

The disciplinary system for judges in Poland

The case for infringement proceedings

22 March 2019

*This opinion accompanies the ESI report “Under Siege: Why Polish courts matter for Europe”.
It 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.*

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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.¹ 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.²
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.

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. [...]”

¹ 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.

² 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.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.

5. Article 3 TEU defines the promotion of its values as one of the objectives of the European Union.³ 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.⁴
6. Article 19 TEU requires member states to “provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”⁵
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.”⁶

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.”⁷

³ 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.

⁴ 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.”

⁵ 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.”

⁶ 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>.

⁷ Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities, para 11; available at <https://rm.coe.int/16807096c1>.

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 trial⁸ 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.”⁹

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.”¹⁰

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 responsibilities* notes, “disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner”.¹¹ 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.”¹²

⁸ Art. 6, European Convention on Human Rights.

⁹ Campbell and Fell vs UK, Application no. 7819/77, para 78; available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57456%22%5D%7D>.

¹⁰ 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>.

¹¹ Recommendation CM/Rec(2010)12, *Judges: independence, efficiency and responsibilities*, para 69.

¹² Recommendation CM/Rec(2010)12, *Judges: independence, efficiency and responsibilities*, para 69.

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.”¹³

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.

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.

¹³

Judgment of the Grand Chamber in Case C-216/18 PPU, 25 July 2018, para 67.

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”.¹⁴
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.¹⁵
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.¹⁶
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.¹⁷
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.¹⁸
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.¹⁹ The Disciplinary Representative of the Ordinary Courts may take over any case.²⁰
27. The Minister of Justice can 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

¹⁴ Art. 107 § 1, Law on the Organisation of Ordinary Courts.

¹⁵ Art. 109 § 1, Law on the Organisation of Ordinary Courts.

¹⁶ Art. 112 §3, Law on the Organisation of Ordinary Courts.

¹⁷ Art. 112 §6, Law on the Organisation of Ordinary Courts.

¹⁸ Art. 114 §1, Law on the Organisation of Ordinary Courts.

¹⁹ Art. 112 §2, Law on the Organisation of Ordinary Courts.

²⁰ Art. 112a §1a, Law on the Organisation of Ordinary Courts.

investigation.²¹ In such cases, the Minister of Justice may issue binding instructions to the disciplinary representative as to how they are to conduct the case.²²

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.²³ The Disciplinary Proceedings Representative of the Minister of Justice is obliged to open an investigation.²⁴ 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.²⁵
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 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”²⁶ and appoints disciplinary court judges himself for six-year terms²⁷ from amongst ordinary court judges with at least ten years’ experience.²⁸ The Minister of Justice is required to consult the National Council of the Judiciary but is not bound by its opinion.²⁹ Disciplinary Court Judges can only be dismissed following disciplinary proceedings.³⁰
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).³¹ Each panel must include three judges and be headed by a criminal law judge.³²
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

²¹ Art. 114 §9, Law on the Organisation of Ordinary Courts.

²² Art. 114 §9, Law on the Organisation of Ordinary Courts.

²³ Art. 112b §1, Law on the Organisation of Ordinary Courts.

²⁴ Art. 112b §3, Law on the Organisation of Ordinary Courts.

²⁵ Art. 112b §5, Law on the Organisation of Ordinary Courts.

²⁶ Art. 110c, Law on the Organisation of Ordinary Courts.

²⁷ Art. 110a §3, Law on the Organisation of Ordinary Courts.

²⁸ 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.

²⁹ Art. 110a §1, Law on the Organisation of Ordinary Courts.

³⁰ Art. 110a §5,3, Law on the Organisation of Ordinary Courts.

³¹ Art. 111, Law on the Organisation of Ordinary Courts.

³² Art. 111, Law on the Organisation of Ordinary Courts.

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.
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 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”³³

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.³⁴

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 Court³⁵, which hears disciplinary cases against Supreme Court judges at both first and second instance.³⁶ It is also the second instance tribunal for disciplinary cases concerning ordinary court judges.³⁷

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.³⁸

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.³⁹ It is required by the Constitution to “safeguard the independence of the judiciary”.⁴⁰

³³ Art. 72 §1, Law on Supreme Court.

³⁴ Art. 75 §1, Law on Supreme Court.

³⁵ Art. 3, Law on Supreme Court.

³⁶ Art. 73 §1, Law on Supreme Court.

³⁷ 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).

³⁸ Article 179 of the Polish Constitution.

³⁹ Article 3,1, Law on the National Council of the Judiciary.

⁴⁰ Article 186, Constitution of Poland.

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.⁴¹

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 elected by their peers, in line with common practice in European jurisdictions and the recommendations of authoritative bodies on this matter.⁴²

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.”*⁴³

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.”*⁴⁴

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”.⁴⁵

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).⁴⁶ 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.

⁴¹ Article 187, Constitution of Poland.

⁴² 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.

⁴³ Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities, para 46.

⁴⁴ Recommendation CM/Rec(2010)12, Judges: independence, efficiency and responsibilities, para 27.

⁴⁵ 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.

⁴⁶ Art. 9a §1, Law on the National Council of the Judiciary.

