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**2020 Rule of Law Report  
Country Chapter on the rule of law situation in Poland**

*Accompanying the document*

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PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**2020 Rule of Law Report  
The rule of law situation in the European Union**

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## **ABSTRACT**

Poland's justice reforms since 2015 have been a major source of controversy, both domestically and at EU level, and have raised serious concerns, several of which persist. The reforms, impacting the Constitutional Tribunal, the Supreme Court, ordinary courts, the National Council for the Judiciary and the prosecution service, have increased the influence of the executive and legislative powers over the justice system and therefore weakened judicial independence. This led the Commission to launch the procedure under Article 7(1) TEU in 2017, which is still under consideration by the Council. In 2019 and 2020, the Commission launched two new infringement procedures to safeguard judicial independence and the Court of Justice of the EU has granted interim measures to suspend the powers of the Supreme Court's Disciplinary Chamber with regard to disciplinary cases concerning judges.

A developed legal and institutional framework exists to prevent corruption and promote transparency. A dedicated government anti-corruption programme focusses on providing training and guidance for officials. However, structural weaknesses have been identified in areas such as the current asset declaration schemes and lobbying regulations. Plans are ongoing for transparency of public life legislation to reorganise key preventive provisions into a single legal act, but concerns exist over repeated delays. Concerns also exist over the independence of the main institutions responsible for preventing and fighting corruption, considering in particular the subordination of the Central Anti-Corruption Bureau to the executive and the fact that the Minister of Justice is at the same time the Prosecutor General.

The Polish legal framework concerning media pluralism is based both on constitutional safeguards and sectorial legislation. Relevant safeguards for the media regulator, the National Broadcasting Council, appear to be in place, however some concerns regarding its independence have been raised. The role of the regulator has been also reduced by the 2016 reform, which assigned the competences over the management of the Polish public media to a National Media Council (RMN). The legal framework on media ownership transparency is not equally applicable to all media actors. With regard to the protection of journalists, the criminalisation of insulting public officials remains problematic.

Other components of the system of checks and balances are also under pressure. Reforms have been adopted through expedited legislative procedures with limited consultation of stakeholders or opportunities for the opposition to play its role in the law-making process. Poland has a vibrant civil society and strong professional associations of judges and prosecutors, which participate in the public debate. Nevertheless, organisations have been subject to unfavourable statements by politicians. Despite the difficult environment, the Ombudsman has continued to play a key role as a rule of law safeguard.

## **I. JUSTICE SYSTEM**

The Polish justice system is separated in two main branches, administrative and ordinary judiciary. The Supreme Administrative Court and 16 administrative courts exercise control over public administration, including the lawfulness of measures of bodies of local government and of territorial organs of government administration. The ordinary judiciary, supervised by the Supreme Court<sup>1</sup>, consists of three levels: 11 appeal courts, 46 regional courts and over 300 district courts. Judges are appointed by the President of the Republic at the request of the National Council for the Judiciary. The Constitutional Tribunal, which adjudicates notably on the Constitutionality of legislation, is composed of 15 judges chosen by the Sejm (lower chamber of the Parliament) for a term of office of 9 years. The National Council for the Judiciary is tasked by the Constitution to safeguard judicial independence. A particular characteristic of the prosecution system, which is not part of the independent judiciary, is that the Prosecutor General and the Minister of Justice are the same person. The Constitution provides that advocates and legal counsellors can self-regulate their practice.

### **Independence**

**The justice reforms started in November 2015 were continued.** These reforms were carried out through more than 30 laws relating to the entire structure of the justice system, including the Constitutional Tribunal, the National Council for the Judiciary, the Supreme Court, the ordinary courts, administrative courts, and the prosecution service. Various aspects of the justice reform raise serious concerns as regards the rule of law, in particular judicial independence. This is the main focus of the Article 7(1) TEU<sup>2</sup> procedure initiated by the European Commission, which is still under consideration by the Council. The European Parliament has also raised concerns regarding the rule of law in Poland<sup>3</sup>. Furthermore, certain aspects of these reforms are subject to infringement proceedings<sup>4</sup>. The safeguarding of judicial independence in Poland was one of the country-specific recommendations addressed in the context of the 2020 European Semester<sup>5</sup>.

**The perception of judicial independence among the general public and companies is low and has shown a decreasing trend in recent years.** Whereas 34% of the general public perceives independence of courts and judges as ‘fairly or very good’ in 2019, 27% of companies shares the same perception<sup>6</sup>. The reason most often invoked for the perceived lack of judicial independence is related to interference or pressure from the Government and politicians<sup>7</sup>. The public debate on the judiciary is marked by strong tensions. In 2019, Polish

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

<sup>2</sup> Commission IP/17/5367.

<sup>3</sup> European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary; resolution of 1 March 2018 on the Commission’s decision to activate Article 7(1) TEU as regards the situation in Poland; resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland.

<sup>4</sup> In two cases, the Court of Justice found an infringement (C-192/18 and C-619/18). C-719/19 is pending, while a fourth procedure was launched on 29 April 2020.

<sup>5</sup> Council Recommendation of 20 July 2020 on the 2020 National Reform Programme of Poland and delivering a Council opinion on the 2020 Convergence Programme of Poland, p. 15 (OJ C 282/21); see also European Commission, Country Report Poland 2020, SWD(2020) 520 final, p. 6 and 36.

<sup>6</sup> Figures 44-47, 2020 EU Justice Scoreboard. The level of perceived judicial independence is categorised as follows: very low (below 30% of respondents perceive judicial independence as fairly good and very good); low (between 30-39%), average (between 40-59%), high (between 60-75%), very high (above 75%).

<sup>7</sup> Figures 45 and 47, 2020 EU Justice Scoreboard.

media reported that high-ranking officials<sup>8</sup> had allegedly been associated with a smear campaign against judges who openly criticised the justice reforms<sup>9</sup>.

**Court of Justice judgments have confirmed EU law requirements on judicial independence.** In 2019, the Court of Justice of the European Union ('the Court of Justice') issued two rulings confirming that the legislation contested by the Commission in the context of infringement proceedings was in violation of EU law as regards requirements of judicial independence<sup>10</sup>. The Court of Justice ruled against changes to the retirement regime for Supreme Court judges, which resulted in prematurely terminating the mandate of around one third of the judges of that court<sup>11</sup>. Furthermore, the Court of Justice found the Polish legislation concerning the new retirement regime of ordinary court judges to be contrary to EU law, in particular on the grounds that it did not contain sufficient safeguards for judicial independence<sup>12</sup>. Prior to the rulings, the Polish authorities had already amended the national law. The Court of Justice was also seized by Polish courts in more than 10 preliminary ruling procedures as regards the justice reform<sup>13</sup>.

**Concerns over the independence and legitimacy of the Constitutional Tribunal, raised by the Commission under the Article 7(1) TEU procedure, have so far not been resolved<sup>14</sup>.** In 2019, the Ombudsman and the Supreme Court<sup>15</sup> continued to express concerns on the functioning and legitimacy of the Tribunal. Concerns relating to the Constitutional Tribunal have been reiterated by the Venice Commission<sup>16</sup>, and by international organisations and NGOs<sup>17</sup>. Cases concerning politically sensitive issues, in particular those concerning the

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<sup>8</sup> These included officials from the Ministry of Justice. Certain members of the newly composed National Council for the Judiciary were reportedly involved. Cf. Onet.pl (2019) '*Onet's investigation. The farm of trolls in the Ministry of Justice, that is 'we will not put you down for doing good'*'. Statements of PACE (2020), para 11; according to NGOs, smear campaigns against judges started already in 2017 (Helsinki Foundation for Human Rights report of 2017; Amnesty International report of 2019).

<sup>9</sup> Whereas a deputy Minister for Justice allegedly involved in the campaign resigned, others denied the allegations. See a report of the judges' association Iustitia of 4 November 2019 (Iustitia Quarterly 3(37)2019). A statement of the Helsinki Foundation of Human Rights of 20 August 2019.

<sup>10</sup> Judgments of the Court of Justice of the European Union of 24 June 2019, *Commission v Poland*, C-619/18; and of 5 November 2019, *Commission v Poland*, C-192/18.

