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**By REGISTERED LETTER and by ELECTRONIC MAIL:
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To:
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of the Council of Europe
Department for the Execution of Judgments
of the European Court of Human Rights
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Avenue de l'Europe
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NRA.015-2.50.2024

Re: Wałęsa v. Poland (application no. 50849/21)

Observations of the Polish Bar Council
on the execution of a group of judgments
of the European Court of Human Rights in Strasbourg,
including the pilot judgment issued in the case
Wałęsa v. Poland (application no. 50849/21) and others

Copy to: Marcin Wiącek – the Commissioner for Human Rights

I. Preliminary remarks

1. The Polish Bar Council (hereinafter referred to as the **PBC**) is the representative body of the Polish Bar which brings together advocates and trainee advocates. The most important statutory tasks of the Polish Bar are to provide legal assistance, to cooperate in the protection of human rights and civil liberties and to shape and apply the law.
2. The PBC, together with the Human Rights Commission at the Polish Bar Council (the **HRC PBC**), attaches great importance to the issue of respect for human rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (the **Convention** or the **ECHR**) in Poland, including the rule of law, the enforcement of the right to a court and procedural guarantees to ensure effective protection of human rights and freedoms by the national legal system. The PBC and the HRC PBC actively participate in the execution of judgments of the European Court of Human Rights (the **ECtHR** or the **Court**) by the Polish authorities and submit written observations on the most important cases brought against Poland.
3. The PBC constantly monitors issues related to the rule of law in Poland, paying particular attention to the right to a court and the right to a fair trial, including the right to a fair and public hearing by a competent, impartial and independent court.
4. Pursuant to Rule 9 of Chapter 2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of amicable settlements, the PBC submits its observations on the execution by the Polish authorities of judgments of the ECtHR concerning the guarantees of the right to fair trial, hoping that these observations will support the Committee of Ministers of the Council of Europe in effectively supervising the fulfilment by the authorities in Poland of their international obligations arising from membership in the Council of Europe.

II. Subject matter of the PBC's observations

5. The subject matter of the PBC's observations is the status of the execution of the ECtHR judgments on the restoration of the rule of law in Poland in the area of guarantees of the right to a fair trial.
6. The key judgment in this area is *Wałęsa v. Poland* judgment (application no. 50849/21, 23 November 2023), referring to previous judgments in *Reczkowicz v. Poland* (application no. 43447/19, §§ 4-53, 22 July 2021), *Dolińska-Ficek and Ozimek v. Poland* (application nos. 49868/19 and 57511/19, 8 November 2021), *Advance Pharma sp. z o.o. v. Poland* (application no. 1469/20, §§ 4-78 and 95-225, 3 February 2022) and *Grzęda v. Poland* ([GC], application no. 43572/18, §§ 14-28, 15 March 2022).
7. Pursuant to Rule 61 of the Rules of the Court, the case of *Wałęsa v. Poland* was subject to the pilot judgment procedure. According to the justification of the pilot judgment, the respondent State is obliged to eliminate the source of the breach for the future and to provide redress for the harm suffered in the past not only by the individual

applicant(s) in the pilot case, but also by all other victims of the same type of breach. In the *Wałęsa v. Poland* pilot judgment, the Court found that the following systemic problems lay at the root of the breach of Article 6 § 1 of the Convention found in the cited cases (cf. § 324):

7.1. the defective procedure for the judicial appointments involving the National Council of the Judiciary (the **NCJ**) established by the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, item 3, as amended, **the Amending Act of 2017**);

7.2. the functioning of the Supreme Court's Chamber of Extraordinary Review and Public Affairs (the **CERPA**) which, while not being an independent and "lawful" court within the meaning of the Convention, has the exclusive competence to deal with any request for the exclusion of a judge;

7.3. the extraordinary-appeal procedure, which is incompatible with the fair-trial standards and the principle of legal certainty, on account of:

- a) the lack of foreseeability of the legal provisions which afford unfettered discretion in interpreting the grounds for extraordinary appeal to the authorities and bodies involved in the procedure;
- b) the possibility of using in practice this exceptional remedy as an "ordinary appeal in disguise" and obtaining through it a fresh examination of the case, including a redetermination of facts, with the adjudicating body acting as a tribunal of facts at the third or fourth level of jurisdiction;
- c) the exceptionally extended and retrospectively applied time-limits for lodging an extraordinary appeal allowing the Prosecutor General and the Commissioner for Human Rights to contest judgments that became final before the entry into force of the Act on the Supreme Court of 2017;
- d) the lack of sufficient safeguards against a possible abuse of process and the instrumentalization of the extraordinary-appeal procedure (for example, for political reasons);
- e) hearing extraordinary appeals by the CERPA, which has exclusive competence in this area without having the status of an independent court established by law.

