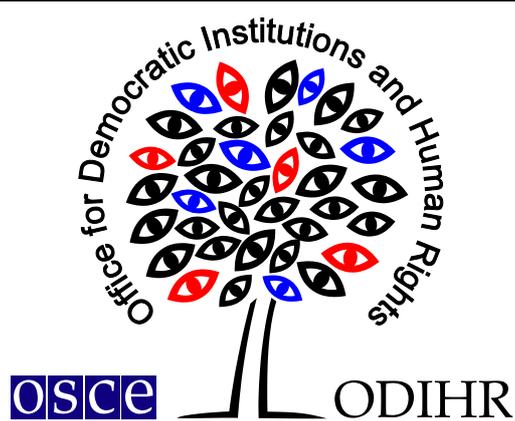


Warsaw, 5 May 2017

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

[www.legislationline.org](http://www.legislationline.org)



**FINAL 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 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

<b>I. INTRODUCTION .....</b>	<b>3</b>
<b>II. SCOPE OF REVIEW .....</b>	<b>3</b>
<b>III. EXECUTIVE SUMMARY .....</b>	<b>4</b>
<b>IV. ANALYSIS AND RECOMMENDATIONS .....</b>	<b>6</b>
<b>1. General Comments .....</b>	<b>6</b>
<i>1.1. The Role and Status of the National Council of the Judiciary of Poland .....</i>	<i>6</i>
<i>1.2. Terminology .....</i>	<i>7</i>
<b>2. International Standards and OSCE Commitments on the Independence of the Judiciary and Judicial Councils or Other Similar Bodies .....</b>	<b>9</b>
<b>3. The Appointment and Terms of Office of Judge Members of the Judicial Council .....</b>	<b>11</b>
<i>3.1. The Modalities of Appointing Judge Members of the Judicial Council .....</i>	<i>11</i>
<i>3.1.1. Appointing Authority .....</i>	<i>11</i>
<i>3.1.2. The Representation of the Judiciary at All Levels .....</i>	<i>18</i>
<i>3.1.3. Additional Recommendations for Amending the 2011 Act and Reforming the National Council of the Judiciary .....</i>	<i>18</i>
<i>3.2. The “Joint” Terms of Office of Judge Members of the Judicial Council .....</i>	<i>22</i>
<b>4. The New Structure of the Judicial Council and Modifications to the Procedure for the Selection of Judges and Trainee Judges .....</b>	<b>22</b>
<i>4.1. The New Structure of the Judicial Council .....</i>	<i>22</i>
<i>4.2. Modifications to the Procedure for the Appointment of Judges and Trainee Judges .....</i>	<i>24</i>
<b>5. The Termination of the Mandate of Current Judge Members of the Judicial Council .....</b>	<b>28</b>
<b>6. Other Comments .....</b>	<b>30</b>
<i>6.1. Changes to the Remuneration of Certain Retired Judges (removed from the new version of the Draft Act of March 2017) .....</i>	<i>30</i>
<i>6.2. Impact Assessment and Participatory Approach .....</i>	<i>31</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,<sup>1</sup> and later endorsed by the Government on 7 March 2017 and subsequently communicated to the Sejm. Since the 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, the 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 first prepare a Preliminary Opinion on the Draft Act, which was published on 29 March 2017.<sup>2</sup>*
5. *The OSCE/ODIHR then held a series of follow-up meetings with various stakeholders working on judicial reform in Poland, including the Ministry of Justice, the National Council of the Judiciary, the Commissioner for Human Rights of Poland, representatives of judges’ and bar associations, as well as non-governmental organizations. The OSCE/ODIHR also took into consideration written comments on the Preliminary Opinion published by the Ministry of Justice on 29 March 2017,<sup>3</sup> as well as those received from the Head of the Delegation of the Sejm and the Senate of the Republic of Poland to the OSCE Parliamentary Assembly.*
6. *This Final Opinion was prepared in response to the above-mentioned request. It primarily aims to clarify and elaborate on certain recommendations or statements made in the Preliminary Opinion.*

## **II. SCOPE OF REVIEW**

7. *The scope of this Final Opinion covers only the Draft Act submitted for review. Thus limited, the Final Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the judiciary in Poland.*
8. *The Final 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*

---

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

<sup>2</sup> OSCE/ODIHR, *Preliminary Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 22 March 2017, <<http://www.legislationline.org/documents/id/20517>> (English version) and <<http://www.legislationline.org/documents/id/20518>> (Polish version), hereinafter “2017 OSCE/ODIHR Preliminary Opinion”.

<sup>3</sup> Available at <<https://www.ms.gov.pl/pl/informacje/news.9193.projekt-wstepnej-opinii-obwe-pelen-bledow-i.html>>.

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

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 Final Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation, the OSCE/ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

9. 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 Final Opinion's analysis takes into account the potentially different impact of the Draft Act on women and men, as judges or as lay persons.<sup>4</sup>
10. This Final 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.
11. In view of the above, the OSCE/ODIHR would like to make mention that this Final 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**

12. 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.
13. While the OSCE/ODIHR recognizes the right of every state to reform its judicial system, any judicial reform process should preserve the independence of the judiciary and the key role of a judicial council in this context.<sup>5</sup> In this regard, the proposed amendments raise serious concerns with respect 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.<sup>6</sup> The changes proposed by the Draft Act could also affect

---

<sup>4</sup> 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>>.

<sup>5</sup> As specifically noted by the Council of Europe's Group of States against Corruption (GRECO) in its *Second Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Poland*, 28 March 2017, par 67, <<http://www.coe.int/en/web/greco/evaluations/round-4>>.

<sup>6</sup> UN Human Rights Committee, *Concluding Observations on the 7<sup>th</sup> 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](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPOL%2fCO%2f7&Lang=en)>. The

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

public trust and confidence in the judiciary, as well as its legitimacy and credibility. If adopted, the amendments could 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.

14. 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 as a consequence possible negative effects for the independence of the judiciary in Poland. Such an approach also contradicts international and regional recommendations, which advise for judge members of judicial councils to be selected by the judiciary.
15. Moreover, it is noted that the new proposed structure of the Judicial Council creates two assemblies within the Council, with a "First Assembly" mainly composed of representatives of the executive and the legislative branches (eight out of ten). This body has equal powers regarding judicial selections as the "Second Assembly" composed of fifteen judges. If either of these assemblies opposes a judicial appointment, this veto 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, which means that the representatives of the legislative and executive powers would be able to *de facto* control and block judicial appointment processes. Allowing these powers to have such a strong influence in this field would contradict 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.
16. Finally, Article 5 of the Draft Act provides that the mandate of the fifteen judges currently sitting on the Judicial Council shall 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 currently sitting on the Judicial Council would not be able to challenge the termination of their mandates before an ordinary national tribunal or other domestic body exercising judicial powers. At the same time, the OSCE/ODIHR welcomes the fact that the provisions from the February 2017 version of the Draft Act involving a drastic reduction of the remuneration of certain retired judges have been removed from the latest version.
17. **In light of the potentially negative impact that the Draft Act, if adopted, would have on the independence of the Judicial Council, and as a consequence 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.**

---

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".

18. At the same time, the provisions of the 2011 Act pertaining to the appointment of judge members to the Judicial Council could be further enhanced, particularly to ensure more proportional and gender balanced representation of judges from all court levels. Moreover, the openness and transparency of their nomination and selection process could be increased, while enhancing public oversight and avoiding the risk of corporatism (see Sub-Sections 3.1.2 and 3.1.3 *infra*). The same applies to the procedure and criteria for selecting judges (see pars 77 and 79 *infra*). In any case, the Draft Act, or any other legislative proposals on judicial reform, should be subject to inclusive, extensive and effective consultations at all stages of the lawmaking process, including at the parliamentary stage.
19. Additionally, the OSCE/ODIHR encourages the conduct of a comprehensive and in-depth regulatory impact assessment of all pending legislative proposals in the field of judicial reform (see Sub-Section 6.2), all the more in light of the plethora of past, present and future initiatives in this area, regarding among others common courts, court presidents, the Supreme Court, the Constitutional Tribunal, the National Council of the Judiciary, judicial education and training, also in light of the parallel reform of the prosecution service.
20. 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 pertaining to the judiciary.

#### **IV. ANALYSIS AND RECOMMENDATIONS**

##### **1. General Comments**

###### ***1.1. The Role and Status of the National Council of the Judiciary of Poland***

21. 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 competences of the Judicial Council (see par 26 *infra*).
22. 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 30 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.

23. 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 pertaining to the election/selection of judge members 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*).