<sup>11</sup> Judgment of the Court of Justice of the European Union of 24 June 2019, *Commission v Poland*, C-619/18. A legislative amendment had already been adopted by the Polish authorities to remove the provisions in question.

<sup>12</sup> Judgment of the Court of Justice of the European Union of 5 November 2019, *Commission v Poland*, C-192/18. A legislative amendment had already been adopted by the Polish authorities to remove the difference in mandatory retirement age of male and female judges, and changed the regime of prolongation of the active service of ordinary court judges (see below).

<sup>13</sup> See already judgment of the Court of Justice of the European Union of 19 November 2019, *A.K.*, C-585/18, C-624/18 and C-625/18; and judgment of 26 March 2020, *Miasto Łowicz and others*, C-558/18 and C-563/18, where the Court declared these two requests inadmissible.

<sup>14</sup> Cf. paras 92-113 of the Reasoned Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM/2017/0835 final - 2017/0360 (NLE)). Questions regarding the composition of the Tribunal have also been brought before the European Court of Human Rights; Case *Xero Flor v. Poland* (No. 4907/18) communicated on 2 September 2019.

<sup>15</sup> Ombudsman's information of his office's activities in 2019; Ombudsman's request of 22 November 19 to recuse a judge of the Constitutional Tribunal; Supreme Court's statement of 28 February 2020.

<sup>16</sup> Venice Commission's opinions CDL-AD(2020)017; CDL-AD(2017)031; CDL AD(2016)026.

<sup>17</sup> In open letters, judges of the Constitutional Tribunal expressed concerns over the functioning of the Tribunal alleging in particular mishandling of cases by its President and unlawful recomposition of the already designated hearing benches (see index for references); 2017 Report of Special Rapporteur on the independence of judges and lawyers on his mission to Poland; 2018 statement of the Batory foundation; 2018 report of the Helsinki Foundation.

justice reforms, have been initiated by the Prime Minister<sup>18</sup>, the Marshal of the Sejm<sup>19</sup>, the National Council for the Judiciary<sup>20</sup> and the newly created Disciplinary Chamber of the Supreme Court<sup>21</sup>. Certain cases initiated by the Prosecutor General and by the Disciplinary Chamber seek an assessment of the compatibility with the Constitution of EU Treaty provisions<sup>22</sup>.

**The National Council for the Judiciary is composed mainly of politically appointed members.** The 2018 justice reform changed the procedure for the appointment of judges-members of the National Council for the Judiciary (NCJ)<sup>23</sup>. The judges-members, who constitute the majority of the members of the NCJ, are now directly appointed by the Sejm instead of by their peers as previously. The new composition of the NCJ did not take into account the Council of Europe recommendations<sup>24</sup> and is one of the concerns raised by the Commission in its Reasoned Proposal adopted under the Article 7(1) TEU procedure relating to the rule of law in Poland<sup>25</sup>. On 25 March 2019, upon request of the NCJ, the Constitutional Tribunal declared that the new procedure of appointment of the NCJ's judges-members complies with the Constitution<sup>26</sup>. On 19 November 2019, upon a preliminary reference of the Supreme Court on the independence and impartiality of the newly created Disciplinary Chamber, the Court of Justice considered that for the participation of a Council for the Judiciary in making the appointment process of judges by the President of the Republic more objective, such body must itself be sufficiently independent of the legislature and executive and of the body to which it gives an opinion<sup>27</sup>. On 23 January 2020, the Supreme Court,

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<sup>18</sup> The case concerned the constitutionality of the Supreme Court's resolution of 23 January 2020 on judicial appointments in which the Supreme Court indicated that it implemented the preliminary ruling of the Court of Justice of 19 November 2019 in case C-585/18. The Prime Minister lodged a request on 24 February 2020 and the ruling was delivered on 20 April 2020 (case U 2/20).

<sup>19</sup> The case concerned the possibility for the Supreme Court to issue the resolution of 23 January 2020. The Marshal of the Sejm lodged, pre-emptively, a request on 22 January 2020 and the ruling was delivered on 21 April 2020 (case Kpt 1/20).

<sup>20</sup> The case on the constitutionality of the new composition of the National Council for the Judiciary was lodged on 27 November 2018 and the Constitutional Tribunal delivered the ruling on 25 March 2019 (case K 12/18).

<sup>21</sup> The Disciplinary Chamber referred a question to the Constitutional Tribunal on 13 December 2019 on the possibility of recusing a judge appointed upon a request by the NCJ in its new composition and a ruling was delivered on 4 March 2020 (case P 22/19).

<sup>22</sup> Cf. Cases K 7/18 and in I DO 16/19, currently pending.

<sup>23</sup> Pursuant to the Constitution, the NCJ consists of ex officio members (the First President of the Supreme Court, the minister of Justice, the President of the Supreme Administrative Court and a representative of the President of the Republic) and of chosen members (4 members chosen by the Sejm from among its deputies, 2 members chosen by the Senate from among senators, and 15 judges chosen from among judges). The term of office of chosen members is of four years.

<sup>24</sup> The 2010 Recommendation of the Committee of Ministers of the Council of Europe recommends that, where a council for the judiciary has been established, 'not less than half the members should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary' (Recommendation CM/Rec(2010)12 of the Committee of Ministers, para 27).

<sup>25</sup> Cf. Paras 137-145 of the Reasoned Proposal. Similar concerns have also been raised by the Venice commission (opinion (CDL-AD(2017)031) and by GRECO in 2019 Second Addendum to the Second Compliance Report, para. 65. Cases concerning the premature dismissal of the previous judges-members of the NCJ and its new composition have been brought before the European Court of Human Rights: applications no. 39650/18 *Żurek vs Poland* (communicated on 14 May 2020), 43572/18 *Grzęda vs Poland* (communicated on 9 July 2019), 43447/19, 49868/19 and 57511/19 *Reczkowicz and two Others vs Poland* (communicated on 5 June 2020).

<sup>26</sup> Ruling of 25 March 2019 in case K 12/18.

<sup>27</sup> Judgment of the Court of Justice of the European Union of 19 November 2019, A.K., C-585/18, C-624/18 and C-625/18, paras 137-145. The Court also stated that "the referring court will need to assess, in the light, where relevant, of the reasons and specific objectives alleged before it in order to justify certain of the

referring to this ruling of the Court of Justice, issued a resolution<sup>28</sup> stating that the newly composed NCJ is not independent and asserting that new Supreme Court judges selected by it are not allowed to adjudicate cases<sup>29</sup>. The resolution was subsequently found to be inconsistent with the Constitution and with EU law by the Constitutional Tribunal, adjudicating upon request of the Prime Minister and the Marshal of the Sejm, supported by the President of the Republic and by the Prosecutor General<sup>30</sup>. The Supreme Court, however, has continued to apply its resolution<sup>31</sup>. The NCJ continues to propose candidates for judicial appointments to the President of the Republic<sup>32</sup>.

**The two new chambers in the Supreme Court, created under the 2018 reform, have been granted new powers in 2019.** The Disciplinary Chamber and the Chamber of Extraordinary Control and Public Affairs are composed solely of new judges appointed at the request of the newly composed National Council for the Judiciary (NCJ). Following the ruling of the Court of Justice of 19 November 2019<sup>33</sup>, the Supreme Court in three rulings found the Disciplinary Chamber not to be an independent court within the meaning of EU and national law<sup>34</sup>. The law of 20 December 2019 granted the new Chamber of Extraordinary Control and Public Affairs the sole power to decide on issues related to judicial independence<sup>35</sup>. This part of the said law is one of the elements raised in the infringement proceedings initiated by the Commission on 29 April 2020<sup>36</sup>. The new Disciplinary Chamber has also been given the competence to lift the immunity of judges when criminal proceedings are brought against them (a competence previously exercised by disciplinary courts of first instance). These new powers granted to the chambers have been criticised by a number of national institutions and the Venice Commission<sup>37</sup>.

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measures in question, whether, taken together, the factors referred to in paragraphs 143 to 151 above and all the other relevant findings of fact which it will have made are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the Disciplinary Chamber to external factors, and, in particular, to the direct or indirect influence of the legislature and the executive, and as to its neutrality with respect to the interests before it and, thus, whether they may lead to that chamber not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law” (para 153).

