

OPINION
OF THE NATIONAL COUNCIL OF THE JUDICIARY

of 30 January 2017

on the government Draft Act amending the Act
on the National Council of the Judiciary and certain other acts (UD73)

The National Council of the Judiciary, acting pursuant to Article 3(1)(6) of the Act of 12 May 2011 on the National Council of the Judiciary (Journal of Laws of 2016, item 976), issues a definitely negative opinion on the government Draft Act amending the Act on the National Council of the Judiciary and certain other acts (UD73). The Council states that proceeding with such a wide reform of the constitutional organisation of a state body such as the National Council of the Judiciary in a manner presented by the Ministry of Justice was not preceded by any consultations with the judicial environment. The Council emphasises that the period of 4 business days to issue an opinion on the Draft Act of systemic nature infringes the applicable standards of cooperation between branches of power as well as the principles of decent legislation.

In the opinion of the National Council of the Judiciary, the Draft Act this opinion refers to infringes the standards enshrined in the Constitution of the Republic of Poland, namely:

- 1) - entrusting the Sejm with powers to select the members of the Council from among the judges of the Supreme Court, administrative courts, common courts and military courts through depriving such members of the Council the quality of being representatives of the judicial self-government and through politicising judges – constitutes an infringement of Article 10(1), Article 17(1) and Article 187(1)(2) of the Constitution;
- 2) - depriving the National Council of the Judiciary of its constitutional competence to formulate requests for the appointment to the judge office and transferring the competence to bodies not mentioned in the Constitution: the First and the Second Assembly of the Council – constitutes an infringement of Articles 179, 186 and 187 of the Constitution;
- 3) giving the President of the Republic of Poland a competence to select judges from among the candidates presented to the President by the First and the Second Assembly of the Council, which is not mentioned in the Constitution, instead of the President's

competence to appoint judges on the request of the National Council of the Judiciary – constitutes an infringement of Article 10(1) as well as Articles 179 and 173 of the Constitution;

- 4) liquidating material equality of votes given by members of the Council through assigning higher weighting to the votes given by the First Assembly of the Council (which is to consist of politicians in 70%) over the votes given by the Second Assembly of the Council (which is to consist of judges selected by the parliamentary majority) – constitutes an infringement of Article 10(1) and Article 187(1) of the Constitution;
- 5) establishing the mode of proceeding before the Council in such a manner that the body will become incapable of acting due to making the exercising of competences by this constitutional state body conditional on unequivocal positions of the respective Assemblies of the Council – constitutes an infringement of Article 10(1), Article 186 and Article 187(1)(2) of the Constitution;
- 6) shortening the term of office of the existing members of the Council who were selected from among the judges of the Supreme Court, administrative courts, common courts and military courts for the 4-year term of office guaranteed by the Constitution – constitutes an infringement of Article 187(3) of the Constitution;
- 7) - depriving the National Council of the Judiciary of its constitutional competence to select deputy chairpersons of the Council and transferring the competence to bodies not mentioned in the Constitution: the First and the Second Assembly of the Council – constitutes an infringement of Article 187(2) of the Constitution.

In the opinion of the National Council of the Judiciary, the presented Draft Act intends to introduce to the legal system solutions which pose a real threat to the protection of the rule of law as well as rights and freedoms of a human and a citizen.

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The National Council of the Judiciary is a constitutional state body which safeguards the independence of courts and judges. Constitutional powers of the Council include submitting to the President of the Republic of Poland requests for the appointment of judges of the Supreme Court, administrative courts, common courts and military courts, as well as filing with the Constitutional Tribunal applications regarding the constitutional compliance of normative acts to the extent in which they apply to the independence of courts and judges

(Article 186 of the Constitution). The Council is therefore a body which acts as a guardian of the independence and separation of the judiciary in the interest and for the benefit of citizens, who have the right to enjoy the independent judiciary system. The independence of courts and judges is not an objective as such, but it constitutes a guarantee of the right to a fair trial, to which every citizen is entitled under Article 45 of the Constitution of the Republic of Poland. In a democratic country, the judiciary is separate from and independent of other powers (Articles 10 and 173 of the Constitution of the Republic of Poland) and is not subordinate to the executive and legislative powers. These circumstances are of paramount importance for the assessment of regulations proposed in the Draft Act which is the subject of this opinion.

In the proposed Articles 10–12 of the Act, the author of the Draft Act proposes that the Sejm would select fifteen members of the Council from among judges of the Supreme Court, common courts, administrative courts and military courts. In the existing regulations, the members were selected in the elections attended by the representatives of judges from specific segments and levels of the judiciary.

In the opinion of the National Council of the Judiciary, the proposed procedure of selecting judges to sit in the National Council of the Judiciary constitutes an infringement of Articles 186 and 187 of the Constitution. Article 187(1) of the Constitution defines the composition of the National Council of the Judiciary, stating that the National Council of the Judiciary is composed of: the First President of the Supreme Court, the President of the Supreme Administrative Court, the Minister of Justice, a person appointed by the President of the Republic of Poland, four members selected by the Sejm from among members of the Sejm and two members selected by the Senate from among the members of the Senate, as well as fifteen members selected from among the judges of the Supreme Court, common courts, administrative courts and military courts. Therefore, the Council does not only represent the judicial environment, but it is composed of the representatives of all of the highest authorities of the state.

