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**COMMISSION RECOMMENDATION**

**of 21.12.2016**

**regarding the rule of law in Poland**

**complementary to Commission Recommendation (EU) 2016/1374**

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) On 27 July 2016, the Commission adopted a Recommendation regarding the rule of law in Poland<sup>1</sup>, setting out its concerns on the situation of the Constitutional Tribunal and recommending how these should be addressed.
- (2) The Recommendation of the Commission was adopted under the Rule of Law Framework<sup>2</sup>. The Rule of Law Framework sets out how the Commission will react should clear indications of a threat to the rule of law emerge in a Member State of the Union and explains the principles which the rule of law entails. The Rule of Law Framework provides guidance for a dialogue between the Commission and the Member State in order to prevent the emergence of a systemic threat to the rule of law that could develop into a "clear risk of a serious breach" which would potentially trigger the use of the "Article 7 TEU Procedure". Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission can initiate a dialogue with that Member State under the Rule of Law Framework.
- (3) The European Union is founded on a common set of values enshrined in Article 2 of the Treaty on European Union ("TEU"), which include the respect for the rule of law. The Commission, beyond its task to ensure the respect of EU law, is also responsible, together with the European Parliament, the Member States and the Council, for guaranteeing the common values of the Union.
- (4) Case law of the Court of Justice of the European Union and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the European Commission for Democracy through Law ("*Venice Commission*"), provides a non-exhaustive list of these principles and hence defines the core meaning of the rule of law as a common value of the Union in accordance with Article 2 TEU. Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights;

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<sup>1</sup> Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland; C/2016/570; OJ L 217, 12.8.2016, p. 53–68.

<sup>2</sup> Communication "*A new EU Framework to Strengthen the Rule of Law*", COM(2014) 158 final.

and equality before the law<sup>3</sup>. In addition to upholding those principles and values, State institutions also have the duty of loyal cooperation.

- (5) In its Recommendation of 27 July 2016, the Commission explained the circumstances in which it decided, on 13 January 2016, to examine the situation under the Rule of Law Framework and in which it adopted, on 1 June 2016, an Opinion concerning the rule of law in Poland. The Recommendation also explained that the exchanges between the Commission and the Polish Government were not able to resolve the concerns of the Commission.
- (6) In its Recommendation, the Commission found that there was a systemic threat to the rule of law in Poland and recommended that the Polish authorities take appropriate action to address this threat as a matter of urgency.
- (7) In particular the Commission recommended that the Polish authorities: (a) implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the 7<sup>th</sup> term of the *Sejm* can take up their judicial functions in the Constitutional Tribunal, and that the three judges nominated by the 8<sup>th</sup> term of the *Sejm* without a valid legal basis do not take up their judicial functions; (b) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016 and ensure that the publication of future judgments is automatic and does not depend on any decision of the executive or legislative powers; (c) ensure that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, including the judgments of 3 and 9 December 2015 and the judgment of 9 March 2016, and takes the Opinion of the Venice Commission fully into account; and ensure that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined by requirements; (d) ensure that the Constitutional Tribunal can review the compatibility of the new law adopted on 22 July 2016 on the Constitutional Tribunal before its entry into force and publish and implement fully the judgment of the Tribunal in that respect; (e) refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal.
- (8) The Commission invited the Polish Government to solve the problems identified in the Recommendation within three months, and to inform the Commission of the steps taken to that effect. The Commission noted that it remained ready to pursue a constructive dialogue with the Polish Government.
- (9) On 30 July 2016, the President of the Republic signed the Law of 22 July 2016, which was published in the Official Journal on 1 August 2016.
- (10) On 11 August 2016, the Constitutional Tribunal rendered a judgment on the Law of 22 July 2016.<sup>4</sup> The judgment held that a number of provisions of that law, all of which were also identified as a concern by the Commission in its Recommendation, were unconstitutional. The grounds of unconstitutionality were notably the principles of the separation and balance of powers<sup>5</sup>, the independence of courts and tribunals from other branches of power<sup>6</sup>, the independence of judges<sup>7</sup> and the principle of

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<sup>3</sup> See COM(2014) 158 final, section 2, Annex I.

<sup>4</sup> K 39/16.

<sup>5</sup> Articles 38(3)-(6), 61(6), 83(2), 84-87 and 89 of the Law of 22 July 2016.

<sup>6</sup> Articles 38(3)-(6), 61(6), 83(2), 84-87 and 89 of the Law of 22 July 2016.

<sup>7</sup> Articles 26(1)(1)(g) and 68(5)-(7) of the Law of 22 July 2016.

integrity and efficiency of the public institutions<sup>8</sup>. However, the Polish Government did not recognise the validity of this judgment and did not publish it in the Official Journal.

- (11) On 16 August 2016, the Polish Government published 21 judgments of the Tribunal rendered in a period from 6 April 2016 to 19 July 2016. The publication of these judgments appears to have been based on Article 89 of the Law of 22 July 2016 which provided that "The Tribunal's rulings issued in breach of the provisions of the Constitutional Tribunal Act of 25 June 2015 before 20 July 2016 shall be published within 30 days from the entry into force of this Act, with the exception of rulings concerning normative acts that have ceased to have effect." This provision was among those declared unconstitutional by the Constitutional Tribunal in its judgment of 11 August 2016. Moreover, neither the judgments of 9 March 2016 and of 11 August 2016 nor the 16 judgments rendered since 11 August 2016 have been published by the Government.
- (12) On 18 August 2016, the Polish Prosecutor's Service informed about the launching of a criminal investigation against the President of the Constitutional Tribunal for not allowing three judges who had been appointed by the new legislature in December 2015 to take up their function.
- (13) On 14 September 2016, the European Parliament adopted a Resolution on the situation in Poland<sup>9</sup>, inter alia calling on the Polish Government to cooperate with the Commission pursuant to the principle of sincere cooperation as set out in the Treaty, and urging it to use the three months afforded by the Commission to engage with all parties represented in the *Sejm* in order to find a compromise which would solve the ongoing constitutional crisis, fully respecting the Venice Commission opinion and the Commission's Recommendation.
- (14) On 30 September 2016, a group of members of the *Sejm* submitted a new legislative proposal on the status of judges of the Constitutional Tribunal. The proposal contains provisions on the rights and obligations of judges of the Tribunal, the arrangements for appointing judges of the Tribunal, their mandate and termination of office and questions on immunity, personal integrity and liability to disciplinary action.
- (15) On 14 October 2016, the Venice Commission adopted its opinion on the Law of 22 July 2016<sup>10</sup>. The opinion noted that the Law contains some improvements as compared to the Law of 22 December 2015 which had been the subject matter of the opinion of the Venice Commission of March 2016. However, it considered that these improvements are too limited in scope, because other provisions of the Law as adopted would considerably delay and obstruct the work of the Tribunal, possibly make its work ineffective, as well as undermine its independence by exercising excessive legislative and executive control over its functioning. Such other provisions include for example those on postponing a case for up to six months upon request by four judges, on allowing the Prosecutor-General to block a hearing by his or her absence, or on suspending all institutional cases for six months, followed by re-registration. The opinion also criticized the system of proposing candidates for the post of President of the Tribunal to the President of the Republic, which could lead to

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<sup>8</sup> Articles 38(3)-(6), 61(3), 61(6), 68(5)-(7), 83(2) of the Law of 22 July 2016.

<sup>9</sup> European Parliament resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union (2016/2774(RSP)).

