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Under Siege

Why Polish courts matter for Europe

And: the case for infringement proceedings

Preview – Brussels version
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What EU law requires of courts in member states:

"that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that *it is thus protected against external interventions or pressure liable to impair the independent judgment of its members* and to influence their decisions."

Judgment of the Court of Justice of the European Union, February 2018

Executive Summary

2018 marked a turning point for the rule of law in Europe. In a landmark verdict in February concerning a salary dispute of judges in Portugal the Court of Justice of the European Union (CJEU) in Luxembourg established a fundamental principle: that, as the ultimate guardian of the rule of law across the EU, it has the obligation to ensure that all citizens of the union enjoy effective judicial protection in their national courts. Its verdict stressed that:

> "every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection."

For this reason, courts in member states need to be "protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions."

This is no longer guaranteed in Poland today. Polish courts are under siege. A Polish judge given a sensitive case, either a business deal that involves prominent members of the governing party or a criminal case the Minister of Justice (who is also Prosecutor General) has strong views on is not "protected against external interventions or pressure liable to impair her independent judgment." Polish ministers of justice, in this or any future government, can threaten, pressure and punish her. New disciplinary procedures make it all too easy.

In countries respectful of the rule of law the disciplinary system for judges is meant to uphold standards and prevent abuse. It does not do so in Poland. No other European democracy has a system like the Polish one. Nowhere else is there such a concentration of powers in the hands of one man. Minister of Justice Zbigniew Ziobro is able to appoint most individuals involved in investigating, prosecuting and judging disciplinary charges against ordinary judges and can intervene in every case.

Recent years have shown that while many of the tools at the disposal of the European Commission are weak the European Union is not defenceless when it comes to defending the rule of law. The experience of the European Commission successfully challenging the Polish law on the Supreme Court in 2018 before the Court of Justice of the European Union has shown this.

Today the European Commission has to take one more crucial step. It should launch another infringement procedure before the Court of Justice, with the aim to restore the independence of courts. These proceedings should focus on the new disciplinary regime for judges.

EU member states should voice their support for this overdue step. All political groups that care about the integrity of the rule of law in the European Union should support it. Now that Commission vice president Frans Timmermans has entered the European parliamentary campaign as a leading candidate it is even more important that the battle to defend the rule of law is strongly backed by Commission president Jean-Claude Juncker. By pushing for another infringement procedure, the outgoing president of the Commission would make clear that this is a matter of European significance. It goes beyond party politics.

By successfully bringing the law on the Supreme Court in 2018 to the Court of Justice of the European Union the European Commission showed that the EU is not helpless when its foundations are undermined. It proved that there is a powerful instrument to protect the rule of law. It restored hope to all European citizens who care about the fundamental values the EU rests upon. Let the successful defense of the rule of law be the lasting historic legacy of the Juncker Commission.

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Cast of characters

Minister of Justice
Zbigniew Ziobro

Commission Vice-President
Frans Timmermans

Commission President
Jean-Claude Junker

President of CJEU
Koen Lenaert

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Polish Supreme Court battle – what now?

2018 marked a turning point for the rule of law in Europe. In a landmark verdict in February concerning a salary dispute of judges in Portugal the Court of Justice of the European Union (CJEU) in Luxembourg established a fundamental principle: that, as the ultimate guardian of the rule of law across the EU, it has the obligation to ensure that all citizens of the union enjoy effective judicial protection in their national courts. Its verdict stressed that:

> "every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection."

For this reason, courts in member states need to be:

> "protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions." [1]

Already at the end of 2017 the Council of Europe's Venice Commission warned that the changes in the Polish judiciary had led to a situation that bore "a striking resemblance with the institutions which existed in the Soviet Union and its satellites." In April 2018 a new law on the Polish Supreme Court entered into force, requiring 40 percent of its judges to retire before the end of their terms. This included the court's president whose length of tenure is guaranteed by the constitution. The law foresaw the dismissal and new appointments of dozens of judges, so that 70 of 120 Supreme Court judges would be new.

On 29 May 2018 ESI and the Batory Foundation published a report with the title "Where the law ends – The collapse of the rule of law in Poland – and what to do." There we called on the European Commission to:

> "launch an infringement procedure against the Law on the Supreme Court immediately before the Court of Justice, with the aim to stop the mass dismissal of judges which is set to take place in early July, and which would be almost impossible to reverse later."[2]

Within days this concrete demand was supported by a broad coalition of Polish and European politicians, judges and public figures. On 1 June, former president and Nobel Laureate Lech Wałesa published a statement calling on the European Commission to act:

> "That is why I favour asking the Court of Justice of the European Union to evaluate the most questionable changes to the judiciary system … I am also calling on the European Commission to refer the law on the Supreme Court to the EU Court of Justice under Article 258 of the EU Treaty."[3]

On 5 June the European People's Party, the biggest political group in the European Parliament, issued a statement calling on the European Commission "to use all the instruments, including the Court of Justice of the European Union, to make sure that the Polish government complies

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1 European Court of Justice, "Judgment of the Court", 27 February 2018.

2 European Commission, "Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme", 2 July 2018.

3 Gazeta Wyborcza, "Statement by Lech Wałęsa concerning the Supreme Court: There is no freedom without the rule of law", 1 June 2018.

with European law and standards."[4] On 6 June the Polish judges' association Themis declared that it "fully supported the conclusions of the [ESI-Batory] report" and called for "immediate measures." On 13 June three former Polish presidents, four former Polish prime ministers, four former Polish foreign ministers and prominent dissidents in the struggle against the communist regime wrote a letter, calling on the European Commission to act quickly.[5] They warned that the law on the Supreme Court, in particular:

> "… will eventually disestablish the tripartite division of powers model, the model that is the essence of the democratic rule of law and the foundation for the identity of the European Union…
>
> There will be no democratic Poland without the rule of law. There will be no European Union without principles. There will be no freedom without law and order."

Also on 13 June, the heads of five political groups in the European Parliament – Manfred Weber (EPP), Udo Bullmann (S&D), Guy Verhofstadt (Alde), Ska Keller and Phillipe Lamberts (Greens) and Gabi Zimmer (European left) - published a joint letter urging the European Commission to

> "immediately start an infringement procedure, in parallel to the Article 7 procedure, and refer the Polish Supreme Court Act to the European Court of Justice (ECJ) to stop the detrimental reform as soon as possible."[6]

This mobilization had an impact. In early June 2018 the European Commission was still uncertain how to confront the Polish government, as everything the Commission had tried until that point to reverse changes in the Polish judiciary had failed. A newspaper article at the time described a power struggle inside the Commission and quoted a senior official saying that "the EU is largely defenceless in confrontation with illiberal democracies."[7] Our own interviews confirmed this. One insider noted that this was "the most intense disagreement yet between Frans Timmermans [the vice president of the Commission in favour of a tough line] and Jean Claude Juncker [the president of the Commission, who questioned whether the Commission would prevail in such a struggle]."

Then, on 2 July 2018, the European Commission opened an infringement procedure against the law on the Supreme Court at the Luxembourg court. It argued forcefully that

> "these measures undermine the principle of judicial independence, including the irremovability of judges, and thereby Poland fails to fulfil its obligations."[8]

The Commission referred to Article 47 of the EU Charter on Fundamental Rights:

> "Everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial tribunal* previously established by law."[9]

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4 EPP, "EPP Political Assembly discusses rule of law in Poland and elects new EPP Vice President", 5 June 2018.

5 Gazeta Wyborcza. "Europe, defend the rule of law in Poland!", 13 June 2018.

6 Letter to Jean-Claude Junker and Frans Timmermans, 13 June 2018.

7 Politico, "Juncker and Selmayr fight Timmermans on behalf of Poland", 5 June 2018.

8 European Commission, "Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme", 2 July 2018.

9 European Parliament, "Chapter of Fundamental Rights of the European Union", 18 December 2000.

It also pointed to Article 19 of the Treaty on European Union and the responsibility of the CJEU to ensure that:

> "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."[10]

Taking the Polish Supreme Court law to the CJEU on 2 July was a last throw of the dice, at the very last moment to prevent the complete restructuring of the Supreme Court. And it worked.

