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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

POLAND

OPINION

ON

THE DRAFT CONSTITUTIONAL AMENDMENTS CONCERNING THE CONSTITUTIONAL TRIBUNAL AND TWO LAWS ON THE CONSTITUTIONAL TRIBUNAL

Adopted by the Venice Commission at its 141st Plenary Session (Venice, 6-7 December 2024)

on the basis of comments by

Mr Michael FRENDO (Member, Malta)
Mr Christoph GRABENWARTER (Member, Austria)
Ms Angelika NUSSBERGER (Member, Germany)
Mr François SÉNERS (Substitute Member, France)
Mr Kaarlo TUORI (Honorary President)

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I. Introduction

1. By letter of 3 September 2024, the Minister of Justice of Poland requested an opinion of the Venice Commission on draft amendments to the Constitution concerning the Constitutional Tribunal (CDL-REF(2024)036), the draft Act on the Constitutional Tribunal (CDL-REF(2024)037) and the draft provisions introducing the Act on the Constitutional Tribunal (CDL-REF(2024)038). On 13 September 2024, the Sejm adopted amended versions of the Act on the Constitutional Tribunal (CDL-REF(2024)037rev) and the Act on the provisions introducing the Act on the Constitutional Tribunal (CDL-REF(2024)038rev), which – together with the aforementioned draft amendments to the Constitution – form the basis for this Opinion.

2. Mr Michael Frendo, Mr Christoph Grabenwarter, Ms Angelika Nussberger, Mr François Séners and Mr Kaarlo Tuori acted as rapporteurs for this opinion.

3. On 14 and 15 October 2024, a delegation of the Commission composed of Mr Grabenwarter, Ms Nussberger and Mr Tuori, accompanied by Ms Tania van Dijk from the Secretariat, travelled to Warsaw and had meetings with the Minister of Justice, the Constitutional Tribunal, representatives of parliamentary factions, the Chancellery of the President, the Deputy Commissioner for Human Rights, one of the former Presidents of the Constitutional Tribunal and civil society organisations. The Commission is grateful to the Council of Europe office in Warsaw for the excellent organisation of this visit.

4. This opinion was prepared in reliance on the English translation of the draft constitutional provisions and the two Acts. These translations may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 14 and 15 October 2024. The draft opinion was examined at the joint meeting of the Sub-Commissions on Constitutional Justice, Democratic Institutions and Latin America on 5 December 2024. Following an exchange of views with Mr Dariusz Mazur, Deputy Minister of Justice, it was adopted by the Venice Commission at its 141st Plenary Session (Venice, 6-7 December 2024).

II. Background

6. The Act on the Constitutional Tribunal, the Act on the Introductory Provisions to the Act on the Constitutional Tribunal and the draft constitutional amendments have been developed to address the crisis surrounding the Constitutional Tribunal since 2015. The origins of this crisis have been well-documented, including in previous Venice Commission Opinions.[1] In October 2015, shortly before the seventh term of the Sejm ended, the Sejm adopted legislation giving it the power to elect judges to the Constitutional Tribunal for all five positions that would become vacant in 2015, including in respect of two positions that would only become vacant after the seventh parliamentary term had ended. Five judges were subsequently elected in October 2015, but did not take office as the President of the Republic did not take their oath. In November 2015, following the October 2015 parliamentary elections, the newly composed eighth term of the Sejm amended the Act on the Constitutional Tribunal,[2] declared the previous election of the five constitutional judges as "lacking legal effect" and elected five new judges, of whom the President promptly took the oath. In two judgments of the Constitutional Tribunal thereafter, respectively on 3 December and on 9 December 2015, the Constitutional Tribunal held that the election by the

[1] For a detailed overview of the events in 2015, please see: Venice Commission, CDL-AD(2016)001, Poland - Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal, paras. 13-34; CDL-AD(2016)026, Poland – Opinion on the Act on the Constitutional Tribunal, part IV.

[2] These amendments *inter alia* stipulated that the term of office of a constitutional judges started from the moment of taking an oath before the President.

seventh Sejm of two judges whose term of office expired in December 2015 was unconstitutional, while the election by the seventh Sejm of the three judges whose term of office expired in November 2015 was constitutional (and that the President was under an obligation to accept the oath of the latter three judges), and that elements of the 19 November 2015 amendments to the Act to the Constitutional Court, *inter alia* as regards the replacement of the judges whose term ended in November 2015 and the taking of the oath as the start of the term in office of constitutional judges, were unconstitutional.[3]

7. In line with these judgments, the President of the Constitutional Tribunal admitted two of the judges elected in December 2015, replacing the judges outgoing in December, to the bench in January 2016. At this point in time, the Tribunal had 12 sitting judges and two sets of three judges each: Three so-called "October judges", whose election had been declared constitutional in judgment K 34/15 of 3 December 2015, but who could not take up office as the President never accepted to take their oath, and three so-called "December judges" (or, in the later words of the European Court of Human Rights (ECtHR): "irregularly appointed judges"), whose election had been declared unconstitutional. Throughout 2016, the President of the Constitutional Tribunal did not assign cases to these irregularly appointed judges.

8. In the following period, various amendments to the existing Act on the Constitutional Tribunal and a new Act on the Constitutional Tribunal were adopted and subsequently partially or fully struck down by the Tribunal, with the Prime Minister refusing to publish these judgments, which obstructed their intended legal effect.[4] On 11 March and 14 October 2016, the Venice Commission adopted two Opinions expressing severe criticism of these legislative initiatives, stating *inter alia* that the new Act on the Constitutional Tribunal would undermine the independence of the Constitutional Tribunal "*by exercising excessive legislative and executive control over its functioning*".[5]

9. On 30 November 2016, the Sejm adopted two new acts, repealing the Act on the Constitutional Tribunal of July 2016: the Act on the Organisation and Procedure before the Constitutional Tribunal and the Act on the Status of Judges of the Constitutional Tribunal. The two acts were complemented on 13 December 2016 by the Act on the Introductory Provisions to the two aforementioned Acts.[6] All three Acts entered into force on 3 January 2017 and are in force to this day.

