European Network of Councils for the Judiciary (ENCJ)

Réseau européen des Conseils de la Justice (RECJ)

ENCJ Extraordinary General Assembly

Vilnius – 28 October 2021

Minutes

At 16:00 hrs the President of the ENCJ Mr Filippo Donati opened the Extraordinary General Assembly.

The following Members signed the attendance sheet:

1. HRJ/CSJ Belgium
2. VSS Bulgaria
3. DSV Croatia
4. Domstolsstyrelsen Denmark
5. Tuomioistuinvirasto Finland
6. CSM France
7. SJC AJ Greece
8. OBT Hungary
9. Courts Service Ireland
10. CSM Italy
11. TP Latvia
12. TT Lithuania
13. Rvdr Netherlands
14. CSM Portugal
15. Sodni Svet Slovenia
16. CGPJ Spain

In accordance with article 10, paragraph 1 of the ENCJ Statutes, the General Assembly shall be quorate when at least half of the members of the General Assembly are present. 16 out of 22 Members were present and the General Assembly was deemed quorate.

The ENCJ Statutes do not provide for a voting by proxy procedure. Therefore only ENCJ Members attending the Extraordinary General Assembly will be able to vote.

All Membership fees for 2021 were paid and therefore all Members present had the right to vote.

Proposal for expulsion of the Krajowa Rada Sądownictwa of Poland

The President of the ENCJ set out the main reasons for the Executive Board to propose the expulsion of the KRS (proposal annexed to the minutes).

He explained that on this day the ENCJ Members would be asked to take a decision, which, though painful, as it concerns a founding Member of the ENCJ, in the view of the Board is necessary.

The President of the ENCJ gave an overview of the developments and circumstances that had led the Executive Board to propose the expulsion of the KRS.

In September 2018 the ENCJ suspended the membership of the KRS and the KRS was stripped of its voting rights and excluded from participation in ENCJ activities. Since then the KRS no longer fulfilled the statutory requirement that it is independent from the Executive and Legislature.
The Board has monitored continuously the developments in Poland. The Board has noted that the KRS had not taken any measures to defend the independence of the judiciary in Poland. A delegation of the ENCJ Board had visited Warsaw twice and had spoken with the stakeholders and the members of the KRS. At this time, the Board concluded that the situation had not improved.

The President of the ENCJ had written a letter to the President of the KRS asking nine questions concerning the ENCJ membership of the KRS. The KRS had replied to this letter.
The Board had considered that the KRS reply is not convincing and had prepared a position paper which was sent to the KRS.

Therefore, the ENCJ Board concluded that the KRS is not independent, taking into account not only the way the judicial members of Council for the Judiciary are now elected (the ongoing term of office of the previous judicial members of the Council, guaranteed by the Constitution, was interrupted and their mandates terminated prematurely, the election of 15 judges, previously elected by their peers, was entrusted to the Sejm) but also the fact that the KRS has not intervened to defend or protect judges against whom politically motivated disciplinary and criminal proceedings were initiated. In Poland, judges are liable to disciplinary procedures if they are adjudged to have engaged in political activity, such as protesting against the reforms, applying European Law as to the independence of judges and tribunals, and referring questions to the CJEU. The KRS has not spoken out in their defence.

The Board has considered many judgments of the CJEU. The Board has also taken into account actions, statements, opinions and conclusions of many organisations, including: the European Commission (infringement procedures, activation of the Rule of Law Framework, triggering of the Article 7 procedure against Poland); The European Parliament (2017 resolution and 2020 resolutions) the LIBE committee and the Democracy, Rule of Law and Fundamental Rights Monitoring Group; the UN Special Rapporteur on the Independence of Judges and Lawyers; the

Organization for Security and Cooperation in Europe (OSCE)'s Office for Democratic Institutions and Human Rights (ODIHR); Council of Europe Commissioner for Human Rights; the Parliamentary Assembly of the Council of Europe; the Venice Commission; the Consultative Council of European Judges; GRECO; the European Judges Associations, Association of European Administrative Judges, MEDEL Europe, International Judges Association. Articles by leading academics in the field have also been taken into account.