<sup>28</sup> The resolution of three joined Chambers of the Supreme Court of 23 January 2020; this resolution is binding on the Supreme Court.

<sup>29</sup> Already in 2018, the European Network of Councils for the Judiciary suspended the membership of the NCJ due to the concerns relating to its independence and on 27 May 2020, the Board of the network proposed to expel the NCJ.

<sup>30</sup> Rulings of 20 April 2020 in case U 2/20 and of 21 April 2020 in case Kpt 1/20.

<sup>31</sup> E.g. a decision of the Criminal Chamber of 25 June 2020 in case I KZP 1/20.

<sup>32</sup> On 4 May 2020, the President of the Republic made six appointments to the Supreme Court (including 3 members of the Disciplinary Chamber). On 27 May 2020, the President of the Republic appointed 77 new judges to all levels of ordinary and administrative judiciary.

<sup>33</sup> Judgment of the Court of Justice of the European Union of 19 November 2019, A.K., C-585/18, C-624/18 and C-625/18.

<sup>34</sup> In particular judgment of the Supreme Court of 5 December 2019 in case III PO 7/18, and two rulings of 15 January 2020 in cases III PO 8/18 and III PO 9/18.

<sup>35</sup> This power includes the examination of motions to recuse judges from cases in view of doubts as to their independence or impartiality. Such decisions are de facto immunised from being changed by other Chambers of the Supreme Court. This was explicitly criticised by the Venice Commission (opinion CDL-AD(2020)017), para 40, which recalled that such motions, based on the involvement of the newly composed NCJ in the judicial appointment procedure, will be decided by judges appointed in the same way.

<sup>36</sup> In these infringement proceedings, the Commission considers that this law prevents Polish courts from fulfilling their obligation to apply EU law or request preliminary rulings from the Court of Justice of the European Union.

<sup>37</sup> Cf. Venice Commission (opinion CDL-AD(2020)17; OSCE-ODIHR (Urgent Interim Opinion JUD-POL/365/2019[AIC]); Ombudsman’s opinion of 7 January 2020; the Supreme Court’s opinions of 16 and 23

**The Supreme Court has been subject to new reforms, in particular as regards the procedure for appointing its First President.** A few months before the end of the term of office of the Supreme Court's previous First President, a new law, adopted by the lower house of the Parliament (Sejm)<sup>38</sup> amended the procedure for appointment of the new First President<sup>39</sup>. The law which came into force in February 2020 provides that the President of the Republic can appoint an acting First President to be in charge of organising the procedure for selecting candidates and changes the quorum necessary to vote on a list of candidates to the office<sup>40</sup>. On 1 May 2020, the President of the Republic appointed an acting First President, from among the judges who, according to the aforementioned Supreme Court resolution<sup>41</sup>, are no longer empowered to adjudicate. The selection procedure was subject to controversy<sup>42</sup>, in particular as the acting First President refused to exclude from that procedure members of the Disciplinary Chamber in spite of the lack of guarantees of their independence<sup>43</sup>. On 26 May 2020, the President of the Republic appointed a new First President who is also one of the judges who, according to the aforementioned Supreme Court resolution, are no longer empowered to adjudicate.

**The disciplinary regime for judges has been amended and is actively used.** The disciplinary regime, substantially amended in 2018<sup>44</sup>, has raised concerns that it lacks appropriate safeguards to protect judicial independence, due to the risk that judges may be sanctioned because of the content of judicial decisions, including decisions to request preliminary rulings from the Court of Justice. Moreover, concerns remain with regard to the independence of the Disciplinary Chamber of the Supreme Court, which acts as the final instance for disciplinary cases and is composed solely of judges selected by the newly composed NCJ<sup>45</sup>. The Commission decided on 10 October 2019 to refer Poland to the Court of Justice, contesting these new arrangements<sup>46</sup>. The disciplinary regime allows judges to be subject to disciplinary proceedings in view of the content of their judicial decisions or

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December 2019. It should be noted that cases concerning the independence of the two new Chambers have been brought before the European Court of Human Rights. See applications no. 43447/19, 49868/19 and 57511/19 *Reczkowicz and two Others vs Poland* (communicated on 5 June 2020).

<sup>38</sup> Law of 20 December 2019 amending the Law on the Ordinary Courts Organisation and certain other laws. This change was also criticised by the Venice Commission in its Opinion of 16 January 2020 (CDL-AD(2020)017), paras 51-55.

<sup>39</sup> The Law of 20 December 2019 provides for a three-tier selection process, granting the President of the Republic the right to invalidate a selection procedure if considered in breach of the law (without setting out any criteria in that respect). If no candidates have been selected by the General Assembly of the Supreme Court following the expiry of the term of office of the sitting First President, the President of the Republic may appoint a person among the Supreme Court judges as acting First President, who is to re-convene the General Assembly in order to ensure that the President of the Republic nominate a candidate to the office of the First President.

<sup>40</sup> The law increased the quorum in the General Assembly of Supreme Court necessary for selecting a list of five candidates to the post of the First President of the Supreme Court: at first stage, 84 Supreme Court judges need to participate in the Assembly. If this number is not met, 75 judges need to be present. If again that number of judges is not met, the next Assembly composed of at least 32 Supreme Court judges would be able to select five candidates.

<sup>41</sup> This resolution has been contested by the Constitutional Tribunal (see the paragraph on the NCJ above).

<sup>42</sup> In a statement of 23 May 2020, a majority (50) of Supreme Court judges, appointed to the Court prior to the justice reform, criticised the procedure as unconstitutional.

<sup>43</sup> See the paragraph on the NCJ above.

<sup>44</sup> Law of 8 December 2017 on the Supreme Court which entered into force on 3 April 2018. For an overview of the new disciplinary regime, see Commission press release of 10 October 2019 IP/19/6033.

<sup>45</sup> See the paragraph on the NCJ above.

<sup>46</sup> Case C-791/19 (pending). A disciplinary regime can be used as a system of political control of the content of judicial decisions in violation of the requirements of judicial independence as established by the Court of Justice (cf. Case C-216/18 PPU, *LM*, 25 July 2018, para 67).

statements they make about the functioning of constitutional bodies in Poland<sup>47</sup>. On 8 April 2020, following a request for interim measures, the Court of Justice ordered Poland to immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber with regard to disciplinary cases concerning judges<sup>48</sup>. Following the order, the Disciplinary Chamber referred a question of law to the Constitutional Tribunal, contesting the constitutionality of Treaty provisions on which the interim measures order is based<sup>49</sup>. The law of 20 December 2019 further broadened the notion of disciplinary offence and increased the risk to judicial independence. This issue is an element of the new infringement proceedings launched by the Commission on 29 April 2020<sup>50</sup>. The new disciplinary regime and the law of 20 December 2019 have led courts of other Member States, in the context of judicial cooperation within the EU, to question the judicial safeguards of the Polish system<sup>51</sup>.

**Judges are subject to numerous new requirements.** The law of 20 December 2019 obliges all judges in Poland to disclose personal information, such as their membership in associations, functions in non-profit organisations or their membership and position in political parties prior to 29 December 1989. Such provisions raise concerns as regards the right to respect for private life and the right to protection of personal data as guaranteed by the Charter of Fundamental Rights of the EU and the General Data Protection Regulation<sup>52</sup>. These new requirements follow other requirements introduced in 2018 relating to the prolongation of the active service of ordinary court judges, which is now decided by the National Council for the Judiciary (NCJ). While this change was a response to the infringement proceedings<sup>53</sup>, it has not been sufficient to address the problem regarding the impact on judicial independence, due to the concerns relating to the NCJ.

**A general prohibition for Polish courts to challenge the powers of courts and tribunals, constitutional organs and law enforcement agencies has been introduced by the law of 20 December 2019.** The law prevents Polish judges from ruling on the lawfulness of judicial appointments and on a judge's power to perform judicial functions. The same prohibition

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<sup>47</sup> In 2019, action was taken against judges who, following the Court of Justice ruling of 19 November 2019, publicly questioned the legitimacy of the NCJ and the validity of judicial appointments carried out at its request. For an overview of pending disciplinary investigations and proceedings, see e.g. Helsinki Foundation for Human Rights' report 'The Time of Trial. How do changes in justice system affect Polish judges?' of 24 July 2019; the 2019 Batory Foundation statement '*Pogłębiający się kryzys w Polsce. – Kiedy w Europie umiera praworządność*'.