8. In the pilot judgment, the Court shared the guidance on general measures given to Poland by the Committee of Ministers in its decision adopted at its 1468th meeting, in which it exhorted Poland to rapidly implement measures to (§ 329):

8.1. restore the independence of the NCJ through the introduction of legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ;

8.2. address the status of all judges appointed in the deficient procedure involving the NCJ as constituted under the Amending Act of 2017 and of decisions adopted with their participation;

8.3 ensure effective judicial review of NCJ's resolutions proposing judicial appointments to the President of Poland, including the Supreme Court.

9. In addition, the Court, in relation to the CERPA, which is partly governed by general measures, indicated that Poland should take appropriate legislative measures to ensure that this body meets the requirements of an "independent and impartial tribunal established by law" in accordance with the Court's case-law, noting the broad powers of the CERPA and among them the power to decide on any motion involving a plea of lack of independence of a judge or a court, signalling that issues pertaining to the independence of judges must be resolved by a court or courts which are themselves "an independent and impartial tribunal established by law" in the light of the Convention (cf. § 330).

10. With regard to the defective operation of extraordinary-appeal procedure, the Court pointed out (cf. § 331) that Poland must:

10.1. remove or amend the legal provisions which allow the bodies concerned unfettered discretion in interpreting the grounds for an extraordinary appeal;

10.2. remove or amend the legal provisions which enable the authorised bodies to use in practice the extraordinary-appeal procedure as an "ordinary appeal in disguise" and the adjudicating body to carry out a fresh determination of the case, including on the facts;

10.3. remove or amend provisions that grant the Prosecutor General and the Commissioner for Human Rights exceptionally extended time-limits for lodging an extraordinary appeal, including in cases terminated before the entry into force of the Act on the Supreme Court of 2017;

10.4. introduce safeguards against abuse of process in the extraordinary-appeal procedure, in particular so as to exclude the instrumentalization of that procedure for political reasons.

III. Evaluation of the execution of the pilot judgment – legislative projects

Preliminary remarks

11. As of the date of these Observations, none of the recommendations of the Court and the Committee of Ministers have been implemented in the form of the introduction of statutory regulations to replace the regulations that were found to be infringing the Convention.

12. On 12 July 2024, the Sejm of the Republic of Poland enacted the Act amending the Act on the National Council of the Judiciary[1] (**the Act of 12 July 2024**), which was referred by the President of the Republic of Poland to the Constitutional Tribunal by way of preventive control. The case was assigned case file number Kp 2/24 and has not been heard to date.
13. In addition, the Government of the Republic of Poland has taken steps to develop statutory solutions to enforce the remaining recommendations arising from the *Wałęsa v. Poland* pilot judgment.
14. As of the date of these Observations, two drafts regulating the issues covered by the *Wałęsa v. Poland* pilot judgment have been submitted:
 - draft law on the restoration of the right to an independent and impartial tribunal established by law by regulating the effects of the resolutions of the National Council of the Judiciary adopted between 2018 and 2025 – draft law of 13 May 2025 published on the website of the Ministry of Justice[2] (**draft law of 13 May 2025**);
 - draft law amending the Act on the System of Common Courts and certain other acts, which in Article 6 also includes amendments to the Act on the Supreme Court in question. The draft law was published in the list of legislative works under no. UD206 on 21 March 2025 and is currently at the opinion stage[3] (**draft law of 21 March 2025**).

