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**Opinion of**

**the Centre for Research, Studies, and Legislation of the National Bar Council of Attorneys-at-Law**

**on**

**the draft Act on restoring the right to an independent and impartial tribunal established by law through regulation of the effects of resolutions adopted by the National Council of the Judiciary between 2018 and 2025**

**Subject of the opinion**:

1. *Draft Act of 24 April 2025 on restoring the right to an independent and impartial tribunal established by law through regulation of the effects of resolutions adopted by the National Council of the Judiciary between 2018 and 2025*

## I. Preliminary issues

1. The subject of this opinion is a preliminary assessment of the draft Act of 24 April 2025 on restoring the right to an independent and impartial tribunal established by law through regulation of the effects of resolutions adopted by the National Council of the Judiciary between 2018 and 2025 (hereinafter: "the Draft Act"). As indicated in the preamble, the Draft Act aims to restore the constitutional rule of law, implement fundamental principles, standards and values of a democratic state governed by the rule of law, guarantee the independence of all judges, restore the functioning of courts and tribunals established by law, and ensure full independence of the judiciary, which were undermined through the deprivation of the National Council of the Judiciary of its constitutional identity, as well as to overcome the unprecedented crisis in the justice system in Poland and comply with numerous judgments of European courts.

This opinion is preliminary in nature and relates exclusively to the assessment of the proposed model for reviewing judicial appointments based on National Council of the Judiciary resolutions issued after 2017.

2. The separation of the judiciary from the legislative and executive powers, together with the related principle of judicial independence, safeguards everyone's right to have their case examined by a court in a fair and public manner without undue delay. Thus, the independence of courts and judges is not a privilege granted to those holding judicial office but rather a guarantee of exercising citizens' subjective rights.

3. The activities of the National Council of the Judiciary (NCJ) after 2017 significantly violated constitutional standards, particularly the principle of the independence of courts and judges as enshrined in Articles 173 and 178(1) of the Constitution of the Republic of Poland. The manner in which members of the NCJ were appointed – dominated by the legislative and executive powers – stripped this constitutional body of its essential attribute as a guardian of judicial independence, in flagrant violation of Article 186(1) of the Constitution. Consequently, decisions taken by the NCJ after 2017 – particularly regarding the assessment of candidates for judicial positions – are constitutionally defective, fundamentally affecting the legality of the judicial nomination process and threatening the right to court established by law under Article 45(1) of the Constitution of the Republic of Poland and Article 6 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR).

   It must be strongly emphasised that during the last two parliamentary terms, the legislature introduced a fundamental overhaul of the normative foundations for the functioning of the NCJ, which significantly impacted how it fulfilled its constitutional functions and responsibilities. The direction of legislative policy adopted is difficult to reconcile with fundamental standards stemming from the Constitution and EU law. The amendments to the Act on the National Council of the Judiciary were aimed at subjecting the NCJ to political control by the legislature and the Minister of Justice, contrary to the standards of separation of judicial power and independence of courts and judges.

   It should also be recalled that the legal status of the National Council of the Judiciary, as shaped after 2017, has been examined by numerous national and international judicial bodies. For the purposes of this opinion, it is crucial to highlight the decisions of Polish courts, including the

Supreme Court[1] and the Supreme Administrative Court[2], which clearly state that the NCJ was appointed in violation of the Constitution, the principle of representative participation of the judiciary, and the guarantees of independence of courts and judges. In its current legal and organizational form, it cannot be recognised as a constitutional body safeguarding the independence of courts and judges within the meaning of Article 186 of the Polish Constitution.

The new procedure for forming the composition of the NCJ was unequivocally negatively assessed by national[3] and international courts. Both the Court of Justice of the European Union and the European Court of Human Rights have emphasised in numerous judgments that Poland must take prompt remedial action in the interest of the rule of law, the principles of separation of powers, and the independence of the judiciary. The independence of courts and judges has been the subject of a number of judgments of the European Court of Human Rights and the Court of Justice of the European Union[4]. The courts have indicated, among other things, that the Polish judiciary is afflicted by a structural defect resulting from the **politicisation of the judicial appointment process**, which has a "radiating effect" on judgments issued by Polish courts, creating a basis for challenging decisions of Polish courts before the ECtHR and courts of EU Member States.

[1]See, for example, the judgment of the Supreme Court, Labour and Social Insurance Chamber, of 5 December 2019 (case no. III PO 7/18) in which it was concluded that the NCJ, as constituted after 2017, was not a body endowed with the independence and impartiality required of the NCJ within the meaning of the Constitution. See also the resolution of the Supreme Court of 23 January 2020, issued by three joined Chambers of the Supreme Court: the Civil Chamber, the Criminal Chamber, and the Labour and Social Insurance Chamber (case no. BSA I-4110-1/20), in which it was noted that the improper staffing of the court should also be understood as a situation in which the Supreme Court judges are appointed following nomination by the NCJ, which does not guarantee the choice of independent judges within the meaning of Article 45 of the Constitution.

