MEMORANDUM ON MATTERS CONCERNING THE ELECTION OF CONSTITUTIONAL TRIBUNAL JUDGES ON 8 OCOTBER 2015 AND ON 2 DECEMBR 2015

I. DESCRIPTION OF CONSTITUTIONAL CUSTOMS

In addition to legislative provisions there is a number of unwritten norms or customs relating to the system which regulate the exercise, by state authorities, of the powers granted to them by the Constitution.

In Polish constitutional practice, established after the entry into force of the Constitution on 2 April, 1997, the following constitutional customs applicable to the election of Constitutional Tribunal judges can be distinguished:

I.1

In elections of Constitutional Tribunal judges, as a rule, candidates put forward by parties holding a parliamentary majority are elected.

The only exception when the Sejm elected a judge recommended by the opposition took place in 1995.

This method serves to ensure that the Tribunal's composition is pluralistic in nature, guaranteeing that, given the 9-year terms held by judges and the different periods in which their terms end, various political forces that hold a majority in the Sejm after parliamentary elections have a say in filling positions in the Tribunal. In the Polish political system the only time that for a full two parliamentary terms (8 years, which is less than the term of a Constitutional Tribunal judge) one political force remained in power were the years 2007-2015 when the Sejm's majority was held by the PS-PSL coalition.

I.2

Leaving the election of Constitutional Tribunal judges to that Sejm which was elected in general elections held prior to the commencement of the judge's terms.

The possibility of electing new Constitutional Tribunal judges during a term of the Sejm that was coming to an end, but after parliamentary elections (resulting in the voters electing a different political force to be in power than before) occurred in 1997 in connection with the entry into force of the Constitution of the Republic of Poland of 2 April 1997, which provided for a Constitutional Tribunal composed of 15 members in place of the previous 12-member Tribunal.

The Sejm of the 2nd term which sat from 1993 until 1997, despite the fact that its term ended on 20 October, 1997[1], whereas the Constitution of the Republic of Poland of 2 April, 1997 entered into force on 17 October, 1997, ultimately decided not to elect three members of the Constitutional Tribunal, leaving the exercise of this right to the new Sejm representing the political force that was elected in elections on 14 September, 1997.

Initially the party that held a majority in the Sejm of the 2nd term – SLD – planned to hold nominations, but abandoned this plan following public criticism of this idea. It is worth noting that the then President of the Constitutional Tribunal Andrzej Zoll expressed his opinion on the matter. In a book *Państwo prawa jeszcze w budowie. Andrzej Zoll w rozmowie z Krzysztofem Sobczakiem* (State ruled by law still under construction. Andrzej Zoll talks to Krzysztof Sobczak, published in Wolter Kluwer S.A., Warsaw 2013) he spoke negatively about the situation at the time and shared his interlocutor's opinion that SLD had tried to shape the

[1] Unlike in the Constitution of 2 April 1997, the Constitutional Act of 17 October 1992 on Mutual Relations between the Legislative and Executive Branches of Government of the Republic of Poland and Local Government which is applied to fix the date of the end of the term of the Sejm elected when it was in force, provided that the Sejm ends its term „when deputies meet at the first sitting of the next term of the Sejm," and not until the day preceding such day as the Constitution now in force provides for.

Tribunal by political means. He pointed out that it was a "dramatic moment" when "the ruling group did everything in its power to bring about the election of three judges still before the elections. But the attempt had failed and they were elected after the elections."

Hence, this custom has developed as a result of a dispute, whose essence was a drive to ensure pluralism of the Constitutional Tribunal's composition so as to guarantee a representation of judges appointed by different political forces.

I.3

The possibility that the President of the Republic of Poland refrains from taking an oath of office from a Constitutional Tribunal judge

Refraining by the President of the Republic of Poland from taking an oath of office from a person elected by the Sejm to become a member of the Constitutional Tribunal is not without precedent.