<sup>10</sup> Opinion no. 860/2016, CDL-AD(2016)026.

a situation that a candidate is appointed who does not enjoy the support of a substantial number of judges. Furthermore, without any constitutional or legal basis, the chancellery of the Prime Minister has purported to control the validity of judgments of the Tribunal by refusing to publish its judgments. The opinion also underlined that the problem of the appointment of judges has not been solved as recommended and that the implementation of the provision in the Law of 22 July 2016 requiring the Tribunal's President to assign cases to the December judges would be contrary to the Tribunal's judgments, which are universally binding and thus bind all state authorities, including the Tribunal and its President. The opinion concluded that by adopting the law, the Polish Parliament assumed powers of constitutional revision which it did not have when it acted as the ordinary legislature. It considered that the Polish Parliament and the Government continued to challenge the Tribunal's position as the final arbiter of constitutional issues and attributed this authority to themselves: they created new obstacles to the effective functioning of the Tribunal, and acted to further undermine its independence. By prolonging the constitutional crisis, they obstructed the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights, according to the opinion. The Polish government decided not to participate in the sitting of the Venice Commission on 14 October 2016 as it considered that the opinion of the Venice Commission was one-sided and did not take into account the Government's position.

- (16) On 26 October 2016, a group of members of the *Sejm* submitted a new legislative proposal regarding the organisation and proceedings before the Constitutional Tribunal. The proposal contains detailed provisions on the organisation and proceedings before the Constitutional Tribunal, including new rules on the election of the President and Vice-President of the Tribunal. The proposal complements the legislative proposal on the status of judges of the Constitutional Tribunal, submitted to the *Sejm* on 30 September 2016 (see above); both legislative proposals are closely interlinked and intend to replace the Law of 22 July 2016.
- (17) On 27 October 2016, within the time limit of three months set in the Recommendation, the Polish Government replied to the Commission Recommendation. The reply disagrees on all points with the position expressed in the Recommendation and does not announce any new measures to alleviate the rule of law concerns addressed by the Commission.
- (18) On 31 October 2016, the UN Human Rights Committee adopted Concluding observations on the seventh periodic report of Poland. It expressed concerns about the negative impact of legislative reforms, including the amendments to the Law on the Constitutional Tribunal of November and December 2015 and July 2016, and the disregard of the judgments of the Constitutional Tribunal; the functioning and independence of the Tribunal and the implementation of the Covenant. The Committee also expressed its concerns about the refusal of the Prime Minister to publish the judgments of March and August 2016 of the Tribunal and efforts of the government to change the Tribunal's composition in ways which the Tribunal has regarded as unconstitutional, and about the legal proceedings initiated against the President of the Tribunal for alleged abuse of power. The Committee concluded that Poland should ensure respect for and protection of the integrity and independence of the Constitutional Tribunal and its judges and ensure the implementation of all its judgments. The Committee urged Poland to immediately publish officially all the judgments of the Tribunal, to refrain from introducing measures that obstruct its

effective functioning and to ensure a transparent and impartial process for the appointment of its members and security of tenure, which meets all requirements of legality under domestic and international law.

- (19) On 7 November 2016, the Constitutional Tribunal rendered a judgment on the constitutionality of the provisions of the Law of 22 July 2016 regarding the selection of the President and Vice-President of the Tribunal<sup>11</sup>. It should be noted that due to the refusal of three judges of the Tribunal to participate in the case<sup>12</sup> and in view of the fact that the three judges that were lawfully nominated in October 2015 by the 7<sup>th</sup> term of the *Sejm* had not taken up their judicial functions in the Tribunal, the Constitutional Tribunal had to change its composition from the full bench into a bench of five judges. Since 11 August 2016 the Constitutional Tribunal has not been able to sit in full bench to render judgments. On 10 November 2016 the hearing of a case in full bench had to be adjourned as the quorum for the full bench could not be reached. In addition, on 30 November and on 8 December 2016, the General Assembly was unable to adopt a resolution on presenting candidates to the post of the President of the Constitutional Tribunal as the quorum prescribed by law could not be reached.
- (20) On 1 December 2016, the Senate adopted the Law of 30 November 2016 on the legal status of judges of the Constitutional Tribunal ('Law on the status of judges').
- (21) On 2 December 2016, the Senate adopted the Law of 30 November 2016 on organisation and proceedings before the Constitutional Tribunal ('Law on organisation and proceedings').
- (22) On 14 December 2016, the European Parliament held a debate on the situation of the rule of law in Poland. During this debate, the Commission urgently called on the Polish authorities not to put into force the new laws before the Constitutional Tribunal has had the occasion to examine their constitutionality.
- (23) On 15 December 2016, the Senate adopted the Law of 13 December 2016 implementing the Law on organisation and proceedings and the Law on the status of judges ('Implementing Law').
- (24) On 19 December 2016, the President of the Republic signed the three laws referred to above which were published in the Official Journal. On the same day, the President of the Republic appointed judge Julia Przyłębska, a judge elected by the new *Sejm*, to the position of acting President of the Constitutional Tribunal.
- (25) On 20 December 2016, judge Julia Przyłębska admitted the three judges nominated by the 8<sup>th</sup> term of the *Sejm* without a valid legal basis to take up their function in the Tribunal and convened a meeting of the General Assembly for the same day. In view of the short notice, one judge was unable to participate and requested to postpone the meeting for the next day. Judge Julia Przyłębska refused and seven other judges also did not participate in the meeting. Only six judges, including the three judges unlawfully nominated, took part in the meeting and elected two candidates, Julia Przyłębska and Mariusz Muszyński, who were presented as candidate to the President of the Republic.
- (26) On 21 December 2016, the President of the Republic appointed judge Julia Przyłębska to the post of President of the Constitutional Tribunal.

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<sup>11</sup> K 44/16.

<sup>12</sup> See ordinance of the President of the Constitutional Tribunal of 7 November 2016.

## HAS ADOPTED THIS RECOMMENDATION:

1. The Republic of Poland should duly take into account the Commission's analysis set out hereafter and take the measures figuring in section 7 of this Recommendation so that the problems identified are solved within the time limit set.

### **1. SCOPE OF THE RECOMMENDATION**

2. The present Recommendation complements the Recommendation of 27 July 2016. It examines which of the concerns raised in that recommendation have been addressed, sets out the remaining concerns and lists a number of new concerns of the Commission with regard to the rule of law in Poland which have arisen since then. On this basis, it makes recommendations to the Polish authorities on how to address these concerns. These concerns relate to the following issues:

- (1) the appointment of judges of the Constitutional Tribunal and the lack of implementation of the judgments of the Constitutional Tribunal of 3 and 9 December 2015 and of 11 August 2016 relating to these matters;
- (2) the lack of publication and of implementation of a number of judgments of the Constitutional Tribunal since March 2016, including the judgments of 9 March and 11 August relating to legislative acts on the Constitutional Tribunal;
- (3) the effective functioning of the Constitutional Tribunal and the effectiveness of Constitutional review of new legislation, in particular in view of newly adopted legislation concerning the Constitutional Tribunal, in particular the Law on the status of judges, the Law on organisation and proceedings and the Implementing Law;
- (4) the rules applicable to the selection of candidates for the post of President and Vice-President of the Constitutional Tribunal and to the appointment of an acting President of the Constitutional Tribunal in the Law on organisation and proceedings and the Implementing Law.

### **2. APPOINTMENT OF JUDGES OF THE CONSTITUTIONAL TRIBUNAL**

3. In its Recommendation of 27 July 2016<sup>13</sup>, the Commission recommended that the Polish authorities implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which requires that the three judges that were lawfully nominated in October 2015 by the 7th term of the *Sejm* can take up their judicial functions in the Constitutional Tribunal, and that the three judges nominated by the 8th term of the *Sejm* without a valid legal basis do not take up their judicial functions.
4. As regards the law of 22 July 2016 on the Constitutional Tribunal the Commission noted that this law is contrary to the judgments of the Constitutional Tribunal of 3 and 9 December. Article 90<sup>14</sup> requires the President of the Constitutional Tribunal to assign cases to all judges who have taken the oath before the President of the Republic but have not yet taken up their duties as judges. This provision seems targeted at the situation of the three judges which were unlawfully nominated by the 8<sup>th</sup> term of the *Sejm* in December 2015. It would enable these judges to take up their function while using the vacancies for which the previous legislature of the *Sejm* had

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<sup>13</sup> Section 2.

<sup>14</sup> See also Article 6(7).

already lawfully nominated three judges, as has been held in the judgments of 3 and 9 December 2015.

