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Press Section

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COMMUNIQUÉ

on the draft Act on the Supreme Court tabled by the President of Poland

In connection with the draft Act on the Supreme Court tabled by the President of the Republic of Poland, analytical work has been initiated aimed at a comprehensive evaluation of the legislative proposal. This communiqué presents the main tenets of the opinion which is currently under preparation and will shortly be published on the website of the Supreme Court and provided to the competent authorities.

I. General

1. The genuine objective of the Act, emphasised in the grounds of the draft, is so-called "decommunisation of a part of the composition of the Supreme Court" combined with the option of taking disciplinary action against judges resulting in termination of their employment.
2. An analysis of the proposals suggests that the intention of the legislator goes much further and includes:
   a) review of the existing case law of the Supreme Court by means of extraordinary appeals;
   b) preventing the common courts and the Supreme Court from exercising distributed review of the constitutionality of laws;
   c) cancellation of both future and past rulings concerning electoral matters, including the validity of elections.
3. In terms of structural changes, these goals are pursued by means of creating two new chambers, which in fact establish two separate, independent courts authorised to exercise review over the common courts and the Supreme Court.
4. Compared to the Act on the Supreme Court vetoed by the President of the Republic of Poland in July 2017, the draft Act could be considered "better" only because it does not provide for concurrent removal of all judges of the Supreme Court from office.

II. Extraordinary appeal

1. Extraordinary appeal:

   a) as a rule, it could be filed within 5 years after the appealed decision becomes legally valid (Article 86(3) of the draft), including cases which have been examined by the Supreme Court following a cassation appeal or a cassation (Article 87(2) of the draft);

   b) within three years after the effective date of the draft Act, extraordinary appeals could be filed in cases closed with decisions which became legally valid after 17 October 1997 (Article 115(1) of the draft);
   c) these solutions constitute a major interference with the principle of stability of legally valid court decisions, derived from Article 2 of the Constitution of the Republic of Poland.

2. It is proposed that the Code of Civil Procedure should apply accordingly to extraordinary appeal proceedings in cases not regulated by the draft Act (Article 92 of the draft), which is an important drawback of the provisions concerning the appeal because:
   a) the defendant would be deprived of significant safeguards under the Code of Criminal Procedure;
   b) the Supreme Court could condemn a defendant who has been acquitted by a legally valid decision of a common court, which is in conflict with the right of the defendant to appeal against a conviction under Article 14(5) of the International Covenant on Civil and Political Rights.
3. One of the grounds for filing an extraordinary appeal is that a court decision is an infringement of human and civil rights and freedoms or principles enshrined in the Constitution of the Republic of Poland (Article 86(1)(1) of the draft). At the same time, it is proposed that the Supreme Court should approach the Constitutional Tribunal with a request when examining an extraordinary appeal if the Supreme Court determines that the court decision is an infringement of human and civil rights and freedoms or principles enshrined in the Constitution of the Republic of Poland because of the unconstitutionality of an Act (Article 88(2) of the draft). This solution:
   a) is in conflict with Article 193 of the Constitution of the Republic of Poland which leaves it for the competent court to decide whether to refer a question (the wording in the Constitution reads: "the court may");
   b) corresponds, as to its grounds, to the constitutional appeal referred to in Article 79 of the Constitution of the Republic of Poland, which means that the draft is unconstitutional as it introduces a competitive remedy;
   c) aims to eliminate distributed review of the constitutionality of laws exercised by the courts when adjudicating individual cases.
4. The proposed grounds for an extraordinary appeal are that a court decision "is an infringement of … principles enshrined in the Constitution of the Republic of Poland" (Article 86(1) of the draft). This solution:
   a) should be criticised in view of the vast scope of such grounds and their ambiguity, which is in conflict with the aforementioned principle of stability of the case law;
   b) would allow for extraordinary appeals to be used as a means of challenging decisions of common courts concerning the validity of local government elections, especially in the absence of a clear definition of the term "decision closing the proceedings."
5. It is not fully clear why the grounds of an extraordinary appeal are combined with the condition of being "necessary to ensure rule of law and social justice" (Article 86(1) of the draft). This will cause doubts of the bench concerning the subject matter of the appeal if a decision which is objectively legal is appealed against only due to being "socially unjust."
6. The introduction of extraordinary appeals:
   a) would increase the workload of common courts with a number of cases which is currently hard to quantify and affect the capacity of parties with the power to file extraordinary appeals to perform other functions;
   b) could result in excessive duration of legal proceedings, which is currently the main issue in the Polish judicial system.

