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**ACT ON THE NATIONAL
COUNCIL OF THE JUDICIARY
OF POLAND
BEFORE THE CONSTITUTIONAL
TRIBUNAL**

 HELSINKI FOUNDATION
FOR HUMAN RIGHTS

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Act on the National Council of the Judiciary of Poland before the Constitutional Tribunal

Summary

- On 14th March, 2019, Polish Constitutional Tribunal is going to adjudicate a case concerning the Act on the National Council of the Judiciary. The case originated from a motion submitted by the National Council of the Judiciary (hereinafter: the Council, the NCJ) itself, and recently was backed by a group of senators of the ruling Law and Justice party, who filed their own motion (almost identical, when it comes to merits, to the Council's one).
- The Constitutional Tribunal will decide if the new provisions concerning the process of appointing the judge members of the NCJ, as well as the procedure of appointing new judges by the NCJ (including the appeals against NCJ's decisions), are in compliance with the Constitution.
- The timing of the hearing is crucial from the perspective of other proceedings pending before the Court of Justice of the European Union. On 19th March CJEU will hear a case concerning requests for preliminary rulings issued by the Supreme Court, which relates to, among others, the position of the National Council of Judiciary.

Position of the National Council of the Judiciary in Polish legal system

The National Council of the Judiciary is a constitutional body, whose primary duty, according to the Constitution, is to safeguard the independence of courts and judges. The Council is entitled to file a motion to the Constitutional Tribunal concerning the compliance of legal acts with the Constitution – in matters pertaining to the abovementioned independence of courts and judges.

The composition of the NCJ

The Constitution provides that the Council consists of 25 members. The first four (the President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and a person appointed by the President of Poland) are members of the NCJ by the power of law. The second group consists of 6 members of the Parliament – 4 deputies to the Sejm (the lower chamber) and 2 senators – chosen, respectively, by the chambers themselves. The term of office of the elected members of the Council lasts 4 years.

The third group is composed of 15 judge members, chosen from among judges of the Supreme Court, common courts, administrative courts and military courts. In 2018 the provisions amending the process of appointing judge members of the Council came into force. In the light of the new provisions, judge members are elected by the lower chamber of the Parliament by 3/5 majority. The process of appointing the new judge members of the Council lacked transparency, as neither the Parliament, nor the candidates to the NCJ, revealed information on who supported their candidacy (a candidate to the NCJ is required by the new provisions to present a list of 25 other judges supporting their candidacy). None of the new judge members of the NCJ is a judge of a court of appeals. In the group of 15 members, 12 judges are judges of the courts of lowest instances.

NCJ's competences

The Council, first of all, reviews and assesses the candidates for the posts of judges of the Supreme Court, common courts, administrative courts and military courts and submits the motions for appointment of the abovementioned to the President of Poland. The decisions of the NCJ can be challenged before the Supreme Administrative Court (in the case of candidates applying for the position in the Supreme Court) or before the Supreme Court (in the case of candidates applying for the position of judges in common courts or administrative courts).

Furthermore, the NCJ also creates the code of ethics for judges and trainee judges and safeguards its observance, gives opinions on draft legislation concerning the judiciary, appoints the disciplinary officer for common courts' judges (and the deputies) and passes opinions on appointment or dismissal of common courts' presidents and vice-presidents.

Supreme Court's requests for preliminary rulings

Between August and October 2018, the Supreme Court issued requests for preliminary rulings concerning proceedings pending before the Court. The scope of these requests concerns, among others, the position of the new Chamber of the Court – the Disciplinary Chamber – and the position of the National Council of the Judiciary. The European Court of Justice will hear these cases on 19th March.

Process of appointing new judges of the Supreme Court

In August 2018, the new National Council of Judiciary started a process of appointing judges to 44 vacant positions in the Supreme Court. Several candidates, who did not receive a positive decision from the NCJ, challenged these decisions before the Supreme Administrative Court. In September 2018, the Supreme Administrative Court issued an interim measure which should have suspended the process of appointing the new judges. In spite of this decision, in October 2018 the President of Poland appointed new judges of the Supreme Court.

