

POSITION OF
THE NATIONAL COUNCIL OF THE JUDICIARY
of 30 July 2021
regarding CJEU judgment dated 15 July 2021 (C-791/19)

The National Council of the Judiciary notes with deep concern and disappointment the findings set out in the CJEU judgment dated 15 July 2021 to the effect that the new system of disciplinary liability fails to ensure the independence and impartiality of the Disciplinary Chamber, *inter alia*, on the grounds that the Disciplinary Chamber has been staffed exclusively with judges selected by the National Council of the Judiciary, whose 15 judicial members were elected by the Sejm, and that the National Council of the Judiciary is a body whose independence may raise legitimate concerns.

It must first be noted with regret that the Court has chosen to refer not to the facts, which should always lie at the core of any jurisdictional decision, but to concerns and impressions, the consideration of which belongs to the sphere of politics and journalism. The National Council of the Judiciary in its current form has operated for over 3 years (39 months). Thus, if indeed its independence was in doubt, this would have been demonstrated over that time by some illustrations. In the NCJ's view, throughout its operation, the Council has never given any reason for its independence to be called into question, whether from political factors or environmental pressure groups, despite the fact that both the Council as a whole and its members have often been subject to unspeakable pressure, attacks and even ostracism from the community. Certainly, if the Council had engaged in conduct that raised doubts as to its independence – particularly, but not exclusively, when appointing Supreme Court judges to the Disciplinary Chamber – this would not have escaped the attention of the Court, the European Commission or certain judicial communities in Poland. The fact that the Court has not illustrated its concerns by citing any specific action of the Council or the conduct of its members is taken by the Council as an acceptance of its independence and integrity in the performance of its constitutional duties.

It is difficult not to have an impression that the Court, in its judgment of 15 July 2021, took the view that only the judicial council, whose members are not elected by the Parliament

but are chosen by the judges themselves, provides a guarantee of the independence of the judges it appoints. In so doing, the Court not only departed from the view taken in its judgment of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, paragraphs 55 and 56, as it expressly acknowledged in paragraph 103 of its judgment of 15 July 2021, but also indirectly called into question the independence of judges in all Member States of the European Union where either the members of the judicial council are elected by the Parliament (Spain) or where judicial councils do not exist at all (Germany, Austria, Czech Republic, Scandinavian countries). Yet, the independence of judges in these states has never been called into question and such a conclusion must be rejected *a limine*.

Nor can similar conclusions be drawn from the case law of the European Court of Human Rights. In *Clarke v. the United Kingdom* the ECtHR held that the mere fact that the executive appoints and removes judges does not constitute a violation of the European Convention on Human Rights as long as the nominees remain outside any influence or pressure in exercising their functions. In the same vein, the ECtHR held in *Majorana v. Italy*, stating that the mere fact that administrative court judges are appointed by local administrative authorities cannot cast doubt on their independence, provided that they perform their functions independently.

One cannot also fail to notice that the election of judges of the Supreme Court, including judges of the Disciplinary Chamber, held by the Council following changes in the manner of its appointment, was for the first time conducted in an open and transparent form. The Council's sessions were broadcast live over the Internet, and it was the first time that candidates for Supreme Court judges have been afforded an opportunity to present themselves before the Council. Indeed, until now such procedure has not been public and the Council has not heard the candidates. It should also be noted that prior to 2018 candidates for Supreme Court judges were selected by the General Assembly of Supreme Court Judges in accordance with the rules of procedure adopted by the same that are not a statutory instrument. This meant that, as a rule, the National Council of the Judiciary elected Supreme Court judges only from among the candidates submitted by judges of that Court in a secret and non-transparent procedure. In practice, the number of candidates for Supreme Court judges considered by the Council did not exceed the number of vacancies, and this selection – contrary to the Polish Constitution – was subject primarily to the discretion of Supreme Court judges themselves and had the form of cooptation rather than an open competition procedure. It was not until 2018 that the selection of judges for the Supreme Court became transparent and subject to scrutiny by civil society representatives.

Having all this in mind, it should be firmly stated that the National Council of the Judiciary has not, in any of its actions, and especially in the process of selecting judges for the Disciplinary Chamber of the Supreme Court, given any reason which would call its independence into question and has never defaulted upon its constitutional duties.

Finally, the National Council of the Judiciary would like to invite all participants in the public debate, and judges of ordinary courts, administrative courts and the Supreme Court in particular, to show restraint and diplomacy when communicating their opinion to the public, so that they always keep in mind the legal order of the Republic of Poland. The National Council of the Judiciary believes that the existing crisis may only be addressed through compliance with the international law by which Poland is bound and, equally, with the Constitution of the Republic of Poland, which seems to be a legitimate point of reference for all participants in the public debate. The Council firmly believes that the key to finding an appropriate legal solution lies in acting with concern for the common interest, irrespective of any personal, political or ideological sympathies or antipathies.

Chairman
of the National Council of the Judiciary

Judge Paweł Styrna