

## RULE OF LAW IN POLAND / ARTICLE 7 (1) TEU REASONED PROPOSAL

HEARING OF POLAND - 11 DECEMBER 2018

### EUROPEAN COMMISSION CONTRIBUTION

#### **1. Supreme Court: the retirement regime of the current Supreme Court judges, including the First President, and the regime for prolongation of judicial mandates.**

##### *(i) Commission Recommendation of 20 December 2017*

In its fourth Recommendation of 20 December 2017 regarding the rule of law in Poland ("fourth Recommendation"), the Commission recommends that the Polish authorities ensure that the law on the Supreme Court is amended so as to:

- not apply a lowered retirement age to the current Supreme Court judges<sup>1</sup>;
- remove the discretionary power of the President of the Republic to prolong the active judicial mandate of the Supreme Court judges<sup>2</sup>.

##### *(ii) State of play*

Amendments to the law of 8 December 2017 on the Supreme Court have been introduced by four subsequent laws: (i) the law of 12 April 2018 amending the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary, and the law on the Supreme Court, (ii) the law of 12 April 2018 amending the law on the Supreme Court, (iii) by the law of 10 May 2018 amending the law on Ordinary Courts Organisation, the law on the Supreme Court and certain other laws, and (iv) by the law of 20 July 2018 amending the law on Ordinary Courts Organisation and certain other laws.

The amendments adopted before the General Affairs Council of 26 June 2018 introduced a mandatory consultation of the new National Council for the Judiciary by the President of the Republic, when considering the prolongations of mandates of the current Supreme Court judges<sup>3</sup>. The opinion of the National Council for the Judiciary is not binding and is to be made on the basis of broad criteria, such as 'the interest of the justice system or an important public interest'. Also, deadlines for deciding on the prolongation have been introduced<sup>4</sup>.

Pursuant to the law on the Supreme Court, the current Supreme Court judges who attained 65 years of age by 3 July 2018, were asked to declare their intention to remain in the Supreme Court by 4 May 2018<sup>5</sup>. 27 current judges of the Supreme Court judges are affected by the lowered retirement age. 16 judges reacted in one way or another to the new prolongation regime: nine judges submitted a formal declaration requesting prolongation of their mandate, whilst the remaining seven judges made a general statement that they are fit and ready to continue to occupy their posts without making a formal declaration requesting prolongation due to the unconstitutionality of such procedure and its humiliating character. In its opinion of

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<sup>1</sup> For the motivation, see paragraphs 5-12 of the fourth Rule of Law Recommendation ('fourth Recommendation').

<sup>2</sup> For the motivation, see paragraphs 13-17 of the fourth Recommendation.

<sup>3</sup> Article 2(2)(b) and Article 5 of the law of 10 May 2018 amending the law on the Ordinary Courts Organisation, the law on the Supreme Court, and certain other laws.

<sup>4</sup> Article 2(2)(c) and Article 5 of the law of 10 May 2018 amending the law on the Ordinary Courts Organisation, the law on the Supreme Court, and certain other laws.

<sup>5</sup> Article 111(1) of the law of 8 December 2017 on the Supreme Court.

10 May 2018<sup>6</sup>, the Supreme Court explicitly stated that the lack of declarations of the other 11 judges cannot be interpreted as the lack of their will to further adjudicate in the Supreme Court.

The First President of the Supreme Court is also affected by the new lowered retirement age<sup>7</sup> and her mandate of a 6-year term of office will be prematurely terminated (two years earlier) - despite the fact that the Polish constitution itself sets the period of that term of office.

*Infringement procedure.* On 2 July 2018, the Commission launched an infringement procedure regarding the law on the Supreme Court. According to the Commission, the retirement regime applicable to the current judges of the Supreme Court and the regime for prolongation of judicial mandates undermine the principle of judicial independence, including the irremovability of judges; therefore, Poland fails to fulfil its obligations under Article 19(1) of the TEU read in connection with Article 47 of the Charter of Fundamental Rights of the EU. The response of the Polish authorities to the letter of formal notice did not alleviate the concerns and on 14 August 2018 the Commission sent a Reasoned Opinion. Polish authorities had one month to take the necessary measures to comply with the Reasoned Opinion.

*New law.* Following the first hearing, a new law was adopted on 20 July 2018 amending i.a. the Supreme Court law. In particular, the amendments facilitate the procedure for appointing a new First President of the Supreme Court<sup>8</sup> and limit the suspensive effect of appeals by judges who have not been selected by the National Council for the Judiciary for judicial appointments<sup>9</sup>. The law entered into force on 9 August 2018 and retroactively applies to the procedures of appointments to the Supreme Court initiated in July 2018<sup>10</sup>.

*Vacant posts in the Supreme Court.* The President of the Republic had increased (in March 2018) the total number of posts in the Supreme Court from 93 to 120. On 29 June 2018, the President of the Republic published 44 vacant posts in the Supreme Court<sup>11</sup>. On 28 August 2018, the President of the Republic published 11 additional posts. These also include the post currently occupied by the First President of the Supreme Court.

*Requests for preliminary ruling.* On 2 and 8 August 2018, the Supreme Court referred several questions to the Court of Justice of the EU for a preliminary ruling, asking the European Court of Justice i.a. whether under EU law Member States can lower the retirement age of Supreme Court judges and apply it to judges currently in office whilst leaving the prolongation of their mandate at the discretion of the executive branch. The Supreme Court simultaneously decided to suspend the

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<sup>6</sup> Supreme Court's supplementary opinion of 10 May 2018 on the draft law amending the Law on the Supreme Court.