50. The judges are elected by the Sejm to the National Council of the Judiciary simultaneously for a joint 4 year term.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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 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.⁵⁰ 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.⁵¹ At second instance they are heard by panels of five,

⁴⁷ Art. 9a §1, Law on the National Council of the Judiciary.

⁴⁸ 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.

⁴⁹ Art. 11d §5, Law on the National Council of the Judiciary.

⁵⁰ Art. 4, Law on Supreme Court. There is only a minimum number of 120 judges.

⁵¹ Art. 73 §1, Law on Supreme Court. And on appeal from ordinary courts.

including two lay members.⁵² Lay members of the Supreme Court only sit on panels hearing disciplinary cases and “extraordinary appeals”.⁵³ They are directly elected (simultaneously) for (renewable) four year terms by the Senate by secret ballot.⁵⁴ 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.⁵⁵ 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 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 conducted⁵⁶, and disciplinary proceedings subsequently initiated,⁵⁷ 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.⁵⁸

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.⁵⁹

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.⁶⁰

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.⁶¹ The appointment of an Extraordinary Disciplinary Proceedings Representative “is tantamount to demanding an investigation”.⁶²

⁵² 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).

⁵³ Art 59 §1 Law on Supreme Court.

⁵⁴ Art 60 §2 Law on Supreme Court.

⁵⁵ Art. 59 §3, Law on Supreme Court.

⁵⁶ Art. 76 §1, Law on Supreme Court.

⁵⁷ Art. 76 §2, Law on Supreme Court.

⁵⁸ Art. 74, Law on Supreme Court.

⁵⁹ Art. 76 §1, Law on Supreme Court.

⁶⁰ Art. 76 §4 and 76,5, Law on Supreme Court.

⁶¹ Art. 76 §8, Law on Supreme Court.

⁶² Art. 75 §8, Law on Supreme Court.

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.⁶³ 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 presented by the Assembly of Supreme Court Judges, after consulting the First President of the Supreme Court⁶⁴ (who the President also appoints from a short list of five⁶⁵). 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.⁶⁶

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.⁶⁷

65. The President of the Disciplinary Chamber can request a disciplinary investigation⁶⁸ 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.⁶⁹ 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;⁷⁰
- b. appoints the Presidents of the Appeal Court Disciplinary Courts from among the judges of this disciplinary court;⁷¹
- c. designates the disciplinary court that will hear a disciplinary case at first instance;⁷²

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

⁶³ The President of the Disciplinary Chamber of the Supreme Court was appointed in February 2019.

⁶⁴ Art. 15 §2, Law on Supreme Court.

⁶⁵ Art. 12 §1, Law on Supreme Court.

⁶⁶ Art. 48 §7, Law on Supreme Court. All judges sitting in the disciplinary chamber receive this supplement.

⁶⁷ Art. 7 §4, Law on Supreme Court.

⁶⁸ Art. 76 §1, Law on Supreme Court.

⁶⁹ Art. 76 §4, Law on Supreme Court.

⁷⁰ Art. 112c Law on the organisation of ordinary courts.

⁷¹ 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).

⁷² Art. 110 §3, Law on the Organisation of Ordinary Courts.

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.
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 divisions⁷³ and "determine the manner of their participation in the assignment of cases"⁷⁴;
 - b. Dismiss heads of divisions and their deputies;⁷⁵
 - c. Withdraw, reassign and add judges to cases in the interests of "the efficiency of proceedings"⁷⁶
 - d. Order inspections (by "inspecting judges") of all activities of courts under their authority⁷⁷
 - e. Review the efficiency of proceedings in individual cases⁷⁸
 - f. Admonish the presidents of lower courts for management errors and reduce their salaries.⁷⁹
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.⁸⁰
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.⁸¹ 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.⁸² 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.⁸³ The National Council of the Judiciary

⁷³ Art. 22a §1, 1 Law on the Organisation of Ordinary Courts.

⁷⁴ Art. 22a §1, 2 Law on the Organisation of Ordinary Courts.

⁷⁵ Art. 11 §3,1 Law on the Organisation of Ordinary Courts.

⁷⁶ Articles 45, 47 §1 and 47b, Law on the Organisation of Ordinary Courts.

⁷⁷ Art. 37c §1, Law on the Organisation of Ordinary Courts.

⁷⁸ Art. 37b §1,1 Law on the Organisation of Ordinary Courts.

⁷⁹ Articles. 37e §9 and 37h §12 Law on the Organisation of Ordinary Courts.

⁸⁰ Articles 23, 24 and 25, Law on the Organisation of Ordinary Courts.

⁸¹ Art. 27 §1, 1 Law on the Organisation of Ordinary Courts.

⁸² Art. 27 §2, 1 Law on the Organisation of Ordinary Courts.

⁸³ Art. 27 §5, 1 Law on the Organisation of Ordinary Courts.

must reject the dismissal by a two thirds majority (17 of its 25 members) to prevent it.⁸⁴ This is a high threshold under any circumstances. It is even less likely to be 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.⁸⁵ 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

⁸⁴ 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 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.

⁸⁵ See, for instance, Judicial Appointments - Report adopted by the Venice Commission, §§ 28 and 44 – 47, CDL-AD(2007)028.

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

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.