



European Network of Councils  
for the Judiciary (ENCJ)

Réseau européen des Conseils  
de la Justice (RECJ)

## **Draft Position Paper of the Executive Board of the ENCJ on the membership of the KRS (expulsion)**

### **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 from January 2018 a law concerning the Polish Council for the Judiciary (KRS).

On 17 September 2018, an Extraordinary General Assembly of the ENCJ decided to suspend the membership of the KRS because it no longer met the requirements of the ENCJ that it is independent of the Executive and Legislature in a manner which ensured the independence of the Polish Judiciary (position paper added). Only the KRS voted against its own suspension.

Since then, the Executive Board sent delegations of three board members to Poland in March and November 2019 assessing the situation. They spoke with the Supreme Court, the judges associations, the Ombudsman, and to the KRS. The latter only met the delegation in November, because, according to the KRS, it was inopportune to talk to the ENCJ whilst a preliminary reference procedure concerning aspects of the judicial reforms in Poland, was pending before the CJEU. The delegations reported back to the Executive Board.

On 14 February 2020, the situation of the independence of the Polish judiciary deteriorated still further with the commencement of a new law which has 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 if they send a request for a preliminary ruling to the CJEU under article 267 TFEU. The KRS has not opposed this development, it has expressed strong support for the new law.

The developments since 2015, and the active role of the KRS in support of them, have led the Executive Board to question whether 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 whether it should propose the expulsion of the KRS as a member of the ENCJ.

In this position paper the Board of the ENCJ sets out its position.

## **2. International responses to the situation of the independence of the Polish judiciary and the role of the KRS**

Since 2015 there has been enormous international scrutiny of the reforms of the Judiciary in Poland. For example the United Nations (ODIHR), the Council of Europe (Greco, the Venice Commission and the Parliamentary Assembly), the European Union (the Commission, the Parliament and the CJEU) and the networks of the Judiciary and advocates in Europe (the network of presidents of Supreme Courts in Europe, the association of the Councils of States and Supreme Administrative Jurisdictions of the EU, the European Association of Judges, The European Bar Association), and many more. All these organizations are very critical of the reforms of the Judiciary in Poland and the role of the KRS.

At this point the Executive Board just wants to mention a few of the recent positions of some of these organizations.

In its report of 5 January 2020 the Monitoring Committee of the Parliamentary Assembly of the Council of Europe considered: “The reform of the National Council of the Judiciary had brought this institution under the control of the executive, which is incompatible with the principle of independence.” (nr 133, page 30)

The Venice Commission issued an urgent Opinion on 16 January 2020 recommending among other things “to restore the powers of the judicial community in the questions of appointments, promotions and dismissals of judges”, implying that the KRS is under the control of the Executive.

On 19 November 2019, the CJEU delivered a judgement holding, inter alia, that the test for the independence of the KRS is in the circumstances in which its members are appointed and the way the KRS actually exercises its role of ensuring the independence of the Judiciary (Case C-585/18; C-624/18 and C-625/18). Applying this test, the Polish Supreme Court (Grande Chambre of all the judges of three divisions) held in a judgement of December 2019 that the KRS is not independent from the Executive.

On 25 October 2019, the Commission brought an action before the CJEU claiming, inter alia, that the independence of the new Disciplinary Chamber in Poland is not guaranteed because its judges are selected by the KRS, while the judge-members of the KRS are selected by the lower house of the Polish Parliament. On 23 January 2020, the Commission requested interim measures in this case. In its judgement of 8 April 2020 the CJEU granted the request, holding, inter alia, that the arguments concerning the lack of a guarantee as to the independence and impartiality of the Disciplinary Chamber are prima facie not unfounded (case C-791/19).

### 3. Relevant rules and standards of the ENCJ

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. (..)”*

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 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”<sup>1</sup>*

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.”*

#### **4. Procedural aspects of the position paper**

In 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 (letter added).

On 13 March 2020 the President of the KRS responded to the nine questions (letter added).

On 22 April 2020 the Executive Board adopted the 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 ... the President of the KRS responded to the draft position paper (letter added). ]

#### **5. Is the KRS independent of the Executive and Legislature?**

On 17 September 2018 the General Assembly adopted the reasons of the Executive Board to suspend the KRS, as put forward in the position paper of 16 August 2018:

##### *“6. Conclusion*

*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.*

*The Board believes that the KRS is no longer an institution which is independent of the executive and, accordingly, which guarantees the final responsibility for the support of the judiciary in the independent delivery of justice.*

---

<sup>1</sup> [ENCJ report on Councils for the Judiciary 2010-2011](#)

*Moreover, the Board feels that actions of the KRS or the lack thereof, as set out in paragraph 5, are constituting a breach of the aims and objectives of the network, in particular the aim of improvement of cooperation between and good mutual understanding amongst Councils for the Judiciary of the EU and Candidate Member States in accordance with article 3 of the Statutes.”*

The delegations of the Executive Board, as mentioned in the introduction, reported to the Executive Board. On the basis of these reports the Executive Board is of the opinion that the situation has not improved since 17 September 2018 , but has deteriorated on several issues.

