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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

POLOGNE

EXPLANATORY MEMORANDUM (*)

TO THE PRESIDENTIAL DRAFT ACT AMENDING THE ACT ON THE SUPREME COURT

(*)Translation checked by the Polish authorities

Grounds

1. Introduction

The President's draft for a new Supreme Court Act is presented in the year in which the Supreme Court celebrates its centenary. This is a good time to propose a reform of the Supreme Court's structure and remit. Such a reform will leave the Supreme Court better able to perform the tasks assigned it by the Constitution of the Republic of Poland in relation to exercising judicial oversight over the activities of common and military courts and giving substance to a sense of social justice. The proposed change in the principles on which the Supreme Court operates also represents the response of the President of the Republic of Poland to the announcement of comprehensive amendments to the National Council of the Judiciary Act of 12 May 2011 and the Supreme Court Act of 23 November 2002, which he had used his constitutional right to veto after their approval by the Sejm. The draft's sponsor decided not just to challenge these solutions, explaining his views in the grounds of the President of the Republic of Poland's conclusions concerning the re-examination of the above acts by the Sejm, but to present his own vision of the amendments, based on his diagnosis of the real personnel, jurisdictional, organisational and functional issues. The solutions proposed by the President of the Republic of Poland also implement his election pledges to the citizens, including increasing the legal protection of persons wronged by the justice system and enhancing the role of the citizen in the dispensation of justice.

There is no gainsaying the fact that the attempt made in mid-2017 to reform the justice system aroused widespread social concern. Society's doubts concerning the justice reforms cannot be disregarded. The credibility of court decisions is a value of the State and a crucial factor in building society's confidence in the State's institutions. It is therefore necessary to present the proposed amendments with the specific reasons for which the draft's sponsor considers it advisable to reform the way the Supreme Court works. These amendments need to be drafted in such a way as to offer considerable potential for rebuilding the flawed reality of the justice system. The President of the Republic of Poland considers it necessary to avoid exposing the State to further collective outrage against the reform of the justice system and placing Poland in a situation in which, in the face of rulings of the Court of Justice of the European Union identifying inadmissible interference in the staffing of the judiciary, Supreme Court judges who have been retired will have to be allowed to return to service or paid significant compensation. The proposed reforms are balanced in this light but also as radical as they can be while complying with the Constitution of the Republic of Poland. They are not, however, an end in themselves but the result of the deep conviction of the draft's sponsor concerning the need to raise the judiciary's awareness of the needs and difficulties of the citizens, who turn to the courts not just for formal justice but for genuine comprehension and appropriate support and to have the cases they bring found fair and just.

It has repeatedly been said that the Supreme Court has been 'decommunised' and that people involved with the Polish United Workers' Party (PZPR) no longer sit on it. Although the Supreme Court was indeed decommunised after 1989, people involved with the PZPR, regrettably, continued to be appointed to the noble office of Supreme Court judge in a free Poland. They range from a person who was not just an active member of the PZPR under martial law but provided the Central Committee of the PZPR with daily reports on the application by the courts of martial law legislation to a person who was previously first secretary of the PZPR's basic party organisation at a court. This obviously raises the question of whether it is possible so long after the transformation to hold Supreme Court judges to account for being involved in and benefiting from the Polish People's Republic. Whereas collaboration with the previous system has been accepted in the case-law of the constitutional tribunals of the Central and Eastern European countries since the change of regime as a fair and admissible eliminatory condition, no such step has ever been decided in Poland, where the case-law of the Constitutional Tribunal and the Supreme Court has weakened the instruments of the lustration

acts or simply ruled them unconstitutional. These instruments have often encountered widespread opposition from legal circles, with many of those claiming to defend democracy later turning out to have been pleading their own cause. It is currently difficult to devise an objective verification condition other than that resulting from the age limit and collaboration with the security services of the Polish People's Republic. Obviously, for the sake of the truth, it should be borne in mind that the group of people meeting that age criterion includes members of the then opposition, people who unfailingly stood up for democratic values and the rule of law in private and in public. This is what is so distressing about the Supreme Court's ruling of 20 December 2007 in case I KZP 37/07, which held that judges who refused under martial law to apply the State Council's decree and stood up for the human and civic rights and freedoms enshrined in the Universal Declaration of Human Rights were acting unlawfully. Such a Supreme Court ruling should never have been adopted in a democratic Republic of Poland born of opposition to the communist system. It is contrary to the system of values underpinning the Constitution of the Republic of Poland. Indeed, the preamble to the Constitution invokes the bitter experiences of the times when fundamental freedoms and human rights were violated.

Staffing arrangements must find a condition for assessing the judges to be retired in a manner that is objective and untainted by unconstitutional forms of discrimination. It should be stressed that the retirement age for Supreme Court judges has been unified in line with the rules applicable to the common courts. The arrangements adopted must not, moreover, provide for purely automatic solutions. The draft act's arrangements concerning the staffing of the Supreme Court, which are based on an age limit that can be modulated in individual cases, ensure the constitutionality of the proposed changes while making it possible to retire a certain group of judges. Complementary arrangements, involving the abolition of the Military Chamber and the transfer of military criminal cases to the Criminal Chamber, will result in the retirement of Supreme Judges adjudicating in the Military Chamber.

