President also seized the Chamber of Extraordinary Control and Public Affairs to recuse certain Supreme Court judges from cases in which they had already made a preliminary ruling request to the Court of Justice⁶⁰. On 16 July 2021, the First President of the Supreme Court issued a statement which refers to the judgment of the Constitutional Court of 14 July 2021 and, considering that EU law does not cover matters regarding the organisation and functioning of the Member States' judiciary, informs about the repeal of the instruction for the Disciplinary Chamber of the Supreme Court suspending its activity in disciplinary proceedings against judges⁶¹.

Several judges are suspended and cannot adjudicate cases following the decisions of the Disciplinary Chamber to lift their immunity. The disciplinary regime, substantially amended in 2018⁶², has given rise to concerns and the Commission contested⁶³ its violation of EU law in infringement proceedings⁶⁴. On 8 April 2020, following a request for interim measures⁶⁵, the Court of Justice ordered Poland to immediately suspend the application of the

⁵⁵ Opinion of the Ombudsperson of 23 March 2021 (IV.510.20.2021). Opinion of the Praesidium of the National Bar Council of 9 March 2021 (NRA.12-SM-1.15.2021). It is noted that the new law received a positive opinion by the new First President of the Supreme Court and by the National Council for the Judiciary (Supreme Court's opinion of 24 February 2021 presented by the new First President of the Supreme Court (BSA-1-021 57/21). NCJ opinion of 12 March 2021 (WO 420.18.2021) on the draft law amending the law on the Supreme Court).

⁵⁶ The resolution of the National Council for the Judiciary giving rise to the appointment of the First President to the Supreme Court, in her capacity of judge, was invalidated by the Supreme Administrative Court in its judgment of 6 May 2021 in case II GOK 2/18 (see the operative part and the second paragraph of the statement of reasons), implementing the Court of Justice judgment of 2 March 2021 in case C-824/18 *AB et al.* (see above).

⁵⁷ See the 2020 Rule of Law Report: Chapter for Poland – Part I.

⁵⁸ See Part III of the present Chapter.

⁵⁹ On 2 December 2020, the new First President of the Supreme Court lodged a request with the Constitutional Tribunal (case K 24/20) to declare the unconstitutionality of certain provisions of the Code of Civil Procedure, and laws governing the functioning of the judiciary to the extent that these allow for the ascertaining of the existence/non-existence of employment relationship of a given judge in view of the procedure of his or her appointment by the President of the Republic acting at the request of the National Council for the Judiciary in its new composition. The request concerning the access to documents legislation has been registered in the Constitutional Tribunal as case K 1/21.

⁶⁰ The judges concerned referred preliminary ruling requests to the Court of Justice in cases C-508/19 and C-491/19 concerning, in essence, the possibility for national courts to assess the compliance with EU law requirements on judicial independence.

⁶¹ Statement of the First President of the Supreme Court of 16 July 2021.

⁶² Law of 8 December 2017 on the Supreme Court which entered into force on 3 April 2018.

⁶³ According to the Commission, the new disciplinary regime can be used as a system of political control of the content of judicial decisions, in violation of the requirements of judicial independence (cf. Case C-216/18 PPU, *LM*, 25 July 2018, para 67). All grievances of the infringement action can be found in the Commission press release IP/19/6033.

⁶⁴ The law of 20 December 2019 further broadened the notion of disciplinary offence and increased the risk to judicial independence. This issue is covered by the new infringement case referred to the Court of Justice on 1 April 2021 (case C-204/21).

⁶⁵ According to the Commission, the disciplinary regime allows judges to be subject to disciplinary proceedings in view of the content of their judicial decisions or statements they make about the functioning of constitutional bodies in Poland; see Part I of the 2020 Rule of Law Report: Chapter for Poland.

national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges⁶⁶. Following the suspension of the disciplinary cases from its remit⁶⁷, the Disciplinary Chamber has begun to actively exercise its new powers⁶⁸ to decide on motions of the prosecution service to lift the immunity of judges alleged to have committed a criminal offence. Since 14 February 2020, the date of entry into force of the new law on the judiciary, until 15 March 2021, the Disciplinary Chamber examined over 40 such motions already, and in more than 10 such cases the judges concerned have been suspended in office and their salary reduced. Several motions remain pending before the Disciplinary Chamber, including as regards judges of the Supreme Court⁶⁹. In the context of the infringement proceedings in case C-204/21, the Commission asked⁷⁰ the Court of Justice to suspend all activities of the Disciplinary Chamber as regards cases concerning judges, including decisions to lift the immunity of judges. On 14 July 2021, the Vice-President of the Court of Justice granted, in full, the request of the Commission and suspended all activities of the Disciplinary Chamber of the Supreme Court as regards judges – different from disciplinary cases concerning judges⁷¹. On 15 July 2021, the Court of Justice issued a final ruling in the infringement case brought by the Commission, finding that the disciplinary regime for judges in Poland is not compatible with EU law⁷².

Judges continue to be subject to intrusive requirements. The new law on the judiciary of 20 December 2019 obliges all judges in Poland to disclose personal information, such as their membership in associations, functions in non-profit organisations and their membership and position in political parties prior to 29 December 1989. Disciplinary proceedings against judges who refused to comply with this requirement continue to be pending⁷³. In the context of the infringement proceedings in case C-204/21, the Commission considers that this requirement is inconsistent with EU law as regards the right to respect for private life and the

⁶⁶ Order of the Grand Chamber of 8 April 2020 in case C-791/19 R.

⁶⁷ Disciplinary investigations and proceedings continue being used by the Disciplinary Officers for Ordinary Courts appointed by the Minister of Justice. See in that respect a report by Themis association of judges ‘*From bad to worse – the Polish judiciary in the shadow of the <muzzle act>*’ (second edition updated as of 31 December 2020).

⁶⁸ The law of 20 December 2019 amending the law on Ordinary Courts Organisation, the Supreme Court, and certain other laws granted the Disciplinary Chamber the competence to lift the immunity of judges when criminal proceedings are brought against them (a competence previously exercised by disciplinary courts of first instance). This issue is covered by the new infringement case referred to the Court of Justice on 1 April 2021 (case C-204/21).

⁶⁹ On 2 July 2021, the Disciplinary Chamber waived the immunity and suspended in office the President of the Labour and Social Affairs Chamber. Following this decision, a group of 75 Supreme Court judges (retired and active) issued an open statement, condemning the decision and underlining that the Disciplinary Chamber is not a court within the meaning of national and EU law.

⁷⁰ Commission press release IP/21/1524. The Polish Government considers that the Commission is exceeding its competences under the Treaty and rejects the position the Commission has taken in this infringement procedure.

⁷¹ Moreover, the Vice-President ordered Poland to suspend the effects of resolutions of the Disciplinary Chamber of the Supreme Court whereby judges have been suspended in office and had their salary reduced.

⁷² Judgment of the Court of Justice of 15 July 2021, *Commission v Poland*, C-791/19. See also above.

⁷³ On 22 July 2020, the Deputy Disciplinary Officer appointed by the Minister of Justice opened disciplinary proceedings against 14 judges belonging to the ‘Forum of Judicial Cooperation’ association the membership in which was not disclosed by these judges, as required by the law of 20 December 2019 (see the press communique of 22 July 2020 of the Deputy Disciplinary Officer).

right to protection of personal data as guaranteed by the Charter of Fundamental Rights of the EU and the General Data Protection Regulation⁷⁴.

A general prohibition for Polish courts to challenge the powers of courts and tribunals, constitutional organs and law enforcement agencies continues to exert its effects. The new law on the judiciary⁷⁵ prevents Polish judges from ruling on the lawfulness of judicial appointments and on a judge's power to perform judicial functions. The same prohibition applies to judges assessing the lawfulness of the composition of a hearing bench. At the same time, the law granted the new Chamber of Extraordinary Control and Public Affairs the sole power to decide on issues related to judicial independence⁷⁶. The Commission decided on 31 March 2021 to challenge these prohibitions of the law on the judiciary in infringement proceedings before the Court of Justice⁷⁷. On 14 July 2021, the Vice-President of the Court of Justice issued an Order for interim measures in case C-204/21 R, suspending the application of the provisions concerned. In certain cases in which ordinary courts challenged the legality of rulings delivered by the Constitutional Tribunal⁷⁸ and by the Disciplinary Chamber⁷⁹, judges have been subjected to disciplinary proceedings⁸⁰.

Concerns persist regarding the fact that the offices of Minister of Justice and the Prosecutor General are held by the same person. As already set out in the 2020 Rule of Law Report, 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 prosecutors⁸¹. This power has been subject to

⁷⁴ Commission press release IP/21/1524. The Polish Government considers that the Commission is exceeding its competences under the Treaty and rejects the position the Commission has taken in this infringement procedure.

⁷⁵ See the 2020 Rule of Law Report: Chapter for Poland – Part I.

⁷⁶ This power includes the examination of motions to recuse judges from cases in view of doubts as to their independence or impartiality. Such decisions are de facto immunised from being changed by other Chambers of the Supreme Court. This Chamber dismisses requests for recusal of judges when based on allegations related to the circumstances of appointment of a judge. E.g. in context of the case I DI 3/21, the Chamber dismissed a request for recusal of Disciplinary Chamber judges assigned to a case in which the prosecution services requested the lifting of immunity of the President of the Labour Chamber of the Supreme Court (see the ruling of 21 January 2021 I NWW 8/21).

⁷⁷ Commission press release 2021 IP/21/1524.