<sup>7</sup> Article 111(1) and (4) of the law of 8 December 2017 on the Supreme Court.

<sup>8</sup> In particular, the new law lowers the number of judges in the Supreme Court (80 instead of 110) needed for triggering the procedure to appoint a new First President - Article 8(4)(b) of the law of 20 July 2018 amending the law on Ordinary Courts Organisation and certain other laws.

<sup>9</sup> In order for the appeal to have a 'suspensive effect' on the NCJ resolution, the new law requires that all candidates concerned, including the successful candidate, appeal from the resolution; Article 5(5)(a) and (c) of the law of 20 July 2018 amending the law on Ordinary Courts Organisation and certain other laws.

<sup>10</sup> Article 22(1) of the law of 20 July 2018 amending the law on Ordinary Courts Organisation and certain other laws.

<sup>11</sup> These also include existing posts which were already vacant before the decision to increase the total number of posts.

applicability of the relevant provisions of the retirement regime. These decisions have been criticised by members of the executive and legislative branches.

On 23 August 2018, the Prosecutor General, who is also the Minister of Justice, referred a motion to the Constitutional Tribunal requesting that it declares unconstitutional the interpretation given by the Supreme Court of the Code of Civil Procedure in conjunction with Article 267(3) TFEU and Article 4(3) TEU, on which the Supreme Court based its decision to suspend the applicability of the provisions of the law on the Supreme Court.

*Recent developments:*

*Suspension of appointments to the Supreme Court.* On 28 September 2018, the Supreme Administrative Court suspended the execution of the resolutions of the National Council for the Judiciary relating to the appointment of new judges<sup>12</sup> to the Civil Chamber and the Chamber of Extraordinary Control and Public Affairs. The suspension order was linked to the fact that following the July 2018 amendments, appeals lodged against resolutions of the National Council for the Judiciary no longer have suspensive effect on the nomination process.

*Infringement procedure and the order on interim measures.* On 24 September 2018, the Commission decided to refer Poland to the European Court of Justice in its infringement procedure concerning the retirement regime of the new Supreme Court law<sup>13</sup>. Following the Commission's request, the European Court, on 19 October 2018, decided to order interim measures<sup>14</sup> to safeguard the independence of the Supreme Court, even in the absence of observations by Poland in the interim proceedings (“*ex parte*”). The interim measures ordered by the European Court of Justice, which took immediate effect, provisionally granted all the Commission's requests. According to the order, Poland had to immediately suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges, ensure that the judges concerned could continue to perform their duties and abstain from any measures aimed at the appointment of new judges in place of the judges concerned. The order of the European Court of Justice applied as of that day, with retroactive effect, to all judges of the Supreme Court concerned. The European Court of Justice also ordered the Polish authorities to communicate to the Commission by 19 November 2018 at the latest, and every month thereafter, all the measures it has adopted or plans to adopt in order to fully comply with the order. This would allow the Commission to assess whether there will be a need to request the European Court of Justice to impose financial sanctions on Poland, if it appears that the Court's order has not been fully implemented.

*Developments following the order of the European Court of Justice.* On 22 October 2018, the First President of the Supreme Court summoned all the Supreme Court judges affected by the lowering of the retirement age to report for duty in the Court. The Commission was informed by the Supreme Court that all 22 judges reported back to work and some of them had already been assigned cases. Among these judges are two Presidents of the Supreme Court, responsible for handling the work of the Criminal Chamber and the Labour Chamber.

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<sup>12</sup> The National Council for the Judiciary is in charge of assessing the applications and of selecting a candidate whose appointment it proposes to the President of the Republic.

<sup>13</sup> [http://europa.eu/rapid/press-release\\_IP-18-5830\\_en.htm](http://europa.eu/rapid/press-release_IP-18-5830_en.htm)

<sup>14</sup> Case C-619/18 R; [https://curia.europa.eu/jcms/jcms/p1\\_1394375/en/](https://curia.europa.eu/jcms/jcms/p1_1394375/en/)

On 16 November 2018, a hearing took place before the Grand Chamber of the European Court of Justice, on the basis of which the Court will take a final decision on the interim measures requested by the Commission.

On 19 November 2018, the Polish government provided the Commission with a statement regarding the order's implementation. The letter considers that there was no direct effect of the order and that a legislative amendment was necessary to implement the order. The letter also sketched out a possible content of such new legislation. The letter expressed doubts as to the European Court of Justice's competence to issue the order.

On 21 November 2018, Members of the Parliament of the governing party tabled a draft legislation amending the law on the Supreme Court. The draft law was adopted by the Sejm on the same day and by the Senate on 23 November 2018. The law has not been signed yet by the President of the Republic and has therefore not yet entered into force.

According to the law, the contested prolongation regime would be eliminated and the retirement age of Supreme Court judges would be set to 70 (as in the previous regime) for judges appointed to the Court before the entry into force of the amending law. Judges who were retired pursuant to the contested provisions would return to their posts and their service would be considered as being "uninterrupted". The law contains other provisions i.a. a specific pension regime favourable for judges who wish to remain retired, an extension of the power of the President of the Republic to appoint an 'acting' First President or 'acting' President of Chamber and a provision on the discontinuation of pending appeals concerning the prolongation of active service initiated before the entry in force of the new law.

