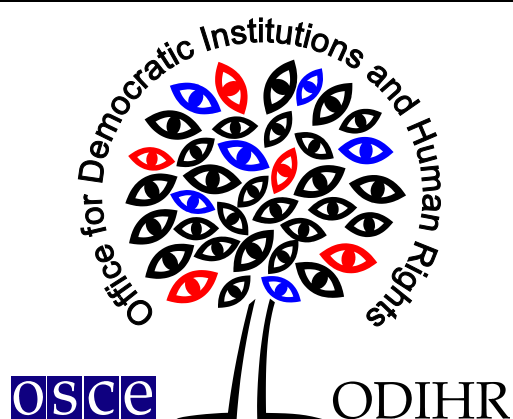


Warsaw, 22 March 2017

Opinion-Nr.: JUD-POL/305/2017
[AIC/YM]

www.legislationline.org



PRELIMINARY OPINION

ON DRAFT AMENDMENTS TO THE ACT ON THE

NATIONAL COUNCIL OF THE JUDICIARY AND

CERTAIN OTHER ACTS

OF POLAND

based on an unofficial English translation of the Draft Act commissioned by the

OSCE Office for Democratic Institutions and Human Rights

This Preliminary Opinion has benefited from contributions made by Ms. Michèle Rivet, Vice-President of the International Commission of Jurists and former President-Judge of the Quebec Human Rights Tribunal, by Professor Karoly Bard, Chair of the Human Rights Program, Legal Studies Department, Central European University - Budapest, and by Mr. Vasil Vashchanka, International Rule of Law Expert

OSCE Office for Democratic Institutions and Human Rights
Ulica Miodowa 10 PL-00-251 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	SCOPE OF REVIEW	3
III.	EXECUTIVE SUMMARY	4
IV.	ANALYSIS AND RECOMMENDATIONS	5
1.	International Standards and OSCE Commitments on the Independence of the Judiciary and Judicial Self-Governing Bodies	5
2.	General Comments	8
3.	The Appointment and Terms of Office of Judge Members of the Judicial Council	9
	3.1. <i>The Modalities of Appointing Judge Members of the Judicial Council.....</i>	<i>9</i>
	3.2. <i>The “Joint” Terms of Office of Judge Members of the Judicial Council</i>	<i>14</i>
4.	The New Structure of the Judicial Council and Modifications of the Procedure for the Selection of Judges and Trainee Judges.....	14
	4.1. <i>The New Structure of the Judicial Council.....</i>	<i>14</i>
	4.2. <i>The Modifications of the Procedure for the Appointment of Judges and Trainee Judges</i>	<i>15</i>
5.	The Termination of the Mandate of Current Judge Members of the Judicial Council.....	18
6.	Other Comments.....	20
	6.1. <i>Changes to the Remuneration of Certain Retired Judges (removed from the new version of the Draft Act of March 2017)</i>	<i>20</i>
	6.2. <i>Impact Assessment and Participatory Approach.....</i>	<i>20</i>

Annex: Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

I. INTRODUCTION

1. *On 13 February 2017, the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) received a request from the Chairperson of the National Council of the Judiciary of Poland to review the Draft Act Amending the Act on the National Council of the Judiciary and Certain Other Acts of Poland (hereinafter “Draft Act”) of 23 January 2017.*
2. *On 20 February 2017, the OSCE/ODIHR Director responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Draft Act with international human rights and rule of law standards and OSCE human dimension commitments.*
3. *On 22 February 2017, the OSCE/ODIHR received from the National Council of the Judiciary an updated version of the Draft Act, which is the subject of this legal analysis. Moreover, on 6 March 2017, a new version of the Draft Act dated 3 March 2017 was published by the Ministry of Justice,¹ and later endorsed by the Government on 7 March 2017. Since this new version contained minor changes compared to the version dated 22 February 2017, this legal review is still based on the February version of the Draft Act. However, these most recent changes have been taken into account in the analysis contained therein.*
4. *Given the short timeline to prepare this legal review, the OSCE/ODIHR decided to prepare a Preliminary Opinion on the Draft Act. This may be followed by the issuance of Final Opinion at a later stage, should follow-up meetings with stakeholders in Poland reveal some potential inaccuracies, misinterpretations or additional information which the OSCE/ODIHR would consider necessary to reflect in its legal analysis.*
5. *This Preliminary Opinion was prepared in response to the above-mentioned request.*

II. SCOPE OF REVIEW

6. *The scope of this Preliminary Opinion covers only the Draft Act submitted for review. Thus limited, the Preliminary Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the judiciary in Poland.*
7. *The Preliminary Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on areas that require amendments or improvements than on the positive aspects of the Draft Act. The ensuing recommendations are based on international standards, norms and practices as well as relevant OSCE human dimension commitments. The Preliminary Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. Moreover, in accordance with the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the Preliminary Opinion’s analysis takes into*

¹ See <<http://legislacja.rcl.gov.pl/docs/2/12284955/12350850/12350851/dokument277955.pdf>>.

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

account the potentially different impact of the Draft Act on women and men, as judges or as lay persons.²

8. This Preliminary Opinion is based on an unofficial English translation of the Draft Act commissioned by the OSCE/ODIHR, which is attached to this document as an Annex. Errors from translation may result.
9. In view of the above, the OSCE/ODIHR would like to make mention that this Preliminary Opinion does not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on respective legal acts or related legislation pertaining to the legal and institutional framework regulating the judiciary in Poland in the future.

III. EXECUTIVE SUMMARY

10. The main objective of the Draft Act is to amend the procedure for appointing the judge members of the National Council of the Judiciary (hereinafter “the Judicial Council”), reorganize the internal structure of the Council and modify the procedure for selection of judges and trainee judges. The proposed amendments would mean, in brief, that the legislature, rather than the judiciary would appoint the fifteen judge representatives to the Judicial Council and that legislative and executive powers would be allowed to exercise decisive influence over the process of selecting judges. This would jeopardize the independence of a body whose main purpose is to guarantee judicial independence in Poland.
11. The proposed amendments thus raise serious concerns with regard to key democratic principles, in particular the separation of powers and the independence of the judiciary, as also emphasized by the UN Human Rights Committee in its latest Concluding Observations on Poland in November 2016.³ The changes proposed by the Draft Act could also affect public trust and confidence in the judiciary, its legitimacy and credibility. If adopted, the amendments would undermine the very foundations of a democratic society governed by the rule of law, which OSCE participating States have committed to respect as a prerequisite for achieving security, justice and stability.
12. In particular, the Draft Act’s proposal to remove the authority to choose judges sitting on the Judicial Council from the judiciary and place it within the legislature runs the risk of increasing political interference in judicial administration, with possibly negative effects for the independence of the judiciary in Poland. Such an approach also contradicts international and regional recommendations on judicial independence, which advise for judge members of judicial councils to be chosen by the judiciary.
13. Moreover, the new proposed structure of the Judicial Council creates a “First Assembly” mainly composed of representatives of the executive and the legislative

² See par 32 of the *OSCE Action Plan for the Promotion of Gender Equality* adopted by Decision No. 14/04, MC.DEC/14/04 (2004), <<http://www.osce.org/mc/23295?download=true>>.

³ UN Human Rights Committee, *Concluding Observations on the 7th Periodic Report of Poland*, 23 November 2016, pars 33-34, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPOL%2fCO%2f7&Lang=en>. The UN Human Rights Committee noted with concerns “the impact on the right to a fair trial and on the independence of judges of recent legislative changes and proposals, in particular the law on prosecution of January 2016 and the draft act on the National Council of the Judiciary, which seek a stronger role for the Government in judicial administration, particularly regarding the appointment of judges and disciplinary sanctions” and urged Poland to “[t]ake immediate steps to protect the full independence and impartiality of the judiciary, guarantee that it is free to operate without interference, and ensure transparent and impartial processes for appointments to the judiciary and security of tenure”.

branches (eight out of ten). This body has equal powers regarding judicial selections as the “Second Assembly” composed of fifteen judges. The First Assembly would have the possibility to veto a judicial appointment, a veto which could only be overridden if the fifteen judge members plus the First President of the Supreme Court and the President of the Supreme Administrative Court unanimously vote in favour of a candidate in a plenary session of the Judicial Council. Such a unanimous vote would be particularly difficult to achieve in practice, thus conferring a decisive role on the legislative and executive powers, which would be able to *de facto* control and block judicial appointment processes. This strong influence of the legislative and executive in this field would be in contradiction to international and regional standards and good practices. It is essential for the maintenance of the independence of the judiciary that the appointment of judges is conducted in an independent manner that is not subject to interference by the legislature and/or the executive.

14. Finally, Article 5 of the Draft Act provides that the mandate of the fifteen judges currently sitting on the Judicial Council should be terminated 30 days after the entry into force of the Draft Act. This automatic termination based only on changes to legislation would directly interfere with the guarantees of independence enjoyed by this duly constituted constitutional body. Such a provision would also be in violation of Article 6 par 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, since the judge members to the Judicial Council would not be able to challenge the termination of their mandates before an ordinary tribunal or other body exercising judicial powers. At the same time, the OSCE/ODIHR welcomes the fact that the provisions involving a drastic reduction of the remuneration of certain retired judges have been removed from the new version of the Draft Act of March 2017.
15. **In light of the potentially negative impact that the Draft Act, if adopted, would have on the independence of the judiciary in Poland, the OSCE/ODIHR recommends that the Draft Act be reconsidered in its entirety and that the legal drafters not pursue its adoption.** In any case, the Draft Act should be subject to further inclusive, extensive and effective consultations in the Parliament. The OSCE/ODIHR remains at the disposal of the Polish authorities for any further assistance that they may require in this and other legal reform initiatives.