The KRS has submitted a defence based on the assumption that they acted according to the Polish law.
The Board believes that the stand of the KRS is not compatible with the ENCJ standard on the role of councils. According to the ENCJ standards, councils must be independent from the executive and legislative powers and must play an active role in defending judges. The Board considered the defence of KRS, which consists in saying that they simply apply the Polish law, is not convincing since judges and Judicial Councils, in addition to a duty to speak out against reforms which undermine their independence, have the obligation to respect and apply the EU law and the key values on which the Union is founded, as enshrined in Article 2 of the Treaty of European Union.

In conclusion, the Board had concluded that:
First. The Board considers that the KRS does not comply with the statutory rule of the ENCJ that a member should be independent from the executive and legislature.
Second. The Board considers that the KRS is in blatant violation of the ENCJ rule to safeguard the independence of the Judiciary, to defend the Judiciary, as well as individual judges, in a manner consistent with its role as guarantor, in the face of any measures which threaten to compromise the core values of independence and autonomy.
Third. The Board considers that the KRS undermines the application of EU Law as to the independence of judges and tribunals, and thus its effectiveness. In doing so, it acts against the interests of the European Area of freedom, security and justice, and the values it stands for.
Fourth. Since the suspension of the KRS by the ENCJ General Assembly no improvements in the functioning of the KRS have been noted. And in effect, the situation further deteriorated.
On the basis of the above-mentioned considerations, the Executive Board concludes that the KRS does not comply with the membership requirements of Article 6 and thus commits serious breaches of the aims and objectives of the Association as set out in Articles 3 and 4 of the Statutes, and is not willing to remedy these serious breaches.

In the circumstances, the Board proposed to the General Assembly that the KRS be expelled from the Association.

The President of the ENCJ then explained that the KRS had informed him that they were not going to attend the meeting (Letter of KRS attached to the minutes) to put forward the opinion of the KRS in relation to the proposal of the Executive Board.

The representatives of the Netherlands Council for the Judiciary and of the Italian Consiglio Superiore della Magistratura took the floor and expressed their Councils' support for the proposal.

The President of the ENCJ, explained the voting procedure that the ENCJ Statutes prescribe:

- The voting was to be held by secret ballot;
- The expulsion would require a ¾ majority of the members present;

The voting papers were distributed in accordance with the statutory rules (Article 10 paragraph 2)

ENCJ Member present	Number of votes
1. CSJ/HRJ Belgium	6
2. VSS Bulgaria	6
3. DSV Croatia	6
4. DSS Denmark	6
5. TIV Finland	6
6. CSM France	6
7. SJC AJ Greece	3
8. OBT Hungary	6
9. Courts Service Ireland	6
10. CSM Italy	5
11. TP Latvia	6
12. TT Lithuania	6
13. Rvdr Netherlands	6
14. CSM Portugal	6
15. Sodni Svet Slovenia	6
16. CGPJ Spain	6
Total	92

The votes were put in a voting box. The ENCJ Office staff read out all the ballot papers in plenary and the votes were counted.

The President announced the decision:

Number of votes needed to reach the majority: 92*3/4=69

Number of votes **in favour** of the proposal to expel the membership of KRS: **86**

Number of votes **against** the proposal to suspend the membership of KRS: **0**

Number of **abstentions**: **6**

Total number of votes: **92**

The President of the ENCJ declared that the proposal to expel KRS from the Association was adopted. The President closed the extraordinary General Assembly meeting.

Annexes

Proposal of ENCJ Board to expel KRS

Letter of the KRS President informing the ENCJ that he would not attend

European Network of Councils for the Judiciary (ENCJ)

Réseau européen des Conseils de la Justice (RECJ)

Proposal of the Executive Board of the ENCJ to expel KRS

1.Introduction

Since October 2015 the governing Law and Justice Party has been engaged in the reform of the justice system in Poland. A series of laws have been enacted, including as of January 2018 a law concerning the Polish Council for the Judiciary (KRS).

On 17 September 2018, the General Assembly of the ENCJ decided to suspend the membership of the KRS because it no longer met the statutory requirement that Members are independent of the Executive and Legislature in a manner which ensures the final independence of the Polish Judiciary.

Since then, the Executive Board has continued to monitor the situation amongst others by sending delegations to Poland to assess the situation.

On 14 February 2020, the situation regarding the independence of the Polish judiciary deteriorated further with the entering into force of a new law which has had grave implications for the rule of law in Poland. For the first time judges may be held to account and disciplined on the basis of the merits of their decisions, for applying European Union Law and for sending a request for a preliminary ruling to the CJEU under article 267 TFEU.