*Situation of judges who reported back to work following the order.* On 5 November 2018, the President of the Criminal Chamber who returned to work on the basis of the order of the Vice-President of the Court of Justice, adopted a decision that a new Supreme Court judge appointed to this Chamber would not be assigned to hearing benches because appeals concerning that judge's appointment were still pending of other candidates concerning the same appointment procedure. The pending appeals include i.a. concerns raised by the new composition of the National Council for the Judiciary. On 9 November, the National Council for the Judiciary stated in a resolution that the President of the Criminal Chamber was a "retired judge" and could not take any decision of administrative or judicial character. On 13 November, the Supreme Court informed the Commission in a letter about the above resolution of the National Council for the Judiciary. According to the Supreme Court, 'the resolution contains in fact a threat of disciplinary responsibility of the Supreme Court judges concerned by the appealed provisions of the statute on the Supreme Court, if they perform official duties'. On 15 November, new judges of the Extraordinary Control and Public Affairs Chamber issued a statement expressing their concerns about the above decision of a Supreme Court President who had returned to work after the issuance of the CJEU order. On 27 November, the President of the Civil Chamber wrote a letter about the same matter rejecting the position taken by the NCJ and the new judges of the Extraordinary and Public Affairs Chamber.

*Requests for preliminary ruling of the Supreme Court.* On 12 September, 19 September and 3 October 2018, the Supreme Court referred additional requests for preliminary rulings to the European Court of Justice. The referrals concern i.a. the compliance with EU law of the new composition and method of appointment of judges-members of the National Council for the Judiciary and the question whether

the newly established Disciplinary Chamber of the Supreme Court is an impartial and independent court within the meaning of EU law.

On 17 October and 7 November 2018, the ‘acting’ President of the Disciplinary Chamber sent two letters to the President of the Court of Justice<sup>15</sup>. The letters argued that requests for preliminary rulings presented by the Supreme Court in recent months were formulated by “unauthorized benches” and that, consequently, the proceedings pending at the national level were subject to annulment on the basis of national provisions. As regards the composition and method of appointment of judges-members of the National Council for the Judiciary, the letter stated that the constitutionality of the National Council had not been challenged. In consequence its composition enjoyed a presumption of constitutionality and ‘individual opinions on this issue appearing in the public sphere cannot challenge that fact’.

*New appointments to the Supreme Court.* In total, in September and October 2018, the President of the Republic appointed 39 new judges to the Supreme Court: on 19 September 2018, the Polish President of the Republic appointed 10 judges to the Disciplinary Chamber. On 10 October 2018, the President of the Republic appointed 7 judges to the Civil Chamber, one judge to the Criminal Chamber, and 19 judges to the Extraordinary Control and Public Affairs Chamber. On 8 November 2018, the President of the Republic appointed 2 judges to the Criminal Chamber – candidates to these posts had been proposed by the former National Council for the Judiciary. The Supreme Court informed that these judges were not appointed on post of the judges affected by the retirement regime.

### *(iii) Assessment*

The developments since the first hearing of 26 June 2018 show an aggravation of the concerns relating to the retirement regime and an acceleration of the process for appointing new judges which would lead to the recomposition of the Supreme Court.

#### *- Aggravation of the concerns relating to the retirement regime*

As stated by the Commission at the first hearing of 26 June 2018, the new laws adopted in April and May 2018 are not sufficient to remove the concerns. The application of the new retirement regime to the current judges of the Supreme Court and the discretionary power given to the President of the Republic in charge of deciding on the prolongation of judicial mandates remains a key concern from the point of view of upholding the principles of the separation of powers and judicial independence: the current judges still have no right to serve their full term as originally established. It is not sufficient for those judges that have reached the new retirement age to simply notify their intention to continue to adjudicate, together with a health certificate, and continue to work. The wide discretion remains for the President of the Republic to decide on the prolongation of Supreme Court judges' mandates as there are no specific criteria, and there is no possibility for a judicial review.

As regards the mandatory consultation of the National Council for the Judiciary, it is noted that the opinion of the National Council is to be based on vague criteria and is not binding on the President of the Republic. In any case, due to its new politically composed structure which violates European standards on judicial

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<sup>15</sup> The letters have been published on the website of the Supreme Court.

independence, the involvement of the National Council for the Judiciary can no longer constitute an effective safeguard.

As a result, 15 judges of the Supreme Court, including the First President, are currently considered retired by the Polish authorities as of 4 July 2018 and 12 remaining judges are at risk of forced retirement unless the President of Republic consents to their request to continue to adjudicate.

The new law of 20 July 2018 does not remove the Commission's concerns. On the contrary, in spite of the ongoing infringement procedure initiated by the Commission on 2 July 2018, the amendments aim at ensuring a rapid appointment of a new First President of the Supreme Court instead of ensuring that the constitutional mandate of the current First President is not prematurely terminated. The fact that among the 11 new posts recently published by the President of the Republic, there is the post currently occupied by the First President of the Supreme Court aggravates the concerns.

It also appears that the pace of implementation of the retirement regime has so far not been affected by the Supreme Court's requests to the Court of Justice of the EU for a preliminary ruling. On the contrary, the Prosecutor General/Minister of Justice seized the Constitutional Tribunal, whose independence and legitimacy has still not been restored, about the Supreme Court's decision to suspend this regime.

