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NOTE

From: General Secretariat of the Council
To: Delegations

Subject: Rule of Law in Poland / Article 7(1) TEU Reasoned Proposal
- Report of the hearing held by the Council on 26 June 2018

As follow-up on note 10354/18 (paragraph 15), delegations will find in the annex the formal report of the hearing of Poland held on 26 June 2018 in accordance with Article 7(1) TEU.

On 26 June 2018, Poland was heard by the Council in accordance with Article 7(1) TEU. The hearing was conducted during the meeting of the General Affairs Council and took approximately three hours.

At the start, the Polish delegation asked for the hearing to be postponed due to the considerable delay (the hearing started at 18.15 instead of 15.00), with the support of some Member States. Since there was no unanimity to remove it from the agenda of the meeting, the Presidency noted that the hearing had to take place as foreseen in the agenda adopted at the start of the Council meeting.

After the Presidency had briefly reminded the participants of how the procedure would be conducted (note 10354/18), the Commission was given the floor at the outset. It stated that the most pressing issue was the situation of the Supreme Court, because a number of its judges were at risk of being forced to retire on 3 July 2018. Another concern was the Polish National Council of the Judiciary, which did not comply with standards requiring that judge-members be elected by their peers. The next issues raised were the forced retirement and the regime for extending the mandates of ordinary courts judges. In addition, 70 presidents of courts had been dismissed by the Minister for Justice without any possibility of judicial review. On the extraordinary appeal procedure, the margin of discretion in triggering this procedure was too broad. Finally, none of the recommended actions regarding the Constitutional Tribunal had been implemented.

The Polish delegation stressed that since the use of Article 7(1) TEU set a precedent in the EU, procedural aspects were of great importance. The ongoing dialogue was a sensitive issue in Poland and the EU. At this stage, the Council was responsible for taking over the process, which set a precedent for the future. The process and its outcome were now exclusively the responsibility of the Council and the Member States. Concerning the content of the dialogue, Poland did not share the Commission's assessment that there was a clear risk of a serious breach of the value of the rule of law because of the cumulative effect of the reforms. Poland had engaged in dialogue at the level of Prime Minister Morawiecki and Jean-Claude Juncker, and this dialogue had led to some considerable concessions and corrections on the Polish side. Poland had equalised the retirement age for men and women as per the Commission recommendations and the arguments in the Commission complaint to the CJEU. Competence to appoint trainee judges had been transferred from the Minister for Justice to the President of the Republic, as was the case for the appointment of all other judges. All judgments of the Constitutional Tribunal had been published as judgments.

Competence to grant consent for extending the mandate of judges had been transferred from the Minister for Justice to the National Council of the Judiciary. Limits had been set as regards who was able to trigger the extraordinary appeal procedure, making it more predictable, as required by the Commission recommendation. In total, 25 reforms had been adopted to comply with the recommendations and meet the expectations of the Commission. The efforts made had not been mirrored with reciprocal action by the Commission, which had described the changes as cosmetic. It was crucial that the hearing be dedicated to facts alone and allow an independent and objective assessment by each Member State in the spirit of responsibility for our common future. Experts involved in consultations with the Commission last month would share a legal assessment of the changes adopted by the Polish parliament over the last two years.

Following this announcement, the Polish representatives gave a PowerPoint presentation, set out in Attachment 1. This presentation took approximately one hour. At the outset, it stressed that the rule of law is a basic and core value of the EU and European civilisation. The first part of the presentation identified general threats to the rule of law without link to any specific Member State. Subsequently, data was presented concerning the trust of the public in the judiciary in Poland. This was followed by an explanation on the role, election, composition, structure and general assessment of the work of the National Council of the Judiciary. In this context, the delegation explained how many candidates ran for office between 2006 and 2018 and why the individual terms were rescinded. On retirement of judges, the delegation presented the legal framework and the content of recent reforms in Poland, focusing in particular on the new regulation of the retirement and prolongation procedure in the Supreme Court. The subsequent part of the presentation concerned court presidents in Poland, their role as well as the content and consequences of the reform of their situation. Then presentation then explained changes in the disciplinary regime focusing on safeguards to exclude any undue influence by the legislative and executive powers. The next part of the presentation concerned the Constitutional Tribunal and focused *inter alia* on the guarantees for the independence of Constitutional Tribunal judges and the publication of judgements. Finally, the delegation presented the reform introducing the extraordinary appeal. At the end of the presentation, the delegation summarised the procedure related to the rule of law situation in Poland focusing on the dialogue between Poland and the Commission and the differences in the assessment of its outcome by the Polish authorities and the Commission. The Polish delegation also stressed the need for an objective, fact-based assessment of the situation in Poland in the framework of the Article 7 (1) TEU procedure and committed to providing the Council with further information, if needed.

The French delegation, speaking also on behalf of Germany, asked about the retirement age of judges of the Supreme Court: one third of judges were expected to retire or be left to the discretion of the President, despite constitutional guarantees of their term and without judicial review. How could the independence of the judiciary be safeguarded under such conditions?

