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Position of the Stefan Batory Foundation Legal Expert Group on the procedure for selecting Supreme Court judges

The Stefan Batory Foundation Legal Expert Group highlights that the selection procedure for Supreme Court (SN) judges currently underway is invalid because the Polish President's notice of 24 May 2018 on judges' vacancies at the SN initiating it was not signed (countersigned) by the Prime Minister. According to the Polish Constitution, every official act by the President that is not a prerogative must be signed by the Prime Minister "for it to be valid" (Article 144.2 of the Constitution). There is no reason to depart from this understanding of this provision or to regard countersignature as a merely technical act. Nor can the obligation to countersign be made conditional on deeming the official act of the President auxiliary in relation to other activities. As a result, the invalidity of the notice initiating the SN selection procedure invalidates the entire procedure. As we wrote in our position of 20 July 2018, people standing for the post of SN judge in an invalid competition must understand that their appointment will be invalid, which means that, in light of existing law, they will not be SN judges.

We wish to signal that the selection of judges who are members of the National Judiciary Council (KRS) based on the law of 8 December 2017 means that it is staffed with people appointed contrary to Article 187 of the Constitution. This provision gives the Sejm (the lower chamber of the Polish parliament) the right to appoint four, rather than nineteen, members of the KRS, and guarantees members a four-year term. Both these principles were violated when appointing the KRS, which means that it has ceased to fulfil its basic function – guarding the independence of courts and judges. Moreover, the KRS's actions in the ongoing selection procedure of SN judges indicate that it is highly politicised, while threatening judicial independence.

The ongoing selection procedure of SN judges is invalid, but also highly unreliable. The KRS named candidates for SN judges remarkably quickly, without assessing their abilities, and based on unclear criteria and meagre information about the candidates, without full assessment of their achievements and with the public stage of their hearings closed to observers. Many of the SN candidates recommended by the KRS are people who – because of their insufficient professional experience and doubts concerning their independence from the executive – do not guarantee that the constitutional and statutory tasks of a SN judge will be performed properly.

SN candidates' involvement in actions that undermine the foundations of the lawful state is a gross betrayal of the values underlying their professions as academics,

judges, lawyers, legal advisors, notaries and prosecutors. As we highlighted in our appeal of 20 July 2018, active involvement in the violation of the Constitution and the dismantling of the rule of law should be considered when assessing ethical qualifications for legal professions of public trust in the future.

The Stefan Batory Foundation Legal Expert Group

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Jacek Czaja, chairman of the Legal Association in Lublin, former deputy minister of justice

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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.

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