Evaluation of the execution of the judgment as regards the restoration of the independence of the NCJ by adopting provisions guaranteeing the Polish judiciary the right to elect members of the NCJ elected from among judges

15. The Act of 12 July 2024, implementing the requirement under Article 187 sec. 1 point 2 of the Constitution of the Republic of Poland, provides for the election of 15 judges to the NCJ by judges only. Compared to the regulations in force prior to 2018, this act provides for the election of the “judicial” part of the NCJ by all Polish judges in direct elections and not, as was previously the case, by general assemblies or assemblies of representatives (see Article 11f of the act).
16. The Act of 12 July 2024 provides that one judge of the Supreme Court, two judges of the courts of appeal, three judges of regional courts, six judges of district courts, one judge of a military court, one judge of the Supreme Administrative Court, one judge of a voivodeship administrative court will be elected to the composition of the NCJ by the judges.
17. The Act of 12 July 2024 provides for the termination of terms of office of the members of the NCJ in their current composition. The explanatory memorandum to the draft law assumed that the provisions of the Amending Act of 2017 introduced an election procedure that violated constitutional regulations, in particular the interruption of the

then ongoing four-year term of office of the members of the NCJ (Article 187 sec. 3 of the Constitution of the Republic of Poland), as well as the taking over by the Sejm of the Republic of Poland of the election of 15 judges – members of the NCJ, contrary to Article 187 sec. 1 in connection with Article 7, Article 10 and Article 186 sec. 1 of the Constitution of the Republic of Poland. Therefore, persons elected in an unconstitutional manner, in gross violation of the law, cannot at the same time invoke the constitutional protection of the permanence of the four-year term of office of an elected member of the NCJ (Article 187 sec. 3 of the Constitution of the Republic of Poland).

18. The Act of 12 July 2024 did not enter into force due to its referral to the Constitutional Tribunal by the President of the Republic of Poland. It must be added that the Constitutional Tribunal, in its current situation and composition, still does not meet the requirements of a "tribunal established by law" within the meaning of Article 6 § 1 of the Convention, as can be seen from the Court's judgment in Xero Flor sp. z o.o. v. Poland (application no. 4907/18).

Evaluation of the execution of the judgment with regard to the status of all judges appointed in the defective procedure involving the NCJ and the rulings issued with the participation of these judges

19. This issue is covered by the draft law on the restoration of the right to an independent and impartial tribunal established by law by regulating the consequences of the resolutions of the National Council of the Judiciary adopted between 2018 and 2025 (draft law of 13 May 2025 published on the website of the Ministry of Justice).
20. The draft law of 13 May 2025 provides that the resolutions of the National Council of the Judiciary established under the Amending Act of 2017 for appointments to the office of judge of courts at all levels are without legal force (see page 15 of the explanatory memorandum to the draft law of 13 May 2025).
21. The draft law of 13 May 2025 differentiates the legal situation of persons appointed to the office of judge according to their “belonging” to the following categories:
 - in the case of persons who are court assessors, persons who are court referendaries and assistant judges, and persons who exercise their right to return to practice as judges by means of a future resolution, properly constituted NCJ, the appointment is to be convalidated with the effect of preventing their status as duly appointed judges from being called into question in the future (see pages 16-22 of the explanatory memorandum to the draft law of 13 May 2025);
 - in the case of persons who are judges seeking appointment to serve as judges in another court or in a higher court, the draft law provides for their reinstatement to the positions entrusted to them in accordance with Article 179 of the Constitution of the Republic of Poland – the rule of return to previous positions (see pages 22-23 of the explanatory memorandum to the draft law of 13 May 2025);