5. In its judgment of 11 August 2016 the Constitutional Tribunal found Article 90 of the Law of 22 July 2016 unconstitutional and the Venice Commission in its opinion of 14 October 2016, confirmed that that provision is not a solution in line with the principle of the rule of law<sup>15</sup>.
6. However, the Polish Government continues to refuse to recognise the validity of the judgment of 11 August 2016 and to publish it in the Official Journal (see section 3 below).
7. In addition, the new Law on the status of judges reintroduces a provision<sup>16</sup> similar to Article 90 of the Law of 22 July 2016 which was declared unconstitutional in the judgment of 11 August 2016. Likewise, provisions aiming at deploying a similar effect can be found in the Law on organisation and proceedings<sup>17</sup> and in the Implementing Law<sup>18</sup>.
8. In its reply of 27 October 2016 the Polish Government considers that the judgments of 3 and 9 December 2015 of the Tribunal did not specify which judges were to take up their function and considers that the new legislature of the *Sejm* has lawfully nominated the five judges in December 2015. This reasoning raises serious rule of law concerns as it denies any effect of the two December judgments and contradicts the reasoning of the Tribunal as consistently reiterated, including in the judgment of 11 August 2016. The reply implies that, with or without the judgments of the Tribunal, the situation would remain the same.
9. The reply concedes that in the operative part of the judgment of 3 December 2015, the Constitutional Tribunal addressed the duty of the President of the Republic to immediately take an oath from a judge elected to the Tribunal by the *Sejm*. It takes however the view that that judgment cannot bind other authorities to apply provisions in the manner specified in a given case. This interpretation limits the impact of the judgments of 3 and 9 December 2015 to a mere obligation for the Government to publish them but would deny them any further legal and operational effect, in particular as regards the obligation for the President of the Republic to take the oath of the judges in question. This interpretation goes against the principle of loyal cooperation between state organs which is, as underlined in the opinions of the Venice Commission, a constitutional precondition in a democratic state governed by the rule of law.
10. The Commission furthermore notes that also the Venice Commission considers that a solution to the current conflict over the composition of the Constitutional Tribunal "must be based on the obligation to respect and fully implement the judgments of the Constitutional Tribunal" and "therefore calls on all State organs and notably the *Sejm* to fully respect and implement the judgments"<sup>19</sup>.
11. In conclusion, the Commission considers that the Polish authorities should respect and fully implement the judgments of the Constitutional Tribunal of 3 and 9 December 2015. These judgments require that the State institutions cooperate loyally

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<sup>15</sup> Opinion no. 860/2016, CDL-AD(2016)026, paragraph 106.

<sup>16</sup> See Article 5.

<sup>17</sup> See Articles 6(1) and 11(5).

<sup>18</sup> See Articles 18(2) and 21(2).

<sup>19</sup> Opinion no. 833/2015, CDL-AD(2016)001, paragraph 136.



in order to ensure, in accordance with the rule of law, that the three judges that were nominated by the 7<sup>th</sup> term of the *Sejm* can take up their judicial functions in the Constitutional Tribunal, and that the three judges nominated by the 8<sup>th</sup> term of the *Sejm* without a valid legal basis do not take up their judicial functions. The relevant provisions of the Law of 22 July 2016 on the Constitutional Tribunal raise serious concerns in respect of the rule of law and have been found unconstitutional by the judgment of 11 August 2016 of the Constitutional Tribunal. Also this judgment should be respected, published and implemented by the Polish authorities. In addition, provisions<sup>20</sup> aiming at producing a similar result included in the Law on the status of judges, the Law on organisation and proceedings and in the Implementing Law are also inconsistent with these judgments and must not be applied.

**3. LACK OF PUBLICATION AND IMPLEMENTATION OF THE CONSTITUTIONAL TRIBUNAL JUDGMENT OF 9 MARCH 2016 AND OF THE JUDGMENTS RENDERED SINCE 9 MARCH 2016**

12. In its Recommendation of 27 July 2016, the Commission recommended that the Polish authorities publish and implement fully the judgment of the Constitutional Tribunal of 9 March 2016 and its subsequent judgments and ensure that the publication of future judgments is automatic and does not depend on any decision of the executive or legislative powers.
13. On 16 August 2016, the Polish Government, on the basis of Article 89 of the Law of 22 July 2016, published 21 judgments of the Constitutional Tribunal rendered in a period from 6 April 2016 to 19 July 2016. However, the two judgments of 9 March and 11 August 2016 have still not been published by the Polish Government, contrary to what had been requested in the Commission's Recommendation. Furthermore, none of the 16 judgments of the Constitutional Tribunal rendered after 11 August 2016 have so far been published.
14. Article 89 of the Law of 22 July 2016 was declared unconstitutional by the Constitutional Tribunal in its judgment of 11 August 2016 because of its inconsistency with the principles of the separation and balance of powers and the independence of courts and tribunals from other branches of power.
15. The reply of the Polish Government of 27 October confirms that the Government still considers to have the power to check the lawfulness of judgments of the Tribunal and that the automatic publication of judgments cannot be ensured.
16. Article 114(1) and (2) of the Law on organisation and procedure provides that "Adjudications are published in the appropriate official journal, in accordance with the principles and in the manner laid down in the Constitution and the act of 20 July 2000 on the publication of the normative acts and certain other legal acts [...]". Moreover it is provided that "The President of the Tribunal orders publication of the adjudications." This provision is as such a step in the right direction.
17. However, Article 19 of the Implementing Law provides that "Judgments of the Tribunal and decisions of the Tribunal adopted in breach of the Constitutional Tribunal Act of 25 June 2015 [...] or the Constitutional Tribunal Act of 22 July 2016 and issued prior to the date of entry into force of the Act referred to in Article 1 shall be published in the relevant official gazettes after their publication has been ordered by the acting President of the Tribunal, unless they concern regulatory instruments

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<sup>20</sup> See footnotes paragraph 7.

that have ceased to apply." A similar provision was already held unconstitutional by the Tribunal in its judgment of 11 August 2016. The Commission's Recommendation underlined that the indication that judgments have been rendered illegally is contrary to the principle of the separation of powers as it is not for the *Sejm* to determine the lawfulness of judgments<sup>21</sup>. Also the Venice Commission confirmed this position in its two opinions<sup>22</sup>. In addition, the exclusion from publication of judgments relating to normative acts which ceased to be applicable, as provided in Article 19 of the Implementing Law, excludes in particular the judgments of 9 March, 11 August and 7 November 2016. As long as the President of the Constitutional Tribunal has not been appointed this provision prevents the full publication of all judgments. Furthermore, there is no guarantee that Article 114(2) of the Law on organisation and procedure will ensure that the future President of the Tribunal publishes all the judgments which have been adopted prior to his term of office.

18. In conclusion, the fact that the Polish Government has so far refused to publish in the Official Journal the judgments of 9 March 2016 and 11 August 2016 relating to legislative acts on the Constitutional Tribunal, and all other judgments rendered by the Constitutional Tribunal since 11 August 2016, creates uncertainty as to the legal basis for the Tribunal's judicial activity and as to the legal effects of its decisions. This uncertainty undermines the effectiveness of constitutional review and raises serious concerns in respect of the rule of law. Compliance with final judgments is an essential requirement inherent in the rule of law. The refusal to publish a binding and final judgment denies the latter's automatic legal and operational effect and breaches the principles of legality and separation of powers.