The suspension of KRS was done in the spirit of keeping an open mind to the possibility that the KRS would improve its functioning and would guarantee and defend Judicial Independence. However, the developments since 2018, and the active role of the KRS in these developments and the lack of actions in defence of judicial independence or support for harassed judges, have led the Executive Board to the conclusion that the KRS has committed serious breaches of the aims and objectives of the Association as set out in Articles 3 and 4 of the Statutes of the ENCJ, and thus proposes the expulsion of the KRS from the Association.

Herewith the Board of the ENCJ sets out how it has arrived at its proposal.

2. Relevant rules and standards of the ENCJ

Article 6.1 of the Statutes of the ENCJ provides:

"Membership is open to all national institutions of Member States of the European Union which are independent of the executive and legislature, or which are autonomous, and which ensure the final responsibility for the support of the judiciary in the independent delivery of justice".

The ENCJ statutes state in article 6, paragraph 4 that:

"The Executive Board may propose the expulsion of a member of the Association if it has committed serious breaches of the aims and objectives of the Association as set out in Articles 3 and 4 (..). The Executive Board must first of all give the member in question the opportunity to state its position. Any expulsion must be decided upon by the General Assembly by a three quarters majority of the members present at that meeting."

Article 3.1 of the Statutes of the ENCJ provides:
" The Association has as its aim the improvement of cooperation between and good mutual understanding amongst, the Councils for the Judiciary and the members of the judiciary of both the European Union Member States and of any European Union candidate Member State."

Article 4 of the Statutes of the ENCJ provides:
"Within the framework of the creation of the European Area of freedom, security and justice, the objectives of the Association are cooperation between members on the following:

- *Analysis of and information on the structures and competencies of members, and exchanges between the members;*
- *Exchange of experiences in relation to how the judiciary is organised and how it functions;*
- *Provision of expertise, experience and proposals to European union institutions and other national and international organizations. (..)"*

ENCJ Standards

The ENCJ has adopted a number of standards since its establishment in 2004.
The most relevant standards to be taken into account in this position paper are the following:

On the role of Councils for the Judiciary
"Each Council for the Judiciary has its origin in the development of its own legal system which is deeply rooted in a historical, cultural and social context but nevertheless all Councils for the Judiciary share common experiences and challenges and are governed by the same general principles.
The fundamental role of the Council is to safeguard the independence of the judiciary and the Council has a distinctive position vis-à-vis other democratic institutions as it has the legitimacy to defend the judiciary, as well as individual judges, in a manner consistent with

its role as guarantor, in the face of any measures which threaten to compromise core values of independence and autonomy"[1]

"The ENCJ considers that it is necessary that Councils for the Judiciary should take action to strengthen and maintain the Rule of Law, in particular by providing support for judicial independence, accountability and the quality of the judiciary. Councils strive to ensure the maintenance of an open and transparent system of justice for the benefit of all."

In the Budapest Declaration of the General Assembly of the ENCJ (2008) the following standard was adopted:
"4. As to the composition of the Councils for the Judiciary: (..) c. in any case (..) the judicial members of the Council (however appointed) must act as the representatives of the entire judiciary"

On the election of the judicial members of Councils for the Judiciary
The ENCJ, and other relevant international bodies, have adopted a standard that the mechanism for appointing judicial members of a Council must be a system which excludes any interference by the Executive or Legislature and the election of judges should be solely by their peers and be on the basis of a wide representation of the relevant sectors of the judiciary[2]

On the duty of judges to speak out when democracy and fundamental freedoms are in peril

"In politics, a judge, like any other citizen, has the right to have a political opinion. His task, by showing this reserve, is to ensure that individuals can have every confidence in justice, without worrying about the opinions of the judge.
(..)
At the same time, the obligation of reserve cannot provide a judge with an excuse for inactivity. While he should not speak on cases with which he deals personally, the judge is nonetheless ideally placed to explain the legal rules and their application. The judge has an educational role to play in support of the law, together with other institutions which have the same mission.
When democracy and fundamental freedoms are in peril, a judge's reserve may yield to the duty to speak out."

In the view of the Executive Board, article 3 and 4 of the ENCJ Statutes presuppose that a Council for the Judiciary fulfils the requirements of Article 6 paragraph 1. If a Council does not meet these requirements it cannot participate in the Association in a way that is prescribed by Article 3 and 4 of the Statutes with serious breaches of these articles as an automatic given.