The Polish delegation reverted to the presentation made (see Attachment 1) and explained that according to the Polish Constitution the retirement age of all judges should be defined by a statute adopted in ordinary legislation. The retirement age was not discriminatory because it was the same as the retirement age for everyone else. There was nothing exceptional about this, and the whole change was in line with the constitution. Similar criteria existed in one other Member State and there had been no Commission reaction to that.

The Dutch delegation asked about the extraordinary appeal procedure: since it could affect judgments from the last 20 years, how could it be reconciled with the legal certainty principle? Was it true that the attorney general could act *ex officio* and that 20-year-old cases could be repealed even against the will of the parties and in situations where legal effects had already been produced?

The Polish delegation reverted to the presentation made (see Attachment 1) and stressed that the adopted amendments were aimed at increasing the predictability of the extraordinary appeal procedure. Now, only two subjects could trigger that procedure, and it remained up to the Supreme Court to decide if a request was valid. The most important was the use of the criteria of application, which are well defined in Polish case-law. The recently adopted amendment had narrowed the scope of cases to only those cases which would not lead to a breach of any of Poland's international obligations. All *acquis* and investment agreements were safe. Most importantly, practice would soon show if the Commission's precautionary objections were grounded or not. None of the 600 proposals presented so far had triggered an appeal. In case of damaging consequences, the Polish parliament would react and adjust the procedure. *Res judicata* was a very important principle of the Polish legal system. There were examples of appeal institutions with no time limit in other Member States.

The Danish delegation asked why many judges had to retire several years earlier than they expected. If the reason was to align with other laws, was the main justification the labour market and/or the belief that older people were less qualified and less able to dispense justice?

The Polish delegation stated that the general rationale of the reform was efficiency. According to statistics, Poland spent significantly more on its justice system than the European average while the efficiency of the system was far below average. In the case of the Supreme Court, the reason for reforms was to make the retirement age the same as for the rest of the population. Any scepticism would be justified if there was a difference in retirement age for the Supreme Court only.

Retirement was a right and an obligation in every profession. There was no discriminatory aspect to the reform and the main rationale was efficiency and accountability. The reform did not affect the independence of the judiciary, which was valued as much by Poland as it was by other Member States.

The Danish delegation asked a follow-up question about whether the intention of the reforms did not imply a political purpose, e.g. to address what was perceived as a communist bias or mind-set.

The Polish delegation explained that the post-communist heritage was a problem in all countries in the region, and it was true that among Supreme Court judges there were examples of people who were not able to embody a democratic state. However, this was not the main reason for the reforms but rather only a positive side effect. The main rationale was equalising the retirement age across society.

The Spanish delegation asked about the independence of the Constitutional Tribunal in the sense that judges appointed in 2015 could not take up their offices and carry out tasks. The second question concerned the reason why a number of presidents of ordinary courts had been removed between August 2017 and February 2018 without specific criteria and judicial review.

The Polish delegation replied that the previous Sejm had tried to elect one third of judges of the Constitutional Tribunal and that this was unacceptable and illegitimate. The Constitutional Tribunal judges were elected by the parliament, as in other Member States, and this gave them a parliamentary mandate and did not constitute politicisation. There used to be a correlation between the composition of the court and the majority in the parliament. This was a provision of the Polish constitution similar to the legal order in other countries. Over the course of six months, the Minister for Justice had dismissed 69 court presidents and 67 deputies, which was 18 % of a total of 374 and 357 judges respectively. The reason given was increasing efficiency. The presidents had a purely administrative role on the operational side of the court. They did not have the right to influence proceedings before the court.

The Irish delegation requested a clarification on the separation of powers, specifically on the involvement of the President of the Republic in decisions on the extension of judges' mandates. What criteria were to be applied by the President of the Republic when exercising his discretion on this?

The Polish delegation explained that the system for extending judicial mandates for the Supreme Court and ordinary courts was a logical consequence of the fact that the President of the Republic was entitled to appoint judges. Supreme Court judges wishing to continue after reaching retirement age, irrespective of gender, had to wait for a decision by the President of the Republic. Such criteria also existed in other Member States and were not too wide. It was legitimate to use the criterion of "the general interest of the judiciary" and allow the National Council of the Judiciary to present proper recommendations in individual cases. In 2018, 27 out of 76 judges had reached the age of 65; 16 of those 27 judges had declared that they would like to continue. At this stage, it was still open how the National Council of Judiciary and the President would decide. This procedure was not extraordinary and a similar architecture existed in other Member States.

The Portuguese delegation asked about the objective behind the new disciplinary system requiring the approval of several presidents of the Supreme Court. According to the previous Polish non-paper, it was to avoid situations where judges could take advantage of professional solidarity. However, it was not clear why judges involved in disciplinary chambers needed the approval of the President of the Republic.

The Polish delegation pointed to the rule that judges should not judge themselves. So far, one in six cases ended with proceedings being discontinued because of delays due to the fact that judges were unwilling to act swiftly. The role of the President of the Republic was to appoint judges in Poland. Then they could not be revoked. In disciplinary action against colleagues, there should not be any pressure on disciplinary judges from colleagues. The procedure should allow for the formation of an independent chamber to avoid misperceptions of solidarity.