It also needs to be borne in mind that all previous attempts to reform the rules of judicial procedure, the organisation of the courts, the role of the Minister for Justice in relation to the courts, etc. have met with opposition from the judiciary, which, considering the arguments put forward, has often been unwarranted. This opposition has repeatedly hampered, even scuppered, the reforms society needs in this area of the functioning of the State. It is impossible to overlook the arguments that the executive power's right to organise the justice system should be taken away and these powers transferred to the First President of the Supreme Court, who has no democratic legitimacy directly conferred by the sovereign people. It is hard to overlook the public statements by prominent members of the judiciary displaying a dismissive, even contemptuous, attitude to ordinary citizens and their material status. Such behaviour is not acceptable in a democratic rule-of-law state, being alien to the judges' commitment to the good of society and loyalty to the citizen, whom judges are supposed to service by performing the extremely important task of settling cases determining a citizen's fate. Along with adjudicating skills, understanding and dedication to citizen's cases are a basic requirement for any person seeking office as a judge.

A separate issue is the proven inability of Supreme Court judges to enforce disciplinary penalties imposed on judges, as can be seen from the failure to exclude from office judges who have been publicly disgraced or whose private circumstances, e.g. the commission of an unintentional offence, ought to incline them to resign from their function.

In putting forward the proposed amendments, the President of the Republic of Poland is following the legislative tradition of recent decades, in which it is generally recognised that acts concerning the organisation of the Supreme Court, the Supreme Administrative Court and the National Council of the Judiciary should emanate from the President's office. This results from the recognition that the Constitution assigns the President of the Republic of Poland the role of arbitrator in matters of the organisation of the State, which definitely include methods for appointing judges and the functioning of the highest judicial authorities, which the Constitution,

with regard to the relationship between the judicial power and the executive power, deliberately transferred from the level of the Cabinet to the President of the Republic of Poland. It is therefore the President of the Republic of Poland, not a Cabinet member, who is the executive power responsible, under the constitutional three-way separation of powers, for the balanced functioning of the Supreme Court or Supreme Administrative Court.. The President of the Republic's power in this matter cannot be challenged or taken away.

2. Main lines of the reform

Compared with the act currently in force, the draft introduces four main groups of innovations:

1) a remedy for correcting final court rulings in the form of the extraordinary appeal;
2) arrangements aimed at increasing the effectiveness of disciplinary proceedings against judges and representatives of other legal professions and at submitting their assessment to persons from outside this professional circle;
3) the reorganisation of the Supreme Court in accordance with its new powers and changes to the status of Supreme Court judge,
4) an intervention in the staffing of the Supreme Court.

3. Description of the draft arrangements

3.1. Amendments concerning the Supreme Court's competence and procedure

The main amendments with regard to the competence of the Supreme Court include investing the Court with the power to examine a new remedy for controlling court rulings with the aim of exercising 'corrective justice'. This consists of an extraordinary procedure for the verification of final court rulings on the grounds that they are grossly unjust or result in a violation of the human and civic rights and freedoms enshrined in the Constitution. The draft's sponsor is therefore proposing the addition of a new remedy in the form of the extraordinary appeal. Introducing this remedy will implement the President's widely reported statements and election pledges.

The extraordinary appeal

The stability of final court rulings is an absolute value and one enshrined in the Constitution of the Republic of Poland. It is not, however, the only value derived from constitutional principles and human and civil rights and freedoms. Court rulings should undoubtedly be just, issued on the basis of a correct interpretation of the law and, ultimately, reflect the evidence that has been collected and duly assessed. In principle, there should be no conflict between the values identified above. As a court ruling ought to result from a procedure that satisfies all the above conditions and enables a court to adjudicate justly, there should be no need to annul final rulings. Experience shows, however, that final rulings can fall a long way short of the above standards. When confronted with grossly unjust rulings based on misinterpretations of the law or key findings by a court that contradict the evidence gathered in a case, it is clear that a judgment's stability cannot be defended at all cost.

Accordingly, the draft's sponsor has introduced a remedy termed 'the extraordinary appeal'.
Article 86 of the draft act provides that an extraordinary appeal may be filed against any final ruling closing proceedings in a case if:

1) the ruling violates principles or human and civil rights and freedoms enshrined in the Constitution;
2) the ruling grossly breaches the law through misinterpretation or misapplication;
3) there is an obvious contradiction between the court's findings and the evidence collected.

In order for an extraordinary appeal to be admissible, it must no longer be possible for a ruling to be annulled or amended by means of other extraordinary remedies. The filing of an extraordinary appeal is also limited in time, both in principle and through the transitional provisions.
An extraordinary appeal may be lodged by the Prosecutor-General, the Ombudsman, a group of at least 30 deputies or 20 senators, and, to the extent of their competence, by the President of the General Counsel to the Republic of Poland, the Children's Ombudsman, the Ombudsman for Patients' Rights, the President of the Financial Supervision Authority and the Financial Ombudsman. The draft's sponsor points out that an extraordinary appeal by a group of deputies or senators is to be lodged by the Marshal of the Sejm or the Marshal of the Senate who, in addition to the representative appointed by the group of deputies or senators, may authorise an official of the Chancellery of the Sejm or the Chancellery of the Senate, an advocate ('*adwokat*') or a legal adviser ('*radca prawny*') to support the appeal.
It will be possible to file an extraordinary appeal against any final ruling, including, therefore, a judgment which has not been the object of an appeal or a judgment that has been the object of cassation proceedings before the Supreme Court. There is, however, a restriction in that only one extraordinary appeal may be filed against a given ruling on behalf of the same party. An extraordinary appeal may not be based on pleas that have been examined by the Supreme Court in cassation or review proceedings.