As regards Lidia Bagińska, elected on 8 December, 2006, as a member of the Constitutional Tribunal by a majority of the Sejm's deputies, the President of the Republic of Poland refrained from taking her oath of office on account of doubts about the trustworthiness of her professional career so far. Consideration was given to the idea of, among others, resumption of voting on the candidacy of Lidia Bagińska by the Sejm on account of the possibility that the deputies were misled about the candidate's ethical qualifications. Ultimately the vote was not taken. The President of the Republic of Poland took the oath of office from Lidia Bagińska on 6 March, 2006, while on 12 March, 2016, she resigned from the position of a Constitutional Tribunal judge.

The above facts clearly show that doubts arising about the ability to fulfil premises that condition the appointment to the office of a Constitutional Tribunal judge by a person elected by the Sejm can customarily become grounds for the President of the Republic of Poland refraining from taking the oath of office until doubts are cleared or a decision is taken that notwithstanding such doubts, the President can take the oath of office from such candidate. There are no grounds to assume that a similar procedure could not be applied in the event that doubts arise as to the procedure chosen to elect Constitutional Tribunal judges.

II. POSITIONS AND OPINIONS PRESENTED BY THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, THE SO-CALLED VENICE COMMISSION

II.1.

"The elective system (of Constitutional Tribunal judges) appears to be aimed at ensuring a more democratic representation. However, this system is reliant on a political agreement, which may endanger the stability of the institution if the system does not provide safeguards in case of a vacant position."[2]

In assessing the above argument in light of the issue under discussion there is a point in the drive towards "democratic representation" of the Constitutional Tribunal by appointing its members in place of those whose term expired after parliamentary elections (with respect to which there were strong grounds to assume that they will bring about a change of the political majority in the Sejm) to elect the 8th Sejm by no other than the 8th Sejm, especially that the same political option was in power in 2007-2015, which had earlier elected 9 out of the 15 Constitutional Tribunal judges when it was in power.

II.2

"[…]a system in which all judges of the Court are elected by parliament on the proposal of

[2] Opinion of the Venice Commission CDL-STD(1997)20 The composition of constitutional courts – Science and Technique of Democracy, no. 20 (1997), p. 7

the President "does not secure a balanced composition of the Court". In particular, "if the President is coming from one of the majority parties, it is therefore likely that all judges of the Court will be favourable to the majority. An election of all judges of the Court by parliament would at least require a qualified majority."[3]

In light of the factual situation existing in the Republic of Poland one can see a certain analogy between the concerns expressed in the above-mentioned argument and the fact that the election of constitutional judges on a proposal of a representative of a specific political party, which could lead to a failure to secure the implementation of this tribunal's full objectivism and the situation, in which despite having filled 9 out of the 15 judicial positions in the course of two terms of the Sejm by one political party, the same party seeks to fill an additional 5 positions despite the fact that the expiry of the term of office of the judges whose posts are up for re-election after the date of the parliamentary elections to the Sejm, a body that is empowered to elect judges of the Constitutional Tribunal.

II.3.

"*The changing of the composition of a Constitutional Court and the procedure for appointing judges to the Constitutional Court are among the most important and sensitive questions of constitutional adjudication and for the preservation of a credible system of the rule of constitutional law. It is necessary to ensure both the independence of the judges of the Constitutional Court and to involve different state organs and political forces into the appointment process so that the judges are seen as being more than the instrument of one or the other political force. This is the reason why, for example, the German Law on the Constitutional Court (the Bundesverfassungsgerichtsgesetz) provides for a procedure of electing the judges by a two-third majority in Parliament. This requirement is designed to ensure the agreement of the opposition party to any candidate for the position of a judge at the Constitutional Court. The German experience with this rule is very satisfactory. Much of the general respect which the German Constitutional Court enjoys is due to the broad-based appointment procedure for judges.*[4]

Considering the existing rules for appointing judges of the Constitutional Tribunal provided for in the domestic legal order, it should be noted that the achievement of a similar level of a positive assessment of the work of a constitutional court is possible on account of a guarantee of its pluralistic composition coming from the election of its individual members by different political parties in the course of the Sejm's successive terms. The drive to dominate the composition of the Constitutional Tribunal by one political party contradicts the opinion about building respect for this body by negating the wide spectrum of judges' views being the result of their election by different political parties.

II.4.

