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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

POLAND

EXPLANATORY MEMORANDUM (*)

**TO THE PRESIDENTIAL DRAFT ACT
AMENDING THE ACT
ON THE NATIONAL COUNCIL OF THE JUDICIARY**

(*) Translation checked by the Polish authorities

EXPLANATORY MEMORANDUM

The fact that the President of the Republic of Poland refused to sign the Act of 12 July 2017 amending the National Council of the Judiciary Act and certain other acts cannot be construed as an endorsement of the *status quo* in the justice system. Polish society does not trust the courts, queries the independence and impartiality of judges and legitimately demands changes. Nobody disputes the need for change. The Act of 12 July 2017 amending the National Council of the Judiciary Act and certain other acts would not have restored the Polish judiciary to good health. It would not have bolstered the right of everyone to have their case heard in a just and transparent manner, and without undue delay, by a fair, independent, impartial and autonomous court.

Making the election of members of the National Council of the Judiciary dependent on political decisions, without their being subject to any form of supervision by civil society, would not guarantee the proper operation of this constitutional body of the State, which is responsible for shaping the judiciary. Judges hand down judgments in the name of the Republic of Poland, are an emanation of the State, and decide on vital issues affecting the lives of millions of Poles. The legislator is thus obliged to do everything possible to ensure that those who become judges are legal practitioners who not only master the subject, i.e. know the law and how to apply it, but above all, when examining case files, can see beyond the documents written in legalese and perceive that there are people who deserve respect and to have their reasoning heard. Rulings that do not live up to the expectations of the parties to proceedings should be explained in accessibly written grounds so as to ease the subjective feeling of injustice and unfairness.

The proposed draft changes the mode of election of members of the National Council of the Judiciary, the body responsible for the judiciary, by granting the public, as well as judges, the right to nominate candidates for membership of the Council. The entities authorised to nominate candidates for membership of the Council will be: groups of at least 2 000 nationals of the Republic of Poland who are over 18 years of age, have full legal capacity and enjoy full public rights, and groups of at least 25 active judges. Approval of this provision will increase the democratic legitimacy of the members of the National Council of the Judiciary appointed from among judges, bolster transparency and allow public debate on candidates.

The draft imposes a requirement on the Marshal of the Sejm (lower house) to announce, in the Official Gazette of the Republic of Poland 'Monitor Polski', no earlier than 120 days and no later than 90 days before the end of the term of office of the members of the current Council, the start of the procedure for nominating candidates for the new Council. The provisions of the amending act also regulate the procedure and deadline for candidates for membership of the Council to be nominated to the Marshal of the Sejm. As already mentioned, the draft provisions allow groups of at least 2 000 nationals of the Republic of Poland or groups of at least 25 judges to nominate candidates. A nomination may concern one candidate only, although this does not stop a citizen or a judge from supporting more than one nomination. The draft provision does not provide for people to withdraw their signature once given.

If a judge is nominated for membership of the Council, the president of the court responsible for the nominated candidate is to draw up an information report covering: the candidate's history of rulings, socially significant rulings and rulings setting a precedent, and key information concerning their workplace culture. If an application concerns a court president themselves, the information report on them will be drawn up by the president of the higher instance court and, if the application concerns the president of a court of appeal, by the vice-president of that court. If the court president responsible for drawing up the information report has not fulfilled this requirement by the set deadline, the proposed provisions allow the candidate judge to draw up the relevant information themselves and submit it to the Marshal of the Sejm. However, the judge will nevertheless be required to send a copy of the opinion to the court president. The Marshal of the Sejm will immediately send any duly submitted nominations for membership of the Council to the deputies of the Sejm and publish them.

The Marshal of the Sejm will also be required to lay down, by means of an order, a model nomination form and models for the list of citizens and list of judges nominating candidates for membership of the Council. The order of the Marshal of the Sejm will be published in the Official Gazette of the Republic of Poland 'Monitor Polski'.