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards and OSCE Commitments on the Independence of the Judiciary and Judicial Self-Governing Bodies

16. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.⁴ This principle is also crucial to upholding other international human rights standards.⁵ More specifically, the independence of the judiciary is a prerequisite to the broader guarantee of every

⁴ See UN Human Rights Council, *Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers*, A/HRC/29/L.11, 30 June 2015, <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/L.11>, which stresses “the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards”.

⁵ See e.g., *OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems*, 6 December 2005, <<http://www.osce.org/mc/17347?download=true>>.

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

person's right to a fair trial, i.e. to a fair and public hearing by a competent, independent and impartial tribunal and by an accountable judiciary established by law. At the international level, the independence of the judiciary is enshrined in key international instruments, including Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights⁶ (hereinafter "the ICCPR"). The UN Basic Principles on the Independence of the Judiciary (1985)⁷ emphasize that the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. The right to a fair trial is elaborated further in General Comment No. 32 of the UN Human Rights Committee on Article 14 of the ICCPR which states that "States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them".⁸

17. At the European level, Poland is also bound by the European Convention for the Protection of Human Rights and Fundamental Freedoms⁹ (hereinafter "the ECHR"), particularly its Article 6 which provides that everyone is entitled to a fair and public hearing "[...] by an independent and impartial tribunal established by law". In relation to judicial appointments specifically, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*¹⁰ expressly states that "where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary [...] should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice". As to the composition of Councils of the Judiciary or similar independent self-governing judicial bodies, the same Recommendation states that "[n]ot less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary". The Preliminary Opinion will also make reference to the opinions of the Consultative Council of European Judges (CCJE),¹¹ an advisory body of the Council of Europe on issues related

⁶ UN International Covenant on Civil and Political Rights (hereinafter "ICCPR"), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Poland ratified the ICCPR on 18 March 1977.

⁷ *UN Basic Principles on the Independence of the Judiciary*, endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>>. Principle 10 emphasises the need for safeguards against improper motives to be taken into account in judicial appointments.

⁸ UN Human Rights Committee, *General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial*, 23 August 2007,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en>.

⁹ The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), signed on 4 November 1950, entered into force on 3 September 1953. The Republic of Poland ratified the ECHR on 19 January 1993.

¹⁰ Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies,

<[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2010\)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true)>.

¹¹ Available at <http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp>, particularly Consultative Council of European Judges (CCJE), *Opinion No. 10 (2007) on the Council for the Judiciary at the Service of Society*, 23 November 2007, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2007\)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true)>. See also CCJE, *Opinion No. 1 (2001) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges*, 23 November 2001, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2001\)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2001)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true)>; the *Magna Carta of Judges*, 17 November 2010, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE-MC\(2010\)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=F](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE-MC(2010)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=F)

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

to the independence, impartiality and competence of judges, and to the opinions and reports of the European Commission for Democracy through Law (hereinafter “Venice Commission”).¹² As a Member State of the European Union (EU), Poland is also held to respect the main values upon which the EU is based, including the rule of law, as stated in Article 2 of the Treaty on European Union. Article 47 of the EU Charter of Fundamental Rights, which is binding on Poland, reflects the ECHR’s fair trial requirements pertaining to “an independent and impartial tribunal previously established by law”.

18. OSCE participating States have also committed to ensure “the independence of judges and the impartial operation of the public judicial service” as one of the elements of justice “which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings” (1990 Copenhagen Document).¹³ In the 1991 Moscow Document,¹⁴ participating States further committed to “respect the international standards that relate to the independence of judges [...] and the impartial operation of the public judicial service” (par 19.1) and to “ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice” (par 19.2). Moreover, in its *Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008), the Ministerial Council also called upon OSCE participating States “to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation, administration and judiciary”, as a key element of strengthening the rule of law in the OSCE area.¹⁵
19. Other useful reference documents elaborated in various international and regional fora contain more practical guidance to help ensure the independence of the judiciary, particularly in relation to self-governing judicial bodies and the appointment of judges, including, among others:
 - the Bangalore Principles of Judicial Conduct (2002), endorsed by the UN Economic and Social Council in its resolution 2006/23;¹⁶
 - the reports of the UN Special Rapporteur on the Independence of Judges and Lawyers;¹⁷
 - the reports of the European Network of Councils for the Judiciary (ENCJ);¹⁸

[DC864&direct=true](#)>; and *Opinion No. 18 (2015) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy*, 16 October 2015, [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2015\)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2015)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true).

¹² Particularly European Commission for Democracy through Law (Venice Commission), *Report on Judicial Appointments (2007)*, CDL-AD(2007)028-e, adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e); and *Report on the Independence of the Judicial System – Part I: The Independence of Judges (2010)*, CDL-AD(2010)004, adopted by the Venice Commission at its 82th Plenary Session (Venice, 12-13 March 2010), [http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)004.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx).

¹³ OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (Copenhagen, 5 June -29 July 1990), pars 5 and 5.12, <http://www.osce.org/fr/odhr/elections/14304>.

¹⁴ OSCE, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* (Moscow, 10 September-4 October 1991), <http://www.osce.org/fr/odhr/elections/14310>.

¹⁵ OSCE, *Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area*, Helsinki, 4 – 5 December 2008, <http://www.osce.org/mc/35494>.

¹⁶ *Bangalore Principles of Judicial Conduct*, adopted by the Judicial Group on Strengthening Judicial Integrity which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judge from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in its resolution 2006/23 of 27 July 2006, http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

¹⁷ Available at <http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>.

¹⁸ Available at <https://www.ency.eu/>.

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

- the European Charter on the Statute for Judges (1998);¹⁹ and
- the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010)²⁰ and the Opinions of the OSCE/ODIHR dealing with issues pertaining to the independence of the judiciary.²¹

2. General Comments

20. The Judicial Council, as well as its role and composition, are set out in Articles 186 and 187 of the Constitution of the Republic of Poland. It is mandated by the Constitution to “safeguard the independence of courts and judges” (Article 186 par 1 of the Constitution). Pursuant to Article 187 of the Constitution, the Judicial Council is composed of 25 members, including “15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts”, the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic. Four additional members are chosen by the *Sejm* (lower house of the Parliament) from among its Deputies and two other members are chosen by the Senate (upper house of the Parliament) from among its Senators. The term of office of the members of the Judicial Council shall be four years (Article 187 par 3 of the Constitution). Article 187 par 4 further specifies that “[t]he 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”. Such rules are currently laid out in the 2011 Act on the National Council of the Judiciary (hereinafter “the 2011 Act”). Article 3 of the 2011 Act lists the competencies of the Judicial Council which include key functions pertaining to the selection and career of judges, professional ethics, discipline, professional development, and giving opinions on draft legislation and matters concerning the judiciary, among others.
21. The principal changes introduced by the Draft Act to the 2011 Act relate to the selection methods for judge members of the Judicial Council (Articles 10-14 of the 2011 Act), the structure and decision-making of the Judicial Council (Articles 15-17, 21 and 22 of the 2011 Act), and the procedure for selecting judges (Articles 31-37 of the 2011 Act). The transitional provisions of the Draft Act also provide for the termination of the mandate of the 15 judges who are currently members of the Judicial Council thirty days after the entry into force of the Draft Act i.e., 14 days after its publication (Articles 5 and 8 of the Draft Act); the appointment of their successors should occur within 30 days from the termination of their mandate (Article 6 par 1 of the Draft Act), and be carried out in accordance with the new procedure and modalities laid out in the Draft Act.
22. As a consequence of these modifications, the Draft Act also introduces amendments to other acts, namely the 1997 Act on the Organisation of Military Courts, the 2002 Act on the Organisation of Administrative Courts, and the 2002 Act on the Supreme Court. Essentially, these pieces of legislation are amended to remove relevant powers

¹⁹ *European Charter on the Statute for Judges* (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe [DAJ/DOC (98)23], <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1766485&direct=true>>.

²⁰ The *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010) were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence, <<http://www.osce.org/odihr/kyivrec>>.

²¹ Available at <<http://www.legislationline.org/search/runSearch/1/type/2/topic/9>>.

pertaining to the election/selection of judges to the Judicial Council from the prerogative of the general assemblies of military court judges, of judges of the provincial administrative courts and of Supreme Court Judges. The new version of the Draft Act dated 22 February 2017 also introduces changes to the 2001 Act on the Organisation of Common Courts and to the 2002 Act on the Supreme Court with respect to the remuneration of retired judges; however, these provisions have been removed in the version of March 2017 (see Sub-Section 6.1 *infra*).

