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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 on the hearing held by the Council on 11 December 2018

As a follow-up to 14621/18 (paragraph 15), delegations will find in the annex the formal report on the hearing of Poland held on 11 December 2018 in accordance with Article 7(1) TEU.

On 11 December 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 two hours.

At the start of the hearing, the Presidency briefly reminded the participants of how the procedure would be conducted (14621/18) and the Commission was then given the floor. The Commission stated that the developments since last December show that the major concerns have not been resolved, as outlined in the Commission assessment (15197/18). In particular, the law following up on the CJEU interim measures has not yet entered in force, as the Polish President has not yet signed it.

The Polish delegation referred to the Polish reply of 21 November 2018 informing the Commission about the new law enabling retired judges to return to active duty and revoking the President's power to extend the term of Supreme Court judges. The delegation voiced their belief that the Polish authorities deserve to receive the Commission's assessment on the Polish draft law within a reasonable timeframe. Taking into consideration recent events, the delegation asked the Member States how they saw the future developments of the Article 7 procedure, especially as the most pressing issue (the early retirement of judges) had been remedied by the Polish government.

Following this announcement, the Polish representatives gave a PowerPoint presentation, set out in Attachment 1. This presentation took approximately 40 minutes. Firstly, it explained that the retirement age for current Supreme Court judges had been changed back to 70 years, and the discretion of the President of the Republic (or any other body) to extend a judicial tenure had been abolished. This was an attempt to reach a compromise through dialogue. Other amendments introduced in 2018 concerned: the levelling of the retirement age for women and men (at 65 years); the transfer of the judicial tenure extension from the Minister of Justice to the National Council of Judiciary (NCJ); the new arrangement whereby court president dismissals may now be blocked by a court college or the NCJ; the introduction of new procedure for appointing trainee judges; the narrowing of the criteria for extraordinary appeal; and the publication of Constitutional Tribunal judgments as requested by the Commission.

All the changes that had been implemented in April and May were the result of the fruitful dialogue with the Commission. Regarding the retirement age of ordinary court judges, it was further clarified that the original retirement age was 65; in the period from 2013 to 2017 it was 67, and it was changed back to 65 in August 2017. In 1998, the Constitutional Tribunal determined that the retirement age of judges could be lowered even without their consent. The change to the retirement age was therefore in compliance with the Polish Constitution. Regarding court presidents, it was stated that they have a purely procedural role and go back to being normal judges as soon as their term ends. Regarding disciplinary hearings, it was stated that there were no formal hearings. It could not be determined whether there have been cases of intimidation. It was underlined that there was a requirement that judges can not perform public duties that would undermine their independence. The disciplinary officers are all independent judges and prosecutors. The Minister of Justice is not involved in disciplinary proceedings. The Minister of Justice only appoints the Disciplinary Officer of the Ordinary Courts and two Deputy Disciplinary Officers (for a four-year term). The remaining 45 officers are appointed by the General Assemblies of Judges of respective District Courts. Regarding extraordinary appeals, it was stated that the social justice criterion was defined in the Polish Constitution and was present in Article 3(3) TEU. Ensuring that there are adequate possibilities for re-examining the case, including reopening proceedings, was also requested by Council of Europe recommendation (2000)2. Only the Ombudsman and the Attorney General can lodge such an extraordinary appeal, and it is only used in extraordinary circumstances. Concerning the NCJ, it was stated that the model chosen in Poland complied with European standards and was similar to existing models in other Member States. The reform had, among other things, introduced live broadcasted hearings of candidates for the NCJ and ensured that the selected members could not be removed from their position during the course of their four-year term. The next part of the presentation concerned the Constitutional Tribunal and focused, among other things, on guarantees of its impartiality and the publication of judgments following the Commission recommendation. With regard to further steps, it was noted that the Article 7(1) TEU procedure needs to remain objective and fact-based and take into account not only the legal text but also its practical application. Poland concluded by expressing its openness to a dialogue with the Council, the Member States and the Commission.