[2]See, for example, the judgments of the Supreme Administrative Court, which held that the NCJ, as constituted after 2017, does not provide sufficient guarantees of independence from the influence of the legislative and executive powers in the procedure of appointing judges, and invalidated the NCJ resolutions on the appointment of Supreme Court judges (case no. II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18, II GOK 7/18, II GOK 4/18, II GOK 8/18, II GOK 10/18, II GOK 11/18, II GOK 12/18, II GOK 13/18, II GOK 14/18, II GOK 9/18, II GOK 15/18, II GOK 16/18, II GOK 17/18, II GOK 18/18, II GOK 19/18, II GOK 20/18).

[3]See, in particular, the resolution of the Supreme Court, full composition of the Supreme Court – the Civil Chamber, the Criminal Chamber and the Chamber of Labour and Social Security of 23 January 2020., BSA I-4110-1/20, OSNKW 2020, No. 2, item 7)

[4]See e.g. ECtHR judgments of 22 July 2021, *Reczkowicz v. Poland*, no. 43447/19; of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*, no. 49868/19 and 57511/19; of 3 February 2022, *Advance Pharma sp. z o.o. v. Poland*, application no. 1469/20; see also the judgment ECtHR of 23 November 2023, *Wałęsa v. Poland*, no. 50849/21). As well as the judgments of the CJEU of 19 November 2019 in joined cases C-585/18, C-624/18 and C-625/18, *AK v. National Council of the Judiciary and CP and DO v. Supreme Court*, EU:C:2019:982; of 2 March 2021, C-824/18, *A.B., C.D., E.F., G.H. and I.J. v. National Council of the Judiciary*, EU:C:2021:153; of 6 October 2021., C-487/19, W.Ż., EU:C:2021:798; see also, for example, the judgment of the CJEU of 19 November 2019 (joined case no. C-585/18, C-624/18, C-625/18), which found that excessive influence of the legislative and executive powers on the composition of the National Council of the Judiciary may cause this body to be deprived of the independence essential to the judiciary, the CJEU judgment of 2 March 2021. (C-824/18), ruling of the CJEU of 14 July 2021 (C-204/21), the CJEU judgment of 15 July 2021. (C-791/19).

4. The irregular election of a significant portion of the NCJ's members substantially impacts the assessment of the actual independence of judges appointed by the President of the Republic of Poland in nomination proceedings involving the improperly constituted NCJ. The change in the method of appointing judicial members to the NCJ deprived the judiciary of the right to elect its representatives, enabling legislative and executive powers to directly or indirectly interfere in judicial appointments, systematically undermining the legitimacy of courts composed of judges so appointed. Pursuant to Article 186(1) 1 of the Constitution of the Republic of Poland, the National Council of the Judiciary shall safeguard the independence of courts and judges. However, with the entry into force of the Act of 8 December 2017, the NCJ **lost its constitutional identity** and, consequently, its capacity to present candidates for appointment to judicial office to the President of the Republic in a manner that would guarantee their impartiality and independence in the administration of justice. As a result, the provisions introduced by the 2017 Act – **contrary to the principles of the rule of law, the separation of powers, and judicial independence** – **deprived judges appointed** following nomination by the current NCJ of the **legitimacy to exercise the administration of justice as an independent and impartial tribunal established by law**.

5. There is no doubt that the **systemic flaws in the procedure** of judicial appointments mean that the participation of a person appointed following nomination by the National Council of the Judiciary, as constituted under the Act of 8 December 2017, in examining cases of individuals entitled to the right to court will result in a violation of that right. This conclusion follows clearly from the case-law of national and international courts, as discussed above.

6. It should be clearly emphasised, in the context of the issues addressed in this opinion, that the **loss** of **"constitutional identity"** by the current National Council of the Judiciary has, in effect, led to a situation in which **judicial nominations** made by the President of the Republic of Poland at the request of this body **are not based on the constitutional foundation specified in Article 179 of the Polish Constitution**, but solely on statutory provisions. Consequently, judges who received appointments with the participation of the National Council of the Judiciary do not enjoy the guarantees granted to judges appointed pursuant to the Constitution of the Republic of Poland. This leads to the clear conclusion that **judges appointed by the President with the participation of the unconstitutional NCJ are not entitled to the protection afforded under Article 181(1) of the Constitution of the Republic of Poland**.