The draft provides for decisions of the Marshal of the Sejm refusing to accept a nomination for membership of the Council to be challenged before the Supreme Court. This provision aims to prevent cases in which the will of persons supporting specific candidate judges seeking membership of the Council is misrepresented. A three-member bench of the Supreme Court will examine appeals within three days in non-contentious proceedings. The proposal for such a fast procedure seems justified by the nature of the cases concerned. A comparable provision specifying the timescale for the Supreme Court to examine cases is laid down in the National Referendums Act of 14 March 2003 and in the Electoral Code Act of 5 January 2011 (examination by the Supreme Court of appeals against decisions by the National Electoral Commission to refuse to accept a notification that an election committee has been established).

The current provisions of the Act concerning the election of judge-members of the National Council of the Judiciary were examined by the Constitutional Tribunal at the initiative of the Prosecutor-General. In its judgment of 20 June 2017, ref. K 5/17, the Tribunal held that *'the drafters of the Constitution did not, however, specify who is to elect these judges. Thus, the Constitution states who may be elected as a member of the Council but does not specify how to elect judge-members of the Council. These issues were left to be regulated in by statute.*

In accordance with the draft, the final election from among the nominated candidates is to be carried out by the Sejm by a qualified majority of 3/5 of the votes, meaning that members of the body safeguarding the independence of the courts and the autonomy of judges will be appointed not only by the parliamentary majority but also by the other groups, making their election the result of consensus between the different groups represented in Parliament. By introducing a different required majority, the draft makes a distinction in the procedure by means of which the Sejm elects members of the Council, who are not only deputies of the Sejm but also judges. In order to ensure that the proposed arrangements remain constitutional, both the manner of nominating candidates from among judges and the mode of electing them, including the majority of votes necessary for their election, legitimately differentiates between the two groups of members of the Council appointed by the representative body, i.e. the lower house of the Polish parliament, It should be stressed here that the restrictions on the freedom to frame this procedure stem from the inalienable role of the National Council of the Judiciary, namely to safeguard the independence and autonomy of the courts. This role means that the judges on the Council must have the appropriate legitimacy together with qualifications and personal values enabling them to perform that function properly.

If it proves impossible for the political groups represented in the Sejm to reach consensus and the 15 members of the Council are not elected by a qualified majority, the draft introduces a procedure for the supplementary election of the members of the Council selected from among judges by means of a vote by roll call. The detailed procedure for this form of voting is laid down in the Rules of Procedure of the Sejm (Article 188(4)). The use of voting by roll call and the fact that the remaining members of the Council are not selected by simple or absolute majority will mean that the composition of the Council is not dependent on the will of the current parliamentary majority and - it can be surmised - will highlight the individual attributes of the various candidates.

One of the aims of the proposed amendments to the National Council of the Judiciary Act of 12 May 2011 is to move away from the principle whereby the members of the Council selected from among judges have individual terms of office. The Constitutional Tribunal has deemed this approach (individual terms) to be contrary to the Polish Constitution. The members of the

Council who are judges will be elected for a joint four-year term of office. In accordance with the draft submitted, the joint term of office of the new judge-members of the Council will begin on the day after that on which the last of them is elected. In so far as is possible, they should be elected in accordance with the same rules and under a comparable procedure. Therefore, if it proves impossible for the Sejm to elect the members of the Council, first by qualified majority voting and then by roll call voting, the electoral procedure in question is terminated and a new one begun from scratch.

The proposed amendments to the National Council of the Judiciary Act of 12 May 2011 also introduce provisions covering situations where it proves necessary to replace a judge-member of the Council before their term of office has ended.