⁷⁸ On 3 November 2020, it was disclosed to the public that a district court judge refused to apply a ruling of the Constitutional Tribunal which concerned the case pending before him, considering the ruling to be issued by an illegitimate composition of the Constitutional Tribunal. On 25 February 2021, a disciplinary officer refused to initiate disciplinary proceedings against that judge. See *Gazeta Prawna*, 'Zignorowanie wyroku TK. Sędziemu nie będzie grozić dyscyplinarka' of 25 February 2021.

⁷⁹ On 26 February 2021, a labour court in Warsaw ruled that one of the judges whose immunity was lifted by the Disciplinary Chamber which also suspended that judge in office, continues to be an active judge since the decision of the Disciplinary Chamber – for not meeting the requirements of EU and national law – is not legally binding. Based on a similar reasoning another labour court ordered a court president to reintroduce in office a judge suspended by the Disciplinary Chamber for attempting to apply in a case pending before him the judgment of 19 November 2019 of the Court of Justice delivered in case C-585/18 *AK et al.*

⁸⁰ Thus the decision by an appeal court judge, in the context of a case pending before him, to request a disclosure of documents related to the appointment of a judge who issued the ruling under appeal, was considered to constitute grounds for disciplinary liability (See the press communique of the Deputy Disciplinary Officer of 5 August 2020). Disciplinary investigation have been opened against judges of the 'Iustitia' association for statements made as to the effectiveness and legality of a decision of the Supreme Court on the validity of judicial appointment by the President of the Republic (see the press communique of the Deputy Disciplinary Officer of 4 August 2020).

⁸¹ See also Part II of the present Chapter.

criticism including by the Venice Commission⁸² and by the Commission in its Reasoned Proposal adopted under the Article 7(1) TEU procedure relating to the rule of law in Poland⁸³. Recently, the National Prosecutor⁸⁴ has actively exercised the power to transfer prosecutors, without their consent and without providing justification, to another post for up to 6 months⁸⁵. This power is reported to be used in practice as a tool against prosecutors who express critical views about the functioning of the prosecution service⁸⁶. Judges seized in disputes in which such secondments are challenged have been called by the prosecution services to testify in the context of criminal investigations⁸⁷. Moreover, concerns are raised that the exercise by the Prosecutor General and the National Prosecutor of their power to discretionally reattribute cases among prosecutors may be influenced by political considerations in order to impact on the conduct of criminal proceedings⁸⁸, including in cases of allegations of financial embezzlement⁸⁹. According to the National Bar Council, the prosecution services have recently also been targeting defence lawyers acting in politically sensitive cases, thereby posing a threat to the right to professional secrecy⁹⁰. This is

⁸² Venice Commission (opinion CDL-AD(2017)028); see also the association of prosecutors ‘Lex Super Omnia’ statements of 26 April and of 3 June 2020.

⁸³ Cf. Paras 169-170 of the Reasoned Proposal. According to the Polish Government, the merger of the office of Minister for Justice with the function of the Prosecutor-General is based on the Polish historical tradition.

⁸⁴ The National Prosecutor is the first deputy of the Prosecutor General and is appointed and dismissed by the Prime Minister acting at the request of the Prosecutor General (see Article 14(1) of the Law of 28 January 2016 on the Public Prosecutor’s Office).

⁸⁵ On 18 January 2021 an independent association of prosecutors ‘Lex Super Omnia’ informed the public that around 20 prosecutors, including prominent members of that association, had been forced to relocate to different prosecutorial units around Poland within 48 hours from receiving respective decisions of the National Prosecutor (these decisions were not motivated). According to associations of judges and of prosecutors, these secondment decisions constitute a form of punishment for prosecutors who act independently from the central government. The National Prosecutor’s Office explains the decisions concerned by the need to ensure staffing of prosecutorial units resulting from the COVID-19 pandemic.

⁸⁶ See the statement of 21 January 2021 of over 70 Supreme Court judges, including former Supreme Court judges, all appointed to the Supreme Court before 2018.

⁸⁷ In December 2020, Polish media informed that the special unit of the National Prosecution dealing with crimes committed by judges summoned, as witnesses, 7 judges of ordinary courts, all of which adjudicated in a labour case of a prosecutor who contested the forced secondment decision, submitting that it constitutes a form of harassment. The National Council for the Judiciary refused to issue a resolution condemning the above practice of the prosecution services (see above). Oko.Press, ‘Szaleństwo Prokuratury Krajowej. Sciga 7 sędziów za korzystanie dla gnębionego prokuratora orzeczenia’ of 16 December 2020.

⁸⁸ Polish Ombudsperson’s communique regarding the case of prosecutor Krasoń of 2019.

⁸⁹ In March 2021, Polish media reported that the primary use of the new powers of the Public Prosecutor to control the handling of criminal investigations was to discontinue such investigation against the current head of the state-controlled PKN Orlen company accused of cooperating with an organised criminal group and conducting economic activities not compatible with his previous office of mayor. See Gazeta Wyborcza, ‘Lex Obajtek. Jego sprawa zniknęła z sądu, gdy PiS pozmieniał prawo.’ of 8 March 2021. The Supreme Audit Office announced on 22 March 2021 that it would conduct investigations as regards use for personal purposes of financing received by this person from the state authorities. See doRzeczy, ‘NIK przygląda się sprawie Obajtki. Analizowane są dokumenty’ of 22 March 2021.

⁹⁰ On 15 October 2020, the Central Anti-Corruption Bureau requested a prosecutorial unit to detain a prominent lawyer acting for the defence in a politically sensitive case. Immediately following the detention, the residence and office of the lawyer were searched without the legally required attendance of the President of the Regional Bar Council or a person appointed by him. On 16 October 2020, the Praesidium of the National Bar Council issued a statement expressing concerns about the search conducted in places where casefiles regarding the lawyer’s clients were stored, which constituted a breach of lawyer’s secrecy. On 22 January 2021, a court considered the detention of the lawyer and the search of his dwelling and office conducted to be unjustified and unlawful.

aggravated by the fact that prosecutors have the power to suspend a lawyer's licence without prior consent of the court⁹¹.

Quality

As regards human resources, similarly to 2020, a significant number of judicial posts remain vacant. According to the official data published by the Ministry of Justice, in 2020 there were 1048 vacant posts in ordinary courts⁹². This being said, Poland's expenses on courts are at the level of the EU average per inhabitant and Poland continues to have one of the highest general government expenditures for the justice system (including prosecution and legal aid) as a percentage of GDP⁹³.

Important progress has been made⁹⁴ but there is room for improvement in the digitalisation of the justice system. There is still a need to introduce more IT tools in the context of judicial procedures, and stakeholders have called for further efforts to digitalise courts⁹⁵. There is also a need to revise those IT tools which the Supreme Audit Office found to be prone to abuse, in particular the system of allocation of cases in courts⁹⁶. This year, the Sejm adopted amendments to the Code of Civil Procedure⁹⁷ aimed at a further digitalisation of the civil procedure. The reform will introduce electronic auctions concerning properties to be used by bailiffs in the context of execution of court rulings. Moreover, notwithstanding critical views expressed by representatives of legal professions⁹⁸, the reforms seek to

⁹¹ The decision to suspend temporarily a lawyer's licence can be challenged before the court. Representatives of legal professions during the country visit emphasised, however, that in view of the time needed to quash such suspension, the decision of prosecutor is capable of adversely affecting interests of the lawyer concerned.

⁹² In 2019 there were 848 vacant posts.

⁹³ Figures 28 and 29, 2021 EU Justice Scoreboard.

⁹⁴ As regards IT tools, the following possibilities currently exist: taking evidence with the use of technical devices enabling this activity to be performed remotely; replaying the recorded video and sound at the hearing; preparing minutes of a hearing or a court session using an audio or video recording device; sharing the content of the minutes and letters in electronic form via the ICT system supporting court proceedings or another teleinformation system used to make them available and possibility for the parties and participants of the proceedings to obtain recorded sound or image and sound from the case files; admittance of electronic evidence; electronic writ-of-payment proceedings; and making deliveries via the ICT system.

⁹⁵ See the report by Court Watch Polska, '*Sądy dostępne przez Internet – Szanse i Zagrożenia*' (2020); Prawo.pl, '*Raport: Pandemia musi przyspieszyć informatyzację sądów*' of 3 February 2021. See also 'Iustitia' association of judges' statement of 9 May 2020. Ombudsperson's letter of 9 June 2020 submitted to the Ministry of Justice. The National Bar Council's resolution of 12 March 2020 (No. 155/20) with appendix. See also figure 39 of 2021 EU Justice Scoreboard.

⁹⁶ On 15 January 2021, the Supreme Audit Office ('Office') published a report (No P/19/038) concerning the implementation of IT projects in order to enhance the effectiveness of the justice system. The report concludes that the system of random allocation of cases is prone to abuse as it can be interfered with to attribute cases to concrete judges. Mechanisms protecting the integrity of the system are based solely on the good administrative practice of persons employed in secretariats of courts. According to the report, there are also shortcomings in the functioning of electronic writ proceedings. A case is pending before an administrative court in which an NGO is seeking public disclosure of the algorithm governing the IT system of case allocation by the Ministry of Justice.

⁹⁷ The law of 28 May 2021 amending the law – Code of Civil Procedure and certain other laws, signed by the President of the Republic on 9 June 2021.

⁹⁸ According to the opinion of the National Bar Council (opinion of 1 February 2021), several changes introduced to the civil procedure are capable of affecting the right to court, to fair trial and procedural equity. Moreover, the general prohibition to convene general assemblies by courts and tribunals is considered inconsistent with the Polish constitution as – in combination with the unlimited power of the Minister of

introduce a system of electronic submission of documents through a comprehensive IT system for ordinary courts, where a document would be presumed to have been duly delivered 14 days following its submission.