7. The professional self-government of attorneys-at-law considers it essential to **regulate, as soon as possible**, the **status of individuals appointed by the President of the Republic of Poland to judicial office following proceedings conducted with the participation of the NCJ functioning in its unconstitutional composition since 2017.** The issue of the validity of judicial nominations is one of the most serious challenges currently facing Poland's justice system.

8. The adoption of any regulations concerning the judiciary should always be preceded by profound reflection and extensive public consultations, whilst the implemented measures should ensure legal certainty and the protection of civil rights and freedoms. This also applies to necessary measures addressing the status of persons appointed to judicial office through procedures shaping the National Council of the Judiciary that failed to meet constitutional requirements. Therefore, the steps undertaken over the past several months should be considered significant and meaningful, particularly the establishment – pursuant to the Regulation of the Council of Ministers of 5 March 2024 (Journal of Laws of 2024, item 350) – of the Codification Commission for the Organisation of the Judiciary and the Public Prosecution Service, operating under the Minister of Justice. On 3 February of this year, the Codification Commission submitted to the Minister of Justice two alternative draft Acts, which are intended to regulate the status of judges appointed in Poland after 2017. Both draft Acts were essentially based on the legitimate premise that the resolutions of the National Council of the Judiciary from 2018 to 2025, in which candidates for judicial offices were presented to the President of the Republic of Poland, were issued in breach of the law. The experts proposed two alternative approaches to resolving this issue in both drafts. The first proposal assumed automatic (*ex lege*) invalidation of the resolutions mentioned above. The second proposal envisaged a reassessment of judicial appointments made since 2017 by a new National Council of the Judiciary formed in accordance with the provisions of the Constitution, necessitating the reopening of appointment procedures concluded by the original resolutions. Thus, the fundamental difference between the drafts concerned how the status of judges appointed after 2017 would be reviewed – whether by operation of new statutory provisions or through the actions of a "renewed" (properly constituted) NCJ.

   Both of the above drafts were subject to extensive public consultation. It should be recalled that the **Centre for Research, Studies, and Legislation of the National Bar Council of Attorneys-at-Law submitted its opinion on both drafts to the Codification Commission, emphasising the need for a swift and effective resolution of this issue**.

   Throughout the entire process of so-called “reform” of the judicial system – particularly the administration of justice – initiated during the term of the 8th Sejm and continued during the 9th

Sejm, the National Bar Council of Attorneys-at-Law consistently voiced its unequivocally negative position on measures incompatible with the Constitution of the Republic of Poland and EU law, concerning the Constitutional Tribunal, the organisation of the common courts, the public prosecution service, and the National Council of the Judiciary. Beginning with the opinion on the government's draft Act amending the Act on the National Council of the Judiciary of 14 March 2017, passed by the Sejm on 12 July 2017 and subsequently "vetoed" by the President of the Republic of Poland, and through subsequent positions, reports, opinions, and other expert analyses concerning a series of subsequent statutes on the structure and functioning of the justice system, the National Bar Council of Attorneys-at-Law has highlighted the far-reaching, negative consequences of introducing these regulations for the Polish legal order, both at the national and international levels.

9. The Ministry of Justice, having regard to the outcomes of the work of the Codification Commission for the Organisation of the Judiciary and the Public Prosecution Service, presented on 24 April of this year a **draft Act on restoring the right to an independent and impartial tribunal established by law through regulation of the effects of resolutions adopted by the National Council of the Judiciary between 2018 and 2025.** This draft is essentially based on the wording of the Codification Commission's proposal envisaging automatic (*ex lege*) invalidation of resolutions adopted by the National Council of the Judiciary since 2017. It is also consistent with the premises set out in the opinion of the Centre for Research, Studies, and Legislation of the National Bar Council of Attorneys-at-Law concerning the aforementioned drafts of the Codification Commission on this subject.

10. The draft presented by the Ministry of Justice is undoubtedly among the most significant legislative initiatives aimed at restoring the principle of the rule of law within the Polish constitutional framework in the area concerning the organisation and functioning of the judiciary, including the shaping of the justice system in accordance with constitutional and international standards. This system was devastated as part of the so-called "reform" conducted in a manner incompatible with the Constitution.

11. The draft presented by the Ministry of Justice is intended to restore the values of a democratic state governed by the rule of law. Adopting specific legislative solutions **will ultimately guarantee the right of access to an independent and impartial tribunal established by law, taking into account the need to ensure the stability of judgments**. It should be noted that these objectives have been correctly identified by the drafters. The fundamental issue remains the

definition of the tasks and the selection of mechanisms that are to serve the achievement of these objectives. Among the essential tasks directed toward fulfilling the objectives mentioned above, two principal matters should be specified: 1) determining the status of individuals appointed to judicial office in a procedure involving the improperly constituted NCJ; 2) in the event that such appointments are found to be affected by irregularities, establishing appropriate "remedial" mechanisms.