The Finnish delegation asked for more clarification on how the infringement procedure relating to the new retirement age of judges was being followed up by Poland.

The Polish delegation replied that the Polish government was required to implement interim measures. The CJEU decision required Poland to reinstate the judges and to allow them to work as before and to inform the Commission of the measures taken. It was underlined that the new law is not just an interim legal solution but would become permanent legislation. The judges affected by the retirement age will return to work.

The Netherlands delegation asked whether it was true that 39 new judges had been appointed to the Supreme Court in September and October 2018 despite concerns and the legal procedure pending before the CJEU. Regarding the extraordinary appeal procedure, the delegation asked whether the criteria for lodging it were not too broad, as per e.g. the Venice Commission's assessment, therefore undermining legal stability.

The Polish delegation replied that the procedure would only be used in extraordinary cases. Since its introduction this year, only three cases had been lodged, and there was therefore no reason to claim that it could lead to instability. Regarding the appointment of new judges, it was stated that this had no bearing on pending procedures, as these judges had been appointed to newly created chambers. The overall number of judges in the Supreme Court is now higher. None of the posts that had become free because of the change to the retirement age had been filled by new judges.

The Belgian delegation asked whether the President of the Republic had the competence to appoint the President of the Supreme Court. The delegation also asked why the Constitutional Tribunal had been requested to verify the compatibility of the Treaty provision on the preliminary question mechanism with the Polish Constitution.

The Polish delegation replied that the new law enabled judges to return to their former positions. Their term is considered to be uninterrupted. It is a general competence of the President of the Republic to appoint the President of the Supreme Court, and no new competences of the President of the Republic had been introduced in this respect. On the second question, the delegation replied that this is a question of interpretation of the Treaty and that the Polish courts have been asked questions on issues remaining national competence.

The Luxemburg delegation asked about the potential compensation of loss suffered by early retired judges and details of the retirement scheme for judges that decide to not return to work but stay retired.

The Polish delegation replied that the judges would receive full remuneration, as their term will be treated as uninterrupted. Since their salary remains unchanged, there is no damage which would need to be compensated.

The Irish delegation asked about steps the Polish government is planning to take to restore faith in the impartiality of judges (referring to statements issued by five Polish judges' associations warning about the chilling effect of the reform of judiciary on Polish judges).

The Polish delegation stressed that there were extensive guarantees for all judges and that they benefit from wide-ranging independence. The declarations mentioned could not be considered to be unbiased since the issuing associations were actively involved in commenting on the reforms. With regard to the disciplinary procedures, it was stated that there were always judges involved, which guarantees the independence of the decision.

The French delegation (also speaking on behalf of Germany) asked whether all Constitutional Tribunal rulings had now been correctly published in the Journal as verdicts.

The Polish delegation explained that the rulings had been published as verdicts. However, they all included an annotation stating that the procedure had clearly been breached. These annotations, however, were purely informative in nature. Subsequent legislative amendments followed and regulated the situation described in these verdicts.

The Swedish delegation referred to a letter signed by several judges of the Constitutional Tribunal regarding irregularities in the composition of sitting benches and the abuse of the internal allocation rules.

The Polish delegation replied that cases were allocated alphabetically and only in certain cases could the President deviate from this rule. Furthermore, it was stated that it was difficult to comment on letters, as they did not necessarily reflect facts but opinions.

The Danish delegation asked about the prospects of Poland accommodating other Commission recommendations, in particular what changes were planned regarding the NCJ.

The Polish delegation answered that the reform did not change the system or the competences of the NCJ. The only thing that had changed was the way judges were elected. More than 50 % of members are still judges who have been elected when they were already independent. There is no real argument in the Commission recommendation concerning changes to the NCJ. The reform follows the recommendations of the Constitutional Tribunal, according to which the situation in 2013-2015 was in breach of the Polish Constitution.

The German delegation asked whether there was a time schedule for the implementation of further reforms (e.g. concerning 350 ongoing disciplinary proceedings or the situation in the NCJ). It also asked how other concerns, e.g. those raised in the Venice Commission reports, would be addressed.