[1] ENCJ report on Councils for the Judiciary 2010-2011
[2] Idem

3. Procedural aspects of the position paper

- On 17 September 2018 the ENCJ General Assembly suspended the membership of the KRS.
- In March and November 2019, a Board delegation visited Poland and met with relevant stakeholders.
- At its meeting of 10 February 2020, the Executive Board decided to start an inquiry into the question whether the KRS should be expelled.
- On 21 February 2020 the President of the ENCJ wrote a letter to the President of the KRS asking nine questions concerning the ENCJ membership of the KRS.
- On 13 March 2020 the President of the KRS responded to the nine questions
- On 22 April 2020 the Executive Board adopted a draft position paper.
- On 22 April 2020 the President of the ENCJ sent the draft position paper to the President of the KRS asking for the reaction of the KRS to the draft position paper.
- On 20 May 2020 the President of the KRS responded to the draft position paper.
- At the meeting of the Executive Board of 17 September 2021 the Executive Board decided to convene an Extraordinary General Assembly on 28 October 2021 in Vilnius to vote on the proposal to expel KRS. The KRS was notified of this decision on the same day.
- On 29 September the ENCJ received a letter from KRS with its Position of 30 July 2021 concerning the CJEU Judgement of 15 July 2021 with case number C-791/19.

4. Facts of the case

KRS's composition

The Council is composed of 25 members: 15 judges from Poland's various courts, four members of the Sejm appointed by the Sejm, two members appointed by the Senate, the President of the Supreme Court, the President of the Supreme Administrative Court, the Minister of Justice, and one member appointed by the President of the Republic[3].

Initially, the 15 judges sitting on the KRS were appointed from within the judiciary by various judicial assemblies. However, in 2017, the Polish President enacted legislation that gave the Sejm the authority to appoint the judicial members of the council.
The ongoing term of office of the previous judicial members of the Council, guaranteed by the Constitution, was interrupted and their mandates terminated prematurely. The election of 15 judges, so far elected by their peers, was entrusted to the Sejm.

KRS's functioning, duties and competences

The Polish Constitution states: "The National Council of the Judiciary shall safeguard the independence of courts and judges"[4].

[3] Art. 187 (1) Polish Constitution
[4] Art. 186 Polish Constitution

5. Is the KRS independent of the Executive and Legislature and is it safeguarding the independence of courts and judges?

The independence of the KRS has also been questioned by the European Commission, the Court of Justice of the EU, the European Parliament, the ECHR, and various bodies of the Council of Europe.

The Executive Board notes that the way of electing of the judicial members of the KRS is a departure from the ENCJ standard that judges in a council should be elected by their peers. Non-compliance with this standard, however, does not automatically imply that the KRS is not independent from the executive and legislature, and therefore the way in which the KRS exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers, is taken into account.

The Board found that the KRS is not independent of the Executive and Legislature.

Since the changes to the manner of appointment of judicial members of the KRS, the Sejm (Parliament) has effectively taken control of judicial appointments in Poland. The reform has led to the 15 judges being appointed by Parliament, effectively bringing the number of members of the KRS directly originating from or elected by the political authorities to 23 of the 25 members of that body. This raises serious doubts about the independence of this body. The majority of the new judicial members are closely related to the Minister of Justice and the government. The KRS often recommends judges for promotion that are loyal to government policies, that are representatives of the executive or even members of the KRS itself.

The changes in the composition of and way of appointment of members of the KRS was strongly criticised by the vast majority of judges, Polish, European and international judges' associations and international organisations (see point 6).

The KRS does not safeguard the independence of courts and judges[5].

The Board finds that the current KRS has not been properly fulfilling its role as the guarantor of independence of the judiciary[6].

The KRS has not intervened in cases of judges against whom politically motivated disciplinary and criminal proceedings were initiated. It has not spoken out in their defence.

Attacks by the government on the judiciary continue, undermining the trust in the judiciary. A smear campaign against judges which seems to have been coordinated from the Ministry of Justice continued. A deputy-Minister had to resign over this scandal and some members

[5] See the report on the Rule of Law in Poland on harrassment of judges with a list of judges targeted and actions of members of KRS (page 100-111).
[6] See ENCJ's contribution to the European Commission's rule of law 2021 report (to be published in September 2021)

of the newly elected KRS may have been involved as well[7]. The KRS however decided that there was not enough proof of a smear campaign and did not speak out in defence of the judges that were/are targeted in the campaign/attacked.