In November, 2018, the Supreme Administrative Court decided to request that a preliminary ruling, regarding interpretation of the provisions regulating the process of challenging the NCJ's decisions in the light of the EU Treaties, be issued by the Court of Justice of the European Union. The date of hearing this case has not been announced by the ECJ yet.

Motions to the Constitutional Tribunal

The process of appointing new judges of the Supreme Court and the Supreme Court's requests for preliminary rulings provoked a vivid discussion concerning the constitutionality and legality of the NCJ's actions. In November 2018 the NCJ (followed by the group of MPs in February 2019) submitted a motion to the Constitutional Tribunal upon verification of the new provisions and their compliance with the Constitution. The motions cover all the aspects of appointing the new judges by the NCJ and the process of challenging this decision.

In particular, the applicants demand the following provisions to be examined:

- the election of 15 judge members of the NCJ by the lower chamber of the Parliament and the process of appointment of the candidates by political parties;
- the right to appeal against the Council's resolutions (concerning review and assessment of the candidates for the posts of judges and motions for appointment of the candidates to the President of Poland) to the Supreme Court;
- the right to appeal against the Council's resolutions concerning individual cases of appointment for the post of a Supreme Court judge to the Supreme Administrative Court;
- a rule that if the Council's resolution on non-submitting a motion for appointment is revoked by the Supreme Administrative Court, the application for an unoccupied seat in the Supreme Court is accepted.

Additionally, the applicants wish to establish whether a certain provision of the Code of Civil Procedure, taken in conjunction with article 44 point 4 of the Act on the NCJ, is constitutional when it enables to withhold the President's prerogative to appoint a judge.

Current situation concerning the Constitutional Tribunal

Two major issues concerning the Constitutional Tribunal should be highlighted here as it is about to adjudicate the case of the NCJ.

First of all, there is a group of judges in the Tribunal who were appointed for the already taken seats (the so-called "double-judges"). After 20th December, 2016, three judges who had been appointed absent legal basis (in 2015) were assigned to cases. The participation of those judges in the process of adjudication could result in a judicial error (whereas the judgements

of the Constitutional Tribunal are final and cannot be challenged in any way). Depending on the composition of the bench, rulings issued with the participation of wrongfully appointed judges in Polish legal system can be invalid (erroneous to the extent that they should be reversed) or even, under particular circumstances, non-existing (bearing no legal effect at all). The second problem is the alleged failure to comply with the rules of assigning judges to cases on the part of the Tribunal's President. In an open letter, authored by a group of 7 judges (all of them elected before 2015) and published in December 2018, the justices point out that the President decides arbitrarily on the composition of the bench in each case, using unclear criteria. According to the provision of Article 38 of the Act on the Organisation and Proceedings before the Constitutional Tribunal, judges should be assigned to cases in alphabetical order by the President of the CT, who should take into account also the type, number and sequence of incoming cases.

The composition of the bench for the hearing on 14th March, 2019, has been announced as follows: Julia Przyłębska (the Tribunal's President, as the presiding judge), Justyn Piskorski (as judge-rapporteur), Grzegorz Jędrejek, Michał Warciński and Andrzej Zielonacki. All of the members of the bench were appointed by the present ruling majority, whereas Mr. Piskorski is considered to be a judge appointed for this position without a valid legal basis.

Potential consequences of the Constitutional Tribunal's judgement

If the Constitutional Tribunal finds the new provisions concerning the National Council of the Judiciary constitutional and, at the same time, deems the provisions regulating the possibility of challenging the decisions of the NCJ, such a decision will have a significant impact on the entire judicial system in Poland.

The potential consequences of such decision would embrace:

- legitimisation of the current composition of the National Council of the Judiciary – the way in which the new judge members were appointed by the Parliament will be legitimised by the Constitutional Tribunal;
- the candidates applying for the position of a judge will not be able to challenge the decisions of the National Council of the Judiciary;
- the proceedings before the Supreme Court and the Supreme Administrative Court concerning the appeals of the candidates will be discontinued. As a result, the proceedings concerning the preliminary ruling before the Court of Justice of the European Union will be discontinued as well.

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