- in the case of persons who came to the judicial profession from other law professions (including, inter alia, 80 persons in the Supreme Court and the Supreme Administrative Court), the draft law provides for the termination of the public service relationship in the position of judge.
22. The draft law of 13 May 2025 also provides that the above effects will occur by operation of law when the act enters into force, and that the occurrence of these effects, in respect of particular persons, will be ascertained by the Minister of Justice in a list published in an official notice in the Official Journal of the Republic of Poland “Monitor Polski”. The draft law provides for the admissibility of an appeal by an interested person to the Supreme Court in order to allow an examination of the correctness of the determination in the entry in the official list promulgated by the Minister of Justice (see pages 24-26 of the explanatory memorandum to the draft law of 13 May 2025).
 23. Another of the draft law’s steps to restore the right to an independent and impartial tribunal established by the law is to re-conduct proceedings in respect of positions that were assumed between 2018 and 2025 on the basis of resolutions of the defectively formed NCJ. In order to ensure the smooth operation of the judiciary, the draft law of 13 May 2025 provides for a system of statutory delegation, which means delegation by law to act as a judge in the court where the person currently holds a position or to which they have been transferred (see page 32 of the explanatory memorandum to the draft law of 13 May 2025).
 24. The proposed solutions do not affect judgments issued with the participation of persons appointed to judicial positions at the request of the NCJ established under the Amending Act of 2017. The draft law of 13 May 2025 presupposes that the consequences of judgments that are unappealable or not subject to challenge will be recognised and respected in legal transactions, unless different consequences result from case-specific judgments of international tribunals (cf. e.g. the judgment of the Court of Justice of the European Union (the **CJEU**) in the case of 6 October 2021, C-487/19 W.Ż., point 160, in joined cases of 13 July 2023, C-615/20 and C-671/20 YP and others, points 65-66) – see page 35 of the explanatory memorandum to the draft law.
 25. With regard to the issue of the permanence of judgments issued between 2018 and 2025, the draft law of 13 May 2025 also provides for a legal remedy to revoke judgments issued with the participations of the above persons. It is proposed that such a measure would be available only to parties and participants in the proceedings who, at the time relevant to the lodging of a request for the exclusion of a judge, raised objections as to the correctness of the composition of the court of first instance or as to the independence or impartiality of the person participating in that composition, in respect of whom the current NCJ had adopted a resolution to submit an application for appointment, on account of circumstances relating to the appointment of that person to the office of judge and subsequently lodged appeals on that basis.

26. A special solution is proposed with regard to decisions of the Supreme Court issued as a result of an extraordinary appeal, which are to be subject to revocation at the request of the parties or another participants in the proceedings lodged within one month of the entry into force of the act. The granting of this request has not been made subject to any additional conditions. As emphasized in the explanatory memorandum of the draft law, such a solution is dictated by the incompatibility of the extraordinary-appeal regulations with the provisions of the Convention, as found in the pilot judgment of the ECtHR in the *Wałęsa v. Poland* case (see page 36 of the explanatory memorandum to the draft law of 13 May 2025).

Evaluation of the execution of the judgment in terms of ensuring that the CERPA meets the standard of an independent and impartial tribunal established by law and its exclusive competence to hear motions involving an allegation of lack of independence of a judge or independence of a court

27. The draft law presented on 13 May 2025 on the restoration of the right to an independent and impartial tribunal established by law by regulating the consequences of the resolutions of the National Council of the Judiciary adopted between 2018 and 2025 provides for:

- abolition of the Chamber of Extraordinary Review and Public Affairs (CERPA);
- repealing the provisions on disciplinary responsibility introduced by the so-called muzzle law (act amending the Act on the Supreme Court and other acts of 2020, item 190), which allowed judges and public prosecutors to be held disciplinarily liable for actions in the course of their judicial (judges) and official (public prosecutors) duties directed at the implementation of constitutional and Convention norms related to the right of the parties to have a case heard by a court established by law, being independent and impartial, including in terms of challenging the existence of a judge's official relationship, the effectiveness of a judge's appointment or his or her empowerment. The draft law amends the Act on the Supreme Court in respect of Article 72 of this act.

28. It should also be noted that, with regard to the conclusion formulated in the pilot judgment as to the exclusive competence of the CERPA to hear motions concerning an allegation of lack of independence of a judge or independence of a court, the Government of the Republic of Poland has drafted a draft law of 21 March 2025, which in Article 6 includes amendments to the Act on the Supreme Court to the extent in question. In terms of implementing the recommendations of the Court's pilot judgment, the draft law provides for:

- repealing § 2-6 of Article 26 of the Act on the Supreme Court, which provide for the exclusive competence of the CERPA to hear requests for the exclusion of a judge containing an allegation of lack of independence of a judge or independence of a court (see Article 6 point 1 of the draft law of 21 March 2025);