<sup>48</sup> Order of the Grand Chamber of 8 April 2020 in case C-791/19 R. In view of implementing the order, on 5 May 2020, the acting First President of the Supreme Court adopted Regulation no 55/2020 and the President of the Disciplinary Chamber adopted Regulation no 21/2020.

<sup>49</sup> The question focuses on the assessment of compliance with the Constitution of the Republic of Poland of the provisions of the Treaty on European Union and the Treaty on the Functioning of the European Union as regards the scope of the obligation of a Member State to implement interim measures granted by the Court of Justice in matters concerning the system and the functioning of constitutional judiciary organs (file ref. No. P7/20).

<sup>50</sup> Commission press release of 29 April 2020, IP/20/772.

<sup>51</sup> E.g. on 17 February 2020, the Karlsruhe Higher Regional Court suspended the execution of a European Arrest Warrant concerning a Polish citizen, raising concerns about the possibility of ensuring his right to fair trial. See: OLG Karlsruhe, order of 17 February 2020 – Aktenzeichen Ausl 301 AR 156/19. On 31 July 2020, the Court of Amsterdam made a request for a preliminary ruling in the context of execution of a European Arrest Warrant issued against a Polish citizen seeking clarifications regarding its obligations under EU law in the light of the recent changes in the Polish justice system. See: Rechtbank Amsterdam, order of 31 July 2020 – ECLI:NL:RBAMS:2020:3776 and Case C-354/20 PPU.

<sup>52</sup> Commission press release of 29 April 2020, IP/20/772.

<sup>53</sup> Judgment of the Court of Justice of the European Union of 5 November 2019, *Commission v Poland*, C-192/18.



applies to judges assessing the lawfulness of the composition of a hearing bench. These requirements have been challenged in the infringement proceedings launched by the Commission on 29 April 2020<sup>54</sup>. The same law introduced new limits on statements and actions that can be made by judges, courts and other independent bodies, who are now prohibited from challenging the powers of judicial and constitutional bodies as well as law enforcement agencies. The law imposes such a prohibition also as regards statements or actions of bodies of judicial self-governance that challenge judicial appointments. These changes have given rise to concerns of national institutions and the Venice Commission<sup>55</sup>. As regards the court presidents, following a dismissal of over 70 court presidents by the Minister of Justice no means have been proposed to remedy their situation<sup>56</sup>. A case concerning such dismissals has been brought before the European Court of Human Rights<sup>57</sup>.

**The fact that the Minister of Justice is at the same time the Prosecutor General raises particular concerns regarding the power to issue instructions in individual cases and to transfer prosecutors.** Following the reforms carried out in 2016, the position of Prosecutor General and that of Minister of Justice were merged. The Minister of Justice therefore directly wields the powers vested in the highest prosecutorial office, including the authority to issue instructions to prosecutors in specific cases. In 2019, the power of the General Prosecutor, or higher ranking prosecutors, to issue instructions<sup>58</sup> in individual cases (including not to prosecute) was used on several occasions, including in politically relevant cases<sup>59</sup>. This power has been subject to criticism including by the Venice Commission<sup>60</sup>. Furthermore, the Prosecutor General has the authority to decide on the secondment of prosecutors, without their consent and without providing justification, to another post for up to 6 months. Moreover, he can discretionally reattribute cases among prosecutors, which has equally given rise to concerns that political considerations could have an impact on the conduct of criminal proceedings<sup>61</sup>.

## Quality

**Funding for the judiciary has seen a gradual increase since 2016.** Poland spends around EU average per inhabitant on courts. At the same time, Poland has one of the highest general government expenditures for the justice system (including prosecution and legal aid) as a percentage of GDP<sup>62</sup>.

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<sup>54</sup> Cf. Commission press release IP/20/772.

<sup>55</sup> Cf. Venice Commission (opinion CDL-AD(2020)017); OSCE-ODIHR (Urgent Interim Opinion JUD-POL/365/2019[AIC]); Ombudsman's opinion of 7 January 2020; the Supreme Court's opinions of 16 and 23 December 2019.

<sup>56</sup> From August 2017 to February 2018, the Minister of Justice had the discretionary power to dismiss and appoint court presidents of all ordinary courts; cf. Paras 151-162 of the Reasoned Proposal.

<sup>57</sup> Applications no. 26691/18 *Broda vs Poland* and no. 27367/18 *Bojara vs Poland* (communicated on 2 September 2019).

<sup>58</sup> The instructions are used in politically sensitive cases in which prosecutors become subject to disciplinary proceedings; cf. resolution of the Lex Super Omnia Association of 26 April 2020. Moreover, media stated that a number of individual instructions is not reported or put in writing in sensitive cases (cf. *Gazeta Prawna* '21 osobistych instrukcji Zbigniewa Ziobry dla prokuratorów. Nie oznacza to, że nieformalnych nacisków w ogóle nie ma.' of 2018; *Gazeta Wyborcza* 'Minister kontroli, nacisków i ręcznego sterowania. Zbigniew Ziobro dzieli i rządzi w resorcie sprawiedliwości.' of 2019).

<sup>59</sup> E.g. investigation concerning the Financial Supervisory Commission. See also the footnote above.

<sup>60</sup> Venice Commission (opinion CDL-AD(2017)028); see also the association of prosecutors 'Lex Super Omnia' statements of 26 April and of 3 June 2020.

<sup>61</sup> Polish Ombudsman's communique regarding the case of prosecutor Krasoń of 2019.

<sup>62</sup> Figure 33, 2020 EU Justice Scoreboard.

**As regards human resources, a number of judicial posts remain vacant.** It is noted that prior to the changes in composition of the NCJ in 2018, the Minister of Justice delayed the publication of vacant posts in courts, which is a precondition for any person to apply to such a post. This was raised as an issue by the Ombudsman<sup>63</sup> and by representatives of judicial associations<sup>64</sup>, who argued that understaffed courts remain the main reason for their decreasing efficiency.

**There is room for improvement as regards digitalisation of the justice system.** Compared to previous years, Poland improved the availability of online information about the judicial system for the general public<sup>65</sup>. Although some important progress has been made, the need to introduce IT tools in the context of judicial procedures remains<sup>66</sup>. Calls for further efforts to digitalise courts came from associations of judges<sup>67</sup>, the Ombudsman<sup>68</sup>, and the National Bar Council<sup>69</sup>, who indicate that the lack of digitalisation became a recurrent issue during the time of COVID-19 pandemic.

**Reforms concerning legal aid, court fees and civil procedure have entered into force in 2019.** Free legal aid and free civil advice is available in Poland to any person who cannot afford to receive paid advice and who makes a declaration to that effect. There are also plans to gradually enable free mediation<sup>70</sup>. The National Bar Council expressed concerns over amendments to the code of civil procedure adopted in 2019 which would not contribute to an increase in the pace of judicial proceedings<sup>71</sup>.

## Efficiency

**The overall performance of ordinary courts is close to the EU average when it comes to length of proceedings.** However, in 2018, there was an increase in the estimated time needed to resolve litigious civil and commercial cases, as well as a deterioration of the rate of resolving such cases. Whereas the number of such cases has dropped, the number of pending

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<sup>63</sup> Polish Ombudsman's statement of 9 October 2018 submitted to the Ministry of Justice.

<sup>64</sup> Prawo.pl 'Wakaty uderzają w sądy...najbardziej okręgowe' of 2019.

<sup>65</sup> Figure 22, 2020 EU Justice Scoreboard.

<sup>66</sup> The following possibilities currently exist: taking evidence with the use of technical devices enabling this activity to be performed remotely; replaying the recorded video and sound at the hearing; preparing minutes of a hearing or a court session using an audio or video recording device; sharing the content of the minutes and letters in electronic form via the ICT system supporting court proceedings or another teleinformation system used to make them available and possibility for the parties and participants of the proceedings to obtain recorded sound or image and sound from the case files; admittance of electronic evidence; electronic writ-of-payment proceedings; and making deliveries via the ICT system.