Legal theory states that in accordance with Article 187(1) of the Constitution “the number of the representatives of the judiciary power, including judges selected by their environments, is clearly larger. This is a logical consequence of entrusting the Council with the task of protecting the independence of courts and judges, not least that the remaining powers still maintain other means of exerting influence over the composition and functioning of the judiciary” (L. Garlicki, thesis 3 to Article 187 [In:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary]*, Sejm Publishing

Office). The Constitution decides that the Sejm selects four members of the Council from among the members of the Sejm and the Senate selects two members of the Council from among the members of the Senate. Thus, the Constitution guaranteed the involvement of persons selected by the legislative power in the work of the National Council of the Judiciary. Members of the Sejm and the Senate, being the representatives of the Nation (Article 104(1) of the Constitution) are not the only members of the Council who hold a democratic mandate. Among the members of the Council, there is also the Minister of Justice, a member of the Council of Ministers, whose composition depends on the will of the parliamentary majority. Moreover, one member of the Council is appointed by the President of the Republic of Poland elected in general elections. Therefore, it should be concluded that Article 187(1) of the Constitution exhaustively specifies the competences of the legislative and executive bodies to select the members of the Council and it prevents the Sejm from being granted the right to select judges to sit in the National Council of the Judiciary. The Constitution is therefore clear that the Parliament may select 6 out of 25 members of the Council, and not as many as 21 out of 25 members of the Council, as the author of the Draft Act proposes.

It follows clearly from the Constitution adopted by the Nation in the national referendum of 25 May 1997 that in the National Council of the Judiciary eight members should hold mandates arising from nominations made by the bodies formed as a result of general elections: the Minister of Justice, four members of the Sejm, two members of the Senate and a person appointed by the President of the Republic of Poland. If the author of the Constitution had wished that also the members of the Council referred to in Article 187(1)(2) of the Constitution were selected by the Sejm, the competence of the Sejm to select such members of the Council would be expressed explicitly in the Constitution, as it is in the case of selecting judges of the Constitutional Tribunal (Article 194(1) of the Constitution) or the members of the Tribunal of State (Article 199(1) of the Constitution).

The author of the Draft Act refers in this regard to the wording of Article 4 of the Constitution, pursuant to which supreme power in the Republic of Poland is vested in the Nation, which shall exercise such power directly or through its representatives. The author fails to mention, however, Article 10 of the Constitution, which shapes the system of state powers based on the principles of separation and balance of the legislative, executive and judiciary powers. The Nation, through its representatives – in particular the President, members of the Sejm and members of the Senate – has a constant influence on personal and substantive aspects of the judiciary power. The President not only appoints judges, but also – acting together with the members of the Sejm and the members of the Senate – participates in

the legislative process. The Minister of Justice, in turn, sets up and liquidates courts, decides on the assignment of case-hearing posts, exercises administrative supervision over the functioning of common courts, appoints presidents and heads of common courts and sets the budget for the common judiciary. The representatives of the Nation have a decisive influence on the contents of law applicable in Poland, including the provisions that specify criteria for candidates for the position of a judge, the system and organisation of the judiciary, and, above all, the provisions regulating the mode of proceedings before courts as well as the contents of substantive law that shapes the ground and limitations of case-hearing exercised by courts. In other words, the democratic mandate of the judiciary arises not only from the real influence of the President of the Republic of Poland on nominations of judges (it is impossible to become a court judge in any other manner than pursuant to the act of the President of the Republic of Poland), but mainly from the fact that courts act pursuant to and within law adopted by the Sejm and approved by the Senate and the President of the Republic of Poland.

Entrusting the Sejm, which adopts acts applied by courts, with the exclusive right to select judges to sit in the National Council of the Judiciary will also infringe the constitutional principle of separation and balance of powers. The separation of powers is not of organisational importance only and it does not boil down to creating various state bodies and assigning various tasks to them. The aim of the separation of powers is the protection of human rights by preventing abuse of power by any of bodies holding it (see the ruling of the Constitutional Tribunal of 9 November 1993, Case No. K 11/93, OTK 1993, part II, p. 358). The Draft Act which is the subject of this opinion, however, assigns the Sejm a dominating position over the judiciary power, which is harmful to the judicial system understood as a guardian protecting the rights of an individual. In the light of the Draft Act, the balance of power becomes distorted. The case-law of the Constitutional Tribunal shows that the relations between the judiciary and the other powers must also be based on the principle of separation, and the necessary element of the separation of powers is the independence of courts and judges (see judgement of the Constitutional Tribunal of 14 April 1999, Case No. K 8/99, OTK 1999, No. 3, item 41).