3. The Appointment and Terms of Office of Judge Members of the Judicial Council

3.1. The Modalities of Appointing Judge Members of the Judicial Council

23. The current Articles 11 to 13 of the 2011 Act specify the selection methods for the fifteen judges appointed to sit on the Judicial Council from among the judges of the Supreme Court, common courts, administrative courts and military courts, as required by Article 187 of the Constitution. Pursuant to Article 11 of the 2011 Act, these fifteen members are elected by different assemblies of judges: of the Supreme Court (two members); of the Supreme Administrative Court based on candidates proposed by the general assembly of judges of the provincial administrative courts²² (two members); of representatives of assemblies of judges of courts of appeal (two members); of representatives of general meetings of circuit courts' judges (eight members); and of judges of military courts (one member). This ensures a relatively wide representation of the judiciary as a whole, and at various levels, although not at the district court level (see also par 34 *infra*).
24. Article 1 pars 1-3 of the Draft Act proposes to replace the existing selection methods with a procedure whereby the fifteen judges sitting on the Judicial Council will be chosen by the *Sejm*. The Marshal of the *Sejm* is to officially publish vacancy notifications for judges to be appointed to the Judicial Council and shall receive nominations for candidates from the Presidium of the *Sejm* or at least 50 deputies of the *Sejm* (new Article 11 par 2 of the 2011 Act). Judges' associations may also present their recommendations concerning the proposed candidates to the Marshal of the *Sejm* (new Article 11 par 3). As per a new Article 12 par 2 of the 2011 Act, the Marshal then presents to the *Sejm* a pool of candidates based on the nominations received from the Presidium and deputies in accordance with the new Article 11 par 2.
25. According to the new provisions proposed by the Draft Act, the judiciary would no longer have a decisive role in the appointment of judges to the Judicial Council; rather, even if under the new system judges' associations may present recommendations on the proposed candidates, the relevant decisions on whom to appoint would be taken by the legislature from among candidates chosen by the legislature. Moreover, while new Article 11 par 3 now says that judges' associations may make recommendations on candidates for membership on the Council, it is not clear whether this means that they may make proposals of their own, or whether they shall simply comment on the candidates proposed by the Presidium of the *Sejm* or 50 members of the *Sejm* according to new Article 11 par 2. In case the judges' associations may propose their own

²² Article 11 par 2 of the 2011 Act read together with Article 24 par 4 (6) of the 2002 Act on the Organisation of Administrative Courts.

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

- candidates, then these proposals would presumably not be binding on the Marshal of the *Sejm*, as he/she, under the new Article 12 par 2 of the 2011 Act, only presents candidates to the *Sejm* from the pool of candidates exclusively nominated by the *Sejm* under Article 11 par 2.
26. In principle, judicial self-governing bodies, such as judicial councils, are crucial to support and guarantee the independence of the judiciary in a given country, and as such should themselves be independent and impartial.²³ As is the case in Poland (see par 20 *supra*), such councils are generally in charge of key administrative issues such as judicial appointments and disciplinary proceedings, but also represent the interests of the judiciary as a whole, in particular *vis-à-vis* the executive and legislative powers. Judicial self-governing bodies should, however, not be composed completely by members of the judiciary, so as to prevent self-interest, self-protection, cronyism and also the perceptions of corporatism²⁴ (see also comments in par 36 *infra* regarding the pluralistic composition of judicial councils). In that respect, the composition of the Judicial Council as envisaged in Article 187 of the Constitution and in the 2011 Act ensures a mixed membership with representatives of the judiciary and non-judicial members.
27. At the same time, the approach of the Draft Act, which places the procedure of appointing members of the Judicial Council primarily in the hands of the other two powers, namely the executive and/or the legislature, increases the influence of these powers over the judiciary, and thereby threatens its independence as guaranteed by Article 173 of the Constitution. It is also worth highlighting that, in its latest Concluding Observations on Poland from November 2016, the UN Human Rights Committee expressed some concerns regarding the draft act on the National Council of the Judiciary, and potential increased government interference in judicial administration.²⁵
28. Based on the above considerations, it is noted that the proposed selection method would likewise not be in line with recommendations on judicial independence developed under the auspices of the OSCE and the Council of Europe, which advise for judge members of judicial councils to be chosen by the judiciary.²⁶
29. The principle of having judges selected by their peers exists primarily to prevent any manipulation or undue pressure from the executive or legislative branches, and to ensure that judicial councils are free from any subordination to political party considerations, so as to be able to perform their roles of safeguarding the independence

²³ See *op. cit.* footnote 16, Preamble (2002 Bangalore Principles of Judicial Conduct), which states that the Bangalore Principles “presuppose that judges are accountable for their conduct to *appropriate institutions* established to maintain judicial standards *which are themselves independent and impartial*”.

²⁴ See *op. cit.* footnote 20, par 2 (2010 ODIHR Kyiv Recommendations on Judicial Independence); and *op. cit.* footnote 11, par 16 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

²⁵ *Op. cit.* footnote 3, pars 33-34 (UN Human Rights Committee Concluding Observations on the 7th Periodic Report of Poland dated 23 November 2016).

²⁶ See e.g., *op. cit.* footnote 20, par 7 (2010 ODIHR Kyiv Recommendations on Judicial Independence), which states that “[w]here a Judicial Council is established, its judge members shall be elected by their peers”; *op. cit.* footnote 10, par 27 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities), which states that “[n]ot less than half the members of such councils should be judges chosen by their peers”; *op. cit.* footnote 19, par 1.3 (1998 European Charter on the Statute for Judges), which states that “[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary”; *op. cit.* footnote 11, pars 17-18 and 25 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society), where it is stated that “[w]hen there is a mixed composition (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers”. See also *op. cit.* footnote 12, par 25 (2007 Venice Commission’s Report on Judicial Appointments); and par 50 (2010 Venice Commission’s Report on the Independence of the Judicial System), which both state that “[a] substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself”.

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

of the judiciary and of judges.²⁷ Putting in place legal/formal safeguards to protect and increase judicial independence also tends to improve the public perception that the judiciary is independent.²⁸ The CCJE has expressly stated that it “does not advocate [for] systems that involve political authorities such as the Parliament or the executive at any stage of the selection process [of judge members of Judicial Councils]”.²⁹ While a variety of models for appointing members of judicial councils exist across the OSCE region, the great majority of EU Member States thus provide for judge members of judicial self-governing bodies to be either elected by their peers or appointed or proposed by their peers, a model that also tends to be followed in so-called new democracies.³⁰ In any case, whatever the system selected, the context and political culture in a given country are decisive in assessing whether the option chosen carries with it a risk of jeopardizing the independence of the judiciary, for instance by increasing the dependence of existing judicial self-governing bodies on the legislature and the executive and potentially politicising key functions such as judicial appointments (see also comments in Sub-Section 4.2 *infra* regarding the appointment of judges).³¹

30. It is noted that the Explanatory Statement to the Draft Act refers to Spain as an example where the parliament elects the judge members of the relevant judicial self-governing body. It must be highlighted, however, that these members are selected by the Parliament from a list of candidates who have received the support of a judges’ association or of at least twenty-five judges, which is then communicated to the Parliament by the General Council of the Judiciary itself.³² The Chamber of Deputies and the Senate of Spain each proceed with the appointment of six judge members exclusively based on this list, which contrasts with the selection modalities proposed by the Draft Act where any judge may be nominated by the Presidium or by 50 deputies of the *Sejm* and where the judiciary does not nominate any candidates and judges’ associations are only able to make non-binding recommendations (see par 25 *supra*).

²⁷ See e.g., *ibid.* pars 18-19 and 31 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); and CCJE and Consultative Council of European Prosecutors (CCPE), *Report on Challenges for Judicial Independence and Impartiality in the Member States of the Council of Europe*, 24 March 2016, par 12, <[http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf\(2016\)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.asp](http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf(2016)3rev%20Challenges%20for%20judicial%20independence%20and%20impartiality.asp)>.

²⁸ *ibid.* pars 23 and 219 (2016 CCJE-CCPE Report on Challenges for Judicial Independence and Impartiality in the Council of Europe); and ENCJ, *Working Paper on the Independence of Judges: Judicial Perceptions and Formal Safeguards* (January 2016), page 24, <https://www.rechtspraak.nl/SiteCollectionDocuments/Paper-independence-of-judges-160111.pdf>.

²⁹ *Op. cit.* footnote 11, par 31 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

³⁰ See e.g., within the European Union, 22 member states have judicial councils, 18 of which have judicial councils where 50% or more of their judge members are elected by their peers or appointed or proposed by their peers (see page 38 of the 2016 EU Justice Scoreboard, available at <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf>). See also, for instance, Article 147 of the Constitution of the Republic of Albania (as of 2016) which provides that “[t]he High Judicial Council shall be composed of 11 members, six of which are elected by the judges of all levels of the judicial power and five members are elected by the Assembly among jurists who are non-judges”; Article 174 of the Constitution of the Republic of Armenia which provides that out of ten, five of the members of the Supreme Judicial Council shall be elected by the General Assembly of Judges from among judges having at least 10 years of judge experience; Article 86 par 2 of the Constitution of Georgia, which states that “[m]ore than half of the High Council of Justice of Georgia shall be composed of the members elected by a self-government body of judges of the courts of Georgia of general jurisdiction. Chairperson of the Supreme Court of Georgia shall chair the High Council of Justice of Georgia”; Article 131 par 9 of the Constitution of Ukraine (as of 2016), which states that “the High Council of Justice consists of twenty-one members: ten of them are elected by the Congress of Judges of Ukraine among judges or retired judges; two of them are appointed by the President of Ukraine; two of them are elected by the Verkhovna Rada of Ukraine; two of them are elected by the Congress of Advocates of Ukraine; two of them are elected by the All-Ukrainian Conference of Public Prosecutors; two of them are elected by the Congress of Representatives of Law Schools and Law Academic Institutions” – available at <http://www.legislationline.org/documents/section/constitutions>. See also the Report and replies to questionnaires on Councils of the Judiciary in the Member States of the Council of Europe (2007), <http://www.coe.int/t/dghl/cooperation/ccje/textes/Travaux10_en.asp>.

³¹ See e.g., *op. cit.* footnote 27, par 311 (2016 CCJE-CCPE Report on Challenges for Judicial Independence and Impartiality in the Council of Europe); and *op. cit.* footnote 12, pars 31-32 (2007 Venice Commission’s Report on Judicial Appointments).