The KRS, or members thereof, have publicly criticised members of the Sąd Najwyższy (Supreme Court) for having referred questions to the Court of Justice for a preliminary ruling or cooperated with the EU institutions, in particular with the European Commission[8].

In Poland, disciplinary sanction of judges is handled by the disciplinary chamber of the Supreme Court, an institution created by the Law and Justice – governing political party (PiS) in 2017. The chamber is led by prosecutors appointed by the Minister of Justice (who is also the Prosecutor-General). The disciplinary chamber of the Supreme Court at Poland's Supreme Court has been subjected to very strong criticism and is subject of infringement proceedings before the CJEU initiated by the European Commission. The CJEU on 15 July 2021 judged that the role of the KRS in the appointment of the judges to the Disciplinary Chamber raises legitimate doubts about KRS' independence. Meanwhile, the Council does not address the threats to judicial independence resulting from changes proposed in domestic legislation, despite having the duty to safeguard the independence of courts and judges.

According to an ENCJ rule a judge must refrain from politics. This rule is subject to an important exemption when the independence of the judiciary is threatened. In that case a judge has not only the right, but also the duty to speak out. The KRS, however, stated that at any protest by judges against the reforms of the justice system constitutes a disciplinary tort. And as a result of this position, it actively supports the disciplinary prosecution of the protesting judges.

It is a rule of European Union Law that every national judge in a European Member State is also a European Union judge, and that European Union judges are entitled and sometimes obliged to refer questions to the CJEU for the uniform application of EU Law. The KRS undermines these rules by actively supporting the disciplinary prosecution of judges who decided to refer preliminary questions to the CJEU.

In a judgment delivered on 19 November, 2019 the CJEU established a test to enable the Polish courts to decide whether the newly established Disciplinary Chamber in the Supreme Court of Poland is an independent tribunal according to EU Law (Case C-585/18; C-624/18 and C-625/18). In a resolution of 23 January 2020, the Polish Supreme Court (Grande Chambre of all the judges of three divisions) applied the test and concluded that the Disciplinary Chamber did not satisfy the test and was not an independent tribunal. It also decided that the KRS is not independent from the Executive.
In direct response to this judgement, the KRS actively supported the disciplinary and criminal prosecution of judges who apply the CJEU-test.

On 14 February 2020 further legislation (the Muzzle Act"[9]) was enacted in Poland. Under Article 107 of this law judges are liable to disciplinary procedures if they are adjudged to

[7] EU Rule of Law report – 2020, Country Chapter Poland – page 2 and 3 footnote 8.
[8] CJEU C-585/18 paragraph 44

have engaged in political activity, such as protesting against the reforms, applying European Law as to the independence of judges and tribunals, and referring questions to the CJEU. disciplinary chamber of the Supreme Court may impose salary cuts, or even outright dismissal, if judges speak out against the validity of the judicial reforms.

The KRS is very much in favour of this law, and openly supported it.

In a reaction to the adoption of the Muzzle Law by the Polish government the Executive Board of the ENCJ reiterated that it is the duty of every judge in the European Union to apply European Union Law without any restrictions - whatsoever - from other branches of a state[10].

Thus, the KRS does not guarantee and defend the Independence of the Judiciary. Even worse the KRS seems actively involved in challenging the independence of the courts and judges.

6. Case Law CJEU[11] and ECHR and reactions/opinions European and International Bodies

The Executive Board is confirmed in its position that the KRS is not independent from the Executive and Legislature and that it is not upholding judicial independence, by the recent case law of the CJEU and the ECHR.

The Court of Justice of the European Union in the cases C -585/18, C-624/18, C-625/18 of 19 November 2019 refers specifically to the KRS.

In the present cases, it should be made clear that Article 30 of the New Law on the Supreme Court sets out all the conditions which must be satisfied by an individual in order for that individual to be appointed as a judge of that court. Furthermore, under Article 179 of the Constitution and Article 29 of the New Law on the Supreme Court, the judges of the Disciplinary Chamber are, as is the case for judges who are to sit in the other chambers of the referring court, appointed by the President of the Republic on a proposal of the [NCJ], that is to say the body empowered under Article 186 of the Constitution to ensure the independence of the courts and of the judiciary.