"A ruling party should not be in a position to have all judges appointed to its liking. Hence, terms of office of constitutional judges should not coincide with parliamentary terms. One way of accomplishing this can be by long terms of office or office until the age of

[3] Opinion of the Venice Commission CDL-AD(2011)010 Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on Courts, the law on State's prosecutor office and the law on the Judicial Council of Montenegro, paragraph 27.

[4] Opinion of the Venice Commission CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), paragraphs 18-19.

retirement. In the former case, reappointment would be possible either only once or indeed not at all. [5]

Irrespective of the way the terms of office of constitutional judges are developed in the Polish legal order, one should share (also in light of the comments made earlier) the point of a general directive, namely that a dominating political party should not have the possibility of appointing all judges of the constitutional court. Hence in light of the above principle it is right to recognize the critical assessment of seeking to appoint additional five judges (in addition to the 9 judges appointed earlier) by a political party whose mandate to exercise power (determined by the date of parliamentary elections) expires still before the end of the term of office of these judges of the Constitutional Tribunal whose positions were up for election.

III. DOCTRINAL VIEWS OF APPOINTING CONSTITUTIONAL COURT JUSTICES

III.l.

"The principle of the Sejm's monopoly in appointing constitutional justices is in contrast with the procedure for choosing court judges (to quote a phrase by W. Sokolewicz), and left entirely beyond the parliament's control. As far as a constitutional court is concerned, however, it is widely regarded that a close relationship between its decisions and a political process of exercising public authority, especially their impact on the legislative powers of the parliament, calls for some kind of checks and balances by enabling the parliament to have a say on such court's composition. Parliamentary appointment conveys a semblance of democratic legitimacy for the constitutional court, as it can modify legislative decisions of the nation's representative body."

The essence of providing the Constitutional Tribunal with a "semblance of democratic legitimacy" seems not only to involve officially allowing the Sejm to elect Tribunal justices, but also ensuring that such election should be made by the Nation's representatives whom the voters have trusted with a mandate to govern. Considering the factual circumstances of the issue at hand and the constitutional customs discussed at the beginning, it seems that the demand to provide the Constitutional Tribunal with democratic legitimacy will be most fully met by letting its five members whose tenure starts after the parliamentary elections be chosen by the newly elected Sejm.

III.2.

"It must be clearly said that, as the power to choose constitutional justices rests with a political body, the Sejm, and as the Tribunal's tasks so much border on the sphere of politics, it would be an illusion to assume that the Sejm will not take politics into consideration in taking relevant personnel decisions. That in a way is built into the parliamentary manner of appointing justices to the Tribunal, and that has been standard practice since the inception of Poland's Constitutional Tribunal. The rule of laws should involve establishing safeguards to prevent a simple inclusion of Tribunal appointment decisions in the partisan "spoils system." That is the logic behind long tenures of constitutional justices and high qualification criteria (...). From this point of view, Polish

5 Opinion of the Venice Commission CDI,-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p.21.

constitutional regulations could provide for at least three safeguards. First, some countries (Germany, Italy, Spain, Portugal, Hungary) have in place a requirement to appoint constitutional justices by a qualified majority (...). Although even this system is not free of weaknesses (as it can give rise to a situation when a parliament is unable to fill vacancies on a constitutional tribunal, as was the case with Hungary in late 1990s), it does include parliamentary opposition in decision making and may prevent nominations that go beyond the standards of political decency. Second, following the example of some countries (e.g. Germany and Portugal), a constitutional requirement might be introduced to appoint partial replacements (e.g. a third) of the Tribunal's composition from among judges of other courts, which would naturally limit political connotations behind such decisions. Third, especially in the light of Poland's experiences so far, a waiting period might be considered, which would rule out a possibility of electing serving MPs and senators to the Tribunal.

Also this part of doctrinal views reveals a conservative assessment of solutions applied to date that govern the appointment of Constitutional Tribunal justices; which further proposes that a rule should be introduced that Constitutional Tribunal justices are elected by a qualified majority of votes, in order to eliminate the "spoils system" mentality and ensure a greater pluralism of this body, thus making it seem not so much apolitical as balanced in terms of opinions it presents.