<sup>67</sup> 'Iustitia' association of judges' statement of 9 May 2020.

<sup>68</sup> Ombudsman's letter of 9 June 2020 submitted to the Ministry of Justice.

<sup>69</sup> The Bar resolution (2020) of 12 March 2020 (No. 155/20) with appendix.

<sup>70</sup> Prawo.pl (2019) 'Finansowe zachęty mają motywować do korzystania z mediacji.'. Poland is also organising a wide range of activities to encourage the use of mediation (figure 20, 2020 EU Justice Scoreboard).

<sup>71</sup> The resolution of the National Bar Council No. 61/2019. In particular, the National Bar Council underlines that the amendments introduce excessive formalism of procedure.

cases increased<sup>72</sup>. Poland remains under enhanced supervision of the Committee of Ministers of the Council of Europe for the length of civil and criminal proceedings<sup>73</sup>.

**The performance of administrative courts is above the EU average.** A slight decrease is visible in the number of incoming administrative cases and in the estimated time needed to resolve them. The rate of resolving such cases remains above 100%<sup>74</sup>.

## **II. ANTI-CORRUPTION FRAMEWORK**

The legal and institutional framework to prevent and combat corruption is largely in place. The Central Anti-Corruption Bureau (CAB) is the specialised anti-corruption body. The CAB combines intelligence and police functions and can trigger both administrative and criminal proceeding. The planned Law on the ‘Transparency of Public Life’ aims to reorganise key preventive provisions into a single legal act. As part of this, certain elements, such as the current asset declaration systems and lobbying regulations will be amended.

**In the latest Corruption Perceptions Index of Transparency International, Poland scores 58/100 and ranks 12<sup>th</sup> in the European Union and 41<sup>st</sup> globally<sup>75</sup>.** Eurobarometer surveys show that the number of Polish respondents who consider corruption to be widespread in their country (59%) is lower than the EU average (71%) while 37% of people feel personally affected by corruption in their daily lives (EU average 26%)<sup>76</sup>. As regards businesses, 49% of companies consider corruption as widespread (EU average 63%) and 27% of companies consider that corruption is a problem when doing business (EU average 37%). Then, 43% of people find that there are enough successful prosecutions to deter people from corrupt practices (EU average 36%) while 26% of companies believe that people and businesses caught for bribing a senior official are appropriately punished (EU average 31%)<sup>77</sup>.

**A planned initiative aims to further develop the anti-corruption legal framework.** Polish criminal law provides a solid basis for the investigation, prosecution and adjudication of corruption offences.<sup>78</sup> Poland also has a legal framework for preventing corruption, with several legal acts regulating issues of ethics and integrity in the public sector<sup>79</sup> as well as disclosure obligations for assets and conflicts of interest<sup>80</sup>. Nevertheless, a number of

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<sup>72</sup> Figures 3, 7, 11 and 14, 2020 EU Justice Scoreboard. The number of incoming civil and commercial litigious cases remained high in recent years (figure 3, 2020 EU Justice Scoreboard). Despite an increase of pending civil, commercial, administrative and other cases in first instance in comparison to 2012, their clearance rate did not significantly drop in 2018 (figures 10 and 13, 2020 EU Justice Scoreboard).

<sup>73</sup> Council of Europe CM/Del/Dec(2018)1331/H46-19: H46-19 Bąk (Application No. 7870/04), Majewski (Application No. 52690/99), Rutkowski and Others (Application No. 72287/10) and Jan Załuska, Marianna Rogalska and 398 other applications (Application No. 53491/10) v. Poland.

<sup>74</sup> Figures 8, 9 and 12, 2020 EU Justice Scoreboard.

<sup>75</sup> Transparency International (2020), Corruption Perceptions Index 2019.

<sup>76</sup> Special Eurobarometer 502 (2020).

<sup>77</sup> Flash Eurobarometer 482 (2019).

<sup>78</sup> GRECO EU Anti Corruption Report 2014; GRECO Third Evaluation Round, Evaluation report, recommendation iii.

<sup>79</sup> Relevant laws include: the Law of 21 August 1997 on Restriction of Business Activity by Persons Performing Public Duties; the Law of 6 September 2001 on Access to Public Information; the Law of 7 July 2005 on Lobbying Activity in the Law making Process; and the Law of 21 August 1997 on Restriction of Business Activity by Persons Performing Public Duties.

<sup>80</sup> These include the Law on the Civil Service of 21 November 2008, the Law on employees of the Government offices of 16 September 1982 and the Law on public procurement of 29 January 2004.

concerns have been raised, in particular as regards conflict of interest and asset disclosure<sup>81</sup>. A new Law on the Transparency of Public Life is currently in an advanced preparatory stage, aiming to reinforce existing anti-corruption mechanisms and incorporate transparency principles into one single act. A further objective of the law is to repeal certain existing acts to standardise the current asset declaration system and rules. The proposal also aims to amend existing rules on lobbying and the law on access to public information, and enhance measures to protect whistleblowers<sup>82</sup>.

**Changes to the Criminal Code were proposed.** A June 2019 draft law amending the Criminal Code<sup>83</sup> was on 14 July 2020 considered unconstitutional by the Constitutional Tribunal<sup>84</sup>. It proposed changes to the definition of a person performing a public function, and it would have introduced a broader definition of a “person performing a public function” to include, amongst others, a domestic or foreign organisational unit disposing of public funds, board members or representatives of state-owned enterprises, and entities whose share capital is owned by central or local government in excess of 50%. Other proposed changes would have included raising sanctions for active and passive bribery offences connected to high-value assets. Nonetheless, mechanisms such as the “non-punishment” clause would have remained, providing that a person giving a bribe, is not punishable if they voluntarily notify law enforcement authorities of the crime. Concerns about elements of the immunities regime and its impact on the prosecution of corruption-related offences has been raised by Council of Europe’s Group of States against Corruption (GRECO)<sup>85</sup>.

**The Central Anti-Corruption Bureau (CAB) is the specialised anti-corruption body.** The CAB combines intelligence and police functions and can trigger both administrative and criminal proceedings<sup>86</sup>. The detection of corruption is part of its core functions, and in cases of reasonable suspicion the CAB can conduct criminal investigations. It has the competence to verify asset declarations and control public procurement decisions. It is also charged with monitoring non-compliance with incompatibility rules regarding outside business activity restrictions by public officials and initiating procedures for the return of unfairly obtained benefits. The CAB also has a preventive role and oversees the coordination of the Governmental Anticorruption Programme for 2018-2020 whose general objectives include improving anti-corruption regulations, and enhancing cooperation and coordination between law enforcement authorities. The Head of the Bureau is appointed by the Prime Minister for a term of four years. The CAB works under the authority of the Prime Minister and of a designated ‘Minister-coordinator for special services’<sup>87</sup>. Under the current legal framework, this appointment procedure and the office’s subordination to the executive has raised concerns as regards the CAB’s independence and ultimate independence from executive power.<sup>88</sup>

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<sup>81</sup> GRECO Fifth Evaluation Round– Evaluation report.

<sup>82</sup> GRECO The Second Addendum to the Second Compliance Report, para 27.

<sup>83</sup> The Law of 13 June 2019 amending the Criminal Code and certain other laws, was sent by the President to the Constitutional Tribunal on 28 June 2019 within the framework of preventive constitutional control.

<sup>84</sup> The Constitutional Tribunal considered that the amendments to the Criminal Code were adopted following a procedure which did not comply with the internal rules of the Sejm governing legislative work.

<sup>85</sup> GRECO Fifth Evaluation Round - Evaluation report, recommendation xii, para 87.

<sup>86</sup> Established by the Law on the Central Anti-Corruption Bureau of 9 June 2006.

<sup>87</sup> The CAB is an office of the Government administration whose head is himself a central authority of that administration. The Head is appointed for 4 years by the Prime Minister renewable once and supervised by him/her through the Minister specially appointed as Coordinator of the Special Services. GRECO Fifth Evaluation Round – Evaluation report, para 34.

<sup>88</sup> GRECO Fifth Evaluation Round – Evaluation report, para 78.