The Belgian delegation asked if the Polish authorities had taken steps to restore the Constitutional Tribunal (inter alia by publishing all judgments and allowing three appointed judges to take up their posts) and how Poland was going to prevent the illegality of judgments handed down by three unlawfully appointed judges.

The Polish delegation stated that the origin of the controversy was the Constitutional Tribunal itself, which had decided not to follow the rules of its organisation and the new law reorganising the court. Therefore, some judgments concerned old law and were no longer relevant. Nevertheless, they had been published as judgments in the Polish official journal with annotations on breach of procedure, because of the change of law. As far as unlawfully appointed judges were concerned, in 2015 the majority in the parliament had acted without knowing their future (more details on this were in the White Paper). The current 15 judges were issuing rulings, the court was independent and there were no means of placing any pressure on it.

The Swedish delegation asked about the extraordinary appeal procedure and how legal certainty could be respected if rulings from the last 20 years could be changed. When did Poland plan to implement the rulings of the Constitutional Tribunal from 2015?

The Polish delegation replied that many systems allowed for this kind of appeal, sometimes with no time limit. Such appeals were as necessary as the cassation procedure in criminal matters, for example, and there was no objection to the *res judicata* principle. To counterbalance potential risks, the scope of its application was very narrow, e.g. there could be no negative impact on international obligations. It would only be possible to assess this instrument when it had been put into practice.

The German delegation asked why it was necessary to have such an unusual appeals procedure and if it would not be better to abolish it.

The Polish delegation stated that the extraordinary appeal procedure was aimed at protecting the rights of individuals. In each Member State there was an extraordinary cassation or appeal procedure. The amendments made would prevent instability, while making it possible to protect Polish citizens.

The Finnish delegation asked the Polish delegation to respond to the Commission analysis according to which the introduced amendments to the extraordinary appeal procedure did not have any real impact. In addition, it asked how this extraordinary appeal procedure might impact businesses' willingness to operate in Poland.

The Polish delegation explained that it did not share the Commission's view and stated that concerns were unjustified since only a limited scope of subjects were entitled to trigger this appeal, and the Supreme Court decided on the final outcome following strict criteria. The business community was trustful and was not hesitating to invest in Poland; this included Finnish companies.

The procedure would not affect legal predictability in the business environment since the parliament had decided to introduce an exception for international commitments. Even if the Supreme Court ruled that a ruling was in breach of law, the ruling would only have a declaratory character and the verdict would remain binding for the sake of protecting legal stability. The ruling could however be a ground for damages for parties from the State.

The Luxembourg delegation asked whether the system of extending the term of office for judges of ordinary courts could be used to put pressure on their independence.

The Polish delegation replied that retirement rights were also a guarantee of the independence of the judiciary. It had to be possible to predict when judges would reach retirement age. Due to criticism of the fact that this competence had been given to the Minister for Justice, it had been transferred on 22 May 2018 to the National Council of the Judiciary, which now took such decisions on the basis of established criteria.

The Cypriot delegation asked what Poland intended to comply with judgments of the Constitutional Tribunal published recently with a disclaimer on their legality.

The Polish delegation explained that according to the Polish constitution and the law on the Constitutional Tribunal, judgments did not require any implementation, but rather were effective when delivered, with the exception of cases in which the court decided that they would only take effect after some time. With respect to the three judgements, they had been published despite procedural problems. Since the laws they concerned had already been repealed by the parliament, the legal effect had already been produced.

The Cypriot delegation asked about the meaning of the disclaimer with which the judgments had been published.

The Polish delegation replied that the Constitutional Tribunal had acted in breach of procedural norms. In this particular case, the parliament had found it necessary to introduce annotations to make publicly available the information that the verdicts had been issued in breach of procedure. Nevertheless they had been published as judgments and there was no difference apart from the annotation. In the future, there would be no role for the government and the Constitutional Tribunal would publish its verdicts directly.

The Estonian delegation inquired about what would happen in practical terms on 3 July 2018 when 27 Supreme Court judges would retire and if new competitions for vacant positions had been announced yet. Furthermore, the delegation wanted to know if this would affect the effectiveness of the judiciary and how the effectiveness of reforms (workload distribution, costs, achievement of certain goals) could be assessed.

The Polish delegation clarified that 11 judges would retire; 16 judges who had made requests would continue until a decision had been taken on the extension of their mandate. It was also stressed that not enough time had passed to assess the effect of the reforms at this stage.

The Presidency asked if there were any other questions and since no delegation asked for the floor, the Presidency gave the floor to the Commission.

The Commission confirmed that the most pressing issue at hand was that of the Supreme Court judges, due to the 3 July 2018 deadline. The irrevocability of judges' mandates did not allow for the lowering of the retirement age or its immediate application to judges who still had a mandate to fulfil. On ordinary courts, the Minister for Justice had used his power to replace almost 70 court presidents over six months. On the disciplinary regime, the Minister for Justice could appoint and replace disciplinary officers if not satisfied with their work. On the extraordinary appeal procedure, the margin of discretion in triggering this procedure was too broad. On judgments of the Constitutional Tribunal, three judges could not take up their duties despite two judgments from 2015 confirming their lawful appointment. All judgments had been published, but some contained a disclaimer on their legality.