If the National Council of the Judiciary is representative and is accepted by society, it will then be able to safeguard one of the most important human rights guaranteed by the Polish Constitution, namely the right of access to impartial, autonomous, independent and fair courts. It is thus proposed to introduce a provision in the draft allowing, in so far as is possible, judges of courts of different types and levels to be represented on the Council. As legal literature stresses (see B. Kostyk *Niekonstytucyjność trybu wyboru części członków Krajowej Rady Sądownictwa* [Unconstitutionality of the procedure for electing some members of the National Council of the Judiciary] in *IUSTITIA* 2/2015, p. 88; K. Szczucki in *Konstytucja RP Komentarz* [Constitution of the Republic of Poland, Commentary], ed. M. Safjan and L. Bosek, Warsaw 2016, vol. 2, p. 1121; K. Zawiślak, *Pozycja ustrojowa, kompetencje i skład Krajowej Rady Sądownictwa* [Constitutional role, competencies and composition of the National Council of the Judiciary], in *IUSTITIA* 3/2012, p. 124), the over-representation on the Council of representatives of higher courts is a significant flaw in the current version of the National Council of the Judiciary Act of 12 May 2011. The number of district court judges - who actually constitute the majority of the judiciary - is disproportionately small as compared to the number of judges from other levels. The provision proposed in the draft act obliges the Sejm to take account, when electing members, of the need for judges of courts of different types and levels to be represented on the Council. At the same time, since ensuring broad representation of the various groups of judges is conditional upon the nominations submitted (it might be the case that the nominations do not include candidates representing courts of all levels), the Sejm is to follow the above guidance 'in so far as is possible'.

Since the draft provisions introduce a new procedure for electing judge-members of the National Council of the Judiciary, Articles 12, 13 and 14(3) of the Act, which regulate the current election procedure, are being repealed.

The amendment to Article 20(1) of the National Council of the Judiciary Act of 12 May 2011 is intended to meet the expectations of society as regards the transparency and clarity of the activities of State bodies, including bodies safeguarding the independence and autonomy of judges. Introducing the possibility of webstreaming the meetings of the National Council of the Judiciary will increase public trust in its work.

The amendment to Article 21(3) of the Act is intended to speed up the work of the National Council of the Judiciary by allowing decisions to be adopted by circular vote. This arrangement is not new in Polish law, and the adoption of decisions in this way is even provided for by the Cabinet Act of 8 August 1996 (Journal of Laws 2012, item 392, as amended). In duly justified cases, the President of the Council will be able to order that a circular vote be held by e-mail. The President of the Council will send material containing personal data in a form assuring their protection and notify the members of the Council of the voting method and of the absolute time-limit by which a declaration casting votes 'for' or 'against' or abstaining from voting are to be sent to the e-mail address indicated by the President of the Council. A circular vote will be valid if at least half the Council members vote within the time-limit set for taking a position.

The new Article 22(1a) is a further amendment intended to make the work of the National Council of the Judiciary more transparent. That provision specifies the guiding principles that should be taken into account when laying down the rules of procedure of the National Council of the Judiciary, prioritising the need to ensure access to information on proceedings before the Council and information on candidates and the reasons why a person is being put forward for appointment to the post of judge. The framing of these guiding principles is influenced by the expectations that have been identified in society concerning the manner of establishing the decision-making process for the delivery of opinions on candidates for judges' posts, in particular as regards increasing transparency. This should directly translate into an increase in public confidence both in the National Council of the Judiciary and in the candidates being considered.

The amendment to Article 24(4) of the National Council of the Judiciary Act of 12 May 2011 is intended to provide greater clarity. The existing arrangement did not indicate precisely which provisions apply to staff of the Bureau of the Council, merely stating that the provisions concerned were those on the employees of State offices. However, the Employees of State Offices Act of 16 September 1992 does not mention staff of the Bureau of the National Council of the Judiciary. In addition, given the nature of a constitutional body such as the National Council of the Judiciary and how closely it is linked to the justice system, it has to be considered more appropriate for the staff of the Bureau to be covered by the provisions of the Act of 18 December 1998 on public prosecution and court staff (Journal of Laws 2017, item 246, as amended). For obvious reasons, it has been specified that Article 2(7) of that Act, requiring completion of a probationary period in a court or public prosecutor's office, does not apply.

The proposed amendment to the wording of Article 31 of the National Council of the Judiciary Act of 12 May 2011 concerns the composition of the team appointed by the President of the Council to prepare an individual case for examination at a meeting of the Council. The draft limits the number of team members to three and specifies that the team may not be made up of judges only.