IV. WAYS OF GUARANTEEING PLURALISTIC COMPOSITION OF CONSTITUTIONAL COURTS IN OTHER COUNTRIES

IV.1.

Germany is a classic example of a country where political disputes at the outset of creating the system of constitutional control led to the adoption of legal guarantees for selecting judges. First, sections 6 and 7 of the Federal Constitutional Court Act introduced the requirement of a two-thirds majority of parliamentarians' votes to elect a judge. In practice, this means that the majority in power and the opposition have to seek an agreement, which necessitates avoiding extreme candidates. Second, the stability of Germany's party system has led to an informal practice of "allotting" positions on the Federal Constitutional Court.

The Federal Constitutional Court is composed of two twin Senates with strictly defined competences. This is a result of the political dispute that accompanied the passing of the Federal Constitutional Court Act of 1951. At the time, it was reckoned that one Senate would be dominated by judges leaning towards the Christian Democrats, while the other would have judges affiliated with the Social Democrats. Accordingly, in the early 1950s the Senates would be described as 'black' and 'red'. These divisions are now a thing of the past.

As regards the procedure of reaching judgements, the Senate may issue a decision if at least six (out of eight) judges are involved. In especially urgent matters, when one Senate cannot pass a judgement (e.g. because some judges have been excluded), the president may order such Senate's composition to be complemented (by drawing lots) with judges from the other Senate.

Should it become necessary to issue an urgent preliminary injunction and the Senate cannot reach a decision, such an injunction may be issued (unanimously) by three judges. Preliminary injunctions expire after one month.

When it comes to ending a constitutional judge's mandate, the Court may authorise the Federal President to retire a judge due to a lasting incapacity to serve, or dismiss a judge

if he or she cannot continue in the office owing to the compromising of personal integrity, a legally binding sentence of liberty deprivation exceeding six months, or gross neglect of duties. The relevant decision is taken by the Court's plenum by a two-thirds majority of Court members.

Furthermore, the Federal President pronounces a judge to be released from office upon such judge's motion.

IV.2.

In France, the participation of parliament – which is typical of appointing constitutional judges – has been replaced by decisions of the presidents of the houses of parliament. This system rules out a situation where the constitutional court is based on the principle of party politics proportion, which is characteristic of most West European countries. Although these decisions are always political, changes to the political image of presidency and parliament have prevented the constitutional court from becoming dominated by one political party (at least for close to 20 years).

Decisions of France's Constitutional Council are taken by at least seven members (out of nine elected members, and a number – not defined by statue – of members sitting on the council by operation of law; the latter group consists of former presidents of the Republic who are nominated for life), unless this is prevented by force majeure, which has to be recorded in the proper form by way of protocol.

In a secret ballot, by an ordinary majority of all the members (including members who sit on the Council by operation of law) the Council decides whether its member has neglected his or her duties. If necessary, proceedings may be instigated concerning the Council's *ex-officio* decision to dismiss its member.

The Council *ex-officio* dismisses a member who conducts an activity, accepts a function or mandate that stems from elections and cannot be reconciled with Council membership, or a member who cannot exercise his or her political and civic rights. This also covers Council members who are prevented from fulfilling their functions by a chronic physical incapacity.

IV.3.

To guarantee a balanced composition of the constitutional court, Italy has adopted a system whereby candidates for judges are put forward by a mix of institutions: higher common and administrative courts (5), combined houses of parliament (5), and the President (5). This makes it possible to strike a balance between 'technician' and 'politician' judges.

IV.4.

To forestall politicization, judges in Portugal are elected by a two-thirds majority of votes. At the same time, pursuant to Article 279.2 of the Constitution, a provision that has been found unconstitutional may be confirmed by a two-thirds majority of deputies, with a quorum of at least half of those entitled to vote. Article 279 is subsumed under Part IV "Guaranteeing and revision of the Constitution", and Title I "Review of constitutionality" (it should be noted that such majority is envisioned for "organic laws").

In Portugal's constitutional court, plenary sessions and sittings of sections require the presence of the majority of members (of the whole constitutional court, which has 13 members, or a section, which has five members, respectively).

