DIFFERENCES AND SIMILARITIES OF THE JUDICIARY REGULATIONS IN POLAND AND OTHER EU MEMBER STATES – SELECTED EXAMPLES

A SUPPLEMENT TO THE WHITE PAPER ON THE REFORM OF THE POLISH JUDICIARY

Polish Government is pleased to welcome the broad discussion that has been raised by the White Paper on the Reform of the Polish Judiciary published on 8 March 2018. We have received many comments and remarks, both from EU Member States and the European institutions.

The White Paper have presented several examples of provisions regulating justice systems of various European countries. Some of them were quoted extensively, some mentioned only briefly. In order to continue a fruitful dialogue with our partners and to avoid any possible misunderstandings about the comparisons between the Polish regulations and other models used in the EU, we are pleased to present you with a more detailed supplement. We believe that it will be helpful to explain how our reforms are similar to those examples – and in what scope do they differ from them.

First of all, it needs to be underlined that **no two legal systems in the EU are identical**. Differences between them stem from various historical experiences of individual states, and the way in which these experiences shaped their respective constitutional identities. The importance of this pluralism and its protection in the Treaties were also indicated in the White Paper (para. 40 – 41 and 169 – 183).

The comparative examples mentioned in the White Paper prove that **there are various models admissible within the European standards of the rule of law, and that the Polish model is fully in line with these standards**.

Hence, Poland does not claim that its reforms are an exact copy of the Spanish, French, British or German regulations. To the contrary: all the differences are well described and acknowledged. There are various legal systems functioning in the EU, and the judiciary may be protected better or worse in each of its Member States – but **all those models provide sufficient guarantees to ensure that the judicial independence and the rule of law remain unaffected**.

It is also unaffected in the Polish legal system. We invite all the Member States, the European Commission, and the European Parliament to examine all these differences thoroughly and decide whether they are in fact significant enough to warrant claim that the rule of law – among all other countries – is threatened only just in Poland.

NATIONAL COUNCIL OF THE JUDICIARY – AND JUDICIAL INDEPENDENCE

The White Paper indicated Spain as a country with the most similar system of electing judicial members to the judiciary council. As mentioned before, the provisions are not 100% identical – there are some distinctions between them. Most significant of these distinctions are presented in the table below:

	SPAIN	POLAND
NAME	General Council of the Judiciary (*Consejo General del Poder Judicial*)	National Council of the Judiciary (*Krajowa Rada Sądownictwa*)
JUDICIAL MEMBERS	13 out of 21 members are judges (**over 3/5 majority**).	17 out of 25 members are judges (**over 2/3 majority**).
WHO ELECTS THE JUDICIAL MEMBERS	• 12 members – Parliament (3/5 majority, **no supplementary mechanism, no additional guarantees for parliamentary groups**); • 1 member – *ex officio* (President of the Supreme Tribunal).	• 15 members – parliament (3/5 majority – there is a supplementary 50%+1 majority in case of filibuster, but it was never used); **at least 40% members are elected out of candidates endorsed by the opposition parliamentary groups;** • 2 members – *ex officio* (First President of the Supreme Court, President of the Supreme Administrative Court).
HOW ARE CANDIDATES SELECTED	Support of 25 other judges, or a judicial association.	Support of 25 other judges, or a group of 2.000 citizens (out of current 15 members **14 were elected with judicial support**, 1 with popular support).
OTHER MEMBERS	8 representatives of other legal professions – elected by the Parliament.	• Minister of Justice; • 6 members of Parliament; • a delegate of the President of the Republic.
TERM OF OFFICE	**Uniform** – 5 years (**does not coincide with the parliamentary 4-year term**).	**Uniform** – 4 years (NCJ term starts halfway through a 4-year parliamentary term **and also does not coincide with it**).
CAN THE MEMBERS BE DISMISSED	**Yes**. The Council may dismiss its member with a 3/5 majority in case of a grave infringement of their duties[1].	**No**. As a result of the ruling of the Constitutional Tribunal that deemed the previous practice of individual terms for

[1] Article 580 (4) of the Spanish Organic Law on the Judiciary – *Ley Orgánica del Poder Judicial.*

BEFORE END OF TERM		each member unconstitutional, these terms were all rescinded before their ends. The Tribunal ruled on many occasions that in certain cases it is justified by the protection of public interest (rulings of 31 March 1998 – K 24 / 97, of 26 May 1998 – K 17/98, of 23 June 1999 – K 30/98, of 13 July 2004 – K 20/03, and of 20 June 2017 – K 5/17). It is worth underlining that **individual terms of 13 NCJ members would end anyway very shortly (within the next couple of weeks) and 2 others would remain in the Council for the next 2 years – which would effectively lead to its paralysis**. More details are presented in the White Paper (para 133).

