Adoption: 23 March 2018
EMBARGO FOR: 29 March 2018 CET

Public
Greco-AdHocRep(2018)1

Ad hoc Report on POLAND (Rule 34)

Adopted by GRECO
at its 79th Plenary Meeting
(Strasbourg, 19-23 March 2018)

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I. INTRODUCTION

1. Following considerable amendments to legislation affecting the judiciary in Poland in 2016/2017, and in parallel with the on-going compliance procedure in the Fourth Evaluation Round (covering, *inter alia*, corruption prevention in relation to judges, GRECO requested in various Plenary meetings further information from the Polish authorities concerning their on-going judicial reforms.[1] Following a discussion on the information provided by the Head of the Polish Delegation, GRECO decided at its 78th Plenary Meeting (4-8 December 2017) to apply Rule 34 of its Rules of Procedure in respect of Poland. This Rule provides for an *ad hoc* procedure which can be triggered in exceptional circumstances, such as when GRECO receives reliable information concerning institutional reforms, legislative initiatives or procedural changes that may result in serious violations of anti-corruption standards of the Council of Europe. In its decision, GRECO requested additional information concerning two draft amending laws (which since then have been adopted and promulgated), the Law on the Supreme Court (LSC) and the Law on the National Council of the Judiciary (LNCJ). The information was submitted by the Polish authorities on 16 January 2018.

2. The current *Rule 34 ad hoc* report, drawn up by Ms Lenka HABRNÁLOVÁ (Czech Republic) and Mr David MEYER (United Kingdom) as rapporteurs, contains a summary description of the legislative and other measures taken by Poland within the context of the 2016/2017 judicial reform. It also describes a number of reactions to these consecutive measures from international organisations and entities, the Council of Europe (Secretary General, Venice Commission, Commissioner for Human Rights, Consultative Council of European Judges and Parliamentary Assembly), the European Commission, the United Nations (UN), the Organization for Security and Co-operation in Europe (OSCE) and others. The report contains an analysis of the particular impact the new legislation has in respect of the corruption prevention standards developed by the Council of Europe and GRECO.

II. CONTEXT AND BACKGROUND INFORMATION

Constitutional Tribunal controversies

3. In response first to controversies around amendments to the Law on the Constitutional Tribunal in 2015 and the appointment of judges to this court, the Secretary General of the Council of Europe urged in December 2015 the Polish authorities to fully implement decisions of the Constitutional Tribunal.[2] Amendments

[1] GRECO's Fourth Evaluation Round Report in respect of Poland was adopted by GRECO at its 57th Plenary in October 2012, containing in total 16 recommendations, of which five recommendations dealt with prevention of corruption in respect of judges. A second Compliance Report got adopted by GRECO at its 75th Plenary in March 2017, concluding that one recommendation in respect of judges remains to yet be fully implemented.

[2] Secretary General of the Council of Europe, *Statement on the appointment of Constitutional Judges in Poland*, 4 December 2015. Ahead of the general elections of the *Sejm* on 25 October 2015, the *Sejm* had nominated five persons to the President of the Republic to become judges at the Constitutional Tribunal. After the elections, the *Sejm* passed a law allowing it to annul these nominations and nominated five new judges. The Constitutional Tribunal ruled that the previous legislature had not been entitled to nominate two out of those

to the Law on the Constitutional Tribunal were adopted by the *Sejm* (lower chamber of Parliament) on 22 December 2015. On 13 January 2016, the European Commission launched a dialogue with the Polish authorities under its rule of law framework, in order to seek solutions to concerns regarding the Constitutional Tribunal.

4. On 11 March 2016, the Venice Commission adopted an opinion on amendments to the Law on the Constitutional Tribunal at the request of the Polish Minister of Foreign Affairs. The Venice Commission, *inter alia*, called upon the *Sejm* to find a solution based on the obligation to respect and fully implement the judgments of the Constitutional Tribunal, in respect of the appointments to the Constitutional Tribunal.[3] Moreover, the Venice Commission, held that the Polish government's refusal to publish the Constitutional Tribunal's judgment of 9 March 2016 – in which the Constitutional Tribunal had ruled that the aforementioned amendments to the law on the Constitutional Tribunal were unconstitutional - would only deepen the constitutional crisis in Poland triggered by the election of judges in autumn 2015 and the amendments of 22 December 2015.[4]

5. On 1 June 2016, following a preliminary assessment of the situation in Poland and a dialogue with the Polish authorities, the European Commission adopted a Rule of Law Opinion outlining its concerns on 1) the appointment of judges to the Constitutional Tribunal and the implementation of the judgments of the Constitutional Tribunal of 3 and 9 December 2015 relating to these appointments; 2) the amendments to the Law on the Constitutional Tribunal and the judgment of the Constitutional Tribunal of 9 March 2016; and 3) the effectiveness of the constitutional review of new legislation.[5]

6. On 15 June 2016, the Council of Europe Commissioner for Human Rights published a report in which he *inter alia* called upon the Polish authorities to find a way out of the deadlock on the Constitutional Tribunal, following the Opinion of the Venice Commission, based on respect and full implementation of the judgments of the Constitutional Tribunal.[6] This was followed by a statement on 8 July 2016 where the Commissioner called upon the Polish Senate *not* to adopt a newly drafted Law on the Constitutional Tribunal.[7]

7. On 22 July 2016, the *Sejm* adopted a new Law on the Constitutional Tribunal. On 11 August 2016, the Constitutional Tribunal ruled that parts of this law were unconstitutional.[8] On 15 October 2016, the Venice Commission adopted an opinion on

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five judges and, consequently, also ruled that the new legislature had not been entitled to annul the nominations of three of those five judges.