The Polish delegation stated that many Supreme Court judges had decided to notify their willingness to continue according to law. The President of the Supreme Court could only be an active judge, and this rule had already existed in the Polish legal system before Poland's accession. The new law did not abolish the irrevocability of judges' mandates but rather just changed the retirement age, which was not discriminatory. The Minister for Justice had been the prosecutor-general in Poland at the time of accession, and he had been entitled to select presidents of ordinary courts, too. On the disciplinary officer: in practice the first appointment had been praised by public opinion. On extraordinary appeal: practice would show how this instrument worked and it should not be evaluated negatively at this stage. On the Constitutional Tribunal judgments: the parliament of the previous term could not know when their term would be finished but wanted to elect judges before its mandate expired. On the separation of powers: there was no doubt that the separation of powers was a fundamental principle of the Polish constitution. However, the balance was different in each of the Member States. There were different constitutional traditions. The concessions and amendments offered so far were neither minor nor cosmetic but fundamental and of a systemic nature. Now these amendments were entering into force and only practice over time would show if further corrections were required. Any definite assessment at this stage would be premature. It was for the Council and the Member States to take responsibility concerning the Article 7 procedure and to assess the situation.

The Presidency stated that the hearing had helped to improve the understanding of the situation in Poland. The Presidency concluded that GAC would come back to the matter at its next meeting.



Rule of law in Poland

Institutional & legal guarantees

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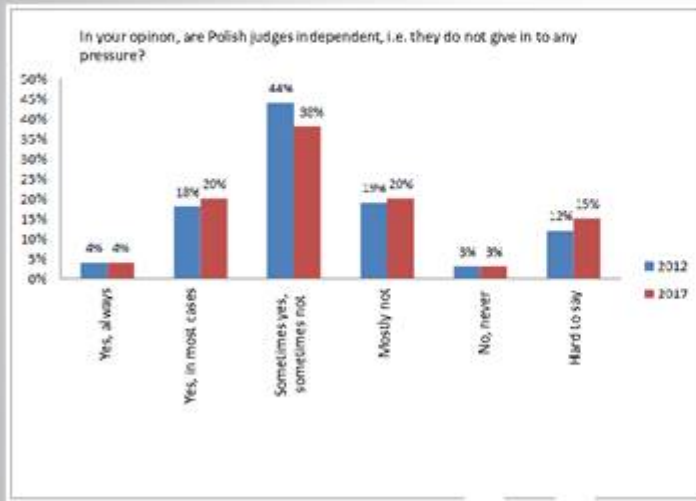
- Threats to the rule of law
- Trust in the judiciary
- National Council of the Judiciary
- Judicial retirement age
- Court presidents
- Disciplinary regime
- Constitutional Tribunal
- Extraordinary appeal
- Article 7 (1) procedure

THREATS TO THE RULE OF LAW



- Absence of separation and/or balance of powers
- Political control over the courts and judges
- Lack of independent constitutional review
- Legal uncertainty
- Low public trust in the judiciary

TRUST IN THE JUDICIARY



Źródło: Centrum Badań Opinii Społecznej. Społeczne oceny wymiaru sprawiedliwości. Kompendium z badań w 8/2017.

- In 2017 only 24% believed that judges were independent „always” or „in most cases”.
- No significant change over the last 5 years.

TRUST IN THE JUDICIARY



Maybe it is just an unfounded perception?

To the contrary: personal experience with courts leads to **worse opinion** on judges

Tabela 4

What is your general attitude towards Polish judges?	Response of:			
	Those with personal experience with the justice system (N=241)		Those without personal experience with the justice system (N=802)	
	percentage			
Very positive	2	24	2	22
Rather positive	22		20	
Neither positive, nor negative	42		46	
Rather negative	19	29	16	22
Very negative	10		6	
Hard to say	5		10	

WHAT IS THE ROLE OF THE NCJ?



Article 186 (1) of the Polish Constitution

„The National Council of the Judiciary shall safeguard the independence of courts and judges.”

Article 187 (4) of the Polish Constitution

*„The organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, **as well as the manner of choosing its members**, shall be specified by a statute.”*

HOW WAS NCJ ELECTED BEFORE?



- **Stage I**

Judges of District Courts (almost 2/3 of the Judiciary) and judges of Circuit Courts (over 20%) elect their representatives to the General Assemblies of Circuit Judges (45 assemblies)

- **Stage II**

Each General Assembly of Circuit Judges elects its representatives to the Assembly of Representatives of General Assemblies of Circuit Court Judges.

- **Stage III**

The Assembly of Representatives of General Assemblies of Circuit Court Judges elects 8 members of the NCJ.

(judges of Appellate Courts, Administrative Courts, Military Courts & the Supreme Court were choosing their representatives respectively)

Result?