On 19 October the CJEU ordered the Polish authorities to immediately suspend the application of the law on the Supreme Court. Rosario Silva de Lapuerta, the vice-president of the CJEU, warned that without this interim decision to freeze the implementation of the law "the general interest of the Union in the proper working of its legal order could be seriously and irreparably affected."[11] The president of the Polish Supreme Court, Malgorzata Gersdorf, who was supposed to be ousted, returned to the Supreme Court. She told supporters outside the modernist courthouse: "We will see what will happen next, but it is good for now. Life is beautiful."[12]

On 21 November the Polish government accepted the decision. It amended the law on the Supreme Court without awaiting the final verdict of the CJEU. After three years, this was the first setback in its efforts to restructure the judiciary. It was a powerful illustration that Europe was not defenseless and European institutions were not impotent. This was a precious success for Frans Timmermans, Jean Claude Juncker and the Commission as a whole. In December 2018 the European Commission declared that it was "satisfied that change is happening and going in the right direction."[13]

And yet, this was also just one battle in an ongoing struggle to prevent the erosion of the rule of law in Poland. It is a struggle that is very far from having been won. In December 2017 the European Commission had put a proposal based on Article 7 of the Treaty on European Union to the EU Council "on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law." It warned that in Poland the constitutionality of laws "can no longer be verified and guaranteed by an independent constitutional tribunal." It expressed "grave concerns" over the erosion of the independence of the judiciary. Very few of these concerns have been addressed.

The danger is now that the Juncker Commission, in its last months in office, may concede defeat on the many other changes that undermine the rule of law in Poland in recent years. This is certainly what the Polish government is hoping for. On 28 January 2019 the Polish Foreign Ministry wrote to the European Commission requesting an end to the Article 7 procedure:

> "We strongly believe that the procedure based on Article 7 no longer contributes to achieving proper understanding of the content of the reform. Quite the contrary — it started to serve as a tool of exerting political pressure instead of aiming at achieving a constructive and tangible solution".[14]

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10 The treaty on European Union.

11 Court of Justice of the European Union, "Poland must immediately suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges", 19 October 2018.

12 Polsat News, "Sędziowie Sądu Najwyższego wracają do pracy. Gersdorf: życie jest piękne", 22 October 2018.

13 Reuters, "Polish response to ECJ ruling is in the right direction: EU executive", 18 December.

14 OKO.press, "Rząd do Rady Europejskiej, Komisji i państw UE. Arogancka samoobrona", 5 February 2019.

The Polish government is making an offer to the Commission: cherish your victory in the case of the Supreme Court … and give up on the rest. Timing helps its case: it is only two months before the election of a new European Parliament. Vice-president Timmermans has been chosen to lead the group of European Socialists and Democrats in their campaign. President Juncker is approaching the end of his long political career. Meanwhile the biggest group in the European Parliament, the EPP to which Jean-Claude Juncker belongs, appears to have given up on the defense of the rule of law in Poland. This, at least, is what events on 11 February at the European Parliament suggest.

On that day the Committee on Civil Liberties, Justice and Home Affairs (LIBE) voted on whether to draft a report on the rule of law in Poland. It had expressed its serious concerns for many months. As recently as 20 November 2018 LIBE had held a hearing with representatives of the Council of Europe's Venice Commission, the European Network of Judicial Councils, the Polish Commissioner for Human Rights, legal experts and representatives of the Polish Free Courts initiative and the Helsinki Foundation for Human Rights. Two weeks later LIBE adopted a report where it warned that "our September delegation to Warsaw proved that the rule of law in Poland is under threat."[15] There was broad support for the assessment Timmermans presented to LIBE on 20 November: "I regret to inform you that the Polish authorities have not responded to any of the objections of the European Commission. We still have a systemic threat." Then, in a vote along party lines on 11 February 2019, the LIBE committee decided *not* to draft a report on the rule of law in Poland after all. In this narrow vote Green, Liberal and Socialist MEPs were defeated 26 to 27 by the two Eurosceptic groups (ECR, ENF), joined by 15 members of the European People's Party (EPP).

Does this reflect the current mood in EU institutions, particularly among EPP members? Will the Juncker Commission concede its ultimate failure in a battle that has been among the most important things it has done during its term? This must not happen. There is an alternative to inaction and defeat; a way forward that defends the rule of law in Poland and sends a powerful signal to other European governments, now and in the future, tempted to follow the PiS example. It requires the European Commission to act once again. Here is why it should, how it can, and how it would succeed.

Justice without protection – the case of Magda

There are around 10,000 judges at Poland's courts. Some 7,000 work at 321 district courts [sąd rejonowy], another 2,000 adjudicate at 45 regional courts [sąd okręgowy] and 700 sit in 11 courts of appeal [sąd apelacyjny]. In the Supreme Court there are another 120 judicial positions.[16]

Let us imagine the case of a Polish judge working at the biggest court in the country with 260 judges, one of the two Warsaw regional courts. Let's call her Magda. She is 42 years old, the average age of Polish judges. Magda is experienced, takes her job seriously, sees herself as an apolitical servant of her state and wants to remain in her job until the end of her professional life.

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15 Tvn24, "European Parliament LIBE committee chief: rule of law is under threat in Poland", 3 December 2018.

16 There are also administrative courts, supervised by the Supreme Administrative Court, and military courts.

Now imagine that Magda is given a sensitive case: a business deal that involves prominent members of the governing party and is of interest to the government, or a criminal case the Minister of Justice (who is also Prosecutor General) strong views on. Is Magda "protected against external interventions or pressure liable to impair her independent judgment", as the CJEU put it in its February 2018 Portuguese verdict? Could Polish ministers of justice, in this or any future government, threaten, pressure or punish her? Yes, they could. In fact, new disciplinary procedures make it all too easy.

In Poland judges risk a disciplinary procedure in case of "misconduct, including an obvious and gross violation of legal provisions and impairment of the authority of the office."[17] A hierarchy of public servants is in charge of initiating investigations to establish whether such misconduct has taken place. At the top of this hierarchy are three national disciplinary officials [in Polish: Rzecznik Dyscyplinarny Sędziów Sądów Powszechnych], appointed directly by the minister of justice. In June 2018 the Minister appointed Piotr Schab as the head, and Michal Lasota and Przemyslaw Radzik as deputies. Schab in turn appointed 56 disciplinary officials among judges, one in each of the 11 courts of appeal and the 45 regional courts.



Piotr Schab – Michal Lasota – Przemyslaw Radzik

In addition, in June 2018 the Minister of Justice appointed both Lasota and Radzik as presidents of different district courts.[18] Following changes to the law, the minister appoints and dismisses court presidents. The National Judiciary Council can veto a ministerial dismissal only with a two-third majority. This seems unlikely, as most of the Council's members were chosen by the PiS parliamentary majority, and not as in the past by other judges, in March 2018.

As a judge at the regional court in Warsaw, Magda falls under the responsibility of the disciplinary officer of the Warsaw court of appeals. However, she is just as likely to face an investigation by Schab, Lasota and Radzik. She would then be asked to justify her behavior in writing. She might be interrogated. Media might report on her case. She might even be summoned and questioned about the behavior of other judges, something that has already happened and is illegal, as Adam Bodnar, the country's Human Rights Commissioner, pointed out.[19] In some cases no legal representatives have been allowed to be present at such interrogations.[20] If an investigation by a disciplinary officer into Magda's conduct concluded without charges being made, the Minister of Justice might himself insist that it continues

17 Art. 107 § 1, Law on the Organisation of Ordinary Courts.

18 Radzik is president of the Regional Court in Krosno Odrzańskie. Lasota is president of the Regional Court in Nowe Miasto Lubawskie.

19 Rzeczpospolita, "RPO: Sędzia nie może być przesłuchany jako świadek ws. Dyscyplinarnej", 25 October 2018.

20 Rzeczpospolita, "Postępowanie dyscyplinarne sędziego Tulei: Dubois wyproszony z przesłuchania", 10 October 2018.

anyways. The Minister might even appoint his own special disciplinary official to take over and pursue her case. Theoretically, any disciplinary investigation can last as long as the minister decides, or until it comes to a trial.

Once this happens, Magda's case would be taken up by special judges at one of 11 appeals courts. These will have been appointed by the Minister of Justice before, who also decided how many such judges there are at each court of appeal. For instance, at the Warsaw court of appeals the minister appointed 15 disciplinary judges. The president of the new disciplinary chamber at the Polish Supreme Court (recently appointed by the President of the Republic) would choose which of the 11 courts of appeal would decide Magda's case. If she is found guilty of misconduct, penalties range from an admonition to a reduction in her salary to a dismissal.

Of course, Magda would likely appeal any negative ruling. Her appeal would then go to the new disciplinary chamber of the Supreme Court in Warsaw, established in 2018. This chamber has eleven members. Being a member of this chamber is attractive, as they are paid 40 percent more than normal Supreme Court judges. These members were appointed by the president of Poland in September 2018, following suggestions from the National Council of the Judiciary.

We already noted that the president of the disciplinary chamber of the Supreme Court determines in which of Poland's 11 courts of appeal Magda's disciplinary trial would take place. The same person would also select two from among the other ten members of his chamber to decide on her appeal, together with a lay judge appointed by the political majority in the Senate, the upper chamber of the parliament.

