Non-paper concerning European Commission contribution prepared for the hearing of Poland in the Council

In its contribution, the Commission decided to present its perception of the state of play with regard to certain elements of the Polish judiciary reform. However, the Commission's contribution contains factual mistakes and misleading assessments. What is more regrettable, the Commission failed to comprehensively address relevant amendments to the reform, introduced recently by the Polish authorities. Due to those deficiencies Poland would like to present additional information in order to correct the description presented by the Commission.

1. **Supreme Court (SC)**

- First of all, it should be noted, that **65 years for men and 60 years for women is a new retirement age for all professions in Poland** (there are few exceptions when an employee may retire earlier). For judges the retirement age was set at 65 years – regardless of gender.
- **Contrary to the Commission's statement, the National Council of the Judiciary opinion on the prolongation of the judicial mandates is not based on "vague" criteria.** Firstly, the notion of "the interest of the justice system" is already present in the Polish legislation (in the Criminal Procedure Code) and it has been interpreted by the verdicts of Polish courts, including the Supreme Court. Secondly, there are additional, specific criteria in the Act on the Supreme Court, which were omitted by the Commission in its paper. These criteria are: public interest, Supreme Court personnel needs and caseload in the particular chambers of the Supreme Court.
- In fact, the existence of broad criteria is intended to allow the NCJ to issue a positive opinion in wide range of circumstances – **if just one of these criteria is fulfilled, the NCJ will be able to issue a positive opinion**.
- The Commission falsely claims that judges should serve an "originally established term". In fact, **such term was never established. All judges in Poland are appointed for an indefinite time** (Article 179 and 180 (1) of the Polish Constitution) – which means that they retain their judicial status until the end of their lives. However, **the Constitution also provides that it is for a statute to establish a retirement age (Article 180 (4))**. Current reform is fully in line with this provision: it does not breach any "originally established term" but changes the retirement age.
- The Commission also claims that some judges may be "forced to retire". Such claim may only be considered true if we would apply it to any retirement procedure. At some point of every professional career one reaches an age that the law considers a point of retirement – thus "forcing" the interested person to retire.
- Retirement age applies to all judges of the Supreme Court – including its First President. It is true that the 6-year term of office of the First President is established

in the Constitution – but there are situations when this term may be effectively shorter. It may happen especially if a person serving the office of First President would cease to be an active judge of the Supreme Court – for reasons such as resignation, retirement, or death.

- That is exactly what happened before the current First President took office – her predecessor died during his term. That is also what would have happened if a counter-candidate was chosen to replace him instead of judge Małgorzata Gersdorf – it was judge Lech Paprzycki, at the time of election aged 68; had he been elected, his term would have ended after 2 years.
- **Another misguided claim is that the judges were "asked to declare their intention to remain in the Supreme Court". No judge was asked (all the more forced) to do it** – but since the retirement age was lowered, they were offered such possibility – which majority of them (16 out of 27) decided to use.
- This fact also disproves another Commission's claim – that of a "humiliating character" or "unconstitutionality" of the procedure.
- It is for the President of the Republic to decide on the prolongation of SC judges' mandates – but only after receiving the opinion of the National Council of the Judiciary, which is composed mainly of judges. The President is bound to consult the NCJ – It is a compulsory part of the procedure, impossible to be ignored.
- At the same time, it must be noted that it is the constitutional prerogative of the President to appoint judges (Article 144 (3) (17) of the Polish Constitution). This competence applies not only to initial appointments, but also to any further reappointments or promotions – and it has been extensively interpreted by the Polish courts over the past two decades. It would be legally impossible to have the decision of the President subject to a review by any other authority – it would undermine President's constitutional role and openly contradict the basic law of the Republic of Poland.