HOW DID IT WORK?



„the multi-stage process of selecting members of the National Council of the Judiciary [is] a non-democratic curial election which employs voter qualification on the basis of official positions in the Courts ... Such provisions may divide, and actually do divide the judicial community.”

– Resolution No. 4 of the Assembly of the Representatives of the General Assemblies of the Circuit Court Judges of 26 February 2014

HOW WAS NCJ COMPOSED?



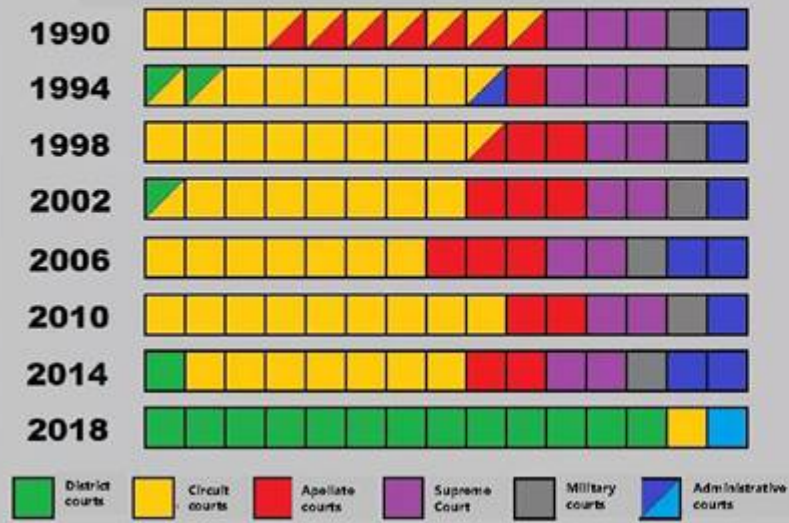
Structure of judicial personnel



HOW WAS NCJ COMPOSED?



Judges in the NCJ



4 District Court Judges in 28 years of the NCJ, 4% of 105 members overall

WHAT HAS THE NCJ STOOD FOR?



*„In connection of the NCJ decisions of 17 April and 11 September 2015 to nominate candidates for judicial posts in the District Court of Przemyśl, we firmly object **the absolute disregard for the opinions of the judicial community**, which at the same time constitutes **a profanation of the notion of judicial self-governance.**”*

*„The appointed candidates **received a support of only 8 and 1 out of 39 and 37 votes, respectively**”*

*„It is **highly dubious whether these decisions are impartial and based on objective substantial criteria**”*

– Resolution of the Assembly of Judges of the Circuit Court in Przemyśl of 6 November 2015

WHAT HAS THE NCJ STOOD FOR?



Also in 2015, the NCJ recommended that a **wife of the NCJ deputy chairman** should be appointed as a judge of the District Court of Warsaw-Mokotów.

The NCJ has done so in spite of negative opinion of the General Assembly of the Judges of the Warsaw Circuit Court – and **selected her over 93 other candidates.**

WHAT HAS THE NCJ STOOD FOR?



The screenshot shows the WP wiadomości website interface. The main headline is "Skandal w KRS? Żona wiceprzewodniczącego wybrana sędzią". The article text states: "W 2015 r. Krajowa Rada Sądownictwa wybrała żonę swojego wiceprzewodniczącego, sędziego płk. Piotra Raczkowskiego, jako kandydatkę na stanowisko sędziego Sądu Rejonowego Warszawa-Mokotów, mimo 93 innych kandydatów. Joannę Raczkowską powołał na stanowisko Bronisław Komorowski."

„A scandal in the NCJ? Wife of deputy chairman elected as a judge”

STRUCTURE OF THE NCJ



THE PROCEDURE



- Candidates: **only judges** with a support of 25 other judges or 2.000 citizens
- Elected by the Parliament by a 3/5 majority
- Opposition groups guaranteed 40% posts
- 4-year term, **irrevocable**
- No means of pressure (even wider guarantees than the Ombudsman or other offices elected by the *Sejm*)

HOW MANY CANDIDATES RAN FOR OFFICE?



„The conditions under which the Sejm elected the 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.”

– European Commission Contribution, page 7

FACTS:

2006 – 19 candidates

2010 – 24 candidates

2014 – 18 candidates

2018 – 18 candidates

WHY WERE THE INDIVIDUAL TERMS RESCINDED?



- **Article 187 (3) of the Polish Constitution**

The **term** of office of those chosen as members of the National Council of the Judiciary shall be 4 years.

- June 2017 Constitutional Tribunal judgment: individual terms – unconstitutional
- Terms of 13 out of 15 judicial members of the NCJ were to end by February, March, May and June 2018
- Until February and March 2020 – **only two judicial members**
- **Potential 2-years paralysis** of the NCJ, judiciary underrepresented, no *quorum*.

JUDICIAL APPOINTMENTS AND RETIREMENT



Article 179 of the Polish Constitution

„Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary”

Article 180 of the Polish Constitution

„1. Judges shall not be removable.

...

