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Permanent Mission  
of the Republic of Poland  
to the United Nations Office  
at Geneva

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The Permanent Mission of the Republic of Poland to the United Nations Office at Geneva presents its compliments to the Office of the UN High Commissioner for Human Rights and has the honour to transmit to the Special Rapporteur on the independence of judges and lawyers the response from the Government of the Republic of Poland to the communication of 5 February 2021 (AL POL 2/2021).

The Permanent Mission of the Republic of Poland to the United Nations Office at Geneva avails itself of this opportunity to renew to the Office of the UN High Commissioner for Human Rights the assurances of its highest consideration.



Geneva, 15 June 2021

**Office of the UN High Commissioner for Human Rights  
Secretariat of the UN Human Rights Council  
Geneva**

## **Response of the government of the Republic of Poland**

### **to the communication from special procedures of 5.02.2021 (AL POL 2/2021)**

#### **1. Please provide any additional information and comments which you may have on the above mentioned allegations**

In the communication of the UN Special Procedures of 5 February 2021 (AL POL 2/2021) several claims were put forward concerning alleged disregard of the measures adopted by EU institutions in relations to the new disciplinary regime for judges that is considered to undermine the judicial independence of Polish judges by not offering necessary guarantees to protect them from political control. Furthermore, there is a claim that the new disciplinary regime does not guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court because it is composed exclusively of judges selected along political lines, and for that reason the Disciplinary Chamber shall not be treated as a court within the meaning of the European Union law and national law.

In the opinion of the Polish government, any analysis of the judiciary reform requires accurate and reliable systemic studies and multifaceted approach to the measures under implementation. Again this is missing in the communication received by the Government. Moreover the list of questions seem to be formulated in a non-objective way that implies violations with no pre-review, no evidence and no regard on applicable legal provisions, constitutional supremacy of certain legal standards and similar situations in other democratic states.

Therefore the Government ask you to analyze the facts, the law and Polish conditions in a way which would give you and international community an objective insight into the State's effort to reform its rigid judicial system, and not to follow the easiest way of repetitions of somewhere heard opinions and accusations in formulation of your assessment.

The government of Poland has taken this opportunity to respond to the communication and wishes to express its hope that objective, respectful and thorough account will be taken on Poland's political, legal and justice system as well as a number of recent significant amendments to the acts reforming the judiciary, such as amendments to the Law of ordinary courts, on the Supreme Court and on the Constitutional Court, which have implemented various recommendations provided by the international community aimed at reassuring everyone involved, that judicial independence, the rule of law, the principle of transparency and the constitutional principle of division and balance of powers are fully guaranteed in Poland.

#### **2. Please provide detailed information on the factual and legal grounds for lifting judge Tuleya's immunity, and explain how the resolution of the Disciplinary Chamber of the Supreme Court can be regarded as compatible with international and regional standards concerning the immunity of judges from jurisdiction in relations to decisions taken in good faith in the exercise of their professional duties.**

##### **a. Factual and legal grounds for lifting the immunity of judge Tuleya**

On 17 January 2017 the National Public Prosecutor's Office (Prokuratura Krajowa) initiated the proceedings concerning the judge possible unauthorized dissemination of information from the investigation no. VIII Kp (...) by admitting media representatives to register the hearing on 18 December 2017.

On 17 February 2020 the National Public Prosecutor's Office requested the Supreme Court to issue a resolution, which would permit calling the applicant to criminal responsibility for the acts penalised under art. 241 § 1 of the Criminal Code (spreading information from preparatory proceedings) and art. 231 § 1 of the Criminal Code (exceeding authority).

On 9 June 2020 the Disciplinary Chamber of the Supreme Court rejected the prosecutor's motion indicating that there were no sufficient grounds to believe that judge I. Tuleya could have committed the offences in question.

On 16 June 2020 the National Public Prosecutor's Office filed an interlocutory appeal, in the consequence of which, on 18 November 2020 the Disciplinary Chamber of the Supreme Court partly granted the prosecution's motion and permitted calling judge I. Tuleya to criminal responsibility on account of publicly spreading information from preparatory proceedings before they have been disclosed in court proceedings, i.e. the act penalised under art. 241 § 1 of the Criminal Code.

According to the resolution, the Supreme Court analysing the case in the first instance erroneously interpreted the notion of "the court proceedings" and wrongly held that the judge had had the right to disseminate information from the investigation no. VIII Kp (...). The Supreme Court noted that annulment by a judge of a prosecutor's decision to discontinue the investigation constituted one of the judicial procedures in preparatory proceedings, not in the court proceedings. Hence, there was no doubt that when judge Tuleya admitted the media representatives to the hearing held on 18 December 2017, the preparatory proceedings in the case no. VIII Kp (...) were still in progress.

The Supreme Court referred in particular to the part of the hearing when judge I. Tuleya quoted extensive extracts of witnesses' testimonies, which had not been previously disclosed, and elaborated on other materials gathered in the course of the preparatory proceedings whereas in accordance with the relevant provisions of the Code of Criminal Procedure, he had been entitled to delay the drawing up of the statement of reasons and explain orally only the main reasons for the decision. Such conduct of judge I. Tuleya not only might have impeded the conduct of the preparatory proceedings, but also violated the rights of persons whose testimonies had been made public.

The Supreme Court concluded that there was a reasonable suspicion that judge I. Tuleya had committed the offence and thus he should be called to criminal responsibility pursuant to art. 80 § 2(c) of the Act on the Organisation of Common Courts. Simultaneously, pursuant to art. 129 § 2 and 3 of the Act on the Organisation of Common Courts judge I. Tuleya was suspended in the performance of service duties and his remuneration was reduced by 25% for the period of the suspension.

**b. Compatibility of the resolution of the Disciplinary Chamber of the Supreme Court with international and regional standards concerning the immunity of judges from jurisdiction in relations to decisions taken in good faith in the exercise of their professional duties.**

It is an internationally recognized standard that judicial immunity does not exclude liability or punishment for acts committed by judges, but only prohibits bringing them to criminal liability, without

the prior consent of the respective court (in the case of Poland the competent one is the Disciplinary Chamber of the Supreme Court) .

In no democratic country can the immunity of a judge prevent the assessment of a judge's criminal behavior by an authorized body. Immunity is a source of impunity for a judge, because its purpose in the constitutional sense (art. 181 of the Constitution of Poland) is to ensure the proper functioning of the judiciary. Thus, through individual guarantees for the judge, it performs general social functions. Therefore, the rule should be to bring the suspected judge to a competent court, provided that there is adequate evidence, the motion to waive immunity is not harassing, there is a justified suspicion that a crime has been committed, and the alleged act is not strictly related to the jurisprudence.

Certainly, the most important element of a decision to allow to bring the suspected judge to a competent court is to determine whether the evidence collected by the prosecution indicates sufficient suspicion that the judge against whom the application for immunity waiver has been referred to the disciplinary court has fulfilled the criteria of the offense described in the application. "A sufficiently substantiated suspicion" is a tangible condition that there is sufficient factual basis to bring the person concerned into a "state of suspicion". Therefore, it is not about establishing that a specific person has committed a crime, but about the fact that the collected evidence indicates a high probability of this fact " .