³² See Articles 572 to 578 of the Organic Law 6/1985 of Spain on the Judiciary (1 July 1985, as of October 2015), <http://legislationline.org/download/action/download/id/6791/file/Spain_law_judiciary_1985_am2016_en.pdf>.

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

31. Moreover, the Draft Act does not specify the modalities for ensuring that judges who are members of the Judicial Council are representative of the whole judiciary at all levels and of all its branches, and hence does not seem to be consistent with Article 187 of the Constitution in that respect. In contrast, the existing Article 11 of the 2011 Act allocates a certain number of judge representatives per court instance level and branch of the judiciary i.e., judges of the Supreme Court, courts of appeal, circuit courts, administrative courts and military courts, in line with Article 187 of the Constitution (see par 23 *supra*). This is somewhat limiting when compared to OSCE and Council of Europe recommendations, which require that selection methods be designed to guarantee the widest representation of the judiciary at all levels, including *first level courts*.³³ More generally, the Draft Act does not specify the criteria and required qualifications of the said candidates.
32. The Explanatory Statement to the Draft Act indicates that the proposed changes to the selection method for judge members to the Council aim to “fulfil the principle of representation of all professional groups of judges” in the Judicial Council and to “simplify the process”. The first objective is unlikely to be achieved by the proposed selection scheme, which does not specify the criteria and modalities to ensure representation of the judiciary at all levels, and could thus in fact result in a less representative Judicial Council (see also the comment in par 34 *infra* regarding judges from first instance courts). At the same time, while the need for simplifying such procedures may seem desirable, this should not come at the expense of jeopardizing the independence of a constitutional body mandated to safeguard the independence of courts and judges by conferring a decisive influence over such appointments to the legislature.
33. Based on the foregoing, **it is recommended that Articles 1(1) – 1(3) of the Draft Act be reconsidered and that judicial members of the Judicial Council continue to be chosen by the judiciary.**
34. At the same time, in addition to the key issues raised in this Preliminary Opinion’s Executive Summary, the legal drafters may consider introducing new provisions to further enhance the 2011 Act’s compliance with international and regional standards and recommendations on the independence of the judiciary. This could involve, among others:
- introducing requirements to ensure greater gender balance and diversity in the composition of the Judicial Council,³⁴ in light of the current composition of the

³³ See e.g., *op. cit.* footnote 20, par 7 (2010 ODIHR Kyiv Recommendations on Judicial Independence), which states that “[the] judge members shall [...] represent the judiciary at large, including judges from first level courts”; *op. cit.* footnote 10, par 27 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities), which states that “[judge members of judicial councils should be chosen] from all levels of the judiciary and with respect for pluralism inside the judiciary”; *op. cit.* footnote 19, par 1.3 (1998 European Charter on the Statute for Judges), which states that “the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary”; and *op. cit.* footnote 11, pars 27-30 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

³⁴ *ibid.* par 24 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society), which states that “the composition of the Council for the Judiciary should reflect as far as possible the diversity in the society”. This could be drafted along the lines of the recommendations made by the OSCE/ODIHR and the Venice Commission regarding proposed measures to ensure greater gender balance in the composition of the Disciplinary Commission under the Council of Judges of the Kyrgyz Republic (see Sub-Section 5.1 of the *OSCE/ODIHR-Venice Commission Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, 16 June 2014, <<http://www.legislationline.org/documents/id/19099>>). See also UN Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined 7th and 8th Periodic Reports of Poland*, 14 November 2014, pars 28-29, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/POL/CO/7-8&Lang=En>, which notes the low representation of women in decision-making positions in Poland.

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

Judicial Council which accounts for only six female members out of twenty-five³⁵ whereas there is a reported majority of female judges at the first and second instance court levels;³⁶

- amending the current Article 11 of the 2011 Act to ensure that judges from first instance courts (district courts) are also represented among the judge members of the Judicial Council;³⁷
 - ensuring that non-judicial members are elected by a qualified majority of the respective chambers of the Parliament to ensure significant support or alternatively, as done in some other countries, by providing in the legislation that representatives of the Parliament should be equally representative of the majority and the opposition;³⁸
 - considering involving external autonomous entities/bodies (e.g., universities, non-governmental organizations, bar associations, etc.) in the process of nominating candidates to become non-judicial members in the Judicial Council;³⁹ and
 - expressly providing for the possibility for civil society representatives to monitor the selection and appointment processes of members of the Judicial Council, to ensure greater transparency (see also comments in par 52 *infra* on the monitoring of Judicial Council's work and functioning in general by the media and civil society).⁴⁰
35. More generally, to further guarantee its independence and impartiality, the Judicial Council should also manage its own budget and have adequate human and financial resources to operate independently and autonomously.⁴¹
36. Finally, and although this would require amending the Constitution (which would go beyond the scope of this Opinion), it must be highlighted that regional bodies have questioned the practice of having members of parliament or of the executive sit on judicial councils at all.⁴² As mentioned in par 29 *supra*, such recommendations aim to

³⁵ See <<http://www.krs.pl/pl/o-radzie/sklad-i-organizacja>>.

³⁶ See European Commission for the Efficiency of Justice (CEPEJ), *Report on European Judicial Systems – Efficiency and Quality of Justice*, CEPEJ Studies No. 23, Edition 2016 (2014 data), page 101, <<http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf>>.

³⁷ Although there is presently one representative of the district courts in the composition of the Judicial Council, it would be better to render this a usual practice to ensure greater diversity and representation in the Judicial Council; see *op. cit.* footnote 20, par 7 (2010 ODIHR Kyiv Recommendations on Judicial Independence), which states that “[the] judge members shall [...] represent the judiciary at large, including judges from first level courts”.

³⁸ It is noted that, currently, two out of four deputies of the *Sejm* belong to the parliamentary majority, as do the two representatives of the Senate to the Judicial Council; see <<http://www.krs.pl/pl/o-radzie/sklad-i-organizacja>>. Pursuant to Article 26-31 of the Rules of Procedure of the *Sejm* (available at <<http://www.sejm.gov.pl/prawo/regulamin/kon7.htm>>), candidates may be proposed by the Marshal of the *Sejm* or at least 35 MPs; the representatives of the *Sejm* to the Judicial Council are chosen by an absolute majority. The two representatives of the Senate to the Judicial Council are also elected by an absolute majority with at least half of all Senators being present, among candidates proposed by at least seven Senators (see Articles 92-95 of the Rules of Procedure of the Senate, available at <<https://www.senat.gov.pl/o-senacie/senat-wspolczesny/wybrane-akty-prawne/regulamin-senatu/>>). See *op. cit.* footnote 11, par 32 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); and *op. cit.* footnote 12, par 32 (2007 Venice Commission's Report on Judicial Appointments). See also, for instance, Article 124 of the Constitution of Croatia which states that “[t]he National Judicial Council shall consist of eleven members, of whom seven shall be judges, two university professors of law and two members of Parliament, one of whom shall be from ranks of the opposition”, <<http://www.legislationline.org/documents/section/constitutions/country/37>>.

³⁹ See e.g., Venice Commission, *Final Opinion on the Revised Draft Constitutional Amendments to the Judiciary in Albania*, CDL-AD(2016)009, 14 March 2016, pars 15-16, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)009-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)009-e)>.

⁴⁰ See e.g., OSCE/ODIHR-OSCE Mission to Serbia, *Report on Monitoring of Peer Elections for the High Judicial Council and State Prosecutors' Council of the Republic of Serbia*, 23 May 2016, pages 21 and 35, <<http://www.osce.org/odihhr/242346>>.

⁴¹ See e.g., *op. cit.* footnote 11, pars 37-40 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); and *op. cit.* footnote 17, pars 93 and 106 (2014 Report of the Special Rapporteur on the independence of judges and lawyers).

⁴² *ibid.* pars 23 and 32 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); par 93 (2014 Report of the Special Rapporteur on the independence of judges and lawyers); and *op. cit.* footnote 12, par 32 (2007 Venice Commission's Report on Judicial Appointments).

avoid undue influence of the other branches of power on the functioning and decision-making of a body which is the guarantor of the independence of the judiciary. As a good practice, consideration could also be given to ensuring that apart from a substantial number of judge members, a judicial council is also composed of members of other legal professions, academic and/or civil society representatives,⁴³ an option which could be considered should the Constitution be amended in the future.

3.2. The “Joint” Terms of Office of Judge Members of the Judicial Council

37. New Article 10 par 1 of the 2011 Act provides that “[j]udges are appointed for 4-year *joint* terms of office”, essentially meaning that all terms of office shall start and end at the same time. At the moment, judge members of the Judicial Council hold “individual” terms of office, i.e., any new judge member is appointed for a full four year term. The new proposal would imply that when a post becomes vacant, any newly appointed judge will be appointed to the Judicial Council only for the time remaining from his or her predecessor’s terms of office, instead of a full four year term.
38. This practice may jeopardize the continuity of the Council’s activities, including in the realm of judicial appointments, since the attendance quorum requires at least half of the Judicial Council’s composition i.e., thirteen members, to be present in order for its resolutions to be valid (existing Article 21 par 1). In that respect, the CCJE has recommended that, in order to guarantee the continuity of judicial councils’ activities, their members should not all be replaced at the same time.⁴⁴
39. **The legal drafters should therefore reconsider the introduction of “joint terms of office” for judge members. Furthermore, it may be advisable to clarify in the 2011 Act that judge members shall hold individual term of office, to avoid ambiguity. More generally, to guarantee the uninterrupted functioning of the Judicial Council, the 2011 Act should provide that Judicial Council members should remain in office until their successors take office.**⁴⁵

4. The New Structure of the Judicial Council and Modifications of the Procedure for the Selection of Judges and Trainee Judges

4.1. The New Structure of the Judicial Council

40. Article 1 pars 4 to 8 of the Draft Act introduces a new organizational structure of the Judicial Council. More specifically, it establishes two new bodies: a First Assembly composed of ten members (the *ex officio* members of the Judicial Council as well as the deputies of the *Sejm* and Senators, i.e., the members designated according to Article 187 par 1 (1) and (3) of the Constitution); and a Second Assembly, which would consist of

⁴³ See e.g., *op. cit.* footnote 20, pars 7-9 (2010 ODIHR Kyiv Recommendations on Judicial Independence); *ibid.* pars 22-23, 32 and 45 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); Venice Commission, *Compilation of Venice Commission Opinions and Reports concerning Courts and Judges*, CDL-PI(2015)001, 5 March 2015, Section 4.2.4 Lay members : importance of having the civil society represented, pages 78-80, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)001-e)>; and European Network of Councils of the Judiciary (ENCJ), *Report on Council for the Judiciary 2010-2011*, par 2.2, <https://www.encj.eu/index.php?option=com_content&view=category&layout=blog&id=19&Itemid=239&lang=en>.