2. National Council of the Judiciary (NCJ)

- According to the 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 statute (Article 187 (4) of the Polish Constitution). It means that various models are allowed – from election only within the judiciary, through involving parliament, or even allowing for a popular vote – as long as only judges are appointed in the end.
- The Commission wrongly states that the NCJ has a "new politically composed structure". In fact, **the structure of the NCJ remains unchanged** – it is composed of 17 judges, including 15 elected members, as well as the First President of the Supreme Court and the President of the Supreme Administrative Court *ex officio*, the Minister of Justice, a delegate of the President of the Republic, 4 members chosen by

the Sejm from amongst its Members and 2 members chosen by the Senate from amongst its Senators.

- The Commission also claims that the four–year mandates of the previous judges – members were prematurely terminated. It is true that they were terminated – but the notion of "prematurity" is unfounded, as well. It must be highlighted that the Constitutional Tribunal ruled that there should be one common term of office for all the members of the NCJ – and that the previous individual terms were unconstitutional. It was a duty of the Parliament to implement this judgment – and it has done so by amending the law of the NCJ.
- Moreover, individual terms of office of 13 out of 15 NCJ judicial members would have expired by the end of June 2018 anyway.
- For this reason, the Parliament decided to terminate all the unconstitutional individual terms at once (noting also the fact, that **a short time remaining to fulfill most of these terms would not affect the Council in any significant way**), and to elect all 15 members for a one, uniform 4-year term, in line with the Constitutional Tribunal judgment.
- The Commission keeps claiming that the new election regime of the judges-members to the NCJ does not comply with European standards**. Contrary to this claim, there is no such standard in practice**. It is true that some institutions insist that a certain composition of the councils for the judiciary is preferred – but it is not uncommon even for founding members of the EU to have it composed contrary to the alleged "universally established standard".
- In some EU Member States there are no judicial councils at all, in some such councils exist but judges do not hold majority therein. In one state the judges do have majority – but are elected by parliament, not their peers.
- Polish NCJ is composed of judges in over 2/3 – and despite being elected not by the judicial community itself, they enjoy very wide guarantees of independence, insulating them from any political influence.
- What's even more important, the new election regime is far more democratic than it used to be – the judges themselves strongly criticized previous electoral system. **In 2014 the Assembly of Representatives of Circuit Court Judges (the most representative body for the judges in Poland) openly labeled the previous system as non-democratic, curial elections, based on the preference for the judges who held executive positions in the courts** (Resolution No 4 of the Assembly of Representatives of General Assemblies of Circuit Judges concerning electoral rules for the National Council of the Judiciary of 26 February 2014 presented in our White Paper of 8 March 2018).
- The Commission states that "only 18 candidates have been proposed for the 15 posts in the Council". It is true – but **what the Commission fails to mention is the number of candidates in the previous elections to the Council**. In 2006, 19 judges ran for 15 posts in the NCJ, in, 2010 there were 24 candidates, and in 2014 – 18.

- Was the NCJ elected in 2014 – out of 18 candidates – more representative for the judiciary than the NCJ elected in 2018 – also out of 18 candidates?
- It is not just a rhetorical question – it may be answered by analyzing the composition of the Council over the previous 28 years. During this time, 102 judicial members were elected to the Council – only 4 of them from the level of District Courts. It must be underlined that the District Courts are staffed with almost 70% of judicial community – and they were represented in the Council only in a negligible ratio.
- It must also be underlined that despite granting the Parliament the competence to elect judicial members of the NCJ, there is a high threshold for potential candidates. Such candidate – herself or himself being a judge – may only run for office after being supported by at least 25 judges or 2.000 citizens. This ensures that politicians cannot hand-pick their preferred candidates, without a support of judicial community or general public.
- In several parts of its contribution the Commission maintains that NCJ is "politicized" – yet fails to present any possible mechanism, by employing which the politicians would be able to affect the decisions of the Council. Since there is **no possibility to revoke the NCJ members or instruct them in any way**, this claim is also unsubstantiated.