Most importantly, after the judicial members are elected to each of the respective councils, **the parliaments (and no other bodies whatsoever) have no means to influence their decisions**. In Spain, they may be revoked only if the council itself decides so, in Poland there is no such possibility at all.

It is worth mentioning in this context that the members of the Polish National Council of the Judiciary **enjoy even wider guarantees than the Polish Ombudsman**. Mr. Adam Bodnar, who is currently serving at this post, is an outspoken critic of the Polish government, and **nobody would accuse him of being dependent on the parliamentary majority** – even that the law provides several options for the *Sejm* to dismiss him before the end of his term of office. These provisions are in force since 1991 and were never deemed a threat to the rule of law.

	THE OMBUDSMAN (COMMISSIONER FOR HUMAN RIGHTS)	**JUDICIAL MEMBERS OF THE NATIONAL JUDICIARY COUNCIL**
APPOINTMENT	The Parliament with a 50%+1 majority[2].	The Parliament with a 3/5 majority[3].
DISMISSAL	The Ombudsman may be dismissed in case of resignation, permanent incapacity to fulfil its duties (if declared as such by a medical certificate), failure to disclose	Parliament (and no other body) **cannot dismiss members of the NCJ.** The term of office of its members may end prematurely in case of death, resignation,

[2] Article 3 (1) of the law of 15 July 1987 (as amended) on the Commissioner for Human Rights.
[3] Article 11d (4) of the law of 12 May 2011 (as amended) on the National Council of the Judiciary.

involvement with the secret state police, or **if the parliament would deem that he breached his oath**.	appointment to another judicial office (judge's consent is required) or a dissolution of judicial appointment (e.g. as a result of a ruling of an independent disciplinary court).

The White Paper also briefly mentioned several other countries without a judicial majority in their respective judiciary councils. All the data was based on the Guide to the European Network of Councils for the Judiciary (ENCJ)[4] and referenced in the footnotes to the White Paper (p. 64, footnotes No. 44 – 47). Since the intention of these references was to indicate that it has been admissible in various EU Member States for such a council to be composed without a majority of judges, their description was only brief. More details about these councils are presented below:

IN DENMARK there are two councils – one for court administration (*Domstolsstyrelsen*) – that consists of 11 members (5 judges), and another for judicial appointments (*Dommerudnævnelsesrådet*), composed of 6 members (3 judges). Only the first was quoted in the White Paper, which might have caused misapprehensions. However, it is worth pointing out that **judges have no majority in neither of these councils** – yet Danish justice system is perceived as most independent in Europe (EU Justice Scoreboard 2017, also quoted in the White Paper – para. 129).

IN FRANCE the Superior Council of the Judiciary (*Conseil Supérieur de la Magistrature*) is composed of 7 *magistrats du siège* (to which the ENCJ refers as "judges"), 7 *magistrats du parquet* (referred to by the ENCJ as "prosecutors") and 8 other members representing various legal professions, nominated by the *Conseil d'État* (1 person), president of the national Council of bars (1 person), President of the Republic (2 persons), president of National Assembly (2 persons) and president of the Senate (2 persons). The Council is divided in two formations – each to deal with judges' and prosecutors' issues, respectively. **Neither *magistrats du siège* nor *magistrats du parquet* have majority in their respective formations** (they form a minority in the formations with jurisdiction regarding nominations of members of the judiciary and are in a position of parity in matters of discipline).

It is worth noting that the different provisions regulating statuses of a judge and a prosecutor between Member States are **yet another example of how many various models of justice system are admissible in the EU.**

[4] Guide to the European Network of Councils for the Judiciary, https://www.encj.eu/images/stories/pdf/workinggroups/guide/encj_guide_version_october_2017.pdf [available 19 March 2018].

IN THE NETHERLANDS the Council for the Judiciary (*Raad voor de rechtspraak*) is currently composed of 4 members, out of which 2 are judges. They are appointed by a Royal Decree for a six-year term and can be reappointed once, for a maximum term of three years. They are nominated for appointment or reappointment by the Minister of Security and Justice. The law[5] allows for the Council to be composed of less or more members (between 3 and 5); the Council itself decides the exact number. There is **no majority of judges provided, but when the vote in the Council is tied, its President (who is always a judge) has the casting vote**.

IN PORTUGAL the Superior Council of the Judiciary (*Conselho Superior da Magistratura*) is also **composed with a minority of judges**: there is 8 judicial members (7 judges elected by their peers and the President of the Supreme Court *ex officio*) and 9 non-judicial (2 members appointed by the President of the Republic and 7 – by the Parliament)[6].