Imagine that Magda manages to navigate this system and pursues her career without incurring the displeasure of the Minister of Justice or his officials and that, one day, she is herself appointed a Supreme Court judge. The threat of arbitrary investigations of possible misconduct would continue to hang over her head. In such a case both her first and her second instance disciplinary trial would take place before the disciplinary chamber of the Supreme Court itself: at the first instance level her adjudicating panel would consist of two regular members and one lay judge, at the second instance level of three regular members and two lay judges.

As a result of this system all judges in Poland are aware that they are potential targets of politically-motivated disciplinary investigations. This is new. Before recent changes, disciplinary officers were selected by the National Council of the Judiciary, a majority of whose members were chosen by judges and not by the parliamentary majority. Judges in disciplinary trials were also chosen at random among all judges in the courts of appeal

In countries respectful of the rule of law the disciplinary system for judges is meant to uphold standards and prevent abuse. It does not do so in Poland. No other European democracy has a system like the Polish one.[21] Nowhere else is there such a concentration of powers in the hands of one man. Minister of Justice Zbigniew Ziobro is able to appoint most of the individuals involved in investigating, prosecuting and judging disciplinary charges against ordinary judges and can intervene in every case. Unfortunately, while Magda is a fictional character, this is already happening to many real judges across Poland.

[21] "A comparative analysis on Disciplinary systems for European judges and prosecutors", 2012.

Judges under pressure

Every summer since 1995 one of Poland's most famous private charities organizes a free music event near the German border on the river Oder. The Pol'and Rock festival presents itself as a "massive event firmly rooted in the ideals of peace, friendship, and love":

> "it might be the last vestige of the world, where people of all creeds and beliefs can co-exist peacefully together. The festival, which attracts thousands of guests each year … creates a vibrant, diverse community, where everyone can feel welcome and appreciated."[22]

In August 2018 the organizers invited Adam Bodnar, the Polish Commissioner for Human Rights, as well as judges from around the country to talk about the rule of law and how it matters for ordinary citizens.

Then, within the next few months, seven of the participants were summoned by Radzik, the deputy national disciplinary official.[23] In September three were called and asked about the event, their participation and their public criticism of judicial reform[24] In October another two judges were summoned by Radzik to explain their activities at the festival.[25] Two more judges later became targets of unrelated investigations, again carried out by Radzik.[26]

At the end of August, in early September and again in December 2018 the Court of Justice of the European Union (CJEU) in Luxembourg received questions from three Polish judges. These questions concerned the power of the executive over the judiciary, and whether the new disciplinary system in place in Poland undermined judicial independence. The first came from a judge working on a case at her court in Lodz, in which a small town in Central Poland claimed that the governor of the region [the vojevoda of Lodz] had transferred too little funding to the town from 2005 to 2015.[27] In an interview in December 2018, she explained what led her to turn to the CJEU:

> "Knowing the new model of disciplinary control over judges, in which the Minister of Justice influences both the appointment of disciplinary officers and of the panel judging disciplinary cases, I assumed that a judgment against the state in this case could be found to be judicial misconduct. I therefore decided to ask the CJEU whether such a situation does not violate a fundamental European principle: the right to a fair trial."[28]

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22 Pol'and'Rock Festival, "About the festival".

23 OKO.press, "Co sędziowie i adwokaci robili na Pol'and'Rock Festival Jurka Owsiaka. Ujawniamy!", 5 August 2018.

24 Krystian Markiewicz, Igor Tuleya, Bartłomiej Przymusiński were called into Radzik office on 20-21 September 2018. TokFm, "Trzech członków 'Iustitii' wezwanych do złożenia wyjaśnień. Głośno krytykowali PiS", 10 September 2018.

25 Agnieszka Franckowiak and Arkadiusz Krupa received letters calling for explanation from Przemyslaw Radzik on 11 October 2018. On 11 January 2018, he decided to close the investigation.

26 Waldemar Zurek from the regional court in Krakow and Ewa Maciejewska from the regional court in Lodz

27 Ewa Maciejewska, a judge at regional court in Lodz received a letter calling for explanation from Michal Lasota on 29 November 2018.

28 Rzeczpospolita, "Sędzia Ewa Maciejewska: Mój pierwszy 'eksces orzeczniczy'", 23 December 2018.

Then, in September, in response to her addressing the European court Piotr Schab, the national disciplinary officer, started a preliminary investigation, questioning her at the end of the month. He also questioned the two other judges who had turned to the CJEU with similar questions.[29]

Speeches about the rule of law at rock festivals or questions put to the CJEU were not the only actions that led Poland's disciplinary officers to become active. A pattern emerged. In September 2018, a judge in Poznan, also the spokesperson of a prominent independent judges' association, was summoned by Lasota, the deputy national disciplinary officer, to explain why he had publicly declared that the new National Council on the Judiciary had become "fully dependent on the minister of justice."[30] Also in September, another judge in Poznan faced a preliminary investigation after an anonymous complaint alleged that she had stated at a public meeting that "the Polish Constitutional Tribunal is a farce and that the Minister of Justice dismisses court presidents by sending faxes during the night, replacing them with people of doubtful reputation."[31] In fact, in December 2017 the European Commission had warned that in Poland "the constitutionality of laws can no longer be verified and guaranteed by an independent constitutional tribunal."[32] The dismissals of court presidents in late 2017 often did involve simply sending a fax.

In November 2018, a judge from the appeals court in Gdansk was summoned by Radzik to explain why at the end of September he had taken part in a public meeting discussing the rule of law at the European Solidarity Center in Gdansk.[33] In December 2018, a judge from Katowice in Southern Poland, who had gone on leave from his court to run for the position of mayor of the town, also faced a preliminary investigation by Radzik.[34] Also in December a judge in Gdansk received an award from the mayor of the town for her contribution to the public debate on the rule of law in Poland.[35] In March 2019 Michal Lasota, the national deputy disciplinary officer, ordered her to provide a written explanation regarding possible misconduct "due to her failure to uphold the dignity of her office" for accepting the reward.[36] In an interview in the daily Rzeczpospolita the judge commented on the disciplinary proceedings:

> "This is meant to silence us. Judges have obligations towards citizens, we have a duty to defend the rule of law and the constitution."[37]

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29 On 29 November, Michal Lasota sent a letter calling for explanation to a at regional court in Warsaw Igor Tuleja, on 31 December to Kamil Jarocki who sits at the regional court in Gorzow Wielkopolski.

30 Bartlomiej Przymusinski, judge at district court in Poznan received a letter calling for explanation from Michal Lasota on 10 September 2018.

31 Monika Frackowiak, judge at district court in Poznan was asked by deputy disciplinary officer Antonii Luczak to provide a written explanation. On 4 October 2018, he announced that he did not find any disciplinary offense in her behavior and dismissed the case. See also: Gazeta Wyborcza, "Nie będzie dyscyplinarki wobec poznańskiej sędzi Moniki Frąckowiak za publicznewystąpienia w obronie sądów", 4 October 2018.

32 European Commission, "Recommendation", 27 July 2018.

33 Wlodzimierz Brazewicz, judge at the appeal court in Gdansk received a letter calling for explanation from Piotr Schab on 10 January 2019.

34 Jarosław Gwizdak, judge at district court in Katowice.

35 Dorota Zabłudowska, judge at district court in Gdansk, received a letter calling for explanation from Michal Radzik on 23 January 2019.

36 OKO.press, "Dyscyplinarka grozi sędzi Zabłudowskiej za nagrodę od Adamowicza. 'Uchybiła godności urzędu'", 5 March 2019.

37 OKO.press, "Dyscyplinarka grozi sędzi Zabłudowskiej za nagrodę od Adamowicza. 'Uchybiła godności urzędu'", 5 March 2019.

In February 2019 Lasota summoned a judge of the regional court in Olsztyn to explain why, on the 100th anniversary of Polish independence, she had posed for a commemorative photo in a T-shirt with the inscription "Konstytucja" (constitution).[38]

Three preliminary investigations have led to formal investigations being opened. In January 2019, deputy disciplinary official Radzik started formal investigations against two of the judges who attended the Pol'and Rock festival, Monika Frąckowiak and Olimpia Barańska-Małuszek, on account of their alleged failure to meet deadlines for preparing written justifications of their judgments. In February 2019 Radzik opened another formal investigation against a Poznan judge, Slawomir Jeksa, who acquitted a woman charged with using offensive language at a women's rights rally.[39]

What emerges from all this? Judges who speak out on judicial reform, who turn to the European court or who pass verdicts that displease the authorities are being pressured by disciplinary officers, some more than once. To see how this can be combined with other ways of pressure take the case of two of Poland's most outspoken critics of the judicial reform, the judges Igor Tuleya and Waldemar Zurek.