10. On 20 December 2016, following the end of the term of office of the then President of the Constitutional Tribunal, the President of the Republic appointed judge Przyłębska as "acting President" of the Tribunal (a new position introduced by the recently adopted Act on the

[3] Constitutional Tribunal of Poland, judgment K 34/15, 3 December 2015 and judgment K 35/15, 9 December 2015.
[4] On 22 December 2015, the Sejm adopted further amendments to the Act on the Constitutional Tribunal, which were declared unconstitutional in their entirety by the Constitutional Tribunal on 9 March 2016, due to deficiencies in their enactment. The Prime Minister however refused to publish this judgment. On 22 July 2016, the Sejm adopted a whole new Act on the Constitutional Tribunal, repealing the 2015 Act, with the Constitutional Tribunal deciding on 11 August 2016 that several of the provisions were unconstitutional, with again the Prime Minister refusing to publish this judgment.
[5] CDL-AD(2016)026, para. 123. The Venice Commission also condemned the arrogation of power by the Prime Minister in controlling the validity of judgments of the Constitutional Tribunal by refusing to publish them, as well as the assumption of powers of constitutional revision by the Polish Parliament, which it did not have when acting as the ordinary legislator, without the requisite majority for constitutional amendments (paras. 126 and 127). As regards the December 2015 amendments, the Venice Commission *had already* stated "*The provisions of the Amendments of 22 December 2015, affecting the efficiency of the Constitutional Tribunal, would have endangered not only the rule of law, but also the functioning of the democratic system"* (CDL-AD(2016)001, para. 137).
[6] Provisions of the Act on the Introductory Provisions as regards the assignment of cases to all judges who had taken the oath before the President (i.e. including the "December judges") were subsequently challenged before the Constitutional Tribunal, which however declared these provisions constitutional on 24 October 2017 (case K 1/17).

Introductory Provisions). On the same day, she admitted the three irregularly appointed judges to the bench and was shortly thereafter sworn in as President of the Constitutional Tribunal.[7]

11. The above developments as well as subsequent actions and rulings of the Constitutional Tribunal, cast a long shadow over the perception of the Constitutional Tribunal as an independent and legitimate guardian of the Polish Constitution in the years thereafter, drawing numerous concerns at the national and international level.[8]

12. On 7 May 2021, the ECtHR ruled in its judgment *Xero Flor w Polsce sp. z o.o. v. Poland* that "*the fundamental rule applicable to the election of Constitutional Court judges was breached, particularly by the eighth-term Sejm and the President of the Republic* (…)".[9] In applying the three-step test set out in the *Guðmundur Andri Ástráðsson v. Iceland* judgment,[10] the ECtHR concluded that the company Xero Flor was denied its right to a "tribunal established by law" on account of the participation of an irregularly appointed judge, "*whose election was vitiated by grave irregularities that impaired the very essence of the right at issue",* and concluded that there had been a violation of Article 6, para. 1 of the Convention.[11]

13. In the period thereafter, the Constitutional Tribunal issued several rulings declaring Article 6 of the European Convention on Human Rights (ECHR)[12] as well as provisions of the Treaty of the European Union (TEU),[13] as interpreted by the ECtHR and Court of Justice of the EU (CJEU), unconstitutional. In a reaction, the Secretary General of the Council of Europe formally requested Poland in December 2021, under Article 52 of the Convention, to explain the manner in which its national law ensured the effective implementation of the Convention.[14] The European Commission in turn referred Poland to the CJEU.[15] In various subsequent judgments of the

[7] Judge Przyłębska was selected by the votes of six new judges (including the three irregularly appointed judges) to become President of the Tribunal, without a resolution of the General Assembly of the Constitutional Tribunal.
[8] See, for example, Council of Europe Commissioner for Human Rights, Report of the visit to Poland from 11 to 15 March 2019 (CommDH(2019)17), paras. 6-10; Parliamentary Assembly of the Council of the Europe, Resolution 2359 (2021), para. 12.1; European Commission, 2020 Report on the rule of law situation in Poland, as well as subsequently for 2021, 2022 and 2023, and at the national level, reports by the Commissioner for Human Rights and judgments of – for example – the Supreme Administrative Court which outlined in its judgment of 16 November 2022 that "*the tribunal has been "infected" with lawlessness and has entirely lost its ability to rule in the accordance with the law in a material sense"* (Judgment no. III OSK 2528/21).
[9] ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021, para. 289, referring to the fact that "*The eighth-term Sejm proceeded to elect three Constitutional Court judges (…) on 2 December 2015, even though the respective seats had already been filled by the three judges elected by the previous Sejm. The President of the Republic refused to swear in the three judges elected by the previous Sejm and received the oath of office from the three judges elected on 2 December 2015*".
[10] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020.
[11] *Xero Flor w Polsce sp. z o.o. v. Poland*, paras. 290-291.
[12] Judgment K 6/21 of 24 November 2021, on application by the Prosecutor General (Minister of Justice), declared that the first sentence of Article 6, para. 1, of the Convention was incompatible with the Constitution of Poland, in as far as the term "tribunal" used in Article 6 provided the ECtHR the jurisdiction to review the legality of the process of electing judges to the Constitutional Tribunal; Judgment K 7/21 of 10 March 2022 declared Article 6, para. 1, of the Convention incompatible with the Constitution of Poland, in as far as it – amongst other matters – authorised the ECtHR and/or national courts to assess the conformity to the Constitution and the ECHR of statutes concerning the organisational structure of the judicial system, the jurisdiction of courts, and the Act specifying the organisational structure, the scope of activity, modus operandi, and the mode of electing members of the National Council of the Judiciary.
[13] See *inter alia* judgment P 7/21 of 14 July 2021 (which denied the binding effect of interim measures ordered by the CJEU) and judgment K 3/21, 7 October 2021 (declaring the CJEU's interpretation of Article 19(1) TEU, according to which a national court may be called upon to decide whether the procedure for appointing a judge meets the requirements of this Article, unconstitutional).
[14] Letter by the Secretary General of the Council of Europe to the Minister of Foreign Affairs, 7 December 2021.
[15] See the press release of 15 February 2023.