When designating the team, the President of the Council is to notify the Minister for Justice of the team's appointment and inform the Minister of the individual cases assigned to the team for examination at a meeting of the Council. Within 21 days, the Minister for Justice may present the Council with an opinion on an individual case being examined. Failure by the Minister to present an opinion within the time-limit set will not suspend the team's work. The opinion of the Minister for Justice or information that no opinion has been submitted will be annexed to the case file. Thus, when examining the case concerned at a meeting, the Council will also have access to the position of the Minister for Justice.

The next amendment introduces a new version of Article 35(2). In accordance with the proposed wording, when establishing the order of candidates on the list for a post as judge or assistant judge, the team is to be guided above all by an assessment of the candidates' qualifications, taking account also of professional experience, including experience of applying the law, academic achievements, opinions presented, recommendations, publications and other documents annexed to the nomination.

The proposed new Article 44a introduces into the Act a requirement for the National Council of the Judiciary to present to the President of the Republic of Poland requests for the appointment of specific judges, together with the grounds, information on the other candidates and an assessment of all the candidates. The purpose of this provision is to enable the President of the Republic of Poland to take a correct decision by providing a comprehensive overview of the case. The President of the Republic Poland should be in a position to analyse all the candidates nominated and take a decision on appointing a candidate against the background of the other requests.

Articles 2, 4 and 5 of the draft adapt the Military Courts Organisation Act of 21 August 1997, the Administrative Courts Organisation Act of 25 July 2002 and the Supreme Court Act of 23 November 2002 to the amendments put forward in the draft.

The amendment introduced in Article 3 of the draft concerns the procedure for appointment by the Minister for Justice of assistant judges at common courts. The Act of 11 May 2017 amending the Act on the National School of Judiciary and Public Prosecution, the Common Courts Organisation Act and certain other acts (Journal of Laws 2016, item 2062, as amended) allows the National Council of the Judiciary to express, within one month, its objection to assistant judges who have previously been appointed by the Minister for Justice and who have sworn an oath to the Minister identical to the judges' oath. The Minister for Justice submits to the National Council of the Judiciary a list of the assistant judges nominated, together with a request for them to be entrusted with the performance of judges' duties. If the National Council of the Judiciary does not object within one month of presentation of the list and the request, the assistant judge will perform judges' duties for a period of four years. During the period when an assistant judge appointed by the Minister for Justice is not performing judges' duties (*either before the National Council of the Judiciary expresses its position or if it objects, until such time as the resolution expressing objection is revoked*), the assistant judge will perform tasks in the area of legal protection other than judicial ones.

The legislator has in fact given the Council only one month to express any negative position regarding a given candidate. In other words, the National Council of the Judiciary - a collegiate body which operates through meetings - has a relatively short time in which to take a stance on at least several dozen (if not several hundred) candidates. If, in practice, the Council is unable - for objective (organisational) reasons - to assess the candidates put forward, the power granted to it will actually be purely illusory.

The amendment proposed in Article 3 extends to two months the time-limit for the National Council of the Judiciary to adopt a position.

Article 6 of the draft provides for members of the National Council of the Judiciary elected under the previous provisions to perform their function until the starting date of the joint term of office of the new members of the Council elected by the Sejm from among judges on the basis of the provisions of the draft amending act.

The proposed provision is linked to the Constitutional Tribunal's judgment of 20 June 2017, ref. K5/17, which found Article 13(3) of the National Council of the Judiciary Act of 12 May 2011 - understood as providing for an individual term of office for members of the National Council of the Judiciary selected from among common court judges - to be contrary to Article 187(3) of the Constitution. The Constitutional Tribunal referred to earlier case-law allowing the conditions for termination of a Council member's term of office to be laid down by statute, which the Constitutional Tribunal took as meaning that a deviation from the four-year term of office was permissible. In the Constitutional Tribunal's opinion, since the term of office of the Sejm deputies and senators who are members of the Council is not currently an individual one, then the term of office of the remaining, elective members of the Council should not be individual either.

The draft provides that the members of the Council elected from among judges are to be elected for a joint term. The draft provisions do not specify the terms of office of other members of the Council, since their term is linked to the period for which they perform the function through which they were elected or appointed to the Council. The proposed provisions thus reflect the values indicated in the grounds to the judgment of 20 June 2017, ref. K 5/17.