Igor Tuleya was one of the judges at the Pol'and Rock festival in August 2018. He was also one of three judges who posed a question to the CJEU. He often speaks in public about the ongoing judicial reform. In 2016 Tuleya played a prominent role in a court case that angered the PiS parliamentary majority. In recent months Tuleya has faced preliminary investigations and questions by disciplinary officers than six times already.



Monika Frąckowiak – Igor Tuleya – Waldemar Żurek

Waldemar Zurek is a judge at the regional court in Krakow. He is also a former spokesman of the National Council of the Judiciary. In January 2018 he was dismissed from his function as media spokesman at his court in Krakow by his court president, newly appointed by the minister of justice. The president then transferred him to another department and assigned him a large number of overdue cases. When Zurek challenged this as unreasonable, he faced a preliminary disciplinary investigation.[40] Three more such investigations followed: one concerning his alleged failure to submit a tax declaration for a tractor he had sold a few years ago, another triggered by his participation in a public event on the reform of judiciary, and a final one initiated by Lasota in January 2019 after Zurek publicly complained about pressure put on his

[38] Dorota Lutostańska, judge at regional court in Olsztyn was asked by Michal Lasota to provide a written explanation in January 2019.

[39] Slawomir Jeksa, judge at regional court in Poznan received a letter from Piotr Schab in which he informed that Przemyslaw Radzik launched a dispciplinary proceeding on 12 February 2019.

[40] He received a letter calling for explanation from Michal Lasota on 15 October 2018.

family, his pregnant wife and elderly parents, by prosecutors and the central anti-corruption office investigating the case of his tractor.

Adam Bodnar, the Polish Human Rights Commissioner, has repeatedly warned in recent month that disciplinary investigations are being used to intimidate judges and to stop them from participating in debates on "reforms affecting the judiciary."[41] So far, this has not succeeded in intimidating Polish judges. But neither has this unacceptable system been reformed.

Juncker's European legacy

In May 2018 we wrote in our report on "Where the law ends":

> "The Polish case is a test whether it is possible to create a Soviet-style justice system in an EU member-state; a system where the control of courts, prosecutors and judges lies with the executive and a single party. It remains to be seen whether this can be corrected before it inspires others, fatally undermining the idea of the EU as a community based on law and common values."

This remains true today. No member state of the EU has ever gone as far in subjugating its courts to executive control as the current Polish government has done. This is a test of the ability of European institutions to defend the foundation on which the European project rests: the ability of citizens and courts across the Union to trust that in every member state effective judicial protection can be provided.

The Juncker Commission has been defined by its battle to defend the rule of law in Poland. Since 2015 it issued a dozen of opinions and statements. In July 2017 it opened an infringement procedure related to the law on the ordinary courts. In December 2017 it opened the procedure of Article 7 of the EU. In July 2018 it decided to use another infringement procedure to protect the Supreme Court. It is vital now that it acts once more, and as soon as possible.

There is today a wide awareness inside the Commission that the Polish government's assault on its judiciary represents a threat to the EU's legal order and long-term political stability. In fact, when it comes to the intimidation of ordinary judges the situation in Poland is worse than it was a year ago. The time has come for the Commission to take another crucial step and to tackle the unacceptable disciplinary system for judges in Poland.

While judges preside over the application of the law, in no democracy do they sit outside it. A recommendation of the Committee of Ministers of the Council of Europe on "Judges: independence, efficiency and responsibilities" noted that "disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner". Indeed, they should follow, as a robust disciplinary system is a guarantor not just of the efficiency of the administration of justice, but also its impartiality. However, it is essential that disciplinary proceedings against judges both respect fair trial guarantees themselves and exclude the possibility of arbitrary or politically motivated interventions on the part of the executive that compromise the independence of judges individually, and of the judiciary as a whole.

[41] RPO, "Sędziowski rzecznik dyscyplinarny pisze do RPO o przyczynach przesłuchań znanych sędziów", 12 October 2018.

The new disciplinary system for judges in Poland provides for the excessive involvement of the executive in ways that undermine the independence of the judiciary and violate the right of judges, subject to disciplinary proceedings, to a fair trial. The effect of this is to jeopardise the rule of law in Poland, the consistent application of EU law in the country and the integrity of the EU legal order as a whole.

Recent years have shown that many of the tools at the disposal of the Commission are weak. The "rule of law dialogue" relies on a counterpart interested in avoiding escalation. It is a slow mechanism and it could not stop the PiS juggernaut until summer 2018. But the experience of the law on the Supreme Court has also shown the European Union is not defenceless. The Court of Justice of the European Union will necessarily need to play a central role again.

This means concretely that:

- The European Commission must launch another infringement procedure before the Court of Justice, with the aim to restore the independence of courts. These proceedings should focus on the new disciplinary regime for judges, focusing on the provisions in the legal opinion in the Annex of this report.

- EU member states should voice their support for this overdue step.

- All political groups that care about the integrity of the rule of law in the European Union should support such action. This goes beyond party politics.

Now that Commission vice president Frans Timmermans has entered the European parliamentary campaign as a leading candidate it is even more important that the battle to defend the rule of law is strongly supported by Commission president Jean-Claude Juncker. By pushing for another infringement procedure, the outgoing president of the Commission would make clear that this is a matter of European significance. Members of EPP, as the largest political group in Europe, as well as all other political groups who care about the rule of law in the EU, should support this also inside the Commission.

By successfully bringing the law on the Supreme Court in 2018 the Commission showed that the EU is not helpless when its foundations are undermined. It proved that there is a powerful instrument to protect the rule of law. It restored hope to all European citizens who care about the fundamental values the EU rests upon.

It is time to take another step now. Let the successful defense of the rule of law be the lasting historic legacy of the Juncker Commission.

Annex: The disciplinary system for judges in Poland: The case for infringement proceedings *

This opinion sets out the legal basis for the European Commission to initiate infringement proceedings against Poland in respect of recent reforms to the disciplinary system for Polish judges.

1. Introduction

1. Following its victory in the October 2015 parliamentary elections, the Law and Justice Party (PiS) embarked on a comprehensive overhaul of the Polish judicial system. Between July 2016 and December 2018, it introduced a series of amendments to the Laws on the Constitutional Court, on the Organisation of Ordinary Courts, the Supreme Court and on the National Council of the Judiciary.[42] PiS argued that the reforms were needed to tackle inefficiencies, corporatism and the lingering influence of judges appointed in the communist era. The cumulative effect of these reforms, however, has been to radically increase the control and influence of the executive and the legislature over the judiciary; gravely compromising its independence and, in turn, the right to a fair trial and the rule of law more broadly.[43]

2. The reforms included both transitional and permanent reforms to the procedures for the appointment, promotion, retirement, dismissal and disciplining of judges at all levels. This opinion focuses solely on the changes to the regular procedures for

    i. disciplining and dismissing judges; and
    ii. appointing and dismissing presidents of ordinary courts.

    It concludes that they gravely undermine the external independence of the Polish judiciary in breach of EU law, specifically Articles 4 and 19 of the Treaty of the European Union in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union guaranteeing the right to a fair trial.

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42 Reforms to Laws on the Constitutional Tribunal first enacted 22 July 2016; on the Organisation of Ordinary Courts first enacted 12 July 2017; and on the Supreme Court and on the National Council of the Judiciary both enacted first enacted on 8 December 2017. The laws were subsequently amended on multiple occasions.

43 The reforms have been extensively criticised by international institutions, including the European Commission for Democracy through Law (the Venice Commission), experts appointed by the Office of Democratic Institutions and Human Rights ODIHR, and the UN Special Rapporteur on the Independence of judges and lawyers; https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e; https://www.osce.org/odihr/357621; https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/084/27/PDF/G1808427.pdf?OpenElement.
The reforms have also been the subject of four Commission Rule of Law Framework Recommendations - (EU) 2017 9050, (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520; a Commission proposal for a Council Decision under Article 7 TEU, arguing a clear risk of a serious breach of the rule of law - COM(2017) 835; and two infringement proceedings relating to changes to the retirement ages of ordinary and Supreme Court judges respectively - http://europa.eu/rapid/press-release_IP-17-2161_en.htm, http://europa.eu/rapid/press-release_IP-18-4341_en.htm.

2. International Standards and EU Law on the Independence of Judges

3. The independence of the judiciary as a whole, and judges individually, is an essential component of the rule of law and the right to a fair trial, both of which are enshrined in EU law.

4. Article 2 of Treaty of the European Union (TEU) states that:

> *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. […]."*

5. Article 3 TEU defines the promotion of its values as one of the objectives of the European Union.[44] Under Article 4 TEU member states are obliged to facilitate and refrain from jeopardising the EU's objectives, which include, via Articles 2 and 3 TEU, the respect for the rule of law.[45]

6. Article 19 TEU requires member states to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."[46]

7. The right to a fair trial is set out in Article 47 of the Charter of Fundamental Rights of the European Union:

> "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
>
> *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented*."