[3] Venice Commission, *Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)*

[4] *Id.,* para. 143

[5] *Press release: European Commission adopts Rule of Law opinion on the situation in Poland*, 1 June 2016

[6] Commissioner for Human Rights, *Visit report: Erosion of the rule of law threatens human rights protection in Poland*, 15 June 2016

[7] Commissioner for Human Rights, *Poland: Commissioner concerned about the bill on the Constitutional Tribunal*, 8 July 2016

[8] The judgment of the Constitutional Tribunal was however never in the Official Journal by the Polish Government and therefore never enforced.

this new law[9], highlighting *inter alia* that the Polish Parliament had assumed powers of constitutional revision which it did not have when acting as the ordinary legislature, without the requisite majority for constitutional amendments and had thus created new obstacles to the effective functioning of the Constitutional Tribunal.[10]

8. On 27 July 2016, the European Commission issued a first Rule of Law Recommendation, finding a "systemic threat to the rule of law in Poland", focusing on the new law on the Constitutional Tribunal and (the lack of) publication and implementation of various judgments regarding the Constitutional Tribunal.[11]

9. On 19 December 2016, following their adoption by the *Sejm* and Senate, the President of Poland promulgated the Law on the Status of Judges (of the Constitutional Tribunal) and the Law on Organisation and Proceedings (before the Constitutional Tribunal). A new President of the Constitutional Tribunal was appointed.

10. On 21 December 2016, the European Commission supplemented its first Rule of Law Recommendation with a second Rule of Law Recommendation, which additionally addressed the issue of the appointment of the new President of the Constitutional Tribunal.[12]

11. On 16 January 2017, in a public statement, the President of the Venice Commission expressed his concern about the worsening situation of the Constitutional Tribunal and criticised attempts to influence its work, including through the election of the President of the Tribunal on the basis of a questionable procedure.[13]

Judicial reform

12. On 28 January 2016, a new Law on the Public Prosecutor's Office was signed into law in Poland. The new law entered into force on 4 March 2016. One of the major changes introduced by this law was the merger of the Office of the Public Prosecutor General with that of the Minister of Justice.

13. In January 2017, the Polish government announced further reforms, including amendments to the LNCJ, foreseeing *inter alia* the involvement of the legislature in electing the judicial members of the National Council of the Judiciary (NCJ) (who were previously elected from among judges by their peers), and to the LSC and the Law on the Organisation of Ordinary Courts, including new retirement ages, appointments and disciplinary proceedings, etc.

14. On 3 April 2017, the Council of Europe Commissioner for Human Rights sent a letter to the Speaker of the *Sejm* encouraging it to reject the draft LNCJ, outlining that the draft

[9] Venice Commission, *Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, (Venice, 14-15 October 2016)*
[10] *Id.*, para. 127
[11] European Commission, *Commission Recommendation regarding the rule of law in Poland*, C(2016) 5703, 26 July 2016
[12] European Commission, *Commission Recommendation regarding the rule of law in Poland*, C(2016) 8950, 21 December 2016
[13] President of the Venice Commission, *Statement*, 16 January 2017

law would "provide the executive and legislative powers with a decisive role in the appointment of judges in Poland", also in light of the premature expiry of the term of office of the members of the Council.[14] Similarly, in its opinion of 7 April 2017, the Consultative Council of European Judges (CCJE)[15] (following a request by the Chair of the NCJ for an opinion) expressed its deep concern about "the implications of the Draft Act for the constitutional principles of separation of powers and independence of the judiciary, as it effectively would mean transferring the power to appoint members of the NCJ from the judiciary to the legislature".[16]

15. On 5 May 2017, OSCE's Office for Democratic Institutions and Human Rights (ODIHR) published an opinion on the draft amendments to the LNCJ, in which it concluded that the draft law would potentially have a negative impact on judicial independence in Poland and therefore recommended that the draft law be reconsidered in its entirety.[17]

16. On 20 June 2017, the Law on the National School of the Judiciary, as adopted on 11 May 2017, entered into force. One new feature introduced by this law was that judges on probation, appointed by the Minister of Justice, would be permitted to sit as sole judges in district court cases for a fixed term of four years (without any prior selection by the NCJ, as was the case for ordinary judges).[18]

17. On 17 July 2017, the Commissioner for Human Rights again raised his concern about the draft LNCJ, which in his view undermined the legitimacy and independence of the judiciary in Poland.[19]

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[14] Commissioner for Human Rights, *Letter from the Commissioner for Human Rights to Speaker of the Parliament of Poland*, 3 April 2017

[15] Issued by its Bureau

[16] CCJE Bureau, *Opinion on the Draft Act of 23 January 2017, latest amended on 3 March 2017, amending the Act of 12 May 2011 on the Polish National Council of the Judiciary and certain other acts (April 2017)*, para. 27 et al. The Bureau of the CCJE expressed particular concerns over the proposed selection methods for judge members of the Council (i.e. according to the draft law the 15 judge members of the National Council would be selected by the *Sejm),* the establishment of two Assemblies within the National Council as well as the pre-term removal of the judges currently sitting as members of the National Council, which it concerned not to be in line with European standards on judicial independence.