Further reforms concerning criminal and civil procedural law have been adopted. In order to respond to challenges created by the COVID-19 pandemic, recently adopted⁹⁹ provisions introduce an obligation to hold court sittings in camera, in case online connection with parties to civil proceedings is not possible¹⁰⁰. Accordingly, during the state of epidemics, civil cases would be mostly examined by single-judge benches only¹⁰¹ and the modalities applicable to specific procedures would be suspended¹⁰². Furthermore, these changes would also prohibit courts and tribunals in Poland from convening general assemblies. Also as regards the criminal procedural law, the Sejm adopted a set of amendments¹⁰³. The changes would, among others, limit access to the casefiles of closed preliminary investigations, and would introduce obligations on telecom operators to secure data immediately following a request of a court or a prosecutor without any provision limiting this power. Specific changes to modalities applicable to the composition of hearing benches would also be introduced¹⁰⁴. Some of these changes have given rise to criticism¹⁰⁵.

Efficiency

The overall performance of ordinary courts is close to the EU average when it comes to the length of proceedings. In 2019, there was a slight decrease in the estimated time needed to resolve litigious civil and commercial cases, and the rate of resolving such cases improved¹⁰⁶. Whereas the number of such cases in 2019 dropped, the number of pending cases remained the same¹⁰⁷. As regards the overall performance of ordinary courts, according to data published by the Ministry of Justice in 2021, between 2015 and 2020 the average length of proceedings increased from 4.2 months to 7 months¹⁰⁸. Poland remains under

Justice to appoint court presidents and vice-presidents – courts and tribunals are de facto fully subordinated to the executive as regards possibilities to present opinions by representatives of the judiciary.

⁹⁹ The law of 28 May 2021 amending the law – Code of Civil Procedure and certain other laws.

¹⁰⁰ A derogation from that rule would be possible in case health considerations permit it.

¹⁰¹ A derogation from that rule would be under the discretion of the court president and only if necessitated by a particularly complicated or unprecedented nature of the case.

¹⁰² The Supreme Court – within a year from the end of the state of epidemics – will not be bound by a request to organise a hearing in cassation appeals lodged in civil cases.

¹⁰³ The law of 20 April 2021 amending the Criminal Code and certain other laws, adopted in third reading by the Sejm on 21 April 2021, currently awaiting signature of the President of the Republic. The law seeks to implement Directive (EU) 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

¹⁰⁴ During the state of epidemics and a year thereafter criminal cases concerning acts subject to up to five years of imprisonment will be examined by a single-judge bench.

¹⁰⁵ According to the opinion submitted by the President of the National Bar Council (NRA.12-SM-1.2.2021), the amendments aim at preventing public control, including by the media, of preliminary criminal investigations, thus annihilating the possibility of controlling actions by the prosecution services.

¹⁰⁶ Whereas in 2018 the rate amounted to approximately 92%, it reached almost 100% in 2019.

¹⁰⁷ Figures 3, 7, 11 and 14, 2020 EU Justice Scoreboard. The number of incoming civil and commercial litigious cases remained high in recent years (figure 3, 2020 EU Justice Scoreboard). Despite an increase of pending civil, commercial, administrative and other cases in first instance in comparison to 2012, their clearance rate did not significantly drop in 2018 (figures 10 and 13, 2020 EU Justice Scoreboard).

¹⁰⁸ Analysis by ciekaweliczby.pl (*‘Ile trwają postępowania sądowe w Polsce?’*) as based on the official data disclosed by the Ministry of Justice on the efficiency of judicial proceedings – the average time of judicial proceedings in years 2011-2020 (for all types of cases).

enhanced supervision of the Committee of Ministers of the Council of Europe for the length of civil and criminal proceedings¹⁰⁹.

The performance of administrative courts is above the EU average. A slight increase is visible in the number of incoming administrative cases, whilst the estimated time needed to resolve them continues to decrease. The rate of resolving such cases dropped below 100%¹¹⁰.

II. ANTI-CORRUPTION FRAMEWORK

The legal and institutional framework to prevent and combat corruption is largely in place. In Poland, several authorities are responsible for anti-corruption, including the Minister of Justice, who is also the Prosecutor-General, 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 sector¹¹¹ alongside the Central Police Investigation Bureau and the regular police¹¹², the Internal Security Agency¹¹³ and the Prosecution Service¹¹⁴. It combines intelligence and police functions and can trigger both administrative and criminal proceedings. More recently, the Central Anti-Corruption Bureau has also been tasked with policy coordination¹¹⁵ and corruption prevention, including educational awareness-raising activities against corruption and an e-learning platform¹¹⁶. 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 among others¹¹⁷.

The perception among experts and business executives is that the level of corruption in the public sector remains relatively high. In the 2020 Corruption Perceptions Index by Transparency International, Poland scores 56/100 and ranks 13th in the European Union and 45th globally¹¹⁸. This perception has significantly deteriorated¹¹⁹ over the past five years¹²⁰.

¹⁰⁹ 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.

¹¹⁰ Figures 4, 8, 9 and 12, 2021 EU Justice Scoreboard.

¹¹¹ Cf. Law of 9 June 2006 on the Central Anti-Corruption Bureau.

¹¹² 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).

¹¹³ Act of 24 May 2002 on the Internal Security Agency and Foreign Intelligence Agency.

¹¹⁴ The Law of 28 January 2016 on the Prosecution Service.

¹¹⁵ The Central Anti-Corruption Bureau replaced the Minister of Interior and Administration in the overall coordination of the Governmental Anti-Corruption Programme.

¹¹⁶ Educational website of the Central Anti-Corruption Bureau: <http://antykorpucja.gov.pl/>, and its e-learning platform: <https://szkolenia-antykorpucyjne.edu.pl/>.

¹¹⁷ Law of 23 December 1994 on the Supreme Audit Office.

¹¹⁸ Transparency International, Corruption Perceptions Index 2020 (2021), pp. 2-3. 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).

¹¹⁹ In 2015 the score was 63, while, in 2020, the score is 56. The score significantly increases/decreases when it changes more than five points; improves/deteriorates (changes between 4-5 points); is relatively stable (changes from 1-3 points) in the last five years.

At the central level, Poland had a developed strategic anti-corruption framework in place for the years 2018-2020 but no subsequent plan has yet been published. According to the Government, preparatory work is under way for a new national strategy to prevent and combat corruption for the years to come, which should take into account the recommendations of the EU, the Group of States against Corruption (GRECO), the OECD, and the UN¹²¹. In addition to its primary tasks as an enforcement agency, the Central Anti-Corruption Bureau is also the coordinating body for the Government Programme for Counteracting Corruption for the years 2018-2020¹²² and the accompanying Action Plan¹²³, and as such mandated to propose legislation and undertake policymaking. The March 2021 implementation report¹²⁴ of the Programme, which will be audited by the Supreme Audit Office in 2021, sets out the progress achieved in 2020. As part of the programme implementation, two sets of anti-corruption guidelines were published in the course of 2020 to standardise and unify the anti-corruption rules applicable to ministries and local government administrations¹²⁵. Doubts exist as to the implementation of the key legislative tasks described in the Programme, in particular with regards to the continuation of the Act on Transparency of Public Life, the publication of the draft law newly regulating asset declarations, and on lobbying¹²⁶. High-risk sectors for corruption are specified in the Programme and include the defence, energy and construction sector, healthcare, environment, and public administration, as well as public procurement¹²⁷. The budget for the Central Anti-Corruption Bureau increased¹²⁸, but the activities of the Programme still need to be specifically budgeted for¹²⁹.

The Polish Criminal Code broadly criminalises corruption. The key offence penalised by the Criminal Code is bribery of public officials¹³⁰ in its passive (accepting a bribe) and active

¹²⁰ The Eurobarometer data on corruption perception and experience of citizens and businesses as reported last year is updated every second year. The latest data set is the Special Eurobarometer 502 (2020) and the Flash Eurobarometer 482 (2019).

¹²¹ Input from Poland for the 2021 Rule of Law Report, p. 25.

¹²² The resolution No. 207 of 19 December 2017 of the Council of Minister – the Governmental Anti-Corruption Programme for years 2018-2020. The main objective of the Programme was to reduce and to raise awareness about 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.

¹²³ The plan for the implementation of tasks and actions of the Governmental Anti-Corruption Programme for years 2018-2020.

¹²⁴ Ibid.

¹²⁵ Both, the ‘Guidelines on how to prepare and implement an effective compliance programme in the public sector’ and the ‘Anti-corruption guidelines for the public administration on uniform institutional arrangements and rules of conduct for officials and persons entrusted with top executive functions’ (PTEF) aim at standardising and at unifying the rules across the ministries and local government administrations, according to Polish Government, Input from Poland for the 2021 Rule of Law Report, p. 20.

¹²⁶ Information received in the context of the country visit to Poland. Reportedly, the analysis of the Minister of Internal Affairs and Administration on the lobbying regulation is still ongoing since October 2018.

¹²⁷ Input from Poland for the 2021 Rule of Law Report, p. 25.

¹²⁸ Input from Poland for the 2021 Rule of Law Report, p. 25: the budget allocated to the Central Anti-Corruption Bureau amounts to approximately EUR 49 million (PLN 221 million) in 2021, compared to approximately EUR 47 million (PLN 213 million) in 2020.

¹²⁹ Information received in the context of the country visit to Poland.

¹³⁰ 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.

(offering a bribe) forms¹³¹. In order to tackle collusion between the giver and the recipient of a bribe, the Criminal Code 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. The OECD has called on Poland to remove this provision, as it leads to impunity¹³². Deficiencies have also been highlighted with regard to the effective enforcement to tackle bribery abroad¹³³. A private company can only be held criminally liable for foreign bribery after the individual who committed the bribe was convicted in the final instance. The level of sanctions are not considered effective, proportionate or dissuasive¹³⁴.

