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**Position of the Stefan Batory Foundation Legal Expert Group
on the amendment to the law on the Supreme Court
adopted on 21 November 2018**

The Stefan Batory Foundation Legal Expert Group welcomes the direction of the normative changes resulting from the law of 21 November 2018 on amending the law on the Supreme Court (the Amendment Act). Efforts by civil society organisations, common courts, the Supreme Court, the Supreme Administrative Court and EU bodies to protect the rule of law in Poland are starting to bear fruit.

Nevertheless, we wish to highlight that the legislator withdrawing some of the unconstitutional changes to the Supreme Court – in particular, depriving some judges of their posts, in violation of the principle of irremovability – does not restore the rule of law in Poland. The National Judiciary Council, which has been made fully subservient to political will, continues to decide on judges' nominations and the Constitution Tribunal, which has lost its independence from the executive power, assesses whether laws are constitutional. The positive assessment of the Amendment Act's direction does not mean that the legislator has acted flawlessly. On the contrary, how the Amendment Act was adopted and some of its provisions give rise to serious constitutional reservations.

The Amendment Act was adopted in violation of the basic principles of law-making in a democracy. The draft was not shown to the public beforehand and did not undergo any public or institutional consultations. Work on the Amendment Act lasted just a few hours, which made any substantive discussion on its content impossible. Not even the National Judiciary Council and the Supreme Court were able to comment on the amendment, though their opinions are mandatory.

The Amendment Act does not restore the legal *status quo* from before the controversial changes entered force. Rather, it shapes it anew, taking the Supreme Court judges' retirement as its starting point. **The Amendment Act also contains ethically dubious provisions encouraging judges who were forced to retire not to return to active service at the Supreme Court. These provisions offer them a pension that is 25% higher than the one that they would be entitled to if they retired based on the general rules.**

Article 4 of the Amendment Act also gives rise to serious constitutional reservations. Essentially, it seeks to cancel the court proceedings in which

common courts and the Supreme Court sent the CJEU requests for preliminary rulings (prejudicial questions). This amounts to unacceptable interference by the legislative authority in the judiciary's basic competence, the administration of justice, as well as the constitutional right to court of citizens who are parties in these proceedings. It also violates the ban on closing the court path resulting from Article 77 paragraph 2 of the Constitution, which is primarily addressed to the parliament as the body adopting the law in the form of a statute.

The Amendment Act seems to go in the right direction, yet the way it was adopted and some of its provisions make one doubt the legislator's true intentions. It seems that it was less interested in genuinely improving the quality of the law on the Supreme Court and of the rule of law in Poland and more focused on obtaining an immediate effect in negotiations with the EU.

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The Stefan Batory Foundation Legal Expert Group assesses legal changes to the state system prepared by the government and parliament, as well as public and civic institutions' place in the legal system. The Group's members monitor draft legal acts, analysing whether they comply with the Polish Constitution, international norms and democratic standards of the rule of law. They also assess whether provisions interfere with human and civil rights and the direction of systemic changes set by the law.