ECtHR, such as the cases of *Grzęda v. Poland*[16] and – more in particular – *M.L. v. Poland,*[17] the legitimacy of judgments of the Constitutional Tribunal due to the participation of irregularly appointed judges continued to play a role (with the latter judgment also touching upon the fact that two of the original irregularly appointed judges had in the meantime passed away and were replaced by two others).

14. In February 2024, following the October 2023 parliamentary elections, the new Polish government announced an Action Plan aimed at restoring the rule of law, in which it outlined the plans of the Sejm to adopt a resolution on the status of the Constitutional Tribunal and to introduce amendments to the Act on the Constitutional Tribunal. The resolution of the Sejm was duly adopted on 6 March 2024 and declared that specific resolutions of the eighth Sejm were "*taken in flagrant violation of the law, including the Constitution of the Republic of Poland and the Convention for the Protection of Human Rights and Fundamental Freedoms, and thus are devoid of legal force and did not produce the legal effects provided for therein*".[18] The resolution furthermore outlined that a re-creation of the Constitutional Tribunal is needed "*taking into account the voice of all political forces respecting the constitutional order*" and called to the judges of the Constitutional Tribunal to resign. Although the 6 March resolution is stated to be a "non-normative act" and as such non-binding, the Constitutional Tribunal ruled on 28 May 2024, on the application of a group of deputies of the Sejm, that this resolution was unconstitutional.[19] Following the above resolution, the government stopped publishing judgments of the Constitutional Tribunal, as a previous government had done in 2015-2016, obstructing once again their intended legal effect.

15. On 6 March 2024, the same day as the Sejm adopted its resolution, the government tabled two draft laws on the Constitutional Tribunal and corresponding constitutional amendments, with a first reading taking place on 26 April 2024. In this period, various opinions and comments were submitted by professional associations and other stakeholders and a public hearing was organised in May 2024, in which representatives of judicial and civil society organisations participated.

16. The Committee of Ministers of the Council of Europe has been supervising the execution of the *Xero Flor* judgment since August 2021. Already in June 2022, the Committee of Ministers, exercising its role as the body supervising the execution of ECtHR judgments, outlined the general measures that needed to be taken by the authorities (as was subsequently repeated, including in the Interim Resolution adopted in June 2023): 1) ensuring the lawful composition of the Constitutional Tribunal; 2) addressing the status of decisions adopted with the participation of irregularly appointed judges and 3) preventing undue influence on the appointment of judges

[16] ECtHR, *Grzęda v. Poland*, no. 43572/18, 15 March 2022, paras. 277 and 315, which centred around the premature *ex lege* termination of the mandate of a judicial member of the National Council of the Judiciary and touched upon the Constitutional Tribunal's decision in this matter.
[17] ECtHR, *M.L. v. Poland*, no. 40119/21, 14 December 2023, paras. 156 and 168-176, which centred around the *de facto* prohibition of abortion in Poland following a judgment of the Constitutional Tribunal. In this case, the Court found that the interference with the applicant's rights could not be regarded as lawful in terms of Article 8 of the Convention because it had not been issued by a body (i.e. the Constitutional Tribunal) compatible with rule of law requirements (para. 175).
[18] Resolution of the Sejm of the Republic of Poland of 6 March 2024 on removing the effects of the constitutional crisis of 2015-2023 in the context of the activities of the Constitutional Tribunal, *Monitor Polski* (item 198), 11 March 2024, referring specifically to the resolutions of the eighth Sejm declaring that the election of the three "October judges" lacked legal force, the resolution electing the three "December judges" / irregularly appointed judges, the resolution replacing two of the three "December judges" / irregularly appointed judges).The resolution goes on to state that the three irregularly appointed judges and their replacements are not judges of the Constitutional Tribunal, that the Presidency of the Tribunal is held by an unauthorised person and that even if her appointment were to be accepted, her term as President of the Tribunal should have ended in December 2022, whereby as a result all procedural decisions made by the President of the Tribunal, in particular the appointment of adjudicating panels, can be challenged.
[19] Constitutional Tribunal of Poland, judgment U 5/24, 28 May 2024.

of the Constitutional Tribunal.[20] While in December 2023, the Committee of Ministers still expressed "*deep regret at the authorities' continued and erroneous reliance on the judgment of the Constitutional Court in the case K 6/21 as an obstacle to implementation, and on the argument that the ECtHR acted beyond its legal authority*" in adopting the Xero *Flor* judgment, at its meeting of September 2024, the Committee of Ministers welcomed the change in the authorities' position and the elaboration of certain general measures to execute this judgment.[21] It furthermore called on the authorities to clarify whether any steps were foreseen for addressing the concerns raised by the presence of unlawfully elected judges while the legislative process is ongoing and invited them to clarify when the mandate of the judges lawfully elected in October 2015 expires, whether it will be possible to admit these judges to the bench and to allow them to adjudicate until the end of their term of office or whether other measures are foreseen for addressing their situation.[22]

17. On 13 September 2024, the Sejm adopted the new Act on the Constitutional Tribunal and the Act on provisions introducing the Act on the Constitutional Tribunal, which were subsequently submitted to the President of the Republic for his signature. On 7 October 2024, the President of Poland sent the two acts to the Constitutional Tribunal for a review of their constitutionality. The Constitutional Tribunal is expected to issue a judgment still this year. The draft constitutional amendments are in the meantime being discussed in the Senate.