137. The participation of such a body, in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective (see, by analogy, judgment of 24 June 2019, Commission v. Poland (Independence of the Supreme Court), C-619/18, EU:C:2019:531, paragraph 115; see also, to that effect, ECtHR, 18 October 2018, Thiam v. France, CE:ECHR:2018:1018JUD008001812, §§ 81 and 82). In particular, the fact of subjecting the very possibility for the President of the Republic to appoint a judge to the Sąd Najwyższy (Supreme Court) to the existence of a favourable opinion of the [NCJ] is capable of objectively circumscribing the President of the Republic's discretion in exercising the powers of his office.

[9] Act of 20.12.2019 on amending the Law on the system of common courts, the Act on the Supreme Court and some other acts, Journal of Laws of 2020, item 190.

[10] Statement of the Executive Board on the situation in Poland – 10 January 2020, available at:

[11] See also Respect fort he Rule of Law in the Case Law of the European Court of Justice, Pech and Kochenov 2021

However, that is only the case provided, inter alia, that that body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal (see, by analogy, judgment of 24 June 2019, Commission v Poland (Independence of the Supreme Court), C-619/18, EU:C:2019:531, paragraph 116).

139. The degree of independence enjoyed by the [NCJ] in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation, as the body empowered, under Article 186 of the Constitution, to ensure the independence of the courts and of the judiciary, may become relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality arising from Article 47 of the Charter.

140. It is for the referring court to ascertain whether or not the [NCJ] offers sufficient guarantees of independence in relation to the legislature and the executive, having regard to all of the relevant points of law and fact relating both to the circumstances in which the members of that body are appointed and the way in which that body actually exercises its role.

141. The referring court has pointed to a series of elements which, in its view, call into question the independence of the [NCJ/KRS].

And in C-791/19 of 15 July 2021
(also confirmed and referred to on 6 October 2021 in C-487/19)

104. In that regard, it should be noted, first, that, as has been argued by the Commission, whereas the 15 members of the KRS selected from among the judges were previously selected by their peers, the Law on the KRS has recently been amended, so that, as is apparent from Article 9a of that law, those 15 members are now appointed by a branch of the Polish legislature, with the result that 23 of the 25 members of the KRS in that new composition have been appointed by the Polish executive or legislature or are members thereof. Such changes are liable to create a risk, hitherto absent from the selection procedure previously in force, of the legislature and the executive having a greater influence over the KRS and of the independence of that body being undermined.

105 Secondly, as has also been emphasised by the Commission, it is apparent from Article 6 of the Law of 8 December 2017 reproduced in paragraph 26 of the present judgment that the thus newly constituted KRS was established through the shortening of the existing four-year term of office, provided for in Article 187(3) of the Constitution, of the members which had, until that point, made up that body.

106 Thirdly, it is important to point out that the legislative reform which thus governed the process whereby the KRS was established in that new composition took place at the same time as the adoption of the new Law on the Supreme Court which carried out a wide-ranging reform of the Sąd Najwyższy (Supreme Court) including, in particular, the creation, within that court, of two new chambers, one being the Disciplinary Chamber, and the introduction of the mechanism, since held to be contrary to the second subparagraph of Article 19(1) TEU and which has already been discussed in paragraph 90 of the present judgment, providing for

a lowering of the retirement age for judges of the Sąd Najwyższy (Supreme Court) and the application of that measure to serving judges of that court.

107 It is, accordingly, common ground that the premature termination of the terms of office of certain then-serving members of the KRS and the reorganisation of the KRS in its new composition took place in a context in which it was expected that numerous posts would be soon be vacant within the Sąd Najwyższy (Supreme Court), and in particular within the Disciplinary Chamber, as the Court of Justice has already emphasised, in essence, in paragraphs 22 to 27 of the order of 17 December 2018, Commission v Poland (C-619/18 R, EU:C:2018:1021), in paragraph 86 of the judgment of 24 June 2019, Commission v Poland (Independence of the Supreme Court) (C-619/18, EU:C:2019:531), and in paragraph 134 of the judgment in A.B. and Others.