The Polish delegation replied that it would need more clarification on the facts referred to in the German delegation's question, as these did not correspond to the data available to the Polish delegation. The Polish delegation called upon other delegations not to refer to figures where the source was unknown or unofficial.

The Spanish delegation made a general comment that CJEU rulings are obligatory for all Member States and rule of law standards are to be met in the accession process and as a Member State.

The Italian delegation asked for further explanation on the election of judges to the Constitutional Tribunal in 2015.

The Polish delegation explained that before the end of its term the previous government had wanted to fill five positions, some of which would only become free after the parliamentary elections. The election of these candidates had been in breach of the Polish Constitution.

The Portuguese delegation asked when the new law concerning the Supreme Court judges would be signed by the President of the Republic.

The Polish delegation explained that the President had 21 days to sign it. The law should enter into force around 17 December.

The Commission underlined that with regard to the infringement procedures the Polish government was accountable to the CJEU and not to the Commission. For two months the government had failed to implement the rulings. With regard to Supreme Court judges, the Commission stated that they were currently working without a legal basis and that the situation needs to be clarified. The Polish authorities will be required to report to the Commission on how the rulings are being implemented. The Commission will continue the dialogue until all the issues at stake have been resolved. Regarding disciplinary procedures, the Commission recalled the statement of the five major Polish associations of judges reporting that these proceedings had had a chilling effect on judges. The Commission concluded that there was scope for continued dialogue until all issues have been resolved.

The Polish delegation said that the current procedure could not be called a dialogue. Many Commission recommendations have been followed, e.g. on the levelling of the retirement age for men and women and the early retirement of Supreme Court judges. Despite these concessions, the Commission had decided not to withdraw the pending infringement procedures against Poland.

The Polish delegation concluded by asking all parties to reflect on the link between the Article 7 procedure and the CJEU infringement procedures and thanking them for the debate.

The Presidency concluded that the General Affairs Council would remain seized on this matter.

NON-PAPER

Amendments to the law on the Supreme Court (Poland)

In its reasoned opinion of 14 August 2018 and in a subsequent application to the Court of Justice, the Commission claims that Poland has failed to fulfil its obligation under the second subparagraph of Article 19(1) of the Treaty on European Union, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, by:

- Lowering the retirement age of judges currently in office, appointed to the Supreme Court before the date of entry into force of that law (3 April 2018), and
- Granting the President of the Republic of Poland discretion to extend the active mandate of Supreme Court judges.

While Poland disagrees with this assessment and continues to maintain that the above regulations are fully in line with the Treaties, Charter and all the fundamental principles of the Union, in order to resolve this dispute Polish parliament has decided to adopt amendments to questioned regulations.

The new legislation – law on amending the law on the Supreme Court – adopted by *Sejm* on 21 November 2018 addresses all the Commission's concerns.

- **Retirement age** for the Supreme Court judges that were in office before 3 April 2018 **is set at the age of 70**.
- For the judges appointed at a later date the age is set at 65 (female judges are able to retire at the age of 60 if they wish to do so).
- The **possibility to extend a judicial tenure** by a decision of the President of the Republic of Poland or of any other body **ceases to exist**.
- **All judges that retired as a result of the law of 8 December 2017 return to the Supreme Court** (unless they already reached 70 years of age).
- Those that wish to remain in retirement are able to do so – simply by declaring such a will.
- Mrs. Małgorzata Gersdorf will remain the First President of the Supreme Court until the end of her 6-year term of office, i.e. 30 April 2020 (unless she decides to retire earlier).

- **Terms of office** of the First President and of all the judges of the Supreme Court **are considered uninterrupted** (unless they decide to remain retired).
- The judges that have received their allowances (6-month salaries) while going to retirement, and decide to return to the Supreme Court would be obliged to return the received amount.
- The judges that decide to stay on retirement will have their pensions increased from 75% to 100% of their last remuneration (as established before the reform, in accordance with Article 180 (5) of the Polish Constitution).