## ***1.2. Terminology***

24. At the outset, it is worth reiterating that across the OSCE region, there exist a variety of mechanisms to ensure judicial independence, including bodies such as judicial councils and/or other bodies independent from the legislative and executive powers. Several models exist, with such bodies performing functions ranging from the appointment and evaluation of judges to competences for management and budgetary matters – and with varying organizational structures and degrees of autonomy from other state powers (see pars 44-46 and 52-53 *infra*).<sup>7</sup>
25. Overall, the judiciary must be, or must be seen to be self-governing in order to be considered independent.<sup>8</sup> In a given country, there may be several so-called “self-governing bodies”, including assemblies of judges from different levels in addition to a central independent body. In any case, the latter should be endowed with broad competences for all questions concerning the status of judges, their appointment, promotion, capacity development and discipline as well as the organisation, the functioning and the image of judicial institutions, and should enjoy a leading role in that respect, in co-operation with other bodies as applicable.<sup>9</sup> Consequently, it is the role and

---

<sup>7</sup> See e.g., Consultative Council of European Judges (CCJE), *Opinion No. 10 (2007) on the Council for the Judiciary at the Service of Society*, 23 November 2007, par 46, <[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)>; and European Network of the Councils for the Judiciary (ENCJ), 2013-2014 *Report on “Independence and Accountability of the Judiciary”*, pages 17-19, <[http://birosag.hu/sites/default/files/allomanyok/kozadatok/obh/encj\\_report\\_independence\\_accountability\\_adopted\\_version\\_sept\\_2014.pdf](http://birosag.hu/sites/default/files/allomanyok/kozadatok/obh/encj_report_independence_accountability_adopted_version_sept_2014.pdf)>.

<sup>8</sup> ENCJ, *Distillation of ENCJ Principles, Recommendations and Guidelines (2004-2016)*, page 5, <[http://www.ejtn.eu/Documents/encj\\_distillation\\_report\\_2004\\_2016.pdf](http://www.ejtn.eu/Documents/encj_distillation_report_2004_2016.pdf)>.

<sup>9</sup> See e.g., *op. cit.* footnote 7, par 42 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); and CCJE, *Magna Carta of Judges*, 17 November 2010, par 13, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE-MC\(2010\)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE-MC(2010)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)>. See also e.g., ENCJ, *Resolution of Budapest on Self-Governance for the Judiciary: Balancing Independence and Accountability* (May 2008),

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

competences of a given body that are crucial when determining whether or not it may qualify as a “judicial self-governing body” that should operate independently from the executive and the legislative branches, rather than its legal classification or definition under national legislation. The underlying key principle is that, in light of their roles as safeguards of judicial independence and the management of the judiciary, judicial councils and/or other similar bodies should themselves be independent and impartial.<sup>10</sup> In order to establish whether a body can be considered independent, various elements should be considered, *inter alia*, the manner in which its members are appointed and their terms of office, the existence of guarantees against outside pressure and the question of whether the body presents an appearance of independence<sup>11</sup> (see also Sub-Section 3.1.1 on Appointing Authorities *infra*).

26. It is acknowledged that Article 3 of the Law on Common Court Organization of Poland<sup>12</sup> defines judicial self-governing bodies as including only judges’ assemblies and meetings of judges of a given court and does not refer to the Judicial Council. At the same time, as detailed in Chapter 4 of the Law (particularly Articles 34, 36 and 36a), the judges’ assemblies and meetings have relatively limited competences, which mainly involve providing opinions on candidates for specific positions and on the operation of courts, as well as, for the general assembly of appeal judges, proposing to the Judicial Council candidates for the position of disciplinary prosecutor (Article 112). Hence, these bodies or platforms’ roles and competences are too limited to ensure the “self-governance” of the judiciary (see par 25 *supra*) and more generally to maintain the independence of the judiciary. On the other hand, Article 186 par 1 of the Constitution states that the Judicial Council shall “safeguard the independence of courts and judges” and Article 3 of the 2011 Act mentions that key functions of this body include competences pertaining to the selection and career of judges, professional ethics, professional development, and an advisory role on draft legislation and issues pertaining to the status of judges and trainee judges, and the judiciary in general, among others.
27. In light of its mandate to safeguard the independence of courts and judges and its functions (see pars 25-26 *supra*), irrespective of its legal classification under domestic law, substantial aspects of the tasks and competences of the Judicial Council are thus to be seen as similar to those of a judicial self-governing body according to the above-mentioned elements (par 25 *supra*). While the Judicial Council is not a judicial authority and does not exercise judicial functions, it should, in light of its role and competences, itself be independent and impartial in order to be able to adequately fulfil its role of safeguarding judicial independence in Poland.<sup>13</sup> Moreover, any interference with the independence of the Judicial Council could as a consequence also have an impact on and potentially jeopardize the independence of the judiciary in general.

---

[https://www.ency.eu/index.php?option=com\\_content&view=article&id=70:resolutionbudapest&catid=19:concils-for-the-judiciary&Itemid=239](https://www.ency.eu/index.php?option=com_content&view=article&id=70:resolutionbudapest&catid=19:concils-for-the-judiciary&Itemid=239); *ibid.* page 5 (ENCJ Distillation of ENCJ Principles, Recommendations and Guidelines (2004-2016)); and *op. cit.* footnote 7, pages 17-19 (2013-2014 ENCJ Report on “Independence and Accountability of the Judiciary”).

<sup>10</sup> See the Preamble to the Bangalore Principles of Judicial Conduct (2002), 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”.

<sup>11</sup> See UN Special Rapporteur on the Independence of Judges and Lawyers, *Report on Judicial Accountability*, A/HRC/26/32, 28 April 2014, <[http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/26/32](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/32)>; and e.g., European Court of Human Rights (ECtHR), *Olujic v. Croatia* (Application no. 22330/05, judgment of 5 May 2009), par 38, <<http://hudoc.echr.coe.int/eng?i=001-91144>>; and *Oleksandr Volkov v. Ukraine* (Application No. 21722/11, judgment of 25 May 2013), par 103, <<http://hudoc.echr.coe.int/eng?i=001-115871>>.

<sup>12</sup> Article 3 par 2 of the Polish Law on Common Court Organization states that “[j]udicial self-government bodies are: 1) general assembly of appeal judges; 2) general assembly of circuit judges; 3) meeting of judges of a given court” (<<http://legislationline.org/topics/country/10/topic/9>>, English version as last amended in 2016, and <<http://isap.sejm.gov.pl/DetailsServlet?id=WDU20010981070>>, Polish version as last amended in 2017).

<sup>13</sup> *Op. cit.* footnote 10 (Preamble to the Bangalore Principles of Judicial Conduct (2002)), 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”.

## **2. International Standards and OSCE Commitments on the Independence of the Judiciary and Judicial Councils or Other Similar Bodies**

28. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.<sup>14</sup> This principle is also crucial to upholding other international human rights standards.<sup>15</sup> More specifically, the independence of the judiciary is a prerequisite to the broader guarantee of every person's right to a fair trial, i.e. to a fair and public hearing by a competent, independent and impartial tribunal established by law and by an accountable judiciary. 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 Rights<sup>16</sup> (hereinafter "the ICCPR"). The UN Basic Principles on the Independence of the Judiciary (1985)<sup>17</sup> 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".<sup>18</sup>
29. At the European level, Poland is also bound by the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>19</sup> (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, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*<sup>20</sup> 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

<sup>14</sup> 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](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".

<sup>15</sup> 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>>.

<sup>16</sup> 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.

<sup>17</sup> *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.

<sup>18</sup> 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%2fGC%2f32&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fGC%2f32&Lang=en)>.

<sup>19</sup> 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.

<sup>20</sup> 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)>.

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

the composition of councils of the judiciary, 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 Final Opinion will also make reference to the opinions of the Consultative Council of European Judges (CCJE),<sup>21</sup> an advisory body of the Council of Europe on issues related 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”).<sup>22</sup>

30. 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”.
31. 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).<sup>23</sup> In the 1991 Moscow Document,<sup>24</sup> 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.<sup>25</sup>
32. 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 judicial councils or other independent bodies of judicial self-government and the appointment of judges, including, among others:

---

<sup>21</sup> Available at <[http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis\\_en.asp](http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp)>, particularly *op. cit.* footnote 7 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society). 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)>; *op. cit.* footnote 9 (2010 CCJE Magna Carta of Judges); 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)>.

<sup>22</sup> 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)>.

<sup>23</sup> 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/odihr/elections/14304>>.

<sup>24</sup> 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/odihr/elections/14310>>.

<sup>25</sup> 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>>.

- the Bangalore Principles of Judicial Conduct (2002), endorsed by the UN Economic and Social Council in its resolution 2006/23;<sup>26</sup>
- the reports of the UN Special Rapporteur on the Independence of Judges and Lawyers;<sup>27</sup>
- the reports and other documents of the European Network of Councils for the Judiciary (ENCJ);<sup>28</sup>
- the European Charter on the Statute for Judges (1998);<sup>29</sup> and
- the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010)<sup>30</sup> and the opinions of the OSCE/ODIHR dealing with issues pertaining to judicial councils and the independence of the judiciary.<sup>31</sup>

### **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***

##### *3.1.1. Appointing Authority*

33. 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 courts<sup>32</sup> (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 Sub-Section 3.1.2 *infra*).
34. 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

<sup>26</sup> *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 judges 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](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)>.