[17] ODIHR, *Final Opinion on Draft Amendments to the Action on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017

[18] Judges on probation do not have the same status as ordinary judges. They are appointed by the Minister of Justice for a limited term of four years and after 36 months they can apply to be appointed as an ordinary judge.

[19] Commissioner for Human Rights, *Poland has a duty to preserve judicial independence*, OpenDemocracy.net, 17 July 2017. The Commissioner pointed in particular to four elements of the recommendation of the Committee of Ministers CM/Rec(2010)12 on "Judges: independence, efficiency and responsibilities" which are of relevance to the Polish situation, namely for 1) the executive and the legislature to avoid actions and discourse which may discredit the judiciary or undermine its independence, 2) councils for the judiciary to be independent bodies which safeguard judicial independence and promote its efficient functioning, with at least half of their members being judges chosen by their peers, 3) judges to be vested with security of tenure and irremovability, unless they seriously breach disciplinary or criminal provisions or "can no longer perform judicial functions", and 4) an independent authority or court to determine the liability of judges who fail to carry out their duties in an efficient and proper manner, without the involvement of political bodies and in full compliance with the principles of a fair trial.

18. On the same day, the Consultative Council of European Judges (CCJE) issued a statement outlining its regret about the adoption of the Law on the National Council of the Judiciary and calling upon the Polish authorities not to adopt the draft LSC.[20]

19. On 18 July, the Secretary General of the Council of Europe sent a letter to the Speaker of the *Sejm* expressing his concerns about the draft LSC, in particular concerning draft provisions on terminating the mandate of all judges of the SC, and appealing to the *Sejm* not to adopt the draft in its current form.[21] Similar concerns were expressed that same day by the President of the Venice Commission.[22]

20. Following approval by the *Sejm* and the Senate of the draft LNCJ, LSC and the Law on the Organisation of Ordinary Courts in July 2017, these laws were submitted to the President of Poland for signature. On 24 July 2017, the President of Poland however vetoed the draft LSC and draft LNCJ.

21. On 25 July 2017, the President of Poland promulgated the Law on the Organisation of Ordinary Courts, *inter alia,* increasing the powers of the Minister of Justice as regards the internal organisation of courts and the appointment and dismissal of court presidents (and deputy presidents). On 13 September 2017, pursuant to the new law, the Minister of Justice started exercising those powers to dismiss court presidents and vice-presidents.

22. On 26 July 2017, the European Commission issued its third Rule of Law Recommendation, in which it considered that the situation with respect to the systemic threat to the rule of law in Poland, as presented in its previous recommendations (concerning the Constitutional Tribunal), had seriously deteriorated as a result of the adoption of the new legislation concerning the ordinary judiciary: the Law on the Organisation of Ordinary Courts, the Law on the National School of the Judiciary, the law on Public Prosecution, the draft LNCJ and the draft LSC.[23] It recommended that the independence be restored and that the new laws/draft laws relating to the judiciary be withdrawn.

23. On 30 August 2017, ODIHR published an opinion on the draft LSC, concluding *inter alia,* that it did not comply with international standards on judicial independence.[24]

24. On 26 September 2017, the President of Poland proposed two new draft laws - on the Supreme Court and the NCJ respectively - to replace the two previous draft laws he had vetoed in July 2017. One difference was that certain decisions, such as the re-appointment of early retired judges to the SC were to be decided by the President of the Republic (instead of the Minister of Justice). Furthermore, the foreseen division of

[20] CCJE Bureau, *Statement o concerning the legislation on the Polish National Council of the Judiciary*, 17 July 2017. The Bureau of the CCJE points in particular to the retirement of a large group of SC judges, the subordination of the SC to the Minister of Justice regarding its organisation and human resources and the powers of the Minister to nominate candidates for positions in the SC.
[21] Secretary General, *Letter to the Speaker of the Sejm*, 18 July 2017
[22] President of the Venice Commission, *Statement*, 18 July 2017
[23] European Commission, *Commission Recommendation regarding the rule of law in Poland,* C(2017) 5320, 26 July 2017
[24] ODIHR, *Opinion on Certain Provisions of the Draft Act on the Supreme Court*, 30 August 2017

the NCJ into two chambers was removed and a higher majority of votes would be needed in the *Sejm* for the election of judicial members to the NCJ. Shortly thereafter the Supreme Court (SC) published its opinion on the two draft laws proposed by the President, in which it considered that the draft LSC would substantially curb the independence of the SC and that the draft LNCJ (as proposed by the President) could not be reconciled with the concept of a democratic state governed by the rule of law. This was followed by an opinion of the NCJ, which outlined that the draft law was fundamentally inconsistent with the Polish Constitution by providing the *Sejm* with the power to appoint new judge members of the Council and dismissing the current judge members.