#### **4. REVIEW OF THE LAW ON THE CONSTITUTIONAL TRIBUNAL AND EFFECTIVENESS OF CONSTITUTIONAL REVIEW OF NEW LEGISLATION**

19. In its Recommendation of 27 July 2016, the Commission considered in detail the Law of 22 July 2016 and its impact, taking into account the effect of the provisions both individually and collectively, as well as the previous case law of the Constitutional Tribunal and the opinion of the Venice Commission. The Commission recommended that the Polish authorities ensure that any reform of the Law on the Constitutional Tribunal respect the judgments of the Constitutional Tribunal, including those of 3 and 9 December 2015 and of 9 March 2016, and take the opinion of the Venice Commission of 11 March 2016 fully into account. In particular, the Commission recommended that the Polish authorities ensure that requirements such as those relating to the attendance quorum, the handling of cases in chronological order, the possibility for the Public Prosecutor-General to prevent the examination of cases, the postponement of deliberations or transitional measures affecting pending cases and putting cases on hold do not, either separately or through their combined effect undermine the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution.
20. In their reply of 27 October 2016, the Polish Government fail to acknowledge that the majority of concerns expressed by the Commission and by the Venice Commission were not taken into account in the Law of 22 July 2016. The reply contests that the Tribunal is prevented from exercising an effective review by referring to the fact that the Tribunal has been able to issue rulings during the so-

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<sup>21</sup> See paragraph 23 of the Recommendation.

<sup>22</sup> Opinion no. 860/2016, paragraph 101; Opinion no. 833/2015, paragraphs 43, 142 and 143.

called constitutional crisis. However, this argument is irrelevant because the Tribunal has been able to do so precisely by not applying the procedural requirements at stake (judgment of 11 August 2016) and the Government is refusing to publish these same rulings of the Tribunal in an attempt to prevent them from taking legal effect.

21. The reply also presents brief explanations on the compliance of the legislation mentioned above with fundamental rights. The Commission observes that these explanations by the Government do not remove the need for a genuinely effective constitutional review by the Constitutional Tribunal.
22. The reply also denies the fundamental role of the Constitutional Tribunal in ensuring the rule of law in Poland. The Commission contests that statement. The Constitutional Tribunal is indeed one of the main guarantors of the rule of law in Poland, in particular as it is bestowed with the task of ruling on the constitutionality of Polish laws. It clearly appears from the Polish constitution that the Constitutional Tribunal is competent to rule on the conformity of statutes and international agreements to the constitution, on the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute, on the conformity of legal provisions issued by central State organs to the constitution, ratified international agreements and statutes, on the conformity to the constitution of the purposes or activities of political parties, and on complaints concerning constitutional infringements<sup>23</sup>. The Constitutional Tribunal shall also settle disputes over authority between central constitutional organs of the State<sup>24</sup>. The fact that according to the constitution the Tribunal of State is to hear cases of violations of the constitution or of a statute committed by certain persons<sup>25</sup>, and that the President of the Republic shall ensure observance of the constitution<sup>26</sup>, does not affect this fundamental role of the Tribunal.
23. The Commission notes that the Law on organisation and proceedings no longer contains the following provisions of the Law of 22 July 2016 identified as a concern in the Recommendation: Article 26(1)(1g) on the referral of cases to the full bench<sup>27</sup>, Article 38(3) on the handling of cases in chronological order<sup>28</sup>, Article 68(5)-(8) on the postponement of deliberations<sup>29</sup>, Article 61(6) on the possibility of the Public Prosecutor-General to prevent the examination of cases<sup>30</sup> and Articles 83-86 on the transitional provisions for pending cases<sup>31</sup>. The Commission notes that the mere publication of the judgment of the Constitutional Tribunal of 11 August 2016 which had already declared these provisions unconstitutional would have been sufficient to address these issues without a new law being necessary.
24. Despite these improvements, the Commission notes nevertheless that certain concerns remain. In particular, the number of judges required to participate in a full

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<sup>23</sup> Article 188 of the constitution.

<sup>24</sup> Article 189 of the constitution.

<sup>25</sup> Article 198 of the constitution refers to the President of the Republic, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Control, members of the National Council of Radio Broadcasting and Television, persons to whom the Prime Minister has granted powers of management over a ministry, and the Commander-in-Chief of the Armed Forces.

<sup>26</sup> Article 126 of the constitution.

<sup>27</sup> See section 4.2.1 of the Recommendation.

<sup>28</sup> See section 4.2.3 of the Recommendation.

<sup>29</sup> See section 4.2.7 of the Recommendation.

<sup>30</sup> See section 4.2.6 of the Recommendation.

<sup>31</sup> See section 4.2.8 of the Recommendation.

bench remains at eleven while it was set at nine in the 1997 Act on the Constitutional Tribunal and in the Law of 25 June 2015. As pointed out in the Recommendation<sup>32</sup> this represents a constraint on the decision-making process of the Constitutional Tribunal, in particular in the current circumstances where the Constitutional Tribunal has only 12 judges (since the three judges that were lawfully nominated in October 2015 by the 7<sup>th</sup> term of the *Sejm* have not taken up their judicial functions). The risk identified in the Recommendation that the attendance quorum for a full bench might on occasion not be reached has already materialised<sup>33</sup>.

25. Moreover, the Law on the organisation and proceeding, the Law on the status of judges and the Implementing Law contain other provisions which have aggravated certain concerns identified in the Recommendation (see section 2 on the appointment of judges and section 3 on the publication of judgments), or have introduced new concerns relating to the situation of judges (see section 4.1.) and to the appointment of the President, the Vice-President and the acting President of the Tribunal (see section 5).

#### **4.1. The concerns relating to the situation of judges**

##### *4.1.1. Disciplinary proceedings*

26. Article 26 of the Law on the status of judges provides: "The commission by a judge of the Tribunal of the misconduct referred to in Article 24(1) may be reported to the President of the Tribunal by [...] the President of the Republic of Poland on the motion of the Prosecutor-General, after consulting the First President of the Supreme Court."<sup>34</sup> Article 27(5) provides: "If the disciplinary officer does not find grounds for initiating disciplinary proceedings at the request of an authorised entity, he or she shall issue an order refusing to initiate proceedings. The authority which submitted the report referred to in Article 26 may complain to the disciplinary court of first instance within seven days of service of this order." Pursuant to Article 27(6) that court shall examine the complaint no more than 14 days after the date on which it was submitted. If the order refusing to initiate disciplinary proceedings is repealed, the disciplinary court's instructions as to further proceedings shall be binding on the disciplinary officer.
27. In its Rule of Law Recommendation, the Commission underlined as regards the Law of 22 December 2015 that the President of the Republic should not have the power to initiate disciplinary proceedings and noted that the removal of such a provision in the Law of 22 July 2016 was an improvement. The Commission also recalls that the provision of the Law of 22 December 2015 which involved other State institutions in disciplinary proceedings concerning judges of the Tribunal was declared unconstitutional by the Tribunal in its judgment of 9 March 2016 and was criticized by the Venice Commission in its opinion of 11 March 2016. The Commission is therefore concerned by the reintroduction of a provision which gives the power to initiate disciplinary proceedings to the President of the Republic. The fact that such proceedings could be initiated by institutions outside the judiciary, as well as the fact that such institutions may complain to the disciplinary court of first instance if the

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<sup>32</sup> See paragraph 43 of the Recommendation.

<sup>33</sup> See recital 19 above.

<sup>34</sup> Article 24(1) provides: "Judges of the Tribunal shall be subject to disciplinary proceedings conducted by the Tribunal for infringing the law, compromising the dignity of the office of judge of the Tribunal, violating the Code of Ethics for Judges of the Constitutional Tribunal or other unethical conduct that could undermine trust in their impartiality or independence".

disciplinary officer does not find grounds for initiating disciplinary proceedings, could have an impact on the independence of the Tribunal.

#### 4.1.2. *Possibility of early retirement*

28. Article 10 of the Implementing Law provides: "1. Judges of the Tribunal whose term of office started before the date of entry into force of the [Law on the status of judges] may, within one month of its entry into force, submit to the President of the Tribunal a declaration to the effect that they are retiring as a result of the introduction during their term of office of the new rules governing the performance of the duties of a judge of the Tribunal laid down in Articles 11(3), 13 and 14 of this Act.<sup>35</sup> 2. The retirement of a judge under paragraph 1 shall take effect on the first day of the month after the month in which the declaration was submitted. The retirement shall be confirmed by an order of the President of the Tribunal."
29. This provision appears to be an incentive for early retirement because it would allow judges of the Tribunal - by way of exception - to take full benefit of the advantages of the status of a retired judge, including receiving a retirement pension, without having completed the term of their mandate. For a judge who would no longer want to continue working under the new rules, such early retirement possibility would be more advantageous than simply resigning. Offering such advantageous regime represents an interference by the legislative power with the independence of the Tribunal as it aims at encouraging the current judges of the Tribunal to resign in advance of the end of their term of office and at influencing their decision in that respect.