IN IRELAND there are also two councils (similarly to Denmark) – The Courts Service (*An tSeirbhís Chúirteanna*) responsible for court administration, and the Judicial Appointments Advisory Board (JAAB - *An Bord Comhairleach um Cheapacháin Bhreithiúna*), that deals with judicial nominations. **First of these councils is composed with a majority of judges (10 out of 17 members), the latter – with a minority (4 out of 10[7]).** It is the JAAB that is more equivalent to the Polish National Council of the Judiciary (as it also deals with judicial appointments). It is also worth noting that in the Irish system **the recommendations of the Advisory Board are indeed advisory** – it is the Government that decides who should be appointed as a judge, and the law allows for naming other candidates than those recommended by the JAAB (if only they meet legal requirements). It is also worth indicating that the independence of the Irish court is also among those highest rated in Europe (see European Justice Scoreboard 2017, quoted in the White Paper – para. 129).

IN ENGLAND AND WALES, the Judges Council is composed with an overwhelming majority of judges (28 out of 29 members). However, the Council itself does not directly deal with judicial appointments – It nominates just 3 members of the Judicial Appointments Commission (JAC). **The Commission itself is composed of 15 members, out of which only a minority (7) must hold a judicial office**, 2 must be persons practising or employed as lawyers, and 5 – lay members (i.e. that never practised or been employed as a lawyer). The 15th member – the Chairman – is also a lay member.

[5] Article 84 (4) of the Judicial Organisation Act of the Kingdom of the Netherlands.
[6] Articles 217 – 218 of Portuguese Constitution
[7] Article 13 of the Courts and Court Officers Act of the Republic of Ireland.

There are no permanent judiciary councils **IN AUSTRIA OR GERMANY**. In both those countries judges are appointed by bodies composed solely or overwhelmingly by other branches of government (executive and legislative). It must be duly noted that there is usually a wide political consensus stemming from a 70-years tradition, allowing both the ruling majority and the opposition to have a say in the procedure of appointment. **The judicial community is also involved, as it puts forward their candidates for judges and they are usually nominated**. However, it is also worth noting that some **regulations allow for appointments made contrary to these proposals** (see White Paper – para 127).

At the same time, **it needs to be underlined again that Poland does not claim that any of the systems described above breaches – or infringes in any way – the European standards of the rule of law. To the contrary**: their extensive variety proves that these standards allow for a various composition of bodies deciding on judicial appointments: from dominance of judges (as in Poland or Spain), through parity (as in Denmark or the Netherlands) to minority (as in France or Ireland) and no judicial involvement in these bodies at all (Germany in some cases).

What is important to the rule of law is that **the judicial independence is safeguarded – and the Polish system provides extensive guarantees for it**, through securing:

- immunity from criminal prosecution (even for traffic offences);
- life-long status of a judge;
- irrevocability;
- immovability;
- high remuneration;
- pension amounting to 75% of remuneration after retirement.

All these guarantees are long-established part of the Polish legal system, some of them were even reinforced in the recent reform (random allocation of cases, immovability), and there is no mechanism that could allow any politician to affect a verdict of any court.

The examples of Spain, Denmark, Netherlands, France, United Kingdom, Germany, Ireland **are not cited with the intention to claim that the reform of the way in which judges are elected to the National Judiciary Council in Poland is their exact imitation**. Full context of their respective regulations is different in each of these states, as they all have different history and constitutional identity. However, it is useful and necessary to appreciate both the similarities and the distinctions between these countries – and to use that as **a basis to decide whether the Polish regulations are indeed that much divergent from well-established European standards**. There is indeed no other way to assess what are the European standards – without making comparisons to other European countries.

EXTRAORDINARY APPEAL

The White Paper quoted an example of a French remedy of *pourvoi dans l'intérêt de la loi* (a cassation in the interest of the law) that may be lodged without a time-frame against any ruling if the Minister of Justice orders the General Attorney to do so, on the basis that said ruling is contrary to the law[8].

There is also a similar remedy in the Italian Constitution, which allows for a *cassazione per violazione di legge* (cassation against the breach of the law)[9]. It can also be lodged without limitations against verdicts that infringe personal liberties, and this provision may only be waived during wartime.

Poland acknowledges that there are differences between these recourses and the extraordinary appeal that is about to be introduced in the new Polish law on the Supreme Court. The latter recourse might be lodged against all verdicts that infringe **constitutional** freedoms or liberties, that **flagrantly** breach the law or that were issued with an **obvious** contradiction between evidence and **significant** findings in the case. **Only the Attorney General or the Ombudsman may submit it – and only for a time of 5 years since the verdict in question had become final**. Moreover, if said verdict did breach the law but had already led to irreversible legal effects, the Supreme Court is authorized to declare the breach – but leave the verdict binding (a decision that constitutes a ground for claiming damages, but does not affect the validity of the ruling itself).