A judge may leave office before the end of term only due to death or lasting physical incapacity, resignation, accepting a position or performing activities that cannot be

reconciled with the office of a constitutional judge, removal from office or compulsory retirement following disciplinary or criminal proceedings.

Resignations are submitted to the court president. The court pronounces on the existence of other reasons for ending a judge's mission.

IV.5.

What clearly emerges from the analysis of the above are mechanisms – arising either directly from normative acts, or from political custom and universal elections – that aim to guarantee the plurality of views among constitutional court judges, and preclude a total domination by people appointed by one political group, as recommended in the Venice Commission's opinions.

The lack of comparable mechanisms in the Polish legal regime has been repeatedly criticized, and led to a situation where the composition of the Constitutional Tribunal is virtually monopolized by one political group.

V. ISSUE OF VIOLATING THE SO-CALLED LEGISLATIVE SILENCE

In his legal opinion to assess the amended act on the Constitutional Tribunal, Prof. Bogusław Banaszak presented the principle of the so-called legislative silence that applies to parliamentary elections, elaborated on in the case law of the Constitutional Tribunal. In its decisions dated 3 November 2006, case no K 31/06 and 28 October 2009, KP 3/09, the Tribunal pointed out that in the case of election law a minimum minimorum should involve adopting material changes to election law at least six months before next elections, understood not only as an electoral act but a whole set of activities covered by the so-called electoral calendar. Any possible exceptions to thus defined dimension of not changing election law might only result from extraordinary circumstances of objective nature. According to the Tribunal, a constitutional issue involves the legislator's violation of the term when election law is exempt from being amended with changes that qualify as "material changes" in the context of constitutional case law. The foregoing results from the case law of the Constitutional Tribunal from after 2000 that addresses infringements connected with amending election law just before the elections. The requirement to observe exemption period from "material changes" to election law has been introduced recently, in conjunction with the Council of Europe's soft law, in order to prevent election law from last-minute amendments and to respect individual rights.

Prof. Bogusław Banaszak goes on to note that the Constitutional Tribunal's position on the matter is defined by a standard of a more general nature, one which does not apply solely to parliamentary elections but also elections of supreme authorities, including Constitutional Tribunal justices. This position should have been considered by the Parliament in the process of adopting the act on the Constitutional Tribunal of 25 June 2015. Unfortunately, it failed to do so and, consequently, changes in deadline for submitting applications to present candidates for Tribunal justices may have clearly influenced the course of voting at the Sejm and its results, as it was for October 2015 that the President called elections to the Parliament, including the Sejm, i.e. a body that elects Constitutional Tribunal justices by an absolute majority. Any shift in proportion between parties and groupings representing the sovereign would have entailed proposing different candidates or formation of some other majority and thus different composition of the Constitutional Tribunal.

The opinion concludes by stating that observing the so-called legislative silence and choosing five new Constitutional Tribunal justices on 2 December 2015, the Sejm legitimately relied on its rules binding at that time, instead of norms amended in the period immediately preceding the elections of Constitutional Tribunal justices.

Furthermore, it must be noted that as at the date of adopting the act on the Constitutional Tribunal (25 June 2015) there was no date set for elections to the Sejm and Senate: President's order on calling the elections was issued on 17 July 2015 and published in the Journal of Laws on 22 July 2015 (Dz. U. Item 1017). However, taking into account the fact that, pursuant to Art. 98.2 of the Polish Constitution, the President calls elections on a holiday that falls within 30 before 4 years from the start of the term of the Sejm and Senate and that the 7th Sejm started on 8 November 2011, elections to the Sejm and Senate could have been called for 11, 18 or 25 October or 1 November 2015. At the adoption date of the Constitutional Tribunal act, which provided for elections of five Constitutional Tribunal justices by the 7th Sejm, it was already known that, irrespective of the parliamentary elections date, the tenure end of the outgoing justices and tenure start of the justices that would replace them would fall after the elections date.