- repealing § 2-25 of Article 29 of the Act on the Supreme Court, which provide for the prohibition of challenges to the legitimacy of courts and tribunals, constitutional state bodies and bodies for the control and protection of the law, as well as restrictions on the examination of the requirement of a judge's independence and impartiality (see Article 6 point 2 of the draft law of 21 March 2025);
- repealing Articles 72 and 75 § 1a of the Act on the Supreme Court, which provide for disciplinary liability of a Supreme Court judge for the so-called denial to enforce justice;
- repealing § 2-5 of Article 82 of the Act on the Supreme Court, which provide for the exclusive competence of the CERPA to issue resolutions in an enlarged panel of seven judges, on legal issues concerning the independence of the judge and the independence of the court (see Article 6 sec. 6 of the draft law of 21 March 2025).

Evaluation of the execution of the judgment with regard to the defective extraordinary-appeal procedure

29. The draft law presented by the Ministry of Justice of 13 May 2025 on the restoration of the right to an independent and impartial tribunal established by law by regulating the effects of the resolutions of the National Council of the Judiciary adopted between 2018 and 2025 envisages the abolition of the institution of extraordinary appeal as a consequence of the objections articulated in the *Wałęsa v. Poland* pilot judgment.
30. It should be noted, however, that already after the publication of the draft law of 13 May 2025 on the restoration of the right to an independent and impartial tribunal established by law by regulating the consequences of the resolutions of the National Council of the Judiciary adopted between 2018 and 2025, there appeared publications informing that the Ministry of Justice plans to “preserve some good aspects of the extraordinary appeal”[4]. According to press reports, the Ministry of Justice proposes to extend the list of entities entitled to lodge a cassation appeal to include the Financial Ombudsman and the Ombudsman for Small and Medium-sized Enterprises, the Patients' Ombudsman and to create the possibility for the court to overturn a final ruling on the confirmation of the acquisition of an inheritance if a final ruling has already been issued as to the same inheritance.
31. In the absence of the draft legislation referred to in point 30 above, it is not possible at this stage to assess the compatibility of such a solution with the Convention standard in the light of the Court's reservations formulated in the *Wałęsa v. Poland* pilot judgment.

IV. Evaluation of the enforcement of the pilot judgment – case law practice

32. From the point of view of the guarantees of the right to a fair trial, it is crucial that judicial procedures are available to ensure that the case is heard by an impartial and independent court established by law. The PBC has already signalled in its observations of 17 May 2023[5] the introduction into the legal system of a so-called test of a judge's independence and impartiality, the conditions of which had been shaped in a way that

significantly impedes or even prevents the execution of a party's right to have a case heard by an impartial and independent court established by law due to the defective status of judges appointed in the procedure before the NCJ established by the Amending Act of 2017. The PBC points out that, to date, none of the shortcomings described in this position have been remedied.

33. At the same time, the practical experience of advocates initiating proceedings for the exclusion of a judge (both in the context of a request for exclusion of a judge and of a request for the so-called impartiality and independence test) shows that these procedures are ineffective, both at the level of common courts, the Supreme Court and administrative courts. The following are some such typical procedural situations in which the parties' requests do not lead to a substantive recognition of their concerns regarding the examination of the case by an impartial and independent court.

Proceedings before the Supreme Court

34. The practical experiences of advocates before the Supreme Court show that:

- 34.1. Requests to exclude a judge of the Supreme Court, if heard by judges appointed in a defective procedure, are sometimes “left without any further action” with reference to the resolution of a panel of seven judges of the Supreme Court of 10 October 2024 (case reference number: III CZP 44/23[6]). This resolution provides that requests for the exclusion of a judge based solely on the circumstances surrounding the judge's appointment have no legal effect, and if they were accepted at the level of the court of first instance, the ruling excluding the judge is subject to revocation, and judgments handed down without such a judge are burdened with a defect of nullity (Article 379 point 3 of the Code of Civil Procedure). The resolution was adopted in a composition in which all members of the judicial panel were appointed as a result of a defective procedure involving the NCJ established by the Amending Act of 2017, which is a breach of the rule *nemo iudex in causa sua*.. The resolution was given the force of a legal principle, which is intended to be binding on all judicial panel.