<sup>27</sup> Available at <<http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>>.

<sup>28</sup> Available at <<https://www.encj.eu/>>.

<sup>29</sup> *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>>.

<sup>30</sup> 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>>.

<sup>31</sup> Available at <<http://www.legislationline.org/search/runSearch/1/type/2/topic/9>>.

<sup>32</sup> 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.

recommendations concerning the proposed candidates to the Marshal of the *Sejm* (new Article 11 par 3). As per a new Article 12 par 2 that the Draft Act proposes to add to 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.

35. According to the new provisions proposed by the Draft Act, the judiciary seems to 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 proposed by the legislature (the Marshal). Moreover, while the new Article 11 par 3 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 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, would only present to the *Sejm* candidates from the pool of candidates exclusively nominated by the Presidium or deputies of the *Sejm* under Article 11 par 2.
36. If the intent of the law makers was to create a two-tier system whereby judges' associations propose candidates to the *Sejm*, and these proposals would form the basis for the election by the *Sejm* of judge members to the Council, similar to the Spanish system (see par 44 *infra*), the current wording of the Draft Act would benefit from more clarity to reflect this intention. Moreover, such appointing modalities still run the risk that non-associated judges will not be proposed as candidates, thus limiting the representation from all levels and all branches of the judiciary. Finally, regarding similar two-tier systems, bodies such as the Council of Europe's Group of States against Corruption (GRECO) have specifically raised their concerns regarding the "perception of politicisation [of the judicial council] in the citizens' eyes", given the role of the Parliament in the selection process.<sup>33</sup>
37. In principle, judicial councils or other similar bodies are crucial to support and guarantee the independence of the judiciary in a given country, and as such *should themselves be independent and impartial*,<sup>34</sup> i.e., free from interference from the executive and legislative branches. Indeed, interfering with the independence of bodies, which are guarantors of judicial independence, could as a consequence impact and potentially jeopardize the independence of the judiciary in general. As is the case in Poland (see par 26 *supra*), such councils are generally in charge of key issues pertaining to the independence of judges, particularly judicial appointments and promotion, and also represent the interests of the judiciary as a whole, in particular vis-à-vis the executive and legislative powers.
38. It is generally acknowledged at the international level that judicial councils or other similar independent bodies should, however, not be composed completely or over-prominently by members of the judiciary, so as to prevent self-interest, self-protection,

---

<sup>33</sup> See e.g., GRECO, *Second Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Spain*, 15 January 2014, par 80, <<http://www.coe.int/en/web/greco/evaluations/round-4>>.

<sup>34</sup> See *op. cit.* footnote 10, 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*".

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

cronyism and also the perceptions of corporatism.<sup>35</sup> 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. At the same time, and while reiterating that judges should represent a “substantial element or a majority” of judicial councils’ members, regional bodies, including the OSCE/ODIHR, the Venice Commission and the CCJE, generally recommend a greater inclusion of lay members in such bodies to avoid the risk of corporatism and add a certain level of external, more neutral control<sup>36</sup> (see also recommendations in pars 49, 51 and 55 *infra* regarding the pluralistic composition of judicial councils).

39. While not *per se* changing the Judicial Council’s existing powers or amending its composition in terms of members, the Draft Act is amending the manner in which its members are appointed, which is one of the criteria considered by the European Court of Human Rights (ECtHR) when assessing whether a given body enjoys independence or not (see par 25 *supra*).<sup>37</sup> In that respect, the Court has highlighted that the manner in which judges are appointed to a judicial council, and particularly the nature of the appointing authorities, is relevant in terms of judicial self-governance.<sup>38</sup> More specifically, the ECtHR has stressed the importance of having the judicial corps elect its own representatives to the Council, in order to “reduc[e] the influence of the political organs of the government on the composition of the [Council]”.<sup>39</sup> It is worth noting that

<sup>35</sup> See *op. cit.* footnote 30, par 2 (2010 ODIHR Kyiv Recommendations on Judicial Independence); and *op. cit.* footnote 7, par 16 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society). See also e.g., 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-e, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), pars 68-76, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)026-e)>.

<sup>36</sup> *ibid* (2014 Venice Commission Opinion on the Seven Amendments to the Constitution of “the former Yugoslav Republic of Macedonia”). See also *op. cit.* footnote 30, par 7 (2010 ODIHR Kyiv Recommendations on Judicial Independence); OSCE/ODIHR *Opinion on the Law concerning the Judicial System, the Supreme Council of the Judiciary, and the Status of Judges in Tunisia*, 21 December 2012, par 21, <<http://www.legislationline.org/documents/id/17846>>; OSCE/ODIHR-Venice Commission, *Joint Opinion on the Constitutional Law on the Judicial System and Status of Judges of Kazakhstan*, 17-18 June 2011, par 20, <<http://www.legislationline.org/documents/id/16560>>. See also *op. cit.* footnote 22, 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 20, 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 29, 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 7, 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”.

<sup>37</sup> *Op. cit.* footnote 11, par 102 (*Oleksandr Volkov v. Ukraine*, ECtHR judgment of 9 January 2013); and par 38 (*Olujic v. Croatia*, ECtHR judgment of 5 May 2009).

<sup>38</sup> *ibid.* pars 109 to 117, particularly par 112 (*Oleksandr Volkov v. Ukraine*, ECtHR judgment of 9 January 2013).

<sup>39</sup> *ibid.* par 112 (*Oleksandr Volkov v. Ukraine*, ECtHR judgment of 9 January 2013). In the *Volkov* case, the ECtHR assessed the independence of the High Council of Justice of Ukraine (HCJ), at a time when its composition consisted of twenty members, including 3 members directly appointed by the President of Ukraine, 3 members appointed by the Parliament of Ukraine, and another 2 members appointed by the All-Ukrainian Conference of Prosecutors, with the Minister of Justice and the Prosecutor General being *ex officio* members of the HCJ. An additional three members were to be appointed by the Assembly of Judges of Ukraine, the Assembly of Advocates of Ukraine, and the Assembly of Representatives of Higher Legal Educational Establishments and Scientific Institutions, each, with additionally the President of the Supreme Court being an *ex officio* member. While noting the amendments made in 2010 to the effect that at least 10 members of the Council should be from the judicial corps, the ECtHR held that “[t]hese amendments, however, did not affect the applicant’s case. In any event, they are insufficient, as the bodies appointing the members of the HCJ remain the same, with only three judges being elected by their peers. Given the importance of reducing the influence of the political organs of the government on the composition of the HCJ and the necessity to ensure the requisite level of judicial independence, the manner in which judges are appointed to the disciplinary body is also relevant in terms of judicial self-governance” (par 112). It must be highlighted that the composition of the High Council of Justice of Ukraine has now been modified in order to reduce potential political influence on the Council, see Article 131 of the Constitution of Ukraine as amended in 2016 (<<http://www.legislationline.org/topics/country/52/topic/9>>) and pars 17-21 of the *Venice Commission’s Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015*, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)027-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)027-e)>.

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

an earlier judgment concerned the judicial council in Croatia, where at the time the council members were appointed by the parliament upon the recommendations of various bodies. Although the ECtHR did not question the independence of the judicial council in that case, the composition and modalities of appointment of the council members have since changed and the Croatian Parliament is no longer competent to appoint members of the judicial council, a choice made in order to reduce the possibility of political influence over the process.<sup>40</sup> In a similar and more recent case where half of the council members were from the judicial corps, the ECtHR has held that the fact that the bodies appointing the great majority of the council members were from the executive and legislative branches constituted a structural deficiency that was not compatible with the principle of independence.<sup>41</sup> Similarly, the Venice Commission has noted that when judge members of a judicial council are elected by Parliament, this places the selection process under the influence of the Parliament, which means that political considerations may prevail when electing the council members.<sup>42</sup> Finally, regarding similar systems, for instance in Spain and in Serbia, GRECO has specifically raised some concerns with respect to the real and perceived independence of the judicial councils in these countries.<sup>43</sup>

40. 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 (apart from the *ex officio* members, 21 members would now be appointed by the legislative branch and one by the executive), increases the influence of these powers over the appointment process of its members, thereby threatening the independence of the Judicial Council, and as a consequence, judicial independence overall 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 has expressed concerns regarding the Draft Act, and the potential for increased government interference in judicial administration.<sup>44</sup>
41. Based on the above considerations, the selection method proposed in the Draft Act would likewise not be in line with recommendations pertaining to the selection of members of judicial councils or other similar bodies 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.<sup>45</sup> The CCJE has expressly stated that it “does not

---

<sup>40</sup> *Op. cit.* footnote 11. In the *Olujić* case, the ECtHR considered the National Council of the Judiciary to be independent, including in light of the appointment of its members and its functioning (pars 38-41); this was at a time where the fifteen members of the Council (i.e., eight judges, one of whom was the President of the Council, four State Attorneys or their Deputies, one Attorney at Law and two Professors of Law) were elected by the Chamber of Representatives of Croatia, which had to “ask the Supreme Court of Croatia, the Minister of Justice, Attorney General of Croatia, the Chamber of Law of Croatia, and noted scholars of jurisprudence for recommendation of individuals deemed worthy of the office of presidency and the membership in the council. References on these individuals can also be obtained from other sources” – see Article 3 of the Law on the State Judiciary Council (1993, as amended in 2005), applicable at the time, available at

[http://www.legislationline.org/download/action/download/id/3866/file/Croatia\\_Law\\_State\\_Judiciary\\_Council\\_1993\\_am2005\\_en.pdf](http://www.legislationline.org/download/action/download/id/3866/file/Croatia_Law_State_Judiciary_Council_1993_am2005_en.pdf).

