

The Supreme Court reform

1. The reform of the organizational structure and the scope of competences of the Supreme Court in 2017¹ allows this body to better fulfil the tasks set out in the Constitution of the Republic of Poland, related to judicial supervision over the activities of common and military courts, as well as to implement a sense of social justice. Legislative changes were based on an in-depth diagnosis of real staffing, competence, organizational and functional problems.
2. Pursuant to the Act on the Supreme Court, a separate Chamber of the Supreme Court was established, dedicated to examining disciplinary cases (the Disciplinary Chamber). The *ratio legis* of the separation of the Disciplinary Chamber was the ineffectiveness of disciplinary proceedings and the inability of Supreme Court judges to enforce the consequences of disciplinary offenses of judges, which could be observed in the absence of exclusion from the performance of the functions of publicly deprived judges or persons from their own circle, whose private circumstances, such as committing an unintentional offense, should lead to resignation from the office.
3. It should be emphasized that the jurisdiction of the Disciplinary Chamber of the Supreme Court includes not only disciplinary cases of the Supreme Court judges and common court judges, but also disciplinary cases of lawyers, legal advisers, notaries, military judges, prosecutors, court bailiffs and prosecutors of the Institute of National Remembrance. In addition, the competences of the Disciplinary Chamber of the Supreme Court include cases for the authorization to prosecute or detain judges, assessors, prosecutors and assessors of the public prosecutor's office, cases in the field of labor law and social security regarding judges of the Supreme Court, and cases related to the retirement of a Supreme Court judge (Art. 27 § 1 of the Act on the Supreme Court).
4. The separation of the Disciplinary Chamber ensures better organisation and efficiency in the handling of disciplinary cases of professions of public trust that are essential for the authority of the judiciary in general. The separation of this Chamber also increases the transparency and accessibility of this procedure to the public and results in an increase in the quality of disciplinary jurisprudence, as well as the specialization of individual judges in this field. In democratic societies there must be mechanisms to control the way in which professions of public trust are performed. Without appropriate regulations aimed at efficient and transparent judicial control of the observance of ethical standards by persons performing such professions, it is impossible to maintain public trust in the justice system at a high level.
5. In the judgment of 19 November 2019 in joined cases C-585/18, C-624/18 and C-625/18 (*A.K. and others*), the Court of Justice of the EU did not recognize that the Disciplinary Chamber of the Supreme Court was not an independent a court within the meaning of EU law. In the content of the judgment, the Tribunal clearly indicated that the mere fact that those judges were appointed by the President of the Republic does not give rise to a relationship of subordination of the former to the latter or to doubts as to the former's impartiality, if, once appointed, they are free from influence or pressure when carrying out their role (point 133). From the judgment of *A.K. and others* it follows that a comprehensive assessment of compliance with the requirement of impartiality and independence of a given court should be performed *ad casum* as part of a possible judicial review of a decision or proceeding. Therefore, the CJEU judgment does not provide grounds for a general (abstract) questioning of the effectiveness of the appointments and the status of a judge. Challenging is only possible when the method of appointing a judge may affect a specific case, i.e. a decision issued in a specific bench.
6. The judgments of the Labor and Social Insurance Chamber of the Supreme Court (reference number III PO 7/18, III PO 8/18 and III PO 9/18) issued as a result of the above CJEU ruling, present a

¹ The Act of December 8, 2017 on the Supreme Court, Journal of Laws 2018 item 5 (hereinafter: the Act on the Supreme Court). The Act was a legislative proposal of the President of the Republic of Poland.

different line of interpretation and thus distort the meaning of the judgment *A.K. and others*. The basis of the Supreme Court's decisions was the conviction that there were irregularities in the procedures for appointing judges to the Disciplinary Chamber. The Supreme Court made its own assessment of the correctness of the appointment and selection of judges-members of the Disciplinary Chamber and concluded that the National Council of the Judiciary does not provide sufficient guarantees of independence from the legislative and executive authorities in the procedure of appointing judges. Consequently, the Supreme Court, contrary to the position of the Tribunal expressed in the judgment *A.K. and others*, admitted the competence to question the legality of the election of judges and to draw a general conclusion that the Disciplinary Chamber of the Supreme Court or the National Council of the Judiciary is unconstitutional and illegal.

7. The position expressed by the cited judgments of the Chamber of Labor and Social Insurance of the Supreme Court was developed in the resolution of the joint Civil Chamber, the Criminal Chamber and the Labor and Social Insurance Chamber of the Supreme Court of January 23, 2020 (reference number BSA I-4110-1 / 20), in which it was found that the participation in the composition of the court of a person appointed to the office of a judge of the Supreme Court or a common court judge or a judge of a military court at the request of the National Council of the Judiciary established in accordance with the provisions of the Act on the National Council of the Judiciary and certain other acts², results in an improper appointment of the court within the meaning of Art. 439 § 1 point 2 of the Code of Criminal Procedure or contradiction of the composition of the court with the provisions of law within the meaning of Art. 379 point 4 of the Code of Civil Procedure.
8. The Supreme Administrative Court referred to the resolution of the joint Chambers in its decision of 27 January 2020 (reference number I OSK 1917/18) on the exclusion of a judge elected as a candidate for this office by the present National Council of the Judiciary. The Supreme Administrative Court indicated, *inter alia*, that the CJEU judgment concerns the Disciplinary Chamber of the Supreme Court, and therefore this judgment “does not imply (...) the possibility of automatically questioning each appointment to the office of a judge or an assessor to a court other than the Disciplinary Chamber”. The Supreme Administrative Court emphasized that “in a situation where the President has not found grounds for refusing to appoint a judge, the Supreme Administrative Court in proceedings for the exclusion of a judge cannot assess the correctness of the appointment of that judge”.
9. The same opinion was expressed by the Constitutional Tribunal in the judgment of April 20, 2020 (reference number U 2/20), which verified the compliance of the resolution of the joint Chambers with the Constitution of the Republic of Poland, the Treaty on the Functioning of the EU and the Convention on the Protection of Human Rights and Fundamental Freedoms. It was found incompatible with Art. 179 of the Polish Constitution, as it undermines the final nature of this provision in the form of the effective appointment of a judge by the President at the request of the National Council of the Judiciary. The Constitutional Tribunal ruled that the resolution of the joint Chambers was inconsistent with Art. 144 sec. 3 point 17 of the Polish Constitution, as it cannot be reconciled with the essence of the President's prerogative to appoint judges in the territory of the Republic of Poland. This prerogative is not subject to any control.
10. Poland has taken the necessary measures to comply with the order of the CJEU of 8 April 2020 (C-791/19 R *Commission v. Poland*) issued on the application of interim measures ordering Polish government to suspend the functioning of the Disciplinary Chamber of the Supreme Court. The Chamber continues its activities in the scope unquestioned by the Tribunal, i.e. with regard to cases for the authorization to prosecute or detain judges, assessors, prosecutors and assessors of the public prosecutor's office (Art. 27 § 1 point 1a of the Act on the Supreme Court).

² Journal of Laws 2018, item 3.