The introduction of the extraordinary appeal is a response to calls for the restoration of an arrangement similar to the extraordinary review but adapted to the conditions of today's system. There is no conflict with the principle of cassation. What is more, the extraordinary appeal fills a gap in the current system of extraordinary remedies. An extraordinary appeal can be based not just on a gross breach of the law but on a contradiction between a court's findings and the material evidence gathered in a case. Unlike a cassation appeal or review, an extraordinary appeal will be possible even against final rulings against which no appeal has previously been filed. The introduction of this remedy that differs radically from the extraordinary remedies for controlling court rulings implements one of the President's main pledges to society.

The appeal also highlights the need for the courts, when adjudicating, to respect constitutional principles and the human and civil rights and freedoms protected by the Constitution. The extraordinary appeal does not conflict with the constitutional appeal provided for in Article 79(1) of the Constitution of the Republic of Poland. According to the doctrine, a constitutional complaint does not serve to protect entities' specific interests but takes the breach of a freedom or right as a starting point, with the settlement encompassing only the hierarchical control of normative provisions (Z. Czeszejko-Sochacki, *Formy naruszenia konstytucyjnych wolności lub praw* [Forms of breaches of constitutional freedoms or rights] (in:) *Skarga Konstytucyjna* [The Constitutional Appeal], ed. J. Trzciński, Warsaw 2003, p. 82). The case-law of the Constitutional Tribunal shows that a constitutional appeal is inadmissible if its pleas concern a flawed finding of fact or concerns a decision that is strictly individual. The constitutional appeal is not a remedy permitting the direct protection of constitutional rights or freedoms breached as a result of the issue of an individual instrument implementing the law (see *inter alia* the order of 16 June 2014 in case Ts 214/13) but one of a number of remedies permitting hierarchical control of the compliance of normative instruments, which, in the event of a judgment finding that the normative instrument on which a settlement is based does not comply with a hierarchically superior act, will lead only to the possibility of re-opening proceedings in the case. Accordingly, in the view of the draft's sponsor, the legal system needs a supplementary remedy protecting citizens' constitutional rights and freedoms, in the event of their breach by court judgments, in extraordinary situations where existing legal remedies do not offer sufficient protection.

It should be noted that the draft's sponsor has introduced an obligation in Article 88(2) for the Supreme Court to refer a legal question to the Constitutional Tribunal if, when examining an extraordinary appeal, it finds a ruling to be unconstitutional because it violates principles or

human and civil rights and freedoms enshrined in the Constitution. This arrangement is intended to avoid jurisdictional disputes between the Supreme Court and the Constitutional Tribunal over which of the two is empowered to examine the hierarchical compliance of normative acts.

The draft also ensures that the social factor is considered when examining extraordinary appeals. It should be noted that the aim of the extraordinary appeal is to restore the basic legal order by eliminating rulings that breach the Constitution, grossly breach the law and obviously contradict the material evidence gathered in a case. The involvement of lay judges in benches ruling on extraordinary appeals will introduce a very important element of social control to cases in which basic elements of the principle of social justice may have been breached.

One of the main motives for reforming the courts, including the Supreme Court, is the very low level of public confidence in the justice system. This state of affairs is attributable to a range of circumstances, above all a series of rulings that are not only legally questionable but grossly breach principles of justice. The draft's sponsor has therefore decided to introduce a provision permitting an extraordinary appeal to be filed against rulings discontinuing proceedings in cases which became final after 17 October 1997. A proviso has also been introduced: if five years have elapsed since the contested ruling became final and the ruling has had irreversible legal effects or if warranted by the principles or the rights and freedoms of persons and citizens enshrined in the Constitution, the Supreme Court may confine itself to confirming that the contested ruling is in breach of the law and indicating the circumstances which led it to issue such a decision (Article 115). The aim of the draft's sponsor is to create a remedy that enables the natural legal order to be restored in accordance with the principle of social justice.

The draft also introduces the possibility of appointing a party to act as public interest spokesman in proceedings. If the First President of the Supreme Court or the President of the Supreme Court deems it necessary to do so in order to protect constitutional principles or human and civil rights and freedoms, particularly when examining an extraordinary appeal, they may appoint a party to act as public interest spokesman and, more specifically, a person who complies with the requirements to hold office as a Supreme Court judge. The public interest spokesman is to seek to put constitutional principles into practice, in particular the common good, social justice and the protection of human dignity through the application of human and civil rights and freedoms.

3.2. Amendments concerning disciplinary proceedings

The draft Supreme Court act provides for the creation of a Disciplinary Chamber of the Supreme Court. If adopted, the proposed structure will ordain and create a more accountable system for reviewing disciplinary rulings by creating an organisationally separate chamber for this purpose at the Supreme Court. This will improve organisation and increase the effectiveness of the examination of disciplinary cases involving professions of public trust, which are crucial to the authority of these professions, including the legal professions, and to the justice system in general. Creating a separate Supreme Court chamber dedicated to examining disciplinary cases will increase the transparency and accessibility of these proceedings for society. Having a separate Disciplinary Chamber of the Supreme Court should also enhance the quality of disciplinary case-law and the specialisation of individual judges in this normative field.