Concerns exist as regards the effectiveness of the fight against high-level corruption.

The police initiated 2 544 corruption-related investigations in 2020 (compared to 3 129 in 2019)¹³⁵. Since 2006, there is a steady decline in police investigations into corruption (from 6 388 police investigations in 2006 to 2 544 in 2020)¹³⁶. The 2020 report of the Supreme Audit Office notes overall a considerable decline in corruption risk across areas that concern the functioning of the state, as for instance in the tax administration, emphasising however serious corruption risks relating to the use of advisory and expert services by public institutions¹³⁷. Petty corruption has further declined¹³⁸. Regarding high-level corruption cases, concerns exist as to rising institutionalised corruption, immunities and impunity caused by a disparity in the treatment of corruption cases for political purposes¹³⁹. In this context, the fact

¹³¹ 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.

¹³² OECD, Poland: Follow-Up to the Phase 3 Report & Recommendations (2015), p. 4. Cf. also OECD, Poland must make urgent legislative reforms to combat foreign bribery (2018).

¹³³ 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, Exporting Corruption (2020), p. 96, with further reference to cases.

¹³⁴ OECD, Poland should urgently implement reforms to boost the fight against foreign bribery and preserve independence of prosecutors and judges (2020).

¹³⁵ Police statistics on corruption investigations for the years 2011-2020 are available online.

¹³⁶ Notably, the number of detected corruption offences fluctuated significantly during the same period in question and increased markedly compared to 2006 (6 378 in 2006, 8 015 in 2020). According to the Polish authorities, fewer investigations with more detections may be due to a variety of reasons, such as the prosecution of more acts in a single investigation as a result of the specific nature of those acts or of a change in the organisation of proceedings within the police. Also other individual law enforcement authorities publish corruption-related data, such as the Central Anti-Corruption Bureau and the Ministry of Justice that publishes annual statistics on final convictions with information about the legal classification of charges and penalties imposed, available on the website of the Statistical Office.

¹³⁷ Input received from Poland for the 2021 Rule of Law Report, p. 21. Supreme Audit Office, <https://www.nik.gov.pl/plik/id.23307.vp.26017.pdf>. In its 2020 report, the Supreme Audit Office noted that there are still institutions in which no anti-corruption mechanisms have been implemented. Further, external services can easily be used to obtain illegal private benefits at the expense of public property, see the summary of the 2020 report as published by the Supreme Audit Office on 21 December 2020. In May 2021, the Supreme Audit Office issued a report concerning the organisation of the postal presidential elections in 2020, considering that it has been carried out in violation of applicable legislation. In that context, the Supreme Audit Office also informed on 25 May 2021 that it has notified the prosecution services about a possible violation of law. See also section IV below.

¹³⁸ Information received in the context of the country visit to Poland.

¹³⁹ Information received in the context of the country visit to Poland. See also Part I. Cf. also GRECO, Fifth Evaluation Round – Draft Compliance Report – Poland (2021), paras. 54-63; and GRECO, 5th Evaluation Round – Evaluation Report Poland (2019), paras. 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

that the Minister of Justice functions at the same time as Prosecutor-General adds to other concerns that have also been raised over the independence of the Central Anti-Corruption Bureau from the executive power¹⁴⁰. The increase in supervising powers of the Prosecutor-General who can take over cases by his subordinate prosecutors provides avenues to influence anti-corruption prosecutions politically¹⁴¹.

The cooperation in practice between the relevant institutions to fight corruption in Poland at times faces some legal and organisational constraints. In particular, the restrictions to access financial data present an obstacle for the detection and prosecution of corruption¹⁴². According to the government, the resources and the level of specialisation and digitalisation of the services involved are also not always sufficient to carry out their tasks in repressing corruption effectively. This concern relates specifically to the shortage of anti-corruption staff, insufficient technological resources and capacities, and effective evidence gathering to meet the standards of proof, which have prolonged procedures and obstructed official duties especially during the COVID-19 pandemic¹⁴³.

A practical guide on conflicts of interest for public officials accompanies the relevant lobbying legislation. A guide entitled '*Conflict of Interest – What is it and how to avoid it?*'¹⁴⁴ is for Government employees to assist them in the practical implementation of the rules laid down in the Law on Lobbying Activity in the Law-Making Process¹⁴⁵. In 2020, the Central Anti-Corruption Bureau examined 2 353 conflict of interest issues in the Ministry of Health and the Ministry of National Defence (compared to 2 477 in 2019), covering 1 949 persons (compared to 2 187 in 2019) with no reported cases referred to the Prosecutor's office¹⁴⁶. There are three lobby registers in place, one for the Government (based on the lobbying act), one for the lower chamber of the Parliament (Sejm), and one covering its higher chamber (Senate)¹⁴⁷. The Minister of Internal Affairs and Administration is the supervisory body over lobby activities vis-à-vis the government¹⁴⁸. For lobbying activities towards parliamentarians, the two chambers of the Parliament (Sejm and Senate) have supervisory tasks¹⁴⁹. Concerns exist as to the effectiveness of the registers. Reportedly, only

objective and fair criteria used effectively in practice (see para. 87). Moreover, GRECO reiterates also its concern regarding 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 (see para. 91).

¹⁴⁰ As reported in the 2020 Rule of Law Report, country chapter on the rule of law situation in Poland, p. 11 and above in section I. GRECO Fifth Evaluation Round – Evaluation report, para. 78.

¹⁴¹ Information received in the context of the country visit to Poland. See also above in section I. For more information, see 2020 Rule of Law Report 2020, country chapter on the rule of law situation in Poland, p. 11.

¹⁴² Input from Poland for the 2021 Rule of Law Report, p. 26, noting also immunities of parliamentarians, prosecutors and judges as a challenge.

¹⁴³ Input from Poland for the 2021 Rule of Law Report, p. 26.

¹⁴⁴ Input received from Poland for the 2021 Rule of Law Report, p. 21. The guide is available online.

¹⁴⁵ The Law of 7 July 2005 on Lobbying in the law-making process was one of Europe's first lobbying regulation. It defines lobbying, establishes a public register and determines obligations and sanctions for unregistered lobbyists.

¹⁴⁶ Central Anti-Corruption Bureau, Information about business results in 2020, p. 37.

¹⁴⁷ 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.

¹⁴⁸ Law of 7 June 2005 on lobbying activities in the law-making process.

¹⁴⁹ See above, Law of 7 June 2005 on lobbying activities in the law-making process.

one interest representative participated in a single parliamentary committee session in 2020, while a total of 508 entities are registered in the registry of the Parliament's lower chamber¹⁵⁰. Overall, the number of lobbyists registering continues to decline, oversight is not systematic and no information exists on whether sanctions have been applied to unregistered lobbyists¹⁵¹. Post-employment ('revolving doors') rules are applicable only to top-level officials (excluding members of the parliament) and limited to entities for whom a public official issued specific decisions¹⁵².

Technical work towards a standardised asset declaration system has been undertaken.

The level of digitalisation of politicians' asset declarations is low and a centralised submission and monitoring system is lacking¹⁵³. Most declarations are still filled out by hand, with various declaration forms being in use¹⁵⁴. The scope of data to disclose is similar but not identical for every obliged public official. In 2020, the Central Anti-Corruption Bureau carried out 81 asset declaration controls (compared to 90 in 2019), of which 45 concerned suspected crime¹⁵⁵, and 385 pre-control analyses concerning asset declarations and compliance with anti-corruption provisions¹⁵⁶ (compared to 364 in 2019). In two cases, material was provided for pending proceedings and, in two additional cases, the Prosecutor's Office was provided with findings of the Central Anti-Corruption Bureau's inspections.

A dedicated government hotline exists for whistleblowers to report corruption and corruption-related crimes. The Central Anti-Corruption Bureau can receive open and anonymous reports by citizens¹⁵⁷. Until amendments are introduced to the current whistleblower provisions provided for in different legal acts, the calls to strengthen protection of reporting persons remain valid¹⁵⁸.

Exemptions to public procurement rules introduced during the COVID-19 pandemic have raised concerns about possible corruption risks. This relates in particular to the exemption from criminal and disciplinary liability of officials who manage public funds or purchase equipment, services and other resources to fight the COVID-19 pandemic¹⁵⁹.

¹⁵⁰ Input received from Poland for the 2021 EU Rule of Law Report, p. 23. Reports might be found on the Sejm and Senate official website. Some information has also been published by the Frank Bold Foundation on a website devoted to lobbying transparency <https://jawnylobbying.org>.

¹⁵¹ Information received in the context of the country visit to Poland.

¹⁵² GRECO, Fifth Evaluation Round – Evaluation report, recommendation viii and para. 65.

¹⁵³ GRECO Fifth Evaluation Round – Evaluation report, recommendations x and xi, paras. 72 and 78.

¹⁵⁴ It is reported that there at least 16 different forms are in use, while no unified legislation exists. In addition, most declarations are published in pdf-format, which presents an obstacle for the monitoring and analyses. Provisions on asset declarations are scattered among several acts, including among others: the Act on the Exercise of the Mandate of a Deputy and Senator; the Act on Restrictions on Conduct of Business Activities by Persons Performing Public Functions covering especially top-level public officials and civil servants; the Act on the status of judges of the Constitutional Tribunal; the Prosecution Service Law Act; local government acts covering public officials and councilmen; and acts specific to certain services, such as police, fire fighters, etc. Cf. also 2020 Rule of Law Report, country chapter on the rule of law situation in Poland – Part I.