⁴⁴ See e.g., *ibid.* par 35 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

⁴⁵ See, for instance, as a matter of comparison, the recommendations made by the Venice Commission to ensure the continuity of membership of Constitutional Courts (Venice Commission, *Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice*, CDL-PI(2015)002, 1 July 2015, Sub-Section 4.4.3, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)002-e)>).

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

the fifteen judge members of the Judicial Council. Pursuant to a new Article 21 a, the First and Second Assemblies would exercise the Judicial Council's competences under Article 3 par 1 (1) of the 2011 Act, i.e. the "review and assessment of candidates for the post of judges of the Supreme Court and common courts, administrative and military courts and for the post of trainee judges".

41. It must be reiterated that the key purpose of judicial self-governing bodies, particularly judicial councils or similar independent bodies, is to safeguard the independence of the judiciary and of individual judges.⁴⁶ To serve this purpose, judicial councils must themselves enjoy sufficient independence from the other branches of power in their work and decision-making.⁴⁷ To ensure such independence, international guidelines specify that no less than half of the members of judicial councils should be judges chosen by the judiciary itself,⁴⁸ and advise against the membership of active parliamentarians and ministers in such councils (see par 36 *supra*). The European Court of Human Rights has held, in relation to disciplinary proceedings before a judicial council, that "where at least half of the membership of a tribunal is composed of judges, including the chairman with a casting vote, this will be a strong indicator of impartiality".⁴⁹
42. The proposed division of the Judicial Council into two Assemblies, one of which is mainly composed of representatives of the executive and the legislative branches, may undermine the collegial and effective work of the Council and deepen divisions between its members. Moreover, it could potentially delay the selection of judges (see also par 49 *infra*) and ultimately undermine the Council's ability to fulfil its constitutional mandate. Accordingly, **it is recommended that Articles 1(4) - 1(8) of the Draft Act be reconsidered in their entirety.**

4.2. The Modifications of the Procedure for the Appointment of Judges and Trainee Judges

43. Article 1 pars 9 to 14 of the Draft Act changes the current procedure for the review and assessment of candidates for the posts of judges and trainee judges. Under the 2011 Act,

⁴⁶ See e.g., *op. cit.* footnote 10, par 26 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

⁴⁷ See e.g., *op. cit.* footnote 20, par 7 (2010 ODIHR Kyiv Recommendations on Judicial Independence), which states that "[t]he work of the Judicial Council shall not be dominated by representatives of the executive and legislative branch"; *ibid.* par 46 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities), which states that "[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers"; *op. cit.* footnote 19, par 1.3 (1998 European Charter on the Statute for Judges), which states that "the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary"; see also *op. cit.* footnote 11, par 19 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

⁴⁸ See e.g., *ibid.* par 7 (2010 ODIHR Kyiv Recommendations on Judicial Independence), which state that "[a]part from a substantial number of judicial members elected by the judges, the Judicial Council should comprise law professors and preferably a member of the bar, to promote greater inclusiveness and transparency"; par 27 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities), which states that "[n]ot less than half the members of such councils should be judges chosen by their peers"; par 1.3 (1998 European Charter on the Statute for Judges), which states that "[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary"; pars 17-18 and 25 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society), where it is stated that "[w]hen there is a mixed composition (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers"; *op. cit.* footnote 12, par 25 (2007 Venice Commission's Report on Judicial Appointments) and par 50 (2010 Venice Commission's Report on the Independence of the Judicial System), which both state that "[a] substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself"; *op. cit.* footnote 43, par 2.1 (ENCJ Report on Council for the Judiciary 2010-2011).

⁴⁹ European Court of Human Rights, *Oleksandr Volkov v. Ukraine*, judgment of 9 January 2013 (Application no. 21722/11), par 109, <<http://hudoc.echr.coe.int/eng?i=001-115871>>.

the Chairperson of the Judicial Council appoints a team of three to five persons from among the Council's members to prepare an individual case for the Council's meeting (Article 31 of the 2011 Act); subsequently the Council votes in plenary on the resolution to propose selected candidate for appointment (Article 37 of the 2011 Act). Article 1 par 10 of the Draft Act proposes that instead of the current plenary meeting of the Council, this competence should be exercised by the two above-mentioned Assemblies separately. If the Assemblies issue divergent opinions on a candidate, the Assembly that issued a positive opinion may refer the case to the plenary meeting of the Council. In that situation, a positive evaluation of a candidate would require the votes of seventeen members (the fifteen judge members plus the presidents of the Supreme and Supreme Administrative Courts, as expressly stated in new Article 31b par 2 of the 2011 Act).

44. The Explanatory Statement to the Draft Act explains that this new appointment procedure is justified to give a greater say to the executive and legislative powers which enjoy "democratic legitimacy" due to the fact that they are directly elected by the people. However, legitimacy may be derived in different ways, and not only from elections. Generally, the very fact that the judiciary is a part of a state's legitimate constitutional framework provides formal legitimacy not only for the judiciary as a whole but for each individual judge.⁵⁰ At the same time, public confidence in and respect for the judiciary guarantee the effectiveness of a judicial system, which requires that judges and the judiciary as a whole maintain legitimacy through work of the highest possible quality which respects high ethical standards (functional legitimacy) and by being accountable to the public.⁵¹
45. Judges are accountable to the public in different ways. First, they are held to account for their decisions through the appeals process ("judicial accountability"); second, they must work in a transparent fashion by having open hearings and by giving reasoned judgments which are made available to the public ("explanatory accountability"); and third, if a judge has engaged in improper actions he/she must be held accountable, for instance through the application of disciplinary procedures and, if appropriate, criminal law ("punitive accountability").⁵² Hence, although of a different nature, the judiciary is an equally legitimate and just as necessary part of the democratic state as the other two component powers,⁵³ and directly accountable to the people.
46. It is noted that the Explanatory Report to the Draft Act refers to the example of Germany, where judges of federal courts are chosen jointly by the competent Federal Minister and a committee for the selection of judges consisting of the competent *Länder* ministers and an equal number of members elected by the *Bundestag* (see Article 95 par 2 of the Basic Law for the Federal Republic of Germany).⁵⁴ At the same time, the CCJE has warned that, although a direct appointment of judges by an elected body may give the judiciary a certain direct democratic underpinning, such selection methods should be reconsidered if there is a risk that as a consequence, the appointment of judges would be subject to political considerations.⁵⁵

⁵⁰ *Op. cit.* footnote 11, par 44 (2015 CCJE Opinion No. 18 on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy).

⁵¹ *ibid.* pars 16-18.

⁵² *ibid.* pars 26-33.

⁵³ *ibid.* par 13.

⁵⁴ Available at <<http://legislationline.org/documents/section/constitutions/country/28>>.

⁵⁵ *Op. cit.* footnote 11, pars 19 and 33-35 (2001 CCJE Opinion No. 1 on the Standards Concerning the Independence of the Judiciary and the Irremovability of Judges).

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

47. Recommendations elaborated at the regional level emphasize that this may be avoided if the authorities in charge of the selection and career of judges are independent of the executive and legislative powers, e.g., if such decisions are made by independent judicial councils.⁵⁶ The aim of these arrangements is to ensure that judges are selected based on candidates' merits rather than based on political considerations.⁵⁷ Moreover, where legislation provides that the government and/or the legislative power shall take decisions concerning the selection and career of judges, CoE Recommendation CM/Rec(2010)12 provides that "an independent and competent authority drawn in substantial part from the judiciary [...] should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice".⁵⁸ This demonstrates that the judiciary should have a decisive role in judicial appointment procedures.
48. Against these standards, the Draft Act proposes a procedure whereby the First Assembly of the Judicial Council, a body mainly composed of representatives of the executive and the legislative branches, could veto the appointment of a judicial candidate who has been positively assessed by the Second Assembly, composed exclusively of the judge members. Any potential deadlocks created by such a veto could only be overcome by the unanimous vote of the fifteen judge members – who would be chosen by the legislature pursuant to the provisions of the Draft Act – plus the votes of the First President of the Supreme Court and of the President of the Supreme Administrative Court. Achieving such a unanimous vote in practice may be extremely difficult. Such a system would subject judicial appointments to the decisive influence of the legislative and executive powers, which account for eight out of ten members of the First Assembly. In addition, it would risk politicizing the process of appointing judges and could potentially subject judge members of the Judicial Council to considerable pressure, to the detriment of merit-based selection and the effective functioning of the Council overall.
49. Moreover, the new Articles 31a and 31b of the 2011 Act do not mention specific deadlines within which each of the two assemblies should render their opinions on a candidate, which could lead to potential delays in judicial appointments, or, in some cases, even indefinite postponement.
50. It is noted that the Draft Act also repeals Article 35 of the 2011 Act, which lists a number of criteria for the selection of judges,⁵⁹ without introducing similar selection

⁵⁶ See e.g., *op. cit.* footnote 10, par 46 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities), which states that "[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers"; *op. cit.* footnote 20, par 8 (2010 ODIHR Kyiv Recommendations on Judicial Independence), which states that "[t]he composition [of bodies deciding on judicial selection] shall ensure that political considerations do not prevail over the qualifications of a candidate for judicial office"; *op. cit.* footnote 19, par 1.3 (1998 European Charter on the Statute for Judges), which states that "[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary"; *op. cit.* footnote 11, par 48 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society), which stated that "[i]t is essential for the maintenance of the independence of the judiciary that the appointment and promotion of judges are independent and are not made by the legislature or the executive but are preferably made by the Council for the Judiciary"; and *op. cit.* footnote 12, pars 25 and 32 (2007 Venice Commission's Report on Judicial Appointments), which states that, "a judicial council should have a decisive influence on the appointment and promotion of judges" and that judicial councils should be insulated from politics.