First. The relations between the KRS and the Minister of Justice are even closer than suspected in the position paper of 16 August 2018. In the meeting of November 2019 the KRS did not criticize the government at all. After enormous pressure, the lists of judges who supported the present members of the KRS as candidates (a minimum of 25 supporting judges was required to be appointed), show support by a narrow group of judges associated with the Minister of Justice, including 50 judges seconded to the ministry. One candidate was appointed without the required minimum of 25 signatures from judges (see ...).

Secondly. The KRS openly supports the Executive and Legislature in its attacks on the independence of the Judiciary, especially by means of disciplinary actions (See below under 6, 7 and 8).

The answers of the KRS in the letter of 13 March 2020 on these points strengthen the Executive Board in its opinion.

In the answer to question 1, the KRS acknowledges that 49 judges supporting the appointment of members of the KRS were seconded to the Ministry of Justice, and thus cannot be viewed as independent from the ministry for the purposes of the ENCJ.

In the answer to question 2, the KRS acknowledges that many signatures of judges supporting the candidacy of member Nowicki had been withdrawn before the election, thus casting doubt on the validity of his election, yet he continues to fulfil the role of a validly elected member of the council.

In the answer to question 3, the KRS only reiterates that it is not its task to monitor the declarations of the Minister of Justice, and does not deny that the Minister of Justice has said in the Senate that he proposed judges to be appointed in the KRS who, in his opinion, were ready to cooperate in the reform of the Judiciary. This amounts to a failure to promote the independence of the council and its members from the executive.

In the answer to question 4, the KRS argues that the members of the KRS are not the representatives of judges, which is incompatible with the ENCJ position paper on the role of councils of the judiciary.

On the basis of both its actions and its responses the Executive Board concludes that the KRS is not independent of the Executive and the Legislature.

**6. Does the KRS fulfil its ENCJ duty to defend the Judiciary as it turns against judges who protest against attacks on the independence of the judiciary?**

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 has ignored this rule by deciding that any protest by judges against the reforms of the justice system constitutes a disciplinary tort. Furthermore, it actively supported the disciplinary prosecution of the protesting judges, as the delegations of the Executive Board reported. Thus it attacks and tries to destroy the independence of the judiciary, while an ENCJ Council for the Judiciary has as its most important duty to guard and protect the independence of the judiciary. It is its prime *raison d'être*.

**7. Does the KRS fulfil its ENCJ duty to defend the Judiciary when it actively supports the disciplining of judges for referring preliminary questions to the CJEU?**

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 ECJ for the uniform application of EU Law.

The KRS undermines these rules by actively supporting the disciplinary prosecution of judges who decided in a judgement to ask preliminary questions to the CJEU. Thus, the KRS is in violation of the ENCJ duty to defend the Judiciary.

**8. Does the KRS fulfil its ENCJ duty to defend the Judiciary by actively supporting the disciplining of judges for the content of judgements in which a judge applies EU Law?**

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).

On 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 supports the disciplinary prosecution of judges who apply the CJEU-test (see also the answer to question 9 in the letter of 13 March 2020). The first judgement in such a case has been delivered: judge (Pawel Juszczyszyn) has been suspended indefinitely from judicial duties.

On 14 February 2020 further legislation was enacted in Poland. Under Article 107 of this law judges are liable to disciplinary procedures if they are adjudged to have engaged in political activity, such as protesting against the reforms, for applying European Law as to the independence of judges and tribunals, and for asking questions to the CJEU.

The KRS is very much in favour of this law, and openly supports it. The answers to the questions 6, 7, 8 and 9 in the letter of 13 March 2020 affirms this support.

Thus the KRS is in violation of the ENCJ duty to defend the Judiciary.

## **9. 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.

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 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.

On the basis of the above mentioned considerations the Executive Board concludes 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, and is not willing to remedy these serious breaches .

## **10. Proposal of the Board**

In the circumstances, the Board proposes to the General Assembly, convening ....., that the KRS be expelled as a member of the network.

With this measure, the ENCJ sends a clear message to the Polish government and the Polish judges that the ENCJ considers the KRS no longer to be a member of the European family of Members and Observers who believe in and are in support of the European Area of freedom, security and justice, and the values it stands for.

This position paper was adopted by the Executive Board on .... .