At the start of the act, Article 1 list the tasks entrusted to the Supreme Court by the lawmaker: Subparagraph 2 of Article 1(1) states that the Supreme Court's tasks include examining disciplinary cases to the extent laid down in the act. It therefore covers all disciplinary proceedings against professions of public trust, not just proceedings concerning judges. The Disciplinary Chamber of the Supreme Court will also be competent for examining disciplinary cases involving prosecutors, advocates, legal advisers, notaries, bailiffs and doctors and other

professions, if the rules governing disciplinary proceedings in respect of these professions provide for the involvement of the Supreme Court. Creating a separate Disciplinary Chamber with a certain autonomy is therefore a consequence of entrusting the Supreme Court with the examination of disciplinary cases. The Chamber will be headed by a President of the Supreme Court. In addition to disciplinary cases, the Chamber will also handle cases involving the examination of appeals concerning the excessive duration of proceedings before the Supreme Court (Article 26).

Democratic societies require functioning mechanisms for controlling the exercise of professions of public trust. The system of rules governing the exercise of these professions derives its specific nature from the fact that it is based on the ethics of the profession concerned. The observance of ethical standards by members of these professions is necessary in a democratic society, in which these professions perform a special function. A judge, prosecutor or procedural representative must enjoy appropriate trust and credibility in order for the process of applying the law in force to be supported, understood and accepted by the public. Without appropriate rules to ensure effective and transparent judicial scrutiny of the application of ethical standards by persons exercising professions of public trust it is impossible to maintain society's trust in the justice system at an appropriately high level.

Like the previous act, the new act lays down rules governing the disciplinary liability of Supreme Court judges. The arrangements applicable in this matter provide for a judge to be liable for disciplinary misconduct and for behaviour compromising the dignity of their office. Disciplinary proceedings may also be brought against a judge for their conduct before taking up a post at the Supreme Court, if they failed to discharge the duties incumbent on their office or showed themselves to be unfit for the office of judge. Article 71(3) establishes the principle that judges committing minor offences are liable only to disciplinary proceedings. Paragraph 4 of that Article provides for an exception to that principle, allowing a judge to agree to be held liable for a minor offence. This exception, however, concerns only a situation in which a judge breaches the prohibitions laid down by the lawmaker in Chapter XI of the Code of Administrative Offences of 20 May 1971 (Journal of Laws 2015, items 1094, 1485, 1634 and 1707; 2017, item 966). The act includes provisions whereby a judge's acceptance of a penalty notice or payment of a fine, when a penalty notice *in absentia* has been issued under Article 98(1)(3) of the Code of Procedure for Minor Offences of 24 August 2001 (Journal of Laws, 2016, items 1713 and 1948, and Journal of Laws, 2017, items 708, 962 and 1543), is to be deemed a statement of their consent to being held liable in such a manner. This solution relieves judges of liability for minor offences in the case of petty, ordinary road traffic offences. These provisions also eliminate the feeling of injustice associated with a system preventing judges from being fined for minor road traffic offences. A judge's consent to being held liable for a minor offence also obviates the need for disciplinary proceedings in the matter (Article 71(5)).

The lawmaker is also introducing an internal disciplinary system for Supreme Court judges, which is based on the examination of disciplinary cases involving that court's judges in first instance by a disciplinary court comprising two judges from the Disciplinary Chamber and one lay judge, and in second instance by the Supreme Court in a bench of three judges from the Disciplinary Chamber and two lay judges. Lay judges in the above cases are to be designated on a case-by-case basis by the First President of the Supreme Court from among the lay judges of the Supreme Court to be elected for a four-year term by the Senate of the Republic of Poland. Introducing mixed benches (judges and lay judges) for disciplinary courts is aimed at increasing the involvement of society in examining disciplinary cases concerning Supreme Court judges. In view of the position occupied by the Supreme Court in the hierarchy of the justice system's bodies and the important tasks entrusted to it in the matter of applying the law, such involvement seems reasonable. This type of provision embodies social control, increases the transparency of disciplinary proceedings and has an impact on increasing citizens' trust in Supreme Court judges while preserving the professional nature of a bench. Involving citizens in

adjudicating in judges' disciplinary cases figured among the election pledges made by the President of the Republic of Poland.

Under the procedural model universally accepted in the Polish legal system, the function of prosecutor in Supreme Court judges' disciplinary cases has been assigned to a disciplinary officer appointed by the College of the Supreme Court for a four-year term of office. The Disciplinary Officer of the Supreme Court conducts investigation activities of their own motion or at the request of the First President of the Supreme Court, the President of the Supreme Court heading the Disciplinary Chamber, the College of the Supreme Court, the Prosecutor-General or the National Prosecutor. To ensure that the above authorities are duly informed and to improve control, the draft act requires Supreme Court judges immediately to notify the First President of the Supreme Court and the President of the Supreme Court heading the Disciplinary Chamber of any court cases in which they are a party or a participant. Investigation proceedings are preceded by an initial determination of the circumstances necessary to establish whether and how the elements of misconduct occurred and, if possible, obtain the judge's explanations.

The act also provides for the President of the Republic to have powers in the matter of disciplinary proceedings against Supreme Court judges. The President of the Republic may, of their own motion, appoint an Extraordinary Disciplinary Officer from among Supreme Court judges, common court judges and military court judges. The appointment of such an Officer may occur in a case that has already been opened (meaning that the Extraordinary Disciplinary Officer joins proceedings that are already under way) or mark the opening of disciplinary proceedings.

It implements the President of the Republic of Poland's function in the matter of controlling Supreme Court judges' observance of ethical principles, a function conferred by the President's position in the system (Article 126(1) of the Constitution). This provision enables the President of the Republic of Poland to safeguard social trust in Supreme Court judges.