4. A statute shall establish an age limit beyond which a judge shall proceed to retirement.

5. Where there has been a reorganization of the court system or changes to the boundaries of court districts, a judge may be allocated to another court or retired with maintenance of his full remuneration.”

JUDICIAL RETIREMENT AGE



*„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**”*

– European Commission Contribution, page 9

FACTS:

- No „term” – indefinite period + retirement when provided by law
- Until 31 December 2012 – **65 years**
- From 1 January 2013 to 11 August 2017 – **67 years**
- Currently – **65 years** (women may retire at 60 at their will)
- **Amendments not just for judges – general reform**

PROLONGATION PROCEDURE



- A judge may declare his or her will to remain in office until the age of 70;
- The declaration (medical certificate attached) is subject to a decision of the NCJ;
- **Pre-established criteria:** interest of the judiciary, public interest, judicial personnel needs, caseload of a particular court;
- Wide criteria allow for prolongation in broad circumstances. **Just one of them fulfilled = enough for prolongation;**
- **Example No. 1 (EU founding Member State):** Council for the Judiciary may prolong the retirement; decision „in consideration of their ability and the interest of the service”
- **Example No. 2:** Prolongation may be made by a joint decision of the head of the top-level court and the member of the government responsible for the judiciary if it is „desirable in the public interest to retain the person in office for a further period”.

JUDICIAL RETIREMENT



- Status of judge – for life
- Pension – 75% of last remuneration
- Maximum seniority allowance – after 20 years of service
- Full criminal immunity – also for misdemeanors, traffic offences

RETIREMENT IN THE SUPREME COURT



- Article 180 (4) of the Polish Constitution **applies both to ordinary courts (common courts) and the Supreme Court**
- Prolongation procedure – similar to the one for ordinary courts
- Declaration of an intent to remain in office + medical certificate -> opinion of the NCJ
- Pre-established criteria: interest of the judiciary, public interest, Supreme Court personnel needs, caseload of a particular chamber of the Supreme Court
- Final decision – President of the Republic

THE ROLE OF THE PRESIDENT OF POLAND



- It is Presidential prerogative to appoint judges (Article 144 (3.17) of the Polish Constitution); this extends to promotion and reappointment
- Exclusive position of the President towards the Supreme Court:
 - **Appointing the First President and other Presidents** of the Supreme Court (Article 183 (3) 144 (3.20) and 144 (3.23) of the Polish Constitution)
 - **Issuing internal Regulation of the Supreme Court** (Article 4 of the Law on the Supreme Court)
 - **Receiving annual report on the Supreme Court activity** (Article 5 of the Law on th Supreme Court)
 - **Appointing all judges of the Supreme Court**, on the recommendation of the NCJ (Article 29 of the Law on the Supreme Court)

PROLONGATION PROCEDURE



„current Supreme Court judges who have already attained 65 years of age, or will have attained it by 3 July 2018, **have been asked to declare their intention** to remain in the Supreme Court by 4 May 2018”

„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**”

– *European Commission Contribution, page 4*

PROLONGATION PROCEDURE



FACTS:

- **1/3 of the judges** (nine) that have reached statutory retirement age **declared their intention to remain in the Supreme Court on the basis of the Article 111 of the Law of the Supreme Court** – disproving any claims of its „unconstitutionality” or „humiliating character”.
- Seven judges declared their intention to remain invoking other provisions – **their declarations will also be assessed by the NCJ.**
- The remaining group of 11 judges have not made any declarations – as they had right to do it or not to do it for the reasons they find appropriate, **no one asked them (all the more forced) to make any declaration** in this regard.

FIRST PRESIDENT OF THE SUPREME COURT



Article 183 (3) of the Polish Constitution

The First President of the Supreme Court shall be appointed by the President of the Republic for a **6-years term of office** from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court.

Article 12 (2) of the Law on the Supreme Court of 2017

The General Assembly of the Supreme Court elects candidates for the position of the First President of the Supreme Court **from amongst active judges of the Supreme Court (...)**

BEFORE THE REFORM Article 10 of the Law on the Supreme Court of 2002

The First President of the Supreme Court is appointed by the President of the Republic of Poland for a six-year term **from amongst active judges of the Supreme Court.**

EXCEPTIONS TO THE 6-YEARS TERM



- Previous First President of the Supreme Court, judge Stanisław Dąbrowski was appointed in 2010. His six-years term ended prematurely with his death in 2014.
- His successor was chosen from amongst two candidates: judge Małgorzata Gersdorf (aged 62 at the time of the appointment and Judge Lech Paprzycki (then-aged 68).
- Had Judge Paprzycki been appointed in 2014, his term would have ended before the lapse of 6 years – precisely in 2016, when he would retire from active service (i.e. after 2 years)

„FORCED” RETIREMENT?