VI. ISSUE OF BREACH OF THE CUSTOM TO ELECT CT JUDGES BY THE SEJM CHOSEN IN ELECTIONS HELD BEFORE THE START OF THE TERM OF OFFICE OF JUDGES

The Constitutional Tribunal Act of 25 June 2015, notwithstanding the act of electing judges pursuant to resolutions of the 7th Sejm on 8 October 2015, violated the principle enshrined in Article I.2 of electing Constitutional Tribunal judges by the Sejm that was chosen in elections held prior to the date of expiry of the term of office of judges whose positions were up for elections.

From this standpoint, a negative assessment should be made of the judgement of the Constitutional Court of 3 December, 2015, file no. K 34/15, which in the scope applicable to a review of the provision of the Constitutional Tribunal Act of 25 June 2015 which provided the grounds for electing judges (Art. 137) related to the period of the term of the 7th Sejm, which was determined by the President of the Republic of Poland's calling of the first sitting of the 8th Sejm, which could occur, pursuant to Article 109.2 of the Constitution of the Republic of Poland, within 30 days from the date of parliamentary elections, i.e. from 25 October, 2015.

It should be noted that the five judges were elected by the 7th Sejm on 8 October, 2015.

Considering that the term of the "first" three Constitutional Tribunal judges (the constitutionality of whose election was not questioned by the Constitutional Tribunal) ended on 6 November, 2015 on the date of election of their successors it was still not known whether this date will fall still during the 7th or already during the 8th Sejm.

For this reason it appears that the judgement of the Constitutional Tribunal of 3 December, 2015, file no. K 34/2015, even though it was issued in the already known and established factual state, was based on an assessment of the constitutionality of statutory norms not in abstract and general terms, but was determined by the event, which on the date the provision was applied in the scope that the Constitutional Tribunal found it unconstitutional , was a future and uncertain event. If, however, the President had decided to call the first sitting of the 8th Sejm for 6 November, 2015 or earlier, the date of expiry of the term of office of the three Constitutional Tribunal judges would have also fallen during the term of the 8th Sejm – which would require accepting that in such factual circumstances,

the Constitutional Tribunal judgement ought to have been different. The problem would not have arisen if, following the established constitutional custom referred to in point I.2, the caesura in the competences of the Sejm to elect new judges would have been the date of parliamentary elections that determine the shape of a new political order, according to the will of the sovereign.

VII. PARTICIPATION OF THE TRIBUNAL'S MEMBERS IN THE WORK ON THE ACT OF 25 JUNE 2015 ON THE CONSTITUTIONAL TRIBUNAL

While analysing the issue of legislative work on the Act of 25 June 2015 on the Constitutional Tribunal, it should be noted that the preliminary draft of that law was developed by the Tribunal.

Without questioning that part of the legal regulations eventually included in the Act had been developed in the course of parliamentary work, it should be noted that Tribunal judges – Andrzej Rzepliński, Stanisław Biernat and Piotr Tuleja – also took part in the work of the Sejm Committee.

At the same time, as noted by the Tribunal itself in its judgment of 13 December 2005, case no. SK 53/04, the European judicature strongly emphasized the importance of judges' impartiality for the implementation of the right guaranteed under art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In its judgment of 8 February 2000 on McGonnell v. the United Kingdom (case no. 28488/95), the ECHR concluded that any direct involvement in the law- or regulations-making process could lead to doubts as to the impartiality of the judge who then decides whether there are grounds to depart from the literal wording of these provisions (paragraph 55 of the Explanatory Memorandum). The existence of legitimate concerns as to the impartiality of a judge was the basis on which the ECHR recognised the violation of art. 6 (1) of the Convention in the case Procola v. Luxembourg (judgment of 28 September 1995, case no. 14570/89). In this case, the threat of judicial impartiality was related to the fact that members of the Council of State of Luxembourg had previously participated in issuing an opinion on the draft regulations, based on which a complaint against an administrative decision was later investigated.

Subsequently, in its judgment of 15 October 2009 in the case Micallef v. Malta, the ECHR noted that the existence of national procedures for ensuring impartiality, i.e. rules governing the preclusion of judges, is an important factor.