12. First and foremost, it is necessary to address the relatively swift legislative action aimed at restoring the rule of law. The adopted legislative form of a statute raises no objections. The regulation of the judiciary indisputably falls within the purview of statutory enactments which, it bears emphasising, should both implement and supplement the constitutional requirements relating to the judiciary. Of particular significance in this context is the issue of the status of individuals appointed by the President of the Republic of Poland to judicial office during the period in which presidential nomination acts were predicated upon institutional collaboration with an improperly constituted National Council of the Judiciary – especially in the light of Article 180 of the Polish Constitution.

## II. Fundamental principles that should guide the regulation aimed at restoring the rule of law in the judicial system

13. There is no doubt that the systemic nature of the breaches of the Constitution concerning the improper composition of the National Council of the Judiciary since 2017 fundamentally affects the regulatory model adopted in the Draft Act. Basing the review of judicial appointments on "individualised" case-by-case, lengthy proceedings **cannot be considered an adequate measure** for achieving the desired result of assessing the legitimacy of holding judicial posts conferred through procedurally defective nomination processes. In the past, there were no comparable situations to the systemic breach of the rule of law in Poland, which means that the mechanisms for responding to instances of breaches of judicial independence, developed in the existing case law of international courts and tribunals, as well as in the established standards of the Venice Commission, must be interpreted in light of this extraordinary situation and the existing circumstances. Given the **systemic** nature of the breaches, it is **necessary** to adopt solutions that involve the operation of a remedial mechanism by virtue of law.

14. It should be considered necessary to subject the resolutions of the unconstitutional National Council of the Judiciary to review in relation to all groups of judges appointed by the President with the participation of this unconstitutional body – unlike the approach presented in the draft of the Codification Commission. A similar regulation should govern the situation of all judges appointed under the defective procedure. Consequently, some form of assessment with respect to the particular "cohorts of nominations" is indispensable.

15. It should also be noted that, since it is impossible to determine whether an objective assessment of persons applying for appointment to judicial office actually took place during the competition proceedings conducted by the unconstitutional NCJ, it **cannot be assumed that any "remedial" normative regulation can "constitutionally legalise" this state of affairs**. It would be difficult to regard as logical a solution whereby a statutory provision prescribes a positive, yet fictional, evaluation of an individual's suitability for judicial office. Obviously, **a person appointed through an unconstitutional procedure cannot become a judge within the meaning of the Constitution**.

16. The pace at which the changes are introduced remains, quite evidently, a matter of particular importance. Implementing the statutory provisions should ensure the **swiftest possible restoration of the right to a court**. Applying an individualised review path for judges would result in a prolonged process, posing a risk of "judges being preoccupied with themselves" and creating potential for retaliation.

## III. Fundamental Premises of the Draft Act

### A. Core Premises

17. The Draft Act under consideration, alongside its explanatory memorandum, regulates the consequential effects of resolutions adopted by the National Council of the Judiciary as constituted pursuant to the Act of 8 December 2017. It does so with optimal proportionality, endeavouring to balance various competing values and principles which warrant consideration in this context.

18. Indisputably, the principle of irremovability of judges constitutes a fundamental aspect of the rule of law and judicial independence. Nonetheless, the reasoning provided in the explanatory memorandum to the Draft Act rightly points out that "[…] there may be circumstances in which

persons appointed to judicial office are not entitled to such protection" (cf. p. 6 of the explanatory memorandum). The memorandum further elaborates that "maintaining such appointments in force would therefore result in perpetuating a situation that is contrary to those standards" (ibid.). As previously established, individuals appointed by the President to judicial office pursuant to a resolution of the unconstitutional NCJ are not entitled to avail themselves of such protection.

The recommendations set forth by the Venice Commission in its Joint Opinion indicate that the issue concerning judicial appointments made with the participation of the unconstitutional NCJ represents a **systemic problem**, necessitating consideration of the substantial proportion of improperly appointed judges relative to the overall number of judges. Therefore, whatever reform is implemented, it must not jeopardise the functioning of the judicial system as such. The solution adopted in the Draft Act appears to be comprehensively in line with the Venice Commission's position in this regard.

It warrants particular emphasis that the Venice Commission explicitly acknowledges the presence within the Polish judicial system of a cohort of incorrectly appointed judges (paragraphs 29 and 30 of the Joint Opinion). For this group, the Commission establishes distinct standards for assessing their status compared to those applied to "properly" appointed judges. Notably, the Commission notes that the **principle of irremovability or security of tenure**, whilst constituting an essential guarantee **of judicial independence, does not confer full protection upon office-holders whose procedure of appointment shows grave deficiencies** (paragraph 30).