#### 4.1.3. *Other provisions*

30. The Law on the status of judges introduces new requirements for judges of the Tribunal concerning financial participation in companies<sup>36</sup>, declarations of assets<sup>37</sup> and declarations on the economic activity of their spouses<sup>38</sup>. In addition, the Law stipulates far reaching consequences in case of non-compliance: failure to perform the obligations concerned shall be equivalent to resigning from the office of judge of the Tribunal. These provisions could raise questions of proportionality and as noted by the Supreme Court, questions of constitutionality<sup>39</sup>. For these reasons, an effective constitutional review of these provisions is particularly important.
31. The Commission also notes that the Law on the organisation and proceedings changes significantly the internal organisation of the Constitutional Tribunal, replacing the Office of the Constitutional Tribunal by two new bodies: a Registry and an Office of the Legal Service of the Tribunal<sup>40</sup>. The Implementing Law provides that the Office of the Constitutional Tribunal will be abolished by 31 December 2017<sup>41</sup> and that no guarantees are given to the present employees to remain employed by the Tribunal after that date<sup>42</sup>. In the current context of the ongoing disputes concerning

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<sup>35</sup> Article 11(3) of the Law on the status of judges refers to the rules on financial participation of judges of the Tribunal in companies; Article 13 refers to the obligation for judges of the Tribunal to submit a declaration of his or her spouse's activity; Article 14 refers to the obligation for judges of the Tribunal to submit an asset declaration.

<sup>36</sup> Article 11(3).

<sup>37</sup> Article 14.

<sup>38</sup> Article 13.

<sup>39</sup> See opinion of the Supreme Court on the draft law on the status of judges of 12 October 2016.

<sup>40</sup> Article 16 - 32 provide detailed provisions on the Registry and the Office of the Legal Service of the Tribunal.

<sup>41</sup> Article 11.

<sup>42</sup> Article 13.

the Constitutional Tribunal, together with the concerns expressed in section 5 of this Recommendation on the appointment of a new President and an acting President of the Tribunal, such reorganisation could lead to further instability of the Tribunal and affect the effectiveness of the constitutional review.

#### **4.2. Vacatio legis**

32. Key provisions of the Implementing Law will enter into force without *vacatio legis*<sup>43</sup>, the day after publication of the law. Also key provisions of the law on organisation and proceedings and on the status of judges will enter into force without *vacatio legis*, on the day after the date of publication, including provisions enabling the unlawfully appointed "December judges" to take up their function<sup>44</sup>. The provisions of the Law of 22 July 2016 on the Constitutional Tribunal will cease to apply on the day after the date of publication of the Implementing law<sup>45</sup>.
33. The Constitutional Tribunal will as a consequence not be able to scrutinize the constitutionality of these key provisions before their entry into force. A constitutional review in such circumstances could no longer be seen as effective. In this respect it is recalled that in its Opinion of 11 March 2016, the Venice Commission stressed that the Constitutional Tribunal must have a possibility of reviewing an ordinary statute that regulates the functioning of the Tribunal before the statute enters into force.

#### **4.3. Consequences of the lack of effectiveness of Constitutional review on new legislation**

34. A number of particularly sensitive new legislative acts have been adopted by the *Sejm*, often through accelerated legislative procedures, such as, in particular, a media law<sup>46</sup>, a new Civil Service Act<sup>47</sup>, a law amending the law on the Police and certain other laws<sup>48</sup> and laws on the Public Prosecution Office<sup>49</sup>, and a new law on the Ombudsman and amending certain other laws<sup>50</sup>. The Commission asked the Polish Government about the state of play and content of these legislative reforms in its letters of 1 February 2016 and 3 March 2016, but so far this information has not been provided. A number of other sensitive draft legislative acts have been adopted by the

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<sup>43</sup> Article 23 states that the following Articles shall enter into force on the day after the date of publication: Articles 1-3, 12 and 16-22. The following Articles shall enter into force on 1 January 2018: Articles 4-5 and 8. The other Articles of the draft law will enter into force 14 days after the date of its publication. Articles that shall enter into force on the day after the date of publication *inter alia* concern the appointment of an "acting President of the Constitutional Tribunal", the integration of the three unlawfully elected "December judges" and the new election procedure for candidates for the post of President of the Constitutional Tribunal.

<sup>44</sup> See Article 1 and 2 of the Implementing Law. Other provisions of the two laws will enter into force 14 days after the date of publication. Only Articles 16 - 32 of the Law on organisation and proceedings will enter into force on 1 January 2018.

<sup>45</sup> See Article 3 and 23. Only Articles 18(1), (4) and (5) of the Law of 22 July on the organisational and administrative working conditions in the Constitutional Tribunal and the Office of the Constitutional Tribunal shall remain in force until 1 January 2018.

<sup>46</sup> Law of 30 December 2015 amending the Broadcasting Law, published in Official Journal on 7 January 2016, item 25.

<sup>47</sup> Law of 30 December 2015 amending the Law on Civil Service and certain other acts, published in Official Journal on 8 January 2016, item 34.

<sup>48</sup> Law of 15 January 2016 amending the Law on Police and other laws, published in Official Journal on 4 February 2016, item 147.

<sup>49</sup> Law of 28 January 2016 on the Prosecutor's Office, published in Official Journal on 15 February 2016, item 177; Law of 28 January 2016 - Regulations implementing the Act - Law on the Prosecutor's Office, published in Official Journal on 15 February 2016, item 178.

<sup>50</sup> Law of 18 March 2016 on the Ombudsman and amending certain other laws. The law was signed by the President of the Republic on 4 May 2016.

*Sejm*, such as the Law on the National Council of Media<sup>51</sup> and a new anti-terrorism law<sup>52</sup>.

35. The Commission considers that as long as the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review, there will be no effective scrutiny of compliance with the Constitution, including fundamental rights, of legislative acts such as those referred to above.
36. The Commission notes for example that new legislation (notably the media legislation<sup>53</sup>) raises concerns relating to freedom and pluralism of the media. More specifically, the new media legislation modifies the rules for the appointment of the Management and Supervisory Boards of the public service broadcasters, putting them under the control of the Government (the Treasury Minister), rather than an independent body. The new legislation also provides for the immediate dismissal of the existing Supervisory and Management Boards. In that respect the Commission questions in particular the possibilities of judicial redress for the persons affected by the law. On 13 December 2016, the Constitutional Tribunal rendered a judgment sitting in a bench of five judges<sup>54</sup> in which it held certain provisions of the legislation to be unconstitutional.
37. Legislation such as the new Civil Service Act<sup>55</sup> is equally important from the perspective of the rule of law and fundamental rights. In that respect the Commission has asked the Polish Government about the possibilities of judicial redress for the persons affected by the law in its letters of 1 February and 3 March 2016<sup>56</sup>. The Polish Government has so far not replied to the Commission on this point.
38. The law amending the law on the Police and certain other laws<sup>57</sup> may also raise questions relating to its compliance with fundamental rights, including privacy and data protection. On 28-29 April 2016, a delegation of the Venice Commission visited Warsaw to discuss the amendments to the Law on the Police and certain other laws, and delivered an opinion in its session of 10-11 June 2016<sup>58</sup>. The opinion states, inter alia, that the procedural safeguards and material conditions set in the Law are still insufficient to prevent its excessive use and unjustified interference with the privacy of individuals.
39. Furthermore, the new anti-terrorism legislation may raise questions relating to its compliance with fundamental rights<sup>59</sup> and is the subject of constitutional review.

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<sup>51</sup> Law of 22 June 2016 on the National Council of Media. The law was signed by the President of the Republic on 27 June 2016.