In the Polish legal system, the protective function of immunity is particularly important in situations where a judge is accused of an act that is factually related to his judicial decisions. In such situations, immunity is to protect the judge and his jurisprudence against unauthorized interference by state authorities or third parties, including defendants. Thus, the legal system protects not only the judge himself against unfair accusations, but also his independence in judging the cases solely on the basis of law, and where his decisions are changed only by the appeal proceedings, never as a result of actions by extrajudicial entities.

As in the legal systems of other democratic countries, also in the Polish legal system the immunity serves only to ensure that no pressure is applied to the judge, or that his work is not hindered for political reasons or personal aversion. Therefore, the task of the disciplinary tribunal in such a situation is to thoroughly check the grounds for the application for waiver of immunity in terms of whether the submitted application does not constitute retaliation against the judge or is not intended to force him to take specific actions, or to refrain from taking them. For this purpose, the disciplinary court must examine the factual basis of the application.

According to the resolution of the Polish Supreme Court of 9 October 2009: "proceedings for the authorization to bring a judge to criminal liability are not disciplinary proceedings, but a specific (incidental) type of proceedings in which the disciplinary court only considers whether the evidence against the judge gathered in the case sufficiently justifies the suspicion that he or she has committed this offense " .

The key task in assessing this prerequisite for a sufficient justification of the suspicion that a crime has been committed must be to establish the existence of the features of the offense alleged against the judge. Their absence, therefore, must preclude consent to holding the judge criminally responsible.

It is a standard of democratic legal systems that proceedings for the waiver of immunity, similarly to the proceedings for the application of pre-trial detention, are proceedings based on evidence collected by the prosecutor. The evidence to the contrary, although it is not completely ruled out, is very limited. The regulations provide for one form of reaction of the person covered by the immunity application, i.e. the submission of explanations. All personal evidence (interrogation of witnesses, interrogation of suspects, etc.) is characteristic of the stage of court proceedings already in a criminal case. The admission of such evidence in the course of the proceedings for the waiver of immunity would strongly alter the sole function of the immunity process.

It should be very strongly emphasized that these special proceedings are not aimed at adjudicating on guilt. This is a special proceeding in the sense that the court examines only the statutory grounds for issuing a judgment, i.e. a justified suspicion of committing a prohibited act. It does so on the basis of the documents attached to the application.

### **3. Please provide updated information on the ongoing criminal prosecution of judge Tuleya.**

In connection with the issuance of the order to present the charges to judge I. Tuleya of committing an offence under art. 241 § 1 of the Penal Code, a summons to appear as a suspect at the National Public Prosecutor's Office on 20 January 2021 was sent via the public postal operator. The above summons was delivered to the suspect I. Tuleya on 31 December 2020 in a correct manner, sufficiently in advance to enable the suspect to fulfill his absolute obligation to appear under art. 75 § 1 of the Code of Criminal Procedure. In view of the unjustified failure to appear within the prescribed period, the suspect was sent a second summons on 10 February 2021 and another on 12 March 2021. Also in these two cases, summons sent via the postal operator were properly delivered to the addressee, who collected them, respectively: on 21 January and 2 March 2021.

Pursuant to the regulation contained in the provision of art. 313 of the Code of Criminal Procedure the order to present the charges should be announced to the suspect immediately. Actions aimed at announcing the order to present the charges against Igor Tuleya were taken immediately after its release.

It should be added that both on 20 January 2021 and on 10 February and 12 March 2021, the suspect Igor Tuleya, although absent during his own trial activities, was present in front of the building of the National Prosecutor's Office, where speaking to the media, he announced that he would never appear voluntarily when summoned by the prosecutor, who would have to bring him forcibly.

According to the generally applicable standard of art. 247 § 1 of the Code of Criminal Procedure, the prosecutor may order the arrest and compulsory bringing of the suspect if there is a justified fear that the suspect will not appear on the summons in order to carry out with his participation the announcement of the order on the presentation of charges and questioning as a suspect.

For this purpose, one should also point to the regulation contained in the provision of art. 80 § 1 of the Act on the Organisation of Common Courts. Pursuant to the wording of this norm, a judge may not be detained or held criminally responsible without the permission of the competent disciplinary court. This implied the necessity to precede the arrest of the suspect Igor Tuleya in order to bring him to the prosecutor's office by adopting an appropriate resolution, in this regard by the Supreme Court.

On 15 March 2021, a request was submitted to the Disciplinary Chamber of the Supreme Court for a respective consent to the detention and forcible bringing of judge Igor Tuleya, in order to carry out with his participation the announcement of the order on the presentation of charges and questioning as a suspect.

By a resolution of 22 March 2021, the Disciplinary Chamber of the Supreme Court refused to consent to the detention and forcible bringing of judge Igor Tuleya. The resolution of the Disciplinary Chamber of the Supreme Court is not final and was appealed against by the prosecutor on 14 May 2021. The date of examining the prosecutor's complaint has not been set so far.

- 4. Please provide detailed information on the ongoing disciplinary procedure against judge Morawiec. Please indicate the factual and legal grounds for lifting judge Morawiec's immunity, and explain how the resolution of the Disciplinary Chamber of the Supreme Court can be regarded as compatible with international and regional standards concerning the immunity of judges from jurisdiction in relations to activities she had undertaken in good faith in the exercise of her professional duties.**

- a. Ongoing disciplinary procedure against judge B. Morawiec**

The evidence collected in the course of the preparatory proceedings of the Internal Affairs Department of the National Public Prosecutor's Office in the matter of criminal liability of Beata Morawiec - judge of the District Court in Krakow, justified the referral, pursuant to art. 13 of the Code of Criminal Procedure and art. 110 § 2a in connection with art. 80 § 1 of the § 2(c) of the Act on the Organisation of Common Courts, a motion to the Disciplinary Chamber of the Supreme Court for a resolution on the permission to hold the said judge criminally responsible, inter alia, for accepting a financial advantage in exchange for behavior constituting a breach of the law.

The Disciplinary Chamber of the Supreme Court shared the assessment of the evidence made by the Prosecutor's Office and on 12 October 2020 issued a resolution allowing judge Beata Morawiec to be held criminally responsible for the crimes specified in art. 231 § 2 of the Penal Code, art. 228 § 3 of the Penal Code and art. 21 § 2 of the Penal Code in connection with art. 231 § 2 and art. 284 § 2 and in connection with art 11 § 2 of the Penal Code.

A complaint filed by judge Beata Morawiec against the aforementioned judgment was examined by the Second Division of the Disciplinary Chamber of the Supreme Court on 7 June 2021. Although the oral justification for the resolution has been classified, the Second Division of the Disciplinary Chamber of the Supreme Court repealed the resolution of the Disciplinary Chamber of the Supreme Court of first instance. The resolution restoring judge Morawiec to adjudication and to her previous remuneration is final and immediately enforceable.