- 34.2. The aforementioned resolution is applied both in cassation appeal cases, where a party informed of the composition of the court requests the exclusion of a judge or a test of impartiality and independence, as well as in situations where the Supreme Court receives a request from a judge of a common court who was excluded from hearing the case at the stage of proceedings before the common court. In the first case, there is no examination of the merits of the request to exclude the judge or of the impartiality and independence test - the request is left without any examination. In the latter case, a request for the exclusion of a judge accepted in the common court is overturned by the Supreme Court citing the above resolution. This jurisprudential practice leads to a factual lack of procedures to verify doubts about the status of an impartial and independent judge.

34.3. A large proportion of requests for the exclusion of a judge or for an impartiality and independence test that are submitted to the Supreme Court are heard by judges also appointed under defective procedures. In practice, this means that they are all recognized in violation of the principle of *nemo iudex in causa sua*. The indication from the pilot judgment as to the exclusion of such situations is therefore not respected.

34.4. Where a request for the so-called impartiality test of a Supreme Court judge is heard by a judge about whom there is no doubt as to the guarantees of impartiality and independence, then as a rule the proceedings triggered by the request for the test are suspended until the CJEU has considered the preliminary questions posed by the Supreme Court in its ruling of 20 October 2023 (case reference number: III CB 40/23). The case before the CJEU was given case reference number C-748/23. Following the suspension of the proceedings before the Supreme Court, there is a suspension of the proceedings before the common court if the case came before the Supreme Court as a result of a request by the excluded judge pursuant to Article 42a §13 of the Act on the System of Common Courts. There is also a known case of a suspension of proceedings upon a request for the so-called impartiality test by the Supreme Court "*due to the need to carry out legislative changes removing the procedural defects identified in the judgment of the Court of Justice of the European Union (Grand Chamber) of 21 December 2023, C-718-21, and in the pilot judgment of the European Court of Human Rights of 23 November 2023 Wałęsa v. Poland (application no. 50849/21) within the timeframe set out therein*" (case reference number: III CB 14/22). This clearly leads to significant excessive length of the proceedings.

34.5. There are also known cases in which an excluded judge of a common court lodges a request for an impartiality and independence test and a request for the exclusion of the same judge. This was the case, for example, in cases with reference numbers III CB 33/25 and III CB 46/25, where a panel of five judges was assigned to hear the request of the excluded judge, in which four judges were appointed to the Supreme Court in a defective procedure. The excluded judge requested an impartiality and independence test against the fifth judge on this panel, Supreme Court Judge Z.P., who was appointed to the Supreme Court in 2010. On 3 June 2025, the Supreme Court, in the person of Supreme Court Judge also appointed before 2018, suspended the proceedings pending the outcome of the CJEU case C-748/23. However, the excluded judge also lodged a request to exclude the same Supreme Court Judge Z.P., who was examined by another judge. By ruling of 7 June 2025, the Supreme Court, in the person of the President of the Civil Chamber of the Supreme Court, in respect of whom there are doubts as to the guarantees of independence and impartiality due to the circumstances surrounding her appointment, excluded Supreme Court Judge Z.P. from hearing the case. The conduct of the President of the Civil Chamber of the Supreme Court described in this case not only constitutes an action under conditions of violation of the principle of *nemo iudex in causa sua*, but also is even a manifestation of behaviour aimed at thwarting the hearing of such requests by judges against whom there are no objections to impartiality and independence arising from the circumstances of their appointment as a result of the

procedure conducted by the NCJ shaped after 2017. It is hard to resist the impression that these are behaviours designed to protect their own status and the analogous status of the judges of the common court. An important context is that the excluded judge is a member of the board of the Association of Judges of the Republic of Poland, which supports changes in legislation resulting in systemic violations of the rule of law in Poland (see the justification of the ruling of the Regional Court in Kraków of 21.03.2025, case reference number: IX GCo 917/24).