The National Council of the Judiciary does not challenge the fact that the manner of selecting the members of the Council is to be specified by the act (Article 187(4) of the Constitution). This does not mean, however, that the legislator has unrestricted freedom in shaping the provisions in this regard as any act must remain in compliance with the Constitution. The legal theory on constitutional law does not provide for the possibility of selecting the judges to sit in the National Council of the Judiciary by the bodies of other

powers. It is proposed that the mode of their selection be shaped according to one of the two models: the selection is made in general elections in which each judge is entitled to vote or the selection is made by the bodies of judicial self-government (and the latter applies currently). Since the members of the Sejm to sit in the Council are selected by the Sejm, and the members of the Senate to sit in the Council are selected by the Senate, judges to sit in the Council should be selected by judges. It needs to be emphasised that the general assemblies of judges are not organisations established to protect professional interests of judges, but they are bodies of the judicial self-government established to exercise, in the public interest, competences arising from acts. They are also an element of the judiciary system structure. Representatives of legal theory point out that it is necessary to protect and strengthen the judicial self-government arising from Article 17(1) of the Constitution (see B. Banaszak, *Uwagi o zgodności z konstytucją znowelizowanego prawa o ustroju sądów powszechnych [Comments on the constitutional compliance of the amended law on the organisation of common courts]*, Przegląd Sejmowy [Sejm Review] No. 5(112)/2012, p. 83–87).

This position is supported by the case-law of the Constitutional Tribunal. In the judgement of 18 July 2007, Case No. K 25/07, the Tribunal stated unequivocally that the “Constitution in Article 187(1)(2) regulates the principle of selecting judges to the National Council of the Judiciary directly, and therefore decides on the composition of the Council. It explicitly specifies that the members of the National Council of the Judiciary may be judges selected by their peer judges, without specifying any other qualities which their membership in the Council would depend on. The selection is made from among the four groups of judges specified in Article 187(1)(2) of the Constitution. The Constitution does not provide for the possibility of dismissing them, and their 4-year term of office in the Council is specified.” In reference to the currently applicable regulations, the Tribunal stated that the “selection procedure specified in the Act on the National Council of the Judiciary, whose scope of functioning is specified in Article 187(4) of the Constitution, remains within the framework established by Article 187(1)(2) of the Constitution and follows the rule of selecting judges by judges” OTK ZU No. 7A/2007, item 80).

Also the Consultative Council of European Judges (an advisory body of the Council of Europe) pointed out that it is necessary that representatives of judges be selected by judges themselves.

In the Magna Carta of Judges of 17 November 2010, the CCEJ stated that “to ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad

competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions¹.” The European Network of Councils for the Judiciary emphasises that the mechanism of appointing members of the Council selected from among judges must “be a system which excludes any executive or legislative interference and the election of judges should be solely by their peers and be on the basis of a wide representation of the relevant sectors of the judiciary (see *Recommendation on Councils for the Judiciary* , European Network of Councils for the Judiciary, Rome 2011²). Also the European Commission for Democracy through Law (Venice Commission) assumed that a significant part or a majority of members of bodies such as the National Council of the Judiciary should be selected by the judiciary itself (see *Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria*, Venice 2015³).

The selection of judges to sit in the National Council of the Judiciary is important for yet another reason. The National Council of the Judiciary is a body which safeguards the independence of courts and judges (Article 186 of the Constitution), and the judiciary is to be a separate power and it is to be independent of other powers (Article 173 of the Constitution). For this reason, the Constitution is specific about competences of the legislative and executive bodies in the field of shaping the composition of the National Council of the Judiciary. Since the task of the Council is to ensure the independence and separation of courts from other powers, it is unacceptable that the majority of the members of the Council would be nominated by such “other powers”. The Council is required to safeguard the independence of courts and judges, among others from the influence of the legislative and executive bodies. It will not be able to fulfil the task if over 80% of its members will be selected based on the will of the parliamentary majority. This was pointed out by the Constitutional Tribunal, which stated in the statement of reasons to the judgement of 18 July 2007, Case No. K 25/07, that the “regulations on the selection of judges to the Council are enshrined in the constitution and are of paramount systemic importance as their position virtually decides on the independence of the constitutional body and the effectiveness of the Council's work.”

¹ <https://wcd.coe.int/ViewDoc.jsp?p=&id=1707925&direct=true> (accessed: 30 January 2017)

² https://www.encj.eu/images/stories/pdf/workinggroups/report_project_team_councils_for_the_judiciary_2010_2011.pdf (accessed: 30 January 2017)

³ [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)022-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)022-e) (accessed: 30 January 2017)