- b. Factual and legal grounds for lifting judge Morawiec's immunity**

On 14 September 2020 the National Public Prosecutor's Office requested the Supreme Court to issue a resolution, which would permit calling judge B. Morawiec to criminal responsibility for the acts penalised under art. 231 § 1 of the Criminal Code (exceeding authority), art. 228 § 3 of the Criminal Code (bribery of a person performing public function) and art. 21 § 2 of the Criminal Code in connection with art. 231 § 1 and art. 284 § 2 and in connection with art. 11 § 2 of the Criminal Code (misappropriation of monetary values to the detriment of the public interest).

On 12 October 2020 the Disciplinary Chamber of the Supreme Court granted the prosecution's motion and permitted calling the judge to criminal responsibility on account of all three allegations, suspended judge B. Morawiec in judicial activities and reduced her remuneration by 50% for the time of suspension.

When assessing the first behavior of judge Morawiec, the Disciplinary Chamber of the Supreme Court concluded that her actions exceeded all ethical norms related to the performance of the judge's function. Judge B. Morawiec exceeded her powers resulting from the principle of impartiality and objectivity of judges in such a way that while preceding the appeal hearing in case no. Act IV Ka (...) of the District Court in (...), she met with the accused MB, who appealed in his favor and, after hearing his critical comments about the judgment of the first instance court, she assured him that a favorable decision would be made in his case, what actually happened in the appeal verdict.

According to the Disciplinary Chamber of the Supreme Court, while meeting the defendant, judge Morawiec acted outside the judicial sphere. The provisions of the Code of Criminal Procedure do not provide for meetings between the judge (especially *ad casum* adjudicating) and the suspect / accused. For this reason, a judge cannot rely on his independence, impartiality and judicial objectivity. Such behavior must be treated as a common offence, and in the principle must lead to respective criminal proceedings. As such it does not contain any element of harassment against the accused.

According to the Disciplinary Chamber of the Supreme Court, also the second behavior listed in the application for waiver of immunity must be treated as a common crime performed outside of the judicial sphere, as it concerned accepting a bribe *ex post* in the form of a mobile phone in gratitude for the issuance of the positive appeal verdict in the case in which she participated as the chairman of the adjudicating panel. According to the court, also in this respect, the collected evidence did not indicate that the application to waive the immunity of the judge's conduct contained any form of retaliation against the person holding the function of a judge, and the probability of committing an offense under Art. 228 § 3 of the Penal Code has been fully justified.

As far as the third allegation included in the motion to revoke the immunity of judge B. Morawiec was concerned, the Disciplinary Chamber of the Supreme Court named it explicitly as an ordinary crime. Judge B. Morawiec in her capacity of a public official employed as the Director of the Court of Appeal and empowered to manage the property of the State Treasury, allegedly misappropriated the funds entrusted by the State Treasury to the Court of Appeal in the amount of PLN 5,000.00, by concluding an superficial contract with (...) for a specific work, which work according to prior arrangements made between her and the (...), was never to be performed, and the purpose of the contract was to conceal the misappropriation of funds entrusted by the State Treasury. Although the judge did not issue any judgment in the case and did not act independently within her competences, nevertheless, such behavior (consent to conclude a contract for a specific task without the will to perform the subject of

performance under it despite accepting the remuneration transferred to it) resulted in a reduction of public funds allocated to judiciary.

The Disciplinary Chamber of the Supreme Court found the evidence collected in the case to be sufficient for issuing a resolution in accordance with the submitted application. Especially the meeting and conversation between the judge and the accused found no reflection on her part in the formal act. In particular, judge Morawiec did not prepare an appropriate memorandum, did not inform her superior or attempted to withdraw from the adjudication panel in the case of the accused.

In justification of its resolution the Disciplinary Chamber of the Supreme Court underlined that suspicion of abuse of office by a judge and his venality are, from the point of view of judicial ethics, the most dangerous and severe behaviors from the point of view of the image of the judiciary. It is therefore in the interest of the administration of justice to thoroughly investigate such allegations and that can only be carried out in the course of criminal proceedings.

**c. Compatibility of the resolution of the Disciplinary Chamber of the Supreme Court with international and regional standards concerning the immunity of judges from jurisdiction in relations to decisions taken in good faith in the exercise of their professional duties.**

It is an unquestionable standard in every democratic legal system that judicial immunity is an exception to the common principles of criminal liability and for this reason it cannot be subject to an extensive interpretation, and the manner of interpretation and application of the provisions on immunity must be subordinated to the exercise of the immunity function. Also, and what is even more important is that judicial independence is not a judge's right, but his primary duty. Just as the constitutional duty of the legislator and judicial administration bodies is to protect the independence of a judge, the judge's duty is to implement this independence in the practice of his adjudication.

Further, please see the explanatory information contained above in response to the question No. 2 point b.

**5. Please explain why the Disciplinary Chamber of the Supreme Court decided to adjudicate the cases of judge Tuleya and Morawiec despite the interim measure adopted by the Grand Chamber of the Court of Justice of the European Union on April 8, 2020. What measures has Poland adopted, or intends to adopt, to implement the Grand Chamber decision?**

**a. The character of the decisions of the Disciplinary Chamber of the Supreme Court taken in the cases of judge I. Tuleya and judge B. Morawiec**

The decision of the Court of Justice of the European Union (CJEU) (regardless of doubts as to its legal effectiveness) was fully and effectively implemented by Poland. The CJEU, pursuant to the decision of 8 April 2020, obliged Poland to suspend the application of the provisions constituting the jurisdiction of the Disciplinary Chamber of the Supreme Court, both in the first and in the second instance, in disciplinary cases against judges. Regardless of the doubts as to the legal effectiveness of this obligation, the result requested by the CJEU obliged Poland to achieve under the aforementioned



provision was definitely achieved: as of 8 April 2020, the Disciplinary Chamber of the Supreme Court - apart from decisions to suspend proceedings - did not take any action in disciplinary cases involving judges, nor has it issued any ruling on these matters. Therefore, the provisions on disciplinary proceedings against judges set out in the ruling of the CJEU are not applied.

At the same time, it is important to point out that the **cases concerning the authorization to bring a judge to criminal liability (the so-called waiver of immunity), which have recently been examined by the Disciplinary Chamber of the Supreme Court, do not constitute disciplinary cases** and therefore do not fall within the scope of the decision on the application of interim measures.

It should be noted here that the effect of the waiver of immunity is to allow the judge to be held criminally responsible in criminal proceedings conducted at the request of the prosecutor's office by a common court. In criminal proceedings, judges of common courts and - in the event of extraordinary means of appeal - in the Criminal Chamber of the Supreme Court decide on the guilt and punishment of the accused. The independence of these courts has not been questioned by the EU. Issues relating to the immunity and criminal liability of judges do not constitute the subject of case before the CJEU at all, and so far, no objections have been communicated in this respect to Poland. Consequently, the admissibility of the above-mentioned cases being processed by the Supreme Court cannot be questioned in the framework of the proceedings concerning the provisions on disciplinary and not criminal liability.

It should also be noted that the CJEU specified only the result which Poland was obliged to achieve and left the choice of appropriate measures to the competent Polish authorities, which, by adopting them, act within the scope of their procedural autonomy, in accordance with their competences.