The act provides for a series of disciplinary penalties, which have been expanded to reflect the principle of proportionality derived from Article 31(3) of the Constitution. These are: a warning, a reprimand, the reduction of a judge's basic remuneration by 5 % to 50 % for a period of six months to two years, dismissal from the function occupied, a judge's removal from office. The proposed penalties give a disciplinary court a wide range of possible responses, enabling it to respond appropriately to a defendant's disciplinary misconduct. The draft also allows a disciplinary penalty to be waived in less serious cases. A rule has also been introduced requiring the publication of a disciplinary court's judgment on the Supreme Court's website. This serves to inform society of disciplinary proceedings against Supreme Court judges and their outcome, thereby increasing the transparency of these proceedings and the impact of such judgments, including the indirect impact on society's trust in judges' morality. The sentencing of a Supreme Court judge in disciplinary proceedings to a reprimand, a reduction of their basic remuneration or dismissal from the function occupied will automatically disqualify a judge from sitting in a disciplinary court, taking part in the College of the Supreme Court and holding a function. A disciplinary ruling removing a judge from office shall disqualify that judge from re-appointment to the office of judge.

The above rules require the adjustment of provisions in other acts, including the Military Courts Organisation Act, by amending the function of disciplinary officer to that of Disciplinary Officer for Military Court Judges, as the authority introduced by the draft act. The latter act has also been amended to include the disciplinary penalty of transfer of a judge to another place of service. The provisions of this act have also been adjusted to the change in the structure of the Supreme Court consisting of the creation of a Disciplinary Chamber.

The proposed provisions provide for the Minister for Justice (after consulting the Minister for National Defence and the National Council of the Judiciary) to appoint a Disciplinary Officer for Military Court Judges and the Deputy Disciplinary Officer for Military Court Judges for a four-year term of office. The Disciplinary Officer for Military Court Judges and the Deputy Disciplinary Officer for Military Court Judges are to perform their duties under the National Council of the Judiciary, which will provide them with administration support by creating a separate organisational entity within the Council's Office. This solution avoids increasing demands for office space and staffing. The Military Courts Organisation Act is amended to include provisions giving the Minister for Justice the same powers as those conferred on the President of the Republic of Poland by the draft Supreme Court Act. The Minister for Justice may appoint from among common court judges or military court judges the Disciplinary Officer of the Minister for Justice for the purpose of conducting a specific case relating to a military court judge. The appointment of the Disciplinary Officer of the Minister for Justice excludes any other officer from taking actions in the case.

The draft Supreme Court act also entails adjustments to the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws 2016, item 1575). Like the amendments to the Military Courts Organisation Act, these amendments provide for a two-tier disciplinary jurisdiction (the first instance being the Disciplinary Court of the Institute of National Remembrance and the second being the Supreme Court). The power to elect judges from among the Institute's prosecutors to a disciplinary court of first instance for a period of four years has been vested in the assembly of prosecutors of the Chief Commission for the Prosecution of Crimes Against the Polish People. This act also provides for a Disciplinary Officer of the Minister for Justice.

Like the provisions described above, the draft provisions also entail amendments to the Common Courts Organisation Act and the Public Prosecutor’s Office Act. These amendments involve aligning disciplinary procedures under the Common Courts Organisation Act on the model introduced in the other acts, namely the Military Courts Organisation Act and the Act on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation.

3.3. Changes in the structure of the Supreme Court

The draft creates two new Supreme Court chambers to perform new and highly important organisational functions, namely an Extraordinary Control and Public Affairs Chamber and a Disciplinary Chamber.

Under Article 25 of the draft, the Extraordinary Control and Public Affairs Chamber is to have jurisdiction over the examination of extraordinary appeals, the examination of electoral disputes and disputes about the validity of a national or constitutional referendum and the confirmation of the validity of elections and referendums, other cases of public law, including cases concerning the protection of competition, the regulation of energy, telecommunications and rail transport and cases in which an appeal has been lodged against a decision of the Chair of the National Broadcasting Council, and appeals concerning the excessive duration of proceedings before common and military courts.

Owing to the social importance of its tasks, the Disciplinary Chamber has been given a special status among Supreme Court Chambers. As regards the jurisdiction of the Disciplinary Chamber, its internal organisation and internal rules of procedure, some tasks of the First President of the Supreme Court and the General Assembly of Supreme Court Judges will be exercised *mutatis mutandis* by the President of the Supreme Court heading the Disciplinary Chamber and the Assembly of Judges of the Disciplinary Chamber (Article 19). The draft’s sponsor also proposes the creation of a separate Office of the President of the Supreme Court heading the Disciplinary Chamber (Article 95). The Disciplinary Chamber will also be able to

draft its budget itself, provided its planned expenditure does not exceed 15 % of the average amount of the Supreme Court's expenditure laid down in the budget acts for the three years prior to the budget year (Article 7).

The arrangements concerning the Disciplinary Chamber are aimed at giving it a certain independence in the structure of the Supreme Court so that it can perform its tasks without interference, which is a determining factor in the level of public confidence in the judicial power. At the same time the draft's sponsor has sought to keep this autonomy within appropriate proportions so as to avoid any doubt that the Disciplinary Chamber is part of the Supreme Court. This is confirmed above all by the fact that judges occupying posts in the Disciplinary Chamber and judges adjudicating on other Supreme Court chambers enjoy the same status.

3.4. Changes in the status of Supreme Court judges

The status of Supreme Court judges is comprehensively regulated in Chapters 4 'Establishing, amending and ending a Supreme Court judge's service relationship' and 5 'The rights and duties of a Supreme Court judge'. The provisions are supplemented by the rules, described above, on disciplinary liability laid down in Chapter 7.

