

POLISH JUDICIARY REGULATIONS – CURRENT STATE OF AFFAIRS

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As you are certainly well aware, Poland and the European Commission have been in dialogue over the Article 7 (1) of the Treaty on European Union procedure and the rule of law for quite some time now. During this dialogue, Poland has explained the ideas behind its judiciary reform, and introduced many changes indicated by the European Commission as guarantees for the independence of justice. So far, the dialogue with the Commission continues, yet the Article 7 (1) procedure is still in course.

We wish that you are best informed about the developments of situation and amendments to the Polish judiciary laws that we have already introduced (or that are still being adopted). For your convenience, we present them in a table below.

AMENDMENTS ALREADY IN FORCE

- All the acts of the Constitutional Tribunal have been published in the journal of laws.** Some of them were issued with breach of law – however, Polish parliament decided that for the sake of legal stability it will be better to have them promulgated, too.

The law on amending the statute of the Constitutional Tribunal **entered into force on 22 May and the judgments were published on 5 June 2018.**
- Moreover, **the government has no power to decide on publication of any verdicts of the Tribunal** – this competence remains solely at the hands of the President of the Tribunal (for the future as well).
- The Tribunal is working pluralistically, and the **cases are allocated in alphabetical order.** Some exceptions are allowed, but the judges appointed during previous terms of parliament are fully involved in sentencing., Contrary to some unfounded claims these judges were never excluded from administering justice and they often form majority in adjudicating panels (in over 40% cases under current CT President).

It is a significant improvement in comparison to situation under the previous CT President, who composed benches in a way that would secure majority for the judges he preferred (all the benches composed under his rule granted majority to judges appointed during previous terms of parliament).

Also the judges appointed during current term of parliament **often rule**

against the position of parliamentary majority (e.g. cases K 17/14, SK 48/15, K 36/15, SK 37/15, K 39/15, SK 25/15, K 2/17, P 7/16 – some of them on very “sensitive” topics, as Police search regulations in case K 17/14). **All of CT judges enjoy very wide guarantees of independence:** they are irrevocable, very highly remunerated (for life) and there are no mechanisms of influencing their decisions.

4. Poland has changed the regime for dismissal of the presidents of the common courts. It is still a competence of the Minister of Justice (who oversees the courts – but only in their administrative aspect). However, he **must now obtain a consent of the college of the court that would be affected by a dismissal** – and in case the college does not grant such consent, **an approval of the National Council of the Judiciary** is needed.

There are also **pre-established criteria that must always be taken into account:** presidents of the courts may only be dismissed in case of flagrant or persistent failure to carry out their duties if their performance does not benefit the interest of the judiciary if there is exceptional ineffectiveness in court organization or in case of voluntary resignation.

The law containing the above amendments **entered into force on 22 May 2018.**

It is also worth noting that **until 2012 the Minister of Justice had absolute discretion in dismissing court presidents** if he believed that they failed to exercise their duties. This regulation was in force when Poland joined the EU, and it remained there for the next 8 years – with **no concerns from the Commission about any threat to the rule of law whatsoever.**

5. The **retirement age of the judges of the common courts has been equalized** at 65 for men and women. Women retain their privilege for an earlier retirement at the age of 60 (just as it is for all other professions in the Polish social security system).

The appropriate law **entered into force on 22 May 2018.**

6. After the judges reach their retirement age, their judicial mandate may be prolonged (for maximum 5 years). This competence was at the hands of the Minister of Justice, and the Commission indicated that it should be moved to the President.

Polish parliament actually went even further than that – and established that the only body authorized to decide on prolongation will be the National Council of Judiciary. The NCJ decides on the basis of pre-established criteria, taking into account the interest of the judiciary, public interest, judicial personnel needs and caseload in the common courts.

The appropriate law also **entered into force on 22 May 2018.**

7. The National Council of the Judiciary is composed with a vast majority of judges (17 out of 25 members, more than 2/3). 2 of these judges are *ex-officio* members, and 15 were elected by the Parliament – with a **very wide democratic mandate (over 3/5 majority in Sejm)**. **After they are elected, there are no mechanisms on influencing NCJ decisions** by the parliament or the government – the judges are irrevocable and there are no effective means to exert any pressure on them.