It is worth noting that since then, the composition and modalities of appointment of its members have changed (see par 45 of the Final Opinion), in order to reduce the possibility of political influence over the process.

<sup>41</sup> *Op. cit.* footnote 11, pars 112 and 117, particularly par 112 (*Oleksandr Volkov v. Ukraine*, ECtHR judgment of 9 January 2013).

<sup>42</sup> See e.g., Venice Commission, *Opinion on the Constitution of Serbia*, adopted by the Commission at its 70th plenary session (Venice, 17-18 March 2007), par 70, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)004-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)004-e); and Venice Commission, pars 36-37, *Preliminary Opinion on the Proposed Constitutional Amendments regarding the Judiciary of Ukraine*, CDL-PI(2015)016-e, 24 July 2015, pars 36-37, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)016-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)016-e).

<sup>43</sup> See e.g., *op. cit.* footnote 33 (2014 GRECO’s Second Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Spain); and also GRECO, *Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Serbia*, 2 July 2015, pars 96-99, <http://www.coe.int/en/web/greco/evaluations/round-4>.

<sup>44</sup> *Op. cit.* footnote 6, pars 33-34 (UN Human Rights Committee Concluding Observations on the 7<sup>th</sup> Periodic Report of Poland dated 23 November 2016).

<sup>45</sup> See e.g., *op. cit.* footnote 30, 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 20, par 27 (2010 CoE

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

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]”.<sup>46</sup>

42. The principle of having judge members of judicial councils 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 of the judiciary and of judges.<sup>47</sup> Putting in place legal/formal safeguards to protect and increase the independence of judicial councils or other similar independent bodies also tends to improve the public perception that the judiciary is independent.<sup>48</sup>
43. While a variety of models for appointing members of judicial councils exist across the OSCE region, the great majority of EU Member States which have judicial councils thus provide for judge members of such bodies to be either elected by their peers or appointed or proposed by their peers,<sup>49</sup> a model that also tends to be followed in so-called new democracies<sup>50</sup> (see also pars 44-46 *infra* regarding specifically the examples of Spain, as well as Belgium, Croatia, France, Hungary, Italy and the Netherlands, and other countries from the OSCE region). 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 the risk of jeopardizing the independence of judicial councils, for instance by increasing the dependence of such bodies on the legislature and the executive and potentially subjecting judicial appointments to political

---

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 29, 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 7, 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 22, 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”.

<sup>46</sup> *Op. cit.* footnote 7, par 31 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

<sup>47</sup> 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)>.

<sup>48</sup> *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>>.

<sup>49</sup> See e.g., among the 22 judicial councils that are reviewed in the 2016 EU Justice Scoreboard, including two for Italy and three for the United Kingdom (one for England and Wales, one for Scotland and one for Northern Ireland), in 18 of them, 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](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf)>).

<sup>50</sup> For other countries of the OSCE region that are not EU Member States, 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](http://www.coe.int/t/dghl/cooperation/ccje/textes/Travaux10_en.asp)>.

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

considerations (see also comments in Sub-Section 4.2 *infra* regarding the appointment of judges).<sup>51</sup>

44. 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. While bearing in mind the concerns voiced with respect to the Spanish model by international bodies (see par 39 *supra*), it is at the same time important to highlight 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* [emphasis added], which is then communicated to the Parliament by the General Council of the Judiciary itself.<sup>52</sup> 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 judges may be nominated by the Presidium or by 50 deputies of the *Sejm* and where the recommendations of judges' associations do not appear to be binding on the *Sejm* (see par 35 *supra*).
45. With regard to other country examples, similarly, judge members, usually representing 50% or more of the council members, are either elected by their peers or appointed or proposed by their peers, and not freely chosen by the Parliament, for instance:
- in Belgium, out of 44 members, 22 (of which eight are attorneys, six are professors and eight are civil society representatives) are designated by the Senate and 22 judge members by the relevant assembly of judges, while non-judge members cannot hold a 'mandate obtained by election' or a 'public function of a political nature';<sup>53</sup>
  - in Croatia, the National Judicial Council consists of eleven members, of whom seven shall be judges elected by the Commission for the Election of Council Members composed of five members each representing a different type of courts and appointed by the General Session of the Supreme Court of the Republic of Croatia, two university professors of law (elected by all the professors of law faculties in the Republic of Croatia) and two members of Parliament, one of whom shall be from ranks of the opposition;<sup>54</sup>
  - in France, the section of the Superior Council of the Magistracy with jurisdiction over judges<sup>55</sup> shall be composed of the Chief President of the *Cour de Cassation*, five judges appointed by their peers, one public prosecutor, one *Conseiller d'État* appointed by the *Conseil d'État* and one barrister, as well as six qualified, "prominent citizens", who are not members of Parliament, of the judiciary or of the administration, and who are chosen by the President of the Republic, and the Presidents of the National Assembly and of the Senate (two each);

<sup>51</sup> See e.g., *op. cit.* footnote 47, par 311 (2016 CCJE-CCPE Report on Challenges for Judicial Independence and Impartiality in the Council of Europe); and *op. cit.* footnote 22, pars 31-32 (2007 Venice Commission's Report on Judicial Appointments).

<sup>52</sup> See Section 122 of the Constitution of Spain and 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](http://legislationline.org/download/action/download/id/6791/file/Spain_law_judiciary_1985_am2016_en.pdf)>.

<sup>53</sup> See Article 151 pars 2 and 3 of the Constitution of the Kingdom of Belgium and Article 259bis1 and 259bis3 par 2 of the Code on the Judiciary of Belgium, <<http://legislationline.org/topics/country/41/topic/9>>.

<sup>54</sup> See Article 124 of the Constitution of Croatia and Articles 4 to 35 of the Act on the State Judiciary Council (1993, as amended in 2011), <<http://legislationline.org/topics/country/37/topic/9>>. See also footnote 40 of the Final Opinion (last sentence).

<sup>55</sup> The Superior Council of the Magistracy shall consist of a section with jurisdiction over judges and a section with jurisdiction over public prosecutors, while it deals with general issues pertaining to the independence of the judiciary in general in plenary; see Article 65 of the Constitution (<<http://www.legislationline.org/documents/action/popup/id/8808/preview>>) and the Organic Law on the Superior Council of the Magistracy of France (1994, as last amended on 20 January 2017), <[http://www.legislationline.org/download/action/download/id/6959/file/France\\_Law\\_on%20the%20Higher%20Council%20of%20Judiciary\\_1994\\_am2017\\_fr.pdf](http://www.legislationline.org/download/action/download/id/6959/file/France_Law_on%20the%20Higher%20Council%20of%20Judiciary_1994_am2017_fr.pdf)>.

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

- in Hungary, the National Judicial Council has fifteen members, including *ex officio* the president of the *Curia* (Supreme Court) while all others are judges, who are elected by majority vote of the meeting of delegated judges<sup>56</sup> (although the Venice Commission found such composition to be problematic and called for a more pluralistic membership);<sup>57</sup>
  - in Italy, the Higher Council for the Judiciary is composed of 27 members, out of which, apart from *ex officio* members, eight lay members are elected by joint sessions of the Parliament and sixteen members elected by judges and prosecutors;<sup>58</sup> and
  - in the Netherlands, the Council of the Judiciary is composed of five members (of which three are judges) selected based on a list of recommendations prepared by the Minister of Justice in agreement with the Council of the Judiciary and after consultations within the judiciary.<sup>59</sup>
46. Similar systems also exist in Latvia, Lithuania, Malta, Romania, Slovenia, the Slovak Republic and the United Kingdom.<sup>60</sup> In other countries such as Austria, Germany, and the Czech Republic, where there are no judicial councils as such, certain functions pertaining to judicial self-management and/or court administration are carried out by special or *ad hoc* boards or commissions, whose mandates vary greatly;<sup>61</sup> at the same time, certain specific tasks such as judicial appointments and discipline are carried out by *ad hoc* autonomous bodies or through other independent methods (see also comments in Sub-Section 4.2 *infra* regarding judicial appointments). Denmark, Ireland, Norway and Sweden have set up some form of independent and autonomous bodies mainly in charge of court service/administration, while other functions such as judicial appointments are generally carried out by distinct independent bodies.<sup>62</sup> In Denmark, for instance, the Court Administration Board is composed of eleven members, eight court representatives (including five judges)<sup>63</sup> nominated by representatives of the Court system, one lawyer and two representatives of the public having “special management and social insights” – although formally they are all appointed by the Minister of Justice.<sup>64</sup> The above examples show that there is a growing good practice among European countries to have judge members of judicial councils or other similar bodies elected, selected or appointed by judges or representatives of the legal profession in general.