#### - Implementation of the order of the Court of Justice of the EU

The Commission is analysing the report provided on 19 November 2018 by the Polish Government. The new law adopted by the Sejm on 21 November 2018 has not yet been signed by the President of the Republic. The law, which seems to go in the right direction as regards concerns related to the retirement regime, is currently being analysed in detail by the Commission.

#### - Appointment procedure to new posts in the Supreme Court

Following the first hearing of 26 June 2018, the process for filling the new posts in the Supreme Court has been accelerated. On 29 June 2018, the President of the Republic published 44 vacant posts in the Supreme Court and 11 additional posts on 28 August 2018. The National Council for the Judiciary has also accelerated its work on the selection process (see below).

Also the new law of 20 July 2018 aims at ensuring that the new vacant posts in the Supreme Court will be filled as soon as possible, by *de facto* eliminating the suspensive effect of appeals by judges who have not been selected by the National Council and therefore allowing the President of the Republic to proceed with the appointment of the candidates proposed by the National Council despite these pending appeals. This amendment was subject to a request for a preliminary ruling by the European Court of Justice lodged by the Supreme Administrative Court on 21 November 2018 (see the section on the National Council for the Judiciary for more information).

It is noted that in its opinion of 16 July 2018 on the new law, the Supreme Court criticises the amendments underlining that their fundamental aim is to speed up the re-composition of the Supreme Court. In his opinion of 24 July 2018, the Polish Ombudsman stated that the new amendments violate the principle of judicial independence and the tripartite division of powers, and raise concern as regards protection of constitutional rights and freedoms, in particular the right to an independent court.

More generally, it should be noted that the Network of the Presidents of the Supreme Judicial Courts of the EU expressed on 11 July 2018 its serious concerns about the deterioration of the situation of the Supreme Court, including of the First President, which raise the question of the independence of the judiciary in Poland with its consequences for the proper functioning of the EU. Concerns were expressed by other International institutions and European networks such as the Council of Europe Commissioner for Human Rights, the Council of Bars and Law Societies of Europe (CCBE), the Consultative Council of European Judges (CCJE), the International Commission of Jurists, Magistrats Européens pour la Démocratie et les Libertés (MEDEL), the Federation of the European Bar (FBE), the presidents of associations of judges of Nordic and Baltic states, and the European Association of Judges.

- New appointments to the Supreme Court

The majority of the new judges appointed by the President of the Republic in September and October 2018 have been appointed to the new Disciplinary Chamber and the new Extraordinary Control and Public Affairs Chamber. As a result, these two new Chambers are now operational. The European Commission in its reasoned proposal under article 7(1) TEU as well as the Venice Commission have raised concerns about these two new Chambers<sup>16</sup>.

**2. The National Council for the Judiciary: election regime of the judges-members of the National Council for the Judiciary, premature termination of the mandates of the former judges-members.**

*(i) Commission Recommendation of 20 December 2017*

In its fourth Recommendation, the Commission recommends that the Polish authorities ensure that the law on the National Council for the Judiciary is amended so that the mandates of its judges-members are not terminated<sup>17</sup> and that the new appointment regime is removed in order to ensure election of judges-members by their peers<sup>18</sup>, instead of by the legislative power.

*(ii) State of play*

No amendments have been adopted to address the above concerns. On 6 March 2018, 15 new judges-members<sup>19</sup> were elected by the Sejm according to the new regime (judges-members are no longer elected by judges). The four-year mandates of the previous 15 judges-members, established in the constitution, were prematurely terminated on the same day. The first meeting of the new National Council for the Judiciary took place on 27 April 2018.

On 12 July 2018, the National Council for the Judiciary adopted five positive and seven negative opinions on requests for prolongation of active mandates of Supreme Court judges currently in office. The opinions did not contain any precise motivation.

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<sup>16</sup> Cf. Para 135 of the Commission's Reasoned Proposal of 20 December 2017 adopted in accordance with Article 7(1) TEU and paras 42 and 92 of the Venice Commission's Opinion CDL(2017)035.

<sup>17</sup> For the motivation, see paragraphs 29-30 of the fourth Recommendation.

<sup>18</sup> For the motivation, see paragraphs 31-35 of the fourth Recommendation.

<sup>19</sup> The Constitution stipulates that the National Council for the Judiciary is composed of 25 members: ex officio members (the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and a presidential appointee); four deputies 'chosen by the Sejm', two senators 'chosen by the Senate' and 15 judges ('chosen from amongst' the common, administrative and military courts and the Supreme Court).

The new law of 20 July 2018 eliminates the automatic suspensive effect of appeals against the National Council's assessments of candidates for the Supreme Court; this allows the President of the Republic to proceed with the appointment of the candidates proposed by the National Council despite the pending appeal of other candidates.

On 23-28 August 2018, the National Council of the Judiciary held an extraordinary plenary session in order to establish the list of candidates to be proposed to the President of the Republic for the appointment to 44 vacant posts in the Supreme Court.

As regards the situation of the First President of the Supreme Court, the National Council for the Judiciary, on its own initiative, adopted a resolution on 27 July 2018, stating that Mrs Gersdorf had retired and was no longer the First President of the Supreme Court and consequently no longer member of the National Council for the Judiciary.

#### *Recent developments*

On 21 November 2018, the Supreme Administrative Court referred to the European Court of Justice a request for a preliminary ruling. The questions asked concern the compliance with EU law of provisions which limit the suspensive effect of appeals lodged against resolutions of the National Council for the Judiciary regarding requests for appointments to the Supreme Court. In its referral, the Supreme Administrative Court questions the current composition and appointment procedure of judges-members of the National Council for the Judiciary.