Proceedings before the common courts

35. For many years, the fundamental problem in dealing with requests for the exclusion of a judge or the so-called independence and impartiality test was the allocation of these cases to judges by way of a draw with participation of judges appointed under the defective procedures involving the NCJ. The parties to the proceedings were forced by necessity to make successive requests for exclusion only against the drawn judge, and then to make such requests when considering the complaint against the refusal to exclude the judge. This led to stacked constructions of requests for exclusion which prevented the recognition of the case for many months or even years. Advocates are familiar with cases in which more than two years have passed since a request to exclude a judge was lodged and still no date has been set for recognising the merits of the case, nor has the panel of judges been stabilised.
36. On 8 February 2024, the Minister of Justice amended the Rules of Procedure of the Common Courts (Journal of Laws of 2024, item 149) by introducing sec. 1a to § 43, according to which judges appointed in a defective procedure involving the NCJ are not taken into account when assigning cases on a request for the exclusion of a judge when among the grounds for the request are the circumstances of the judge's appointment in the defective procedure. This regulation only partially solves the problem of adjudication in violation of the principle of *nemo iudex in causa sua* and the problem of “stacked requests” for the exclusion of a judge. If such a request, considered by a court in a composition that does not raise doubts as to its independence and impartiality, is granted by excluding a judge, then pursuant to Article 42a § 13 of the Act on the System of Common Courts, the excluded judge may lodge, within 3 days, a motion for reconsideration with the Supreme Court. The case then goes to the Supreme Court's CERPA, which as described above in point 33.1., hears the case in a composition that violates the principle of *nemo iudex in causa sua*. On the other hand, requests by a party to the proceedings for the exclusion of a judge of the CERPA are left without examination with reference to the resolution of a panel of seven judges of the Supreme Court of 10 October 2024, III CZP 44/23, cited above. In fact, therefore, a party to the proceedings is deprived of an effective procedural remedy to verify doubts about the impartiality and independence of the judge.
37. It should also be noted that the amendment to § 43 sec. 1a of the Rules of Procedure of Common Courts made by the Minister of Justice does not include analogous solutions

excluding infringement of the principle of *nemo iudex in causa sua* in the examination of appeals lodged against judgments of first instance courts. Still, appeals (as well as complaints) in which one of the allegations is that the case was heard by a court composed in a manner that raises doubts about the guarantee that the case will be heard by an impartial and independent court are randomly assigned taking into account judges appointed in a defective procedure. This results in the need for submitting of requests for the exclusion of judges with all the consequences described above. Both in terms of the excessive length of the proceedings and the actual ineffectiveness of the procedure for the exclusion of a judge due to its being subject to the exclusive control of the CERPA, which by itself fails to meet the standard of an impartial and independent court, actually blocks the possibility of achieving this standard at the level of the common courts.

Proceedings before the administrative courts

38. It should be emphasised that the above solution provided for in § 43 sec. 1a of the Rules of Procedure of the Common Courts, does not function either before the Supreme Court or the administrative courts (Regional Administrative Courts and the Supreme Administrative Court). Unlike in the case of the common courts, the introduction of such solutions requires:

- amendments to the Rules of Procedure of the Supreme Court, which according to Article 4 of the Act on the Supreme Court, are enacted by the President of the Republic of Poland[7];
- amendments to the Rules of Procedure of the Regional Administrative Courts, which pursuant to Article 23 § 1 of the Act on the System of Administrative Courts, is enacted by the President of the Republic of Poland[8];
- amendments to the Rules of Procedure of the Supreme Administrative Court, which pursuant to Article 43 of the Act on the System of Administrative Courts, are enacted by the President of the Republic of Poland [9].

39. In proceedings before the administrative courts, the jurisprudential practice of guaranteeing that a case is heard by a court that does not cast doubt on its impartiality and independence was set by the resolution of the panel of seven judges of the Supreme Administrative Court of 3 April 2023 (case reference number: I FPS 3/22[10]). The resolution excluded the possibility of examining the requirements of independence and impartiality taking into account the circumstances surrounding the appointment of a judge in the context of a request for the exclusion of a judge considered under Article 19 of the Act on Administrative Court Proceedings. At the same time, the resolution indicated that these circumstances may be subject to the so-called impartiality and independence test set out in Article 5a §1 of the Act on the System of Common Courts. The paradox of the situation is that resolution I FPS 3/22 simultaneously indicates that it is practically impossible to fulfil the prerequisites for the admissibility of filing an effective request for an impartiality and independence test under Article 5a § 1 of the

Act on the System of Common Courts. As a result, a party to the proceedings is deprived of any effective procedural means of examining, in administrative court proceedings, the guarantees that the case will be heard by an impartial and independent court, taking into account the circumstances surrounding the appointment of the judge. Requests for the exclusion of a judge are in practice dismissed, citing the contents of resolution I FPS 3/22, while requests for tests of impartiality and independence are generally rejected because the conditions for their admissibility are not met.