#### **b. Measures adopted to implement the decision of the Grand Chamber of the CJEU**

In implementation of the CJEU decision of 8 April 2020 in case C-791/19 R, the Polish government has taken the following steps:

On 5 May 2020, two ordinances were issued:

1. Regulation No. 55/2020 of the First President of the Supreme Court;
2. Regulation No. 21/2020 of the President of the Supreme Court managing the work of the Disciplinary Chamber.

Moreover, on 10 April 2020, the Supreme Court referred a legal question to the Constitutional Tribunal of Poland as to whether art. 4 section 3 sentence 2 TEU in conjunction with art. 279 TFEU to the extent that it results in the obligation of an EU Member State to implement interim measures relating to the structure and functioning of the constitutional organs of the judiciary of that State is consistent with art. 2 (democratic rule of law), art. 7 (the principle of legalism), art. 8 sec. 1 (the principle of the highest legal force of the Constitution in the political order of Poland) and art. 90 sec. 1 (the so-called "European clause") in connection with art. 4 sec. 1 (the principle of national sovereignty) of the Polish Constitution - as a result of which a case was initiated before the Constitutional Tribunal of Poland under reference number P 7/20.

In compliance with the CJEU's obligation, the proceeding of the cases related to disciplinary proceedings of judges belonging to the competence of the Disciplinary Chamber of the Supreme Court was suspended by regulation No. 55/2020. New cases, as well as cases that have not yet been registered or referred for examination according to the jurisdiction of the Disciplinary Chamber of the Supreme Court - will be kept at the Registry of the First President of the Supreme Court until the end of the proceedings before the CJEU or until the judgment is issued by the Constitutional Tribunal. On the other hand, cases already registered in the Disciplinary Chamber of the Supreme Court, but in which the judges were not appointed, were transferred to the Secretariat of the President of the Supreme Court who directs the work of the Disciplinary Chamber. That means that these cases will not be examined until the end of the above-mentioned proceedings.

The measures adopted by Poland make it possible to effectively and permanently achieve the goal set out in the CJEU's decision to apply interim measures (despite doubts as to the legal effectiveness of this provision), while respecting, recognized also under art. 2 TEU, the basic principles of the political system of Poland expressed in the Constitution of Poland.

In addition, the solutions adopted in both regulations guarantee the security and secrecy of the court files, which are still kept in the Disciplinary Chamber of the Supreme Court, as they were received there before the above-mentioned regulations were adopted, including in particular ensuring the protection of personal data disclosed in these files against unauthorized access.

In conclusion, it should be noted that the judges of the Disciplinary Chamber of the Supreme Court, as addressees of the CJEU decision on the application of interim measures, do not take any action that would violate the operative part of this provision. Until the proceedings in the case C-791/19 are completed, the judges of the Disciplinary Chamber of the Supreme Court do not take any action in disciplinary cases concerning judges.

Undoubtedly, the submission of the Supreme Court to the Constitutional Tribunal with a legal question regarding the CJEU ruling is closely related to the implementation of the CJUE decision. The subject of the review in the case covered by the legal question of the Supreme Court of 10 April 2020 is the norm derived from the provisions of the TEU and the TFEU, consisting in the fact that it creates an obligation for an EU Member State to implement interim measures that relate to the shape of the system and functioning of the constitutional organs of this State, in particular, they concern the organization and functioning of the judicial authority of that State.

The accusations against the above-mentioned norm consist in the fact that it obliges the EU Member State, and thus Poland, to implement interim measures relating to the shape of the system and the functioning of the constitutional organs of that State, in particular the judicial authority, despite the fact that these cases have not been handed over to the EU and its bodies on the basis of an international agreement, which is a condition for the exercise of these competences by the EU.

Unquestionably, the adjudication of the case pending before the Constitutional Tribunal as a result of the legal question of the Supreme Court of 10 April 2020 will be of significant importance from the point of view of the assessment of the CJEU's decision in terms of its compliance with the Constitution of Poland.

The Polish government is of the opinion that the EU does not have any competence to define the system of its Member States or to shape the competences of individual organs of these States, to influence the internal organization of these organs, and to suspend their activities, in particular the constitutional organs of Member States. Resolving the legal questions of the Supreme Court will be crucial for determining whether Poland is bound by the CJEU's order on interim measures and for determining whether it does not go beyond the judicial mandate granted to the CJEU under art. 19 section 1 TEU.

Pursuant to the Constitution of Poland, courts and tribunals are separate and independent from other authorities (art. 173 of the Constitution of Poland), and judges in exercising their office are independent and subject only to the Constitution and statutes (art. 178 (1) of the Constitution of Poland), they are also irremovable (art. 180 of the Constitution of Poland). The above explicitly excludes that the executive or legislative authority interfere with the judicial activity of courts in such a way as to violate judicial jurisdiction and interfere with the course of the court cases, and even more so with the actual or legal status of judges, by means of statutes or administrative decisions.

The interim measure applied by the CJEU, due to its precedent nature and deep interference in the foundations of the system of a Member State, provokes various reactions, also on the part of the judiciary. They are most understandable in a democratic country where a lively public debate on the reform of the judiciary exists.

The EU law explicitly binds national judges. However they are also, pursuant to art. 179 par. 1 of the Constitution of Poland, subject to that Constitution. Hence the Supreme Court has not only the right but also an obligation to submit a legal question to the Constitutional Tribunal in order to explain the fundamental constitutional issues that arise in the course of its work. The court dialogue - both with the CJEU and with the Constitutional Tribunal - serving to solve multifaceted legal problems, is undeniably an inherent element of multicentric legal systems.

It is worth emphasizing that similar legal debates are taking place also in other democratic States. For instance in its judgment of 30 July 2019, the German Federal Constitutional Tribunal stated that "*the necessary freedom in assigning the tasks contained in Article 19 sec. 1 TEU ends when the interpretation of the Treaties is no longer comprehensible and is therefore objectively arbitrary. If the CJEU exceeded this limit, the action of the CJEU would no longer be covered by Article 19 sec. 1 TEU, and the CJEU ruling on Germany would not contain the minimum level of democratic legitimacy required under Article 23 sec. 1, second sentence, in conjunction with Article 20 sec. 1 and Article 79 sec. 3 of the German Constitution*".

Further, in the latest judgment of 5 May 2020, **the German Federal Constitutional Tribunal stated that the CJEU cannot enter the sphere which is the exclusive domain of a Member State. The mandate given in art. 19 sec. 1 TEU is exceeded when the traditional European methods of interpretation or, more broadly, general legal principles common to Member States of the EU legislators are clearly disregarded.** The German Federal Constitutional Tribunal stated that it was not bound by the CJEU decision when the interpretation of the principle of proportionality adopted by this Court (...) goes beyond the judicial mandate granted to the CJEU in art. 19 sec. 1 TEU. This could lead to an actual change of the Treaties or the expansion of these competences - contrary to the principle that only the Member States decide on the content of the Treaties and these competences. As indicated by the German Federal Constitutional Tribunal, tensions and disputes between the CJEU and the courts of the

Member States are an inherent element of the EU structure, and they should be resolved with their cooperation, in the spirit of European integration and in mutual respect and understanding.