In the opinion of the National Council of the Judiciary, the selection of judges to sit in the National Council of the Judiciary by the Sejm, contrary to the intentions of the authors of the Draft Act, would undermine social trust towards those who exercise judicial powers. It needs to be emphasised that the members of the Council referred to in Article 187(1)(2) of the Constitution combine exercising their mandate of the Council member with case-hearing and they exercise their judge duties on a daily basis, which is an essential part of performing the role of a judge. The proposed solution in which such persons would need to gain support of politicians in the Sejm may bring about negative consequences, in particular in terms of their impartiality and apoliticality. In this regard, the author of the Draft Act proposes yet another solution, namely it provides for the possibility of a single re-election of a judge being a member of the National Council of the Judiciary. The currently applicable regulations under the Act also state that the judges selected to the National Council of the Judiciary may hold functions in the Council for two terms of office only. It needs to be emphasised, however, that now the judges are selected by peer judges and not by politicians. The proposed solution makes room for abuse of power, as any person who intends to be re-elected for the office may be particularly exposed to pressure from the body deciding on the re-election. Therefore, the persons selected to the Council by the Sejm and entitled to be re-elected would be particularly prone to suggestions made by politicians and they would not be able to perform their functions in the Council reliably and freely. In the opinion of the Council, it is unacceptable to create possibilities of exerting such pressure on judges. Otherwise, it would be necessary to state that the right to be re-elected in these factual circumstances would infringe the essence of the position held by the National Council of the Judiciary within the system as a guardian of the independence of courts and judges.

The proposed provisions lead to unequivocal politicisation of the National Council of the Judiciary and to the deprivation of the judicial self-government of any impact on the selection of candidates for the position of a judge to be presented. In the proposed Article 12 of the Act, the Minister of Justice proposed that the only body capable of presenting (in a binding manner) candidacies of judges for the members of the National Council of the Judiciary would be the Marshal of the Sejm. The circumstances are not changed by the fact that the candidacies are made by the Presidium of the Sejm or a group of at least 50 members of the Sejm (Article 11(2)) or by the fact that “judges’ associations may present their recommendations concerning the proposed candidates for a member of the Council to the Marshal of the Sejm” (Article 11(3)), since after all it is the Marshall of the Sejm who will ultimately decide which candidacies proposed by the aforementioned entities will be

presented to the Sejm for consideration (Article 12(1)). It should be mentioned at this point that “judges’ associations” are voluntary social organisations which not only are not the bodies of the judicial self-government (such bodies function under the act in the Supreme Court, administrative courts and military courts, but also in any judicial region and in any jurisdiction of the court of appeal), but they even fail to represent the entire judicial environment. In other words, the author of the Draft Act proposed that the judges to the National Council of the Judiciary be selected by the parliamentary majority from among the candidates proposed exclusively by the Marshal of the Sejm, who is always a politician belonging to the parliamentary majority.

This means that the composition of the Council will depend exclusively on the will of the governing party or the governing coalition. Additionally, the Draft Act fails to mention criteria based on which the Marshal of the Sejm would select candidates for the members of the National Council of the Judiciary from among candidacies received or criteria based on which such members of the Council would be selected by the Sejm. This means that both bodies will be able to follow in this regard their political interest instead of taking into account the competencies of the candidates or their other qualities which are vital for the tasks of the National Council of the Judiciary.

The author of the reasons for the Draft Act states that the objective of the amendments is, among others, “fulfilling the principle of representation of all professional groups of judges” in the National Council of the Judiciary. Still, the wording of the proposed provisions does not indicate that the Sejm, when selecting the judges to the National Council of the Judiciary, will have to follow the rule of a broad representation of various groups of judges in the Council. It may be concluded from the proposed provisions that the Sejm, depending on the will of the parliamentary majority, will be able to select to the National Council of the Judiciary, for instance, 15 judges representing the same segment of the judiciary (e.g. common courts), depriving administrative courts and military courts of their own representatives. The proposed provisions do not prevent a situation in which the Sejm will select to the Council judges from a single court, depriving judges of other Polish courts of their own representatives. In other words, contrary to the claims made by the author of the Draft Act, the proposed provisions lead to undermining the principle of all professional groups of judges being represented. The principle is satisfied under the existing regulations, pursuant to which the composition of the National Council of the Judiciary includes judges of all levels and all segments of the judiciary.

The Minister of Justice proposed that two new bodies be established “within” the National Council of the Judiciary: “the First and the Second Assembly of the Council”. The First Assembly of the Council would consist 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. The Second Assembly of the Council would be composed of fifteen members selected (by the Sejm) from among the judges of the Supreme Court, common courts, administrative courts and military courts. The essence of the amendment is the rule that “the First and the Second Assembly of the Council shall in turn and separately consider and evaluate the candidates for the positions of Supreme Court judges, the positions of common court judges, administrative court judges and military court judges as well as the positions of assistant judges” (Article 31a). The National Council of the Judiciary could issue a “positive opinion on a candidate” for a vacant position of a judge or an assistant judge if the First and the Second Assembly of the Council “issue positive resolutions in this respect” (Article 31b).

At this point it should be recalled that pursuant to Article 187(4) of the Constitution, the organisation, scope of functioning and mode of proceeding of the National Council of the Judiciary is to be specified by the act. In the opinion of the National Council of the Judiciary, the proposed solution exceeds the scope of this mandate as in practice it assumes that the National Council of the Judiciary will be replaced by two separate bodies which will consider the candidacies for the positions of judges and assistant judges independently of each other. Meanwhile, the Constitution establishes the National Council of the Judiciary as a uniform body of a precisely specified composition. The Minister of Justice is open about stating that the objective of the Amendments is to deprive the Council of its constitutional competence to formulate requests for the appointment of judges. In the reasons for the Draft Act being the subject of this opinion, it was explicitly stated that the First and the Second Assembly of the Council are to “exercise its powers to consider and assess candidates for the positions of judges”. In other words, the Assemblies are not supposed to act “within the Council” but “instead of the Council”.