25. On 11 October 2017, the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution on new threats to the rule of law in member states (Resolution 2188 (2017)), in which it expressed concern about tendencies to limit the independence of judiciaries by politicising judicial councils and courts.[25] PACE addressed a particular concern to Poland in this respect.[26]

26. On 12 October 2017, the CCJE issued an opinion (at the request of the NCJ) on the President's proposal for the draft LNCJ, in which it reiterated its deep concern about the implications for the principle of separation of powers and independence of the judiciary, as the draft effectively would transfer the power to appoint members of the NCJ from the judiciary to the legislature.[27]

27. On 27 October 2017, the UN Special Rapporteur on the Independence of Judges and Lawyers presented his preliminary observations from an official visit to Poland, stating "The independence of Poland's judicial system and other crucial democratic standards like the separation of powers are under threat".[28]

28. On 10 November 2017, the CCJE issued a statement expressing concerns as regards the "critical situation affecting the rule of law and the independence of the judiciary in Poland".[29]

29. On 13 November 2017, ODIHR adopted a further opinion on the new draft LSC outlining that its provisions were incompatible with international standards on judicial independence.[30]

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[25] PACE, Resolution 2188 (2017), *New threats to the rule of law in Council of Europe member states: selected examples*

[26] *Id.*, paras. 9.1 and 9.2

[27] CCJE Bureau, *Opinion on the Draft Act of September 2017 amending the Act on the Polish National Council of the Judiciary*, 12 October 2017. The opinion (similar to its opinion on the previous draft) emphasis that judge members of the National Council for the Judiciary should continue to be chosen by the judiciary and that pre-term removal of judges currently sitting as members of the Council is not in accordance with European standards.

[28] UN Special Rapporteur on the Independence of Judges and Lawyers, *Preliminary Observations on the Official Visit to Poland*, 27 October 2017

[29] CCJE, *Statement of the CCJE as regards the situation on the independence of the judiciary in Poland*, 10 November 2017. In the statement the CCJE confirms what has been outlined by its Bureau in earlier statements and opinions (see above).

[30] ODIHR, *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland*, 13 November 2017

30. On 8 December 2017, the Venice Commission, at the request of the President of the PACE following Resolution 2188 (2017), adopted an opinion on the draft LNCJ, the draft LSC and the already-adopted law on the Organisation of Ordinary Courts.[31] In this opinion, the Venice Commission concluded that the pieces of (draft) legislation concerned, especially taken together and seen in the context of the 2016 Act on the Public Prosecutor's Office, "enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to judicial independence as a key element of the rule of law".[32]

31. On 8 December 2017, the Venice Commission, at the request of PACE, also adopted an opinion on the law on the Public Prosecutor's Office (a law which had already been adopted in January 2016).[33] It concluded that the merger of the office of the Minister of Justice and that of the Public Prosecutor General, the increased powers of the Public Prosecutor General vis-à-vis the prosecution system, the increased powers of the Minister of Justice in respect of the judiciary and the weak position of checks to these powers result in "the accumulation of too many powers for one person, which has direct negative consequences for the independence of the prosecutorial system from the political sphere, but also for the independence of the judiciary and hence the separation of powers and the rule of law in Poland".

32. The draft LNJC and LSC were adopted by the *Sejm* on 8 December 2017, and approved by the Senate on 15 December 2017. They were signed into law by the President on 20 December 2017.

33. On 20 December 2017, as none of its concerns outlined in the third Rule of Law Recommendation had been addressed, the European Commission issued a fourth Rule

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[31] Venice Commission, *Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017)* (hereafter: VC Opinion on Three Laws)

[32] *Id.*, para. 129. As regards the draft law on the National Council of the Judiciary, the Venice Commission recommends that the judicial members of the National Council for the Judiciary be elected by their peers. As regards the draft law on the Supreme Court, the Venice Commission advises against 1) the creation of two new chambers within the Supreme Court (Disciplinary Chamber and Extraordinary Chamber), composed of newly appointed judges and entrusted with special powers, 2) the involvement of lay judges in proceedings before the Supreme Court, 3) the proposed system of extraordinary review of final judgment, additionally to the retroactive application of this mechanism, 4) entrusting the competency for electoral disputes to the newly created Extraordinary Chamber, 5) and the premature removal of a large number of justices of the Supreme Court (including the First President) by applying to them a lower retirement age, 6) the discretionary power of the President of the Republic to extend the mandate of a Supreme Court judge beyond retirement age, 7) the presentation to the President of the Republic of five candidates for the position of First President to the Supreme Court and 8) the proposed discretion of the First President in matters related to the distribution of cases and assigning Supreme Court judges to panels. As regards the law on the Organisation of Ordinary Courts, the Venice Commission recommends to amend the adopted law 1) to make the decision of the Minister of Justice to appoint/dismiss a court president subject to approval by the National Council for the Judiciary or the general assembly of judges of the respective court (by a simple majority of votes) and ideally to have general assemblies of judges submit candidates for position of presidents to the Minister of Justice, 2) to remove the discretionary power of the Minister of Justice to extend the mandate of a judge beyond retirement age, 3) to remove the disciplinary powers of the Minister of Justice vis-à-vis court presidents and 4) limit the discretion of court presidents in the distribution of cases and assignment of judges to panels.