8. As the Venice Commission has noted:

> *"Two aspects of judicial independence complement each other. External independence shields the judge from influence by other state powers and is an essential element of the rule of law. Internal independence ensures that a judge takes decisions only on the basis of the Constitution and laws and not on the basis of instructions given by higher ranking judges."*[47]

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44 Art. 3§1, Treaty of the European Union:
"The Union's aim is to promote peace, its values and the well-being of its peoples.

45 Art. 4§3, Treaty of the European Union:
"The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

46 Art. 19§1, Treaty of the European Union:
"The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

47 Venice Commission, Report on the Independence of the Judicial System part I: The Independence of Judges, para 56, available at https://rm.coe.int/1680700a63.

9. In its *Recommendation on Judges: independence, efficiency and responsibilities*, the *Committee of Ministers of the Council of Europe* recognised that:

> *"The external independence of judges is not a prerogative or privilege granted in judges' own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law."*[48]

10. The external independence of judges is compromised where the executive and/or legislature has significant influence over the appointment, promotion and dismissal of judges. Thus, the European Court of Human Rights has ruled in relation to the right to a fair trial[49] that

> *"In determining whether a body can be considered to be "independent" – notably of the executive and of the parties to the case – the Court has regard to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."*[50]

11. Similarly, the Court of Justice of the European Union has ruled in relation to Article 47 CFR that:

> "*As regards the requirement that courts be independent, which forms part of the essence of that right [to a fair trial], it should be pointed out that that requirement is inherent in the task of adjudication and has two aspects. The first aspect, which is external in nature, presupposes that the court concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.*
>
> *...*
>
> *Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it."* [51]

12. While judges preside over the application of the law, they do not sit outside it. As the Recommendation of the Committee of Ministers on *Judges: independence, efficiency and*

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48 Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities, para 11; available at https://rm.coe.int/16807096c1.

49 Art. 6, European Convention on Human Rights.

50 Campbell and Fell vs UK, Application no. 7819/77, para 78; available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57456%22]}.

51 Judgment of the Grand Chamber In Case C-216/18 PPU, 25 July 2018, para 63; available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=204384&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=11283306.

responsibilities notes, "disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner".[52] Indeed, they should follow. A robust disciplinary system is an important guarantor not just of the efficiency of the administration of justice, but also its impartiality.

13. However, it is essential that disciplinary proceedings against judges that may result in sanctions or dismissal both respect fair trial guarantees themselves and exclude the possibility of arbitrary or politically motivated intervention on the part of the executive that would compromise the independence of judges individually and the judiciary as a whole.

14. As the Recommendation of the Committee of Ministers of the Council of Europe on *Judges: independence, efficiency and responsibilities*, goes on to note:

> *"[Disciplinary] proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction."* [53]

15. The EUCJ has been explicit:

> *"The requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary."*[54]

16. The procedures introduced by the current Polish government in relation to the disciplining of judges and the appointment and dismissal of ordinary court judges set out in this opinion violate the external independence of the judiciary and are in breach of EU law in so far as they:

    a. jeopardise the attainment of the EU's objective of the respect for the rule of law (Article 4 TEU, in conjunction with Articles 2 & 3 TEU.); and

    b. compromise the fairness of judicial proceedings, thereby denying remedies sufficient to ensure effective respect for EU law in Poland (Article 19 TEU, in conjunction with Article 47 CFR);

    The changes to the disciplinary procedures in both the Supreme Court and ordinary courts also

    c. violate the right to a fair trial under Article 47, CFR.

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52 Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities, para 69.
53 Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities, para 69.
54 Judgment of the Grand Chamber in Case C-216/18 PPU, 25 July 2018, para 67.

3. Disciplinary Proceedings against Judges

17. The changes to the disciplinary procedures for judges introduced by the new Laws on the Supreme Court and on the Organisation of the Ordinary Courts, combined with the reforms to the National Council of Judiciary, allow a ruling political party to exert very considerable influence over which judges are investigated and why; over who conducts the investigation and initiates disciplinary proceedings; over how they do so; and over who ultimately decides on the outcome.

18. The disciplinary systems for judges of the Supreme Court and ordinary court judges differ, but both provide for the excessive involvement of the executive in a multitude of ways, that both undermine the independence (and the appearance of independence) of the judiciary as a whole and violate the right of judges subject to disciplinary proceedings to a fair trial. The effect of these reforms is not just to jeopardise the rule of law in Poland, but also the consistent application of EU law in the country and the integrity of the EU legal order as a whole.

3.1. Disciplinary proceedings in Ordinary Courts

19. Following the reforms to the law on the Ordinary Courts, the Minister of Justice appoints almost every single person involved in the investigation, prosecution and adjudication of disciplinary charges, such that disciplinary proceedings in the ordinary courts cannot possibly be considered to meet fair trial guarantees.

20. Ordinary court judges are liable to disciplinary proceedings on the broad and vague grounds of "misconduct, including an obvious and gross violation of legal provisions and impairment of the authority of the office".[55]

21. Disciplinary penalties include: 1) an admonition; 2) a reprimand; 3) a salary reduction of between 5-20% for a period between six months to two years; 4) dismissal from the function held; 5) transfer to another place of service; and 6) dismissal from the office of a judge. [56]

22. Disciplinary proceedings are brought by specially appointed judges called "Disciplinary Representatives". These are organised hierarchically. A national "Disciplinary Representative of the Ordinary Court" and two Deputies supervise the work of the disciplinary representatives attached to each of the 45 regional courts.

23. The Disciplinary Representative of the Ordinary Court and the two Deputies were previously appointed from amongst sitting judges by the National Council of the Judiciary from candidates nominated by the General Assemblies of Judges of the Courts of Appeal. They are now appointed by the Minister of Justice for four-year terms, with absolute discretion.[57]

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55 Art. 107 § 1, Law on the Organisation of Ordinary Courts.
56 Art. 109 § 1, Law on the Organisation of Ordinary Courts.
57 Art. 112 §3, Law on the Organisation of Ordinary Courts.

24. The Disciplinary Representative of the Ordinary Court appoints the Disciplinary Representatives of the Regional Courts from shortlists of 6 candidates elected by the Assemblies of Judges of Regional Courts, for four-year terms.[58]

25. Investigations can be initiated by a Disciplinary Representative on their own initiative or on the request of the Minister of Justice, the President of the Court of Appeal or of the Regional Court, the Board of the Court of Appeal or of the Regional Court, and the National Council of the Judiciary.[59]

26. The Disciplinary Representative of the Ordinary Courts and his Deputies are responsible for disciplinary investigations and proceedings against Appeal Court judges and the presidents and vice presidents of regional courts. Disciplinary measures against regional court judges and the presidents of district courts are brought by Disciplinary Representatives of the Court of Appeal. Disciplinary measures against all other judges are led by Regional Disciplinary Representatives.[60] The Disciplinary Representative of the Ordinary Courts may take over any case.[61]

27. The Minister of Justice is able to order the launching of disciplinary proceedings against ordinary court judges, in virtue of the power to order a disciplinary representative to reopen a file and initiate disciplinary proceedings, if they have decided to close the case following their investigation.[62] In such cases, the Minister of Justice may issue binding instructions to the disciplinary representative as to how they are to conduct the case.[63]

28. In addition to these significant powers to initiate and influence disciplinary investigations and proceedings conducted by regular disciplinary representatives, the Minister of Justice may also appoint a "Disciplinary Proceedings Representative of the Minister of Justice" to conduct a disciplinary inquiry into *any* ordinary court judge, including where a case has already been opened against them by another Disciplinary Representative.[64] The Disciplinary Proceedings Representative of the Minister of Justice is obliged to open an investigation.[65] If they close the case on the conclusion of their investigation, the Minister of Justice is empowered to appoint another Disciplinary Proceedings Representative in respect of the same case.[66]

29. The Minister of Justice is not just able to appoint his own special Disciplinary Representatives - and oblige regular disciplinary representatives to initiate disciplinary proceedings - he also appoints the Disciplinary Court Judges who will hear the disciplinary cases he insists on.

30. Prior to the reforms, disciplinary cases were heard at first instance by Appeal Court judges chosen by lot on a case by case basis. They are now heard by "Disciplinary Court Judges at the Appeal Courts", who are directly appointed by the Minister of Justice, such that courts hearing disciplinary cases cannot be considered "independent and impartial

58 Art. 112 §6, Law on the Organisation of Ordinary Courts.
59 Art. 114 §1, Law on the Organisation of Ordinary Courts.
60 Art. 112 §2, Law on the Organisation of Ordinary Courts.
61 Art. 112a §1a, Law on the Organisation of Ordinary Courts.
62 Art. 114 §9, Law on the Organisation of Ordinary Courts.
63 Art. 114 §9, Law on the Organisation of Ordinary Courts.
64 Art. 112b §1, Law on the Organisation of Ordinary Courts.
65 Art. 112b §3, Law on the Organisation of Ordinary Courts.
66 Art. 112b §5, Law on the Organisation of Ordinary Courts.

tribunals" within the meaning of Article 47 CFR. Appeals against disciplinary decisions by Courts of Appeal are heard by the Supreme Court (see below).