This proposal of the Minister of Justice may also be an attempt to circumvent legal regulations that guarantee that votes of the members of the Council are equal. This is because it assumes that the vote of each of the ten members of the First Assembly of the Council will be stronger than the vote of each of the fifteen members of the Second Assembly of the Council; therefore, the principle according to which all votes of the members of the National Council of the Judiciary are equal will be infringed. What raises the most reservations is that

the proposal discussed herein means that to present any candidate for the position of a judge or an assistant judge to the President of the Republic of Poland, it will be necessary to gain support of the First Assembly of the National Council of the Judiciary, which is to consist of politicians in as much as 70% (the Minister of Justice, four members of the Sejm, and two members of the Senate). The politicians will be virtually given the right to veto any judicial nominations. Therefore, this regulation leads to a clear politicisation of the judicial nominations process. Meanwhile, the essence of the constitutional procedure regulating the appointment of judges was to guarantee that judicial nominations are free from any political influence as the competence in this respect was granted to the apolitical and competence-oriented National Council of the Judiciary and to the President of the Republic of Poland, who – as assumed by the authors of the Constitution – was supposed to be an independent arbitrator free from any influence of political parties. Still, in the opinion of the society, political influences exerted over a judge are one of the basic threats to the independence of judges (see K. Daniel, *Normatywny i społeczny obraz sędziego [Normative and social image of a judge]* [In:] M. Borucka-Arctowa, K. Pałeczki (eds.), *Sądy w opinii społeczeństwa polskiego [Courts in the opinion of the Polish society]*, Kraków 2003, p. 117).

To justify the unconstitutional “Assemblies” replacing the Council, the author of the Draft Act refers to the allegedly “symbolic” importance of the voice of politicians belonging to the National Council of the Judiciary. It should be therefore noted that the current Minister of Justice since the date of taking up his office (16 November 2015) has taken part only in 2 meetings of the Council out of 27 held in this period, and it was only at the beginning of his term. Even though the participation of the Minister of Justice in the work of the Council is his constitutional obligation, he was not present even in meetings during which requests filed by him were considered (e.g. the request for an opinion on the candidate for the position of the president of the court).

As far as the details of this unconstitutional solution are concerned, it needs to be pointed out that the proposed wording of Article 31b does not indicate whether the “positive opinion on the candidate” referred to in the provision is a new competence of the National Council of the Judiciary or if the wording is a non-diligent reference to issuing resolutions on the decisions to present the request for the appointment to the judge office. It is also unclear what should be done when both Assemblies propose different candidacies for the same vacant judicial position as the author of the Draft Act does not explain how the Council would act to reach a uniform position. This issue is of paramount importance for the swiftness of proceedings before the Council, and consequently, for the avoidance of excessive duration of

court proceedings resulting from numerous vacant judicial positions. As it was already mentioned, the provisions discussed herein fail to state at which point the Council may file the request for the appointment of a judge with the President of the Republic of Poland. Additionally, the proposed Article 16(1) of the Act, which awards the Assemblies of the Council, deliberating separately, the right to choose one deputy chairperson of the Council each, is not compliant with Article 187(2) of the Constitution, pursuant to which the selection of the deputy chairpersons is a competence of the Council.

The Draft Act discussed herein interferes with the constitutional substance and infringes it also in terms of specifying the manner in which the National Council of the Judiciary is to exercise its main competence, i.e. filing requests for the appointment to the judge office with the President of the Republic of Poland. The Council is not only deprived of its independence in this respect since the contents of the request depends on the approval of specific Assemblies of the Council, but it is also assumed that if more than one candidate applies for a judicial position, the Council will present to the President of the Republic of Poland at least two candidates with the request for the appointment to the judge office. Pursuant to Article 179 of the Constitution, under the currently applicable provisions of acts regulating the judiciary system, the President of the Republic of Poland appoints judges on the request of the National Council of the Judiciary. The Minister of Justice – without introducing indispensable changes to the Constitution in this respect – intends to implement the principle according to which the President of the Republic of Poland would appoint a judge from among two (or more) candidates presented to him by the National Council of the Judiciary. The proposal evidently infringes Article 179 of the Constitution of the Republic of Poland, as the Constitution distinguishes explicitly between the appointment of judges by the President of the Republic of Poland “on the request of the National Council of the Judiciary” and the “appointment from among candidates proposed” by a competent body. The latter type of the appointment is provided for in the Constitution for instance for the appointments to the positions of the First President of the Supreme Court, the President of the Supreme Administrative Court as well as the President and the Deputy President of the Constitutional Court. Therefore, if the author of the constitution had intended to introduce a procedure in which judges are appointed in such a manner, Article 179 of the Constitution of the Republic of Poland would entail the same wording as used in Article 183(3), Article 185 and Article 194(2) of the Constitution.