III. Analysis

18. In the words of the Minister of Justice, the Constitutional Tribunal has been "*subordinated to political interests*", which has resulted in "*the institution's inability to fulfil its constitutional role as the guardian of the Constitution's supremacy, the principles of democratic rule of law, and the protection of individual freedoms and rights*".[23] The ultimate aim of the adopting a new Act on the Constitutional Tribunal is "*to establish enduring normative foundations that enable the restoration of the Tribunal's authority and the reestablishment of its role as an effective, reliable and independent arbiter of constitutional compliance in Poland*" and is as such not confined to rectifying the Tribunal's composition in line with constitutional and international standards.[24] The legislative measures are, according to the Minister of Justice, rooted in "*the principles of transitional justice, a phase Poland is navigating to restore the rule of law after an unprecedented period of democratic and legal regression".*[25] The Venice Commission accepts that it is necessary to have a holistic approach to the restoration of the rule of law in Poland. Nevertheless, without losing sight of the magnitude of the problem and the context of the reform of the Constitutional Tribunal, it analyses the reform of the Constitutional Tribunal of Poland first and foremost as a measure of execution of the judgments of the ECtHR, notably in the case of *Xero Flor w Polsce sp. z o.o. v. Poland* (as well as the case of *M.L. v. Poland*). Poland, as a party to the ECHR, has accepted the jurisdiction of the ECtHR, which, under Article 32 ECHR, covers "*all matters concerning the interpretation and application of the Convention and the Protocols thereto*", and has undertaken to abide by the judgments of the ECtHR in any case to which it is a party, as provided in Article 46, para. 1 of the Convention. Poland is thus under an international obligation in this respect.

[20] Committee of Ministers, Interim Resolution CM/ResDH(2023)142, Execution of the judgment of the European Court of Human Rights in *Xero Flor w Polsce sp. z o.o. v. Poland,* Adopted by the Committee of Ministers on 7 June 2023 at the 1468th meeting of the Ministers' Deputies.
[21] Committee of Ministers, Decision CM/Del/Dec(2024)1507/H46-22, Execution of the judgment of the European Court of Human Rights in *Xero Flor w Polsce sp. z o.o. v. Poland,* Adopted by the Committee of Ministers on 19 September 2024 at the 1507th meeting of the Ministers' Deputies, para. 2.
[22] *Ibid.*
[23] Letter of the Minister of Justice of Poland to the Venice Commission, 2 December 2024.
[24] *Ibid.*
[25] *Ibid.*

19. The Venice Commission has previously recalled that the enforcement of the ECtHR's judgments is a critical component of the ECHR system. The right to individual petition would be illusory if a final, binding judgment of the ECtHR remained unenforced. The mechanism set up by the Convention for supervising the execution of judgments, under the Committee of Ministers' responsibility (Article 46, para. 2 of the Convention), demonstrates the importance of effective implementation of judgments. The ECtHR's authority and the system's credibility both depend to a large extent on the effectiveness of this mechanism of execution of judgments. As also underlined by the Committee of Ministers, *"speedy and efficient execution of judgments is essential for the credibility and efficacy of the [Convention] as a constitutional instrument of European public order on which the democratic stability of the continent depend*".[26] While Poland "*in principle remains free to choose the means by which it will discharge its obligations under Article 46 para. 1 of the Convention"*,[27] the ECtHR has emphasised that such means would have to be *"compatible with the 'conclusions and spirit' set out in the Court's judgment"*.[28]

20. The Venice Commission emphasises in this respect that any measure taken with a view to "restoring" the rule of law has to meet the overall requirements of the rule of law. Restoring the rule of law means rejecting the root of its backsliding: the idea that the winner takes all, that the majority may rule disregarding the rights and legitimate aspirations of the minority. In this context some balancing between different – at times apparently conflicting – elements of the rule of law could be required. The Venice Commission welcomes the intention to reform the Constitutional Tribunal, in light of (but not limited to) the abovementioned judgments of the ECtHR. At the same time, it recognises the complexity of the endeavour to restore the constitutional order and rule of law in Poland in line with these judgments and the fundamental principles of the rule of law.[29] All the more so because of this complexity and the extraordinary measures that may be required to restore the Constitutional Tribunal in its role as the guardian of the Polish Constitution (and also to "*address the status of decisions adopted with the participation of irregularly appointed judges"*, as required by the Committee of Ministers), the Venice Commission appreciates that a thorough consultation process appears to have taken place in respect of the Act on the Constitutional Tribunal and the provisions introducing the Act on the Constitutional Tribunal.

21. In the below, the Opinion will focus on the main features of the two laws and draft constitutional amendments directed at achieving the implementation of the three aims to be achieved to implement the abovementioned ECtHR judgment(s), as spelled out by the Committee of Ministers:[30] 1) ensuring the lawful composition of the Constitutional Tribunal; 2) addressing the status of decisions adopted with the participation of irregularly appointed judges[31] and 3) preventing undue influence on the appointment of judges of the Constitutional Tribunal. In addition, the Opinion will comment on a select set of other noteworthy provisions. The absence of remarks on other aspects of the two acts and the draft constitutional amendments should not be interpreted as tacit approval.

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[26] Reply to Parliamentary Assembly Recommendation 1576 (2002), adopted by the Committee of Minister on 26 March 2003 at the 833rd meeting of the Ministers' Deputies (CM/AS(2013)Rec1576 final). See also Steering Committee for Human Rights (CDDH), Report on the longer-term future of the system of the ECHR, https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4.