31. The Minister of Justice decides the number of disciplinary court judges attached to each Court of Appeal, "guided by organizational considerations and the need to ensure efficient proceedings" [67] and appoints disciplinary court judges himself for six-year terms[68] from amongst ordinary court judges with at least ten years' experience[69]. The Minister of Justice is required to consult the National Council of the Judiciary but is not bound by its opinion.[70] Disciplinary Court Judges can only be dismissed following disciplinary proceedings.[71]

32. The judges assigned to any particular case are chosen by lot from amongst the disciplinary court judges at the Court of Appeal to which the case has been allocated by the President of the Disciplinary Chamber of the Supreme Court (see para 66).[72] Each panel must include three judges and be headed by a criminal law judge.[73]

33. While the judges assigned to hear a given case are chosen by lot from amongst disciplinary court judges at the designated Court of Appeal, it is currently the case that each and every one of these judges – at every Court of Appeal - has been appointed by the current Minister of Justice. The ability of the government to ensure that "loyal" or ideologically aligned judges hear disciplinary cases is not eroded over time, however. The impact of these reforms are not "one-off". Disciplinary judges are appointed for six-year terms, and their number can be increased, at any Court of Appeal, by this or any future Minister of Justice at any time. It is also significant that the Court of Appeal to which a disciplinary case is allocated is decided by the President of the Disciplinary Chamber of the Supreme Court, who is appointed by the President of the Republic (for short three-year terms). It is all too easy, therefore, for any future ruling party simultaneously holding the presidency, to direct disciplinary cases to courts that are favourably disposed to it. The obvious long-term danger is that successive governments use their powers to appoint and set the number of disciplinary judges to erase the influence of their predecessor, thereby setting in motion a divisive and dangerous politicisation of the judiciary.

34. The powers of the Minister of Justice to: order disciplinary investigations against ordinary court judges; insist on the initiation of disciplinary proceedings; issue binding instructions as to how the charges should be framed; appoint their own disciplinary officer to conduct proceedings should they so wish; and appoint the judges responsible for hearing disciplinary cases, provide, in combination, for an extraordinary degree of influence of the executive over the disciplining of judges, which is aggravated further by the vagueness of the grounds on which fault can be alleged and found.

35. These powers clearly compromise the fairness of disciplinary proceedings, in violation of the right to a fair trial. Moreover, their very existence is chilling and sufficient to undermine public confidence in the external independence of the Polish judiciary, quite regardless of the probity of their use in practice.

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67 Art. 110c, Law on the Organisation of Ordinary Courts.

68 Art. 110a §3, Law on the Organisation of Ordinary Courts.

69 Art. 110 §1,1, Law on the Organisation of Ordinary Courts. They retain their regular posts for the duration of their appointment, taking on the function of Disciplinary Court Judges only as needed.

70 Art. 110a §1, Law on the Organisation of Ordinary Courts.

71 Art. 110a §5,3, Law on the Organisation of Ordinary Courts.

72 Art. 111, Law on the Organisation of Ordinary Courts.

73 Art. 111, Law on the Organisation of Ordinary Courts.

36. Indeed, the potential for the abuse of these powers is not limited to cases in which fault might wrongfully be found. Considerable pressure can be brought on individual judges – and messages sent to other judges – through the obligatory opening of disciplinary inquiries and their enforced protraction at the will of the Minister of Justice, irrespective of their final outcome.

37. The powers of the Minister of Justice to:

    a. order the opening of disciplinary proceedings against an ordinary court judge by a disciplinary representative and issue binding instructions to that disciplinary representative, under Article 114, 9 of the Law on the Organisation of Ordinary Courts;

    b. appoint their own disciplinary representative to carry out or take over disciplinary investigations or proceedings against ordinary court judges under Article 112b, 1 of the Law on the Organisation of Ordinary Courts;

    c. appoint the Disciplinary Representative of the Ordinary Courts and their two Deputies with absolute discretion under Article 112, 3 of the Law on the Organisation of Ordinary Courts; and

    d. appoint Disciplinary Judges subject to only to the requirement to seek the non-binding opinion of the National Council of Judiciary under Article 110, 1 of the Law on the Organisation of the Common Courts; and

    the authority of the President of the Disciplinary Chamber of the Supreme Court the power to designate the Court of Appeal in which disciplinary proceedings against ordinary court judges are heard at first instance under Article 110, 3 of the Law on Ordinary Court, in conjunction with Article 15, 3 of the Law on Supreme Court providing for the appointment of the President of the Disciplinary Chamber by the President of the Republic;

    are inconsistent with the requirements of EU law relating to the independence of the judiciary and violate the right of ordinary court judges subject to disciplinary proceedings in Courts of Appeal to a fair trial.

3.2. Disciplinary Proceedings in the Supreme Court

38. Disciplinary proceedings in the Supreme Court reproduce many of the problematic features of disciplinary proceedings in ordinary courts. Similar powers to those vested in the Minister of Justice to direct disciplinary proceedings against ordinary court judges are vested in the President of the Republic in respect of Supreme Court judges. The independence and impartiality of the Supreme Court tribunal responsible for hearing disciplinary cases has also been severely compromised as a result of the politicisation of the National Council of the Judiciary, which is the body responsible for the selection of all judges, including Supreme Court judges and, specifically, the judges responsible for hearing disciplinary cases in the Supreme Court.

39. Supreme Court judges are liable to disciplinary action on the broad and vaguely defined grounds of "service-related offences and for any offence against the dignity of his or her office"[74]

[74] Art. 72 §1, Law on Supreme Court.

40. The range of disciplinary penalties is set out in law. They are: 1) a warning; 2) a reprimand; 3) a reduction of a judge's basic remuneration by 5 % to 50 % for a period of six months to two years; 4) dismissal from the function occupied; and 5) a judge's removal from office.[75]

3.2.1 The creation of, and appointment of judges to, the Disciplinary Chamber of the Supreme Court

41. Disciplinary cases in the Supreme Court were previously heard by Supreme Court judges chosen at random from amongst all Supreme Court judges. The new Law on the Supreme Courts created a new Disciplinary Chamber in the Supreme Court[76], which hears disciplinary cases against Supreme Court judges at both first and second instance.[77] It is also the second instance tribunal for disciplinary cases concerning ordinary court judges.[78]

42. The creation of a new chamber in the Supreme Court has required the appointment of new judges. Supreme Court judges are, like all judges, appointed by the President of the Republic on the motion of the National Council of the Judiciary.[79]

43. In common with other jurisdictions that have such a body, the Polish National Council of the Judiciary is responsible for proposing candidates for appointment to judicial office, setting and monitoring professional standards for judges, advising on the training and professional development of judges and giving opinions on matters and laws affecting the judiciary.[80] It is required by the Constitution to "safeguard the independence of the judiciary".[81]

44. As with other such bodies, the Polish National Council of the Judiciary is composed of both lay members (parliamentarians) and judges in addition to a number of ex officio members. The composition of its 25 members is set out in the Constitution. They are:

- the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic;
- 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts;
- 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators.[82]

45. The Constitution does not define the mode of appointment of the judge members of the National Council of the Judiciary. Prior to the recent reforms, the judge members were

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75 Art. 75 §1, Law on Supreme Court.

76 Art. 3, Law on Supreme Court.

77 Art. 73 §1, Law on Supreme Court.

78 Art. 110 §1, Law on the Organisation of Ordinary Courts. Concerns over independence of the judges appointed to the Supreme Court's disciplinary chamber are of equal significance, therefore, to the fairness of disciplinary proceedings of ordinary court judges on appeal. The Supreme Court is also the first instance disciplinary court for ordinary court judges in respect criminal and tax offences requiring intent and in cases over which it has claimed jurisdiction (Art, 110 §1,b).

79 Article 179 of the Polish Constitution.

80 Article 3,1, Law on the National Council of the Judiciary.

81 Article 186, Constitution of Poland.

82 Article 187, Constitution of Poland.

elected by their peers, in line with common practice in European jurisdictions and the recommendations of authoritative bodies on this matter.[83]

46. Recommendation of the Committee of Ministers of the Council of Europe on *Judges: independence, efficiency and responsibilities*, for instance, states that:

> *"The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half the members of the authority should be judges chosen by their peers."*[84]

47. In countries, such as Poland, that grant a decisive role to a National Council of the Judiciary or similar body in the appointment of judges, the Recommendation, states:

> *"Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary."*[85]

48. Likewise, the Venice Commission has recommended that "a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself".[86]

49. Amendments to the Law on the National Council of the Judiciary adopted on 8 December 2017 replaced the election of its judge members by fellow judges with their election by the Sejm (the lower chamber of the Polish Parliament).[87] As a result, a ruling party with a majority in Parliament is able to exercise a very considerable influence over the composition of the National Council of the Judiciary and, in turn, therefore, over the appointment of judges, both in general and, specifically, to the Supreme Court.