¹⁵⁵ Central Anti-Corruption Bureau, Information about business results in 2020, pp. 19-20.

¹⁵⁶ Central Anti-Corruption Bureau, Information about business results in 2020, p. 24.

¹⁵⁷ Input received from Poland for the 2021 Rule of Law Report, p. 24. No data was submitted regarding the effectiveness and use of the hotline.

¹⁵⁸ United Nations Convention (2015), Implementation Review Group (cycle 1) and OECD Poland: Follow up to the Phase 3 Report and Recommendations.

¹⁵⁹ 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.

However, a new Public Procurement Law also entered into force in the beginning of 2021¹⁶⁰, which anti-corruption stakeholders largely valued as good practice going into the right direction¹⁶¹. The Central Anti-Corruption Bureau is in charge of anti-corruption 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.

III. MEDIA PLURALISM AND MEDIA FREEDOM

Journalists' protection is based on Constitutional principles and specified in sectorial legislation. The Broadcasting Act and the Press Law provide, respectively, a legal framework for the media regulator - the National Broadcasting Council (KRRiT) and safeguards for journalistic independence. The Broadcasting Act is expected to be amended as a result of the ongoing transposition of the revised Audiovisual Media Services Directive¹⁶².

The upcoming changes in the legal framework will aim to strengthen the statutory safeguards for the independence of the media regulator. According to the Constitution, the members of the National Broadcasting Council (KRRiT) are appointed by the Sejm, Senate, and the President of the Republic. They may not belong to a political party, trade union or perform public activities incompatible with their function. Poland is still working on the transposition of the revised Audiovisual Media Services Directive (AVMSD)¹⁶³. According to the Polish authorities, the upcoming amendments of the Law on Broadcasting are expected to make the procedure for dismissing KRRiT members more rigid¹⁶⁴. Currently, the rejection of the annual report of the KRRiT by the Sejm and the Senate results in the automatic expiry of the mandate of all its members (Article 12 of the Broadcasting Act). The new act will introduce additional formal requirements for this rejection procedure. In particular, it will require the President of the Republic to confirm the expiry of the KRRiT members' term of office, following a negative vote by the Sejm and of the Senate. Both the resolutions of the Sejm and of the Senate, as well as any confirmation by the President, will need to be reasoned. Also, the list of responsibilities of the media regulator will be widened to align it with the revised AVMSD. Neither the KRRiT nor the National Media Council (RMN)¹⁶⁵ - the public service media governing body - deals with the public service media news programmes. This was raised as problematic in the context of the coverage of the 2020

¹⁶⁰ The law of 11 September 2019 – the Law on Public Tenders, effectiveness of which remains to be seen in practice, due to its recent entry into force.

¹⁶¹ Information received in the context of the country visit to Poland.

¹⁶² Poland ranks 64th in the Reporters Without Borders 2021 World Press Freedom Index (23rd among the EU Member States), down two places from the 62nd position in 2020. Between 2015 and 2020 Poland fell 46 positions in the Word Press Freedom Index.

¹⁶³ Directive (EU) 2018/1808 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

¹⁶⁴ In accordance with Article 7(6) of 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 of the member concerned resigns, suffers from an illness baring 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.

¹⁶⁵ In 2016, some of the competences of KRRiT were transferred to the newly established National Media Council (RMN), which is now in charge of appointing and removing management and supervisory boards of the Polish Television (TVP), Polish Radio and Polish Press Agency. 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. The judgment remains to be implemented. There are no specific conflict-of-interest rules as regards the membership of active politicians in the Public Service Media boards.

presidential campaign¹⁶⁶. However, the KRRiT cooperates with the Public Discourse Monitoring Centre, which provides reports on the radio and TV appearances of politicians and experts, in particular in stations and journalistic programmes¹⁶⁷.

Recent developments on the Polish media market risk reducing media pluralism.

Concerns have been raised regarding plans for legislative changes¹⁶⁸ allowing not to grant broadcasting concessions to operators directly or indirectly controlled by persons registered outside the EEA¹⁶⁹. Stakeholders have already raised concerns about the future of TVN24 channel¹⁷⁰ whose license has not yet been renewed since the application was filed in February 2020¹⁷¹. The potential acquisition of the German-owned Polska Press¹⁷² by the state-controlled oil company PKN Orlen has also raised concerns as a potential threat to media market pluralism¹⁷³. The transaction was approved by Poland's competition authority (UOKiK). The approval was subsequently challenged by the Polish Ombudsperson, who argued that the transaction should be reversed as it threatens the press freedom. Pending the examination of the Ombudsperson's appeal on merits¹⁷⁴, the Court of Competition and Consumer Protection ordered interim relief temporarily suspending the UOKiK's decision¹⁷⁵. The competition authority has three months to submit its appeal. PKN Orlen declared,

¹⁶⁶ See OSCE-ODIHR Final Report on the Presidential Election held in Poland on 28 June and 12 July 2020 (Special Election Assessment Mission) as well as the 2020 Rule of Law Report: country chapter for Poland.

¹⁶⁷ The Public Discourse Monitoring Centre is an academic project, run by the Nicolas Copernicus University, aimed at providing systematic characteristics of journalistic radio and TV programs, including the analysis of which politicians are invited as guests to the most important journalistic programs on radio and TV stations with the broadest range.

¹⁶⁸ Draft law No. 1389 amending the law on the radio and television broadcasting, submitted to the Sejm on 7 July 2021.

¹⁶⁹ Another recent legislative proposal concerned a new levy on advertising revenues that would apply to a large array of media companies. Representatives of private media claimed that the new bill would particularly affect leading domestic news media groups. The proposal prompted an unprecedented, coordinated protest by the majority of private media on 10 February 2021. While the Government has not proceeded with the legislative discussions on the proposal in its original form, according to the recent press reports the ruling party has not abandoned the idea of proposing such a levy. See: Money.pl, 'Podatek od mediów wróci? GW: Kaczyński chce go w Nowym Ładzie' of 30 April 2021.

¹⁷⁰ Owned by TVN group, which is owned by U.S. company Discovery.

¹⁷¹ Under the Polish Broadcasting Act, the applicant has to submit a request no later than 12 months before expiry of the current licence. The Broadcasting Act does not specify a time limit for the media regulator with regard to issuing its decision. One should assume that the national media regulator (KRRiT) should issue its decision regarding a new broadcasting licence before the expiry of the current licence. The TVN24's licence expires on 26 September 2021.

¹⁷² Polska Press owns 20 out of 24 regional newspapers, 120 local weeklies and 500 online portals across the country. According to the alert published on the Council of Europe platform to promote the protection of journalism and safety of journalists, *the transaction has dismayed many actors of Poland's independent media who see this as a first step in bringing the sector under government control. Some media have however described this purchase as an opportunity to break the foreign domination of the regional press. The Association of Polish Journalists has repeatedly pointed to the monopolistic position of foreign capital in the regional press market.* See to that end Council of Europe's Platform to promote the protection of journalism and safety of journalists.

¹⁷³ See Media Freedom Rapid Response's press release of December 2021.

¹⁷⁴ See the press communique of the Ombudsperson of 13 April 2021.

¹⁷⁵ It should be noted that the transaction was not examined in the context of its potential impact on media pluralism, which would have been outside the competence of the Polish media regulator who is only in charge of radio and audiovisual broadcasters. In its press release, the UOKiK confirmed being empowered only to examine the impact of acquisitions on the market and consumers in terms of competition, but not to examine the impact on freedom of speech or media pluralism. See: UOKiK, 'UOKiK President's approval' of 5 February 2021.

however, that it considered the acquisition of shares as completed already before the court's decision¹⁷⁶ and it proceeded with various managerial decisions, including changes of personnel in the editorial teams of the Polska Press' newspapers¹⁷⁷. According to Reporters Without Borders, such decisions should be considered as confirmation that the acquisition affects the media group's independence¹⁷⁸, and the Ombudsperson stated that the actions of PKN Orlen have demonstrated a "blatant disregard" to the Court's decision. In addition, the International Press Institute raised concerns that the decision of the competition authority could result in weakening media companies perceived as opponents to the ruling party¹⁷⁹.

The media ownership transparency obligations are expected to be strengthened. As part of the amendments of the Broadcasting Act transposing the revised AVMSD, the Polish authorities intend to expand the scope of the transparency obligations for media service providers¹⁸⁰. This will include providing the information on beneficial owners by referring to the registration in the KRS (National Judicial Register) and the Central Register of Beneficial Owners¹⁸¹. The amendments are expected to be enacted in the third quarter of 2021. The 2021 Media Pluralism Monitor reported medium risk with regards to the transparency of media ownership and high risk of news media concentration¹⁸².

State advertising appears to be directed mostly to the media outlets considered as government-friendly. Stakeholders report that state authorities and companies owned by the State Treasury place their announcements and advertising spots only in media considered favourable to the Government¹⁸³. While public media are reported to be the main beneficiaries of the state support¹⁸⁴, a recent study confirmed the growing share of the pro-Government private media¹⁸⁵. The International Press Institute has warned that instrumentalisation of public advertising affects negatively the market dynamics and could

¹⁷⁶ See: EURACTIV.com, *Poland's PKN Orlen says media takeover unchanged by court decisions* of 14 April 2021.

¹⁷⁷ As reported by the media on 30 April 2021, chief editors of the four largest regional journals were dismissed from their function and substituted by persons reported by the media of having close ties with the governing coalition (see *Gazeta Wyborcza 'Czystka w Polska Press'* of 30 April 2021).

¹⁷⁸ Reporters Without Borders, *With firing of four editors, "repolonisation" under way in Poland* of 10 May 2021.