Article 179 of the Constitution clearly provides for the division of responsibilities between the President of the Republic of Poland and the National Council of the Judiciary in terms of participation of these bodies in the procedure of appointing judges, as observed by the Constitutional Tribunal in the statement of reasons to its decision of 23 June 2008, Case No. Kpt 1/08 (OTK ZU No. 5A/2008, item 97). In its judgement of 5 June 2012, Case No. K 18/09, the Constitutional Tribunal decided that “details on the prerogative to appoint judges are included in Article 179 of the Constitution. By stipulating that judges are appointed by the President on the request of the National Council of the Judiciary for an indefinite period, the provision clearly defines the competences of both the President and the National Council of the Judiciary. The National Council of the Judiciary is responsible for filing a request for judicial appointments (indicating candidates for specific judge positions). Only after the request is filed can the President take steps to appoint judges. Article 179 of the Constitution is therefore a comprehensive norm as far as the President’s competence in the field of appointing judges is concerned, since all necessary elements of the nomination procedure are included therein” (OTK ZU No. 6A/2012, item 63).

Therefore, it may be said that the Act discussed herein causes the split of the presidential prerogative set out in Article 179 of the Constitution into two competences: 1) selecting a nominee from among the candidates presented by the Council (bound by the opinion of the Assemblies of the Council) and 2) appointing the selected nominee to the position of a judge. Meanwhile, the Constitution defines the President of the Republic of Poland's role in the procedure of appointing judges in a comprehensive manner and it does not provide for doubling the competences of the head of state. This should be taken into account mainly because within this regulation, only an act of the President of the Republic of Poland by which he appoints a judge does not need to be co-signed; Article 144(3) of the Constitution does not mention the selection of a candidate for a judge from among the candidates presented to the President by the Council. The National Council of the Judiciary has already expressed its negative opinion on the idea in its opinion of 19 May 2016 on the first wording of the Draft Act and it upholds its position.

The reasons for the Draft Act indicate that “the number of appeals against resolutions of the National Council of the Judiciary related to the appointment of judges” (...) “clearly indicates a lack of trust towards proceedings conducted in this regard by the National Council of the Judiciary”, whereas the proposal to confer a non-constitutional competence on the President of the Republic of Poland to appoint judges from among at least two candidates presented by the Council “will limit the contestability of resolutions adopted by the National

Council of the Judiciary”. This reasoning is not borne out by any evidence and proves that the author of the Draft Act misunderstands the procedure of nominating judges and the right to a fair trial, to which every person applying for the position of a judge is entitled (cf. judgment of the Constitutional Tribunal of 27 May 2008, Case No. SK 57/06, OTK-A 2008, No. 4, item 63). Lodging an appeal against resolutions of the Council in individual cases is a natural consequence of the right to a fair trial, to which every person whose case is heard by the Council is entitled. The fact that a candidate for the position of a judge exercises his or her right to appeal against the resolution of the National Council of the Judiciary to the Supreme Court has nothing to do with “lack of trust” to the Council. It is obvious that a person who wants to become a judge and is not presented by the Council to the President along with the request for the appointment will take all measures prescribed by law to receive a nomination for the position of a judge. An appeal against a resolution of the National Council of the Judiciary is such a legal instrument serving this purpose. Moreover, circumstances where a dozen-or-so candidates have applied for one vacant position of a judge and the Council – as per the presented, unconstitutional regulation – presents to the President a request for the appointment of some of them to the position of a judge, will not only not minimise the risk of appealing against such resolution by persons whose applications were refused, but will increase this risk. Those candidates, for the reasons presented above, would be able to legitimately argue that the Council adopted the resolution based on provisions infringing Article 179 of the Constitution.

To justify this unconstitutional proposal, the Minister of Justice relies on the fact whereby the nomination of judges is the President's prerogative. It has to be firmly stated, therefore, that the President's prerogative is a competence which is exercised independently of the discretion of the President of the Council of Ministers. Moreover, Article 144(3)(17) of the Constitution, in accordance with which the appointment of judges by the President of the Republic of Poland does not require the signature of the President of the Council of Ministers to be valid, is not ranked higher in terms of law than Article 179 of the Constitution, which clearly provides for the procedure of nominating judges by the President of the Republic of Poland. Pursuant to basic rules of interpretation, both provisions are subject to common interpretation, which yields a competence standard enabling the President of the Republic of Poland to appoint judges on the request of the National Council of the Judiciary, without obtaining the consent of the President of the Council of Ministers in this respect. It should be reiterated that the judge nomination procedure applicable in Poland – under the Constitution, and not under the Act on the National Council of the Judiciary – involves considering the

request for the appointment to the judge office presented by the National Council of the Judiciary by the President of the Republic of Poland. The President does not “select” the nominee from among the candidates or from a list of candidates presented thereto by the Council, but considers the candidature of a specific person to a specific position of a judge. Is it illogical and irrational to propose that the Council – in order to fill one vacant position of a judge – should present to the President more than one candidate. This is because the President will never have the power to accept both requests, whereas pursuant to Article 179 of the Constitution, the President has the exclusive discretion to decide whether the request for the appointment submitted by the Council is accepted or refused. This unconstitutional proposal will, therefore, not increase the actual influence of the President of the Republic of Poland on the appointment of a judge, as even today, e.g. only a person who is appointed to the office by way of a decision of the President of the Republic of Poland can become an administrative court judge.