On 23 November 2018, the regional administrative court in Warsaw ruled that the names of judges supporting the candidates to the National Council for the Judiciary to be elected by the Sejm should be disclosed to the public. These names have so far not been disclosed.

On 27 November 2018, the National Council for the Judiciary decided to refer a motion to the Constitutional Tribunal as regards the constitutionality of the provisions governing the appointment procedure of its judges-members. The National Council for the Judiciary also requested the Constitutional Tribunal to declare the unconstitutionality of a provision of the civil code of procedure on the basis of which the Supreme Administrative Court recently suspended the execution of resolutions of the National Council relating to the appointment of judges to the Supreme Court.

On 19 and 22 November 2018, the assemblies of representatives of appeal and regional judges in Gdańsk and Cracow circuits refused to provide opinions to the National Council for the Judiciary as regards candidates to judicial posts<sup>20</sup>. The assemblies motivate their decision i.a. by noting that such opinions would legitimize the National Council for the Judiciary which has been appointed in violation of the Polish constitution.

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<https://www.iustitia.pl/81-uchwaly/2670-uchwala-zgromadzenia-przedstawicieli-sedziow-apelacji-gdanskiej-z-dnia-22-listopada-2018-roku-w-sprawie-czasowej-odmowy-opiniowania-kandydatow-do-objecia-urzedu-sedziow-sadow-okregowych-i-sadu-apelacyjnego-apelacji-gdanskiej>  
<https://www.iustitia.pl/83-komunikaty-i-oswiadczenia/2664-uchwaly-zgromadzenia-przedstawicieli-sedziow-okregu-sadu-okregowego-w-krakowie-z-dnia-19-listopada-2018-roku>



On 28 November 2018, the association of judges ‘Iustitia’ published the latest results of an ongoing survey conducted among Polish judges<sup>21</sup>. The results show that over 91% of judges interviewed believe that the National Council for the Judiciary does not perform its constitutional obligation to safeguard judicial independence, and that over 87% of judges believe that the current members of the National Council for the Judiciary should resign.

*(iii) Assessment*

The concerns expressed by the Commission fully remain. In particular, the politicization of the National Council for the Judiciary undermines its role as an effective safeguard of judicial independence. The new election regime of the judges-members of the National Council does not comply with European standards requiring that judges-members of Councils for the Judiciary are elected by their peers. No changes have been introduced in that respect. No remedy is foreseen to address the premature termination of the four-year mandates of the former judges-members of the National Council for the Judiciary.

The conditions under which the Sejm elected the new judges-members, and the first meeting of the National Council for the Judiciary illustrate its politicisation and lack of legitimacy. While in Poland there are over 11.000 judges, only 18 candidates have been proposed for the 15 posts in the Council.

The law of 20 July 2018, which eliminates the suspensive effect of appeals against the decisions of the National Council for the Judiciary concerning judicial appointments to the Supreme Court, confirms the pivotal role given to the National Council to implement in an accelerated manner the contested reforms, contrary to its constitutional obligation to safeguard the independence of courts and judges.

The recent developments, in particular the decision of the National Council to speed up the process of selecting candidates for the new vacant posts through an extraordinary plenary session, confirm the risks of its politicisation.

Also, the decisions taken by the National Council regarding judicial appointments reveal that a number of candidates proposed appear to be closely linked to the executive and the ruling party. For example, as regards the disciplinary chamber, the National Council selected 12 candidates among which six are prosecutors recently promoted by the Minister of Justice, two are court presidents recently appointed by the Minister of Justice within the 6-month discretionary regime, and one is an advisor to the Marshal of the Sejm, member of the ruling party. The concerns regarding the risk of politicisation also appear from the National Council's resolution, adopted on its own motion, stating that Ms Gersdorf is no longer the First President of the Supreme Court.

On 17 August 2018, the Board of the European Network of Councils for the Judiciary (ENCJ) proposed to the General Assembly to vote on 17 September 2018 to suspend the membership of the Polish National Council for the Judiciary as it no longer meets the requirement to be independent of the executive and legislature.

These developments illustrate the concerns relating to the lack of independence of the new National Council for the Judiciary and the lack of support the new Council receives from the judiciary.

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<sup>21</sup> Information was published on 28 November 2018: <https://www.iustitia.pl/2686-juz-ponad-2500-sedziow-ze-112-sadow-wzielo-udzial-w-referendum-fws>

### **3. Ordinary Court judges: retirement regime of current ordinary court judges, regime for prolongation of judicial mandates and situation of Ordinary Court judges already affected by the new retirement regime.**

#### *(i) Commission Recommendation of 20 December 2017*

In its fourth Recommendation, the Commission recommends that the law on Ordinary Courts Organisation is amended so as to remove the new retirement regime for judges of ordinary courts, including the discretionary power of the Minister of Justice to prolong their mandate; also, the situation of the ordinary court judges who have already been forced to retire because they were affected by the lowered retirement age should be addressed<sup>22</sup>.

#### *(ii) State of play*

Amendments have been introduced by the law of 12 April 2018 amending the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary, and the law on the Supreme Court.