¹⁷⁹ When in January 2021, the competition authority blocked the acquisition of the radio broadcaster Eurozet by Agora (owner of the independent newspaper "Gazeta Wyborcza"), the latter claimed that the decision was being influenced by representatives of the ruling party. According to Agora the negative decision of the competition authority was "arbitrary and selective" and it "protects Agora's competitors, not competition". See: Alert registered at the Mapping Media Freedom platform and the Media Freedom Rapid Response '*Democracy declining: Erosion of Media Freedom in Poland*' MFRR Press Freedom Mission to Poland (November-December 2020) mission report.

¹⁸⁰ Written contribution received in the context of the country visit to Poland.

¹⁸¹ Information from the Country visit from the public authorities. The Register is available online and can be consulted under the following address: <https://www.gov.pl/web/mswia/dzialalnosc-lobbingowa>.

¹⁸² 2021 Media Pluralism Monitor, country report for Poland, p. 12.

¹⁸³ Media Freedom Rapid Response '*Democracy declining: Erosion of Media Freedom in Poland*' MFRR Press Freedom Mission to Poland (November-December 2020) mission report.

¹⁸⁴ 2021 Media Pluralism Monitor, country report for Poland, p. 14. Also see: Politico '*Polish media suspend reporting to protest planned tax on advertising*' of 10 February 2021.

¹⁸⁵ T. Kowalski '*Analiza wydatków reklamowych spółek skarbu Państwa (SSP) w latach 2015-2019 (na podstawie monitoringu firmy Kantar Media)*' – pre-print of March 2020; see also media reports based on the above analysis: Press.pl '*Spółki Skarbu Państwa wydały na reklamę mniej, niż rok wcześniej*' of 18 February 2021 and Antyweb.pl '*Raport UW: Spółki Skarbu Państwa reklamują się głównie w mediach sprzyjających władzy*' of 17 February 2021.

lead to a deterioration in journalistic standards.¹⁸⁶ Similarly, the 2021 Media Pluralism Monitor pointed out that certain forms of state support, including grants, loans or state advertising remain fragmented and non-transparent¹⁸⁷.

In addition, in March 2020, in response to the COVID-19 pandemic, the Government activated a horizontal COVID-19 “Anti-crisis shield” offering various measures of support (both financial and legislative) for all companies¹⁸⁸. The 2021 Media Pluralism Monitor reports that not all media groups applied for funds to cover employees’ salaries during the lockdowns¹⁸⁹. Within the framework of the “Anti-crisis shield”, the Government introduced an additional levy on local revenues of video-on-demand platforms operating in Poland¹⁹⁰. According to the representatives of the Government, the new levy was introduced in order to compensate the financial losses of cinemas and support the Polish Film Institute¹⁹¹.

The Polish legal framework recognises the right of access to public information, however proliferating limitations inhibit its implementation in practice. Stakeholders report cases of limiting access to information without explanation, cancellation or denying of journalists’ accreditation¹⁹² or blocking entry to certain events¹⁹³. Exercising the right of access to public information risks being further limited as a result of the ongoing constitutional challenge¹⁹⁴. The International Press Institute points out that the situation has deteriorated during the COVID-19 pandemic¹⁹⁵. Similarly, the 2021 Media Pluralism Monitor reports that the legal provisions adopted as a part of the COVID-19 “Anti-crisis shield”, enabled the authorities to suspend deadlines stipulated by administrative law, thereby limiting or delaying access to public information¹⁹⁶. Consequently, the 2021 Media Pluralism Monitor notes higher risks in relation to the access to information in Poland in comparison to the last year’s edition¹⁹⁷.

The professional environment for journalists is deteriorating in Poland. While the safeguards of journalistic independence are included in the Broadcasting Act and the Press

¹⁸⁶ See MFFR mission report as referred to above.

¹⁸⁷ 2021 Media Pluralism Monitor, country report for Poland, p. 14.

¹⁸⁸ The 2020 Act of 14 May 2020 amending certain acts in the field of protective measures in connection with the spread of the SARS-CoV-2 virus.

¹⁸⁹ 2021 Media Pluralism Monitor, country report for Poland, p. 14.

¹⁹⁰ See Infor.pl, ‘*Wpłaty na rzecz polskiej kinematografii (tzw. podatek od seriali) od 1 lipca 2020 r.*’ of 22 May 2020.

¹⁹¹ Some stakeholders raised concerns with regard to the method of the calculation of the financial contribution. See Lexology.com (2020), ‘*Poland to introduce “Netflix tax” to support local filmmakers.*’

¹⁹² See an alert registered on the Mapping Media Freedom platform.

¹⁹³ As confirmed by the MFFR mission report as referred to above.

¹⁹⁴ On 16 February 2021, the newly appointed First President of the Supreme Court lodged a request with the Constitutional Tribunal asking it to declare, in essence, the unconstitutionality of provisions governing the access to documents in so far as these broaden ‘in illegitimate way’ the definition of entities obliged to disclose public information and allow for a too broad disclosure of the data requested. See in that context information provided under Part I of the present Chapter and case K 1/21 pending before the Constitutional Tribunal.

¹⁹⁵ See MFFR mission report as referred to above.

¹⁹⁶ 2021 Media Pluralism Monitor, country report for Poland, p. 10.

¹⁹⁷ *Ibid.*

Law,¹⁹⁸ the provisions aimed at limiting political control over media outlets are missing (for instance, limits on control of media by politicians)¹⁹⁹. As a result of political interference (both in private and public media), there were cases where journalists decided to establish new media outlets online, relying on crowdfunding business models²⁰⁰. The violent actions of the police forces during protests and demonstrations affected also journalists reporting from such events²⁰¹. The 2021 World Press Freedom Index reported that Polish police force have repeatedly failed to protect journalists during protests and instead used violence and arbitrary arrests²⁰². During the lockdown period, journalists were qualified as one of the privileged professional groups allowed to stay in a hotel during work-related travel²⁰³. The news media community has observed an increase in lawsuits against journalists with intimidating effects warning letters addressed to journalists and newsrooms in order to postpone or stop critical reporting concerning companies or public institutions²⁰⁴. Such a trend appears to particularly affect smaller news outlets and freelancers that are at high risk of self-censorship due to the fear of legal consequences²⁰⁵. While the majority of such lawsuits tend to be unsuccessful, they are reported to be still widely used to harass Government critics²⁰⁶. The Council of Europe platform to promote the protection of journalism and safety of journalists registered 10 alerts concerning Poland in 2020, and two in 2021²⁰⁷. The nature of the alerts confirms the trend of using intimidating legal actions against journalists. The 2021 Media Pluralism Monitor assesses the risks related to the journalistic profession, standards and protection at medium level.

IV. OTHER INSTITUTIONAL ISSUES RELATED TO CHECKS AND BALANCES

Poland is a representative democratic republic with a directly elected President, a bicameral Parliament²⁰⁸ 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

¹⁹⁸ In particular, the 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.*

¹⁹⁹ The 2021 Media Pluralism Monitor reported high risk with regards to the political independence of media. See: 2021 Media Pluralism Monitor, country report for Poland, p. 13.

²⁰⁰ See OSCE-ODIHR Final Report on the Presidential Election held in Poland on 28 June and 12 July 2020 (Special Election Assessment Mission), Reporters without Borders's information on the 'repolonisation' of the Polish media market ('<Repolonising> means censoring').

²⁰¹ For instance attacks during protests of 11 November 2021 led to numerous injuries, with the most severe case of the hospitalization of a 74-year-old photographer who was shot in the face with a rubber bullet. See: Committee to Protect Journalists, 'Polish riot police attack journalists covering demonstrations' of 16 November 2020.

²⁰² See: 2021 World Press Freedom Index

²⁰³ See: Regulation of the Council of Ministers of 22 January 2021 amending the regulation concerning the imposition of specific limitations, obligations and prohibitions due to the existence of the state of epidemics.

²⁰⁴ The International Press Institute Reports that many lawsuits are initiated by government agencies, state bodies or ruling party politicians, and are aimed at weakening newspapers' financial resources. See: MFFR mission report as referred to above. According to the representative of journalists, such intimidation method are also often used by large business corporations. See: Press.pl 'Postraszyć redaktora' of 21 August 2020.

²⁰⁵ See MFFR mission report as referred to above.

²⁰⁶ *Ibid.*

²⁰⁷ Majority of alerts were addressed by Polish authorities. See Council of Europe's *Platform to promote the protection of journalism and safety of journalists* – information concerning Poland.

²⁰⁸ The Parliament is composed of the Sejm (the lower chamber) and the Senate (the higher chamber).

tasked with safeguarding the freedoms and rights of persons and citizens specified in the Constitution and other normative acts.

The expedited adoption of legislation continues to be used for significant structural reforms of the judiciary or of other independent authorities²⁰⁹. The recent amendments to the law on the Supreme Court were adopted in third reading by the Sejm within 24 hours from being tabled. It is recalled that ensuring effective public consultations and involvement of social partners in the policy-making process in Poland was one of the country-specific recommendations issued in the context of the 2020 European Semester²¹⁰. The Venice Commission and OSCE have on several occasions underlined the importance of thorough deliberations of legislative proposals and amendments, including meaningful consultations with stakeholders, experts and the civil society, and a dialogue with the political opposition²¹¹.

The state of epidemics introduced by the Government in March 2020 is still in force. On 20 March 2020, the Minister of Health introduced a country-wide state of epidemics in order to counter the effects of the COVID-19 pandemic. The state of epidemics is based on statutory legislation²¹² and allows the Minister of Health and other members of the Council of Ministers to introduce limitations on constitutional freedoms and impose obligations on the citizens and business owners. The state of epidemics has been imposed without time-limitation and will remain in place as long as the Health Minister does not revoke it by means of an ordinance. The state of epidemics and the measures it allows to be introduced through governmental ordinances have raised questions as to their constitutionality²¹³, with reference to the fact that the Polish constitution explicitly provides that any curtailment of fundamental rights and freedoms can be imposed only under the state of emergency²¹⁴. That position has also been taken by courts seized in individual cases concerning the imposition of sanctions due to violations of anti-COVID measures²¹⁵.