[33] Venice Commission, *Poland - Opinion on the Act on the Public Prosecutor's office, as amended, adopted by the Venice Commission at its 113th Plenary Session (Venice, 8-9 December 2017)*

of Law Recommendation repeating its criticism and concerns with respect to the Constitutional Tribunal and the judiciary in general. The Polish government was invited to resolve the issues identified in the Recommendation within three months.[34]

34. The LNCJ entered into force on 17 January 2018.

35. On 19 January 2018, the Commissioner for Human Rights sent a letter to the Prime-Minister of Poland reiterating *inter alia* his earlier concerns concerning the judicial reform, including as regards the hasty process of adopting these key pieces of legislation, without an inclusive debate, and the campaign accompanying the adoption of these laws presenting Poland's judiciary as fundamentally corrupt and dysfunctional.[35] In reply to this letter, the Polish authorities point to some of the ODIHR recommendations taken on board in the process of judicial reform and similar systems as regards the NCJ under the new law existing in other Council of Europe member states.[36]

36. The LSC will enter into force on 2 April 2018.

III. ANALYSIS BY GRECO

37. The following analysis focuses exclusively on those elements of the on-going reform that fall within the purview of GRECO's Fourth Evaluation Round, namely certain aspects of the law of 8 December 2017 amending the LNCJ, which entered into force on 17 January 2018, and the law of 8 December 2017 amending the LSC, which is to enter into force on 2 April 2018. This new legislation is considered within the particular framework of the Evaluation Round, covering, *inter alia*, corruption prevention in respect of judges. It should be emphasised that the recommendations issued below are of a preliminary nature, pending the final outcome of a further more detailed re-assessment by GRECO. These preliminary recommendations serve as an indication of what GRECO perceives to be the most pressing issues in respect of the LNCJ and LSC in the context of corruption prevention in respect of judges, on the basis of the information it currently has at its disposal.

[34] European Commission, *Commission Recommendation regarding the rule of law in Poland,* C(2017) 9050, 20 December 2017

[35] Commissioner for Human Rights, *Letter from the Commissioner for Human Rights to the Prime Minister of Poland*, 19 January 2018

[36] *Reply from the Under-Secretary of State of Poland, Piotr Wawrzyk, to the Letter of the Commissioner for Human Rights*, 2 February 2018. This letter points to some of the ODIHR recommendations which have been taken on board, by refraining from establishing two chambers within the NCJ, providing the possibility for proposing members of the NCJ for a group of at least 2000 Polish national or a group of 25 judges, limiting the number of candidates deputies of the *Sejm* can propose and introducing the principle that NCJ members are to be elected by a 3/5ths majority within the *Sejm*. In addition, the Under-Secretary of State points to similarities of the model of electing the NCJ to that of Spain.

LNCJ: Reform of the National Council of the Judiciary

- *Election of its judicial members*

38. As already noted in GRECO's Fourth Round Evaluation Report on Poland, the NCJ has a central role in the administration of the judiciary in Poland and, according to Article 186 of the Constitution, is to safeguard the independence of courts and judges. It is, *inter alia,* responsible for examining and selecting candidates for the position of judge at the first instance courts, appeal courts and the SC, for a final decision by the President of the Republic. In accordance with the Polish Constitution (Article 187), the NCJ has 25 members, of which three are *ex officio*-members (the First President of the SC, the Minister of Justice and the President of the Supreme Administrative Court), one member is appointed by the President of the Republic, 15 are chosen from among judges, four are to be chosen by the *Sejm* from among its deputies and two by the Senate from among its senators. The tenure of the members of the NCJ is of four years (renewable once).

39. While the previous LNCJ provided that the 15 judicial members of the NCJ were to be chosen by the judiciary, Article 9a of the amended law provides that they are to be elected by the *Sejm*. This particular amendment is not in compliance with GRECO's well established case-law and other supporting European standards which require that at least half of the members of a judicial council should consist of judges elected by their peers, as was the case in Poland before the amending law was adopted.[37]

40. Having a closer look at the foreseen selection process for the NCJ members who are judges (15 posts), a committee of the Sejm is to pre-select candidates from a list of all judge candidates (proposed by groups of at least 25 judges or by 2000 citizens) and then establish a final list to be voted on. This limits considerably the influence of the judiciary on these elections in favour of the legislature. In addition, six members of the NCJ are to be elected directly by the *Sejm* and Senate. The fact that the executive branch is represented in the NCJ by the Minister of Justice and one member appointed by the President of the Republic is also to be borne in mind.