Following this motto, also the government of Poland guarantees readiness to cooperate with the EU, within the limits set by the relevant legal regulations binding Poland and within the limits of competences invoked by the EU in the Treaties, in accordance with the principle of sincere cooperation (art. 4 (3) TEU).

Importantly, for the assessment of the correctness of the implementation of interim measures ordered by the CJEU, the mere fact of submitting a legal question to the Constitutional Tribunal does not affect the effectiveness of the CJEU's decision or its lack. Depending on the decision of the Constitutional Tribunal, the Polish authorities will take appropriate steps to clearly define the effects of such provisions in relation to the Polish legal system. Certainly, however, the mere fact of initiating this case cannot be interpreted as inconsistent with the ruling of the CJEU.

**6. Please provide detailed information on the legislation concerning accountability of judges, and explain how it is compatible with international human rights norms and standards relating to the independence of judiciary.**

**a. Law concerning accountability of judges**

**Constitutional and statutory provisions:**

According to art. 178 of the Constitution of Poland:

1. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

(...)

3. A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges.

According to art. 66 of the Act on the Organisation of Common Courts (ustawa prawo o ustroju sądów powszechnych) of 27 July 2001, as amended by the Act of 8 December 2017 on the Supreme Court (ustawa o Sądzie Najwyższym), at the appointment, a judge makes the solemn affirmation before the President of the Republic of Poland, in accordance with the following formula:

*I affirm solemnly, holding the post of common court judge entrusted to me, to serve faithfully to the Republic of Poland, to guard the law, to perform scrupulously the duties arising from my position, to administer justice, without any bias, according to my conscience and to the rules of law, to keep the State and professional secrets, and to be guided by the principles of dignity and honesty.*

Art. 82 § 1 of the Act on the Organisation of Common Courts requires a judge to act in compliance with the judicial oath, whereas § 2 states that: A judge should, when on and off service, guard the authority

of the post of judge and avoid everything that could bring discredit to the authority of a judge or weaken the confidence in his/her independence.

Pursuant to art. 89 § 1 of the Act on the Organisation of Common Courts: A judge may submit, make and lodge requests, motions and complaints in matters related to the office held only along official channels. The judge shall not refer to third institutions or third persons in this regard, nor make the matter in question public.

A judicial immunity is regulated under art. 80 of the Act on the Organisation of Common Courts:

§ 1. A judge may not be detained or called to criminal responsibility without the permission of a competent disciplinary court. The foregoing shall not concern detention if a judge was caught red handed, should such detention be necessary to ensure the appropriate course of proceedings. By the time of issuance of a resolution, which permits calling, the judge to criminal responsibility, only acts requiring urgent attention are permitted. (...)

§ 2c. The disciplinary court issues a resolution, which permits calling the judge to criminal responsibility if a reasonable suspicion exists that the judge has committed the offence. The resolution resolves the issue within the scope of permission to call the judge to criminal responsibility and includes the statement of grounds.

§ 2d. The disciplinary court considers the motion for permission to call the judge to criminal responsibility within fourteen days from the date of lodging it to the disciplinary court. (...)

§ 2e. Prior to the issuance of the resolution, the disciplinary court hears the disciplinary representative, as well as the judge, representative of the body or a person who applied for the permission, if such appear. The failure of the foregoing persons or of a legal counsellor to appear shall not withhold the consideration of the motion.

§ 2f. The judge, whom the proceedings concern, has the right to access documents enclosed to the motion. However, when bringing the motion to the disciplinary court, the public prosecutor may reserve that such documents or a part thereof, may not be disclosed to the judge due to the interest of preparatory proceedings. (...)

§ 4. When deciding in the case referred to in section 1, the disciplinary court may be satisfied with the statement of the judge that he/she agrees to the issuance of a resolution on the permission to call him/her to criminal responsibility.

Pursuant to art. 107 § 1 of the Act on the Organisation of Common Courts: A judge is disciplinarily liable for official (disciplinary) misconduct for:

1. an obvious and gross offence against the provisions of the law;
2. acts or omissions which may prevent or significantly impede the functioning of an organ of the judiciary;
3. actions questioning the existence of the official relationship of a judge, the effectiveness of the appointment of a judge, or the constitutional mandate of an organ of the Republic of Poland;

4. public activities that are incompatible with the principles of judicial independence and the impartiality of judges;
5. an infringement of the dignity of the office.

According to art. 110 § 2a of the Act on the Organisation of Common Courts resolutions permitting calling a judge to criminal responsibility shall be issued by the Supreme Court composed of one judge of the Disciplinary Chamber in the first instance, and the Supreme Court composed of three judges of the Disciplinary Chamber in the second instance.

Art. 114 of the Act on the Organisation of Common Courts state that:

§ 1. The disciplinary representative initiate preliminary inquiries upon request of the Minister of Justice, the president of the court of appeal or of the regional court, the board of the court of appeal or regional court, the National Council of the Judiciary or upon his/her own initiative, after initial determination of circumstances necessary to establish constituent elements of a disciplinary offence. The preliminary inquiries shall be concluded within thirty days from the date of the first action undertaken by the disciplinary representative.

§ 2. In the course of the preliminary inquiries the disciplinary representative may summon a judge to make a written statement concerning the subject of the inquiry within fourteen days from the date of receipt of the request. The disciplinary representative may also collect an oral statement from the judge. Failure to submit a statement by a judge shall not suspend further proceedings.

§ 3. Should, after the conclusion of the preliminary inquiries, the disciplinary representative finds sufficient grounds for instituting the disciplinary proceedings, he institutes disciplinary proceedings and provides the judge concerned with written charges. (...)

According to art. 128 of the Act on the Organisation of Common Courts, the provisions of the Code of Criminal Procedure apply to matters not regulated in the Act.

Pursuant to art. 129 § 2 and 3 of the Act on the Organisation of Common Courts: (...)

§ 2. Should the disciplinary court issue a resolution permitting to call the judge to criminal responsibility, the judge is suspended in the performance of service duties ex officio.

§ 3. The disciplinary court, when suspending a judge in the performance of service duties, shall reduce the judge's remuneration by 25 to 50 % for the period of the suspension; the foregoing shall not concern persons with respect to whom the proceedings for incapacitation have been initiated.

According to art. 85 § 1 of the Act on the Organisation of Common Courts: A judge shall keep confidential the facts of the case which have been made known to him/her as a result of holding the post, in a way other than during an open court trial.

Art. 241 § 1 of the Criminal Code stipulates that anyone who, without permission, publicly spreads information from preparatory proceedings before they have been disclosed in court proceedings is liable to a fine, the restriction of liberty or imprisonment for up to two years.

Art. 10 of the Code of Criminal Procedure enshrines the principle of legalism:

§ 1. With respect to an offence prosecuted ex officio, the authority responsible for the prosecution of offences is obliged to institute and conduct preparatory proceedings, and the public prosecutor is moreover obliged to bring and support charges.

§ 2. Except for the cases mentioned in the law or in international law, no one can be discharged from liability for an offence committed.