Apart from **17 judicial members** there are also **two members of the opposition parliamentary groups** in the Council. Any undue influence can be easily exposed, since all the sessions are carried out in public, with active presence of members independent from the ruling majority (either the current one or any other in the future).

8. For the first time in the Council history, the law provides that **its sessions are publicly transmitted on-line**, so that all decisions on judicial nominations and promotions would be as transparent as possible – **it further eliminates any possibility of undue influence** (either political or of any other nature). Apart from the Parliament, no other public body is as transparent for the public.

We believe that it is currently in the best interest of the judiciary to allow the NCJ to work in tranquillity – and observe how it carries out its competences. New members will be elected to the Council in 2022 – and it will be the next term of Sejm that will do it (so there is no incentive for the Council members to act in favour of – or against – any political group).

The NCJ has been convened by the First President of the Supreme Court and commenced its duties on 27 April.

9. In the Supreme Court, an amendment was introduced allowing **the judges currently sitting in other chambers to request a transfer to a newly created Disciplinary Chamber** – all of the judges in this chamber shall be fully independent, as all other judges in the Supreme Court, too.

Three more groups of amendments have been adopted and signed into law by the President just recently – and they **will enter into force on 15 June**. These amendments concern:

- a) the extraordinary appeal;
- b) the judges on probation; and
- c) possibility for the judges of the Supreme Court to continue their service after reaching the retirement age.

10. An **additional prerequisite is introduced for the extraordinary appeal** – in order to use it, it will have to be **necessary to ensure conformity with the rule of law** (to be exact, it is the principle of “*democratic state ruled by law and implementing the principles of social justice*” is enshrined in the Article 2 of the Polish Constitution).

This principle has been thoroughly explained in the verdicts of Polish courts, including the Supreme Court and the Constitutional Tribunal – and its interpretation allows refers to a very limited range of situations, thus making the new remedy extraordinary indeed.

11. In addition to that, **one of three additional requirements** – (i) infringement of principles, liberties or human rights protected by the Constitution, (ii) flagrant breach of law through its misinterpretation or misapplication, or (iii) an obvious contradiction between significant findings and material evidence **must be fulfilled**.

It should be noted that as a result of the adopted amendments, the grounds for lodging an extraordinary appeal were narrowed down and made more precise. Accordingly, **any assessments of the changes introduced in the extraordinary appeal procedure – until they are fully implemented in the case-law practice – would now be premature**.

12. As to the verdicts issued before the extraordinary appeal became available, **only two institutions (instead of eight) will now be able to lodge it**: the Ombudsman and the Attorney General.

Other bodies (President of the General Counsel to the Republic of Poland, the Commissioner for Children's Rights, the Commissioner for Patients' Rights, the Chair of the Polish Financial Supervision Authority, the Financial Ombudsman, and the President of the Office of Competition and Consumer Protection) will only be allowed to file it against future verdicts, and only if the case lies within the scope of their competence.

13. Moreover, **if a verdict challenged by the extraordinary appeal would have already led to irreversible legal effects** (such as transfer of ownership of a real property to a third party), the Supreme Court should limit itself to declaring that the verdict was issued with breach of law – but **it will not be repealed for the sake of legal stability**.
14. Similar exception is introduced for situations when **international commitments of Poland** could be undermined. If such is the case, the Supreme Court would also declare the breach of law – but **not repeal the judgment**. The definition of “international commitments” is quite wide, and for a good reason – so that it would apply not only to intergovernmental relations, but also private entities, thus strengthening the protection of foreign investment in Poland.
15. Another group of amendments concerns appointment of the judges on probation. **The power to nominate them would be transferred from the Minister of Justice to the President**, and they will be appointed on the basis of a ranking list from judicial exam. The National Council of the Judiciary would make its recommendations and pass it to the President – **in a procedure very much alike to the one for the judges appointed for life**.
16. The judges on probation will be appointed for a 4-year fixed term, during which they **cannot be revoked by anybody** (save for disciplinary reasons). In order to apply for a judicial post for life, **they will be assessed only by the judiciary** – a visiting judge, a college of the court, general assembly of district judges and the National Council of the Judiciary.
17. As to the judges of the Supreme Court that wish to continue their service after reaching the standard retirement age (65 years, irrespective of gender), **they are authorized to do so – if they declare such a will and obtain appropriate health certificate**.
18. The judges could make such declaration before **the First President of the Supreme Court – who then would issue its opinion** whether they should continue and pass it on to the President of Poland. However, before deciding on prolongation, **the President would be obliged to consult the National Council of the Judiciary**.
19. **The National Council of the Judiciary reaches an opinion on the basis of pre-established criteria** – very similar to those for the common courts. The NCJ would take into account the interest of the judiciary, public interest, Supreme Court personnel needs and caseload in the particular chambers of the Supreme Court.