41. The Polish authorities argue that in several other European countries there are no such councils or when there are such councils in place they do not always have a composition in line with the standards applied by GRECO. The authorities also state that the NCJ does not have any judicial functions and does not act as a disciplinary body. Notwithstanding these arguments, GRECO concludes that, following the 2017 amendments to the LNCJ, the election of representatives of the judiciary to the NCJ is no longer in compliance with GRECO's established practice in respect of such councils. This is particularly problematic in light of the NCJ's central role in the process for appointing judges in Poland. Therefore, **GRECO recommends to ensure that at least**

[37] See CM Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para. 46; Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges (CDL-AD(2010)004-e), para. 32; CCJE, Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, para. 18; CCJE, Magna Carta for Judges (Fundamental Principles), paragraph 13; see also GRECO's Fourth Round Evaluation Reports, for example in respect of Azerbaijan (para. 52, rec. v), Bulgaria (para. 83, rec. v), Portugal (para. 96, rec. vi), Serbia (para. 99, rec. iv) and the Slovak Republic (para. 69, rec vii).

half of the members of the National Council of the Judiciary are judges elected by their peers.

- *Premature dismissal of the current judicial members*

42. Article 9a of the new LNCJ provides that the mandate of the judicial members will be terminated 30 days after entry into force of the draft law. In this context, the Polish authorities state that a common term of office for judicial members is necessary to align the new law with the Constitution, in light of a Constitutional Court judgment in this respect. However, GRECO notes that this judgment of the Constitutional Court does not call for the simultaneous dismissal of all currently serving judicial members, but only for a joint term of office of all elected members of the NCJ which may be achieved in another way.[38] In this context, GRECO also notes that it does not appear to be possible for judicial members of the NCJ to challenge their premature dismissal from the NCJ. GRECO regrets that Article 9a of the new LNCJ has already been enforced.

LSC: Reforms relating to the SC

- *Structural reforms at the SC*

43. The amended LSC introduces two new chambers of the SC: one dealing with disciplinary proceedings against SC judges and one dealing with extraordinary appeals against court judgments, including those of the SC.[39] These particular chambers will consist of SC judges as well as lay judges (whereas the chambers for civil law, criminal law and labour/social security law only comprise professional judges). The lay members of the SC are to be elected by the Senate.[40]

44. GRECO is well aware that the structural reforms have been subject to extensive criticism in broad consensus within the international community, including bodies such as the Venice Commission, the CCJE and the European Commission. For example, the establishment of the special chambers for extraordinary appeals and for disciplinary matters has been criticised for creating a hierarchy within the court (in that these two chambers have been granted special status and may be seen as superior to the other "ordinary chambers").

[38] For a summary of this Constitutional Court judgment, please see: http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/9752-ustawa-o-krajowej-radzie-sadownictwa/

[39] The LSC introduced the possibility of extraordinary appeals to be made by the Prosecutor General (Minister of Justice), the Ombudsperson (etc.) against rulings, if this is necessary to "ensure the rule of law and social justice" and the ruling "violates the principles or the rights and freedoms of persons and citizens enshrined in the Constitution, is a flagrant breach of the law on the grounds of misinterpretation or misapplication and there is an obvious contradiction between the court's findings and the evidence collected" (Article 86 LSC). Concerns have been raised in this regard, *inter alia* by the Venice Commission and the European Commission, that the proposed system is "dangerous for the stability of the Polish legal order" and additionally problematic due to its retroactivity, permitting the reopening of cases long before its enactment.

[40] According to Article 58 LSC, a person may be a lay judge of the Supreme Court if they have (only) Polish nationality and enjoy full civil and civic rights, are of good character, are between 40 and 60 years' old, are sufficiently healthy to perform the function of a lay judge and have completed secondary education. There are a number of incompatibilities provided for, including employment with the courts, prosecution office, police or military, as well as being an elected official in the National Assembly or municipal, district or provincial council.

45. The use of lay judges at the SC, which has been introduced as a way of bringing in a "social factor" into the system, according to the Polish authorities, has also been criticised, partly for being alien to other judicial systems in Europe at least at the level of higher courts, but also due to the unsuitability of lay persons for determining significant cases involving legal complexities, and the fact that they are elected by the legislature, thus compromising judicial independence. Criticism goes in the same direction in respect of the LSC providing the President of the Republic with the power to establish the rules of procedure of the SC.

46. These issues raise questions of fundamental importance for the judiciary, which require further consideration. However, for the purpose of this *ad hoc* report, GRECO will limit its findings to those particular issues of direct importance to its Fourth Evaluation Round, namely those relating to corruption prevention in respect of judges.

- *Tenure of SC judges*

47. The LSC, as amended, provides for a new lower retirement age for SC judges (from 70 to 65, with women given the possibility to retire at 60). The new retirement age will be applied not only to future judges, but also in respect of those currently sitting. It is to be noted in this context that under Article 108 LSC there is a possibility for the President of the Republic to prolong the tenure of individual SC judges beyond retirement age (until the age of 71). GRECO does not question the new retirement age as such, nor does it question the possibility of prolonging the service of judges beyond retirement age when necessary safeguards against undue influence are taken into account. However, the instant implementation of the lower retirement age (which reportedly affects a large number of the sitting SC judges), in combination with the power of the President of the Republic to prolong the mandate of judges, in fact leads to the introduction of a system that constitutes a *de facto* "re-appointment system" as far as judges who would normally have served until the previous retirement age are concerned. Security of tenure is in the GRECO context considered an important safeguard against undue influence over judges and the judiciary and, accordingly, for their independence.