<sup>56</sup> See Section 88 of the Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, <http://www.legislationline.org/topics/country/25/topic/9>.

<sup>57</sup> See Venice Commission, *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), par 45, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e)>.

<sup>58</sup> See Article 104 of the Constitution of the Republic of Italy and the Law of 24 March 1958 n. 195 on the Functioning of the Higher Council for the Judiciary, as amended (<<http://legislationline.org/topics/country/22/topic/9>>).

<sup>59</sup> See Sections 84 and 85 of the Act of 18 April 1827 on the Composition of the Judiciary and the Organization of the Justice System in the Netherlands (as of 2008), <<http://legislationline.org/topics/country/12/topic/9>>.

<sup>60</sup> See <<http://www.legislationline.org/topics/topic/9>>.

<sup>61</sup> See e.g., <[http://www.coe.int/t/dghl/cooperation/ccje/textes/Travaux10\\_en.asp](http://www.coe.int/t/dghl/cooperation/ccje/textes/Travaux10_en.asp)> read in conjunction with <<http://www.legislationline.org/topics/topic/9>>.

<sup>62</sup> See e.g., CCJE, *Preliminary report on States without a High Council for the Judiciary*, 19 March 2007, <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1187513&Site=COE&direct=true>>.

<sup>63</sup> i.e., one Supreme Court Justice, two Court of Appeal judges, two District Court judges, one member representing other legal personnel than judges, and two members representing the administrative personnel, see <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE/REP\(2007\)14&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorIntranet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE/REP(2007)14&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorIntranet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true)>.

<sup>64</sup> See <<http://www.domstol.dk/om/otherlanguages/english/thedanishjudicialsystem/courtadministration/Pages/default.aspx>> and <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE/REP\(2007\)14&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorIntranet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE/REP(2007)14&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorIntranet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true)>. Additionally, judicial appointments are made by the Judicial Appointments Council, which is composed of a Supreme Court judge (chairperson), a high court judge (vice-chairperson), a district court judge, a lawyer and two representatives of the public.

47. 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** (see also additional recommendations on proposals for amendments to the 2011 Act to enhance the representation of judges from all court levels, increase the openness and transparency of the nomination and selection process, and avoid corporatism in Sub-Sections 3.1.2 and 3.1.3 *infra*).

*3.1.2. The Representation of the Judiciary at All Levels*

48. 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”.
49. The first objective is unlikely to be achieved by the proposed selection scheme. Indeed, the Draft Act does not appear to include specific modalities that would help ensure that judges, who are members of the Judicial Council are representative of the whole judiciary at all levels and of all its branches, and could thus in fact result in a less representative Judicial Council. 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. This is however 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*,<sup>65</sup> **and amendments to the 2011 Act are recommended in that respect** (see also par 51 *infra* regarding judges from first instance courts).
50. Regarding the second objective, 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.

*3.1.3. Additional Recommendations for Amending the 2011 Act and Reforming the National Council of the Judiciary*

51. The objectives of achieving greater openness and transparency during the nomination and selection process of judge members, as well as representation of judges from first level courts could be achieved by other means which are less likely to impact the independence of the Judicial Council. In addition to the key issues raised in this Final 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, which would also help enhance public oversight and avoid the risk of corporatism.** This could involve, among others:

---

<sup>65</sup> See e.g., *op. cit.* footnote 30, 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 20, 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 29, 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 7, pars 27-30 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

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

- introducing requirements to ensure greater gender balance and diversity in the composition of the Judicial Council,<sup>66</sup> in light of the current composition of the Judicial Council which accounts for only six female members out of twenty-five<sup>67</sup> (i.e., less than 25%, which does not reach Council of Europe’s threshold of 40% of representation of either women or men in any decision-making body in political or public life)<sup>68</sup> whereas there is a reported majority of female judges at the first and second instance court levels;<sup>69</sup>
- amending/supplementing the requirements for judge candidates for the Judicial Council and procedures for their election in the 2011 Act to ensure that judges from first instance courts (district courts) are also represented among the judge members of the Judicial Council,<sup>70</sup> while respecting a certain proportion between all instances of courts and all branches of the judiciary (see Sub-Section 3.1.2 *supra*);
- specifying in the 2011 Act that any judge may submit his/her application to become a judge member to the Council and that the election should be done by secret ballot;<sup>71</sup>
- 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;<sup>72</sup>
- considering the involvement of external autonomous entities/bodies (e.g., universities, non-governmental organizations, bar associations, etc.) and/or civil

<sup>66</sup> *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 7<sup>th</sup> and 8<sup>th</sup> 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](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.

<sup>67</sup> See <<http://www.krs.pl/pl/o-radzie/sklad-i-organizacja>>.

<sup>68</sup> See the *Preamble of the Appendix to the CoE Recommendation CM/Rec(2003)3 of the Committee of Ministers to CoE Member States on the Balanced Participation of Women and Men in Political and Public Decision-making*, adopted on 30 April 2002, <<https://wcd.coe.int/ViewDoc.jsp?id=2229>>.

<sup>69</sup> 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>>.

<sup>70</sup> 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 30, 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”.

<sup>71</sup> See e.g., Venice Commission, *Compilation of Venice Commission Opinions and Reports concerning Courts and Judges*, CDL-PI(2015)001, 5 March 2015, Section 4.3 Procedural Aspects of Appointment/Elections of the Members of the Council, pages 84-88, <[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)>.

<sup>72</sup> 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 7, par 32 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); and *op. cit.* footnote 22, 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>>.

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

society representatives in the process of nominating candidates to become non-judicial or judicial members in the Judicial Council;<sup>73</sup>

- achieving greater openness and transparency by ensuring that all documents pertaining to the selection process, including with respect to potential candidates, are made available to the public, and that the meetings of the appointing bodies, when they discuss the appointment of judge members, are also open to the public; and
- expressly providing civil society representatives with the opportunity to monitor the selection and appointment processes of members of the Judicial Council, to ensure greater transparency (see also comments in par 79 *infra* on the monitoring of Judicial Council's work and functioning in general by the media and civil society).<sup>74</sup>

52. Moreover, it should be highlighted that regional and international bodies, such as the CCJE, GRECO, the Venice Commission and the UN Special Rapporteur on the Independence of Judges and Lawyers, have questioned the practice of having members of parliament or of the executive sit on judicial councils at all.<sup>75</sup> While the 2016 EU Justice Scoreboard refers to 13 cases (out of 22) where judicial councils include members “elected/appointed by the Parliament”, this does not necessarily mean that these are all members of parliament. On the contrary, the applicable legislation in Belgium, Bulgaria, France, Italy, Romania, Slovenia, and Spain provides that such members elected or appointed by the Parliament should be judges, attorney at law or lawyers, professors and/or civil society representatives.<sup>76</sup> In other EU countries, relevant legislation does not exclude members of parliament from becoming members of the judicial councils (Portugal and Slovak Republic), but only in three countries, legislation expressly provides that members of parliament shall be council members, namely Croatia, Latvia and Poland.<sup>77</sup> In some cases such as Belgium, France, Italy and Spain, the relevant laws even expressly state that being a member of the parliament constitutes an ineligibility ground for or is incompatible with membership in the judicial council.<sup>78</sup>
53. As regards the membership of the executive on such councils, only three EU Member States have the Ministry of Justice sitting *ex officio* on the judicial council (Latvia, Poland and Romania). Also, only eight out of the twenty-two judicial councils

<sup>73</sup> See e.g., Venice Commission, *Final Opinion on the Revised Draft Constitutional Amendments on 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)>.

<sup>74</sup> 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/odihr/242346>>.