[27] ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, 20 June 2009, para.88.

[28] ECtHR, *Ilgar Mammadov v. Azerbaijan* [GC], no. 15172/13, 29 May 2019, para. 195.

[29] See in a similar vein, Venice Commission, CDL-AD(2024)029, Poland – Joint Opinion of the Venice Commission and the Directorate General Human Rights and Rule of Law on European standards regulating the status of judges, para. 17.

[30] Decision CM/Del/Dec(2024)1507/H46-22.

[31] When referring to "irregularly appointed judges" hereafter, this is to be understood – in light of the *M.L.* judgment – to include the successors of two of the original three irregularly appointed judges who passed away in the meantime.

A. As concerns the lawful composition of the Constitutional Tribunal

22. The first objective of the reform should be to exclude from the bench the three irregularly appointed judges, given that their continued involvement in the decisions would entail further violations of Article 6 ECHR.[32]

1. The Act on the provisions introducing the Act on the Constitutional Tribunal

23. The Venice Commission notes that the Act on the provisions introducing the Act on the Constitutional Tribunal does not unequivocally address the status of the three irregularly appointed judges nor the consequences of their continued involvement in pending decisions. However, while it grants the judges of the Constitutional Tribunal the possibility of retiring early with preservation of the status of "retired judge" and associated benefits, pursuant to Article 15 of the Act, it clarifies that this possibility does not apply to the irregularly appointed judges. This may be understood as an implicit denial of their status as constitutional court judges. However, as this is not explicitly stated and given the position of the Constitutional Tribunal expressed in its judgment in case K 6/21 (that Article 6, para. 1 ECHR is incompatible with the Constitution of Poland, in as far as the term "tribunal" used in Article 6 provided the ECtHR with the jurisdiction to review the legality of the process of electing judges to the Constitutional Tribunal), it is not excluded that even if this Act would be promulgated, the irregularly appointed judges – depending on the stance of a new President of the Tribunal once selected – continue to be appointed to panels.[33]

24. While – as will be examined further below – the draft constitutional amendments provide for the removal of all the currently sitting judges, including the three irregularly appointed judges, the Venice Commission observes that at the moment these draft amendments do not stand a credible chance of being adopted.[34] As the matter of the participation of the irregularly appointed judges in the decisions of the Constitutional Tribunal is the most crucial one, this matter should, in the Commission's view, be addressed explicitly as a matter of priority at the legislative level. The three irregularly appointed judges should be prevented from deciding in pending cases and from being allocated new cases.

25. Consequently, as concerns the pending cases, the Venice Commission recommends that the law should contain a provision providing that the three irregularly appointed judges should be required to immediately withdraw from all pending cases in which they may be rapporteurs and from all benches on which they may be sitting. Such withdrawal should be mandatory and operate *ex lege*, should the judges not do so themselves within a short deadline. As concerns new cases, as under the Polish system, the allocation of cases is decided by the President of the Court, the Venice Commission considers that the law should contain a provision providing that no new cases will be allocated to the three irregularly appointed judges and that any possible allocation done in breach of this rule will be considered as null and void. The participation of the irregularly appointed judges will be challengeable by the parties to the relevant cases. Any possible decisions which were to be delivered under a wrongful composition of the bench will have to be dealt with according to the rules in part B below.

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[32] In the Committee of Ministers' decision CM/Del/Dec(2024)1507/H46-22, it is also indicated that measures should be taken to allow the three judges elected in October 2015 to be admitted to the bench and to serve until the end of their nine-year mandate.

[33] The term of one of the irregularly appointed judges should end at the end of this year. The terms of the two others, who replace the two initial irregularly appointed judges should end in September 2026 and January 2027.

[34] Any amendments to the Constitution require a two-thirds majority of votes in the Sejm (in the presence of at least half of the statutory number of deputies) and an absolute majority of votes in the Senate (Article 235, para. 4 of the Constitution). Given the current polarised political context it seems unlikely that the constitutional majority needed to change the Constitution will be reached anytime soon.

26. Given that under the current rules it is the President of the Constitutional Tribunal who decides on the composition of adjudicating panels, the question of who is and who will be the President of the Constitutional Tribunal is of great importance for the effectiveness of the above rule. The current President of the Constitutional Tribunal is still exercising this role (even if the current legislation provides for a six-year term in office of the President) but is due to leave the Tribunal before the end of 2024 when her term of office as a constitutional judge ends. Should she continue to allocate cases to the irregularly appointed judges until she leaves, the decisions by the latter should be dealt with under the rules further below.

27. Article 14 of the Act on the provisions introducing the Act on the Constitutional Tribunal provides that, as of the entry into force of the new Act on the Constitutional Tribunal, the most senior judge in the Constitutional Tribunal will perform the duties of the President of the Constitutional Tribunal and the General Assembly of judges of the Constitutional Tribunal has to present – within six months of entry into force of the Act on the Constitutional Tribunal – candidates for the positions of the President and Vice President (two candidates for each position, as envisaged in Article 11 of the new Act of the Constitutional Tribunal, see below) to the President of the Republic.