III. Appointment of benches

1. According to the draft, judges may be delegated by the First President of the Supreme Court to participate in the examination of a case in a different chamber and, with the consent of the judge, to adjudicate temporarily in a different chamber (Article 34(3) of the draft). This is in conflict with the principle of randomised appointment and with the general principles of appointing benches, which is the

concept underlying the July amendment of the Act on the Common Court System, signed by the President into law.

2. In the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the following issues arouse doubts:
   a) the authority of the First President of the Supreme Court to appoint jurors adjudicating in individual disciplinary cases (Article 72(2) of the draft);
   b) provisions whereby the President of the Supreme Court heading the relevant Chamber allocates cases and appoints benches at his or her own discretion (Article 77(1) of the draft).

IV. No adequate transitional provisions

1. There are no transitional provisions concerning the continuation of the examination of public cases transferred to the new Chamber of Extraordinary Review and Public Cases.
2. There are no transitional provisions concerning the continuation of disciplinary cases for professions of public trust other than the legal professions (there are only transitional provisions concerning the legal professions).

V. Disciplinary proceedings

1. An overall analysis of the draft suggests that the objective of the amendments concerning disciplinary proceedings is not to improve the efficiency of proceedings but rather to make proceedings more repressive.
2. A number of amendments would put accused judges in a less favourable procedural position than the position of a defendant accused of a criminal offense in criminal proceedings, i.e.:
   a) the draft Article 114(4) of the Act on the Common Court System ("ACCS") imposes the obligation to dismiss evidence in disciplinary proceedings where the motion for evidence fails to be submitted within the time limit (in the event of an adverse interpretation, also where a request for a statement is refused), which is absent from the criminal procedure (see Articles 160 and 170 of the Code of Criminal Procedure);
   b) authorities before which the disciplinary procedures are pending could leave unexamined any motions for evidence submitted after the time limit unless the party proves that the party was previously unaware of such evidence (draft Article 114(4) and Article 115(3) ACCS);
   c) the disciplinary court could proceed in the justified absence of the defendant or the defendant's counsel after their being properly notified unless this should be in conflict with the interest of the disciplinary proceedings (draft Article 115a ACCS).
3. The Minister of Justice would be given the power to:
   a) appoint judges to adjudicate in disciplinary courts of first instance (draft Article 110a(1) ACCS);
   b) appoint the Disciplinary Prosecutor of Judges of Common Courts and two Deputy Disciplinary Prosecutors of Judges of Common Courts as well as the Disciplinary Prosecutor of Judges of Military Courts and the Deputy Disciplinary Prosecutor of Judges of Military Courts (draft Article 112(3) ACCS);
   c) request the reopening of any disciplinary proceedings closed with a legally valid decision given by the disciplinary prosecutor before the effective date of the Act, both in favour of and to the disadvantage of the defendant (Article 124(1) of the draft);
   d) appoint the Disciplinary Prosecutor of the Minister of Justice, which would:
      - be tantamount to a request to initiate explanatory proceedings or disciplinary proceedings while recusing, respectively, the Disciplinary Prosecutor of Judges of Common Courts and the Deputy Disciplinary Prosecutors of Judges of Common Courts (draft Article 110a(1) ACCS) and the

Disciplinary Prosecutor of Judges of Military Courts and the Deputy Disciplinary Prosecutors of Judges of Military Courts (draft Article 40b(4) of the Act on Military Court System ("AMCS")); and

- generate the risk of intentionally influencing individual disciplinary proceedings and exerting pressure on individual judges as the disciplinary prosecutor could press charges against judges of common and military courts, which in some cases (even in the event of subsequent acquittal by the disciplinary court or the final staying of the disciplinary proceedings) could affect the judge's further professional career and indirectly the judge's rulings;

e) have access to the proceedings of a military disciplinary court of first instance, which should be criticised in the context of the right to appoint the Disciplinary Prosecutor of the Minister of Justice (draft Article 41d AMCS); it cannot be ruled out that the Minister of Justice exercises his rights and appoints a Disciplinary Prosecutor of the Minister of Justice in order to initiate disciplinary proceedings against a judge of the disciplinary court to exert pressure on the judge.