108 It must be held that the factors highlighted in paragraphs 104 to 107 of the present judgment are such as to give rise to legitimate doubts as to the independence of the KRS and its role in an appointment process such as that resulting in the appointment of the members of the Disciplinary Chamber.

And on 22 July 2021, the European Court of Human Rights in the Case of Reczkowicz v. Poland (Application no. 43447/19) found that:

…by virtue of the 2017 Amending Act, which deprived the judiciary of the right to nominate and elect judicial members of the NCJ – a right afforded to it under the previous legislation and recognised by international standards – the legislative and the executive powers achieved a decisive influence on the composition of the NCJ. The Act practically removed not only the previous representative system but also the safeguards of independence of the judiciary in that regard. This, in effect, enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, a possibility of which these authorities took advantage – as shown, for instance, by the circumstances surrounding the endorsement of judicial candidates for the NCJ (KRS).

The Board has also taken into account statements, conclusions and case law of the following organisations:

- The infringements procedures initiated by the European Commission as well as the initiation of the Rule of Law Framework and the triggering of the Article 7 of the Treaty on the European Union procedure against Poland
- The European Parliament (2017 resolution and 2020 resolutions) and hearings organised by LIBE committee and its working group named LIBE Democracy, Rule of Law and Fundamental Rights Monitoring Group
- Statements by the UN Special Rapporteur on the Independence of Judges and Lawyers
- Opinions, statements and Round Table Discussions of the Organization for Security and Cooperation in Europe (OSCE)'s Office for Democratic Institutions and Human Rights (ODIHR)
- Statements by the Council of Europe Commissioner for Human Rights
- Statements by the Parliamentary Assembly of the Council of Europe
- Opinions of the Venice Commission

- Opinions of the Consultative Council of European Judges
- Ad hoc procedure initiated by GRECO
- Opinions, statements and letters by the European Judges Associations, Association of European Administrative Judges, MEDEL Europe, International Judges Association
- Articles by leading academics in the field.

7. The defence of the KRS

The most important defence of the KRS in its presidents' letter of 20 May, 2020 is that the ENCJ allegations "constitute an accusation against the legislative authority – for issuing specific legal acts, and with respect to the national Council of the Judiciary – for obedience to these acts of law." And: "The allegations directed at the National Council of the Judiciary seem to pertain the fact that it exercises its competences and observes the law in force in Poland, (..)."

The Board does not agree with the position of the KRS.
According to many European institutions and organisations, and national Polish institutions and judicial organisations alike, the Polish government is attacking the independence of the Polish Judiciary on a large scale. The CJEU already now has condemned Poland on several occasions for not upholding the European Union Rule of Law as to the independence of the Judiciary, and more cases are pending. From a European Union Law point of view, the stand of the KRS that it just obeys "the law" is therefore not correct: European Union Law is also the law of Poland and has primacy above acts of the Polish Legislature and/or Executive.

The stand of the KRS is incompatible with the ENCJ standard on the role of councils. In ordinary circumstances the stand of the KRS might be correct, but not so "*in the face of any measures which threaten to compromise core values of independence and autonomy"* of the Judiciary. See the ENCJ-standard on the role of judicial Councils as cited in par 3. According to this standard the duty of the KRS in the circumstances should have been to safeguard the independence of the Judiciary against the attacks of the Polish Executive and/or the Polish Legislature. And the defence of the KRS makes it absolutely clear that it does not live up to this duty, and does not want to live up to this duty, saying it is legally not able to live up to the duty. The latter: Quod non. In the circumstances, the obedience of the KRS to "the law" is apparently limited to the acts of the Polish national Legislature and does not extend to European Union Law. This constitutes a breach of the ENCJ standard to safeguard the independence of the judiciary.

Furthermore, the Board does not believe that the stand of the KRS that it is just obeying "the law" and not actively supporting the attacks on the independence of the Judiciary is truthful: The reports of the delegations of the Board to Poland clearly show otherwise.

The Board concludes that the defence of the KRS is not satisfying or convincing.

8. Conclusion of the Executive Board

First. The Board considers that the KRS does not comply with the statutory rule of the ENCJ that a member should be independent from the executive and legislature.

Second. The Board considers that the KRS is in blatant violation of the ENCJ rule to safeguard the independence of the Judiciary, to defend the Judiciary, as well as individual judges, in a manner consistent with its role as guarantor, in the face of any measures which threaten to compromise the core values of independence and autonomy.