It must also be underlined that the abovementioned changes were introduced in relation to an interim measure issued by the Court of Justice on 19 October. Poland has always abided by the rulings of the Court, and is committed to do so in the future, with full respect for the Treaties and the European values.

The same constructive approach concerns the process in the Council. The **Polish government has not only always declared its will to resolve the dispute with the Commission through means of dialogue, but also actively pursued such a resolution.** In March, April and May 2018, several key amendments were introduced to the laws on ordinary courts, Constitutional Tribunal and the Supreme Court. They were all related to concerns that the Commission had repeatedly raised, and addressed these concerns by:

- Publication of all Constitutional Tribunal Judgments, regardless of their issuance with breach of certain procedures;
- Depriving the government of discretionary power to promulgate judgments of the Constitutional Tribunal;
- Depriving the Minister of Justice of the competence to prolong judicial tenure for the judges of ordinary courts;
- Equalizing retirement age for male and female judges of ordinary courts;
- Limitations to the Minister of Justice's discretion of dismissing Court Presidents (dismissal must be based on pre-established criteria and may be blocked by the college of the court or by the National Council of Judiciary);
- Aligning regulations for trainee judges with those for judges appointed for life (i.a. providing that they are appointed by the President of the Republic instead of the Minister of Justice)

- Narrowing admissibility criteria for extraordinary appeal (as a result, only two such appeals were lodged this year)

Poland continues to believe in a constructive conclusion of the issues brought by the Commission before the Council. The goal of such approach is to achieve an understanding that is beneficial not just for Poland or the Commission, but for the Union as a whole.

The Council deserves that all the arguments presented during the process are assessed substantially and without unnecessary delay. For these reasons Poland finds it surprising that the Commission's contribution before the hearing scheduled on 11 December does not refer in detail to the amendments adopted on 21 November, thus not allowing the Member States to appreciate its view in this respect.

Poland understands that the Commission might want to address some other issues as well, and will refer in detail to all such concerns during the hearing. However, it must be underlined that the law on Supreme Court has repeatedly been presented by the Commission as a most important element, the one that actually triggered bringing the case before the Council (and then before the Court). It would seem appropriate to refer to amendments made to these very regulations in a more detailed way than provided in the Commission's contribution. It is understandable that the Commission needed a certain amount of time, but at this stage it seems excessive – three weeks will have passed tomorrow and the Council has still not been informed.

Notwithstanding the above, Poland remains fully committed to advise the Council, all its Members and the Commission with respect to all the contents of the current case. All questions will be answered in detail during the hearing or in writing, at any Member's request. We invite each and every Member of the Council to ask such questions or make any remarks they deem necessary in order to facilitate the process.



Rule of law in Poland

HEARING – 11 DECEMBER 2018

TABLE OF CONTENTS



Issues already discussed during previous hearings in June and September 2018:

- Supreme Court
- Judicial retirement age
- Court presidents
- Disciplinary regime
- Extraordinary appeal
- National Council of the Judiciary
- Constitutional Tribunal

New element:

- Amendments to the law on the Supreme Court

SUPREME COURT - AMENDMENTS



Commission claims:

"Poland has failed to fulfil its obligation under the second subparagraph of Article 19(1) of the Treaty on European Union, in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, by:

- **Lowering the retirement age of judges currently in office**, appointed to the Supreme Court before the date of entry into force of that law (3 April 2018), and
- Granting the President of the Republic of Poland **discretion to extend the active mandate** of Supreme Court judges."