The provisions of Chapters 4 and 5 amend the current provisions of Chapters 3 and 4 of the Supreme Court Act of 23 December 2002 (Journal of Laws 2016, item 1254). The changes are aimed primarily at simplifying the procedure for selecting candidates for the post of Supreme Court judge, ensuring the impartiality of the procedure, increasing the involvement of the President of the Republic of Poland in the procedure for the appointment of Supreme Court judges and assuring the independence of judges and increasing their impartiality in the settlement of cases. The amendments also concern the retirement age for judges and introduce a new, accelerated procedure for withdrawing their immunity.

As before, a judge is to be appointed to the Supreme Court by the President of the Republic of Poland at the request of the National Council of the Judiciary. The procedure for the appointment of a judge to the Supreme Court is initiated by the President of the Republic of Poland, who, having consulted the First President of the Supreme Court, announces the number of vacancies for judges in specific chambers of the Supreme Court in the Official Gazette of the Republic of Poland 'Monitor Polski' (Article 30(1)). Any person satisfying the conditions for the post of Supreme Court judge may apply within one month of the announcement. Applications are to be presented to the National Council of the Judiciary (Article 30(2) and (3)). The President of the Republic of Poland is to lay down, by means of an ordinance, a model application form (Article 30(4)).

Under the transitional provisions, proceedings concerning an appointment to the post of Supreme Court judge instituted but not completed prior to the date of the entry into force of this act are to be discontinued, unless candidates have been presented for appointment by the President of the Republic of Poland (Article 114).

The qualifications for candidates for the post of Supreme Court judge are laid down in Article 29(1). In addition to the existing requirements, the draft act introduces a new requirement, namely to be over 40 years of age. The same criterion applies to candidates for the office of Supreme Administrative Court judge.

Another new requirement introduced by the draft act is that a candidate must not have served in, worked for or collaborated with the state security bodies referred to in Article 5 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws, 2016, item 1575). A person will only be able to become a Supreme Court judges if they have not been convicted or conditionally discharged of an intentional crime prosecuted by public indictment or an

intentional fiscal crime. This type of provision is also aimed at increasing the credibility of Supreme Court judges and trust in them. A judge's service relationship will be terminated if they are finally convicted of an intentional crime prosecuted by public indictment or an intentional fiscal crime or if they are found to have served in, worked for or collaborated with the state security bodies referred to in Article 5 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation. The draft act lays down a special procedure for verifying the latter circumstance (Article 35(5) to (7)). Competence for these matters is vested in the First President of the Supreme Court. In order to establish whether a judge has served in, worked for or collaborated with the state security bodies, the First President of the Supreme Court asks the President of the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation to provide a report from the Head of the Institute's Lustration Office on this matter. If the report provided confirms the circumstances in question, the Head of the Lustration Office at the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation indicates whether they result from a lustration statement referred to in Article 7 of the Act of 18 October 2006 on the disclosure of information on the documents of the state security organs from the years 1944-1990 and of the contents of those documents (Journal of Laws 2016, items 1721, 1948, 2260 and 2261; 2017, items 1530 and 1600) or from a final judicial ruling of a regional court referred to in Article 17 of the Act of 18 October 2006 on the disclosure of information on the documents of the state security organs from the years 1944–1990 and of the contents of those documents, confirming that the person verified made a false lustration statement referred to in Article 21a(2) of the Act. If the President of the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation or the Head of the Lustration Office learns of the above circumstances, they are immediately to notify the First President of the Supreme Court or the President of the Supreme Court heading the Disciplinary Chamber.

A further new addition to the circumstances terminating a judge's service relationship is the acquisition of the citizenship of a foreign country. The only exception is if the judge renounces this citizenship within 30 days of acquiring it. In this respect, the transitional provisions of Article 117 are also important, according a judge or assistant judge six months from the entry into force of the proposed act to renounce their foreign citizenship.

The previous rules on family ties between judges are also amended. Under the proposed Article 31, persons linked by up to the second degree of kinship, the first degree of affinity or marriage cannot be judges of the Supreme Court at the same time. A similar arrangement to that proposed currently applies to employees of state agencies under Article 9 of the Employees of State Agencies Act of 16 September 1982 (Journal of Laws 2016, items 1511, 2074 and 2261). The previous provisions of the Supreme Court Act only barred blood relatives from occupying posts in the same chamber, from sitting on the same bench and from direct subordination.

The provisions of Article 36 of the proposed act concern the retirement age for Supreme Court judges. The draft provides, in principle, for a Supreme Court judge to retire at the age of 65. An exception can be made to this rule if a judge submits a declaration of intent to remain in their post no later than six months and no earlier than 12 months before reaching the age of 65. When doing so, a Supreme Court judge must also present a certificate confirming that their state of health permits them to perform a judge's duties. The certificate must be issued in accordance with the rules specified for a candidate for a judge's post. Whether a judge can remain in post is decided by the President of the Republic of Poland. The President of the Republic of Poland will be able to consult the National Council of the Judiciary. Consent may be given for a period of three years and no more than twice. A judge who has passed the retirement age and obtained consent to remain in post may, however, retire at any time by submitting the relevant declaration to the President of the Republic of Poland via the First President of the Supreme Court. Given the different rules previously applicable in the matter of

the age at which a judge is to retire, Article 108 of the act lays down a transitional provision, whereby judges who have reached the age of 65 or will reach the age of 65 during that period are to retire within three months of the act's entry into force. Judges are to declare their intent to remain in their posts within one month of the entry into force of the act.