⁵⁷ See *ibid.* par 51 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); par 44 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities); and par 8 (2010 ODIHR Kyiv Recommendations on Judicial Independence).

⁵⁸ *ibid.* par 47 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

⁵⁹ Article 35 par 2 of the 2011 Act states that "[w]hen determining the order of the candidates on the list the team relies, above all, on the assessment of the qualifications of the candidates, and, moreover, takes into account: (1) professional experience, opinions of the superiors, recommendations, publications and other documents attached to the registration card; (2) opinion from the board of a competent court and evaluation of a competent general assembly of judges".

criteria elsewhere. According to recommendations elaborated at the international level, the selection of judges should be based on objective, pre-established, and clearly defined criteria,⁶⁰ while ensuring that the composition of the judiciary reflects the composition of the population as a whole⁶¹ and is balanced in terms of gender.⁶² Also, the selection process should be transparent, and any refusal to appoint a judge should be reasoned, with the possibility for the unsuccessful candidate to challenge the respective decision.⁶³

51. In light of the above, **it is therefore recommended that Articles 1(9) – 1(14) of the Draft Act be reconsidered in their entirety.**
52. In any case, to increase the transparency of judicial appointment processes, and more generally of the work of the Judicial Council, the legal drafters could consider allowing the attendance of civil society and media representatives as monitors or observers during certain working sessions of the Judicial Council, as done in some OSCE participating States⁶⁴ (see also par 34 *supra*).

5. The Termination of the Mandate of Current Judge Members of the Judicial Council

53. Article 5 par 1 of the Draft Act provides that the mandate of the current judge members of the Judicial Council should be terminated 30 days after the entry into force of the Draft Act.
54. The early termination of the mandate of judges duly elected to a constitutional body, for no legitimate reason other than an amendment to relevant legislation, raises concerns with regard to the independence of the judiciary.
55. In this context, it is noted that Article 14 of the 2011 Act lists a number of limited circumstances in which the early termination of members of the Judicial Council is possible.⁶⁵ The list therein does not include amendments to relevant legislation. As

⁶⁰ See e.g., *op. cit.* footnote 8, par 19 (UN HRC General Comment No. 32 (2007)); *op. cit.* footnote 10, par 44 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities); *op. cit.* footnote 20, par 21 (2010 ODIHR Kyiv Recommendations on Judicial Independence); *op. cit.* footnote 19, pars 2.1 and 2.2 (1998 European Charter on the Statute for Judges); *op. cit.* footnote 11, pars 5-51 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

⁶¹ *ibid.* par 24 (2010 ODIHR Kyiv Recommendations on Judicial Independence).

⁶² See par 190 under Strategic Objective G.1: “Take measures to ensure women's equal access to and full participation in power structures and decision-making” of the Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), <<http://www.un.org/esa/gopher-data/conf/fwcw/off/a-20.en>>; *OSCE Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life*, 2 December 2009, par 1, <<http://www.osce.org/mc/40710?download=true>>; see also *op. cit.* footnote 17, par 81 (2011 Annual Report of the UN Special Rapporteur on the Independence of Judges and Lawyers).

⁶³ See *op. cit.* footnote 10, par 48 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities); *op. cit.* footnote 20, par 23 (2010 ODIHR Kyiv Recommendations on Judicial Independence); *op. cit.* footnote 11, pars 50-51 and 91-93 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society), and *op. cit.* footnote 11, pars 17-31 (2001 CCJE Opinion No. 1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges).

⁶⁴ See e.g., *ibid.* par 10 (2010 ODIHR Kyiv Recommendations on Judicial Independence), which states that “[p]ublic access to the deliberations of the Judicial Council and publication of its decisions shall be guaranteed in law and in practice”; UNODC, *Criminal Justice Assessment Toolkit – The Independence, Impartiality and Integrity of the Judiciary* (2006), page 11, <https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/2_Independence_Impartiality_Integrity_of_Judiciary.pdf [copy and paste weblink in the browser]>. See also OSCE/ODIHR, *Annotated Agenda of the 2016 Human Dimension Seminar on Promoting Effective and Integral Justice Systems: How to Ensure the Independence and Quality of the Judiciary*, 21-23 November 2016, <<http://www.osce.org/odihr/281336?download=true>>. For instance, in Georgia and Moldova, civil society organizations monitor national judicial council meetings.

⁶⁵ Pursuant to Article 14 par 1 of the 2011 Act, early termination is possible in the event of (1) death; (2) renunciation of the mandate; (3) expiry of the mandate of the Deputy or Senator; (4) appointment of the judge to another judicial post, except for the appointment of the judge of the district court to the post of the judge of the circuit court, the military judge of the garrison court to the post of the judge of the military circuit court or the judge of the voivodship administrative court to the post of the judge of the Supreme Administrative Court; (5) expiry or termination of the judge's service relationship; and (6) when the judge retires or is retired.

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

mentioned in pars 26, 29 and 41 *supra*, judicial councils constitute essential safeguards of the independence of the judiciary, and as such, their members should enjoy guarantees of independence,⁶⁶ and their constitutionally-protected tenure should not be subject to undue interference by the executive or legislative branches. Indeed, as noted by the CCJE, decisions of the executive or legislative powers which remove basic safeguards of judicial independence are unacceptable.⁶⁷ In principle, the removal of a member before the expiration of his or her mandate should be possible only for the reasons specified in the respective law, and Parliament should refrain from adopting measures which would have a direct and immediate effect on the composition of the Judicial Council.⁶⁸ Generally, the early termination of the mandates of judge members of judicial councils should be guided by the same safeguards and principles that apply to the removal from office of an ordinary judge.⁶⁹ These principles advise for clearly established and transparent procedure and safeguards, based on clear and objective criteria,⁷⁰ in order to exclude any risk of political influence on judges' early removal from office. This means that judge members' appointments should only be reconsidered if some breach of disciplinary rules or the criminal law by the individual judges sitting on the Council is clearly established, in accordance with proper disciplinary or judicial procedures.⁷¹

56. Moreover, Article 5 par 1 of the Draft Act also raises some concerns regarding the individual situation of judge members to the Council. In similar cases, the European Court of Human Rights has considered that office-holders/court executives have a right within the meaning of Article 6 par 1 of the ECHR to serve their terms of office until their mandates expire or come to an end.⁷² In cases where these office-holders/court executives' tenures were prematurely terminated due to the adoption of new legislation, the Court found this to be in violation of Article 6 of the ECHR, because the respective decision to terminate was not open to review by an ordinary tribunal or other body exercising judicial powers.⁷³ Should the adoption of the Draft Act lead to the automatic termination of the mandates of judge members to the Judicial Council, as contemplated by Article 5, it is not clear whether they would have the means to challenge such termination. Unless this is the case, Article 5 of the Draft Act would accordingly be in violation of Article 6 par 1 of the ECHR.
57. In light of the above, **it is recommended that Article 5 par 1 of the Draft Act be removed.**
58. Article 5 par 2 of the Draft Act similarly provides that the terms of office of the disciplinary prosecutors of common courts' judges and trainee judges as well as of

⁶⁶ See e.g., *op. cit.* footnote 11, par 36 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

⁶⁷ *Op. cit.* footnote 11, par 44 (2015 CCJE Opinion No. 18 on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy).

⁶⁸ See e.g., *ibid.* pars 43-45 (2015 CCJE Opinion No. 18 on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy); Venice Commission, *Opinion on the Seven Amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council, the competence of the Constitutional Court and Special Financial Zones*, CDL-AD(2014)026, 13 October 2014, par 77, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)026-e)>; and Venice Commission, *Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia*, CDL-AD(2013)007, 11 March 2013, pars 72-73, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)007-e)>.

⁶⁹ See e.g., CCJE, *Opinion No. 19 on the Role of Court Presidents*, 10 November 2016, pars 44-48, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2016\)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2016)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)>.

⁷⁰ *ibid.*

⁷¹ *Op. cit.* footnote 11, par 44 (2015 CCJE Opinion No. 18 on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy).

⁷² European Court of Human Rights, *Baka v. Hungary*, judgment of 23 June 2016 (Application no. 20261/12), pars 107-111, <<http://hudoc.echr.coe.int/eng?i=001-163113>>.