**Issues of ethics and integrity in the public sector, and conflicts of interest are currently regulated by several basic acts.** The main legal act promoting integrity is the Law on Restrictions on Conduct of Business Activities by Persons Performing Public Functions, which prohibits certain activities, and limits business shareholdings and membership in various boards. The ordinance on the ethical framework for the civil service sets the ethical standards for the public administration, but does not cover top executives, whose conduct is broadly regulated by the constitution. Ministries also address integrity in their ranks to different extents. GRECO has underlined the potential benefits of a more coherent policy and recommended the elaboration of a general integrity plan, the development of a code of conduct with robust supervision and sanctioning mechanisms, and awareness raising on integrity matters<sup>89</sup>. In addition, several other legal texts provide for an obligation to report specific situations of conflicts of interest, but without clear coordination or consolidation into a single framework<sup>90</sup>. Whilst there is no legal definition of conflicts of interest in commonly binding laws, the Code of Administrative Procedures is covering conflicts of interest for public officials. For ministers and other senior officials, these are limited to certain specific situations involving property interests<sup>91</sup>. In 2019, the CAB examined 2477 conflict of interest issues in the Ministries of Health and Defence (4581 in 2018), covering 2187 persons (2110 in 2018) with 3 cases referred to the Prosecutor's office<sup>92</sup>.

**There is no unified legislation or centralised submission and monitoring system for asset declarations.** Members of Parliament submit asset declarations in accordance with the Law on the discharge of their duties by Sejm deputies and Senators of May 1996. The Law on Restrictions on Conduct of Business Activities by Persons Performing Public Functions prescribes the yearly disclosure of financial and economic activities for top executive functions. However, the legislation is applied in practice to politicians at all levels, concerns exist over the divergent systems and the frameworks to guarantee the publication of declarations<sup>93</sup>. In 2019, the CAB carried out 90 asset declaration controls (69 in 2018), 364 pre-control analyses (330 in 2018) and 341 control cases (320 in 2018)<sup>94</sup>. However, amendments to the Law on the Exercise of the Mandate of a Deputy and Senator, meant to extend the catalogue of obliged persons and the scope of information included, are currently being challenged before the Constitutional Tribunal. Whilst welcoming the existence of obligations, GRECO has stated that Poland's arrangements for asset declarations need to be strengthened and complemented with an independent and effective review mechanism<sup>95</sup>. In this regard, a draft law with a new declaration of assets form is being prepared and the CAB is developing a unified system to address the lack of electronic and automated methods of submitting and controlling declarations<sup>96</sup>.

**Measures exist to regulate lobbying and 'revolving doors' and certain provisions allow for the protection of whistleblowers.** The Law on Lobbying Activity in the Law-making Process broadly defines lobbying, establishes a public register, and determines obligations and sanctions for unregistered activities. However, the law's provisions restrict the concept of lobbying to the process of law making. GRECO has recommended that interactions by

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<sup>89</sup> GRECO Fifth Evaluation Round – Evaluation report, recommendations i, ii iii and ix.

<sup>90</sup> See footnote 77.

<sup>91</sup> GRECO Fifth Evaluation Round – Evaluation report, para 53.

<sup>92</sup> Central Anti-Corruption Bureau Annual Report 2019.

<sup>93</sup> GRECO Fifth Evaluation Round – Evaluation report, paras 66-72.

<sup>94</sup> Central Anticorruption Bureau, Annual Report 2019 pp. 23, 25, 28.

<sup>95</sup> GRECO Fifth Evaluation Round– Evaluation report, recommendations x and xi, paras 72 and 78.

<sup>96</sup> The Government Anticorruption Programme for 2018-2020.

parliamentarians with lobbyists be made more transparent,<sup>97</sup> that detailed rules be introduced for interactions with lobbyists, and that sufficient information about the purpose of these contacts be disclosed<sup>98</sup>. ‘Revolving doors’ are regulated by a cooling-off period of one year but this is limited to entities for whom an official issued specific decisions. Whilst plans exist to extend the period, a broadening of the scope of application has also been recommended<sup>99</sup>. Certain legal acts include provisions for whistleblower protection, yet there is no specific legislation on the matter and the need to strengthen protections of reporting persons has been underlined<sup>100</sup>.

### **III. MEDIA PLURALISM**

The legal framework concerning media pluralism is based both on constitutional safeguards and sectorial legislation. The Constitution guarantees the independence of the national media authority - the National Broadcasting Council (KRRiT) - and the competences of the regulator are further specified by the 1992 Broadcasting Law<sup>101</sup>. With regard to the framework for journalists’ protection, freedom of expression is constitutionally protected<sup>102</sup>. At the same time, however, the Criminal Code includes offences of insulting State symbols, senior public officials and religion. The Constitution also guarantees the right of citizens to be informed about the activities of public authorities<sup>103</sup>. This right is further specified in the Law of 6 September 2001 on access to public information<sup>104</sup>.

**The legal framework provides safeguards for the independence of the media regulator.** The Constitution<sup>105</sup> gives the National Broadcasting Council (KRRiT) the role of safeguarding freedom of speech, the right to information and the public interest in radio and television broadcasting. Its members are appointed by the Parliament and the President of the Republic. They may not belong to a political party, trade union or perform public activities incompatible with the dignity of their function. The Broadcasting Law includes a specific list of KRRiT’s competences. The revised Audiovisual Media Services Directive (AVMSD)<sup>106</sup> sets out a range of specific guarantees for the independence and effectiveness of national media regulators. Poland is currently in the process of transposing the revised AVMSD, during which some further alignments of the national legislation with the EU framework might be proposed and could be adopted in early autumn 2020<sup>107</sup>.

**The Polish media regulator might still be subject to political influence.** The MPM 2020 reported medium risk with regard to the independence and effectiveness of the Polish media regulatory authority<sup>108</sup>, assessing that the appointment procedures for the National Broadcasting Council (KRRiT) have not effectively limited the risk of political influence

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<sup>97</sup> GRECO Fourth Evaluation Round – Evaluation report, recommendation i. Paragraph 11 of the 2nd addendum to the second compliance report states that this recommendation still has not been implemented.

<sup>98</sup> GRECO Fifth Evaluation Round– Evaluation report, recommendation vi, para 44.

<sup>99</sup> GRECO Fifth Evaluation Round – Evaluation report, recommendation viii and para 65.

<sup>100</sup> United Nations Convention Against Corruption (2015) Implementation Review Group (cycle 1) and OECD Poland: Follow up to the Phase 3 Report and Recommendations.

<sup>101</sup> The Law of 29 December 1992 on the Broadcasting.

<sup>102</sup> Article 54 of the Constitution.

<sup>103</sup> Article 61 of the Constitution.

<sup>104</sup> Between 2019 and 2020 Poland fell by three places in the Reporters Without Borders World Press Freedom Index, now registering at 62nd position worldwide.

<sup>105</sup> Articles 213-215 of the Constitution.

<sup>106</sup> Directive (EU) 2018/1808 of 14 November 2018.

<sup>107</sup> Information received in the context of the country visit to Poland.

<sup>108</sup> As regards the independence of the Office of Electronic Communications, see section IV.

over the media. For instance, no electoral monitoring was ordered to analyse media coverage of the 2019 electoral campaigns to European and national Parliaments. Similarly, in the case of the 2020 presidential campaign, as reported by OSCE's Office for Democratic Institutions and Human Rights (ODIHR), the KRRiT did not ensure independent monitoring of the campaign<sup>109</sup>. In addition, as a result of the 2016 reform<sup>110</sup>, some of the competences of KRRiT were taken away and assigned to the newly established National Media Council (RMN)<sup>111</sup>, which is now in charge of appointing and removing management and supervisory boards of the Polish Television (TVP), Polish Radio and Polish Press Agency. In December 2016, the Polish Constitutional Tribunal considered the exclusion of KRRiT from the process of appointment of the public media's management as unconstitutional<sup>112</sup>. The judgment remains to be implemented<sup>113</sup>.