The issue addressed by the proposed regulation was also considered by the representatives of the study of law. Representatives of the legal theory assumed that “taking into consideration the constitutional position of the National Council of the Judiciary and its function in the judge nomination process, including but not limited to comprehensive, informed evaluation of candidates, it should be assumed that – if it is the duty of the National Council of the Judiciary to submit the request for the appointment by the President – including more than one person in the request pertaining to the same position of a judge, which would give the President the right to select the person to be appointed for the position of judge, would collide with the role of the National Council of the Judiciary and the intentions of the author of the Constitution. In other words, with respect to each vacant position of a judge, the National Council of the Judiciary may, in the light of Article 179, formulate the request for the appointment of only one person. It is inadmissible, however, to include more than one person in a request pertaining to the same position of a judge, which would give the President the right to select the person to be appointed to the vacant position of a judge (see J. Sułkowski, Gloss to judgement of the Supreme Court of 10 June 2009, III KRS 9/08, “Przegląd Sejmowy” No. 5/2010, p. 226 at seq.). This position may be substantiated by noticing that resolutions of the National Council of the Judiciary are subject to *de lege lata* judicial review, which – notwithstanding the provisions of Article 45(1) – encourages objectivity in ensuring the access to public service (see K. Weitz, Note No. 3 to Article 179 [in:] *Konstytucja RP. Tom II. Komentarz do art. 87–243 [Constitution of the*

Republic of Poland. Volume II. Commentary to Articles 87–243] edited by M. Safjan and L. Boska, Warsaw 2016).

The Draft Act, while infringing Article 179 of the Constitution, does not provide for any regulation that would be desired from the perspective of the application of that provision. In particular, the Draft Act does not mention potential effects of the President's refusal to appoint to the position of a judge a person whose candidature was presented by the Council (e.g. the possibility of appealing to a court against the President's refusal to appoint a candidate). Contrary to what the author of the Draft Act claims, presenting to the President of the Republic of Poland at least two candidates for the position of a judge does not minimise the risk of refusal to appoint; it only doubles the negative consequences of the President's failure to exercise the prerogative in the scope of nominating the judges. In the opinion of the National Council of the Judiciary, undertaking works towards explicit determination of consequences of the President's refusal to appoint a judge is necessary, not only on account of general obligations of the legislator in the scope of compliance with constitutional standards, but above all on account of the rights of persons applying for the access to public service in the form of holding an eminent position of a judge. Since now we are dealing with a legislative omission in this regard.

The Draft Act also regulates the issue of the term of office of selected members of the National Council of the Judiciary, which in accordance with Article 187(3) of the Constitution is four years. In the proposed wording of Article 10(1) of the Act on the National Council of the Judiciary, the Minister of Justice proposes an explicit provision that judges are appointed to the National Council of the Judiciary for 4-year individual terms of office. This solution is a clarification only and, in fact, does not change the current legal status, where terms of office of judges – selected members of the National Council of the Judiciary – are deemed individual terms of office.

The author of the Draft Act found that a change in the manner in which the members of the Council are selected “may imply the necessity to shorten the term of office of specific members appointed to the Council.” This position is in contradiction with Article 187(3) of the Constitution. It should be emphasised that the principle of rotation of the selected members of the Council and the duration of the term of office are constitutional standards which cannot be modified by way of an act. The Constitution, apart from regulating the term of office of the selected members of the National Council of the Judiciary, regulates the terms of office of only a few state authorities: the Sejm and the Senate, the President of the Republic

of Poland, the First President of the Supreme Court, the President of the Supreme Administrative Court, judges of the Constitutional Tribunal, the President of the Supreme Audit Office, the Ombudsman and the President of the National Bank of Poland. The duration of the term of office and the rules of shortening it with respect to all other public administration bodies may be specified by way of an act, whereas terms of office of the listed authorities are protected by the Constitution and may be modified only following a procedure expressly stipulated in the Constitution. Amendments to detailed provisions of the Act on the National Council of the Judiciary pertaining to the selection of the members of the Council may not lead to shortening the terms of office of current Council members because their terms of office do not follow from the Act on the National Council of the Judiciary, but directly from the Constitution. As in the case of amending the provisions concerning the election of the President of the Republic of Poland, a situation where the Sejm, by way of an “ordinary” act, would shorten the President's 5-year term of office would be unthinkable.