The retirement age of female judges at ordinary courts has been aligned with the retirement age of male judges (65 years of age)<sup>23</sup>; female judges at the ordinary courts have been given a right to early retirement on request upon the attainment of the age of 60<sup>24</sup>.

The power to prolong mandates of ordinary court judges has been transferred from the Minister of Justice to the National Council for the Judiciary<sup>25</sup>. The already wide discretion to decide on the prolongation of mandates has been further broadened<sup>26</sup>. There is no judicial review of the decision concerning the prolongation.

The law of 20 July 2018 empowers the Minister of Justice to change the structure of ordinary courts at district and regional level<sup>27</sup>; the organisational consequence of such changes could include the transfer of judges between courts, even without their consent, and the possibility to transform a division into a new court with a new court president. The new law also provides the National Council for the Judiciary, instead of the colleges of courts, with the power to assess appeals against judicial transfers within the same judicial district decided by court presidents<sup>28</sup>.

#### *(iii) Assessment*

The concerns expressed by the Commission fully remain. The alignment of the retirement age for female and male judges at 65 years of age is to be welcomed but does not remove the concerns relating to judicial independence.

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<sup>22</sup> For the motivation, see paragraph 47(f) of the fourth Recommendation and paragraphs 146-150 of the Reasoned Proposal.

<sup>23</sup> Article 1(4)(a) of the law of 12 April 2018 amending the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the Supreme Court.

<sup>24</sup> Article 1(4)(c) of the law of 12 April 2018 amending the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the Supreme Court.

<sup>25</sup> Article 1(4) (a) of the law of 12 April 2018 amending the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the Supreme Court.

<sup>26</sup> Article 1 (4)(b) of the law of 12 April 2018 amending the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the Supreme Court.

<sup>27</sup> Article 1(3)-(5) of the law of 20 July 2018 amending the law on Ordinary Courts Organisation and certain other laws.

<sup>28</sup> Article 1(6)(c) of the law of 20 July 2018 amending the law on Ordinary Courts Organisation and certain other laws.

The amendments do not address the key concern which is that the current ordinary court judges still have no right to serve their full term as originally established. The wide discretion to decide on the prolongation of mandates of ordinary court judges remains and has even been broadened; there is no timeframe for the National Council for the Judiciary to make a decision and judges concerned continue to adjudicate whilst remaining 'at the mercy' of the Council; there is no judicial review of the Council's decision.

Whilst the transfer of the power to decide on the prolongation of ordinary courts judges to the National Council for the Judiciary is a step in the right direction, this is undermined by the politicisation of that body as a result of the appointment of the judges-members by the Sejm (see point 2 above).

In addition, the new law of 20 July 2018 appears to further increase the possibilities for the executive to put pressure on ordinary courts by the Minister of Justice.

#### **4. Disciplinary regime, including the new autonomous disciplinary chamber in the Supreme Court.**

##### *(i) Commission Recommendation of 20 December 2017*

In its fourth Recommendation, the Commission underlines that the disciplinary regime established by the law on the Supreme Court raises a number of concerns in particular related to the autonomy of the new disciplinary chamber in the Supreme Court<sup>29</sup>, the removal of a set of procedural guarantees in disciplinary proceedings conducted against ordinary judges and Supreme Court judges<sup>30</sup> and the influence of President of the Republic and the Minister of Justice on the disciplinary officers<sup>31</sup>.

##### *(ii) State of play*

The law of 12 April 2018 amending the law on the Supreme Court introduces a provision enabling current judges of the Supreme Court to become judge in the disciplinary chamber from the start of its functioning<sup>32</sup> (instead of having in this chamber only newly appointed judges selected by the new Council for the Judiciary).

The law of 20 July 2018 increases the possibilities for the disciplinary officer (appointed by the Minister of Justice) to appoint deputies of his choice under certain circumstances<sup>33</sup>. It also allows in certain circumstances to reduce the salary of retired judges for the duration of the disciplinary proceedings<sup>34</sup>.

On 5 and 6 September 2018, two regional courts, in separate cases, referred requests for preliminary rulings to the Court of Justice of the EU relating to the compatibility of the new disciplinary regime applicable to ordinary court judges with the requirements of EU law regarding judicial independence (Article 19(1) second subparagraph TEU).

##### *Recent developments*

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<sup>29</sup> For the motivation, see paragraph 25 of the fourth Recommendation.

<sup>30</sup> For the motivation, see paragraph 24 of the fourth Recommendation.

<sup>31</sup> For the motivation, see paragraph 23 and 24 of the fourth Recommendation.

<sup>32</sup> Article 1(14) of the law of 12 April 2018 amending the law on the Supreme Court.

<sup>33</sup> Article 1(30)(c) of the law of 20 July 2018 amending the law on Ordinary Courts Organisation and certain other laws.

<sup>34</sup> Article 1(24) and 1(32)(a) of the law of 20 July 2018 amending the law on Ordinary Courts Organisation and certain other laws.

On 15 September 2018, the five largest associations of judges in Poland adopted a statement<sup>35</sup> underlining that: “disciplinary prosecutors have, in recent times, become visibly more active. The steps they have been undertaking – with no legally founded basis and aimed against judges who are members of judges associations – are to create a “chilling effect”. Requesting judges to give statements explaining their participation in a public debate and presenting a position on issues important for the citizens (judges also being part of the society) is a contradiction of democracy in public life and a violation of the rule of law. These are indeed attempts at intimidating judges who are publicly standing in defence of the Constitution, the independence of courts, impartiality of judges, and who are taking part in educational activities, raising awareness in the society about the dangers evoked by violating the Constitution and the separation of powers.”