**The legal framework concerning the transparency of media ownership in Poland is not equally applicable to all media actors.** In particular, there are no sector-specific provisions on transparency of news media ownership. Due to this fact, the MPM 2020 has assessed transparency of media ownership in Poland to be at medium risk, noting however, that some specific rules are in place in the broadcasting sector. These refer to disclosure of information to the public body KRRiT.

**There is a lack of regulatory safeguards limiting political control over media outlets in Poland.** Such safeguards concern rules on conflicts of interest between owners of media and the ruling parties, partisan groups or politicians<sup>114</sup>. The CBOS survey from 2019 shows that the perception of political bias in the media is widespread<sup>115</sup>. Nevertheless, as recognised by the MPM 2020, owners of the largest media in Poland have no open affiliation with political parties, and most of the news media, including digital outlets, promote distinct political views.<sup>116</sup> It appears that during the 2020 presidential campaign, the governing coalition referred to possible legislative changes concerning the concentration of foreign-owned media outlets<sup>117</sup>. If such changes were to materialise, they could have implications for media pluralism and for the internal market of the EU.

**Criminal law provisions may affect certain aspects of the framework for journalists' protection and activities.** The Criminal Code includes offences of insulting State symbols, senior public officials and religion. Imprisonment (of maximum 1 year) is among the possible sanctions for defamation<sup>118</sup> which occurs by means of mass communication<sup>119</sup>. As mentioned

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<sup>109</sup> Statement of preliminary findings and conclusions of the ODIHR Special Election Assessment Mission

<sup>110</sup> Sejm's official communique of 7 July 2016.

<sup>111</sup> *Ibidem*. According to Law on the National Media Council, the Council consists of five members, three of them appointed by the Sejm and two by the President for term of six years. The President of Poland appoints members of the Council from candidates nominated by the largest parliamentary opposition groups.

<sup>112</sup> Judgment of the Constitutional Tribunal of 13 December 2016 in case K 13/16.

<sup>113</sup> Ombudsman's communique of 3 February 2020.

<sup>114</sup> 2020 Media Pluralism Monitor.

<sup>115</sup> Press.pl, 'CBOS: dla większości badanych media nie są bezstronne, najgorzej wypada TVP' (as referred to in the 2020 Media Pluralism Monitor).

<sup>116</sup> Information gathered in the context of the country visit; MPM 2020, page 12.

<sup>117</sup> Reuters.com, 'Poland to propose limits on foreign media soon, Kaczynski says'. More recently, a representative of the governing party dealing with media issues confirmed that the draft legislation will be tabled in Autumn (WirtualneMedia 'Lichočka: jesienią Sejm zajmie się dekoncentracją mediów. Czarnecki: trzeba będzie odkupywać je od Niemców').

<sup>118</sup> CMPF's mapping of decriminalisation of defamation.

<sup>119</sup> According to the Polish authorities. The Polish authorities also specified that there is no criminal liability if allegations regarding persons holding a public office are true and that in a vast majority of cases financial penalties have been imposed and imprisonment only in a negligible percentage of cases.

by some representatives of journalists, this regime has been subject to the long lasting criticism as the issue of defamation could be sufficiently tackled on the basis of the civil liability framework<sup>120</sup>. In this context, the MPM 2020 also notes that the self-regulatory measures that could contribute to the strengthening of the position of journalists have not been implemented effectively in Poland. On a positive note, the Law on the Press was amended and it no longer obliges journalists to follow the editorial line of a particular title. The Law now gives the possibility to a journalist to reject a binding instruction if it contradicts the principles of fairness, objectivity and professional accuracy. With regard to safety of journalists, the Council of Europe's Platform to promote the protection of journalism and safety of journalists published two alerts concerning Poland in 2019 and six in 2020. The alerts have been classified under the category of harassment of journalists and the category of acts having chilling effects on media freedom<sup>121</sup>. As regards digital safety of journalists, the MPM 2020 reports occasional cases where journalists were threatened through surveillance by the police and intelligence services as well as cases of using journalists' telecom or internet data without prior notification<sup>122</sup>.

**The current legal framework recognises the right of access to public information. However, there have been recurring cases of refusing such access.** The Law of 6 September 2001 on access to public information requires state authorities (and other entities) to make available any information on public matters. Under the Law, the right to public information includes the right to obtain such information containing up-to-date knowledge of public matters without delay. Classified information is excluded from this rule. With regard to application of this right in practice, the MPM 2020 reports cases where access to information has been denied at the local level, especially as regards information about activities of local and regional government or planned investments. Other cases of denial included denying journalists access to debates about educational and judicial reforms.

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

Poland is a representative democratic republic with a directly elected President, a bicameral Parliament<sup>123</sup> and a Constitutional Tribunal in charge of constitutional review of laws. The Sejm has the final decision-making power when adopting laws. The President of the Republic, the Senate, a group of 15 deputies, the Council of Ministers and a group of at least 100.000 citizens have the right to propose new legislation. The independent Ombudsman is tasked with safeguarding the freedoms and rights of persons and citizens specified in the Constitution and other normative acts.

**In the period of 2015-2019, the expedited adoption of legislation was widely used, with important examples including significant structural reforms of the judiciary.** As regards

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<sup>120</sup> Information received in the context of the country visit to Poland.

<sup>121</sup> With regard to safety of journalists, the 2020 alerts concern: 1) the lawsuit concerning the protection of personal rights filed against the publisher and journalists with regards to the content of an investigative article; 2) the accusations towards a photojournalist with regard to breaking social distancing measures, while he was taking pictures of the protest against the leader of the ruling party; 3) the criminal investigation against a journalist alleging her of "unauthorised distribution of messages from a public trial before they were disclosed in court proceedings"; 4) the vandal attack on the editorial office of a publishing house in Warsaw; 5) managerial sanctions of the public radio towards a journalist who refused to broadcast discriminatory information.

<sup>122</sup> In line with Council of Europe recommendations, a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear (Recommendation CM/Rec(2016)4 of the Committee of Ministers of the Council of Europe).

<sup>123</sup> The Parliament is composed of the Sejm (the lower chamber) and the Senate (the higher chamber).



the legislation on justice reforms, Parliament spent on average 18 days on each law<sup>124</sup>. In particular, concerns have been raised over the expedited procedure applied by the legislator in December 2019 to adopt controversial changes in the laws on the judiciary, including the way the changes to the initial draft were proposed in the legislative process. The Supreme Court has considered that this violated the rules of good legislation<sup>125</sup>. The Venice Commission and OSCE have on several occasions underlined the importance of thorough deliberations of legislative proposals and amendments, including meaningful consultations with stakeholders, experts and the civil society, and a dialogue with the political opposition<sup>126</sup>. It should be noted that public consultations are mandatory only in case of a legislative proposal lodged by the Council of Ministers, while judicial reforms were initiated by members of Parliament, for which no consultation is necessary<sup>127</sup>.

**On 20 March 2020, the Government introduced a state of epidemic to face the COVID-19 pandemic**<sup>128</sup>. Stakeholders have expressed concerns about the measures imposed in that context in view of their impact on fundamental rights and presidential elections<sup>129</sup>. The state of epidemic is still in force although restrictions are being gradually lifted. Certain measures adopted in order to tackle the state of epidemic adversely affect terms of office of specific state authorities<sup>130</sup>, including the Office of Electronic Communications for which the European Commission launched infringement proceedings<sup>131</sup>.

**Supreme Court judges appointed under the 2017 reform are empowered to review ordinary courts' rulings in certain cases dating back 20 years.** Under the new extraordinary appeal procedure, the new Chamber of the Extraordinary Control and Public Affairs is empowered to overturn fully or in part any final judgment delivered by ordinary courts in the past 20 years, subject to some exceptions. The power to lodge the appeal is vested *inter alia* in the Prosecutor General and the Ombudsman. According to the information available, most of the proceedings so far have been lodged by the Prosecutor General<sup>132</sup>. Concerns have been expressed that this procedure can be used also for what could

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<sup>124</sup> Counted from the time of a draft legislation being tabled in Parliament to its being adopted with the final effect by the Sejm; based on the data provided on the website of the Sejm indicating the legislative proceedings on laws.

<sup>125</sup> As set out in the Supreme Court's opinions (e.g. opinions of 16 and 23 December 2019).