28. As the entry into force of the Act on the Constitutional Tribunal and of the Act on the provisions introducing the Act on the Constitutional Tribunal may be delayed, it is possible that a new President of the Constitutional Tribunal will in the meantime be elected under the current legal provisions. Once the new legal provisions enter into force, his or her mandate would be terminated. The Venice Commission recalls that the ECtHR has considered it problematic for judicial independence that the mandate of a president of a court was terminated through *ad hominem* legislation, even if s/he remained a judge of that court.[35] At the same time, the ECtHR has underlined also in respect of a constitutional court that the Convention "*does not prevent States from taking legitimate and necessary decisions to reform the judiciary and that the power of a government to undertake reforms of the judiciary cannot be called into question, on condition that any reform of the judicial system should not result in undermining the independence of the judiciary and its governing bodies*".[36] The Venice Commission too has been "*cautious of accepting the termination of the mandate as court president as part of a general reform unless compelling reasons are given. If legitimate and compelling reasons can be established, the termination of a mandate as court president must nonetheless respect the principles of legal certainty (legitimate expectations) and proportionality*".[37]

29. The Venice Commission notes however that, even if the Act on the Constitutional Tribunal has not entered into force, it has been published. As a consequence, the envisaged new system and the new duration of the mandate of a new President of the Constitutional Tribunal are known to all sitting judges, and therefore to all potential future candidates for the position of President of the Constitutional Tribunal: the new rules will therefore not be unpredictable and cannot be considered to be *ad personam*.[38]

[35] ECtHR, *Baka v. Hungary*, no. 20261/12, 23 June 2016.
[36] ECtHR, *Gyulumyan and others v. Armenia*, no. 25240/20, 21 November 2023, para. 74, in which the ECtHR found no convincing arguments that the impugned amendments were aimed at, or resulted in, undermining the legitimacy or independence of the Constitutional Court and that it targeted them specifically (in contrast to *Baka*, cited above, para. 117, and *Grzęda,* cited above, para. 299).
[37] Venice Commission, CDL-AD(2020)016, Armenia - Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court, para. 57, referring also to CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Amendments to the Organic Law on General Courts of Georgia, paras. 97-98.
[38] See in a similar vein, Venice Commission, CDL-AD(2020)033, Republic of Moldova - Urgent joint Amicus Curiae Brief on three legal questions concerning the mandate of members of Constitutional Bodies, para. 36.

2. The draft constitutional amendments

30. When it comes to the lawful composition of the Constitutional Tribunal, the transitional provisions of the Bill on amendments to the Constitution are more delicate: they envisage the expiration of the term of office of all current judges of the Constitutional Tribunal, with 15 new judges being elected (for a non-renewable term of nine years, as is currently the case) by a three-fifths majority of votes within the Sejm within 14 days of entry into force of the Act, whereby judges are elected for a staggered term of office (to prevent stacking of the Tribunal by the Sejm thereafter): five judges will be elected for three years, five judges for six years and five judges for nine years.

31. Much of the assessment of the draft constitutional amendments comes down to a single question: Can a complete renewal of the Constitutional Tribunal be justified? While the aim of restoring the lawful composition of the Constitutional Tribunal and – in general – repairing the rule of law is legitimate, the means chosen by the Polish authorities to achieve this aim must remain in line with European standards and the rule of law. Irremovability of judges correctly appointed, a sub-principle of judicial independence, is such a standard. All the criticism that can be levelled at the Constitutional Tribunal for its role in undermining the Polish constitutional order and contributing to systemic deficiencies of the judicial system (as highlighted in the case-law of the ECtHR[39] and the CJEU) does not change the fact that 12 out of the current 15 judges of the Constitutional Tribunal have been elected in accordance with the constitutionally prescribed procedure, with their mandates not yet having come to an end. As the Venice Commission has stated before "*security of tenure of constitutional court judges is an essential guarantee of their independence. Irremovability is designed to shield the constitutional court judges from influence of the political majority of the day*", so as to avoid that each new government replaces sitting judges with newly elected ones of their choice.[40]

32. As pointed out by the Minister of Justice in his comments, the Venice Commission has accepted that, in case of reforms introducing a significant improvement of the overall system, the tenure of sitting office holders could be prematurely terminated, in order not to paralyse the necessary reform efforts.[41] Indeed, as it has outlined in an earlier Opinion on the National Council of Judiciary of Poland, the Venice Commission has "*promoted a case-by-case assessment of the purpose, effects and circumstances of an early ending of the mandate*", referring also to the ECtHR which likewise found that "*upholding those principles at all costs (…) may in certain circumstances inflict even further harm on the rule of law and on public confidence in the judiciary. (…) a balance must therefore be struck in such instances to determine whether there is a pressing need – of a substantial and compelling character – justifying a departure from the principle of legal certainty (…) and from the principle of irremovability of judges, as relevant, in the particular circumstances of a case*".[42]

33. The Venice Commission notes that the fact that there is currently not a constitutional majority in Poland to adopt these draft constitutional amendments weakens the arguments for a pressing need justifying a departure from the principle of irremovability of judges. It observes that in the current parliamentary term five judges (including the President of the Tribunal) are due to be replaced, in addition to the three irregularly appointed judges and any judges who might retire

[39] See in this respect also ECtHR, *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021, para. 263 and *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, 3 February 2022, para. 319, in which the Court characterised the actions of the Constitutional Tribunal as "*an affront to the rule of law and the independence of the judiciary*".
[40] Venice Commission, CDL-AD(2019)024, Armenia – Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the amendments to the Judicial Code and some other laws, para. 58.
[41] See *inter alia* Venice Commission, CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo, para. 60; CDL-AD(2024)018, Poland - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the draft law amending the Law on the National Council of the Judiciary of Poland, para. 57.
[42] *Ibid*, referring also to *Guðmundur Andri Ástráðsson v. Iceland* [GC], para. 240.

early as per Article 15 of the new Act on the provisions introducing the Act on the Constitutional Tribunal. It would thus appear that before any amendments can be made to the Constitution, new appointments could lead to a more pluralistic composition of the Constitutional Tribunal. Indeed, as the draft constitutional amendments currently do not stand a credible chance of being adopted, the best chances of changing the composition of the Constitutional Tribunal are by filling any upcoming vacancies. Consequently, it cannot be said that the irremovability of the sitting judges of the Constitutional Tribunal "*paralyses the necessary reform efforts*" and that, at the time of the future adoption of amendments to the Constitution, there would be a pressing need to interrupt the mandate of all the sitting judges of the Constitutional Tribunal. As the Venice Commission has said before "*the appropriate way of bringing to life a new model of a Constitutional Court is to maintain the term of office of the current judges (…)*".[43] Maintaining the term of office of the current judges whose mandate will not have expired at that point in time would have an added benefit of staggering future appointments, preventing that the same qualified majority would be able to elect 15 judges in one go.