„27 current judges of the Supreme Court, including the First President, are at risk of forced retirement on 3 July 2018”

– *European Commission Contribution, page 5*

FACTS:

- At some point of every professional career everyone is „forced” to retire. It is the statute that establishes that point.
- Polish Administrative Courts have ruled on many occasions that no such thing as a „right to serve as a judge” exists – if only the conditions for appointment, promotion and retirement are in line with the Constitution (e.g. judgments of 9 October 2012, I OSK 1981/12, 16 October 2012, I OSK 1870/11, or 7 December 2017, I OSK 857/17)
- Article 180 (4) of the Constitution allows it for a statute to establish judicial retirement age – as long as it is not excessively high or low it cannot be perceived as unconstitutional

PRESIDENTS OF THE COMMON COURTS



- Administrative role
- No influence in adjudicating matters
- Since 2017, competences towards rank-and-file judges – limited:
 - Random allocation of cases – instead of hand-picking
 - No more transferring judges without their consent
- Lack of pressure mechanisms

PRESIDENTS OF THE COMMON COURTS



BEFORE THE REFORM

- **Until 2012** – (also in 2004, when Poland was joining the EU), the Minister of Justice could dismiss Presidents/Deputy Presidents of the common courts at his discretion.
- Basis: flagrant and persistent failure to exercise duties
- NCJ – consultative opinion only
- **Since 2012 until 2017** – Minister of Justice after the opinion of the NCJ

PRESIDENTS OF THE COMMON COURTS



AFTER THE REFORM

- August 2017 – February 2018: return to the solution from before 2012
- **Current regulation**: consent of the college of the court/NCJ required
- Criteria: (i) flagrant or persistent failure to carry out their duties; (ii) their performance not beneficial in the interest of the judiciary (iii) exceptional ineffectiveness in court organization or (iv) voluntary resignation.

REMEDY FOR THE DISMISSED PRESIDENTS?



„no remedy has been provided for judges who have been dismissed as court presidents”

– European Commission Contribution, page 14

FACTS:

- It has always been the competence of the Minister of Justice to appoint and dismiss court presidents
- No remedy required – MoJ exercises statutory competences
- No „personal right to be a president of the court”

DISCIPLINARY REGIME



- Two stages: preliminary proceedings & disciplinary trial
- No influence of the executive in the second stage whatsoever
- First stage: influence limited to appointing Disciplinary Officer (and his/her two deputies) or Extraordinary Disciplinary Officer
- Disciplinary Officer – a judge appointed for a 4 year term
- Extraordinary Disciplinary Officer – might also prosecutor, but only if the disciplinary offence constitutes an intentional crime prosecuted by public indictment

DISCIPLINARY REGIME



*„[it is requested] 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”*

– European Commission Contribution, page 11

Is there such an influence in the first place?

DISCIPLINARY REGIME



wyborcza.pl
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Kraj

Ziobro powołał "głównego oskarżyciela sędziów". "Uczciwy i niepodatny na naciski"

Łukasz Nivolski: 22 czerwca 2018 16:54

Gazeta Wyborcza, 22 June 2018: Ziobro [MoJ] appointed „main prosecutor of judges”. „Honest and insusceptible to pressure”

„Judge Piotr Schab conradicted the Minister of Justice and refused a disciplinary action against judge Wojciech Łączewski. Right-wing media labeled him a member of the „extraordinary caste”, but the Minister has just made the judge the top disciplinary officer in the country”

DISCIPLINARY REGIME



- Disciplinary trial – judges decide
- First instance – judges only
- Second instance: 2 professional judges and 1 lay judge
- Disciplinary Chamber of the Supreme Court – autonomous from executive and peer influence
 - Separate budget
 - Wide competences of the President of the Supreme Court in charge of Disciplinary Chamber
- Executive – no power over disciplinary courts

CONSTITUTIONAL CONTROL



- Independence of the Constitutional Tribunal
- Guarantees for its judges
- Pluralism among them
- Review of the law, not its application

GUARANTEES FOR CT JUDGES



- 9-year term (irrevocable)
- Remuneration & pension
- No possibility for re-election
- Life-long status
- Full immunity

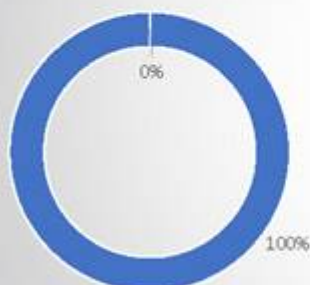
„The Polish Authorities still have not taken any steps to restore the independence and legitimacy of the Constitutional Tribunal”

– European Commission Contribution, page 16

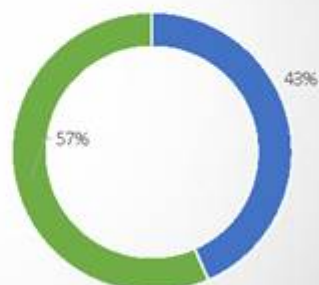
HOW DOES IT WORK?