Of particular significance is the Venice Commission's assertion that the considerable number of such defectively appointed judges **constitutes a matter requiring a systemic resolution** (paragraphs 18 and 29 of the Joint Opinion). The Commission identifies the root cause of this systemic deficiency in the flawed appointment mechanism of the NCJ, contending that this body fails to satisfy the requisite standards of independence and impartiality, thereby rendering judicial appointments defective (paragraphs 8, 11, and 16 of the Joint Opinion).

A central thesis of the Joint Opinion, therefore, is the contention that the principle of irremovability of judges, as understood within European standards, applies exclusively to appointments made in accordance with constitutional provisions and European standards. This means that the principle of irremovability cannot serve as an obstacle to the removal of defectively appointed judges (paragraphs 15 and 30). The Venice Commission makes it clear that

the **requirement of security of tenure can only apply when the relevant appointment, nomination or election was made in compliance with the Constitution and with European standards.** To hold otherwise would mean that it would be possible for a government to disregard or circumvent the constitutional provisions on appointment and subsequently invoke the constitutional principle of security of tenure to make such appointment irreversible, a situation which would defeat the rule of law (paragraph 15).

It thus clearly follows from the Joint Opinion that, although the principle of irremovability is a vital aspect of the rule of law and judicial independence, **there may be circumstances** in which persons appointed to judicial office do not enjoy such protection This is particularly applicable in instances where appointments occurred – as exemplified by the activities of the National Council of the Judiciary as constituted under the Act of 8 December 2017 – in a manner incompatible with Article 179 of the Constitution of the Republic of Poland and international standards. Maintaining such appointments in force would therefore perpetuate a situation contrary to those standards.

This position was also adopted by the Court of Justice of the European Union in the case directly concerning Poland. In its judgment of 24 June 2019 in Case C-619/18, the CJEU held that "the principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality." (paragraph 76). This finding leads to the conclusion that where appointments to judicial office are found defective when measured against constitutional or international legal standards, the protection normally afforded by the principle of irremovability is significantly diminished. In such circumstances, this protection must yield to other objectively justified and compelling aims, such as restoring the rule of law and properly functioning judicial appointments[5].

[5]A. Sajó, *The Limits of Judicial Irremovability from the Perspective of the Restoration of the Rule of Law: A View from Strasbourg*, in: *Rule of Law in Europe*, eds. F. Marques, P. Pinto de Albuquerque, Cham 2024, p. 57–59).

19. On page 6 of the explanatory memorandum to the Draft Act, it reads that the proposed legislation "aims to restore to persons appointed to judicial office, following nomination by the current Council, the legitimacy to administer justice as an independent and impartial tribunal established by law. The Draft Act assumes that this shall be accomplished through **comprehensive statutory regulation** of the effects of resolutions of the current Council. These effects are differentiated according to the legal situation in which persons appointed to judicial office between 2018 and 2025 found themselves following nomination by the improperly constituted National Council of the Judiciary".

The drafters have adopted as the criterion for determining the effects of the current Council's resolutions in appointment procedures the **gravity of the violation in relation to the legal situation** in which candidates in the respective groups found themselves, rather than merely the type of court and its position within the judiciary organisational structure. In this manner, the Draft Act provides for differentiation contingent upon the status held by the person appointed to judicial office following nomination by the current Council prior to the adoption of the resolution in this regard, that is to say, prior to their being recommended for judicial office.

The principal solution consists in restoring approximately 1,200 judges who applied for appointment to offices in another court or in a court of higher instance to their judicial posts in the court in which they assumed office pursuant to Article 179 of the Constitution of the Republic of Poland. This arrangement shall remain in force until the final conclusion of re-conducted proceedings concerning judicial appointments that were previously concluded by resolutions of the improperly constituted Council. In these proceedings – conducted before a properly constituted National Council of the Judiciary and subject to review by the Supreme Court – the status of this category of persons shall be definitively determined.