3. Ordinary court judges

- The Commission suggests that some ordinary court judges have been "forced to retire" because they were affected by the lowered retirement age. **It was already explained with regard to the Supreme Court, but it must also be underlined here: according to the Article 180 (4) of the Polish constitution "a statute shall establish an age limit beyond which a judge shall proceed to retirement".**
- Also in this regard the Commission claims that ordinary court judges "have no right to serve their full term as originally established". **This remark is another factual mistakes also for the ordinary court judges there was never an established term of office** – they were also appointed for life, with a reservation that at the moment established in a statute they would go to retirement.
- What is even more interesting is that **the Commission fails to mention the previous changes to the judicial retirement age. Until 2013, it was set at 65. Then it was briefly raised to 67 – not just for judges, but almost all other professions**. This issue was one of the focal points of 2015 parliamentary election – as the ultimately winning Law and Justice party declared that the age would be re-established at 65. And that is precisely what happened in 2017 – not just for judges, but also for the entire population.
- Hence, **even if the Commission's claim about the existence of an "originally established retirement age" would be true – for most of the judges such age must be considered as 65.** Only those few who started their career between 2013 and 2017 might claim that they had the retirement age "originally established" at 67

years. For obvious reasons, the judges that started their careers during last 5 years have not been affected by the lower retirement age, so far.

- It should also be noted that after reaching retirement age judges retain their judicial status and all privileges, including a very high remuneration (75 percent of their salary – until the end of their lives) and a very wide immunity, extending to all criminal cases and even traffic offences.
- The Commission admits that the power to prolong mandates of ordinary court judges has been transferred form the Minister of Justice to the National Council of the Judiciary. On the other hand, the Commission questions the fact that there is no judicial review of the decision concerning prolongation. One should ask then, whether there is a need for judicial review of the decision taken by the body composed mainly by judges (17 out of 25 members).
- In this context it must also be indicated, that a very similar system of prolongation has been in place in one of the EU founding members. It is also a Council for the Judiciary that decides it – basing its decision on criteria of their professional ability and "the interest of service".
- The Polish regulation **also grants this competence to the National Council of the Judiciary – and allows it to employ even broader criteria**, i.e. the public interest, the interest of the judiciary, personnel need of the judiciary or caseload of a particular court – **making it possible to retain a judge in office in wider range of situations**.

4. Disciplinary regime

- The Commission claims that there is a possible undue influence of the executive branch of government in the disciplinary procedure – and that it should be removed. This claim is again unjustified.
- First of all, it must be noted that the disciplinary regime is composed of two stages: preliminary proceedings and disciplinary trial. The first stage resembles that of an investigation – ran by a prosecutor who gathers evidence and decides whether to bring the case to the court. The second one – is a trial before the disciplinary court.
- **Any possible influence of the Minister of Justice is limited to the first stage – and it is only comprised of a competence to appoint a Disciplinary Officer for the Common Courts and two deputies thereof** (these officers are judges themselves). Then it is the Disciplinary Officer that appoints further Deputies (for every appellate and circuit court) – from amongst the candidates presented by the judicial community.
- The Minister of Justice can also appoint a Disciplinary Officer of the Ministry of Justice, to run a specific case if it is necessary. This Disciplinary Officer must also be a judge – only if the disciplinary offence meets the characteristics of intentional crime prosecuted by public indictment, a prosecutor may be appointed as a Disciplinary Officer.

- All these provisions relate to initial stage of disciplinary proceedings – the preliminary part. **After this part ends, it is only the disciplinary court that decides. There is virtually no power of the Minister of Justice or any other executive institution to dictate how the disciplinary court rules**.
- **The Disciplinary Courts are always composed solely (in the first instance) or in a majority of judges themselves** (in the Disciplinary Chamber of the Supreme Court the benches are composed of two professional judges and one lay judge). There are no representatives of the Minister of Justice, he is also unable to affect the composition of benches or to dismiss the judges.
- The Commission's concern that for current Supreme Court judges it will be hardly possible to participate from the start as judges in the disciplinary chamber is also unfounded. The consecutive consent of three Presidents of the Supreme Court, the National Council for the Judiciary and, finally, of the President of the Republic should not be considered as an obstacle to transfer a judge to the Disciplinary Chamber. This kind of consent is needed due to the unique character of the chamber itself and the rank of the affairs it deals with.
- New regulations that establish a separate Disciplinary Chamber and new disciplinary regime not only pose no risk to the separation of powers – but they reinforce the independence of individual judges, also within the judiciary.
- Since the judges of Disciplinary Chamber are supposed to judge their peers, they need additional guarantees of independence – that is precisely why the scope of competences of the President of the Supreme Court in charge of the Disciplinary Chamber are wider than for the Presidents in charge of other Chambers.
- It must also be noted that the main goal of new disciplinary regime is to prevent situations when judges are able to avoid responsibility due to distorted professional solidarity, or allowing the cases to be discontinued because of the statute of limitations. In the latter regard terms were extended to 5 years instead of 3 (and 8 instead of 5 when the proceedings are already initiated) – and **to battle self-interest within the judiciary, the new regulations allow for autonomous disciplinary judges: independent not only from the executive, but also from their colleagues' pressure**.