50. The judges are elected by the Sejm to the National Council of the Judiciary simultaneously for a joint 4 year term.[88] The Sejm votes on a single list of 15 candidates selected by the Justice and Human Rights Committee, which is currently dominated by the ruling party.[89] The list requires a two thirds majority in a first round, or a simple majority in a second round, if the qualified majority cannot be achieved.[90] The new judge members were elected on 6 March 2018.

51. 19 of the 25 members of the National Council of the Judiciary are now elected by the Sjem, including 4 from amongst its own members. A further two are elected by the Senate. As a consequence, a ruling party, with a simple majority in both Parliamentary chambers, and holding the Presidency of the Republic, has a decisive influence over the

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83 Prior to the reforms the judge members of the NJC were elected as follows: two by the General Assembly of Judges of the Supreme Court; one by the General Assembly of Judges of Military Courts; two by the General Assemblies of Administrative Judges, and eight by the General Assemblies of appellate and district courts.

84 Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities, para 46.

85 Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities, para 27.

86 Position expressed in the Rule of Law Checklist, in the Report of the Judicial Appointments and in the Report on the Independence of the Judicial System (Part I: The Independence of Judges). See CDL-AD(2016)007, footnote 68; CDL-AD(2007)028, § 29; see also CDL-AD(2010)004, § 31.

87 Art. 9a §1, Law on the National Council of the Judiciary.

88 Art. 9a §1, Law on the National Council of the Judiciary.

89 Art. 11d §4, Law on the National Council of the Judiciary. Candidates must be proposed by 2000 citizens or 25 judges (11a, 2). The Justice and Human Rights Committee selects the final list of 15 candidates from lists containing a maximum 9 candidates presented by each party represented in the Sejm (11d 1,2 &4). The Committee is required to include at least one candidate from each party's list.

90 Art. 11d §5, Law on the National Council of the Judiciary.

appointment of 23 of the 25 members of the body responsible for the appointment of judges and their promotion to higher courts.

52. A system which provides for so much political influence over the body responsible for the nomination of judges is difficult to reconcile with the requirements of the independence of the judiciary and falls some way short of prevailing international standards on the appointment of judges. The independence of judges appointed through such a system, and the impartiality of their judgments in cases of political interest to a ruling party, or personal interest to one of its members, must inevitably be called into question.

53. Irrespective of the broader concerns that the changes to the manner of appointment of judge members to the National Council of the Judiciary entail for the independence of the Polish judiciary as a whole, they are acutely problematic for the independence of disciplinary proceedings in the Supreme Court.

54. The ruling party has been able to employ the new procedures for the appointment of judges to influence the appointment of every single judge currently responsible for hearing disciplinary cases against Supreme Court judges and ordinary court judges on appeal. Eight of the eleven judges appointed to the Disciplinary Chamber were born after 1970, none were born before 1965. This is to say that the current government has been able to exercise considerable influence over the appointment of judges that will continue to hear disciplinary proceedings for next 15-20 years.

55. The President of the Republic has the power to decide on the number of judges in each Supreme Court chamber, with no maximum limit.[91] Irrespective of the current composition of the disciplinary chamber, therefore, the sitting or any future President can at any time alter it by increasing the number of judges in the chamber and – if aligned with the majority party in the Sejm – ensure the appointment of preferred candidates.

56. The independence of disciplinary proceedings in the Supreme Court is further undermined by the presence of (newly created) lay members of the Supreme Court on panels hearing cases. At first instance, disciplinary cases are heard by panels of 3, comprising one lay member of the Supreme Court.[92] At second instance they are heard by panels of five, including two lay members.[93] Lay members of the Supreme Court only sit on panels hearing disciplinary cases and "extraordinary appeals".[94] They are directly elected (simultaneously) for (renewable) four year terms by the Senate by secret ballot.[95] Lay members require no special qualifications beyond exclusive Polish citizenship, good character, a secondary education and at least 40, and at most 60, years of age.[96] The potential for party political influence over lay Supreme Court members participating in disciplinary hearings is obvious and exacerbated the renewability of their mandates and their simultaneous election.

57. The cumulative effect of the creation of a special Disciplinary Chamber of the Supreme Court under Article 3 of the Law on the Supreme Court, combined with the transfer of the

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91 Art. 4, Law on Supreme Court. There is only a minimum number of 120 judges.

92 Art. 73 §1, Law on Supreme Court. And on appeal from ordinary courts.

93 Art. 73 §1, Law on Supreme Court. The appointment of lay members to panels is at the discretion of the President of the Supreme Court (73 §2), who is appointed by the President of the Republic from a shortlist of 5 Supreme Court judges presented by the Assembly of Supreme Court Judges (Article 12 §1).

94 Art 59 §1 Law on Supreme Court.

95 Art 60 §2 Law on Supreme Court.

96 Art. 59 §3, Law on Supreme Court.

election of the 15 judge members of the National Council of the Judiciary to members of the Sejm under Article 9a and the related provisions in Articles 11a – 11e of the Law on the National Council of the Judiciary is such that the Disciplinary Chamber of the Supreme Court cannot be considered, and certainly not perceived as, an independent and impartial tribunal within the meaning of Article 47 CFR. As such, they violate the fundamental principles of the independence of the judiciary that are enshrined in, and essential to the proper application of, EU law.

3.2.2 The influence of the President of the Republic over disciplinary proceedings

58. Disciplinary investigations into Supreme Court judges are conducted[97], and disciplinary proceedings subsequently initiated[98], by the Disciplinary Proceedings Representative of the Supreme Court, or one of two Deputies, who are elected by the Board of the Supreme Court for four-year terms, from amongst sitting judges.[99]

59. The Disciplinary Proceedings Representative of the Supreme Court can initiate disciplinary investigations on their own initiative or on the request on the First President of the Supreme Court, the President of the Disciplinary Chamber of the Supreme Court and the Prosecutor General (who is also the Minister of Justice), following a preliminary examination of the accusations.[100]

60. The decision of the Disciplinary Proceedings Representative to decline to initiate disciplinary proceedings upon the conclusion of an investigation requested by listed persons, can be appealed by those persons.[101]

61. The President of the Republic has the power to appoint an Extraordinary Disciplinary Proceedings Representative (from among Supreme Court, Common Court, or Military Court judges), who may initiate a new disciplinary inquiry or take over one already initiated.[102] The appointment of an Extraordinary Disciplinary Proceedings Representative "is tantamount to demanding an investigation".[103]

62. The power of the President of the Republic to order a disciplinary investigation and appoint the investigating authority under Article 76,8 of the Law on the Supreme Court is inconsistent with the requirements of EU law relating to the independence of the judiciary and violates the right of judges subject to such disciplinary proceedings before the Disciplinary Chamber of the Supreme Court to a fair trial.

3.2.3 The role of the President of the Disciplinary Chamber of the Supreme Court

63. The President of Republic wields considerable influence over the activities of the Supreme Court Disciplinary Chamber through new powers of appointment of the Chamber's President.[104] The President of the Republic appoints the President of the Disciplinary Chamber (and the four other chambers) from a list of three Supreme Court Judges

97 Art. 76 §1, Law on Supreme Court.
98 Art. 76 §2, Law on Supreme Court.
99 Art. 74, Law on Supreme Court.
100 Art. 76 §1, Law on Supreme Court.
101 Art. 76 §4 and 76,5, Law on Supreme Court.
102 Art. 76 §8, Law on Supreme Court.
103 Art. 75 §8, Law on Supreme Court.
104 The President of the Disciplinary Chamber of the Supreme Court was appointed in February 2019.

presented by the Assembly of Supreme Court Judges, after consulting the First President of the Supreme Court[105] (who the President also appoints from a short list of five[106]). The President of the Disciplinary Chamber serves a short, three-year term, which is renewable twice. The inducement to satisfy the will of the President of the Republic is strengthened by the salary supplement of 40% that the President of the Disciplinary Chamber (but not the Presidents of other Chambers) receives.[107]

64. The President of the Disciplinary Chamber enjoys a degree of autonomy within the Supreme Court - including from the supervision of the First President of the Supreme Court - that is not enjoyed by Presidents of other Chambers, including autonomy in respect of the administration of the chamber's budget.[108]

65. The President of the Disciplinary Chamber can request a disciplinary investigation[109] against a Supreme Court Judge and appeal against a decision of the Disciplinary Representative (see para 25) finding no grounds to initiate disciplinary proceedings upon the conclusion of such an investigation.[110] It is anomalous, to say the least, and far from compatible with fair trial guarantees that the same individual should be able to prompt disciplinary proceedings and adjudicate in respect of them.