4. In addition to the power to appoint the Disciplinary Prosecutor of the Minister of Justice, the Minister of Justice would have the power to object against any decision of a disciplinary prosecutor refusing to open disciplinary proceedings or any decision staying disciplinary proceedings (draft Article 114(9) ACCS), which would:
   - put the Minister of Justice in a much more privileged position than the other parties with the power to request that the disciplinary prosecutor initiate explanatory proceedings;
   - empower the Minister of Justice in fact to handle disciplinary proceedings because guidelines issued by the Minister of Justice with respect to such objection would be binding to the person handling the disciplinary proceedings;
   - in extreme cases, indefinitely prolong the period when disciplinary charges are pending against a judge. This solution should also be considered in the context of the draft Article 108(5) ACCS, whereby the statute of limitations does not run for the duration of disciplinary proceedings from the filing of a motion to the disciplinary court to the legally valid closing of the disciplinary proceedings.
5. A "judge of a common court" could be appointed to a disciplinary court (draft Article 110a(1) ACCS), including judges of all courts and instances, such as judges of a court with geographic jurisdiction far away from the appeal court / disciplinary court, which could turn the appointment to disciplinary courts into a tool of repression against individual judges.
6. The Supreme Court may condemn a defendant judge even if the judge has been acquitted in first instance (draft Article 121(3) of ACCS which excludes the application of Article 454 of the Code of Criminal Procedure in disciplinary proceedings) and the judge may appeal in the same instance to another bench of the Disciplinary Chamber (draft Article 122(2) ACCS).
7. The draft provides for early termination of the mandate of the Disciplinary Prosecutor of Judges of Common Courts, the Disciplinary Prosecutors of Judges of Military Courts and their Deputies appointed under the existing provisions (Article 116(1) of the draft).

VI. Reorganisation of the Supreme Court

1. The draft Act provides for the creation of two new chambers of the Supreme Court: the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Cases. The Act provides for the liquidation of the Military Chamber of the Supreme Court (Article 3(1) of the draft).
2. Concerning the Chamber of Extraordinary Review and Public Cases:
   a) it will be competent for extraordinary appeals and electoral matters (Article 25 of the draft) and it will have its own separate organisation and personnel, which means that it will not be a chamber on a par

with the other chambers of the Supreme Court but a "super-chamber" or a separate and independent court only apparently established within the organisation of the Supreme Court;

b) the composition of the Chamber will be new, comprised only of judges appointed under the new procedure defined in the draft, which could in fact fossilise the composition of the "super-chamber" for decades. This should be considered in the light of the amendment of the Act on the National Council of the Judiciary tabled by the President of the Republic of Poland.

3. The Disciplinary Chamber would also be largely autonomous, i.e.:
   a) the powers of the minister responsible for public finance would be vested in the President of the Supreme Court heading the Disciplinary Chamber of the Supreme Court (Article 7(5) of the draft) rather than in the First President of the Supreme Court;
   b) the head of the Disciplinary Chamber would have the power to appoint heads of the divisions of the Disciplinary Chamber, publish announcements of the number of vacant positions in the Disciplinary Chamber, request that a judge of a common court be delegated to the Disciplinary Chamber or act as an assistant in the Disciplinary Chamber, approve additional employment of a judge of the Disciplinary Chamber, refer judges of the Disciplinary Chamber to medical examinations (Article 19(1) of the draft);
   c) the First President of the Supreme Court would be required to exercise the powers defined in Article 13(1)(2), (4) and (7) (representation before the Constitutional Tribunal, issuing opinions on requests for continuation of the mandate of a judge, actions related to the selection of jurors) in communication with the President of the Supreme Court heading the Disciplinary Chamber (Article 19(2) of the draft);
   d) the appointment of the President of the Supreme Court heading the Disciplinary Chamber would not require asking the opinion of the First President of the Supreme Court (Article 14(3) of the draft);
   e) the President of the Supreme Court heading the Disciplinary Chamber would be supported by an independent and autonomous Secretariat (Article 95(3) and Article 97(2) of the draft);
   f) the President of the Supreme Court heading the Disciplinary Chamber or the person authorised by the President of the Supreme Court heading the Disciplinary Chamber would handle matters falling under the labour law with respect to persons employed in positions in the Secretariat of the President of the Supreme Court heading the Disciplinary Chamber.

VII. Changes to the human resources of the Supreme Court

1. According to the draft, judges of the Supreme Court retire when they turn 65 years old unless:
   a) the judge makes a declaration of the intention to remain in office not later than six months and not earlier than twelve months before turning 65;
   b) the judge presents a certificate to the effect that the judge is capable of performing the functions of a judge in view of the judge's health status, issued on the same terms as for a candidate for a judge;
   c) the President approves the continuation of the mandate of the judge of the Supreme Court (Article 36(1) of the draft).
2. The approval of the President must be endorsed by the Prime Minister (Article 144(2) and (3) a contrario of the Constitution of the Republic of Poland).
3. According to the justification of the draft Act, these solutions "follow … the solutions which are already in place in the common court system;" however, retirement cannot be equated to pension payments.
4. The objective of the amendments is to hold some judges of the Supreme Court accountable for their rulings; in view of extraordinary appeals, the powers of the Disciplinary Chamber and the Chamber of

Extraordinary Review and Public Cases, this could be used further to initiate disciplinary proceedings against such judges.