5. Extraordinary appeal procedure

- First of all, it must be noted that the Commission's critical assessment is based much on the fact that the extraordinary appeal refers to the principle of "social justice". This is very surprising – as **social justice is one of the basic values of the European Union, protected in the Article 3 (3) of the Treaty**.
- **This principle is also enshrined in the Polish Constitution** – and that is exactly the rationale behind allowing citizens to resort to an extraordinary judicial remedy, if their basic rights are infringed.
- There are misinterpretations and omissions in the description provided by the Commission. It should be clarified that if the verdict challenged by the extraordinary

appeal has already led to irreversible legal effects, the Supreme Court as a rule "shall" (not just "can", i.e. is allowed to) declare that the verdict was issued in breach of law, but the judgment will not be repealed. Only exceptional situations (like flagrant violation of human rights) may lead to a repeal of the verdict in such a case – but in the end it is for the Supreme Court to decide.

- The Commission also fails to mention that as to the verdicts issued before the extraordinary appeal came into force, only two institutions (instead of eight as it was previously) will now be able to lodge it: the Ombudsman (totally independent from the government) and the Attorney General. This is another way in which the number of cases brought before the Supreme Court will be limited.
- The Commission went as far as to include in its contribution a very strong allegation that extraordinary appeal creates a threat for final judgments by Polish courts applying EU law as interpreted by the case-law of the Court of Justice of the EU. This kind of presupposition is groundless – as it leads to a conclusion that case-law of the CJEU may infringe principles, liberties or human rights protected by the Polish Constitution.
- It should be emphasized, that as in all other court cases, the verdict passed on the basis of the extraordinary appeal shall remain an exclusive competence of independent judges. Without a Supreme Court ruling, no final verdict shall be annulled and will remain binding.

6. Court Presidents

- In response to the expectations of the Commission, Poland has recently changed the regime for dismissal of the Presidents of the common courts. Although it is still a competence of the Minister of Justice (who oversees the courts – but only in their administrative aspect), yet he/she must now obtain a consent of the college of the court that would be affected by a dismissal – and in case the college does not grant such consent, an approval of the National Council of the Judiciary is needed.
- There are pre-established criteria that must always be taken into account: presidents of the courts may only be dismissed in case of flagrant or persistent failure to carry out their duties, if their performance does not benefit the interest of the judiciary, if there is exceptional ineffectiveness in court organization, or in case of voluntary resignation.
- It should be emphasized that the Minister of Justice needs to have the right to appoint court presidents, as it is the only tool at his or her disposal to react to organizational irregularities discovered in courts, notably as far as the excessive length of proceedings is concerned.
- As Commission indicated, within six months under the previous procedure, the Justice Minister dismissed 69 court presidents and 67 deputy presidents. Considering, however, that there are currently 374 court presidents and 357 deputy presidents in Poland, these changes concerned a total of 18.6% of judges with administrative

functions. It shows that the procedure was not abused — on the contrary, it was a proportionate and appropriate means to replace the management of the least effective courts.