²⁰⁹ On 8 March 2021, the Commission sent a reasoned opinion to Poland for breaching EU law safeguarding the independence of the national regulatory authority (NRA), a key principle of the EU's telecommunications legislation. More specifically, the legal provisions amending the Polish Telecommunications Law that resulted in the early termination of the mandate of the Head of the Polish NRA – the Office for electronic communications, raise concern. See to that end also the 2020 Rule of Law Report: country chapter for Poland, Part IV.

²¹⁰ Council Recommendation of 20 July 2020 on the 2020 National Reform Programme of Poland and delivering a Council opinion on the 2020 Convergence Programme of Poland, p. 15 (OJ C 282/21); see also European Commission, Country Report Poland 2020, SWD(2020) 520 final, p. 6 and 36. This recommendation was also made in previous years.

²¹¹ Venice Commission's opinions CDL-AD(2020)017, para. 18; CDL AD(2016)026-e, paras. 21-22; OSCE-ODIHR (Urgent Interim Opinion JUD-POL/365/2019[AIC]), para. 30. The practice of using an accelerated procedure for adopting laws regulating important aspects of the legal or political order is generally dissuaded by bodies such as the Venice Commission (cf. Checklist (CDL-AD(2019)015) para. 75).

²¹² See the Law of 2 March 2020 on detailed solutions linked to the prevention of, and counteracting as well as preventing COVID-19, other contagious diseases and crisis situations resulting therefrom.

²¹³ See e.g. an open letter of the Ombudsperson of 4 June 2020 addressed to the Prime Minister (VII.565.461.2020.ST).

²¹⁴ See to that end Chapter XI of the Polish constitution (Articles 228 – 234). It is noted that the introduction of a state of emergency would result in civil liability of the state for property losses resulting from the limitation of constitutional rights and freedoms (see the Law of 22 November 2020 on the compensation for property losses resulting from the restriction of human and civil freedoms and rights during a state of emergency).

²¹⁵ See below.

Measures introduced in 2020 to face the COVID-19 pandemic by the Government continue to be considered unlawful by courts. Upon introduction of the state of epidemics²¹⁶, stakeholders have expressed concerns about the measures imposed²¹⁷ in that context in view of their impact on fundamental rights²¹⁸. Following the imposition of fines by state authorities such as the Police and the Sanitary Inspection due to breaches of anti-COVID measures, ordinary and administrative courts are reported to have on a large scale rejected those fines, considering them inconsistent with the Polish constitution, including as regards the prohibition of public gatherings²¹⁹. A request lodged by the Prime Minister with the Constitutional Tribunal, which is still pending, seeks to prevent the Polish State from being obliged to cover damages resulting from anti-COVID measures²²⁰.

²¹⁶ The state of epidemics is introduced by an ordinance of the Minister of Health acting on the basis of the law of 5 December 2008 (amended in 2020) on preventing and combating infections and infectious diseases in humans. Once introduced, the state of epidemics allows to decide, by means of ordinances, on imposing several limitations and obligations concerning the movement of persons, functioning of businesses etc. See Regulation of 20 March 2020 of the Minister of Health concerning the introduction, within the borders of the Republic of Poland, of the state of epidemics. The state of epidemics has no pre-fixed duration and can be prolonged by the Government. The state of epidemics, introduced on 20 March 2020, continues to be in place.

²¹⁷ According to an official statement of the President of the Supreme Audit Office of 28 April 2021, a control of the procedure used to organise the postal presidential elections in 2020, ordered by the Prime Minister, give rise to constitutional liability of the Prime Minister due to breaches of law committed in that respect. On the same day, the Central Anti-Corruption Bureau carried out an ad hoc search of real estate belonging to the family of the President of the Office. The President of the Office delivered a public statement considering the search to be a retaliation by state bodies against his activities in office. According to the final report by the Supreme Audit Office, published on 13 May 2021, the Prime Minister lacked a legal basis to organise postal presidential elections and breached the Electoral Code by assuming competences that had not been assigned to him by law. On 28 May 2021, the President of the Supreme Audit Office indicated that he formally notified the prosecution services as regards a possible violation of law by the Prime Minister, the Head of the Chancellery of the Prime Minister, the Minister of Public Assets, and the Minister of Internal Affairs. For the impact of the COVID-19 Pandemic on the presidential elections in Poland, see 2020 Rule of Law Report, Part I.

²¹⁸ Under the Constitution, fundamental rights can be limited only in case of declaration of the state of emergency, which has not been declared. See e.g. statements of the Ombudsperson on measures counteracting the COVID-19 pandemic: <https://www.rpo.gov.pl/pl/kategoria-tematyczna/koronawirus-i-epidemia-w-polsce>.

²¹⁹ In particular, upon motion of the Ombudsperson, the Supreme Court (in the Criminal Chamber) repealed at four occasions rulings of lower courts which confirmed the imposition of fines for breaching anti-COVID measures, including because these breached fundamental rights and constitutional provisions (See press communiques of the Ombudsperson's office of 15 April 2021 and 19 March 2021. Some cases remain pending before the Supreme Court, see press communiques of the Ombudsperson's office of 22 April 2021, 7 April 2021, of 19 March 2021, 17 March 2021, 20 April 2021). In that respect, see also *Gazeta Wyborcza*, 'Sądy lawinowo uchylają kary nakładane przez sanepid za łamanie obostrzeń' of 16 January 2021; *Bezprawnik.pl*, 'Sądy uchylają mandaty, a także umarzają postępowania w związku z nienoszeniem maseczek. A co z karami administracyjnymi?' of 11 October 2020. *Prawo.pl*, 'Rząd myśli o zmianach w prawie, a sądy już uniewinniają osoby bez maseczek' of 5 August 2020. On 1 July 2021, the Supreme Court ruled that the prohibition of gatherings imposed by the Government in the context of COVID-19 pandemic is inconsistent with the constitution (case IV KK 238/21).

²²⁰ As of January 2021, Polish entrepreneurs started lodging group civil lawsuits against the Polish State to cover damages borne due to lockdown restrictions, considering those unconstitutional as they were primarily introduced by means of governmental ordinances. The Prime Minister, already in August 2020, seized the Constitutional Tribunal asking it, in essence, to declare the unconstitutionality of a provision of the Civil Code that establishes the state authorities' civil liability for damages, to the extent that this provision i.a. allows ordinary and administrative courts to declare the unconstitutionality of a legal act whilst circumventing the Constitutional Tribunal (see in that respect also the supportive motion of the Marshal of

The Supreme Court continues to review rulings of ordinary courts in certain cases dating back 20 years. Under the new extraordinary appeal procedure, the new Chamber of the Extraordinary Control and Public Affairs is empowered to overturn fully or in part any final judgment delivered by ordinary courts in the past 20 years, subject to some exceptions²²¹. This new extraordinary appeal procedure, based on broad criteria, raises issues as regards the principle of legal certainty²²² and is one of the concerns raised by the Commission in its Reasoned Proposal adopted under the Article 7(1) TEU procedure²²³. According to the information available, most of the proceedings so far have been lodged by the Prosecutor General²²⁴.

Civil society space continues to be adversely affected²²⁵. Poland has a broad and vibrant civil society, consisting of more than 120 000 different NGOs²²⁶. However, the 2020 update of the CIVICUS report considers that the civic space for NGOs' functioning has narrowed²²⁷. The access to public funding of NGOs remains an issue²²⁸. The ruling of the Constitutional Tribunal²²⁹ of 22 October 2020, leading to a de facto ban on abortion²³⁰, sparked nation-wide

the Sejm; case K 18/20, currently pending). See also *Gazeta Prawna*, 'Przedsiębiorcy pozywają Skarb Państwa za restrykcje. Pozew grupowy a indywidualny – co wybrać?' of 19 January 2021

²²¹ The recent amendments to the Law on the Supreme Court prolong, until 3 April 2023, the transitional period in which final judgments of ordinary courts issued since October 1997 can be contested.

²²² Venice Commission opinion of 11 December 2017 (CDL-AD(2017)031), paras. 53-63.

²²³ Reasoned Proposal, paras 128-131.

²²⁴ According to data provided by the Supreme Court, in 2020 the Chamber of Extraordinary Control and Public Affairs examined 29 extraordinary appeals. As of 25 February 2021, the Ombudsperson lodged with the Supreme Court 46 such appeals of which 6 have so far been examined (see the press communique of the Ombudsperson's Office of 25 February 2021. See also the Ombudsperson's opinion to the law amending the law on the Supreme Court referred to in Part I of the present Chapter).

²²⁵ PACE report of 6 January 2020; see the 2020 Rule of Law Report: country chapter for Poland, p. 17.

²²⁶ According to the Polish authorities, cooperation between public authorities and civil society organisations must respect the principles of subsidiarity, sovereignty of the parties, partnership, efficiency, fairness of competition, transparency, equal treatment and independence.

²²⁷ CIVICUS Monitor – Tracking Civic Space; ratings are on a five-category scale defined as: open, narrowed, obstructed, repressed and closed. The main reasons listed by CIVICUS for its assessment concern the excessive force used by the authorities on protesters and journalists reporting on protests; continuous targeting of LGBTI persons by the government; lawsuits lodged by public authorities against private media and other legal instruments adopted to restrict press freedom (see CIVICUS Monitor Watch List – updated 18 February 2021).