SUPREME COURT - AMENDMENTS



Law on amending the Law on the Supreme Court (21 November 2018):

- **Retirement age – back to 70** (65 for newly appointed judges only)
- **Discretion to extend a judicial tenure** by President of the Republic (or any other body) – **abolished**
- All judges that retired – return (may choose to remain in retirement)
- First President (and other Presidents) – **uninterrupted term**
- **Pensions increased** from 75% to 100% of their last remuneration (Article 180 (5) of the Polish Constitution)
- Allowances received while going to retirement will be returned

SUPREME COURT - AMENDMENTS



Reasons:

- Domestic legal dispute whether the regulations were effective and constitutional
- Criticism voiced by the the EU institutions
- CJEU interim measure (despite reservations)

Intention to reach a **dialogue-based resolution**



UZASADNIENIE

Proponowany projekt dotyczy nowelizacji przepisów odnoszących się do przejścia w stan spoczynku sędziów Sądu Najwyższego i sędziów Naczelnego Sądu Administracyjnego, po osiągnięciu określonego wieku.

Inicjatywa ustawodawcza została zainspirowana przede wszystkim:

- 1) zastrzeżeniami, także natury konstytucyjnej, dotyczącymi kształtu przepisów o przejściu sędziów w stan spoczynku podnoszonymi przez różne środowiska w kraju, w tym niektóre organy władzy publicznej (zob. np. zob. Sąd Najwyższy w postanowieniu z dnia 2 sierpnia 2018 r., sygn. akt III UZP 4/18);
- 2) krytyką obowiązujących rozwiązań prawnych podnoszoną przez instytucje Unii Europejskiej, w tym także w związku z toczącym się przed Trybunałem Sprawiedliwości UE postępowaniem ze skargi Komisji Europejskiej przeciwko Polsce, związanym z procedurami przechodzenia w stan spoczynku;
- 3) koniecznością podjęcia środków w celu wykonania nałożonego na Polskę zobowiązania wynikającego z postanowienia Wiceprezesa TSUE z dnia 19 października 2018 r., sygn. C-619/18 w związku z przejściem sędziów w stan spoczynku na podstawie ustawy o Sądzie Najwyższym z 2017 r.

SUPREME COURT - AMENDMENTS



"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."

– European Commission Contribution, page 6

"It is the Commission's sincere hope that Poland will now urgently address the key concerns identified by us. In particular, **it is indispensable that urgent action be taken by the Polish government to address the situation of the Supreme Court judges** before the 3rd of July – because that is when the decisions about the retirements become final".

– Commission statement by First Vice-President F. Timmermans (European Parliament, 13 June 2018)

SUPREME COURT - AMENDMENTS



*"The Commission's Recommendation asks the Polish authorities not to take any measure to dismiss or force the **retirement of Supreme Court judges. If such a measure is taken the Commission is ready to immediately trigger the Article 7(1) procedure.**"*

– Commission statement by First Vice-President F. Timmermans (26 June 2017)

*"the Commission **already notes** that certain issues in connection with the new draft laws [presented on that same very day] **could raise serious concerns**"*

– Commission statement by First Vice-President F. Timmermans (15 November 2017)

AMENDMENTS INTRODUCED IN 2018



Dialogue between the Commission and Poland – results:

- Retirement age – equal for women and men (65)
- Prolongation of judicial tenure – **transferred from the Minister of Justice to the National Council of Judiciary**
- Court Presidents **dismissal may now be blocked** by a court college / NCJ
- New procedure for appointing trainee judges
- **Narrow criteria** for extraordinary appeal
- Publication of Constitutional Tribunal judgment – **no more govt. competence**

OTHER IMPROVEMENTS



Random allocation of cases

- **Previously:** head of court division could appoint a civil case to a judge as they pleased – **possible undue influence**
- **Now:** cases allocated by a computerized draw (Law on the composition of common courts – Article 47a)

Strict limitation of transferring judges without their consent

- **Previously:** court presidents could transfer a judge at the beginning of every year if they deemed that it is necessary for organisational reasons
- **Now:** transfer prohibited without judge's consent, save for limited exceptions only – and the judge has **always the right to appeal** (Law on the composition of common courts – Article 22a § 4a)

No changes to adjudicating panels during trial

- **Previously:** a judge could be swapped even in the last moment of a civil trial and the new one **could still issue a verdict, even not having heard the evidence in person**
- **Now:** composition of a bench unchanged during trial, save for exceptional circumstances (Law on the composition of common courts – Article 47b)

LOWER 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 17

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 (4) of the Polish Constitution:

“**A statute shall establish an age limit** beyond which a judge shall proceed to retirement.”