According to art. 2 of the Act of 28 January 2016 on Public Prosecution Services (ustawa prawo o prokuraturze) the public prosecutor's office performs tasks in the area of prosecuting crimes and upholds the rule of law.

The rules, which judges should respect are contained in the Collection of Principles of Judges' Professional Ethics attached to the resolution of the National Council of the Judiciary No. 25/2017 of 13 January 2017 (Zbiór zasad etyki zawodowej sędziów i asesorów sądowych).

### **Rules on disciplinary liability**

As a judge, the applicant is subject to disciplinary liability. The rules of disciplinary liability of judges are contained in the Act on the Organisation of Common Courts, as amended by the Act of 8 December 2017 on the Supreme Court ("the 2017 Amending Act") which entered into force on 3 April 2018 and the Act of 20 December 2019 amending the Act on the Organisation of Common Courts, the Act on the Supreme Court and other acts, which entered into force on 14 February 2020 ("the 2019 Amending Act").

Prior to that date, art. 107 of the Act on the Organisation of Common Courts provided for the judges' disciplinary liability for misconduct in service including gross violation of the provisions of law and for breach of the authority of the office of judge (delikt dyscyplinary). The 2019 Amending Act clarified the catalogue of disciplinary misconducts without changing the general rules under which liability can be enforced.

According to art. 107 section 1 of the Act on the Organisation of Common Courts, a judge shall be disciplinarily liable for official (disciplinary) misconduct for an obvious and gross offence against the provisions of the law; the acts or omissions which may prevent or significantly impede the functioning of an organ of the judiciary; the actions questioning the existence of the official relationship of a judge, the effectiveness of the appointment of a judge, or the constitutional mandate of an organ of the Republic of Poland; the public activities that are incompatible with the principles of judicial independence and the impartiality of judges or an infringement of the dignity of the office.

Disciplinary proceedings concerning judges can be instituted only by the disciplinary representative or his deputies. Such function is entrusted with the disciplinary representative for the judges of the common courts (Rzecznik Dyscyplinary Sędziów Sądów Powszechnych; "disciplinary representative") and his two deputies who are appointed by the Minister of Justice, as well as judges adjudicating in disciplinary cases at the courts of appeal and regional courts. Neither the disciplinary representative nor his deputies are subordinates of the Minister of Justice - Prosecutor General as they are not organisationally or professionally associated with the Ministry of Justice or with the Office of the Public Prosecutor. The Minister of Justice - Prosecutor General has no supervision or control powers over the

disciplinary representatives. The Minister of Justice - Prosecutor General assumes powers to take specific actions in the course of the disciplinary proceedings.

The Act on the Supreme Court of 8 December 2017 established a new Disciplinary Chamber (Izba Dyscyplinarna) in the Supreme Court. The Disciplinary Chamber acts as a court of second instance in disciplinary matters of judges of the common courts. The 2017 Amending Act established also the office of the disciplinary representative of the Minister of Justice who is appointed by the minister.

The preliminary inquiries are initiated by the disciplinary representative under art. 114 § 1 of the Act on the Organisation of Common Courts, as amended by the 2017 Amending Act "after initial determination of circumstances necessary to establish constituent elements of a disciplinary offence" ("po wstępnym ustaleniu okoliczności koniecznych dla stwierdzenia znamion przewinienia dyscyplinarnego"). In practice, the disciplinary representative initiates proceedings concerning a certain activity of a judge that could, in his view, make out constituent elements of a disciplinary offence, and summons a judge to make a written or oral statement or to give evidence as a witness. According to the second sentence of art. 114 § 1 of the Act on the Organisation of Common Courts, in principle the preliminary inquiry proceedings shall be concluded within thirty days.

The aim of preliminary inquiries is to verify whether there are any grounds whatsoever for instituting the disciplinary proceedings. Institution of the preliminary inquiries does not entail any implications for the judge concerned – neither is he presented with charges nor is he restricted in his professional activity. In this aspect, the preliminary inquiries can be compared to the initial stage of preparatory proceedings when they are conducted in a specific case before presenting charges to anyone (in rem proceedings).

In the course of disciplinary proceedings a judge who has been pressed with charges becomes a party to the proceedings. According to art. 128 of the Act on the Organisation of Common Courts to matters not regulated therein the provisions of the Code of Criminal Procedure apply. The judges' status in those proceedings is therefore regulated and the judges do enjoy adequate procedural safeguards, such as presumption of innocence or *in dubio pro reo* principle.

According to art. 114 § 7 of the Act on the Organisation of Common Courts it is not the disciplinary representative or his deputy who settles the case concerning a judge's disciplinary liability but an impartial and independent court. Art. 115 and art. 121 of the above-mentioned Act indicate that the judicial disciplinary proceedings consist of two instances.

**b. Compatibility of judges' accountability law in Poland with international human rights norms and standards relating to the independence of judiciary.**

Judicial independence in Polish legal system is determined by the norms of international law which Poland has ratified and which it strictly applies. Pursuant to art. 6 para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone has the right to a fair and public hearing within a reasonable time by an independent court. Similarly, pursuant to art. 14 para. 1 of the International Covenant on Civil and Political Rights "Everyone has the right to a fair and public hearing by a competent, independent and impartial tribunal (...)".



It must also be reiterated that Poland has a standing invitation to all special procedure mandate holders and is open to cooperate closely with human rights institutions. There is a dynamic dialogue with international institutions on the issue of judicial reform, in particular with the European Commission of the European Union. The dialogue has already brought some concrete results with the adoption of amendments containing several provisions that positively respond to remarks made in the previous months by the European Commission and other international institutions.

As far as the relationship of other than judicial state authorities to the courts is concerned, Poland has regulated this nexus in accordance with the European Charter of Statutory Principles Concerning Judges (adopted on 10 July 1998 by the Council of Europe). Further, Poland has fully reflected in its legal system all the principles delineated in the Recommendation No. R (94) 12 of the Committee of Ministers to the Member States on the independence, efficiency and role of judges (adopted by the Committee of Ministers on 13 October 1994 at the 516th meeting of the ministers' deputies) that requires Member State governments to introduce necessary measures to ensure the proper role of judges and to provide them with appropriate training, status, position and remuneration that would correspond to the seriousness and dignity of the profession and the responsibility of judges

**7. Please indicate the measures Poland intends to take to address the serious concerns raised by several international and regional mechanisms in relations to the threats to the independence of the judiciary, and provide detailed information on the guarantees in place to protect and promote the independence of individual judges.**

**a. Prospective intended measures to address the serious concerns raised by several international and regional mechanisms in relations to the threats to the independence of the judiciary**

As already thoroughly explained in response to question No. 5 b. of this communication, Poland has adopted necessary measures to – on the one hand - implement the decision of the Grand Chamber of the CJEU and – on the other hand – to finally assess whether any such decision, which so deeply interferes with internal organization of Poland and suspends the activities of its constitutional organs is indeed compatible with the constitutional norms that stay highest in the rank of norms in each and every democratic state.