It must be concurred with the Draft Act that the adoption of this measure is not feasible in respect of persons whose first appointment to judicial office was made in a manner incompatible with Article 179 of the Constitution of the Republic of Poland. Taking into account the legal situation in which these persons found themselves, however, necessitates differentiating the effects which are to occur in relation to them. With regard to the group of approximately 1,000 entry-level judges who applied for judicial appointments as court assessors, court referendaries, and judicial assistants, and other persons who had passed the judicial examination, the Draft proposes validation of their status by the future, properly constituted NCJ through confirmation of the

effectiveness of the motions for their appointment to judicial offices formulated on the basis of resolutions adopted by the improperly constituted NCJ, with the effect of preventing future challenges to their status as properly appointed judges. As indicated in point 7 of the explanatory memorandum to the Draft Act, "[...] this solution takes into account the fact that these individuals were placed in a compulsory position and could not refrain from participating in the competition proceedings due to the risk of losing the right to hold judicial office." **Such a solution was proposed in the opinion of the Centre for Research, Studies, and Legislation with respect to the original draft regulation of *ex lege* effects presented on 3 February of this year by the Codification Commission**.

Furthermore, the Draft provides that this solution cannot be applied to the group of approximately 350 individuals in the common courts and approximately 80 individuals in the Supreme Court and the Supreme Administrative Court, who were not only appointed to judicial office in breach of Article 179 of the Constitution, but also found themselves in a different position than the court assessors, court referendaries, or judicial assistants mentioned above. This category consists primarily of individuals who applied for appointment to judicial office while working as prosecutors, advocates, attorneys-at-law, counsels of the General Counsel to the Republic of Poland, notaries, or academics. Again, as stated on page 7 of the explanatory memorandum, "[…] the acquisition by these individuals of legitimacy to exercise the administration of justice as an independent and impartial tribunal established by law may only occur through the re-initiation of judicial appointment proceedings." The explanatory memorandum further rightly states that "[…] there is no constitutional justification for validating the status of this category of individuals through statutory measures." This solution is entirely justified.

In summary, the normative solution adopted in the Draft Act should be regarded as appropriate. First, the Draft Act *effectively* restores individuals who had previously held judicial office to their prior judicial positions and grants them, in part, the delegation to exercise judicial powers under a temporary assignment. At the same time, the Draft Act denies the possibility of continued adjudication to individuals appointed to judicial office with the involvement of the unconstitutional NCJ if they had not previously served as judges. Secondly, the Draft Act requires a reassessment of all groups of judges appointed with the participation of the unconstitutional NCJ.

20. From this perspective, the mechanisms set out in the variant providing for the loss of effect of NCJ resolutions by operation of law appear to be consistent with the opinion of the Venice Commission, as it is not the judicial appointment itself that becomes invalid by operation of law, but rather the resolution of the unconstitutional NCJ by which the nomination was submitted to the President is rendered legally ineffective. Re-conducting the competitions will allow the National Council of the Judiciary to assess the individual qualifications of a candidate for judicial office. This assessment will be conducted in conditions of open competition to ensure that judicial functions are performed by individuals who meet the highest substantive criteria.

21. Another issue that should be addressed in the proposed legislation is the matter of judicial review procedures. In point 51 of the Opinion, the Venice Commission notes that appointees should be given the right to seek judicial review against the invalidation of their nomination or promotion in case the decisions on invalidation are not taken by a judicial body. The procedure would not necessarily have a suspensive effect.

    The proposed effects in relation to the group of judges who participated in the promotion procedure before the improperly constituted NCJ shall operate *ex nunc* with the entry into force of the Act, and their continuance shall depend on the final decision in the re-conducted proceedings – by a National Council of the Judiciary independent of the legislative and executive powers and properly constituted – concerning appointments to judicial offices that were previously concluded by resolutions of the improperly constituted Council.

    In the presented Draft Act, similarly to the version proposed by the Codification Commission with *an ex lege* effect, the judicial review mechanism will be based on reviewing an announcement of the Minister of Justice. Individuals affected by the Minister of Justice's notification concerning their inclusion within the effects of the proposed Act may appeal to the Supreme Court, which creates the basis for judicial review of the proposed measures and secures their right to court.

    It must be emphasised that the drafters assume that judicial review of the effects specified in the Act may fully occur within the framework of the repeated competition procedures for vacated judicial positions, since the opening of these competitions and the participation therein of persons appointed to judicial office following nomination by the current Council is inherently linked to the vacation of judicial positions. It should also be underlined that, although the legal and technical framework relies on the concept of repeated competitions (nomination proceedings), in

terms of the circle of eligible participants and the criteria taken into account in these proceedings, the Draft Act provides the National Council of the Judiciary with the possibility of deciding to uphold the effects arising from the Act.

22. The Draft Act also introduces a certain degree of individualisation of assessment by distinguishing between different cohorts of appointments. The procedure concerning removal from office shall be conducted in respect of entire groups of defectively appointed judges, delineated by rational criteria.

    The Draft introduces such an individualised approach by defining somewhat differently the mechanism for invalidating resolutions adopted in respect of assessors and judges, as opposed to resolutions adopted in competitions where the successful candidates were persons who had not previously held judicial office or served as assessors.