<sup>75</sup> *Op. cit.* footnote 7, pars 23 and 32 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); *op. cit.* footnote 11, par 93 (2014 Report of the UN Special Rapporteur on the Independence of Judges and Lawyers); and *op. cit.* footnote 22, par 32 (2007 Venice Commission's Report on Judicial Appointments). See e.g., *op. cit.* footnote 43, par 99 (2015 GRECO's Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Serbia), where a majority of members of the Council for the Judiciary is elected by the Parliament, and GRECO specifically recommended to change the composition of the High Judicial Council, in particular by excluding the National Assembly from the election of its members, providing that at least half its members are judges elected by their peers and abolishing the *ex officio* membership of representatives of the executive and legislative powers.

<sup>76</sup> See Article 151 par 2 of the Belgian Constitution and Articles 259bis1 and 259bis3 par 2 of the Judicial Code of Belgium; Article 130 of the Constitution of Bulgaria and Article 17 of the Judiciary System Act of Bulgaria; Article 65 par 2 of the Constitution of the French Republic; Article 104 of the Constitution of the Republic of Italy; Article 133 of the Constitution of Romania; Article 131 of the Constitution of the Republic of Slovenia; and Articles 572 to 578 of the Organic Law 6/1985 of Spain on the Judiciary – all available at <<http://www.legislationline.org/topics/topic/9>>.

<sup>77</sup> See Article 218 of the Constitution of Portugal; Article 141a of the Constitution of the Slovak Republic and Act 185 on the Judicial Council of the Slovak Republic; Article 124 of the Constitution of Croatia and Articles 4 to 33 of the Act on the State Judiciary Council of Croatia; and Chapter 13<sup>1</sup> of the Law on Judicial Power of Latvia – all available at <<http://www.legislationline.org/topics/topic/9>>.

<sup>78</sup> See e.g., Article 259bis3 par 2 of the Judicial Code of Belgium; Article 65 par 2 of the Constitution of the French Republic; Article 104 par 7 of the Constitution of the Republic of Italy; and Article 580 par 1 of the Organic Law 6/1985 of Spain on the Judiciary – all available at <<http://www.legislationline.org/topics/topic/9>>.

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

mentioned in the 2016 EU Justice Scoreboard include members appointed by the executive (Ireland, France, Italy, Malta, the Netherlands, Poland, Portugal and the Slovak Republic). In some of these countries, legislation expressly excludes representatives of the executive/administrative branch themselves from membership in judicial councils (for instance in France and the Netherlands).<sup>79</sup> Also, in some of them, reform proposals have been or are currently considering modifications to the composition of judicial councils to change such appointment modalities and ultimately decrease the potential influence of the executive over such bodies (for instance in Ireland and in France).<sup>80</sup>

54. The Judicial Council of Poland is considered by some to be a necessary platform for dialogue between the three branches of powers. As noted by the CCJE, this type of dialogue is useful to improve the effectiveness of each power and its co-operation with the other two powers. There are many different modalities for organizing such dialogue.<sup>81</sup> It may be worthwhile to explore all available means of such co-operation that would not involve including members from the executive and the legislative in the Council, which is not in line with international and regional recommendations (see par 52 *supra*). Such dialogue should also be undertaken in an atmosphere of mutual respect and pay particular regard to preserving judicial independence.<sup>82</sup>
55. The above considerations aim to 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 should also be given in the future to ensuring that apart from a substantial number of judge members, the Judicial Council is also composed of members of other legal professions, academic and/or civil society representatives.<sup>83</sup>
56. More generally, to further guarantee their independence and impartiality, judicial councils should enjoy financial independence, meaning that they should have the power and capacity to negotiate and organize their own budgets effectively, to ensure that they have adequate human, financial and material resources, including their own premises,<sup>84</sup> to allow them to operate independently and autonomously.<sup>85</sup> Article 27 of the 2011 Act already provides that the “Council's revenues and expenses constitute a separate part of

<sup>79</sup> See Section 84 par 7 of the Act on the Composition of the Judiciary and the Organisation of the Justice System of the Netherlands; and Article 65 par 2 of the Constitution of the French Republic.

<sup>80</sup> See e.g., in Ireland, the General Scheme of the Judicial Council Bill (2016, currently under discussions), <http://www.justice.ie/en/JELR/General%20Scheme%20Judicial%20Bill.pdf/Files/General%20Scheme%20Judicial%20Bill.pdf>. In France, a reform of the Constitution in 2008 led to a modification of the composition of the Superior Council of the Magistracy to decrease the possible influence of the executive over the Council, by removing the provisions stating that the President of the Republic was the Chairperson and the Ministry of Justice was the Vice-Chairperson of the Council. A recent proposal for reform of the composition of the Superior Council of the Magistracy (2016) specifically aimed to amend Article 65 of the Constitution to have the six members that are, pursuant to Article 65 of the Constitution, nominated by the President of the National Assembly, the President of the Senate and the President of the Republic, nominated by a panel of independent personalities, although such amendments were not adopted at the end – see [http://www.assemblee-nationale.fr/14/rapports/r1050.asp#P180\\_26159](http://www.assemblee-nationale.fr/14/rapports/r1050.asp#P180_26159) and <http://www.assemblee-nationale.fr/14/rapports/r3618.asp>.

<sup>81</sup> *Op. cit.* footnote 21, pars 31, 34-38, 40-43, 52-54 (2015 CCJE Opinion No. 18 on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy).

<sup>82</sup> *ibid.*

<sup>83</sup> See e.g., *op. cit.* footnote 30, pars 7-9 (2010 ODIHR Kyiv Recommendations on Judicial Independence); *op. cit.* footnote 7, 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.ency.eu/index.php?option=com\\_content&view=category&layout=blog&id=19&Itemid=239&lang=en](https://www.ency.eu/index.php?option=com_content&view=category&layout=blog&id=19&Itemid=239&lang=en).

<sup>84</sup> *ibid.* pars 37-38 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); and ENCJ, *Report on the Funding of the Judiciary 2015-2016*, 3 June 2016, Principle 3 on Council for the Judiciary on pages 12-13, [https://www.ency.eu/index.php?option=com\\_content&view=article&id=147&Itemid=254&lang=en](https://www.ency.eu/index.php?option=com_content&view=article&id=147&Itemid=254&lang=en).

<sup>85</sup> *ibid.* pars 37-40 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); and *op. cit.* footnote 11, pars 93 and 106 (2014 Report of the UN Special Rapporteur on the Independence of Judges and Lawyers).

the State Budget” and that “[t]he draft plan of the revenues and expenses adopted by the Council is forwarded by the Chairman of the Council to the minister in charge of the budget for the purpose of being incorporated into the draft budgetary act”. **The legal drafters may consider supplementing Article 27 of the 2011 Act or other relevant legislation on public finance or budgetary processes to introduce additional safeguards to protect Judicial Council’s financial independence also in practice.**<sup>86</sup>

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

57. 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.
58. Irrespective of whether the current terms of office of judge members of the Council were intended to be ‘individual’ or ‘joint’, it is noted that the above-mentioned practice may complicate 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.<sup>87</sup>
59. **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.**<sup>88</sup>

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

### **4.1. The New Structure of the Judicial Council**

60. 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 within the Council: a

---

<sup>86</sup> See for instance, as a comparison, legal safeguards to ensure the financial independence of national human rights institutions mentioned in OSCE/ODIHR, *Opinion on the Draft Act on an Independent National Human Rights Institution of Iceland*, 6 February 2017, par 76, <[http://www.legislationline.org/download/action/download/id/6947/file/301\\_NHRI\\_ISL\\_6Feb2017\\_en.pdf](http://www.legislationline.org/download/action/download/id/6947/file/301_NHRI_ISL_6Feb2017_en.pdf)>, which refer for instance to the possibility to prescribe in relevant legislation that the budget proposal should in principle be included in the national budget without changes; in addition, legal provisions against unwarranted budgetary cutbacks could be introduced, including but not limited to the principle that compared to the previous year, any reductions in the budget should not exceed the percentage of reduction of the budgets of the Parliament or the Government.

<sup>87</sup> See e.g., *op. cit.* footnote 7, par 35 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

<sup>88</sup> 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 Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland***

First Assembly composed of ten members (the *ex officio* members of the Judicial Council, the individual appointed by the President of the Republic 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 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".

61. 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.<sup>89</sup> To serve this purpose, judicial councils must themselves enjoy sufficient independence from the other branches of power in their work and decision-making.<sup>90</sup> 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,<sup>91</sup> and advise against the membership of active parliamentarians and ministers in such councils (see par 52 *supra*).
62. While 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 allow for more flexibility with respect to the organization of the meetings of Council members, and thus enhance participation of the Council's members, it may also undermine the collegial work of the Council, create divisions between its members and risks polarizing its functioning (see pars 73-74 *infra*). Moreover, this overly complex system could impact the effective work of the Council and delay the selection of judges, in particular in cases where one of the two Assemblies is not able to meet or reach the respective quorum that will allow it to adopt its resolutions on candidates, or in cases of a deadlock (see pars 71 and 73 *infra*). This may ultimately undermine the Council's ability to fulfil its constitutional mandate.
63. **Accordingly, it is recommended that Articles 1(4) - 1(8) of the Draft Act be reconsidered in their entirety.**

---

<sup>89</sup> See e.g., *op. cit.* footnote 20, par 26 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

<sup>90</sup> See e.g., *op. cit.* footnote 30, 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 29, 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 7, par 19 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

<sup>91</sup> 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 22, 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 83, par 2.1 (ENCJ Report on Council for the Judiciary 2010-2011).