⁷³ *ibid.* pars 120-122.

military court's judges – who are appointed by the Judicial Council pursuant to Articles 3 par 2 (4) and 6 of the 2011 Act – shall expire within 30 days after the entry into force of the Draft Act. Again, this would constitute a direct interference of the legislative power in the decision-making of the Judicial Council, since such terminations would *de facto* annul the appointment decisions made by the existing Council. Accordingly, **Article 5 par 2 of the Draft Act should also be removed.**

6. Other Comments

6.1. Changes to the Remuneration of Certain Retired Judges (removed from the new version of the Draft Act of March 2017)

59. Article 3 of the Draft Act (February 2017 version) introduced changes to Article 100 of the existing 2002 Act on the Organisation of Common Courts, regarding the pension benefits of retired judges. A new sub-paragraph 2a of Article 100 would have provided for a decrease in benefits from currently 75 per cent to 50 per cent of the amount of remuneration for judges retired pursuant to Article 71 pars 1-2 of the 2002 Act. This relates to cases where the board of a competent court requested such retirement where due to an illness or health conditions, a judge has not performed his/her duties for more than a year, or where the said judge failed to undergo an examination required by such board or the Minister of Justice (Articles 71 pars 1-2 and 70 par 2 of the 2002 Act). Article 5 par 2 of the Draft Act (February 2017 version) was aiming to introduce similar changes with respect to Supreme Court justices. These provisions have now been removed from the March 2017 version of the Draft Act.
60. It is welcome that such provisions have now been deleted, as they appeared to be at odds with international and regional standards on the independence of the judiciary. In principle, legislation should lay down guarantees for maintaining reasonable remuneration of judges in case of illness and retirement, which should be as close as possible to the level of their final remuneration as a judge just before retirement.⁷⁴ An adequate level of retirement pensions is part of the safeguards to guarantee the independence of the judiciary and of judges.⁷⁵

6.2. Impact Assessment and Participatory Approach

61. The legal drafters have prepared an Explanatory Statement to the Draft Act, which lists a number of reasons justifying the contemplated reform,⁷⁶ but does not mention the research and impact assessment on which these findings are based. Given the potential impact of the Draft Act on the independence of the judiciary, an in-depth regulatory impact assessment is essential, which should contain a proper problem analysis, using

⁷⁴ See e.g., *op. cit.* footnote 10, par 54 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities), which states that “[g]uarantees should exist for maintaining a reasonable remuneration in case of illness, maternity or paternity leave, as well as for the payment of a retirement pension, which should be in a reasonable relationship to their level of remuneration when working”; *op. cit.* footnote 19, pars 6.3-6.4 (1998 European Charter on the Statute for Judges); *op. cit.* footnote 11, par 7 (2010 CCJE Magna Carta of Judges); *op. cit.* footnote 12, pars 44-51 (2010 Venice Commission’s Report on the Independence of the Judicial System). See also *op. cit.* footnote 11, pars 61 and 73 (8) (2001 CCJE Opinion No. 1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges).

⁷⁵ *ibid* pars 6.1-6.4 (1998 European Charter on the Statute for Judges), which expressly recognizes the key role of adequate remuneration in shielding “from pressures aimed at influencing [judges] decisions and more generally their behaviour”, and of the importance of guaranteed sickness pay and adequate retirement pensions in that respect.

⁷⁶ See <<https://legislacja.rcl.gov.pl/projekt/12284955>>.

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

- evidence-based techniques to identify the best efficient and effective regulatory option (including the “no regulation” option).⁷⁷ In the event that such an impact assessment has not yet been conducted, the legal drafters are encouraged to undertake such an in-depth review, to identify existing problems, and adapt proposed solutions accordingly.
62. Finally, it is understood that the legal drafters have sought to consult various bodies of the judiciary, including at the sub-national level, about the Draft Act and earlier versions made available in May 2016.⁷⁸ This is a welcome approach that is in line with OSCE commitments, which require legislation to be adopted “as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (Moscow Document of 1991, par 18.1).⁷⁹ The 1998 European Charter on the Statute for Judges also specifically recommends that judges be consulted on any proposed change in their statute or any change proposed as to the basis on which they are remunerated, or as to their social welfare, including their retirement pension, and to ensure that judges are not left out of the decision-making process in these fields.⁸⁰
63. However, it is noted that the legal drafters provided quite short deadlines for the submission of feedback (ten days in May 2016, and the deadline of 31 January 2017 for a draft communicated by letters dated 24 January).⁸¹ Moreover, it is not clear to which extent the comments/input received on these occasions have been taken into consideration or not.⁸²
64. In any case, consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide sufficient time to prepare and submit recommendations on draft legislation; the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions.⁸³ According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, *inter alia*, the nature, complexity and size of the proposed draft act and supporting data/information.⁸⁴ To guarantee effective participation, consultation mechanisms must allow for input at an early stage *and throughout the process*,⁸⁵ meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). Public consultations constitute a means of open and democratic governance; they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.⁸⁶ Discussions held in this manner, and that allow for an open and inclusive debate will

⁷⁷ See e.g., OSCE/ODIHR, *Report on the Assessment of the Assessment of the Legislative Process in the Republic of Armenia* (October 2014), pars 47-48, <<http://www.legislationline.org/documents/id/19365>>.

⁷⁸ See <<https://legislacja.rcl.gov.pl/projekt/12284955/>>.

⁷⁹ Available at <<http://www.osce.org/fr/odihr/elections/14310>>.

⁸⁰ *Op. cit.* footnote 19, par 1.8 (1998 European Charter on the Statute for Judges).

⁸¹ See <<https://legislacja.rcl.gov.pl/projekt/12284955/>>.

⁸² As of 15 March 2017, the section “Public Consultations” of the website of the Governmental Legislation Centre (<<https://legislacja.rcl.gov.pl/projekt/12284955/>>) does not include the opinions or comments received from the bodies/entities that were consulted or reports summarizing such contributions, and the general page regarding the Draft Act only includes two Opinions or responses received from the Ministry of Foreign Affairs and the General Counsel to the Treasury (*Prokuratoria Generalna Skarbu Państwa* or PGSP), respectively.

⁸³ See e.g., *Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes* (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015, <<http://www.osce.org/odihr/183991>>.

⁸⁴ See e.g., OSCE/ODIHR, *Opinion on the Draft Law of Ukraine “On Public Consultations”*, 1 September 2016, pars 40-41, <<http://www.legislationline.org/documents/id/20027>>.

⁸⁵ See e.g., OSCE/ODIHR, *Guidelines on the Protection of Human Rights Defenders* (2014), Section II, Sub-Section G on the Right to participate in public affairs, <<http://www.osce.org/odihr/119633>>.

⁸⁶ *ibid.*

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

increase all stakeholders' understanding of the various factors involved and enhance confidence in the adopted legislation. Ultimately, this also tends to improve the implementation of laws once adopted.

65. In light of the above, **the Polish legislator is therefore encouraged to ensure that the Draft Act is subject to further inclusive, extensive and effective consultations, according to the principles stated above at all stages of the lawmaking process.**

[END OF TEXT]

ANNEX

Draft Act of 22 February 2017

(reflecting the changes introduced by the new version of the Draft Act of March 2017, which are indicated in red, except from purely syntax or restructuring of the articles which do not affect the overall meaning of a provision)

A C T

of 2017

amending the Act on the National Council of the Judiciary and certain other acts⁸⁷

Article 1 The Act of 12 May 2011 on the National Council of the Judiciary (Journal of Laws of 2016, items 976 and 2261) shall be amended as follows:

1) Article 10-12 shall be replaced by the following:

“Article 10. 1. Judges are appointed for 4-year joint terms of office.

2. A judge may hold the function of an appointed member of the Council only for two terms of office.

Article 11. 1. The Marshal of the Sejm shall, not earlier than 120 days and not later than 90 days before the expiry of the term of office of a judge – member of the Council – or immediately following the expiry of a judge’s mandate, publish a notification in the Official Journal of the Republic of Poland “Monitor Polski” that a post in the Council becomes vacant.

2. ~~3.~~ Within 30 days from the date of the notification of vacant post in the Council, the Presidium of the Sejm or at least 50 members of the Sejm present their candidates for a member of the Council to the Marshal of the Sejm.

3. ~~4.~~ Judges’ associations may present their recommendations concerning the proposed candidates for a member of the Council to the Marshal of the Sejm within the time limit referred to in Article 11(2).

⁸⁷ “This Act amends the following acts: the Act of 21 August 1997 on the organisation of military courts, the Act of 25 July 2002 on the organisation of administrative courts and the Act of 23 November 2002 on the Supreme Court.

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

Article 12. 1. The Marshal of the Sejm, presents the Sejm with the candidates for vacant posts of judges in the Council from among the candidates proposed in accordance with Article 11(2).

2. The Sejm selects judges for the function of members of the Council from among candidates presented by the Marshal of the Sejm.

2) Article 13 shall be repealed.

3) In Article 14:

a) In Article 14(3) point 4 is repealed,

b) Article 14(3) shall be replaced by the following:

“3. A new member of the Council should be appointed within 90 days after the expiry of mandate”;

4) Article 15 shall be replaced by the following:

“Article 15. The bodies of the Council shall comprise the Chairperson, the Presidium of the Council, the First and Second Assembly of the Council.”;

5) Article 16(1) shall be replaced by the following:

“1. The Council appoints the Chairperson and three members of the Presidium of the Council from among all the Council members. The First and Second Assembly of the Council each appoint one Deputy Chairperson from among their members.