<sup>52</sup> Law of 10 June 2016 on anti-terrorism. The law was signed by the President of the Republic on 22 June 2016. The Commission is furthermore aware that a new law amending the Law on the National Judicial Council and certain other laws has been submitted on 5 May 2016 by the Minister of Justice to the National Legislative Centre.

<sup>53</sup> Law of 30 December 2015 amending the Broadcasting Law, published in Official Journal on 7 January 2016, item 25, and Law of 22 June 2016 on the National Council of Media. The law was signed by the President of the Republic on 27 June 2016.

<sup>54</sup> K13/16.

<sup>55</sup> Law of 30 December 2015 amending the Law on Civil Service and certain other acts, published in Official Journal on 8 January 2016, item 34.

<sup>56</sup> Letter of 1 February 2016 from First Vice-President Timmermans to Minister of Justice Mr Ziobro; Letter of 3 March 2016 from First Vice-President Timmermans to Minister of Foreign Affairs Mr Waszczykowski.

<sup>57</sup> Law of 15 January 2016 amending the Law on Police and other laws, published in Official Journal on 4 February 2016, item 147.

<sup>58</sup> Opinion no. 839/2016. CDL-AD(2016)012.

<sup>59</sup> Law of 10 June 2016 on anti-terrorism. The law was signed by the President of the Republic on 22 June 2016.

40. Also, the Law of 13 December amending the law on the assemblies<sup>60</sup> may raise questions relating to its compatibility with fundamental rights, in particular the freedom of assembly as enshrined in the European Convention on Human Rights<sup>61</sup>.
41. On 14 December 2016, the Press Bureau of the Chancellery of the *Sejm* issued a statement regarding changes to the conditions under which the media can work in the *Sejm* and Senate about which concerns were expressed on the respect of freedom of expression and information. On 16 December 2016, the budgetary Law for 2017 was voted by the *Sejm* under controversial circumstances, in particular as it was alleged that the quorum was not reached, a member of the *Sejm* was excluded from voting and media were blocked from recording the vote. There is a need for an effective judicial review, including where applicable constitutional review, of these measures and of the conditions under which they have been adopted.
42. In conclusion, the Commission considers that as long as the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review, there will be no effective scrutiny of the compliance of legislative acts with fundamental rights. This raises serious concerns in respect of the rule of law, notably as a number of particularly sensitive new legislative acts have been adopted recently by the *Sejm* for which constitutional review should be available.

## **5. APPOINTMENT OF THE PRESIDENT, VICE PRESIDENT AND ACTING PRESIDENT OF THE TRIBUNAL**

43. The new Law on the organisation and proceedings contains new provisions relating to the selection of the candidates for the post of President and Vice-President of the Tribunal to be presented by the General Assembly to the President of the Republic. The new Implementing Law also contains provisions concerning the selection of candidates for the post of President of the Tribunal and provisions enabling the President of the Republic to task a judge who will perform temporarily the duties of the President of the Tribunal ("acting President of the Tribunal").
44. The Commission recalls that Article 194(2) of the constitution provides that the President and Vice-President of the Constitutional Tribunal are appointed by the President of the Republic "from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal". The term of office of the President of the Tribunal ended on 19 December 2016. The term of office of the current Vice-President of the Tribunal will end on 26 June 2017. The two laws mentioned in the previous paragraph have already been adopted and signed by the President of the Republic. Moreover, they were adopted with great speed (the draft Implementing Law was submitted to the *Sejm* on 24 November 2016) without a *vacatio legis* which would enable an effective constitutional review. At the moment of their adoption, the Tribunal had already started the process of selecting candidates for the post of President of the Tribunal to be proposed to the President of the Republic as required by the Law of 22 July 2016<sup>62</sup>. However, the General Assembly was unable to adopt a resolution on presenting candidates to the post of the President

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<sup>60</sup> Law of 13 December 2016 amending the Law on the Assemblies not yet signed by the President of the Republic.

<sup>61</sup> Article 11.

<sup>62</sup> In its judgment of 7 November 2016, the Tribunal examined the constitutionality of the provisions in the Law of 22 July 2016 relating to the selection of candidates for the post of President of the Tribunal. See paragraph 46.



of the Constitutional Tribunal as the quorum prescribed by law could not be reached<sup>63</sup>.

## **5.1. The selection procedure for the President and Vice-President of the Tribunal**

45. The Implementing Law and the Law on organisation and proceedings contain new rules on the procedure for submitting candidates for the post of President and Vice-President of the Tribunal. The procedure of the Implementing Law<sup>64</sup> is specifically designed for the present procedure of election of the President of the Tribunal and applies in the situations described in its Article 16(1) (see section 5.3. below). The Law on organisation and proceedings<sup>65</sup> provides for a procedure which will generally apply for future election procedures for the post of President and Vice-President of the Tribunal and which is broadly similar to the procedure set out in the Implementing Law.
46. The new procedure for the selection of candidates for President of the Tribunal requires the three "December judges" unlawfully nominated by the new legislature of the *Sejm* to participate in the process<sup>66</sup>. The Commission considers that such requirement renders the entire selection process unconstitutional (see section 2 below). Similarly, the fact that the lawfully elected "October judges" cannot participate in the process can equally have an impact on the outcome, and therefore vitiates the process.
47. In addition, the new procedure does not ensure that only candidates are proposed to the President of the Republic which have the support of the majority of the General Assembly of the Tribunal<sup>67</sup>. According to the judgment of the Tribunal of 7 November 2016, Article 194(2) of the constitution must be understood as providing that the President of the Tribunal shall be appointed by the President of the Republic from amongst candidates which have obtained a majority vote in the General Assembly of the Tribunal. This renders the new procedure incompatible with the judgment of the Constitutional Tribunal of 7 November 2016. In its opinion of 14 October 2016, the Venice Commission also underlined the importance that the selection process ensures that only candidates with substantial support in the Tribunal can be elected as candidate to be proposed to the President of the Republic<sup>68</sup>.
48. The same concerns relate to the procedure for submitting candidates for the post of Vice-President of the Tribunal<sup>69</sup>; this procedure is identical to the procedure for submitting candidates for the post of President as provided in the Law on organisation and proceedings.

## **5.2. Role of the Vice-President of the Tribunal**

49. The Commission also notes that the Implementing Law and the Law on organisation and proceedings contain a number of provisions which negate the function of the Vice-President of the Constitutional Tribunal. Article 12(3) of the Law on organisation and proceedings allow the President of the Constitutional Tribunal to

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<sup>63</sup> See recital 19.

<sup>64</sup> Article 21.

<sup>65</sup> Article 11.

<sup>66</sup> Article 21(2) of the Implementing Law; Article 11(5) of the Law on organisation and proceedings.

<sup>67</sup> Article 21(7)-(12) and Article 22 of the Implementing Law; Article 11(7)-(15) of the Law on organisation and proceedings.

<sup>68</sup> Opinion no. CDL-AD(2016)026, paragraphs 30 and 124.

<sup>69</sup> Article 11(15) of the Law on organisation and proceedings.

authorise another judge besides the Vice-President to execute certain competencies on the management of the work of the Tribunal. Article 37 provides that the President of the Tribunal can designate another judge to replace him at full bench hearings (the Vice-President is not mentioned). Furthermore, if the term of the President of the Tribunal ends, certain key functions are assumed by the judge with the "greatest aggregate seniority" (Article 11(2)), or by the "most junior" judge (Article 11(4)) and not by the Vice-President. In addition, Article 8(2) provides that the President of the Tribunal must be present at the General Assembly in order for a decision it issues to be legitimate (except in case of election of a new President of the Tribunal as above), whereas according to the law of 22 July 2016 it is the President or Vice-President of the Tribunal who is required to be present at the General Assembly. Also, the Law no longer foresees that the Vice-President can preside the General Assembly, contrary to the Law of 22 July 2016. In addition, Article 17(1) of the Implementing Law provides that for the period after the publication of the law until the formal appointment of the new President of the Tribunal, the Tribunal shall be headed by the judge whom the President of the Republic has tasked with performing the duties of the President of the Tribunal (see section 5.3. below).