In its judgment of 18 July 2007, ref. K 25/07, the Constitutional Tribunal allowed the possibility for the term of office of members of the National Council of the Judiciary to be shortened on condition that the legislator indicate *exceptional, constitutionally justified circumstances for the provision adopted*, since only such circumstances could potentially justify breaking with the principle of terms of office.

The current conditions for early termination of members' terms of office are regulated by Article 14 of the National Council of the Judiciary Act of 12 May 2011. The fact that a member's term of office is terminated, i.e. they cease to perform their function, is not equivalent to deviating from the constitutional principle of a four-year term of office. What would be contrary to that principle would be, for example, if the Act laid down a three-year term. The draft respects the length of the term of office specified in the Constitution. The principle in question has therefore not been breached. The principle of continuity of operation of the constitutional body is also respected, since the current members of the Council will stop being able to perform their function only on the day when the joint term of the new members of the Council begins. The provision in Article 6 of the draft is an exceptional one, does not negate the constitutional principle requiring a four-year term and is proportionate to the systemic changes being pursued.

The constitutional values justifying the proposed provision were also outlined in the *Dissenting opinion of seven members of the Legislative Council concerning the opinion of the Legislative Council on the draft act amending the National Council of the Judiciary Act and certain other acts of 26 August 2016*.

That opinion stated that the major changes to the method for appointing members of the National Council of the Judiciary were an expression of the democratisation of the election process and constituted a development of the principle of the democratic rule of law (Article 2 of the Polish Constitution). This democratisation is undoubtedly an important public interest and justifies shortening the term of office of the persons currently serving (see judgment of the Constitutional Tribunal of 18 July 2007, ref. K 25/07, and the case-law referred to therein). The opinion also stressed as follows: *'While not denying the importance of continuity of the term of office, this aspect should nevertheless be deemed less important than that of representativeness and uniformity of representation of judges on the National Council of the Judiciary ('the Council'). The shortening of the term of office should be seen exclusively as an exception, but one that is permissible in a situation where there is no real possibility of introducing transitional arrangements when the rules on the representation of judges on the Council change. There is no formally correct but also feasible means of introducing a provision whereby judges' representatives would be elected later in accordance with the new Act. Indeed, this would give rise to differentiated representation of judges on the Council. [...] As the various elective members of the Council have individual terms of office (different start and end dates), introducing the planned systemic changes without shortening their terms of office would be a long drawn-out, complicated process. [...] In effect, the entire process of systemic change would not be completed until March 2020 (the end of the term of office of the last of the current members of the Council) and, more importantly, during that period there would be a differentiation in the status of the members of the Council in terms of the form of representation. [...] It thus appears that the coherence of the amendments being introduced and the possibility for the Council to operate in accordance with a single systemic approach are factors that justify an earlier end to the term of office of the current elected members of the Council. [...] Allowing judges elected in accordance with rules that are no longer in force to remain on the Council would significantly undermine the trust of their electors. Indeed, they were appointed with a different conception of the personnel decisions taken and legitimate expectations as regards expressing the will of those who elected them.*

As regards transitional provisions, the draft lays down that the election of members of the National Council of the Judiciary for a new term of office, in connection with the termination of

performance of the function by the members of the Council referred to in Article 6, is to be effected on the basis of the Act referred to in Article 1, as amended by the current Act, save that:

- 1) the Marshal of the Sejm is to announce the start of the procedure for nominating candidates for membership of the Council no later than seven days after the date of entry into force of the current Act;
- 2) candidates for membership of the Council are to be nominated to the Marshal of the Sejm no more than 21 days after the publication of the notice referred to in subparagraph 1;
- 3) the Sejm is to elect members of the Council from among judges no more than 60 days after publication of the notice.

It is proposed that the draft act enter into force 30 days after the date of its publication.

The entry into force of the Act in its proposed wording will not give rise to a financial burden for the State budget or the budgets of local government bodies.

The draft act will have no impact on the activity of micro-, small and medium-sized enterprises.

The subject matter of the draft does not come within the scope of European Union law.