RETIREMENT AGE - HISTORY



- Until 31 December 2012 – **65 years**
- From 1 January 2013 to 11 August 2017 – **67 years**
- Since 12 August 2017 – **back to 65 years**
- April 2018 – retirement age equalized for male and female judges
- Judges expecting to retire at the age of 67 – **appointed in 2013 at the earliest, no-one retired**

UNCONSTITUTIONAL?



Judgment of the Constitutional Tribunal of 24 June 1998, K 3/98

"the Constitution obliges the legislator to set an age limit, beyond which judges have to retire. According to the law on composition of common courts, this age limit was – and remains 70 years of age; beyond this limit no one can exercise judicial duties in courts referred to in Article 175 of the Constitution. It does not mean, however, that the legislator is not allowed to set other, additional limits, beyond which judges may be retired, even without their consent."

[the law of 17 December 1997 on amending the law on common courts lowered the retirement age from 70 to 65 – also for the judges already in office – with the possibility to prolong judicial tenure for 5 years]

COURT PRESIDENTS



- Function of a court president ≠ judicial tenure
- **Major role – adjudicating**
- Court president – administrative duties
- After being relieved of presidential duties – **still in active service**

DISCIPLINARY PROCEDURE



"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".

"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"

– European Commission Contribution, page 12

Source?

- „publicly available information“
- a statement of judicial organizations (engaged in the dispute)
- **no particular case described**

DISCIPLINARY PROCEDURE



Article 178 (3) of the Polish Constitution

A judge shall not belong to a political party, a trade union or **perform public activities incompatible with the principles of independence of the courts and judges**

Incompatible?

- Attending public demonstration
- Publicly supporting / denouncing political parties
- Disavowing colleagues

Investigation → indictment / discontinuation

Disciplinary officer → Disciplinary court → Disciplinary Chamber of the Supreme Court

DISCIPLINARY PROCEDURE



Who decides?

- Disciplinary officer – **a judge**
 - Exception allowed only in cases that could lead to a criminal conviction
- Disciplinary judgment – **at the hands of the judiciary**
 - First instance: a panel of three professional judges
 - Second instance: a panel of two professional Supreme Court Judges and one Supreme Court Lay Judge
- **Minister of Justice – not involved**

DISCIPLINARY PROCEDURE



Who is in charge?

- Minister of Justice appoints Disciplinary Officer of the Ordinary Courts (DOOC) and two Deputy Disciplinary Officers – **only judges, appointed for 4-year terms**
- Additional Deputy Disciplinary Officers (also judges) are appointed by the DOOC **from among the candidates presented by the General Assemblies of Judges of respective District Courts** (at least 45).
- Any possible influence of the Minister of Justice – limited, and only during first stage:
 - MoJ may file a motion for initiating the proceedings
 - a special disciplinary officer may be appointed to initiate and carry it out
- Initial stage ends with a disciplinary indictment – or discontinuation

EXTRAORDINARY APPEAL



"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."

"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."

– European Commission Contribution, page 13–14

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 **in line with 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.

STRICT CRITERIA → LIMITED APPLICATION



- Competence to lodge an appeal before the Supreme Court – only 2 institutions
- Several thousand citizens requests – **three appeals in 2018**
 - Two lodged by the Ombudsman (inheritance law)
 - One – by the Attorney General (inheritance law)
- In May 2018 – criteria further narrowed → **protection of legal stability and international obligations** (another result of the dialogue between Poland and the Commission)
- Final decision → **Supreme Court**