According to publicly available information, disciplinary officers appointed by the Minister of Justice continue to initiate preliminary disciplinary investigations against judges who participated in public debates or provided public statements about the ongoing reforms. Preliminary disciplinary investigations concern also judges who referred requests for preliminary ruling to the Court of Justice. In addition, disciplinary officers appointed by the Minister of Justice exercised their power to take over investigations carried out by disciplinary officers appointed at request of the judiciary, including in cases where the judges concerned were found by the latter not to have committed any disciplinary offence.

On 28 September 2018, a Polish court referred a request for a preliminary ruling to the European Court of Justice relating to the compatibility of the new disciplinary regime applicable to ordinary court judges with the requirements of EU law regarding judicial independence (Article 19(1) second subparagraph TEU).

### *(iii) Assessment*

The concerns expressed by the Commission fully remain. They are confirmed by the statement of the five largest associations of judges of 15 September 2018 referring to attempts to intimidate judges who are publicly raising to the defence of the Polish constitution and the independence of courts. Also the requests for a preliminary ruling on the new disciplinary regime confirm the concerns.

It is recalled that the amendment introduced by the law of 12 April 2018 renders it in practice hardly possible for current Supreme Court judges to participate from the start as judges in the disciplinary chamber: whilst it is normally the First President of the Supreme Court who decides on transfers of Supreme Court judges between chambers (including the disciplinary chamber), the new provisions require for the disciplinary chamber the consecutive consent of the three Presidents: of the Supreme Court, the National Council for the Judiciary and, finally, of the Republic.

The disciplinary regime has been identified as a serious concern with regard to the separation of powers not only in the reasoned proposal but also by the Venice Commission and the recent GRECO report published on 29 March 2018 which requests "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"<sup>36</sup>.

<sup>35</sup> 'The position of judges associations regarding the current situation of the system of justice in Poland': <https://www.iustitia.pl/en/new-krs/2534-the-position-of-judges-associations-regarding-the-current-situation-of-the-system-of-justice-in-poland>

<sup>36</sup> On 22 June 2018 GRECO published an addendum to its Ad Hoc Report of 29 March 2018 whereby it concluded that the amendments to the Laws on the National Council for the Judiciary, the

As regards the new law of 20 July 2018, the new amendments to provisions governing the disciplinary regime increase the influence of the Minister of Justice on the appointment of deputy-disciplinary officers. Changes concerning disciplinary sanctions could have an adverse impact on the active engagement of retired judges in the public discourse concerning the judicial reform.

To be noted that in its judgment of 25 July 2018<sup>37</sup> concerning European Arrest Warrants issued by Polish courts, the Court of Justice of the EU underlined that the requirement of judicial independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions.

## **5. Extraordinary appeal procedure**

### *(i) Commission Recommendation of 20 December 2017*

In its fourth Recommendation, the Commission recommends that the Polish authorities ensure that the law on the Supreme Court is amended so as to remove the extraordinary appeal procedure<sup>38</sup>.

### *(ii) State of play*

Amendments have been introduced by the law of 10 May 2018 amending the law on Ordinary Courts Organisation, law on the Supreme Court and certain other laws. This law has not removed the extraordinary appeal procedure.

According to the amendments, the extraordinary appeal procedure can be triggered if it is necessary in order to ensure compliance with the principle of a democratic state ruled by law and implementing the principles of social justice<sup>39</sup>. Moreover, if the verdict challenged by the extraordinary appeal has already led to irreversible legal effects, the Supreme Court can declare that the verdict was issued in breach of the law - but the judgement will not be repealed<sup>40</sup>. This also applies to cases which could 'undermine international commitments of Poland'.

### *(iii) Assessment*

The concerns expressed by the Commission fully remain. The changes do not eliminate the broadness of the criteria governing the extraordinary appeal: they remain almost the same; in particular they still refer to 'social justice' albeit in a different wording. The Venice Commission explicitly criticised such references<sup>41</sup>. Also, the 20-year reach of the extraordinary appeal has not been eliminated, which means that the extraordinary appeal could result in the repeal of final judgments dating back to October 1997.

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Supreme Court and the Ordinary Courts Organisation enable the legislative and executive powers to influence the functioning of the judiciary in Poland in a critical manner, thereby significantly weakening the independence of the judiciary.

<sup>37</sup> Case C-216/18 PPU § 67.

<sup>38</sup> For the motivation, see paragraphs 18-21 of the fourth Recommendation.

<sup>39</sup> Article 2(3)(a) of the law of 10 May 2018 amending the law on the Supreme Court and certain other laws.

<sup>40</sup> Article 2(3)(b) and Article 2(5)(b) of the law of 10 May 2018 amending the law on the Supreme Court and certain other laws.

<sup>41</sup> Opinion CDL-AD(2017)031, paras 58, 63 and 130.

The new condition which was introduced aiming at avoiding that the extraordinary appeal will result in the repeal of judgements infringing international obligations lacks real impact: such repeal is nevertheless possible if justified by principles or rights established in the Polish constitution. This could even justify, for example, the repeal of final judgments by Polish courts applying EU law as interpreted by the case-law of the Court of Justice of the EU.