50. The combined effect of these provisions denies the specific position of the Vice-President as the deputy of the President of the Constitutional Tribunal. The position of Vice-President of the Tribunal is recognized in the constitution. Even if the constitution does not specify the role of the Vice-President, the provisions referred to in the previous paragraph undermine the position of Vice-President and potentially raise an issue of constitutionality which requires an effective constitutional review.

### **5.3. The appointment of an "acting President of the Tribunal"**

51. Article 17(1) of the Implementing Law provides: "If it is necessary to implement the procedure for submitting candidates for the post of President of the Tribunal referred to in Article 21, for the period between the day after the date on which this Act is published and the appointment of the President of the Tribunal, the Tribunal shall be headed by the judge of the Tribunal whom the President of the Republic, by way of a decision, has tasked with performing the duties of the President of the Tribunal. " Article 21 establishes a specific procedure for the selection of the candidates for the post of President of the Tribunal to be presented by the General Assembly to the President of the Republic (see above).
52. Article 17(2) provides: "The President of the Republic shall select the judge of the Tribunal tasked with performing the duties of the President of the Tribunal from among the judges of the Tribunal with the longest period of service in the ordinary courts or in central government posts involving application of the law." Article 17(3) provides that the new procedure established in the Law on organisation and proceedings for selecting the candidates for the post of President of the Tribunal would not apply in this case.
53. Article 16(1) of the implementing Law provides: "If, on the day of publication of this Act, the General Assembly: 1) has not been convened by the President of the Tribunal, or 2) has been convened by the President of the Tribunal in a manner incompatible with the requirements of the Act referred to in Article 3, or 3) has not submitted candidates for the post of President of the Tribunal to the President of the Republic, or 4) has submitted candidates for the post of President of the Tribunal to the President of the Republic, but the President of the Republic has not appointed the President of the Tribunal, or 5) has selected candidates for the post of President of

the Tribunal in violation of the Act referred to in Article 3, - the procedure for submitting candidates for the post of President of the Tribunal shall be carried out in accordance with the rules laid down in Article 21 of this Act."

54. Article 16(2) provides: "In the cases referred to in paragraph 1(1)-(5), all actions and instruments implemented within the framework of the procedure for submitting candidates for the post of President of the Tribunal to the President of the Republic shall be repealed."
55. The acting President of the Tribunal is given a wide range of powers as long as there is no new President of the Tribunal. In particular, according to Article 18 of the Implementing Law the acting President shall enable the unlawfully elected "December judges" to perform their duties as judge (see section 2 above) and lead the new selection process and exercise fully the powers of the President of the Tribunal as long as there is no formally appointed new President<sup>70</sup>.
56. These provisions which allow the President of the Republic to directly appoint an acting President raise serious concerns as regards the principles of the separation of powers and the independence of the judiciary as protected by the Polish constitution. In particular, the constitution does not provide for the function of acting President of the Tribunal. Moreover, the power given to the President of the Republic to appoint an acting President of the Tribunal appears to be contrary to Article 194(2) of the constitution which provides that the President and Vice-President of the Tribunal shall be appointed by the President of the Republic "from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal", while the procedure in the Implementing Law denies any such role to the General Assembly. The judgment of the Tribunal of 7 November 2016 confirms that candidates for the post of President of the Tribunal should be proposed by the General Assembly.
57. Furthermore, the criteria to be used by the President of the Republic to choose the acting President appear arbitrary. The choice should be made from amongst the judges of the Tribunal with the longest period in ordinary courts or in central government posts. These criteria appear arbitrary as someone with no meaningful experience in the judiciary but only in central government could be selected, while someone with a long experience in the Tribunal itself but not in ordinary courts could not be selected.

These provisions also disregard any prior steps in the selection process taken by the Tribunal before the entry into force of the new law. Article 16(3) of the Law of 22 July 2016 required the Tribunal to initiate the selection process of the candidate between the 30th and the 15th day before the end of the term of office of the incumbent. Article 16(2) of the Implementing Law repeals any steps taken by the Tribunal to fulfil this obligation. Such interference by the legislative power with any possible decision taken previously by the Tribunal raises concerns as regard the independence of the judiciary and the principle of loyal cooperation between state organs.

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<sup>70</sup> Article 18 of the Implementing Law provides that the acting President of the Tribunal shall direct the work of the Constitutional Tribunal, represent the Constitutional Tribunal externally, attribute cases to judges of the Tribunal who have taken the oath, perform actions in labour-law cases involving employees of the Office of the Tribunal and exercise other powers and duties vested in the President or the acting President of the Tribunal by the Implementing Law.

#### **5.4 The appointment of a President of the Tribunal on 21 December 2016**

58. On 19 December 2016, the President of the Republic appointed judge Julia Przyłębska, to the position of acting President of the Constitutional Tribunal. On 20 December 2016, judge Julia Przyłębska admitted the three judges nominated by the 8th term of the Sejm without a valid legal basis to take up their function in the Tribunal and convened a meeting of the General Assembly for the same day. In view of the short notice, one judge was unable to participate and requested to postpone the meeting for the next day. Judge Julia Przyłębska refused and seven other judges also did not participate in the meeting. Only six judges, including the three judges unlawfully nominated, took part in the meeting and elected two candidates, Julia Przyłębska and Mariusz Muszyński, who were presented as candidate to the President of the Republic. On 21 December 2016, the President of the Republic appointed judge Julia Przyłębska to the post of President of the Constitutional Tribunal.
59. The Commission considers that this procedure which led to the appointment of a new President of the Tribunal is fundamentally flawed as regards the rule of law. As explained above, the procedure was led by an acting President whose appointment raises serious concerns as regards the principles of the separation of powers and the independence of the judiciary as protected by the Polish constitution. Furthermore, the fact that the procedure allowed the three "December judges" unlawfully nominated by the new legislature of the *Sejm* to participate in the process rendered the entire selection process unconstitutional (see section 2 below). Similarly, the fact that the lawfully elected "October judges" could not participate in the process equally had an impact on the outcome, and therefore vitiated the process. Moreover, the very short notice for the convocation of the General Assembly and the refusal to postpone the meeting raise serious concerns. Finally, the election of candidates by six judges only is incompatible with the judgment of the Tribunal of 7 November 2016 according to which Article 194(2) of the constitution must be understood as providing that the President of the Tribunal shall be appointed by the President of the Republic from amongst candidates which have obtained a majority vote in the General Assembly of the Tribunal.
60. For these reasons, the Commission considers that these provisions on the appointment of an acting President of the Tribunal and of an President of the Tribunal, and their implementation on 19, 20 and 21 December 2016 seriously threaten the legitimacy of the Constitutional Tribunal and consequently the effectiveness of the constitutional review.

#### **6. FINDING OF A SYSTEMIC THREAT TO THE RULE OF LAW**

61. For the reasons set out above, the Commission considers that whereas some of the issues addressed in its recommendation of 27 July 2016 have been addressed, important issues remain unresolved, and new concerns have arisen in the meantime. The Commission is therefore of the opinion that the situation of a systemic threat to the rule of law in Poland presented in its Recommendation of 27 July 2016 remains. In particular:
- (1) As regards the composition of the Constitutional Tribunal, its judgments of 3 and 9 December 2015 have still not been implemented; as a result, the three judges that were lawfully nominated in October 2015 by the 7<sup>th</sup> term of the *Sejm* cannot take up their judicial functions in the Constitutional Tribunal. A

solution is all but forthcoming as the three new laws adopted in November and December 2016<sup>71</sup> require that the three judges nominated by the 8<sup>th</sup> term of the *Sejm* without a valid legal basis take up their judicial functions. Moreover, the absence of the three judges lawfully nominated in October 2015 by the 7<sup>th</sup> term of the *Sejm*, taken together with the attendance requirements which remain high, have at different occasions threatened the effectiveness of the Tribunal because of a lack of quorum for the adoption of resolutions by the General Assembly or of judgments in full bench.