5. The reduction of the retirement age is in conflict with the right to retire on the terms applicable at the time of appointment of the judges of the Supreme Court.
6. The draft amendments concerning the retirement age have a broader application as they also affect judges of the Supreme Court of Administration (Article 49 of the Act on the Administrative Court System).
7. The reduction of the retirement age designed in order to terminate the mandate of the First President of the Supreme Court is in conflict with the Constitution (Article 183(3) of the Constitution of the Republic of Poland).
8. The draft provides for different conditions of termination of the mandate of the First President of the Supreme Court (voluntary retirement, mandatory retirement, termination of employment – Article 11(1) of the draft) and the Presidents of the Supreme Court (only termination of employment – Article 14(2) of the draft). This amounts to unequal treatment on grounds of age.

VIII. Jurors

1. Jurors are to adjudicate disciplinary cases initiated through extraordinary appeals (Article 58(1) of the draft).
2. According to the draft, eligible as jurors are persons with at least secondary or secondary vocational education (Article 58(2)(6) of the draft), which is questionable given the potential grounds of extraordinary appeals.
3. According to the President's draft, candidates for jurors could be proposed by associations, other social and professional organisations registered under applicable regulations, with the exception of political parties, or groups of at least one hundred citizens with the right to vote (Article 61(2) of the draft). This solution could result in thousands of candidates being proposed.
4. The draft does not require jurors in the Supreme Court to submit assets declarations or vetting declarations.
5. Due to an erroneous reference, in contradistinction to judges, jurors in the Supreme Court would be eligible even if they provided professional service, worked or collaborated with state security services listed in Article 5 of the Act of 18 December 1998 on the National Remembrance Institute – Committee for the Prosecution of Crimes against the Polish Nation (Article 63(2) of the draft).

IX. Extended powers of the President of the Republic of Poland at the expense of the independence of the Supreme Court

1. The draft grants new powers to the President of the Republic of Poland over the Supreme Court. An analysis of the draft provisions suggest that such powers will be exercised at the expense of the independence of the Supreme Court.
2. The power given to the President to define the rules of the Supreme Court in a regulation (Article 4 of the draft):
   a) requires the endorsement of the Prime Minister (Article 144(2) and (3) a contrario of the Constitution of the Republic of Poland);
   b) derives originally from the infamous tradition of the People's Republic of Poland: under the Act on the Supreme Court of 15 February 1962 and the Act on the Supreme Court of 20 September 1984, the Rules of the Supreme Court were defined by the collegiate head of state – the Council of State acting, however, at the request of the First President of the Supreme Court tabled in communication with the competent minister;

c) goes against the legal tradition: even before WWII, the Supreme Court adopted its own rules and the Minister of Justice published the rules in a regulation (Article 78(2) of the Regulation of the President of the Republic of Poland of 6 February 1928 – Common Court System Law);
d) is systemically inconsistent in view of other central judicial authorities in Poland. The internal rules of the Supreme Court of Administration and those of the Constitutional Tribunal are adopted by their respective General Assemblies of Judges.

3. The President could appoint an Extraordinary Disciplinary Prosecutor from among the judges of the Supreme Court, common and military courts, which would recuse the Disciplinary Prosecutor of the Supreme Court (Article 77(8) of the draft). This generate the risk of intentionally influencing individual disciplinary proceedings and exerting pressure on judges adjudicating individual cases.

X. Transitional period

1. Judges who are 65 years old or older retire 3 months after the effective date of the Act (Article 108(1) of the draft) which is three months after the publication of the Act in the Journal of Laws (Article 132 of the draft) unless:
   a) they make a request to the President within one month;
   b) the President approves the continuation of the mandate of the judge of the Supreme Court.
2. If the First President of the Supreme Court retires under these provisions, then:
   a) the President appoints a judge to head the Supreme Court (Article 108(4) of the draft), which requires the endorsement of the Prime Minister (Article 144(2) and (3) a contrario of the draft);
   b) the First President of the Supreme Court is elected only after at least 2/3 of the number of judges of the Supreme Court are appointed to the chambers of the Supreme Court (Article 108(4)), which could take more than a dozen months.
3. Until the first term of office of jurors of the Supreme Court begins, the responsibilities of jurors of the Supreme Court are exercised by jurors appointed by the First President of the Supreme Court from among jurors of the Regional Court in Warsaw and the Regional Court Warsaw-Praga in Warsaw (Article 128(1) of the draft).