NATIONAL COUNCIL OF THE JUDICIARY



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."*

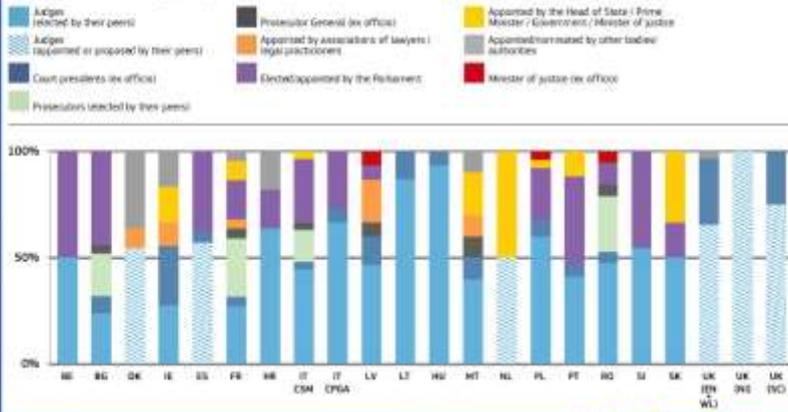
NATIONAL COUNCIL OF THE JUDICIARY



Figure 49

Composition of the Councils for the Judiciary according to the nomination process (*) ()**

The figure shows the composition of Councils for the Judiciary (**), members of the ENCI, according to the nomination process, depending on whether the members are judges/prosecutors elected or appointed/proposed by their peers, members nominated by the executive or legislative branch, or members nominated by other bodies and authorities. Not less than half the members of Councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary (**).



2016 EU Justice Scoreboard, p. 38

NATIONAL COUNCIL OF THE JUDICIARY



European Standard – in theory, in practice?

- 1) Majority of judges elected by their peers
- 2) Judges elected by their peers – but **no majority**
- 3) Majority of judges – **elected by parliament/appointed by the executive**
- 4) **Minority of judges**, appointed in various ways (not exclusively by their peers)
- 5) **No judicial council at all** – nominations, appointments, promotions decided by the executive and/or the legislature

NATIONAL COUNCIL OF 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."

– European Commission Contribution, page 9

- **18 candidates for 15 seats in 2018, 18 – in 2014, 24 in 2010, 19 in 2006**
- Hearing of candidates for judicial positions (limited hearings before 2018)
- **Transparency – live broadcast, judicial appointments are now subject of a live public discussion**
- Independence – secret ballot
(some candidates for the Supreme Court were recommended a majority as narrow as 13–11, others were rejected by similar numbers)
- **Irrevocability, fixed 4-year term**
- Over 2/3 judicial majority (17 out of 25 members are judges)

CONSTITUTIONAL TRIBUNAL



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

– European Commission Contribution, page 11

Already explained during two previous hearings:



CONSTITUTIONAL TRIBUNAL



- All five judges nominated in October 2015 were appointed in breach of law (their terms were to start after the parliamentary election, which the then-ruling majority expected to lose)
- CT President appointed lawfully – contrary claim unsubstantiated
- Since current CT President took over – majority for judges appointed before 8th term of Sejm in 39.7% cases *(updated for 11 December 2018)*
- Previous CT President – 0% cases with majority for judges appointed during 8th term of Sejm
- All judges in CT history – endorsed by some political groups, some – members of political parties themselves (including previous President)

CONSTITUTIONAL TRIBUNAL



- Rulings **against the position of the government** / parliament / Attorney General, e.g.
 - Pensions reform (Kp 1/18)
 - Case brought by MoJ regarding bar association regulations (U 4/17)
 - Police search regulations (K 17/14)
 - Local taxes (SK 48/15)
 - Administrative supervision of entrepreneurs (SK 37/15)
- All judges involved, regardless whether appointed before or after 2015
- **Wide guarantees → Independence**

FURTHER STEPS



- Article 7 (1) TEU *vis-à-vis* CJEU procedure
- Jurisdictional independence of the Court
- Objective, fact-based assessment
- **Legal text vs. practical application** of the norms (e.g. extraordinary appeal, also disciplinary proceedings)
- Openness to a dialogue with the Council, Member States and the Commission
- Efficiency of the process



THANK YOU FOR YOUR ATTENTION