34. While radical measures, even if adopted by a constitutional majority, may seem necessary, this may run the risk of giving the draft amendments an objectionable *ad personam* character, and simply providing arguments to a future constitutional majority to do the same. Whenever there is a majority in Parliament large enough to change the Constitution, the judges of the Constitutional Tribunal would have to fear their mandates being terminated, with all new constitutional judges being appointed by the political majority of the day.

35. In restoring the rule of law, building public confidence in institutions is of paramount importance. As the Venice Commission has said in respect of the ordinary judiciary before: "*While reforms are sometimes required to increase public confidence in the judicial system, persistent institutional instability where reforms follow changes in political power may also be harmful for the public trust in the judiciary as an independent and impartial institution".*[44] This is all the more true for constitutional justice.

36. On a different matter, the Venice Commission notes that the Bill on amendments to the Constitution contains a provision on the situation of the three judges elected in October 2015, providing that they can retire (and thereby have both the benefits and the status of retired judge of the Constitutional Tribunal, with the latter being of significance in light of the provisions on disciplinary panels under Article 35 of the Act on the Constitutional Tribunal, as described below). It is not clear however if the three judges elected in October 2015 have the possibility to first fulfil their mandate before retiring, which would have the preference of the Venice Commission, or would – given that their mandate would have expired in November 2024 – be expected to retire straightaway. Also in light of the Committee of Ministers decision on the execution of the *Xero Flor* judgment, it would be welcome if this was clarified.[45]

37. Finally, Article 3 of the Bill on the constitutional amendments provides for a staggered term of office for the first fifteen elected judges (with five judges elected for three years, five for six years and only the last five for the full constitutional term of nine years). The Venice Commission has some sympathy for the idea to prevent repeating the complete renewal of the Tribunal in nine years, with the ruling majority of that time being able to elect 15 judges in one go. However, it considers that making an exception to the constitutional term of office of nine years by providing for an initial staggered term in office would not be necessary if the Constitutional Tribunal would not be renewed in one go and duly appointed judges would instead be replaced over time when their term of nine years ends.

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[43] CDL-AD(2020)016, para. 53.
[44] *Ibid.,* para. 31, referring to CDL-AD(2019)027, Ukraine – Opinion on Amendments to the legal framework governing the Supreme Court and judicial governance bodies, para. 13.
[45] Decision CM/Del/Dec(2024)1507/H46-22.

B. As concerns the status of decisions adopted with the participation of irregularly appointed judges

38. The second objective of the reform should be to address the status of decisions adopted with the participation of irregularly appointed judges. In this respect, the Act on the provisions introducing the Act on the Constitutional Tribunal contains the most far-reaching provision of the legislative package: an invalidation of all judgments and orders[46] of the Constitutional Tribunal rendered by panels that included irregularly appointed judges (Article 10, para. 1),[47] providing that they do not have the legal effects as provided for in Article 190, paras. 1 and 3 of the Constitution (i.e. they are neither universally binding nor final). All proceedings in these cases have to be repeated (Article 10, para. 3). Subsequent judicial decisions and final administrative decisions rendered in individual cases on the basis of these judgments of the Constitutional Tribunal (i.e. judgments by panels that included irregularly appointed judges) and which are no longer appealable at the time of entry into force of this Act remain nonetheless in effect (Article 10, para. 4). Within one month of entry into force of the Act, the Constitutional Tribunal itself shall compile a list of all judgments and orders that are invalid, which will be published in the Official Gazette (Article 10, para. 5). Procedural actions in on-going proceedings involving a panel on which an irregularly appointed judge sits will need to be repeated (Article 12). Decisions on discontinuation of proceedings remain in effect, but in respect of discontinued constitutional complaints, the individual applicant may again file a constitutional complaint within three months of entry into force of the Act (Article 11).

39. As the Venice Commission has already recalled in a recent Opinion on Poland: a fundamental aspect of the rule of law is legal certainty, which requires – amongst other matters – that where courts have finally determined an issue, their ruling should not be called into question.[48] Legal certainty presupposes respect for the principle of *res judicata*, the principle of the finality of judgments.[49] In principle, the legislator is precluded from invalidating judgments of the Constitutional Tribunal by legislation.[50] As already indicated by the Venice Commission before in respect of the actions of the eighth term of the Sejm in 2016, rejecting the authority of a constitutional court in such a way "*flouts the principle of independence of the judiciary and constitutes another flagrant violation of the rule of law*".[51] A fundamental difference in the given

[46] Pursuant to Article 102 of the new Law, judgments are decisions in cases concerning the conformity of statutes and international agreements to the Constitution, statutes to ratified international agreements whose ratification required prior consent granted by statute, legal provisions issued by central state authorities to the Constitution, ratified international agreements, and statutes and the objectives or activities of political parties, as well as constitutional appeals, questions of law and requests for a constitutional review of statutes and international agreements prior to them entering into force. Orders are decisions in disputes concerning powers between central constitutional state authorities (as well as on the temporary inability of the President to exercise his/her function and all other cases not requiring a judgment).

[47] These are defined as judges who have been appointed in violation of the Act of 25 June 2015 on the Constitutional Tribunal and in violation of the judgments of the Constitutional Tribunal of 3 and 9 December 2015 (cases K 34/15 and K 35/15 which – as outlined above – respectively determined that 1) only the election of the two seats on the Constitutional Tribunal that had become vacant in December 2015 was unconstitutional and 2) that the replacement of judges whose term ended in November 2015 was unconstitutional, as was the notion that the term in office of constitutional judges started with the oath before the President), as well as judges appointed in their place.