48. Consequently, GRECO is highly concerned that the establishment of a lower retirement age to be applied with direct effect to currently sitting judges, in combination with the discretionary possibility to re-appoint judges to the SC, opens the way for a system that is vulnerable to undue influence over judges and the judiciary. This situation is particularly grave when branches other than the judiciary are involved in the appointment procedure. **GRECO recommends that in respect of Supreme Court judges the new retirement age is not applied to currently sitting judges in combination with the provisions allowing the executive to extend the tenure of such judges and, to ensure that similarly in respect of new Supreme Court judges the possible extension of their tenure beyond retirement age is free from political influence.** In this context, GRECO notes that a similar system has been introduced under the Law on the Organisation of Ordinary Courts, as amended, and similar concerns can be raised as regards the discretionary power of the Minister of Justice to prolong the tenure of judges at ordinary courts, in accordance with Article 69 of the amended Law.

- *Appointment of the First President and presidents of the chambers of the SC*

49. The LSC also introduces some changes to the procedure for the appointment of the top officials of the SC: the First President and the five presidents of the SC, who manage the five chambers. It is noted that the influence of the executive power has increased in this matter as well. Although the decision to appoint the First President is still to be made on the basis of a list of candidates chosen by the General Assembly of the SC, the discretion of the President of the Republic to appoint has increased as the list to be put forward is now to include five candidates as opposed to only two candidates in the past. According to the Polish authorities, the LSC does not provide for a permanent competence of the President to appoint the First President and presidents of chambers of the SC and this provision is of a temporary and one-time nature. However, GRECO cannot find any indication in the LSC to suggest that this provision of the LSC has only a temporary validity.

50. As far as the appointment of the presidents of the chambers is concerned, the pre-selection of candidates is to be made by the judges of the respective chambers (in the past this was done by the First President) which are to put forward three candidates for appointment. It is to be noted in this context that membership of two of these chambers includes lay judges elected by the legislature (as described above). While the First President is appointed for six years and may be re-appointed once (as in the past), the presidents of the chambers are now to be appointed for only 3 years (5 years in the past) and subject to re-appointment twice (three periods in total). Re-appointments in the judiciary, in particular when such processes are subject to external and political influence and discretion are in conflict with the principle of security of tenure and may be a potential threat to judicial independence and should - preferably - be avoided.[41] **GRECO recommends that the procedures for appointing the First President and the presidents of the chambers of the Supreme Court and the duration of these positions (in combination with reappointments) are amended in order to ensure that these procedures respect the independence of the judiciary and are free from external influence.** It is noted that the situation appears even more serious in respect of the presidents of ordinary courts who may be appointed and dismissed by the Minister of Justice at his/her own discretion, without involvement of the judiciary in the process.

- *Disciplinary proceedings*

51. The LSC introduces a number of changes to the disciplinary proceedings applicable to SC judges. In the past, the SC dealt with disciplinary proceedings in a unit for disciplinary matters and investigations were led by a disciplinary officer, elected by the SC. As already noted, the amended LSC establishes a new chamber within the SC, with

[41] In this respect, reference can be made to CCJE Opinion No. 19 (2016) on the Role of Court Presidents: "The CCJE considers that the procedures for the appointment of presidents of courts should follow the same path as that for the selection and appointment of judges. This will include a process of evaluation of the candidates and a body having the authority to select and/or appoint judges in accordance with the standards established in Recommendation CM/Rec(2010)12 and previous Opinions of the CCJE" (para. 38), an opinion which is shared by the Venice Commission.

jurisdiction over all disciplinary cases involving SC judges and appeals concerning excessive duration of proceedings before the SC. A hierarchical structure within the SC may in itself negatively impact on judicial independence. Another new feature is the involvement of lay judges in the chamber dealing with disciplinary proceedings (two SC judges and one lay member and, if appealed, three SC judges and two lay members).

52. In addition, the LSC, as amended, provides a possibility for the President of the Republic to appoint (from among SC judges, ordinary court judges or military court judges, according to Article 75 LSC) an Extraordinary Disciplinary Commissioner who may initiate disciplinary proceedings or even take over such pending proceedings against SC judges (Article 75, para. 8 LSC). This involvement of an Extraordinary Disciplinary Commissioner will exclude the ordinary Disciplinary Commissioner (as appointed by the SC's board) from the proceedings.[42] The written information provided to GRECO by the Polish authorities adds that the Extraordinary Commissioner may also be appointed externally, from among prosecutors at the National Public Prosecutor's Office.

53. The involvement of lay judges in disciplinary proceedings against SC judges might possibly be seen as adding an element of accountability and transparency vis-à-vis society to the process, as put forward by the Polish authorities. However, the fact that lay judges are to be elected by the Senate inserts a potential political dimension to the disciplinary process applicable to judges, with its negative impact on judicial independence. Above all, the possibility for the President of the Republic to intervene in disciplinary matters within the judiciary, both to initiate procedures or take over on-going procedures through the appointment of an Extraordinary Disciplinary Commissioner (who – according to the information provided by the Polish authorities – may also be appointed from outside the judiciary), raises serious concern in respect of judicial independence from the executive power. **GRECO recommends to amend the disciplinary procedures applicable to Supreme Court judges in order to exclude any potential undue influence from the legislative and executive powers in this respect**. Also in this context, GRECO notes that under the Law on the Organisation of Ordinary Courts, various amendments have been made and that - while they differ from those made to the disciplinary proceedings applicable to SC judges - concerns similar to those about the discretionary power of the Minister of Justice in respect of lower court presidents can be raised.