6) in Article 17

a) (2)(2) the full stop shall be replaced by a semi-colon and the following point 3 is added:

“3) presides over the Assembly of the Council he or she is a member of, subject to Article 21c(1)”,

b) (3) shall be replaced by the following:

“3. The distribution of the activities referred to in paragraph 2(1) and 2(2) between the Deputy Chairpersons is determined by the Chairperson who informs the Council about it.”;

7) after Article 21 the following Articles 21a-21d shall be inserted:

“Article 21a. The Council exercises the competence referred to in Article 3(1)(1) through the First and Second Assembly of the Council.

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

Article 21b. 1. The First Assembly of the Council consists of the Minister of Justice, the First President of the Supreme Court, the President of the Supreme Administrative Court, a person appointed by the President of the Republic of Poland, four members of the Sejm and two members of the Senate, referred to in Article 9.

2. The Second Assembly of the Council consists of fifteen judges referred to in Article 11.

Article 21c. 1. Each Assembly of the Council is presided over by a competent Deputy Chairperson. However, the Assembly of the Council is presided over by the Chairperson, if he or she is the member of the Assembly.

2. If the Chairperson and the Deputy Chairperson are absent at the meetings of the Assembly of the Council, they are presided over by the eldest member of the Assembly of the Council, who also signs resolutions of the Assembly of the Council.

Article 21d. 1. At least half the composition of the Assembly of the Council shall be present for a resolution to be valid.

2. The Assembly of the Council shall adopt resolutions by absolute majority of votes in an open ballot. At the request of a member of the Assembly of the Council, the voting may be conducted in a secret ballot.

3. The voting may be repeated in the case of the infringement of the rules of procedure, based on a resolution of the Assembly of the Council adopted at the request of a member of the Assembly of the Council announced not later than on the expiry of the deadline specified for raising objections to the minutes of the meeting.”

8) Article 22 shall be replaced by the following:

“Article 22 1. The Council defines the detailed procedure of its operation in its regulations.

2. The First and Second Assembly of the Council define the detailed procedure of their operation in their regulations, taking into consideration the application of the IT system used for the purpose of the proceedings on the appointment to the post of a judge or assistant judge referred to in the Act of 27 July 2001 – Law on the organisation of common courts, hereinafter referred to as the “IT system”.

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

3. Regulations of the Council, the First and Second Assembly of the Council are published in the Official Journal of the Republic of Poland “Monitor Polski”;

9) Article 31(1) shall be replaced by the following:

“1. The Chairperson shall appoint a team for the preparation of an individual case to be considered at the meeting of the Council, other than a case pertaining to the appointment to the post of a judge or assistant judge. The team shall be composed of three to five members of the Council.”;

10) after Article 31 the following Articles 31a and 31b shall be inserted:

“Article 31a. The First and Second Assembly of the Council shall in turn and separately consider and evaluate the candidates for the posts of Supreme Court judges, the posts of common court judges, administrative court judges and military court judges as well as the posts of assistant judges.

Article 31b. 1. The Council issues a positive opinion on a candidate referred to in Article 31a, if the First and Second Assembly of the Council issue positive resolutions in this respect.

2. If the Assemblies of the Council have adopted divergent assessment of the candidate, the Assembly of the Council, which issued a positive assessment, may adopt a resolution to refer the application for the examination and evaluation by the full composition of the Council. In this case, issuing a positive evaluation of a candidate requires votes of 17 members of the Council: First President of the Supreme Court, President of the Supreme Administrative Court and the Council members elected from among the judges.”;

11) Article 32(1a) shall be replaced by the following:

“1a. Letters and other documents in individual cases pertaining to the appointment to the post of a common court judge or an assistant judge, as well as resolutions adopted in such cases, shall be served upon candidates via the IT system. The service shall be deemed effective upon logging-in by the candidate to the IT system or after the expiry of 14 days from the date of placing the letter in the IT system.”;

12) Article 33(1) and (2) shall be replaced by the following:

“1. The Council, the First and Second Assembly of the Council shall adopt resolutions in individual cases after a thorough consideration of the case, on the basis of available

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

documentation and clarifications provided by the parties to the proceedings or other persons, if such have been submitted.

2. In justified cases the Council, the First and Second Assembly of the Council may request that the party to the proceedings appear in person or that it provide written clarifications or supplement the materials required in the case. The provision of Article 30(2) shall apply accordingly.”

13) Article 34 and 35 shall be repealed.

14) Article 36 and 37 shall be replaced by the following:

“Article 36 1. If persons pursuing the profession of an advocate, legal adviser, notary public or fulfilling the function of a prosecutor, assistant prosecutor, adviser or deputy president of the General Counsel to the Republic of Poland have put forward their candidatures for the post of a judge or an assistant judge, then the following are notified of the meetings of the First and Second Assembly of the Council, accordingly: The Polish Bar Council, the National Council of Legal Counsels, National Council of Notaries, the National Prosecutor of the Republic of Poland, the President of the General Counsel to the Republic of Poland.

2. In the case referred to in Article 36(1) the representative of the Polish Bar Council, the National Council of Legal Counsels, National Council of Notaries, the National Prosecutor of the Republic of Poland, the President of the General Counsel to the Republic of Poland may participate in the meetings of the First and Second Assembly of the Council as a consultant.

Article 37 1. If more than one candidate has applied for the judicial post or the post of an assistant judge, the First and Second Assembly of the Council review and evaluate all candidatures jointly. In this case, the Council adopts a resolution regarding the submission of a motion for the appointment to the post of judge or assistant judge with respect to all candidates.

2. The first and last names of candidates, the resolutions of the First and Second Assembly of the Council with reasons as well as the resolution of the Council with reasons are published in the Public Information Bulletin.

15) in Article 43 (2) expression “(1) or (1a)” shall be replaced by the following “(1)”

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

Article 2 Article 10(3)(2) of the Act of 21 August 1997 on the organisation of military courts (Journal of Laws of 2016, items 358, 2103 and 2261) shall be repealed.

~~**Article 3** In the Act of 27 July 2001 – Law on the Common Courts Organisation (Journal of Laws of 2016 items 2062, 2103 and 2261), in art. 100:~~

~~1) § 2 shall be replaced by the following:~~

~~"§ 2. Judge who retires or is retired due to age, illness or physical incapacity is entitled to an emolument equal to 75 percent of the basic salary and seniority allowance received at the most recent post held, subject to § 2a."~~

~~2) after § 2, the § 2a is inserted:~~

~~"§ 2a. Judge who retires or is retired in the cases referred to in Article 71 § 1 and 2, prior to the attainment of the age referred to in Article 69 § 1, is entitled to the emolument equal to 50 percent of the basic salary and seniority allowance received at the most recent post held."~~

~~3) § 3 shall be replaced by the following:~~

~~"§ 3. The remuneration referred to in § 1-2a, shall be increased in line with changes in the amount of the basic salaries of judges in active employment."~~

Article 3 ~~4~~ Article 24(4)(5) and 24(4)(6) of the Act of 25 July 2002 on the organisation of administrative courts (Journal of Laws of 2016, items 1066 and 2261) shall be repealed.

Article 4 ~~5~~ In the Act of 23 November 2002 on the Supreme Court (Journal of Laws of 2016, items 1254, 2103 and 2261) ÷

~~1) In the Article 16:~~

~~a1)~~ Article 16(1)(1) shall be replaced by the following:

~~"1) adopting the regulations on the selection of candidates for the post of a Supreme Court judge and the First President of the Supreme Court;"~~

~~b2)~~ Article 16(1)(4) shall be repealed.

~~2) Article 50 will be replaced by the following:~~

~~"Art. 50. A retired Justice of the Supreme Court shall be entitled to receive a salary equal to 75 percent of the last collected basic salary and seniority allowance. Justice of the Supreme Court who was retired in the cases referred to in Article 31 § 3 and 4, prior to the attainment of the age referred to in Article 30 § 1, shall be entitled to the emolument equal to 50% of the last collected basic salary and seniority allowance. The aforementioned salary shall be subject to indexation on the dates and in the amounts correlated with the changes of the basic salary of active Justices."~~

OSCE/ODIHR Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland

Article 5 ~~6~~ 1. Mandates of members of the National Council of the Judiciary referred to in Article 187(1)(2) of the Constitution of the Republic of Poland, appointed pursuant to previous provisions, shall expire after **30** days after this Act enters into force.

2. The term of office the disciplinary prosecutor of common courts' judges and assistant judges as well as the term of office of the disciplinary prosecutor of military courts' judges shall expire after 30 days after this Act enters into force.

Article 6 ~~7~~ 1. The appointment of new members of the National Council of the Judiciary due to the expiration of mandates referred to in Article 6 (1) is made pursuant to the provisions of the Act amended in Article 1, as amended hereby, except that the selection shall be made within 30 days of the expiry of the mandate.

2. The Marshal of the Sejm shall, not later than ~~14~~**7** days after this Act enters into force, publish a notification in the Official Journal of the Republic of Poland "Monitor Polski" that posts in the Council become vacant. Within 21 days from the date of notification, Presidium of the Sejm, or at least 50 members of the Sejm submit their proposed candidacies for the post of a member of the Council, to the Marshal of Sejm. Within the same period, the recommendations concerning the applications of candidates for the post of a member of the Council may be submitted to the Marshal of the Sejm, by the associations of judges.

Article 7 ~~8~~ Individual cases pertaining to the appointment to the office of a common court judge or assistant judge initiated and not closed by a resolution of the National Council of the Judiciary before this Act enters into force shall be reconsidered by the Council based on the provisions of the Act amended in Article 1, as amended hereby.

Article 8 ~~9~~ The Act shall enter into force 14 days after publication, ~~with an exception of Article 3 and Article 5 (2) which shall enter into force as of 1 October 2017.~~