Such provisions are an expression of national legislator's concern aiming to eliminate any reasonable doubt as to the impartiality of a given judge or a court, and an attempt to ensure impartiality by eliminating the reasons for such concerns. Regardless of guaranteeing the absence of actual bias, these provisions aim at removing any outward signs of bias, and so they serve to promote the confidence the courts should inspire in a democratic society (ECHR's judgment of 15 July 2005, case no. 71615/01, MEŽNARIĆ v. Croatia).

VIII. MEASURES INTRODUCED BY THE ACT OF 22 DECEMBER 2015 AMENDING THE ACT ON THE CONSTITUTIONAL TRIBUNAL, AIMED TO ENSURE THE IMPLEMENTATION OF THE RULE OF PLURALISM IN THE WORK OF THE CONSTITUTIONAL TRIBUNAL

The Act of 22 December 2015 amending the Act on the Constitutional Tribunal (Dz. U. poz. 2217) introduced in particular the following measures:

VIII.1

As a rule, examination of the cases shall be conducted by a full Tribunal (amended provisions of art. 44 (1) and (2) of the Act of 25 June 2015 on the Constitutional Tribunal, hereinafter referred to as "A.C.T.").

This measure provides - in contrast to the previous principle, according to which the issue of constitutionality was adjudicated in presence of 5 (in case of acts) or 3 judges (in case of ordinances and other legal instrument) - an insightful and comprehensive consideration of constitutionality issues by an authority appointed for such purpose and takes into account the particular importance the Tribunal's adjudications have for the public good.

Exceptions from this principle are foreseen, but in cases initiated by a constitutional complaint or question of law and in cases concerning the conformity of acts with international agreements ratified with prior consent granted by an act, the Tribunal's composition of 5 judges was replaced by a broader one, of 7 judges, corresponding to almost half the total number of judges and closer to the general rule.

VIII.2

The full Tribunal is defined as consisting of at least 13 judges (amended provision of art. 44 (3) of the A.C.T.).

This measure reflects the composition of the Tribunal as a body of 15 judges, specified in the Constitution, to a much greater extent than the current regulation which defines the full Tribunal as counting 9 judges. It is intended to safeguard the quality and objectivity of decisions taken, in principle, with the participation of all judges constituting the Tribunal, taking into account the guarantee nature of the mechanism for appointing judges to the individual 9-year terms. At the same time, determining the minimum number of judges constituting the full Tribunal at 13 people provides a safety margin and the possibility to examine a case by the Tribunal in the case of exclusion of certain judges.

VIII .3

The Tribunal shall adjudicate by a 2/3 majority (amended provision of art. 99 (1) A.C.T.).

The requirement to adjudicate by qualified, and not the ordinary majority, together with the principle of examining cases in full Tribunal consisting of at least 13 judges, protects against deciding too rashly against the principle of presumed constitutionality of acts adopted by the Sejm and Senate (which come from general elections as representative bodies) drafted according to a particular procedure, when opinion regarding unconstitutionality of an act or provision is not sufficiently grounded. This measure prevents situations - possible under current regulations - when to declare an act unconstitutional, a consensus of three judges was sufficient, despite a different position of the majority of the other judges of the Tribunal. This measure increases the authority and importance of the Tribunal's judgments.

Such measures are found in other countries (e.g. Germany) only in exceptional categories of cases. The measure proposed in the Polish act, however, is the functional equivalent of qualified majority voting that applies to the selection of judges of the Tribunal in other countries.

VIII.4

The General Assembly of the Judges of the Tribunal shall be able to adjudicate only if composed of at least 13 judges and a 2/3 majority (amended provision of art. 10 (1) of the A.C.T.)

Just like the increase in the number of judges constituting the full Court and the introduction of qualified majority when adopting decisions, this measure increases the authority and importance of decisions taken by the General Assembly as a body of the Tribunal and a judicial self-government body and prevents making accidental decisions that do not have the approval of the majority of the Tribunal's judges.

VIII. 5

The Tribunal examines the cases by order of receipt (provision added - art. 80 (2) of the A.C.T.).

This measure ensures the implementation of the principle of equality in terms of access to court (the Tribunal) and prevents arbitrariness in determining the order of cases pending before the Tribunal.