The arrangements proposed in the draft also follow on from other arrangements already applicable in the system of common courts. A Supreme Court judge who is a woman may retire on her 60th birthday. In this case retirement will be solely at the request of judge concerned.

When addressing the problem of the reduction of the retirement age for judges, reference must be made to the European Court of Justice's judgment in Case C-286/12, finding that Hungary, by adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62, which gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued, failed to fulfil its obligations under Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJEU L 303, 2.12.2000, p. 16).

During the proceedings before the European Court of Justice, Hungary argued that, 'in reality, those provisions lowered the age-limit for compulsory retirement in order to redress a situation of positive discrimination in favour of judges, prosecutors and notaries under the scheme previously in force, in so far as they, unlike other public sector employees, could remain in their posts until the age of 70.' The Court of Justice did not, however, accept this line of argument, holding there to be discrimination compared with persons who, having yet to reach the age laid down, can remain in service. The Court of Justice ruled that the 'difference in treatment on grounds of age is based on the very existence of an age-limit above which the persons concerned must retire, regardless of the age fixed for that limit and, *a fortiori*, for the previously applicable limit'. This cannot, however, mean that introducing any age limit whatsoever is inadmissible. It follows from the Directive and the Court of Justice's case-law that 'a difference in treatment based on age does not constitute discrimination if, within the context of national law, it is objectively and reasonably justified by a legitimate aim and where the means of achieving that aim are appropriate and necessary' (see paragraph 55 of the judgment in Case C-286/12, paragraph 77 of the judgment in case C-447/09 and paragraph 21 of the judgment in Case C-141/11).

The arrangements in the draft Polish act contain two major differences from the Hungarian act. First, the draft act allows a judge to remain in their post after reaching the age of 65 with the approval of the President of the Republic of Poland. Second, retirement does not entail an obligation to cease all activity. A judge may still take up activities compatible with their retired status or give up their retired status and take up another professional activity. Nor will retirement affect the possibility of continuing to work as a teacher, scholar teacher or scholar at a Polish university or to teach at the National School of Judiciary and Public Prosecution and on training courses organised by the self-governing professional bodies referred to in the Advocates Act, the Legal Advisers Act, the Notaries Act and the Bailiffs and Enforcement Act. Furthermore, the solution adopted is appropriate to the aim pursued by the draft's sponsor, and the retirement age for Supreme Court judges is consistent with the acts adopted with regard to the judiciary.

Article 39 concerns the secondment of judges from lower instances to the Supreme Court. This is to be done at the request of the First President of the Supreme Court, with the decision in the matter being taken by the Minister for Justice. The requirement to have held a function at a regional or appeal court has been replaced by the requirement to have appropriate experience, taking 10 years as the minimum required. This requirement is intended to assure that seconded judges have a suitably high level of competence.

The draft act restricts the possibility for Supreme Court judges to work as a teacher, scholar teacher or scholar at a Polish university or to teach at the National School of Judiciary and Public Prosecution and on training courses organised by the self-governing professional bodies referred to in the Advocates Act, the Legal Advisers Act, the Notaries Act and the Bailiffs and Enforcement Act to a total of no more than 210 teaching hours a year. Introducing a limit on the number of hours serves to avoid a situation in which additional employment hampers the proper performance of a judge's duties. The possibility that the performance of a judge's duties might be hampered is also grounds for the First President of the Supreme Court to object to the taking-up of additional employment.

The provisions of Article 43(7) are aimed at assuring complete transparency regarding the taking-up of additional employment by Supreme Court judges. According to the proposed provision, the First President of the Supreme Court is immediately to publish in the Public Information Bulletin on the Supreme Court's webpage information on the taking-up by a Supreme Court judge of additional employment as a teacher, scholar teacher or scholar or any other activity or gainful occupation, indicating the entity at which the judge has taken up the additional employment or other activity or gainful occupation, the nature of the additional employment or other activity or gainful occupation and amount of time devoted to them. The aim is to remove any suspicion concerning a judge's impartiality based on professional relationships.

A key change in the context of the previous Supreme Court Act is the proposed accelerated procedure for examining a motion for authorisation to bring criminal proceedings against a judge arrested *in flagrante delicto* for certain narrowly defined offences. These offences are crimes, offences for which the maximum term of imprisonment is at least eight years and the offence referred to in Article 177(1) of the Criminal Code in conjunction with Article 178(1) of the Criminal Code and in Article 178a(1) or (4) of the Criminal Code. Where a judge has been arrested *in flagrante delicto* for one of the above offences and remains in custody, the disciplinary court will adopt a resolution on the request no more than 24 hours after its receipt by the disciplinary court. A resolution allowing criminal proceedings to be brought against a judge or a judge to be remanded in custody is immediately enforceable.

The above new procedure is aimed above all at accelerating the examination of requests concerning those committing the most serious offences, such as the most serious road traffic offences. As an essential element of a properly functioning democratic state, immunity cannot, however, be transformed into a means for members of a given circle to escape liability for unlawful acts, especially not for judges, who need appropriate authority to legitimise their decisions. The proposed provision neither introduces new conditions for withdrawing a judge's immunity nor transfers the power to decide whether to withdraw immunity to another authority. It is aimed simply at accelerating the examination of requests in particularly important cases, where the seriousness of the charges and arrest *in flagrante delicto* warrant it, so the proposed provision is in no way aimed at restricting the principle of a judge's immunity. The aim is simply to avoid excessive delays in resolving such matters and complications in the proper conduct of criminal proceedings against the perpetrator of a prohibited act.