- (2) As regards the publication of judgments, the judgment of the Constitutional Tribunal of 9 March 2016 has still not been published in the Official Journal. In addition, the Polish Government refuses to publish the judgment of 11 August 2016 concerning the Law of 22 July 2016 on the Constitutional Tribunal and all other judgments rendered after that date, including the judgement of 7 November 2016 concerning the provisions of the Law of 22 July 2016 on the selection of the candidates for the post of President of the Tribunal. As a result, the uncertainty continues on the legal basis on which the Tribunal must act and on the legal effects of its judgments. The Commission notes that the Law on the organisation and proceedings contains a provision which gives the power to the President of the Tribunal to order publication of the judgments<sup>72</sup>. However, the Implementing Law still precludes the publication of certain judgments rendered by the Tribunal, including the judgments referred to above<sup>73</sup>.
- (3) As regards the effectiveness of the constitutional review, the Commission considers that even if certain improvements can be noted as compared to the Law of 22 July 2016, the three new laws adopted in December 2016 contain a number of provisions which do not respect earlier judgments of the Constitutional Tribunal and added new concerns as compared to those identified in the Recommendation of 27 July 2016.
- (4) These new concerns relate in particular to the disciplinary proceedings, the possibility of early retirement, the new requirements for judges of the Tribunal, the significant changes to the internal organisation of the Tribunal, the selection procedure for candidates to the post of President and Vice-President of the Tribunal, the role of the Vice-President of the Tribunal and the appointment of an acting President of the Tribunal.
- (5) The Commission considers in particular that the combined effect of the provisions on the appointment of an acting President of the Tribunal, the selection procedure for the candidates to the post of President and the refusal to swear in the judges elected by the 7<sup>th</sup> *Sejm* while providing for the taking up of office of the three judges nominated by the 8<sup>th</sup> term of the *Sejm* without a valid legal basis, seriously threaten the legitimacy of the Constitutional Tribunal and consequently the effectiveness of the constitutional review. In addition, as long as the the three judges that were lawfully nominated in October 2015 by the 7<sup>th</sup> term of the *Sejm* cannot take up their judicial functions in the Constitutional

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<sup>71</sup> Article 5 of the Law on the status of judges, Articles 6(1) and 11(5) of the Law on the organisation and proceeding and Articles 18(2) and 21(2) of the implementing Law.

<sup>72</sup> Article 114(2).

<sup>73</sup> Article 19.

Tribunal, the Commission considers that the selection process of the new President of the Tribunal remains fundamentally flawed.

- (6) The Commission also notes that the timing of the adoption of these three laws and the lack of an appropriate *vacatio legis* for a number of key provisions denies the possibility to the Constitutional Tribunal to review their constitutionality before their entry into force.
  - (7) In addition, actions and public statements by the Polish authorities undermining the legitimacy and efficiency of the Constitutional Tribunal continue to occur, including the launching of a criminal investigation against the President of the Constitutional Tribunal. The Commission recalls the principle of loyal cooperation between state organs which is, as underlined in the opinions of the Venice Commission, a constitutional precondition in a democratic state governed by the rule of law.
62. The Commission is particularly concerned by the consequences of this situation of a systemic threat to the rule of law:
- (1) The fact that the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review adversely affects its integrity, stability and proper functioning, which is one of the essential safeguards of the rule of law in Poland. Where a constitutional justice system has been established, its effectiveness is a key component of the rule of law. Under the current circumstances, the constitutionality of Polish laws<sup>74</sup> can no longer be effectively guaranteed.
  - (2) The trust in the Polish legal system, in its integrity and coherence is seriously damaged by the refusal of the Polish Government to publish the judgments of the Constitutional Tribunal. This is confirmed by the fact that the Supreme Court considered it necessary to issue a resolution<sup>75</sup> stating that judgments of the Constitutional Tribunal are binding even if they are not published. Similar statements have been expressed by the Chief Council of the Supreme Administrative Court<sup>76</sup> and other authorities, in particular the National Council of the Judiciary of Poland,<sup>77</sup> the National Bar Association,<sup>78</sup> and the National Solicitor Association.<sup>79</sup>
  - (3) Respect for the rule of law is not only a prerequisite for the protection of all the fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law, and for establishing mutual trust of citizens, businesses and national authorities in the legal systems of all other Member States.

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<sup>74</sup> According to Article 188 of the constitution, the Constitutional Tribunal is to rule on the conformity of statutes and international agreements to the constitution, on the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute, on the conformity of legal provisions issued by central State organs to the constitution, ratified international agreements and statutes, on the conformity to the constitution of the purposes or activities of political parties, and on complaints concerning constitutional infringements. According to Article 189 of the constitution, the Constitutional Tribunal shall also settle disputes over authority between central constitutional organs of the State.

<sup>75</sup> Resolution of 26 April 2016 of the General Assembly of the Supreme Court of Poland.

<sup>76</sup> Resolution of 27 April 2016 of the Chief Council of the Supreme Administrative Court.

<sup>77</sup> Statement of 7 April 2016 of the National Council of the Judiciary of Poland.

<sup>78</sup> Resolution of 12 March 2016 of the National Bar Association.

<sup>79</sup> Statement of 12 March 2016 of the National Solicitor Association.

63. The Commission observes that within a period of one year six consecutive legislative acts have been enacted regarding the Constitutional Tribunal. Such legislative activism without proper consultation of all the stakeholders concerned and without a spirit of loyal cooperation required between state authorities, is detrimental to the stability, integrity and proper functioning of the Constitutional Tribunal.

## **7. RECOMMENDED ACTION**

64. The Commission recommends that the Polish authorities take appropriate action to address this systemic threat to the rule of law as a matter of urgency.

65. In particular the Commission recommends that the Polish authorities take the following actions already requested in its Recommendation of 27 July 2016:

- (a) implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which requires that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis do not take up the post of judge without being validly elected; for this reason, the President of the Republic is required to urgently take the oath of the three judges elected by the previous legislature;
- (b) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016 and the judgment of 11 August 2016 concerning the Law of 22 July 2016 on the Constitutional Tribunal and other judgments rendered after that date and future judgments;
- (c) ensure that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, takes the Opinions of the Venice Commission fully into account and ensures that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined;
- (d) refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal.

66. In addition to these actions, the Commission recommends that the Polish authorities:

- (e) ensure that the Constitutional Tribunal can as a matter of urgency effectively review the constitutionality of the Law on the status of judges, the Law on organisation and proceedings and the Implementing Law, and that the judgments concerned are published without delay and implemented fully;
- (f) ensure that no appointment of the new President of the Constitutional Tribunal take place as long as the judgments by the Constitutional Tribunal on the constitutionality of the new laws have not been published and implemented fully, and as long as the three judges that were lawfully nominated in October 2015 by the 7<sup>th</sup> term of the *Sejm* have not taken up their judicial functions in the Tribunal;
- (g) ensure that as long as a new President of the Constitutional Tribunal has not been lawfully appointed, he is replaced by the Vice-President of the Tribunal and not by an acting President, or by the person appointed as President of the Tribunal on 21 December 2016.

67. The Commission underlines that the loyal cooperation which is required amongst the different state institutions in rule of law related matters is essential in order to find a solution in the present situation.
68. The Commission invites the Polish Government to solve the problems identified in this recommendation within two months of receipt of this recommendation, and to inform the Commission of the steps taken to that effect.
69. The Commission also recalls that Recommendations adopted under the rule of Law Framework do not prevent the mechanisms set out in Article 7 TEU being activated directly, should a sudden deterioration in a Member State require a stronger reaction from the EU<sup>80</sup>.
70. On the basis of this Recommendation, the Commission stands ready to pursue a constructive dialogue with the Polish Government.

Done at Brussels, 21.12.2016

*For the Commission*  
*Frans TIMMERMANS*  
*Vice-President*

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<sup>80</sup> Section 4.1. of the Communication "A new EU Framework to Strengthen the Rule of Law", COM(2014) 158 final.