Summary

40. The analysis of the legal situation and practice presented above leads to the following conclusions:

- the Act of 12 July 2024 amending the Act on the National Council of the Judiciary was challenged by the President of the Republic of Poland to the Constitutional Tribunal;
- as of autumn 2023, the current Government of the Republic of Poland has failed to enact laws regulating the status of judges appointed in a defective procedure, abolishing the Chamber of Extraordinary Review and Public Affairs and relating to the institution of an extraordinary appeal. In the current political situation resulting from the outcome of the election of the President of the Republic of Poland, their enactment is in serious jeopardy;
- jurisprudential practice points to a growing problem caused by defective appointments resulting in the lack of instruments realistically available to the parties to test a judge's impartiality and independence due to his or her participation in a defective procedure before the defectively established NCJ;
- practice relating to requests for the exclusion of a judge and the so-called tests of a judge's impartiality and independence, subjecting these cases to final review by the Supreme Court, even when these requests relate to judges of a common court, still violates the right to have a case heard by an impartial and independent court established in accordance with the law and the right to have the case heard within a reasonable time;
- despite the suspension by the Minister of Justice of vacancy announcements for the position of judge in common courts, competition procedures for the appointment of Supreme Court judges and administrative court judges are still underway before the defectively established NCJ. For this reason alone, the problem of defective appointments continues to grow;
- of the currently available solutions, it should be recommended to introduce regulations into the Rules of Procedure of the Common Courts excluding the draw of judges appointed in a defective procedure for the allocation of appeal and complaint cases, in a situation where the subject of the appeal or complaint are the circumstances in which a judge was appointed in a procedure conducted before the defectively established NCJ.

On behalf of the Polish Bar Council

advocate Przemysław Rosati

President of the Polish Bar Council

The Observations have been prepared by advocate Krzysztof Sokołowski and advocate Artur Kula – Members of the Human Rights Commission of the Polish Bar Council

[1] [https://orka.sejm.gov.pl/opinie10.nsf/nazwa/219_u/\\$file/219_u.pdf](https://orka.sejm.gov.pl/opinie10.nsf/nazwa/219_u/$file/219_u.pdf) (access: 1.07.2025).

[2] <https://www.gov.pl/web/sprawiedliwosc/projekt-ustawy-o-przywroceniu-ladu-konstytucyjnego-w-sadownictwie> (access: 1.07.2025).

[3] <https://legislacja.gov.pl/projekt/12395952> (access: 1.07.2025).

[4] <https://www.prawo.pl/prawnicy-sady/co-dalej-ze-skarga-nadzwyczajna.533015.html> (access: 1.07.2025).

[5] Position of the PBC on the enforcement of the judgments in the cases of Broda-Bojara v. Poland (application no. 26691/18 and 27367/18), Reczkowicz v. Poland (application no. 43447/19), Xero Flor w Polsce sp. z o.o. v. Poland (application no. 4907/18) and Grzęda v. Poland (application no. 43572/18).

[6] https://www.sn.pl/sites/orzecznictwo/Orzeczenia3/III_CZP_44-23.pdf (access: 04.07.2025).

[7] The current Rules do not provide for random allocation of cases at all, granting the President of the Supreme Court the power to allocate cases to judges in alphabetical order. The provision of §80 sec. 5 of the Rules of Procedure of the Supreme Court does not provide for the possibility of disregarding a judge appointed in a defective procedure.

[8] The current §28 of the Rules of Procedure of the Provincial Administrative Courts (Journal of Laws of 2024, item 779) does not provide the exclusion from the draw of judges appointed in a defective procedure.

[9] Currently, §25a of the Rules of Procedure of the Supreme Administrative Court (Journal of Laws of 2024, item 805) does not provide for a solution excluding from the draw judges who were appointed in a defective procedure.

[10] <https://orzeczenia.nsa.gov.pl/doc/4B3F8834D2> (access: 04.07.2025).