**4.2. Modifications to the Procedure for the Appointment of Judges and Trainee Judges**

64. 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, 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).
65. 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, in the case of the judiciary, legitimacy generally derives from both a state's constitutional framework (formal legitimacy)<sup>92</sup> and public confidence in judges and the judiciary, which requires that judges and the judiciary as a whole maintain legitimacy by delivering work of the highest possible quality, while respecting high ethical standards (functional legitimacy).<sup>93</sup> Moreover, judges need to be accountable to the public (e.g., through the appeals process, the publicity of their work and reasoning of their judgments and disciplinary actions).<sup>94</sup>
66. Hence, although of a different nature, the judiciary is an equally legitimate and necessary part of the democratic state as the other two component powers,<sup>95</sup> and directly accountable to the people. Therefore, the greater involvement of representatives of the executive and of the Parliament, as a directly-elected body, in the selection process of judge members is not a precondition to enhance the legitimacy of the judiciary and judges in general. However, some additional measures or accountability mechanisms could be considered to enhance public trust in the judiciary and legitimacy of the institution (see Sub-Section 3.1.3 *supra* and par 79 *infra*). In any case, states should strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline of judicial conduct.<sup>96</sup>
67. 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).<sup>97</sup> At the same time, and as noted in the 2017 EU Justice Scoreboard (which includes a series of new indicators on

<sup>92</sup> *Op. cit.* footnote 21, 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).

<sup>93</sup> *ibid.* pars 16-18.

<sup>94</sup> *ibid.* pars 26-33.

<sup>95</sup> *ibid.* par 13.

<sup>96</sup> See *op. cit.* footnote 11, par 91 (2014 Report of the UN Special Rapporteur on the Independence of Judges and Lawyers).

<sup>97</sup> Available at <<http://legislationline.org/documents/section/constitutions/country/28>>.

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

the structural independence of judicial systems compared to the 2016 EU Justice Scoreboard), a variety of rules apply in each German *Land*.<sup>98</sup> Moreover, the German legal system does not foresee a permanent judicial council at the federal level (see par 46 *supra*). Finally, the CCJE has stated 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.<sup>99</sup>

68. As highlighted in the 2017 EU Justice Scoreboard, in about half of the EU Member States, the executive and the parliament have little to no discretion in terms of appointment of judges (Bulgaria, Denmark, Greece, Croatia, Italy, Cyprus, Portugal, Spain, France, the United Kingdom, Belgium, Romania, Slovak Republic, Czech Republic, Estonia and Hungary),<sup>100</sup> and very often the executive formally appoints and/or in practice follows the proposals made by the judicial appointments body (for instance, Ireland, Greece for administrative judges, Lithuania, Luxembourg, Slovak Republic).<sup>101</sup>
69. Recommendations elaborated at the regional level emphasize that an undue influence of political interests in the appointment process 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 or other bodies where at least half of the members are judges appointed by their peers.<sup>102</sup> The aim of these arrangements is to ensure that judges are selected based on candidates' merits rather than on political considerations.<sup>103</sup> 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 states 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

---

<sup>98</sup> See the 2017 EU Justice Scoreboard, April 2017, page 40, <[http://ec.europa.eu/newsroom/document.cfm?doc\\_id=43918](http://ec.europa.eu/newsroom/document.cfm?doc_id=43918)>, where it is stated that in Germany, "proceedings at the level of the federal states differ greatly. In half of the 16 federal states, judicial electoral committees participate in the recruitment. In some of the federal states, this matter is dealt with completely by their state Ministry of Justice, whereas in other federal states the authority to decide on recruitment and on the (first) appointment has been transferred to the presidents of the higher regional courts. Some federal states provide for mandatory participation of a council of judges. Others require a joint appointment by the competent minister and a conciliation committee if the council of judges objects. In some federal states, judges are elected by the state parliaments and have to be appointed by the state executive". See also for an overview of such rules and procedures in each *Land*: Northern Ireland Assembly, *Research Paper on Judicial Appointments in Germany and the United States*, March 2012, <<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2012/justice/6012.pdf>>.

<sup>99</sup> *Op. cit.* footnote 21, pars 19 and 33-35 (2001 CCJE Opinion No. 1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges).

<sup>100</sup> See 2017 EU Justice Scoreboard, page 41, <[http://ec.europa.eu/justice/effective-justice/scoreboard/index\\_en.htm](http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm)>.

<sup>101</sup> *ibid.*

<sup>102</sup> See e.g., *op. cit.* footnote 20, 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 30, par 8 (2010 ODIHR Kyiv Recommendations on Judicial Independence), which states that "apart from a substantial number of judicial members", "[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 29, 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 7, 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 22, 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.

<sup>103</sup> 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).

appointing authority follows in practice”.<sup>104</sup> This demonstrates that the judiciary should have a decisive role in judicial appointment procedures.

70. 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 (eight out of ten), or the Second Assembly, composed exclusively of the judge members, could veto the appointment of a judicial candidate who has been positively assessed by the other assembly. 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 (new Article 31b). While this procedure could overcome a veto expressed by the First Assembly, the mentioned anti-deadlock mechanism would not apply in practice to a veto by the Second Assembly.
71. In cases involving a veto by the First Assembly, such a unanimous vote may however be difficult to achieve in practice. Indeed, requiring the unanimous vote of the fifteen judge members plus the First President of the Supreme Court and of the President of the Supreme Administrative Court to overcome the negative decision of the First Assembly would *de facto* mean that only a qualified majority of more than two-thirds (68%) of the total number of council members could overcome the veto of ten members of the First Assembly. Moreover, this qualified majority of all Council members would not be sufficient *per se*, but would have to be made up of exactly the persons mentioned above (fifteen judges, plus the First President of the Supreme Court, and the President of the Supreme Administrative Court), which also means that achieving such an unanimous vote will not be possible in case any of these seventeen council members are unavailable.
72. In practice, the proposed set-up of the Judicial Council would give significantly more powers to the ten members of the First Assembly than to the fifteen members of the Second Assembly.
73. In contrast, the existing voting rules and thresholds for adopting resolutions by the Judicial Council require an absolute majority of votes in plenary, which correspond to the votes of (any) thirteen members if all the members are present (see Article 21 pars 1 and 2 of the 2011 Act). This means that in the current system, the eight council members representing the executive and legislative branches have the same powers as all other council members and are therefore not in a position to block a Council decision. Rather, even if they all vote *en bloc*, they would still need to be supported by at least five additional members from the judiciary if all members of the council are present. Hence, the new structure proposed in the Draft Act would substantially reverse the balance between judicial and non-judicial members of the Council. The veto of the First Assembly could then only be overridden in the above-mentioned manner, which is so complex, that in practice, it would be very difficult to appoint any candidate who is not accepted by the First Assembly.
74. The new approach proposed by the Draft Act could therefore unnecessarily polarize the process of appointing judges and may 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.

---

<sup>104</sup> *ibid.* par 47 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

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

75. In light of the above, these new rules would not be following recommendations elaborated at the regional level which state that the judiciary should have a decisive role in judicial appointment procedures (see par 69 *supra*).
76. 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,<sup>105</sup> without introducing similar selection criteria elsewhere. In this context, it is noted that Articles 55 to 64 of the Law on Common Courts Organisation<sup>106</sup> provide information pertaining to the selection procedure and list minimum eligibility requirements for appointments to judicial posts. At the same time, this Law does not seem to detail the criteria based on which the selection of judges shall take place. Moreover, its Article 60 also specifically states that “[t]he National Council of the Judiciary considers applications for posts of common court judges, applying the procedure specified in a separate act”, which presumably refers to the 2011 Act. Article 35 of the 2011 Act (which is being repealed) is also understood as serving as a legal basis whereby candidates may challenge selection decisions made by the Judicial Council.
77. According to recommendations elaborated at the international level, the selection of judges should be based on objective, pre-established, and clearly defined criteria,<sup>107</sup> while ensuring that the composition of the judiciary reflects the composition of the population as a whole<sup>108</sup> and is balanced in terms of gender.<sup>109</sup> Also, the selection process should be transparent, and any refusal to appoint a judge should be reasoned. The unsuccessful candidate should have the possibility to challenge the respective decision.<sup>110</sup> **The legal drafters should therefore reconsider the removal of Article 35 of the 2011 Act, or replace it with a provision outlining appropriate objective and clearly defined criteria for selecting judges. The Draft Act could also include cross-references to relevant legislation that further defines such criteria.**
78. In light of the above, it is therefore recommended that Articles 1(9) – 1(14) of the Draft Act be reconsidered in their entirety.
79. Furthermore, **the legal drafters may consider additional measures to increase the effectiveness and transparency of judicial appointment processes, and more generally of the work of the Judicial Council. For instance, new provisions could be introduced, either in the Draft Act or in the respective Rules of Procedure of the Council, which would specify the composition of the team in charge of preparing cases pertaining to judicial appointments (Article 31 of the 2011 Act), providing that half of its members shall be judges (selected by their peers) in line with**

<sup>105</sup> 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”.