66. The President of the Disciplinary Chamber also has considerable influence over disciplinary proceedings in ordinary courts. She/he:

    a. has oversight of the activities of the first instance disciplinary courts;[111]
    b. appoints the Presidents of the Appeal Court Disciplinary Courts from among the judges of this disciplinary court;[112]
    c. designates the disciplinary court that will hear a disciplinary case at first instance;[113]

4. The appointment and dismissal of Ordinary Court Presidents

67. The amendments to the Law on Ordinary Courts adopted on 12 July 2017, provided the Minister of Justice with the absolute discretion to appoint and dismiss all presidents of ordinary courts within a six-month window, running from 13 August 2017 to 13 February 2018. The Minister of Justice started to use these powers on 13 September 2017. By the time the powers had expired, 158 of the 377 presidents of the ordinary courts had been dismissed and replaced.

68. The Polish government's desire to replace ordinary court presidents reflects the very considerable influence they have over the running of ordinary courts and the work of judges sitting in them.

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105 Art. 15 §2, Law on Supreme Court.
106 Art. 12 §1, Law on Supreme Court.
107 Art. 48 §7, Law on Supreme Court. All judges sitting in the disciplinary chamber receive this supplement.
108 Art. 7 §4, Law on Supreme Court.
109 Art. 76 §1, Law on Supreme Court.
110 Art. 76 §4, Law on Supreme Court.
111 Art. 112c Law on the organisation of ordinary courts.
112 Art. 110b §1, Law on the Organisation of Ordinary courts. The President of the Disciplinary Chamber of the Supreme Court can also dismiss the President of the Disciplinary Court at the Court of Appeal on the vague grounds that their remaining in post "cannot be reconciled with good justice" (Article 110b).
113 Art. 110 §3, Law on the Organisation of Ordinary Courts.

69. The powers and influence of court presidents have not been significantly modified by the current government. They were already great. They include the power to:

    a. Assign judges to divisions[114] and "determine the manner of their participation in the assignment of cases"[115];
    b. Dismiss heads of divisions and their deputies;[116]
    c. Withdraw, reassign and add judges to cases in the interests of "the efficiency of proceedings"[117]
    d. Order inspections (by "inspecting judges") of all activities of courts under their authority[118]
    e. Review the efficiency of proceedings in individual cases"[119]
    f. Admonish the presidents of lower courts for management errors and reduce their salaries.[120]

70. The amendments to the Law on Ordinary Courts did not just provide for temporary powers to dismiss and appoint new court presidents. They also changed the regular procedures for the appointment and dismissal of presidents of ordinary courts to strengthen the role of the Minister of Justice and reduce the influence of the judiciary itself.

71. Before the amendments, appointments of court presidents by the Minister of Justice could be rejected by the National Council of the Judiciary. This safeguard has been removed. The Minister of Justice now appoints the Presidents of Appeal, Regional and District Courts with absolute discretion.[121]

72. The Minister of Justice can dismiss court presidents on the vague grounds of "gross or persistent failure to perform professional duties"; if the continuation of the President in office "cannot be reconciled with the interests of justice"; or on account of the inefficient administration of courts under their supervision.[122] These criteria are not new. However, the procedure for the dismissal of court presidents has been changed.

73. Prior to the reforms the dismissal of Court Presidents required the approval of a majority of the National Council of the Judiciary. Now, the Assembly of the relevant court must be consulted on the dismissal of its president.[123] Should the Assembly vote, by a simple majority, to reject the dismissal of its President, the Minister of Justice can appeal against its decision to the National Council of the Judiciary. [124] The National Council of the Judiciary must reject the dismissal by a two thirds majority (17 of its 25 members) to prevent it.[125] This is a high threshold under any circumstances. It is even less likely to be

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114 Art. 22a §1, 1 Law on the Organisation of Ordinary Courts.
115 Art. 22a §1, 2 Law on the Organisation of Ordinary Courts.
116 Art. 11 §3,1 Law on the Organisation of Ordinary Courts.
117 Articles 45, 47 §1 and 47b, Law on the Organisation of Ordinary Courts.
118 Art. 37c §1, Law on the Organisation of Ordinary Courts.
119 Art. 37b §1,1 Law on the Organisation of Ordinary Courts.
120 Articles. 37e §9 and 37h §12 Law on the Organisation of Ordinary Courts.
121 Articles 23, 24 and 25, Law on the Organisation of Ordinary Courts.
122 Art. 27 §1, 1 Law on the Organisation of Ordinary Courts.
123 Art. 27 §2, 1 Law on the Organisation of Ordinary Courts.
124 Art. 27 §5, 1 Law on the Organisation of Ordinary Courts.
125 Curiously, while express provision is made in the law to exclude the president of the court from voting on his own dismissal as a member of the Assembly of the relevant court (Article 27,4), similar provision

reached under the current system for appointing members of the National Council of the Judiciary.

74. International standards on the appointment and dismissal of presidents of courts recognise their importance to the effective and independent administration of courts and justice. They consequently recommend that such decisions be surrounded by the same safeguards and guarantees of independence as the appointment of new judges and their promotion to higher courts.[126] The need for such safeguards is all the greater in Poland considering the unusually large influence of court presidents on the administration of justice and working lives of judges in courts under their authority.

75. The procedures for the appointment and dismissal of judges in Poland already fail to satisfy the most basic requirements for an independent judiciary. The safeguards surrounding the appointment and dismissal of court presidents are even further reduced.

76. Articles 23, 24 and 25 of the Law on the Organisation of Ordinary Courts conferring complete discretion on the Minister of Justice to appoint ordinary court presidents; and Article 27 §5 of the Law on the Organisation of Ordinary Courts requiring a majority of two-thirds of the members of the National Council of the Judiciary to reject the proposed dismissal of a president of an ordinary court fail to ensure the independence of key judicial appointments from the undue influence of the executive and are therefore not in conformity with the requirements of EU law relating to the independence of the judiciary.

5. Summary of Provisions in breach of EU law

77. The European Commission should initiate infringement proceedings against Poland under Article 258, Treaty on the Functioning of the European Union, in respect of the following provisions:

Regarding disciplinary proceedings against ordinary court judges:

Article 114, 9 of the Law on the Organisation of Ordinary Courts

granting the Minister of Justice the power to order the opening of disciplinary proceedings against an ordinary court judge and issue binding instructions to the disciplinary representative in charge of the case;

Article 112b, 1 of the Law on the Organisation of Ordinary Courts

granting the Minister of Justice the power to appoint their own disciplinary representative to carry out or take over disciplinary investigations or proceedings against ordinary court judges;

Article 112, 3 of the Law on the Organisation of Ordinary Courts

granting the Minister of Justice the power to appoint the Disciplinary Representative of the Ordinary Courts and their two Deputies with absolute discretion;

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is not made for the Minister of Justice to be denied their vote as an ex officio member of the National Council of the Judiciary.

126 See, for instance, Judicial Appointments - Report adopted by the Venice Commission, §§ 28 and 44 – 47, CDL-AD(2007)028.

Article 110, 1 of the Law on the Organisation of the Common Courts

granting the Minister of Justice the power to appoint Disciplinary Judges subject to only to the requirement to seek the non-binding opinion of the National Council of Judiciary;

Art. 110, 3 of the Law on Ordinary Court

granting the President of the Disciplinary Chamber of the Supreme Court the power to designate the Court of Appeal in which disciplinary proceedings against ordinary court judges are heard at first instance, in conjunction with Article 15, 3 of the Law on Supreme Court providing for the appointment of the President of the Disciplinary Chamber by the President of the Republic;

Regarding disciplinary proceedings in the Supreme Court

Article 76,8 of the Law on the Supreme Court

granting the President of the Republic the power to order a disciplinary investigation and appoint the investigating authority (an Extraordinary Disciplinary Proceedings Representative);

Article 9a and related provisions in 11a -11e of the Law on the National Council of the Judiciary

governing the election of the 15 judge members of the National Council of the Judiciary by the Sejm; in conjunction with

Article 3 of the Law on the Supreme Court creating a special Disciplinary Chamber of the Supreme Court;

Regarding the appointment and dismissal of presidents of ordinary courts:

Articles 23, 24 and 25 of the Law on the Organisation of Ordinary Courts

governing the appointment of ordinary court presidents by the Minister of Justice; and

Art. 27 §5, 1 of the Law on the Organisation of Ordinary Courts

requiring a majority of two-thirds of the members of the National Council of the Judiciary to reject the proposed dismissal of a president of an ordinary court.