The requirements for the extraordinary appeal are even higher than those existing already in the Polish criminal procedure code for the so called "extraordinary cassation" – and this remedy is used very rarely (about 300 times per millions of criminal verdicts each year).

Poland also acknowledges that the axiological reasons behind these recourses in France or Italy may vary (and that they sometimes **serve the improvement of the homogeneity of the legal system, or protection of personal liberty**). The logic behind the Polish extraordinary appeal is also based on these arguments: the new remedy should allow the Supreme Court on one hand to widen the scope of civil rights protection, and on the other – to correct obvious and flagrant mistakes that happen in some cases even when due process of law is assured.

The examples of France or Italy serve not to claim that the new extraordinary appeal is their exact copy – but rather to indicate **that there are some remedies in other Member States' legal systems that may be used without time limitations, and that it does not lead to instability of these legal systems.**

[8] Articles 621 – 622 of the French Criminal Procedure Code.
[9] Article 111 (1) of the Italian Constitution.

JUDICIAL RETIREMENT AGE

There are two examples mentioned in the White Paper in the context of the **prolongation of the retirement age** – one of the UK (where it is the Lord Chancellor that is authorized to express or deny a consent for prolongation[10]), and another of France (where it is the Superior Council of the Judiciary, with some involvement of the Minister of Justice).

It is once again a proof that the legal systems vary in the European Union – as the British Lord Chancellor is an office separate from the post of the Minister of Justice (yet held by the same person). Since the United Kingdom has no written constitution, the exact role and duties related to each of these offices might be different from the likes of continental Ministers of Justice. Still, **the Lord Chancellor represents the executive branch of Her Majesty's Government** and plays a vital role in prolonging judicial retirement age. **A regulation authorizing the Polish Minister of Justice (or the President of Poland) to express similar consent with respect to Polish judges – though different in details – corresponds to it significantly**.

The French system is different, as it gives the final decision not to the Minister, but to the Superior Council of the Judiciary. The Minister is, however, involved in the process. Judges interested in having their retirement prolonged need to present a relevant motion to the Minister of Justice, indicating at the same time at least three courts of the same or lower level in which they have intention to continue their office. If need be, the Minister may ask the interested judge to present additional three courts – and then the Minister passes a motion to the Superior Council of the Judiciary for a prolongation of retirement age and appointment to one of three (or six) courts indicated by the judge[11]. The White Paper briefly stated that it is the Minister of Justice that may transfer a judge – in **fact the final decision in this aspect belongs to the council of the judiciary, acting on Minister's motion**.

* * *

It is only briefly noted in the White Paper that **lowering of a judicial retirement age** took place before in Italy (para. 106) and in Spain (para. 195). A German example was also indirectly mentioned by quoting the ECJ judgement of 21 July 2011 (Fuchs (C-159/10) and Köhler (C-160/10) v. Hessen; para. 100).

Polish government understands that **the historical and economical context behind these changes might vary from the one in Poland right now. However, there are similarities, too – and the ones that justify the comparisons.**

In Italy the retirement age – or rather the provisions allowing for extension of employment – were changed several times not only for judges, but for **almost all civil servants**, for the reasons related in some part to the economy and financial needs of the Italian state. In Poland the amendments have concerned **not only public servants, but the whole society**:

[10] Article 26 (6) and (13), and Article 30 of the UK's Judicial Pensions and Retirement Act.
[11] Article 76 and Article 76-1-1 of the French Organic Law on the Status of the Judiciary

the general retirement age was set at the same level for everyone, not just for judges (as indicated in the White Paper – para. 101).

Spanish history of lowering the retirement age was also different than Polish, yet similar to some extent. The change was carried out in 1985, partially for the reasons of changing the judicial personnel structure after authoritarian rule. It is true that it was different in details from Polish regulations (e.g. there was a transition period in Spain), but the historical context also varied: Spain managed to deal with this issue 10 years after transition to democracy started – in Poland it has not been done for almost 30 years after that.

Finally, **in the German case** the ECJ ruled that provisions regulating retirement age for judicial personnel (in that case – the prosecutors) might be justified by a pursuit to optimize the age structure thereof. That was also one of the reasons of the Polish judiciary reform – and it was indicated in the White Paper, too (para. 47 and 96 – 102).

All these examples serve again not to claim that the changes undertaken now in Poland are the exact copy of the regulation concerning retirement age in other EU Member States – but that **they are similar enough not to raise concerns over the rule of law in this context as well.**

* * *

Our government welcomes any further comments, remarks or questions related to the reform of the Polish judiciary and the comparisons between the law in Poland and other EU member states – as it helps to ascertain the standards that should be kept in order to follow the common values declared in the Treaties. We believe that it should be the first step before deciding that certain regulations are not in line with these values – and remain hopeful for a further honest and detailed discussion about this issue.