3.5. Lay judges of the Supreme Court

Ruling in disciplinary proceedings conducted by the Supreme Court and on extraordinary appeals will be delivered by benches comprising judges and lay judges. This entailed the need to lay down the method for the election and functioning of lay judges of the Supreme Court. The draft proposes that lay judges be elected by the Senate of the Republic of Poland from among candidates nominated by citizens directly or through social organisations. The number of lay judges of the Supreme Court is to be established by the College of the Supreme Court. Lay judges of the Supreme Court will be elected for a four-year term of office. The principles for their functioning are comparable to those applicable to lay judges in the common courts.

During the transitional period following the act's entry into force, pending the election of lay judges of the Supreme Court for the first term of office, lay judges' duties will be performed by lay judges of the Warsaw Regional Court and the Warsaw-Praga Regional Court.

3.6. The President's powers over the Supreme Court

The draft proposes new powers for the President of the Republic of Poland with regard to the Supreme Court. The procedure for the appointment of the First President of the Supreme Court has been amended to require the General Assembly to present five candidates to the President of the Republic of Poland. The draft also invests the President with the following powers:

1) laying down, by means of an ordinance, the Supreme Court's rules of procedure;
2) appointing a President of the Supreme Court from among three candidates presented by the assembly of judges of the Supreme Court chamber to which the President is to be appointed for a three-year term of office; the person appointed to the post of President of the Supreme Court may occupy the post for a maximum of three terms of office and only until they cease to be in active service;
3) announcing the number of vacancies in individual chambers of the Supreme Court in the Official Gazette of the Republic of Poland 'Monitor Polski';
4) laying down, by means of an ordinance, a model application form for candidates for a vacant Supreme Court judge's post,
5) approving the continuing occupation of a post by a judge who has reached the designated retirement age: a Supreme Court judge will retire on reaching 65 years of age, unless no later than six months and no earlier than 12 months prior to this date that judge submits a declaration of intent to remain in their post and provides a certificate, issued in accordance with the rules specified for a candidate for a judicial post, that their state of health permits them to perform a judge's duties. Such approval may be granted for a period of three years and no more than twice;
6) fixing the day on which a Supreme Court judge's service relationship is to end;
7) fixing the day on which a Supreme Court judge is to retire or be retired;
8) appointing an Extraordinary Disciplinary Officer to the Supreme Court;
9) laying down, by means of an ordinance, the rates of the post allowance for members of the Supreme Court's Research and Analysis Bureau;
10) laying down, by means of an ordinance, the method for the election, the composition and organisational structure, rules of procedure and specific tasks of the Lay Council of the Supreme Court.

Conferring a series of powers on the President of the Republic of Poland, who has traditionally possessed prerogatives with regard to the justice system, seems entirely justified and consistent with the Constitution of the Republic of Poland.

3.7. Amendments to civil and criminal procedure

The amendments to civil and criminal procedure are intended to adapt these procedures to the provisions of the new Supreme Court Act concerning the extraordinary appeal.

3.8. Transitional provisions

The act provides for a series of transitional provisions. One such provision concerns the retirement of Supreme Court judges who have reached 65 years of age (Article 108(1)). This is accompanied by another provision laying down the procedure for the retirement of a judge holding the office of First President of the Supreme Court or President of the Supreme Court and the need to elect a new President. It is proposed that if the circumstances referred to in the Article 108(1) necessitate the election of the First President of the Supreme Court or a

President of the Supreme Court, the President of the Republic of Poland is to entrust the running of the Supreme Court or chamber of the Supreme Court to a Supreme Court judge of their choice until the elected judge takes up their post. The General Assembly of the Supreme Court will present candidates to the President of the Republic of Poland after at least 2/3 of the number of judges to be appointed to the Supreme Court's individual chambers under the Rules of Procedure of the Supreme Court have been appointed (Article 108(4)). The rule has been worded so that candidates for the post of First President of the Supreme Court can only be put forward by the new composition of the General Assembly. This provision means that the General Assembly will not be above to nominate candidates for the post of First President of the Supreme Court until at least 2/3 of judges have been appointed. In the interim this function will be performed by a judge designated by the President of the Republic of Poland.

The act also permits the voluntary retirement of any Supreme Court judge who decides to do so and submits the relevant declaration within six months of the entry into force of this act (Article 108(2).

Public access to case-law is facilitated by the obligation for the Supreme Court to publish all its rulings and the grounds for these rulings within two years of the act's entry into force (Article 127).

The draft act contains appropriate transitional provisions accompanying the amendments relating to disciplinary proceedings.

4. Social, economic and financial impact assessment

The entry into force of the draft act will have financial repercussions on the state budget in terms of benefits for retiring Supreme Court judges. The creation of new posts for judges at the Supreme Court and the election and functioning of lay judges of the Supreme Court will also have financial effects. Note should also be taken of Article 125 of the draft act, which provides a legal basis for the Prime Minister, by means of an ordinance, to transfer planned budgetary income and expenditure the appointment and functioning of the new chambers and the appointment of Supreme Court judges to them.

The draft act should help increase legal certainty for citizens and restore the authority of the judicial authorities. The new rules on disciplinary courts should also serve to increase public trust in the justice system.

The subject-matter of the draft act is not covered by European Union law.

Under Section 4 of the Regulation of the Council of Ministers of 23 December 2002 concerning the operation of the national system for notification of standards and legal acts (Journal of Laws, item 2039, as amended), the draft act is not subject to notification to the European Commission.

The draft act will not affect microenterprises, small or medium-sized enterprises.