



European Network of Councils  
for the Judiciary (ENCJ)

Réseau européen des Conseils  
de la Justice (RECJ)

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**Kees Sterk, President of the ENCJ**

**LIBE hearing on the Rule of Law in Poland**

Mr. Chairman, thank you for the kind invitation to participate in this public hearing.

Let me first introduce the ENCJ. The ENCJ gathers 24 councils for the judiciary in the EU or similar autonomous bodies that ensure the final responsibility for the support of the judiciary in the independent delivery of justice. The ENCJ deals with justice systems and not judges individually. It is an institutional network of the Councils for the Judiciary that provide the all-important buffer between the judiciaries on the one hand and the executive and legislative branches of government on the other.

I was asked, to explain to you why the ENCJ has taken the unprecedented and sad step in September 2018 to suspend the membership of the Polish National Council for the Judiciary, in short the KRS. I will first say something about the process the ENCJ followed, and then something about the substance of the matter.

**The process.** As most of you are aware, since October 2015 the governing Law and Justice Party has been engaged in the reform of the justice system in Poland. From 2015 on, the government proposed changes and the Parliament enacted new law. Amongst other laws, the Polish Parliament changed laws regarding the Constitutional Court, the Supreme Court, the Ordinary Courts and the KRS.

According to the ENCJ-standards the Judiciary should always be involved in all stages of any reform process. This is to ensure the independence of the judiciary, and that the reforms are effective and instil confidence. The Polish government did not involve the Judiciary in any relevant way, but always presented the Judiciary with unchangeable draft laws.

From 2016 onwards, the General Assembly and the Board of the ENCJ time and again made statements about the then draft law concerning the KRS and expressed its concerns about the independence of the then future KRS. The worries were that the then future KRS would not comply with the statutory rule that a member of the network should be independent of the Executive, which is also a rule of Union Law. The Polish government did not react to these statements or entered into dialogue. The government just pushed forward despite the concerns of the Councils for the Judiciaries of Europe.

After the enactment of the law concerning the KRS in January 2018, the Board sent a letter to the KRS raising the question of KRS' membership of the ENCJ. The KRS sent an invitation to the Board in return, which was accepted by the Board. On 21st June 2018 a delegation of the Board visited Poland. The delegation also spoke with the First President and other Presidents of the Supreme Court, with a delegation from the judges' associations Justitia and Themis, with members of the Forum of the Cooperation of Judges, and with the Ombudsman as statutory defender of human rights in Poland. The KRS submitted written answers to the questions raised by the ENCJ delegation. The associations of judges submitted additional information.

Before I go to the content of the Law on the KRS let me pause here for a bit and mention that the Board and in fact all Members of the ENCJ regret very much that the question of the position of the KRS in ENCJ had to be raised. The KRS is one of the founding fathers of the network and their representatives to the network were very much respected and contributed highly to the work of the network, both in the Board and in the various ENCJ projects over many years.

I will now address the substance of the matter. The first observation of the ENCJ is that the Law regarding the KRS should be seen in conjunction with the Laws on the Constitutional Court, the Supreme Court and the Common Courts. Reviewing the total of these laws, it is clear to the ENCJ that there is a major power shift from the

Judiciary to the Executive, in such a way that the Executive - in violation to the required independence of the Judiciary - controls the Judiciary. The ENCJ found that the reasons provided by the Polish government are no justification whatsoever to abolish the independence of the Polish Judiciary.

Due to time restrictions, I will only focus on the Law regarding the KRS. The essence of the reform is that the judicial members of the KRS are no longer directly elected by their peers but are instead appointed by Parliament. Judges may be appointed by Parliament if they are supported by 25 judges or a group of 2000 citizens. This is a departure from the ENCJ standard that judges in a council should be elected by their peers and have the majority vote.

Although non-compliance with this standard does not automatically imply that a council is not independent from the Executive, in the case of the Polish Council a number of additional circumstances have led the ENCJ to conclude that the KRS is no longer independent from the Executive. These circumstances include the following:

- The total of the reform laws have as an effect the control of the Judiciary by the Executive;
- The official goal of the reforms is to fight corruption, inefficiency and communist influence in the Judiciary. However, the Polish government nor the new KRS did not make clear to the ENCJ whether, and if so, in what way the reforms will contribute to these goals;
  - The selection process of a judicial member of the new KRS is not transparent. For instance the lists of supportive judges are not made public, and so it cannot be checked whether the list consists primarily of judges seconded to the Ministry of Justice, or of the same 25 judges for every candidate; the KRS has not published the list of supporting judges, but they have instead provided the ENCJ only with a list showing the number of judges they were supported by;
  - A majority of the elected members of the KRS have very close ties to the Ministry of Justice or politicians of the ruling party. The associations of judges informed the Board of the ENCJ that four of the present judicial members were until shortly before their election as member of the KRS seconded to the Ministry of Justice; five of the members of the KRS were appointed

president of a court by the Minister of Justice - using his special powers which a reform law gave him - shortly before their election as members of the KRS; a majority of the members of the KRS (14 out of 25) are either a member of the ruling party, a member of the government or are chosen by Parliament on the recommendation of the ruling party.

- A large portion, according to the associations of judges, of the 10,000 Polish judges believe that the KRS is politicised.
- The judicial members of the KRS support all the justice reforms from the government, although they admit that the majority of the judges are of the opinion that the reforms are in violation of the Polish Constitution and are infringing the independence of the Judiciary;
- Several members of the KRS expressed the opinion that judges who publicly speak out against the reforms and/or speak out in defence of the independence of the Judiciary should be disciplined (fired) because of unlawful political activity;
- The new KRS does not speak out on behalf of the judges who defend the independence of the judiciary (such as the President of the Supreme Court).

For these reasons on the 17th of September 2018 in a special General Assembly in Bucharest, 21 out of 24 member Councils voted in favour of suspension of the KRS. One Council was not present, one Council abstained, and the KRS voted against.

Therefore, the KRS is, for the time being, stripped of its voting rights and excluded from participation in ENCJ activities. The ENCJ hopes that the time will come when the suspension can be lifted, but that will only be when the principle of judicial independence is properly respected in Poland.

However, the actions of the KRS since its suspension from the ENCJ give little reason to believe that a change for the better is looming. The ENCJ learned that the KRS actually started disciplinary proceedings against members of the former KRS, against judges who protest against the reforms, and against judges who exercise their right as European judges to send preliminary questions to the European Court in Luxembourg.

The ENCJ aims to improve cooperation between, and good mutual understanding amongst, the Councils for the Judiciary and the members of the Judiciary of the European Union Member States. This objective brings with it a common responsibility to uphold the fundament of our common EU legal order, especially the Rule of Law and the independence of the Judiciary within that order.

Member States are free to organise their judicial systems in a way that they see fit, but there are some minimum standards that have to be complied with. In the case of the KRS the minimum standards were clearly not met. That is why the ENCJ sadly had to decide to suspend the KRS.

I thank you for your time.