**6. Court Presidents: situation of the court presidents affected by the transitional six-month dismissal and appointment regime.**

*(i) Commission Recommendation of 20 December 2017*

In its fourth Recommendation, the Commission recommends that the law on Ordinary Courts Organisation is amended so as to remedy decisions on dismissal of court presidents already taken under the six-month transitional regime which ended on 12 February 2018<sup>42</sup>.

*(ii) State of play*

In the period between 12 August 2017 and 12 February 2018, over 70 presidents (and 70 vice-presidents) of courts have been dismissed under the six-month transitional regime which gave the Minister of Justice the power to arbitrarily dismiss them without any specific criteria, without justification and without judicial review<sup>43</sup>. The laws adopted in April and May 2018 do not address the above issues.

*(iii) Assessment*

The concerns expressed by the Commission fully remain. In particular, no remedy has been provided for judges who have been dismissed as court presidents.

**7. Constitutional Tribunal: publication of the 2016 judgments and the recomposition of the Tribunal, including the procedure to appoint a new president.**

*(i) Commission Recommendation of 20 December 2017*

In its fourth Recommendation of 20 December 2017, the Commission recommends that Polish Authorities publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016<sup>44</sup>.

The Commission also recommends that the Polish authorities restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed. In addition, the Commission recommends to implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the

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<sup>42</sup> For the motivation, see paragraph 47(f) of the fourth Recommendation and paragraphs 151-162 of the Reasoned Proposal.

<sup>43</sup> Data provided by the Ministry of Justice as per statement BM-II-082-219/18 of 19 April 2018.

<sup>44</sup> For the motivation, see paragraph 47(e) of the fourth Recommendation and paragraphs 97-101 of the Reasoned Proposal.

Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected<sup>45</sup>.

*(ii) State of play*

An amendment has been introduced by the law of 12 April 2018 amending the law concerning the Constitutional Tribunal<sup>46</sup>. The amendment provides for publication of '*findings delivered in breach of law*'. On 5 June 2018 the Polish government published the three 2016 judgements with this disclaimer.

No steps have been taken in order to restore the independence and legitimacy of the Constitutional Tribunal.

On 5 July 2018, a group of seven judges of the Constitutional Tribunal (all judges appointed by previous legislatures and one judge appointed by the current legislature) wrote an open letter criticising the judge acting as President of the Tribunal for irregularities in her decisions on the composition of benches, to the detriment of judicial impartiality. This issue is also raised in a report of the Batory Foundation of 10 July 2018 referring to interferences in the composition of benches, including as regards judges-rapporteurs, in concrete cases. On 16 July 2018, a Constitutional Tribunal judge wrote an open letter to the judge acting as President of the Tribunal criticising her for delaying, to the detriment of the Tribunal itself, the examination of a complaint against that judge (and two other judges) lodged by the Prosecutor General/Minister of Justice alleging the unconstitutionality of their appointments in 2010. Because of the pending complaint, the judge concerned has not been able to adjudicate in the Constitutional Tribunal since January 2017.

*Recent developments*

On 22 October 2018, the Polish Ombudsman reported that the composition of a hearing bench of the Tribunal was again changed without legal basis in a politically sensitive case by the judge acting as President of the Tribunal, and that an unlawfully appointed judge was added to the bench. This led the Ombudsman to withdraw the case, lodged in 2016, which concerned the constitutionality of the new powers attributed to the Prosecutor General, who is also the Minister of Justice. It was the fifth case which the Ombudsman decided to withdraw for these reasons.

On 17 October 2018, the Prosecutor General/Minister of Justice asked the Constitutional Tribunal to declare the unconstitutionality of the preliminary ruling mechanism enshrined in Article 267 of the Treaty on the Functioning of the European Union, in case the questions concern the “system, shape and organisation” of the Polish justice system. The motion extends the initial request lodged by the Prosecutor General/Minister of Justice on 23 August 2018.

*(iii) Assessment*

The concerns expressed by the Commission fully remain. The three 2016 judgements have not been published as a 'judgement' but as '*findings delivered in breach of law*'. The Polish Authorities still have not taken any steps to restore the

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<sup>45</sup> For the motivation, see paragraph 47(d) of the fourth Recommendation and paragraphs 91-96 and 102-113 of the Reasoned Proposal.

<sup>46</sup> Articles 1 and 2 of the law of 12 April 2018 amending the law laying down implementing provisions for the law on the Constitutional Tribunal (Organisation and Proceedings) and for the law on the Status of Constitutional Tribunal Judges.

independence and legitimacy of the Constitutional Tribunal. In fact, none of the recommended actions set out by the Commission have been implemented:

- the three judges that were lawfully nominated in October 2015 by the previous legislature have still not been able to take up their function of judge in the Constitutional Tribunal. By contrast, the three judges nominated by the 8th term of the *Sejm* without a valid legal basis were admitted to take up their function by the acting President of the Tribunal;
- three important judgements of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016 have still not been published as such, without any additional qualifications about their legality;
- after the end of the mandate of the former President of the Constitutional Tribunal, a new President has still not been lawfully appointed. The former President was not replaced by the Vice-President of the Tribunal but by an acting President and, subsequently, by the person appointed as President of the Tribunal on 21 December 2016. The appointment of the new President of the Constitutional Tribunal took place before an effective review of the law on the status of judges, the law on Organisation and Proceedings and the Implementing law could occur. The open letters of judges and the report referred to above raise additional concerns as regards the role of the judge acting as President of the Tribunal in the functioning of the Constitutional Tribunal.

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