[42] For a further outline of the role of disciplinary commissioners and disciplinary proceedings, see GRECO's Fourth Round Evaluation Report in respect of Poland, para. 157

IV. CONCLUSION

54. In view of the above, GRECO concludes that the LNCJ, as amended in 2017, does not comply with GRECO's established standard that at least half of the members of a judicial council should consist of judges elected by their peers. The current situation, including the premature dismissal of judicial members of the NCJ, has a negative impact on judicial independence, in particular, as far as the appointment of judges is concerned. GRECO also concludes that the LSC, as amended in 2017, falls short of GRECO's recommended practice with respect to appointments, security of tenure and disciplinary proceedings, as the amended legislation increases the potential of political influence over SC judges and thus affects judicial independence.

55. The issues raised above regarding the LNCJ and LSC must be seen in the wider context of the judicial reform in Poland 2016/2017, which has been extensively criticised by a number of international organisations and bodies from the perspective of European/international standards, and well beyond what is covered by this *ad hoc* report. The analysis made here, with respect to issues that are particularly relevant for GRECO's Fourth Evaluation Round, concurs by and large with the criticism expressed by the other international bodies, but is limited to the LNCJ and LSC and looks at these issues from the perspective of corruption prevention.

56. It should be noted that the issues concerning the LSC, which are highlighted above, are to a large extent mirrored in the Law on the Organisation of Ordinary Courts, as amended earlier in 2017. For example, the Law on the Organisation of Ordinary Courts has similar shortcomings with respect to appointments, security of tenure and disciplinary proceedings (with the Minister of Justice fulfilling a similar role in the framework of the aforementioned law to that of the President of the Republic in respect of the SC). Given the applicability of the Law on the Organisation of Ordinary Courts to the entire realm of the ordinary courts, the discretionary powers of the Minister of Justice vis-à-vis the judiciary, including on such issues as case assignment and the method for random case allocation, are of particular concern. This concern is compounded by the fact that under the new Law on the Public Prosecutor's Office, as amended in 2016, the Office of the Public Prosecutor General has merged with that of the Minister of Justice and the powers of the Public Prosecutor General / Minister of Justice vis-à-vis the prosecution service have increased. Several of the findings highlighted in this report are therefore to be seen in the light of other new acts adopted within the framework of the judicial reform, including the aforementioned laws on the Organisation of Ordinary Courts and on the Public Prosecutor's Office, and on the Law on the National School of the Judiciary and, possibly, some other laws.

57. In view of the foregoing, GRECO notes that several basic principles of the judicial system has been affected in such a critical way and to such an extent that the assessment made in GRECO's Fourth Round Evaluation Report on Poland in 2012, as far as it concerns corruption prevention in respect of judges is no longer pertinent in crucial parts. As the compliance procedure in that round is still on-going in respect of Poland, GRECO considers it important to update its Evaluation Report as regards corruption prevention in respect of judges, beyond the abovementioned findings in respect of the LNCJ and LSC. The updated Evaluation Report may thus also revisit the

Law on the Organisation of Ordinary Courts, the Law on the National School of the Judiciary, as well as other legislation as appropriate, and may also reflect changes to the Law on the Public Prosecutor's Office, in as far as this is pertinent for the re-assessment of the outdated parts of GRECO's Fourth Round Evaluation report concerning corruption prevention in respect of judges.

58. GRECO therefore instructs its President to inform the Polish authorities about GRECO's findings and to agree with the authorities on the dates of an on-site visit to re-assess the outdated parts of GRECO's Fourth Round Evaluation in respect of Poland, with view to adopting an addendum to its Fourth Round Evaluation Report concerning corruption prevention in respect of judges at one of its forthcoming plenary meetings.

59. In the meantime, pending a full reassessment of the prevention of corruption in respect of judges, GRECO addresses the following recommendations to Poland concerning the LNCJ and LSC:

i. **to ensure that at least half of the members of the National Council of the Judiciary are judges elected by their peers;**

ii. **that in respect of Supreme Court judges the new retirement age is not applied to currently sitting judges in combination with the provisions allowing the executive to extend the tenure of such judges and, to ensure that similarly in respect of new Supreme Court judges the possible extension of their tenure beyond retirement age is free from political influence;**

iii. **that the procedures for appointing the First President and the presidents of the chambers of the Supreme Court and the duration of these positions (in combination with reappointments) are amended in order to ensure that these procedures respect the independence of the judiciary and are free from external influence;**

iv. **to amend the disciplinary procedures applicable to Supreme Court judges in order to exclude any potential undue influence from the legislative and executive powers in these procedures**.

60. GRECO invites the authorities of Poland to authorise, at their earliest convenience, the publication of this report, and to make a translation of it into the national language available to the public.