VIII.6

The Tribunal shall examine cases at a hearing if such a request has been included in the complaint, application or question of law to the Tribunal (provision added - art. 81 (1a), amended provisions of art. 81 (2) and art. 93 (1) of the A.C.T.) .

This measure ensures the implementation of the principle of the public nature of the proceedings before the Tribunal to a greater extent than the current regulation which reserves the right to hear the case at the hearing to the sole discretion of the Tribunal's formation that adjudicates the case.

VIII.7

Introduction of regulations regarding the election of the President and Vice-President of the Tribunal (provisions added - art. 12(2a)(3a)(3c) of the A.C.T).

This measure provides for the rules regarding the election of the Tribunal's bodies specified in the Constitution to be determined in regulations of statutory ranking. According to the existing regulation this issue was governed by the internal rules, making them vulnerable to short-term changes.

VIII.8

Changes in the regulations on disciplinary proceedings against the Tribunal judges (provision added - art. 28a, provisions repealed - art. 28 (2) and art. 30 of the A.C.T.).

The introduction of a provision which allows the President and the Minister of Justice to present a motion to initiate disciplinary proceedings, while safeguarding the principle according to which the Tribunal itself decides in disciplinary matters regarding the judges, ensures to a greater extent the implementation of the constitutional principle of balance of powers. At the same time, the provision according to which a judge could be liable to disciplinary action for conduct from the time before taking office and the provision excluding the admissibility of a cassation appeal against a disciplinary decision issued in the second instance have been repealed, increasing by the same the guarantees of judicial independence.

Annex

TIMELINE

08.11.2011 – 7th Sejm holds its first sitting

25.06.2015 – Constitutional Tribunal Act is passed

17.07.2015 – President orders Sejm and Senate elections to be held on 25.10.2015 (the last possible in practice date for the elections, earlier possible dates: 4th or 11th October)

22.07.2015 – President's decision on ordering Sejm and Senate elections is promulgated in the Journal of Laws 30.07.2015 – Constitutional Tribunal Act is promulgated in the Journal of Laws

30.08.2015 – Constitutional Tribunal Act of 25.06.2015 enters into force

08.10.2015 – 7th Sejm elects five new judges of the Constitutional Tribunal

25.10.2015 – Sejm and Senate elections

05.11.2015 – President summons the first sitting of the 8th Sejm for 12.11.2015

06.11.2015 – terms of office of 3 Constitutional Tribunal judges expire

11.11.2015 – last day of the 7th Sejm

12.11.2015 – first sitting of the 8th Sejm

19.11.2015 – Act Amending the Constitutional Tribunal Act is passed

20.11.2015 – Act Amending the Constitutional Tribunal Act of 19.11.2015 is promulgated in the Journal of Laws 25.11.2015 – 5 Sejm resolutions pronounce Sejm resolutions of 08.10.2015 on the election of Constitutional Tribunal judges to be legally invalid

02.12.2015 – 8th Sejm elects 5 new judges of the Constitutional Tribunal

03.12.2015 – term of office of one Constitutional Tribunal judge expires

03.12.2015 – President receives the oath of office from the 4 Constitutional Tribunal judges who were elected on 02.12.2015

03.12.2015 – Constitutional Tribunal judgement on the Constitutional Tribunal Act of 25.06.2015 (file No K 34/15)

05.12.2015 – Act Amending the Constitutional Tribunal Act of 19.11.2015 enters into force

09.12.2015 – term of office of one Constitutional Tribunal judge expires

09.12.2015 – President receives the oath of office from the Constitutional Tribunal judge who was elected on 02.12.2015

09.12.2015 – Constitutional Tribunal judgement on the Act Amending the Constitutional Tribunal Act of 19.11.2015 (file No K 35/15)

16.12.2015 – Constitutional Tribunal judgement in case K 34/15 is promulgated in the Journal of Laws

18.12.2015 – Constitutional Tribunal judgement in case K 35/15 is promulgated in the Journal of Laws

22.12.2015 – Act Amending the Constitutional Tribunal Act is passed

28.12.2015 – Act Amending the Constitutional Tribunal Act of 22.12.2015 is promulgated in the Journal of Laws and enters into force.