Third. The Board considers that the KRS undermines the application of EU Law as to the independence of judges and tribunals, and thus its effectiveness. In doing so, it acts against the interests of the European Area of freedom, security and justice, and the values it stands for.

Fourth. Since the suspension of the KRS by the ENCJ General Assembly no improvements in the functioning of the KRS have been noted. And in effect, the situation further deteriorated

On the basis of the above-mentioned considerations, the Executive Board concludes that the KRS does not comply with the membership requirements of Article 6 and thus commits serious breaches of the aims and objectives of the Association as set out in Articles 3 and 4 of the Statutes, and is not willing to remedy these serious breaches.

9. Proposal of the Board

In the circumstances, the Board proposes to the General Assembly, convening on 28 October 2021 that the KRS be expelled from the Association.

Councils for the Judiciary should support any judiciary which is under attack and do all they can to persuade the executive and legislature to support the action which they are taking in this regard. The prudent convention that judges should remain silent on matters of political controversy should not apply when the integrity and independence of the judiciary is threatened. There is now a collective duty on the European judiciary to state clearly and cogently its opposition to proposals from government which tend to undermine the independence of individual judges or Councils for the Judiciary.

The ENCJ wants to make absolutely clear that it remains committed to defending the independence of the Polish Judiciary. The ENCJ will continue to cooperate with all the relevant stakeholders in order to defend and restore the independence of the Polish judiciary as soon as possible. Once a Council for the Judiciary in Poland fulfils the requirement that it is independent from the Executive and Legislature, and actually supports the values of the ENCJ, the ENCJ will be happy to welcome any such Council back as a member.

This position paper was adopted by the Executive Board on 27 May, 2020 and updated by the Executive Board in September 2021.

Annexes

1. Letters between ENCJ and KRS February 2020-May 2020
2. Reports of Board delegation visits 2019
3. Letter Judges Associations Poland on expulsion
4. Position KRS on decision CJEU 15 July 2021
5. Minutes EGA 2018 Bucharest

CHAIRMAN OF THE
NATIONAL COUNCIL OF THE JUDICIARY
OF POLAND
Nr WWM.061.4.2021

WARSAW, 26.10.2021

Hon.
Prof. Filippo DONATI
President of the
European Network of the
Councils for the Judiciary

I want to express my thanks for the information about the Extraordinary General Assembly of the European Network of Councils for the Judiciary, which will be held in Vilnius. However, I will not take part in this meeting. I believe that the decision of the ENCJ to suspend the National Council of the Judiciary of Poland as a member of this organisation was made without a legal basis and does not comply with the ENCJ Statutes. Therefore, the pre-condition for the participation of the National Council of the Judiciary in events of the Network is the prior repeal of the resolution of the General Assembly about suspension of the KRS membership.

At the same time, I kindly inform you that the National Council of the Judiciary of Poland upholds all its arguments presented in the explanations which have been submitted at the request of the European Network of Councils for the Judiciary and declares its readiness for further collaboration with the ENCJ.

Yours sincerely,

judge Paweł Styrna

PRZEWODNICZĄCY
KRAJOWEJ RADY SĄDOWNICTWA
Nr WWM.061.4.2021

WARSZAWA, 26.10.2021

Sz. P.
Prof. Filippo DONATI
Przewodniczący
Europejskiej Sieci Rad Sądownictwa

Dziękuję za informację o Nadzwyczajnym Zgromadzeniu Ogólnym Europejskiej Sieci Rad Sądownictwa, które odbędzie się w Wilnie. Nie wezmę udziału w tym spotkaniu. Uważam, że decyzja ENCJ o zawieszeniu KRS w prawach członka tej organizacji została podjęta bez podstawy prawnej i jest sprzeczna ze Statutem ENCJ. Warunkiem udziału w spotkaniach w ramach Sieci jest więc uprzednie uchylenie uchwały Zgromadzenia Ogólnego o zawieszeniu Krajowej Rady Sądownictwa w prawach członka.

Jednocześnie uprzejmie informuję, że Krajowa Rada Sądownictwa podtrzymuje wszystkie swoje argumenty przedstawiane w wyjaśnieniach, które były składane na prośbę Europejskiej Sieci Rad Sądownictwa i deklaruje gotowość do dalszej współpracy z ENCJ.

Z poważaniem,

sędzia Paweł Styrna