    Undoubtedly, this "individualisation" of assessment cannot assume the character of an evaluation of a given person's conduct. Since the purpose of the adopted regulation is to "restore the rule of law", and that the core defect lies in the "unconstitutionality" of the NCJ's composition under the current statutory framework, the review should primarily serve to eliminate the defect arising from proceedings conducted by an unauthorised body. It appears that the assessment conducted by the newly constituted NCJ cannot pertain to the evaluation of the attitudes of individuals who participated in the unconstitutional procedure. Such an assessment should not be conducted based on examining personal attitudes. It should therefore be noted that it is the very fact of the NCJ's appointment in breach of the Constitution that constitutes the basis for the invalidation of its resolutions – not the alleged "politicisation" of that body.

**B. Judicial review of the Minister of Justice's notice concerning the vacancy of a position**

23. The Draft Act also provides for the issuance of a specific act by an authority which has an informative nature and confirms the occurrence of specific effects resulting from the Act. The Draft Act assumes that its legal effects concerning the status of judges appointed following nomination by the NCJ constituted under 9a of the Act of 8 December 2017 shall occur by operation of law upon the Act's entry into force. The Draft requires the Minister of Justice to officially confirm these effects for individual judges by announcing (pl. *obwieszczenie*) their list in the "Monitor Polski" – Official Gazette of the Republic of Poland. The list must include each judge's forename, surname, date of birth, current office, appointment date, as well as the specific

effects of the Act applicable to them and the relevant legal basis. In light of the Draft Act, the act of the Minister of Justice is purely informative in nature.

Based on the published list, all entities and authorities for which this has legal significance will be able to ascertain the occurrence of the legal effects arising directly from the Act with respect to the judge concerned. Above all, however, this solution serves as an official confirmation of the statutory effects in relation to the judge concerned. The entry in the list announced by the Minister of Justice will thus serve as authoritative confirmation of the legal status of the judge listed therein as a result of the Act's entry into force.

24. Article 15 of the Draft Act provides for the **Minister of Justice** to issue, in the form of an **announcement** (pl. obwieszczenie), a list of persons who held judicial office following nomination through a procedure involving the unconstitutional NCJ, indicating the effects resulting from the Act. The announcement will include, among other things, information about judges returning, upon the Act's entry into force, to judicial office in positions they held on the date the NCJ adopted its resolution. The notice will also address all other circumstances covered by the Act (i.e., Article 3(1) and (2), Article 5(1), Article 10(1), (3) and (5), Article 11(1), Article 12(1) Article 13(1) (2) and (4)).

    It appears that such a notice should be regarded not as an administrative decision, but as a specific act within the field of public administration concerning rights arising under the law, within the meaning of Article 3(2)(4) of the Act – Law on Proceedings before Administrative Courts. Such an act would, in principle, be subject to review by an administrative court. However, pursuant to Article 15(3) of the Draft Act, **this act is excluded from administrative court review**. The Draft instead establishes a more effective mechanism for reviewing the contents of the Minister's announcement.

    It should be noted that the Draft **Act provides for judicial review of the announcement's content before the Supreme Court**. Pursuant to Article 15a of the Draft Act, any person affected by the Act's provisions may appeal to the Supreme Court against their inclusion in the list, challenging the correctness of how the Act's effects were determined in their case. The appeal may also concern omission from the list. Presidents of courts where affected judges previously served may also file such appeals. The Labour, Social Insurance and Public Affairs Chamber of the Supreme Court will have jurisdiction over these appeals. The Supreme Court will hear these cases in panels of five judges selected from the entire Supreme Court composition, including

judges delegated to the Supreme Court. Importantly, filing an appeal will not suspend the effects arising under the Act.

Article 15b 1. The Minister of Justice is to promptly announce in "Monitor Polski", the Official Gazette of the Republic of Poland, any Supreme Court decision quashing a list entry referred to in Article 15 (1), including the date and case reference number of the judgment. 2. In the event that the Supreme Court quashes an entry in the list, the Minister of Justice shall issue a supplementary announcement according to 15(1), limited to matters concerning the appellant, for the purpose of accurately determining the effects of the Act in their case. The announcement shall include the appellant's forename(s), surname, date of birth, position and the date of appointment to that position, as well as an indication of the legal effects and the relevant legal basis. Article 15a applies accordingly.

## C. Upholding existing judgments – stability of case law

25. According to the provisions of the Draft Act under analysis, judgments rendered by improperly constituted courts shall, in principle, remain in force, with the objective of **guaranteeing case law stability** and citizens' sense of legal certainty. However, the proposed regulatory framework provides that such judgments may be set aside exclusively upon satisfaction of precisely defined conditions.