Shortening the terms of office of selected members of the National Council of the Judiciary is not only inconsistent with the Constitution, but also irrational. If – as the author of the Draft Act acknowledges – current terms of office of selected members of the Council are treated as individual terms of office, and the Draft Act upholds this rule, the provision on the shortening of the terms of office cannot be deemed a provision adapting the current state of affairs to new provisions. The author of the Draft Act contradicts their own statement that “terminating a term of office of one member of the Council would not mean the possibility of introducing the method of selection arising from the proposed Act, as they cannot be implemented partially, but only comprehensively.” The proposed wording of Article 11(1) of the Act on the National Council of the Judiciary expressly reads that terminating a term of office of one member of the Council would oblige the Marshal of the Sejm to launch the entire selection procedure – with respect to this one position in the Council. Therefore, the factual circumstances do not preclude carrying out a selection process to the vacant position in the Council in accordance with the procedure proposed by the author of the Draft Act in the proposed Article 11(1) of the Act on the National Council of the Judiciary, in the case of the impending expiry of a term of office of a Council member after the Act enters into force. Therefore, the proposed wording of Articles 5 and 6 of the Draft Act is not substantiated by facts, and their contents infringes Article 187(3) of the Constitution for the above-said reasons.

Moreover, the Council points to the constitutional rule of continuity of state authority (Article 126(1) of the Constitution). The rule applies specifically to the protection of the

principle of rotation of public authorities. Pursuant to Article 238(1) of the Constitution, “the term of office of constitutional bodies of public authorities and the individuals composing them, whether elected or appointed before the coming into force of the Constitution, shall end upon the expiry of the period specified in provisions valid before the day on which the Constitution comes into force.” Although this provision does not apply in the case of amending an act, it sets a constitutional standard of intertemporal law. If the author of the Constitution, when adopting the new Constitution, decided to protect the duration of terms of office determined pursuant to provisions that applied before the effective date of the Constitution, the rule should be applied by analogy in the case of amending an “ordinary” act.

On 30 January 2017, the Executive Board of the European Network of Councils for the Judiciary (ENCJ) issued its opinion on the Draft Act. The ENCJ stated that the solutions proposed by the Minister of Justice may hinder the independence of the judiciary in Poland. In its opinion, the ENCJ argues that the proposed amendments fail to meet the international standards of ENCJ. The Executive Board of the European Network of Councils for the Judiciary stated, among others, that:

- giving the Council less than a week to issue an opinion on a large-scale reform of the National Council of the Judiciary does not qualify in any way as a meaningful consultation in the scope of reforms to the justice system;
- shortening the terms of office of judges – members of the National Council of the Judiciary – would jeopardise the continuity of the body and substantiate the suspicion that the government wishes to take control of the Council;
- depriving the judges of the right to select their representatives to the National Council of the Judiciary and granting the exclusive right to select the judges to the National Judicial Council to the parliament breaches the standards of a democratic state as drawn up by the Council of Committee of Ministers of the Council of Europe (recommendation No. 12 of 2010⁴), Venice Commission (opinion of 2015 on Bulgaria⁵) and the Consultative Council of European Judges at the Council of Europe (opinion No. 10⁶), pursuant to which members of councils of the judiciary appointed from among judges should be selected by judges themselves.

⁴ [https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2010\)12E_%20judges.pdf](https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2010)12E_%20judges.pdf) (accessed: 30 January 2017)

⁵ [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)022-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)022-e) (accessed: 30 January 2017)

⁶ [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2007\)OP10&Language=lanPolish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2007)OP10&Language=lanPolish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true) (accessed: 30 January 2017)

In the opinion it was emphasised that the ENCJ standards “have not been developed to serve the interests of justice, but they only reflect common rules and values of EU Member States, which guarantee proper operation of democratic systems based on the rule of law.”

Moreover, the National Council of the Judiciary states that on the same date, the Ministry of Justice submitted to the Council for an opinion two draft acts amending the Act on the National Council of the Judiciary (the Draft Act under discussion and the Draft Act amending the Act on the National School of Judiciary and Public Prosecution, Act – Law on the organisation of common courts and certain other acts). The Draft Acts are not only non-coherent, but in a part, aim at amending the same provisions in a different manner (this refers to the amendments to Article 22, Article 32(1a), Articles 34, 35, 36 and 37 of the Act on the National Council of the Judiciary). The fact that Draft Acts regulating the same issues in a different manner are drawn up in the same Ministry on the same day gives the Council serious reasons for concern.

To conclude, it must be stated that the Minister of Justice on multiple occasions refers in the reasons for the Draft Act to examples of regulations applicable in other states (e.g. Spain or Germany). The National Council of the Judiciary is aware of the fact that in other legal systems, the rules of justice operation and the manner of appointing judges are constructed in various ways. However, it must be recalled that in accordance with Article 8(1) of the Constitution – it is the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws, No. 78, item 483 as amended) that is the supreme law in the Republic of Poland, and not the Constitution of Spain of 31 October 1978 or the Basic Law of the Federal Republic of Germany of 23 May 1949. In the opinion of the National Council of the Judiciary, taking this fact in consideration during the legislative works carried out by the Ministry of Justice would be likely to result in a discontinuation of the works on the Draft Act. Since, as it has already been indicated, the proposed solutions are in obvious and gross contradiction with the Polish Constitution.