- As the function of court president is only administrative in nature and presidents are responsible for effective organization of work in their respective courts, introduced reform poses no threat to judicial independence.
- Lastly, **the Commission fails to point out that the Polish Minister of Justice had even wider power in this scope at the time when Poland joined the European Union and during the next eight years of membership – until 2012**. The legislation from that period provided that the court president is appointed by the Minister of Justice after requesting an opinion of the competent general assembly. Such opinion, as a rule, did not bind the Minister. The Minister of Justice had also exclusive right to dismiss a court president in the event of a flagrant failure to exercise their duties – the Minister had to consult the National Council of the Judiciary, but its opinion was not binding for the Minister. There have never been any objections to these regulations before.

7. Constitutional Tribunal

- It must again be clarified that in October 2015 members of the Tribunal were unconstitutionally elected with the votes of the previous 7th Sejm's parliamentary majority. The election of judges of the Constitutional Tribunal by previous parliamentary majority in a time frame that exceeded the mandate of the 7th Sejm was a violation of the democratic legitimacy of judges of the Constitutional Tribunal. It should be stressed that during elections of the CT judges by the 7th Sejm, there were no vacancies in the Tribunal. The 7th Sejm nevertheless chose to elect judges for posts that were still occupied in order to prevent the next Sejm from performing proper elections. That is why the 8th Sejm reviewed the election process of judges of the Constitutional Tribunal carried out by the previous 7th Sejm.
- It should be noted that the Constitutional Tribunal issued the decision of 7 January 2016 in which it dismissed motions by a group of MPs to examine the constitutionality of the Sejm's resolutions on the election of the Constitutional Tribunal judges and reaffirmed that the Tribunal does not have the competences to rule on the election of judges of the Constitutional Tribunal nor on the lack of the legal force of a resolution concerning the election of a judge of the Constitutional Tribunal. Nevertheless, the Commission neglects the above mentioned important facts in its recommendations.
- Regarding the rulings of the Constitutional Tribunal recently published in the Official Journal, it should be emphasized that they were delivered contrary to existing provisions and refer to provisions that have lost their binding force. Nevertheless, Polish Parliament decided in a law adopted in April that for the clarity of the legal system and for strengthening public trust in the Constitutional Tribunal, they should be promulgated.

- Contrary to Commission's suggestion, the election of current President of the Tribunal was in line with the law – it took place on the basis of the statue of 13 December 2016, later deemed to be constitutional by the Tribunal (case file K 1/17). Moreover, **the election was acknowledged also by the former deputy President of the Tribunal in his public statements**. After the end of his term of office the former President was temporarily replaced by the acting President and it was fully in line with the existing law.
- The Commission completely disregards the fact, that the legislative initiatives adopted by the parliamentary majority in 2016 have led to a resolution of a political conflict around the Constitutional Tribunal, which was provoked by actions of the previous governing coalition. As a result of the amendments, currently there are no legal or political obstacles that would prevent the Tribunal from proper functioning.
- Currently the Constitutional Tribunal is enjoying full legitimacy and independence. The cases are allocated to both to judges that were appointed during current term of Sejm, as well as to those appointed before. The latter group had majority in 23 benches out of 53 cases resolved by the Tribunal under its current President (as of 25 June 2018).
- It must also be noted that all judges – both those appointed during current term of Sejm, as well as those appointed before – often adjudicate contrary to the position of the parliamentary majority or the government. It has happened over the past several months in a very wide range of cases, including those concerning sensitive topics, such as Police search regulations (K 17/14), taxation (SK 48/15) or administrative control of entrepreneurs (SK 37/15).
- The judges do not feel obliged to adjudicate in line with the political position of the party that supported them in the appointment procedure for one reason – the law provides very wide guarantees of independence and they may not be influenced by anybody. Judges of the Constitutional Tribunal are appointed for 9-year terms, they may not be revoked, they enjoy full immunity (also for crimes or even misdemeanors), and they are very highly remunerated – even after they retire from the Tribunal. That is why after they were elected they are fully independent. Analysis of the facts regarding the performance of the Tribunal and the verdicts that it has issued proves, that the claim of alleged lack of independent constitutional court in Poland is also unfounded.

We remain at your disposal for any further questions.