    Structurally, the Draft Act establishes a review mechanism available to parties or participants in proceedings who satisfy two sequential conditions. First, they must have raised objections, within the timeframe prescribed for judicial recusal motions, concerning either: (a) the propriety of the first-instance court's composition; or (b) the independence or impartiality of a judicial panel member who was appointed following a resolution of the current Council. Such objections must specifically relate to the circumstances surrounding that person's judicial appointment. Second, the parties must have subsequently lodged appellate remedies on those grounds.

    The Draft Act assumes that the effects of judgments that have not been or cannot be set aside shall be recognised and observed in legal transactions, unless different consequences result from judgments of international courts issued in specific cases (cf., for example, the CJEU judgment in the case of 6 October 2021, C-487/19 W.Ż., para. 160, in the joined cases of 13 July 2023, C-615/20 and C-671/20 YP and Others, paras. 65-66). Moreover, with the exception of cases heard under the Act of 6 June 1997 – Code of Criminal Procedure (consolidated text, Journal of Laws

of 2025, item 46), the Act of 24 August 2001 – Code of Procedure in Cases of Petty Offences (consolidated text, Journal of Laws of 2024, item 977, as amended) and the Act of 10 September 1999 – Fiscal Penal Code (consolidated text, Journal of Laws of 2024, item 628, as amended), for the sake of the stability of judgments, it has been decided that if a final judgment or decision on the merits of a case has irreversible legal effects, the court shall limit itself to declaring that the judgment was issued in breach of law and indicating the circumstances that led to such a finding. In such a case, a party will, nonetheless, be entitled to claim compensation for damage caused by the issuance of such a judgment without the prior establishment of the judgment's non-conformity with law in separate judicial proceedings.

**D. Application for re-entry to the roll of attorneys-at-law or advocates**

26. Pursuant to Article 8(2) of the Draft Act, an individual whose judicial service relationship shall terminate upon the entry into force of the proposed regulation, and who, on the date of the adoption of the resolution by the NCJ in the nomination procedure, was practising as an attorney-at-law, may apply for entry to the roll of attorneys-at-law in accordance with the principles set forth in the Act of 6 July 1982 on Attorneys-at-Law (Journal of Laws of 2024, item 499; hereinafter also "the AAL"). As regards the matter of re-entry to the profession of attorney-at-law by a judge who participated in the nomination procedure involving the unconstitutional NCJ, this matter is regulated to a sufficient extent within the Act on Attorneys-at-Law itself.

27. The solutions contained in the Draft Act should be regarded at the very least as a form of legislative superfluity. Since the removal from the roll occurred at the request of the attorney-at-law who transitioned to judicial profession, and having been struck off for this reason (Article 26 of the AAL in conjunction with Article 29(1) of the AAL), such an individual retains the right to apply for re-entry to the roll under the procedure set forth in Article 29 ² (1) of the AAL. Moreover, the individual is guaranteed re-entry provided that the requirements stipulated in Article 24(1) of the AAL are satisfied. This procedure fulfils all guarantees of a fair enrolment process with individual examination of each case and the constitutional right to appeal against a refusal of re-entry to the administrative court. The procedure applies to any attorney-at-law who, after transitioning to the judicial profession, wishes to return to practicing as an attorney-at-law.

## IV. Concluding remarks

The problem of defective judicial appointments made since the end of 2017 is systemic in nature and stems from the unconstitutional composition of the National Council of the Judiciary. It is not the result of factors that can be evaluated on an individual basis in relation to a specific judge's conduct (e.g. corruption or collaboration with an undemocratic regime). In other words, the paradox of a judge who cannot adjudicate arises from the constitutional defect in the procedure through which they acquired their current status – not from their individual qualifications. There is no doubt that persons appointed to judicial office do not enjoy the full constitutional protection of irremovability.

The mechanism for reviewing decisions of the unconstitutional NCJ should be consistent with established standards on judicial independence as developed in the case-law of the European Court of Human Rights and the Court of Justice of the European Union, as well as with the relevant requirements set out in the opinions of the Venice Commission.

This opinion has provided a preliminary assessment of the draft Act of 24 April 2025 on restoring the right to an independent and impartial tribunal established by law through regulation of the effects of resolutions adopted by the National Council of the Judiciary between 2018 and 2025. The Centre for Research, Studies, and Legislation of the National Bar Council of Attorneys-at-Law views the model described in the Draft Act – which provides for a systemic mechanism to address the status of individuals defectively appointed to judicial office after 2017 – as the only effective measure capable of achieving the intended objective. In the course of further legislative work, the Centre will submit a more detailed opinion regarding the draft Act officially presented in the legislative process.

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