Resolving the legal questions of the Supreme Court will be certainly crucial for determining whether Poland is bound by the CJEU's order on interim measures and for determining whether it does not go beyond the judicial mandate granted to the CJEU under art. 19 par. 1 TEU. Undoubtedly this will also finally define the limits of any external interference into the constitutional, democratic shape of Poland, including its organs and public institutions.

As far as the question on “the serious concerns raised by several international and regional mechanisms in relations to the threats to the independence of the judiciary” are concerned, Poland intensely suggests all such international and regional mechanisms to take a closer look at the whole judiciary reform in Poland and its specific context that triggered the changes. The attempt to reform and reorganize the judiciary in a comprehensive manner, taken up by the parliamentary majority,

addressed high public expectations in this regard, according to which the justice system in Poland was disorganized and ineffective. Polish government holds an opinion that efficient, fair and truly independent system of justice is in the interest of all Polish citizens. Only the system free from political pressure and any particular interests is a real guarantee of the rule of law, public respect for the law, and an efficient state. That conviction laid foundation for the changes.

**b. Detailed information on the guarantees in place to protect and promote the independence of individual judges**

It must be first and foremost underlined that in no democratic state does the judicial independence constitute a judge's right, but it is rather his primary duty. As already thoroughly explained in earlier parts of this communication, the principle of judicial independence is formulated in art. 178 of the Polish Constitution. The essence of this provision is to ensure a fair trial. It is also closely related and constitutionally based on the principle of a democratic state ruled by law (art. 2 of the Constitution), the principle of the right to a fair trial (art. 45 of the Constitution), the principle of separate and independent courts from other authorities (art. 173 of the Constitution), which is a consequence of the principle of separation of powers adopted in the Constitution (art. 10 of the Constitution). These four constitutional principles are the constitutional foundation on which the principle of judicial independence is built; through their prism it is also interpreted.

Judicial independence in Polish legal system is also determined by the norms of international law which Poland has ratified and which it strictly applies. Pursuant to art. 6 para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone has the right to a fair and public hearing within a reasonable time by an independent court. Similarly, pursuant to art. 14 para. 1 of the International Covenant on Civil and Political Rights "Everyone has the right to a fair and public hearing by a competent, independent and impartial tribunal (...)".

Formulated in art. 178 of the Polish Constitution, the principle of judicial independence guarantees that a judge is in a situation where he can make impartial decisions in the performance of his duties, in a manner consistent with his conscience and protected against the possibility of any direct or indirect external pressure. Independence of a judge in Polish legal system includes a number of elements:

- 1) impartiality towards participants in the proceedings,
- 2) independence from out-of-court bodies (institutions),
- 3) independence of the judge from the authorities and other judicial bodies,
- 4) independence from the influence of political factors, especially political parties,
- 5) internal independence of the judge.

Respecting and defending all these elements of independence is a constitutional duty of all organs and persons dealing with the activity of courts, but also a constitutional duty of the judge himself. A breach of this obligation by a judge may constitute a breach of the principle of judicial independence, which is tantamount to a very serious breach of the fundamental principles of the functioning of the judiciary.

Judicial independence is not a judge's right, but his primary duty. Just as the constitutional duty of the legislator and judicial administration bodies is to protect the independence of a judge, the judge's duty is to implement this independence in the practice of his adjudication.

The prerequisite for the actual existence of the principle of judicial independence is the guarantee of this independence, regulated at the constitutional level. The special powers of judges do not however constitute personal "privileges" intended to protect the interests of this group of public officials. They should be seen through the prism of striving to ensure effective compliance with the most important constitutional principles of the judiciary. First of all, it is about norms of law in the subjective sense, even though they result in certain subjective rights of persons holding the office of judges. Nevertheless, in functional terms, these are not personal rights, the primary purpose of which would be to protect the interests of specific persons (or professional groups). After all, the principle of independence determines not only the powers, but also specific duties of judges.

Constitutional guarantees of judicial independence are:

1. an order to provide the judge with appropriate working conditions and remuneration corresponding to the dignity of the office and the scope of duties (art 178 (2));
2. the order to remain apolitical (art. 178 (3));
3. the principle of stabilizing the position of a judge: permanent appointment of judges (art. 179), irremovability of a judge except for constitutionally indicated extraordinary situations (art. 180 par. 1-4), non-transferability of a judge (art. 180 par. 2 and 5);
4. immunity and inviolability of the judge (art. 181);
5. participation of the National Council of the Judiciary in taking the most important personal decisions concerning a judge (art. 179 and art. 186).

#### **Ad. 1. Remuneration corresponding to the dignity of the office**

The current Constitution particularly emphasizes the status of judges, *expressis verbis* referring to the "dignity of their office" in relation to the issue of their material status. The constitutional norm expressed in art. 178 sec. 2 of the Constitution of Poland is aimed at strengthening the position of the judiciary in the system of state organs and guaranteeing judges such working conditions and remuneration that are to serve the proper administration of justice. In a democratic state ruled by law, a well-functioning administration of justice is a guarantee and a condition for the functioning of the rule of law. The constitution-maker assumes that the judiciary will function properly when the working conditions of judges and their remuneration are adequate to the dignity of the office of judge and the scope of his duties. It should be emphasized that judges are the only professional category whose remuneration is subject to explicit constitutional regulation. Hence the obligation of the competent authorities of the state to pay special attention to shaping the appropriate level of these remuneration, also in relation to the remuneration of other public officials.

#### **Ad. 2. Apoliticality**

The Constitution of Poland in art. 178 sec. 3 prohibits judges from belonging to a political party and trade union and from carrying out public activities incompatible with the principles of independence of the judiciary and judges. Moreover, art. 103 sec. 2 of the Constitution imposes a ban on the exercise of parliamentary mandate by judges, also while retired.

The ban on belonging to a political party should be treated as an exception to the freedom guaranteed in art. 11 sec. 1 of the Constitution, which cannot be interpreted extensively. It means a ban on being a member of a political party and an obligation to withdraw from it upon assuming office. The suspension of membership does not apply in this case. Furthermore, as regards the prohibition of public activity, any activity that could conflict with the image of the judge as an impartial and politically neutral person, as well as with the image of the judiciary as a structure separate from other authorities, is excluded. Thus, the prohibition set out in art. 178 sec. 3 cannot be understood as interfering with the judge's personal rights, e.g. the right to have one's own convictions, beliefs and views, but they should remain an internal matter of the judge.

### **Ad.3. Irremovability**

In art. 180 of the Polish Constitution, the basic guarantees of judicial independence are related to the status of a judge, namely: prohibition of depriving a judge of his office, prohibition of suspending a judge from holding office, prohibiting the transfer of a judge to another seat or position, and the institution of retirement determining the status of a judge after termination of office. The essence of this regulation is to provide a judge with a guarantee of independence by ensuring that he cannot be removed from his post without his consent to the change being made. The principle of irremovability of judges is to safeguard the stabilization of the office of judge by excluding potential decisions of the executive authority upon the legal situation of a judge. It is an instrument that safeguards the independence of the judiciary and its ability to administer justice independently.