3 XII 2015 - 20 XII 2016
(President Andrzej Rzepliński)



Since 21 XIII 2016
(President Julia Przyłębska)



- Cases resolved with a ruling issued by a panel with a majority of judges nominated **BEFORE** 8th term of Sejm
- Cases resolved with a ruling issued by a panel with a majority of judges nominated **DURING** 8th term of Sejm

„SENSITIVE” CASES – EXAMPLES



- K 17/14 – Police search regulations
- SK 48/15 – taxation
- SK 37/15 – administrative supervision of entrepreneurs
- Tribunal ruled against the position of the Parliament, the Government or the Attorney General; in line with the Ombudsman’s motion (K 17/14)
- Also judges appointed during current term of Sejm often rule **against** the position of the government or Parliament that elected them (e.g. K 17/14, K 36/15, K 2/17, P 7/16 – just in the last few months)

PUBLICATION OF JUDGMENTS



The three 2016 judgements have not been published as a 'judgement' but as "findings delivered in breach of law".

– European Commission Contribution, page 16

 **DZIENNIK USTAW**
RZECZYPOSPOLITEJ POLSKIEJ

Warszawa, dnia 5 czerwca 2018 r.
Poz. 1077

Rzeczypospolita wydaje z naruszeniem przepisów ustawy z dnia 25 czerwca 2015 r. o Trybunale Konstytucyjnym (Dz. U. z 2015 r. poz. 794), dotychczas akty normatywne, które zostały nadane obowiązkiem

WYROK
TRYBUNALU KONSTYTUCYJNEGO
z dnia 9 marca 2016 r.
sygn. akt K 45/15

 **DZIENNIK USTAW**
RZECZYPOSPOLITEJ POLSKIEJ

Warszawa, dnia 5 czerwca 2018 r.
Poz. 1078

Rzeczypospolita wydaje z naruszeniem przepisów ustawy z dnia 25 czerwca 2015 r. o Trybunale Konstytucyjnym (Dz. U. z 2015 r. poz. 794), dotychczas akty normatywne, które zostały nadane obowiązkiem

WYROK
TRYBUNALU KONSTYTUCYJNEGO
z dnia 11 sierpnia 2016 r.
sygn. akt K 28/16

VALIDITY OF ELECTIONS



- *Sejm* in its 7th term tried to elect 5 judges (1/3 of the Tribunal) just before the parliamentary elections, acting „in the dark” – not knowing when 7th term would end and 8th one would start (the date was not fixed – Constitution allows for flexibility)
- In 8th term *Sejm* declared these elections null and void – and lawfully elected judges to the Tribunal
- The Constitutional Tribunal never ruled that the appointment of judges was correct or incorrect – that is not the role of the CT
- The resolution of 7th and 8th term *Sejm* were subject to a review before the Tribunal – the proceedings were discontinued.
- President of the Tribunal was also lawfully elected – ex-Deputy President publicly acknowledged that

EXTRAORDINARY APPEAL



„the new laws are not sufficient to remove the concerns. 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”

– European Commission Contribution, page 13

Article 2 of the Polish Constitution

The Republic of Poland shall be a democratic state ruled by law and implementing the principles of **social justice**.

Article 3 (3) TEU

The Union ... shall promote **social justice** and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

COUNCIL OF EUROPE RECOMMENDATION



Recommendation No. R (2000) 2 of the Committee of Ministers of 19 January 2000

The Committee of Ministers:

I. Invites ... the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*;

II. Encourages the Contracting Parties, in particular, to examine their national legal systems with a view to **ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings**, in instances where the Court has found a violation of the Convention, especially where:

(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and

(ii) the judgment of the Court leads to the conclusion that

(a) the impugned domestic decision is **on the merits contrary to the Convention**, or

(b) the violation found is based on **procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings** complained of.

EXTRAORDINARY APPEAL



Criteria:

Necessity for conformity of a judgment with the principle of democratic state ruled by law and implementing the principles of social justice

AND ONE OF THE FOLLOWING

(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

EXTRAORDINARY APPEAL



- Only the Ombudsman and Attorney General may file the extraordinary appeal with respect to cases that have been concluded before the law entered into force;
- It is only for the Supreme Court to decide whether the appeal is justified
- Even if it is – but it has led to irreversible legal effect – the verdict shall remain binding
- Similar exception – international commitments
- So far: over 600 citizens' motions for extraordinary appeal – none filed to the Supreme Court

THE PROCEDURE SO FAR



- Dialogue between Poland and the Commission
- Amendments and actions taken since March 2018:
 - Equalized retirement age for men/women
 - NCJ decides on prolongation instead of MoJ
 - Criteria pre-established by law
 - Criteria and time-frame also for Supreme Court retirement prolongation
 - New regime for trainee judges
 - Additional pre-requisites and exceptions for extraordinary appeal
 - Publication of CT judgments
- Practical application of law – CT pluralism, disciplinary appointments

COMMISSION'S CONTRIBUTION



- „originally established term”
- „forced retirement”
- „only 18 candidates to the NCJ”
- „humiliating character”
- „cosmetic changes”

WHAT NOW?



- Unprecedented character of the Article 7 (1) TEU Procedure
- Objective, fact-based assessment
- Not just the regulations – their practical application
- Any reform that does not work as intended may be changed
- Further reforms are imminent: civil proceedings, public legal advisory
- We are happy to provide the Council and Member States full information & updates



THANK YOU FOR YOUR ATTENTION