20. After the NCJ issues its opinion, the President may grant its consent within 3 months since receiving (i) the judge's declaration, (ii) health certificate, (iii) the opinion of the First President of the Supreme Court (or the College of the Supreme Court) and (iv) the opinion of the National Council of the Judiciary. The opinions must be taken into account. However, **if the National Council of the Judiciary does not reach an opinion within prescribed term, the President is still authorized to grant its consent.**

21. **The procedure shall apply accordingly to the judges that have already declared their intention of remaining in office.** The President will be obliged to request the NCJ opinion on their declarations immediately after the law enters into force, i.e. after 15 June 2018.

22. It is worth noting that 13 out of 27 judges that have already reached the retirement age declared their will to continue their service – which **contradicts the claim that the judges decided to boycott the procedure.** On the other hand, the judges who have not expressed such a wish cannot be forced to remain in office.

In the end, earlier retirement age **may only affect from 1/6 to 1/3 of the 76 judges of the Supreme Court.** It should also be noted that all judges of the Supreme Court who reach the standard retirement age and do not wish to continue their service will keep their existing guaranteed rights, and none will be deprived of their right to retirement benefits, on the same terms and conditions as before the reform, i.e. an emolument equal to 75 percent of the basic salary and seniority allowance received in at the most recent post (amounting to a six-month salary). They also retain a special legal status related to their service for the rest of their lives – including full immunity, also for criminal proceedings.

23. As far as the retirement age of the Supreme Court judges is concerned, it is worth noting that similar doubts as the European Commission is referring today to the Polish reform appeared in the 1990s. At that time, member states of the Council of Europe took action to establish a permanent Tribunal in place of the then existing European Commission on Human Rights and the European Court of Human Rights.

The scope of the reform also included the status of judges. It introduced the principle that the term of office of the judges ends when they reach the age of 70 years. As a result of the adoption of the new provisions on 1 November 1998, **the term of office of all the judges expired. The composition of the newly established full-time Tribunal in only one third was identical to that before the reform.**

24. Similar matter was subject to a ruling of the European Court of Justice in 2011 (joined cases Gerhard Fuchs (C-159/10) and Peter Köhler (C-160/10) v. Land Hessen). The issue in question concerned the possibility to use a reform of mandatory retirement age for a purpose of rejuvenating the structure of civil servants (the case concerned public prosecutors that usually enjoy similar guarantees to those of judges).

And **the ECJ ruled that it may be done** – because *“the aim of establishing an age structure that balances young and older civil servants in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees’ fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service, can constitute a legitimate aim of employment and labour market policy.”*

25. It must be also noted that the Article 180 (4) and (5) of the Polish Constitution leaves it for a statute to establish the judicial retirement age – and **it even allows for a forced retirement of judges when there is a reorganization of the court structure** (which currently takes place in the Supreme Court).

This regulation **has been present in the Polish legal system since 1997 and was never contested by the Commission – also at the time when Poland was joining the EU.** It is therefore even more surprising that it is subject to such criticism now, after over a decade since the 2004 enlargement.

In Poland’s view, all these changes seem to be welcome both from the perspective of the Polish legal system, as well as by the European Commission. They also prove that the rule of law is fully safeguarded in Poland. Poland also believes that the procedure of Article 7(1) that remains in course is unjustified – especially in the light of recent changes and the commitment that Poland has shown to guarantee the independence of the judiciary. The talks with the Commission continue, and they will hopefully lead to a resolution that will be beneficial for all parties concerned.

We wish to keep you best informed about the state of affairs – should you need any more information do not hesitate to contact us at your convenience; we will happily provide you with all the details.