Derogation from the principle of irremovability may occur exceptionally, taking into account constitutional principles and values. Such temporary derogation from the legal principle of binding a judge to the place of his office and judicial power is the institution of delegating a judge by the Minister of Justice or the president of the court. This is not, however, depriving a judge of his place of service. Due to the act of delegation, a judge is not deprived of office, but only performs the activities indicated in the delegation act in the appropriate unit. His status under the appointment of a judge by the President does not change.

The principle of irremovability, as stated in art. 180 of the Constitution, is not absolute, but also contains regulations specifying the conditions for the judge's retirement, as well as allowing, subject to certain guarantees, the statutory determination of the situation when a judge loses office. The jurisprudence of the Constitutional Tribunal indicated that, on the basis of the constitutional principle of independence and the separation of powers, the removal of a judge from performing judicial functions is permissible when he or she has a permanent incapacity to continue to practice the profession or such a system of personal or professional relationships that may permanently undermine impartiality of a judge.

Certain individual behavior of a judge that undermines the dignity of the profession of judge and undermines the trust necessary to practice the profession may lead to the judge's expulsion from the profession only through disciplinary proceedings (which has already been explained in more detail in previous parts of this communication). Only in such proceedings are the necessary procedural guarantees preserved, and the possibility of substantive assessment of the relationship between the behavior alleged by the judge and the loss of confidence necessary to perform the work is ensured. However, the decision on this issue cannot be left to non-judicial bodies, in particular the executive.

Situations in which a judge may be retired are indicated in art. 180 sec. 3-5 of the Constitution. On the other hand, the assessment of whether a judge's health condition prevents him from exercising, left for the adjudicating body to be assessed, must be made in the manner specified by statutes. In such case the judge has the right to appeal to a court against this decision. Also the "age limit" after which the judge retires, has been submitted to statutory regulation.

The retirement of a judge in the event of a change in the court system or a change in judicial districts is provided for in art. 180 sec. 5 of the Constitution. This provision formulates however one important guarantee - leaving full remuneration. From the content of art. 180 sec. 5, it can be inferred that this transfer should be treated as a final solution, admissible only in a situation where transfer to another court is not possible.

#### **Ad. 4. Immunity**

As already explained thoroughly above, the judge's immunity specified in art. 181 of the Constitution includes the prohibition of criminal liability and the prohibition of deprivation of liberty without the prior consent of a court specified in the respective statute. A judge's immunity is relative, as it may be waived, which will allow the judge to be held criminally responsible and, if convicted, may lead to the loss of the judge's office. It is therefore impossible to proceed against a judge before the waiver of immunity, and that may only be performed by one of the courts referred to in art. 175 of the Constitution in the course of the procedure providing the judge with necessary guarantees of fair proceedings. Since the procedure for the waiver of immunity is intended to enable the authorities to encroach on the constitutionally guaranteed scope, indicated by art. 181 of the Constitution and allows limiting the scope of constitutionally defined freedom, therefore - under art. 31 of the Constitution - it must ensure defense that is real and effective and enables a judge participating in this procedure to take up and defend his own position.

#### **Ad. 6. Supervision**

The supervision provided for in the Act on the Organisation of Common Courts should be interpreted in a way that corresponds to the purpose of this institution, i.e. influencing the course of the court's administrative affairs without interfering with its administration of justice. The concept of supervision under this act has a well-formed meaning. The analysis of the binding provisions of the Act on the Organisation of Common Courts indicates two types of supervision: judicial and administrative supervision. These two categories should include forms of verification of the actions of the judiciary.

The need for administrative supervision results in the fact that the courts are separate organizational units, have a specific structure consisting of judges (and other employees) and are equipped with certain material and budgetary resources. Therefore, each court must have an administration, the functioning of which should be subject to certain verification. The form of this verification is the administrative supervision exercised by the presidents of courts, the Minister of Justice and, respectively, the President of the Supreme Administrative Court.

In Poland the relationship of other state authorities to the courts is regulated in accordance with the European Charter of Statutory Principles Concerning Judges (adopted on 10 July 1998 by the Council of Europe). This act includes the obligation of the State to provide judges with the resources necessary for the proper performance of their tasks, in particular to settle cases within a reasonable time.

Recommendation No. R (94) 12 of the Committee of Ministers to the Member States on the independence, efficiency and role of judges (adopted by the Committee of Ministers on 13 October 1994 at the 516th meeting of the ministers' deputies) stressed that Member State governments should seek to introduce necessary measures to ensure the proper role of judges and to provide them with appropriate training, status, position and remuneration that would correspond to the seriousness and dignity of the profession and the responsibility of judges. The system of courts should be structured in such a way as to provide adequate support staff and create the possibility of delegating non-judicial tasks to persons other than judges. These principles have been fully reflected in the Polish legal system.

The provision that allows the Minister of Justice to “draw attention” in the event of a failure to comply with the efficiency of court proceedings is also consistent with the Constitution of Poland and with the principle of judicial independence. Pursuant to art. 37ga of the Act on the Organisation of Common Courts, the Minister of Justice may “draw attention” of the president or vice president of the court of appeal in writing if he finds deficiencies in the management of the court, internal administrative supervision or performance of other administrative activities and demand that its effects be removed. The president or vice-president of the court of appeal to whom the “attention was drawn” may submit a written objection to the Minister of Justice within fourteen days from the day on which the attention was drawn. If an objection is submitted, the Minister of Justice shall, within fourteen days from the date of submission of the objection, revoke the objection or refer the case to the National Council of the Judiciary. Drawing attention by the Minister of Justice does not concern the substantive side of examining the case, and therefore does not directly interfere with the administration of justice. Efficiency of the proceedings is an element of the right to a fair trial. The powers vested in the Minister of Justice are to strengthen the exercise of the right to a fair trial with regard to its element which is related to the examination of the case without undue delay.

Referring to the institution of the so-called “pointing out” (“wytyk sędziowski”) referred to in Art. 40 of the Act on the Organisation of Common Courts, the Constitutional Tribunal stated that it is a different institution than “drawing attention” described under art. 37ga of the Act on the Organisation of Common Courts. While art. 37ga of the Act on the Organisation of Common Courts points to the instruments of administrative supervision, the institution regulated in art. 40 § 1 of the Act on the Organisation of Common Courts is of a judicial nature. The failure to fulfill legal procedural obligations is brought forward in the course of the instance, in connection with the pending proceedings, and the competent authority is the court adjudicating in the second instance. The “pointing out” is therefore not made in a separate proceeding and it is not a disciplinary action.

The institution of “pointing out” is addressed to the court, not to the individual members of the court. Under this procedure, it is not possible to take into account the infringement of the law by individual members of the composition and to issue a ruling on “pointing out” only to those members of the board who committed the infringement themselves, or to burden the court with the actions of a member of its composition. For judges from the court, the negative consequences of the ruling on “pointing out” are independent of their involvement in an activity that was obviously offended by the provisions.

The applicability of art. 40 of the Act on the Organisation of Common Courts is also connected with the assessment of the importance of violation of the law, its effects and consequences for the resolution of the case. Quite often, such breaches concern the court's failure to comply with the applicable

procedural law. It may consist not only in the action of the court itself, but also in preventing the parties from taking authorized actions or in allowing them to act in a situation where the law prohibits it.