<sup>126</sup> Venice Commission's opinions CDL-AD(2020)017, para. 18; CDL AD(2016)026-e, paras. 21-22; OSCE-ODIHR (Urgent Interim Opinion JUD-POL/365/2019[AIC]), para. 30.

<sup>127</sup> The practice of using an accelerated procedure for adopting laws regulating important aspects of the legal or political order is generally dissuaded by bodies such as the Venice Commission (cf. Checklist (CDL-AD(2019)015) para. 75).

<sup>128</sup> Regulation of 20 March 2020 of the Minister of Health concerning the introduction, within the borders of the Republic of Poland, of the state of epidemic. The state of epidemic has no pre-fixed duration and can be prolonged by the Government.

<sup>129</sup> Under the Constitution, fundamental rights can be limited only in case of declaration of the state of emergency, which has not been declared. Presidential election did not take place as initially planned. See e.g. statements of the Ombudsman on measures counteracting the COVID-19 epidemic: <https://www.rpo.gov.pl/pl/kategoria-tematyczna/koronawirus-i-epidemia-w-polsce>.

<sup>130</sup> One of the measures empowered the Prime Minister to arbitrarily and prematurely terminate the term of office of any member of the Social Dialogue Council. On 26 May 2020, the President of the Republic lodged a request with the Constitutional Tribunal, requesting it to declare the unconstitutionality of the legislation concerned (case K 9/20; pending).

<sup>131</sup> On 2 July 2020, the Commission addressed a letter of formal notice to Poland, on the grounds that implementing certain legal provisions that could affect the independence of the Polish National Regulatory Authority, the Office of Electronic Communications, have resulted with an early dismissal of its President.

<sup>132</sup> According to the information provided by the Ombudsman and the Supreme Court. It is noted that according to the data provided by the Supreme Court, in April there were 45 such extraordinary appeals pending.

appear as political motives<sup>133</sup>. More generally, this new extraordinary appeal procedure, based on broad criteria, raises issues as regards the principle of legal certainty<sup>134</sup> and is one of the concerns raised by the Commission in its Reasoned Proposal adopted under the Article 7(1) TEU procedure<sup>135</sup>.

**New developments adversely affect the civil society space**<sup>136</sup>. Poland has a broad and vibrant civil society, consisting of more than 120.000 different NGOs. However, developments have shown that NGOs that are critical towards one or the other policy of the Government are targeted by unfavourable statements of the representatives of the public authorities<sup>137</sup>. A National Institute of Freedom – Centre for Civil Society Development is responsible for the distribution of government funding, as well as nationally attributed EU funding, to NGOs. The organisations’ representatives constitute a minority in the decision-making process under this institute, which is chaired by a member of the Government. The OSCE found that the Government appears to have a decisive influence on the governance and operation of the National Institute of Freedom and made recommendations in that respect<sup>138</sup>. The 2020 update of the CIVICUS report considers that the civic space for NGOs functioning has narrowed<sup>139</sup>. Stakeholders have raised concerns regarding the fact that members of the Government recently proposed legislation which would oblige NGOs to disclose foreign subsidies received and under certain conditions would consider NGOs as ‘foreign founded’<sup>140</sup>. The decision of certain regions to declare themselves to be ‘LGBTI-free zones’ has created serious doubts as to the capacity of the local authorities to fairly distribute EU funds among NGOs<sup>141</sup>. Actions of the government aimed at LGBTI groups, including arresting and detaining some of the groups’ representatives, and smear campaigns conducted against such groups have raised concerns<sup>142</sup>.

**The Ombudsman plays an important role in defending the rule of law.** The Ombudsman was re-accredited with ‘A’ status in November 2017 by the UN Global Alliance of National Human Rights Institutions (GANHRI)<sup>143</sup>. GANHRI underlined the need for the provision of adequate funding to enable the Ombudsman to carry out its mandate effectively. The Ombudsman has issued a number of opinions on new legislation, including reforms affecting the functioning of the judiciary, and intervened before Polish courts and the Court of Justice of the EU. The Ombudsman regularly intervenes in support of individuals in cases regarding

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<sup>133</sup> Venice Commission’s opinion CDL-AD(2017)031. It is noted that on 11 June 2020, the Prosecutor-General lodged an extraordinary appeal in a case concerning a judge and former spokesperson of the National Council for the Judiciary who has publicly criticised the justice reform.

<sup>134</sup> Venice Commission opinion of 11 December 2017 (CDL-AD(2017)031), paras. 53-63.

<sup>135</sup> Reasoned Proposal, paras 128-131.

<sup>136</sup> PACE (2020).

<sup>137</sup> Ombudsman’s statement of 8 January 2020. See also OSCE-ODHIR, Guidelines on the Protection of Human Rights Defenders, paras 70-73.

<sup>138</sup> OSCE-ODIHR (2017), Opinion on the Draft Act of Poland on the National Freedom Institute, para 12. Concerns have also been raised on the award of grants for post-penitentiary assistance by the Justice Fund managed by the Ministry of Justice, Civil Space Watch (2019).

<sup>139</sup> CIVICUS Monitor – Tracking Civic Space; ratings are on a five-category scale defined as: open, narrowed, obstructed, repressed and closed.

<sup>140</sup> Press release of the Ministry of Environment and the Ministry of Justice of 7 August 2020.

<sup>141</sup> On 2 June 2020, services of the European Commission addressed a letter to the Polish authorities in this regard.

<sup>142</sup> Statement of 8 August 2020 of the Council of Europe’s Commissioner for Human Rights.

<sup>143</sup> Global Alliance of National Human Rights Institutions (GANHRI), Sub-Committee on Accreditation (SCA), Accreditation Report – November 2017.

possible violations of fundamental rights<sup>144</sup>. Other activities of the Ombudsman are focused on promoting judicial independence standards, the rule of law, and fundamental rights. Since 2016, the Ombudsman has been facing a more challenging environment characterised by an inadequate budget (decided upon by the Sejm<sup>145</sup>), criticism from the ruling political majority and personal attacks in certain media outlets<sup>146</sup>.

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<sup>144</sup> In 2019, the Ombudsman received 59.524 cases, including 27.113 new cases. In addition, 4.385 people came to the Ombudsman's office in person, and 32.395 persons received individually advices and explanations concerning their situation. Cf. Ombudsman's statement of activities in 2019.

<sup>145</sup> EIGE (2020), report on Poland. An adequate level of funding is required by international standards; cf. United Nations Paris Principles: "2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence".

<sup>146</sup> DoRzeczy 'Sejmowa awantura o Bodnara. "Antypolski rzecznik", "to jest kryminal"' of 2019; Wprost 'Krytyka TVP po materiale o synu Bodnara. "14-latek groził nożem rówieśnikom"' of 2019.

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\* *The list of contributions received in the context of the consultation for the 2020 Rule of Law report can be found at (COM website).*

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## **Annex II: Country visit to Poland**

The Commission services held virtual meetings in June and July 2020 with:

- Association of Journalists (*Towarzystwa Dziennikarskiego*)
- Association of Polish Journalists (*Stowarzyszenie Dziennikarzy Polskich*)
- Associations of Judges 'Iustitia' and 'Themis'
- Association of Local and Regional Polish TV Stations
- Association of Prosecutors 'Lex Super Omnia'
- Batory Foundation;
- Chamber of Press Editors
- Civil Development Forum
- Constitutional Tribunal
- Free Courts
- Helsinki Foundation of Human Rights
- Jagiellonian Club
- Local Newspapers Association
- Ministry for Justice
- National Council for the Judiciary
- National Council for the Television and Radio Broadcasting
- National Council of Media
- Office of the Ombudsman
- Polish Media Association
- Supreme Administrative Court
- Supreme Court

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

- Amnesty International
- Civil Liberties Union for Europe
- Civil Society Europe
- Conference of European Churches
- EuroCommerce
- European Center for Not-for-Profit Law
- European Centre for Press and Media Freedom
- European Civic Forum
- Free Press Unlimited
- Front Line Defenders
- ILGA-Europe
- International Commission of Jurists
- International Federation for Human Rights
- International Press Institute
- Lifelong learning Platform
- Open Society Justice Initiative/Open Society European Policy Institute
- Reporters without Borders
- Transparency International EU