²²⁸ A National Institute of Freedom – Centre for Civil Society Development is responsible for the distribution of government funding, as well as nationally attributed EU funding, to NGOs. The organisations' representatives constitute a minority in the decision-making process under this institute, which is chaired by a member of the Government. The OSCE found that the Government appears to have a decisive influence on the governance and operation of the National Institute of Freedom and made recommendations in that respect. See also OSCE-ODHIR, Guidelines on the Protection of Human Rights Defenders, paras 70-73. According to the information received from the Polish authorities, in 2020 grant programmes had a budget of almost PLN 160 million (c.a. EUR 35,5 million).

²²⁹ It is also noted that 31 July 2020, the Prime Minister, supported by the Prosecutor General, the Sejm, and the Minister of Foreign Affairs, requested the Constitutional Tribunal to declare the unconstitutionality of a number of provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence (case K 11/20, currently pending).

²³⁰ The Constitutional Tribunal asserted the unconstitutionality of provisions allowing for an abortion procedure carried out due to the incurable status of the foetus, which constituted around 98% of cases of legally performed abortions in Poland. The dissenting opinion attached to the ruling considered that two members should not have been part of the hearing bench, one for having as Member of Parliament signed a request similar to the one giving rise to the case and the other for having as Member of Parliament voted on such motion to be referred to the Constitutional Tribunal. Stakeholders noted that the ruling was issued in breach of law as it was delivered in full bench including by judges whose status is disputed (see: Batory Foundation,

protests held amidst the COVID-19 pandemic, with concerns being raised over intimidation, violence and detention of peaceful protesters²³¹. Increasing threats against women activists continue being reported allegedly with no apparent reaction from the public authorities²³². The Council of Europe expressed concerns as regards the harassment and intimidation of the LGBTI community in Poland, rendering the functioning of LGBTI NGOs particularly difficult, including as regards the access to funding²³³. The Ombudsperson challenged the decision of certain regions to declare themselves to be ‘LGBTI ideology-free zones’ before the Supreme Administrative Court²³⁴.

The Ombudsperson, due to a ruling of the Constitutional Tribunal, is obliged to end his functions while a successor has not been elected. Throughout 2020 and 2021, the Ombudsperson has continued to play a key role as a rule of law safeguard²³⁵. Pursuant to the law on the Ombudsperson – who is an equality body under EU law – the incumbent Ombudsperson remains in office, pending the appointment of a new office-holder. The appointment, made by the Sejm, requires consent of the Senate, where opposition parties hold the majority. Following the expiry of the term of office of the Ombudsperson in September 2020, which the Constitution prescribes to be of five years²³⁶, representatives of the governing coalition seized the Constitutional Tribunal requesting it to declare the unconstitutionality of the above statutory transitional provision. On 15 April 2021, the Constitutional Tribunal issued a ruling²³⁷ asserting that, if no new Ombudsperson is elected, the outgoing Ombudsperson is to cease exercising core powers three months after the

‘Stanowisko Zespołu Ekspertów Prawnych w sprawie rozstrzygnięcia Trybunału Konstytucyjnego dotyczącego aborcji’ of 26 October 2020).

²³¹ On 11 February 2021, the European Parliament adopted a resolution on challenges ahead for women’s rights in Europe: more than 25 years after the Beijing Declaration and Platform for Action (2021/2509(RSP)). The Committee of Ministers of the Council of Europe called on Poland to adopt clear and effective procedures for women to access lawful abortion (CoE CM Interim Resolution of 12 March 2021 (CM/ResDH(2021)44)). It is to be noted that on 24 February 2021, LIBE and FEMM Committees held joint hearing on ‘Attacks on abortion rights and breaches of the Rule of Law in Poland’.

²³² CIVICUS statement of 31 March 2021.

²³³ See a report on a fact-finding mission to Poland of November 2020 of the Council of Europe’s Congress of Local and Regional Authorities Current Affairs Committee (10 February 2021). See also the Council of Europe’s Commissioner for Human Rights – Memorandum on the stigmatisation of LGBTI people in Poland (3 December 2020). U.N. High Commissioner for Human Rights expressed concerns about the continuing repression of LGBTI people and activists, including i.a. restrictions on their freedom of assembly (Statement of UN High Commissioner for Human Rights of 14 September 2020). Human Rights Watch report: 2020 developments in Poland.

²³⁴ Press communique of the Ombudsperson’s Office of 29 March 2021.

²³⁵ In 2020, the Ombudsperson received over 72 thousand complaints, including over 31 thousand new cases (an increase by 20% with regard to 2019) and examined over 36 thousand cases. A major part of the complaints received concerned the anti-COVID measures introduced by the government. In addition the Ombudsperson regularly intervened on behalf of citizens before public authorities and provided opinions on on draft legislation that were often not taken into account by the public authorities. See the Report on 2020 activities of the Ombudsperson’s office (8 February 2021), State of the rule of law in the European Union – Reports from National Human Rights Institutions 2021 (ENNHRI contribution), pp. 251.

²³⁶ The Constitutional Tribunal considered it against the Constitution for the Ombudsperson to continue fulfilling its function beyond the 5-year period prescribed by the Constitution.

²³⁷ The ruling was subject to some controversy. The Ombudsperson reported that the judgment was drafted by a judge rapporteur who in his former capacity of member of the governing coalition made open attacks on the Ombudsperson, including by accusing him of acting against the Polish government. The Ombudsperson also endorsed allegations of unlawful tampering with the hearing bench and considers that certain judges should have been recused because of their previous activities.

publication of the Constitutional Tribunal's decision²³⁸ (i.e. on 16 July 2021). Parliamentary proceedings now point to an appointment of a new Ombudsperson with cross-party support²³⁹. In spite of the increased workload, public authorities further restricted the budget allocated to the Ombudsperson's office in 2021, following the trend observed since 2016.

²³⁸ Immediately thereafter, ENNHRI issued a statement, reiterating that applicable international standards continue to apply while a new Head of a National Human Rights Institution (NHRI) has not yet been selected and appointed. The independence and effectiveness of NHRIs must be preserved at all times. According to the written motives of the decision, as of 15 July 2021, the Ombudsman whose term of office expired in September 2020 can no longer exercise the right to intervene before courts in Poland, including as regards representing citizens before courts or join cassation appeals.

²³⁹ Following five unsuccessful attempts, on 9 July 2021, the Sejm appointed a new Ombudsperson. The new appointee must still be approved by the Senate.

Annex I: List of sources in alphabetical order*

* The list of contributions received in the context of the consultation for the 2021 Rule of Law report can be found at <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report-targeted-stakeholder-consultation>.

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Annex II: Country visit to Poland

The Commission services held virtual meetings in April 2021 with:

- Amnesty International;
- Batory Foundation;
- Trybunał Konstytucyjny (Constitutional Tribunal);
- Forum Obywatelskiego Rozwoju (Civil Development Forum);
- Fundacja – Instytut Prawa Ustrojowego (Institute of Constitutional Law Foundation);
- Fundacja Bona Notitia (Bona Notitia Foundation);
- Fundacja Mamy i Taty (Mother and Father Foundation);
- Helsińska Fundacja Praw Człowieka (Helsinki Foundation of Human Rights);
- Instytut Prawa i Społeczeństwa (Institute of Law and Society);
- Instytut Sobieskiego (Sobieski Institute);
- Izba Wydawców Prasy (Chamber of Press Editors);
- Klub Jagielloński (Jagielloński Club);
- Ministerstwo Kultury (Ministry of Culture);
- Krajowa Rada Sądownictwa (National Council for the Judiciary);
- Krajowa Rada Radiofonii i Telewizji (National Council for the Television and Radio Broadcasting);
- Krajowa Rada Radców Prawnych (National Council of Legal Councillors);
- Rada Mediów Narodowych (National Council of Media);
- Rzecznik Praw Obywatelskich (Ombudsperson);
- Fundacja – Instytut na rzecz Kultury Prawnej Ordo Iuris (Foundation – Institute for legal culture Ordo Iuris);
- Stowarzyszenie Polskich Mediów (Polish Media Association);
- Stowarzyszenie Polskie Telewizje Lokalne i Regionalne (Association of Polish Local and Regional Television);
- Naczelny Sąd Administracyjny (Supreme Administrative Court);
- Naczelna Rada Adwokacka (Chief Bar Council);
- Sąd Najwyższy (Supreme Court);
- Stowarzyszenie prokuratorów ‘Lex Super Omnia’ (association of prosecutors ‘Lex Super Omnia’);
- Stowarzyszenie sędziów ‘Iustitia’ (association of judges ‘Iustitia’);
- Stowarzyszenie sędziów ‘Themis’ (association of judges ‘Themis’);
- Towarzystwo Dziennikarskie (Journalists Association);
- Towarzystwo Dziennikarzy Polskich (Polish Journalists Association);
- Watchdog Polska.

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

- Amnesty International
- Center for Reproductive Rights
- CIVICUS
- Civil Liberties Union for Europe
- Civil Society Europe
- Conference of European Churches
- EuroCommerce
- European Center for Not-for-Profit Law
- European Centre for Press and Media Freedom
- European Civic Forum

- European Federation of Journalists
- European Partnership for Democracy
- European Youth Forum
- Front Line Defenders
- Human Rights House Foundation
- Human Rights Watch
- ILGA-Europe
- International Commission of Jurists
- International Federation for Human Rights
- International Planned Parenthood Federation European Network (IPPF EN)
- International Press Institute
- Netherlands Helsinki Committee
- Open Society European Policy Institute
- Philanthropy Advocacy
- Protection International
- Reporters without Borders
- Transparency International EU