<sup>106</sup> Available at <<http://www.legislationline.org/topics/country/10/topic/9>>.

<sup>107</sup> See e.g., *op. cit.* footnote 18, par 19 (UN HRC General Comment No. 32 (2007)); *op. cit.* footnote 20, par 44 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities); *op. cit.* footnote 30, par 21 (2010 ODIHR Kyiv Recommendations on Judicial Independence); *op. cit.* footnote 29, pars 2.1 and 2.2 (1998 European Charter on the Statute for Judges); *op. cit.* footnote 7, pars 5-51 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

<sup>108</sup> *ibid.* par 24 (2010 ODIHR Kyiv Recommendations on Judicial Independence).

<sup>109</sup> 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 27, pars 81 and 91 (2011 Report of the UN Special Rapporteur on the Independence of Judges and Lawyers on Gender and the Administration of Justice).

<sup>110</sup> See *op. cit.* footnote 20, par 48 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities); *op. cit.* footnote 30, par 23 (2010 ODIHR Kyiv Recommendations on Judicial Independence); *op. cit.* footnote 7, 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 21, pars 17-31 (2001 CCJE Opinion No. 1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges).

**international and regional recommendations** (see par 69 *supra*). The Rules of Procedure could further specify **that all council members shall receive communications or have access to all supportive documents sufficiently in advance of a plenary meeting of the Council, to allow them to make an informed decision. Moreover, the Draft Act could provide council members who are not able to attend sessions of the Council with the opportunity to provide their position and/or vote on a specific matter in writing, or their participation could be ensured remotely via Information and Communication Technologies (ICT). The 2011 Act could also specifically allow 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 States, or their involvement in consultative bodies created under the auspices of the Judicial Council to discuss judicial reform and policy initiatives**<sup>111</sup> (see also par 51 *supra*). In any case, these measures should be discussed with various bodies of the judiciary and other stakeholders working on the reform of the judiciary in Poland and be subject to meaningful consultations (see Sub-Section 6.2. *infra*).

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

80. 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.
81. 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 respect of the independence of such a body, and as a consequence of the judiciary as a whole.
82. 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.<sup>112</sup> The list therein does not, however, include amendments to relevant legislation. As mentioned in pars 25, 27 and 37 *supra*, judicial councils constitute essential safeguards of the independence of the judiciary, and as such, their members should enjoy guarantees of independence,<sup>113</sup> 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.<sup>114</sup> In principle, the

---

<sup>111</sup> 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](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 and Consolidated Summary 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/hds\\_2016](http://www.osce.org/odihr/hds_2016)>. For instance, in Georgia and Moldova, civil society organizations monitor national judicial council meetings.

<sup>112</sup> 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.

<sup>113</sup> See e.g., *op. cit.* footnote 7, par 36 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

<sup>114</sup> *Op. cit.* footnote 21, 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).

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.<sup>115</sup> Generally, and while noting that the judge members to the Council will not lose their status of judge, the early termination of the mandates of judge members of judicial councils should be guided by similar safeguards and principles.<sup>116</sup> These principles advise for clearly established and transparent procedures and safeguards, based on clear and objective criteria,<sup>117</sup> 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, following proper disciplinary or judicial procedures.<sup>118</sup>

83. Moreover, and as noted by the Court of Justice of the European Union, if it were permissible for a state to compel an "independent" body to vacate office before serving its full term, in contravention of the rules and safeguards established in applicable legislation, "the threat of such premature termination to which that authority would be exposed throughout its term of office could lead it to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence [...] even where the premature termination of the term served comes about as a result of the restructuring or changing of the institutional model".<sup>119</sup> This means that even if the adoption of new legislation or amendments to an existing institutional model is legitimate, the independence of said body should not be compromised, which entails the obligation to allow the respective body to serve its full term of office.<sup>120</sup>
84. Further, 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 ECtHR has considered that office-holders/court executives, hence positions similar to those of judge members of the Judicial Council, have the 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.<sup>121</sup> 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 national tribunal or other domestic body exercising judicial powers.<sup>122</sup> 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 of the Draft Act, then these members may not have the means to individually challenge this

---

<sup>115</sup> 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); *op. cit.* footnote 35, par 77 (2014 Venice Commission's Opinion on the Seven Amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council); 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)>.

<sup>116</sup> 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)>.

<sup>117</sup> *ibid.*

<sup>118</sup> *Op. cit.* footnote 21, 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).

<sup>119</sup> Court of Justice of the European Union, *European Commission v. Hungary*, Case C-288/12, 8 April 2014, par 54, <<http://curia.europa.eu/juris/documents.jsf?num=C-288/12>>.

<sup>120</sup> *ibid.* par 60.

<sup>121</sup> European Court of Human Rights, *Baka v. Hungary* (Application no. 20261/12, judgment of 23 June 2016), pars 107-111, <<http://hudoc.echr.coe.int/eng?i=001-163113>>.

<sup>122</sup> *ibid.* pars 120-122.

termination before any national body exercising judicial powers, given that their individual complaints would not concern a final decision issued by a court or a public administration authority, as required by Article 79 of the Constitution of Poland. It is also understood that the judge members would not have the possibility to seek remedies before ordinary courts, given that as council members, they are not in an employment relationship with the Judicial Council. Article 5 of the Draft Act would accordingly be in violation of Article 6 par 1 of the ECHR.

85. In light of the above, **it is recommended to remove Article 5 par 1 from the Draft Act, so that members of the Judicial Council may serve their full term of office, all the more since there do not seem to be any legal or other compelling reasons justifying the early termination of their mandates.**
86. 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 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)**

87. 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.
88. 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.<sup>123</sup> An

---

<sup>123</sup> See e.g., *op. cit.* footnote 20, 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 29, pars 6.3-6.4 (1998 European Charter on the Statute for Judges); *op. cit.* footnote 9, par 7 (2010 CCJE Magna Carta of Judges); *op. cit.* footnote 22, pars 44-51 (2010 Venice Commission's Report on the Independence of the

adequate level of retirement pensions is part of the safeguards to guarantee the independence of the judiciary and of judges.<sup>124</sup>

## **6.2. Impact Assessment and Participatory Approach**

89. The legal drafters have prepared an Explanatory Statement to the Draft Act, which lists a number of reasons justifying the contemplated reform,<sup>125</sup> 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 evidence-based techniques to identify the best efficient and effective regulatory option (including the “no regulation” option).<sup>126</sup> 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.
90. 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.<sup>127</sup> 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).<sup>128</sup> 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.<sup>129</sup>
91. 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).<sup>130</sup> Moreover, it is not clear to which extent the comments/input received on these occasions have been taken into consideration or not.<sup>131</sup>
92. 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.<sup>132</sup> According to recommendations issued by international and regional

---

Judicial System). See also *op. cit.* footnote 21, pars 61 and 73 (8) (2001 CCJE Opinion No. 1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges).

<sup>124</sup> *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.

<sup>125</sup> See <<https://legislacja.rcl.gov.pl/projekt/12284955>>.

<sup>126</sup> 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>>.

<sup>127</sup> See <<https://legislacja.rcl.gov.pl/projekt/12284955/>>.

<sup>128</sup> Available at <<http://www.osce.org/fr/odihr/elections/14310>>.

<sup>129</sup> *Op. cit.* footnote 29, par 1.8 (1998 European Charter on the Statute for Judges).

<sup>130</sup> See <<https://legislacja.rcl.gov.pl/projekt/12284955/>>.

<sup>131</sup> As of 5 May 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.

<sup>132</sup> 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>>.

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

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.<sup>133</sup> To guarantee effective participation, consultation mechanisms must allow for input at an early stage *and throughout the process*,<sup>134</sup> 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.<sup>135</sup> Discussions held in this manner that allow for an open and inclusive debate will 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.

93. 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]

---

<sup>133</sup> 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>>.

<sup>134</sup> 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>>.

<sup>135</sup> *ibid.*

**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 acts<sup>136</sup>**

**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).

---

<sup>136</sup> “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 Final 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 Final 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 Final 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 Final 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 Final 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:~~

~~a) 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;"~~

~~b) 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 Final 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.~~