[48] CDL-AD(2024)029, para. 41; See also ECtHR, *Brumărescu v. Romania* [GC] no. 28342/95, 28 October 1999, para. 61; *Ryakbykh v. Russia*, no. 52854/99, 24 July 2003, para. 51.

[49] *Ibid.*, respectively para. 62 and 52. See also in this respect, CDL-AD(2016)007, Rule of Law Checklist, para. 63: "*Final judgments must be respected, unless there are cogent reasons for revising them*".

[50] The ECtHR has also underlined that "*while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute*", *Zielinski and Pradal and Gonzalez and Others v. France* [GC], no. 24846/94, 28 October 1999, para. 57; *Scordino v. Italy (no. 1)* [GC], 36813/97, 29 March 2006, para. 126.

[51] CDL-AD(2016)026, para. 98, in respect of declaring judgments "illegal" by the legislator: "(…)*Moreover, through this provision the legislature openly questions the position and authority of the Constitutional Tribunal as the final arbiter in constitutional issues. Like the purported exercise of such authority by the executive, rejecting the authority*

case is however that it is not the Polish legislator, but an international court rendering binding judgments which found that certain judgments of the Constitutional Tribunal could not – due to the involvement of irregularly appointed judges – be considered as judgments handed down by an "independent and impartial tribunal established by law". This reasoning by extension affects all other judgments of the Constitutional Tribunal involving irregularly appointed judges, including the replacements of the initial irregularly appointed judges (as is also evident from the *M.L.* judgment, which unlike the *Xero Flor* judgment did not involve a constitutional complaint).[52] This is a specific situation, and the obligation of Poland to execute these international judgments may be considered to justify in principle the adoption of such extraordinary measures.[53]

40. The Venice Commission was informed that there are currently just over 100 judgments of the Constitutional Tribunal that are affected by these irregularities, since the first judgment involving an irregularly appointed judge was handed down in 2017. The Helsinki Foundation for Human Rights has carried out a detailed analysis of the 85 judgments rendered between 2017 and 2022, which shows the wide variety in the subject matter and nature of these judgments and the impact they have had, giving also some indication of the complexity of the arising issues at stake when decisions are invalidated *ex lege* in the manner as has now been proposed.[54] Invalidating judgments could for example lead to the restoration of provisions previously abolished from the legal system, possibly even retroactively, and could lead to reinstating norms which have violated people's rights. As such, it would have been welcome if the legislator had itself carried out a detailed assessment of the potential impact on the domestic legal order of invalidating by law more than 100 judgments.

41. It is clear that when it comes to executing the ECtHR judgment in the case of *Xero Flor* to – in the words of the Committee of Ministers – address "*the status of decisions already adopted in cases concerning constitutional complaints with the participation of irregularly appointed judges*",[55] it is impossible to find a perfect solution, bearing in mind that some of these judgments and the legal reality they have created have now been in force for up to seven years. Any solution to be found would have to be proportionate to its aim, striking a careful balance between addressing violations of the right to a fair trial and the need for legal certainty (*res judicata,* in particular in view of persons having acquired rights in good faith). While recognising the margin of appreciation of member states in deciding on the exact nature of the general measures to be taken to execute ECtHR judgments, the Venice Commission takes the view that the aim of addressing violations of the right to a fair trial could be achieved through more moderate means than by declaring all judgments that involve irregularly appointed judges invalid. This is all the more so since it does not follow from the ECtHR judgment in the case of *Xero Flor* that all

of a court in such a way flouts the principle of independence of the judiciary and constitutes another flagrant violation of the rule of law".

[52] While in theory ECtHR judgments are *inter partes* and the *erga omnes* effect is not expressly provided by the ECHR, the principle of *res interpretata* de facto introduces such an effect.

[53] In this respect, it should be noted that while the origins of the *Xero Flor* judgment concerned a constitutional complaint, in case of *M.L.* it was not a constitutional complaint: The Constitutional Tribunal's judgment in case K 1/20 was in response to a request by a group of 118 members of parliament to determine the conformity with the Constitution of provisions of the 1993 Act on family planning, protection of the human foetus and conditions permitting the termination of pregnancy.

[54] Helsinki Foundation for Human Rights, Judgments delivered by irregular judicial formations of the Polish Constitutional Court (June 2023). Of the 85 judgments, 45 percent concerned constitutional complaints, 33 percent concerned questions on the conformity with the Constitution of statutes or ratified international agreements by entities with general or special standing, 15 percent concerned questions on a point of law by courts and seven percent requests by the President for an *ex ante* review. As shown in this study, in 48 of the 85 judgments this led to a finding of incompatibility with the standard of review (a finding of unconstitutionality), leading in some cases to the loss of binding force of certain legal provisions or the identification of legislative omissions (which in turn was in a number of cases followed by legislative amendments to address the unconstitutionality or legislative omission), but in other cases it did not lead to loss of binding force (e.g. because it concerned an *ex ante* review and the law in question never came into force, or because it concerned provisions of the ECHR or Treaty of the EU). However, as demonstrated by the Helsinki Foundation, in several cases declaring these judgments invalid would have direct undesirable consequences for individuals concerned.

[55] Decision CM/Del/Dec(2024)1507/H46-22 (see above).

decisions adopted with the participation of irregularly appointed judges should be declared invalid or null and void. Rather, the reopening of proceedings should be possible. In this context, it is important to distinguish between effects *ex nunc* and *ex tunc*. While absolute nullity of decisions could entail *ex tunc* effects, annullability may imply *ex nunc* effects only. In the context relevant for the situation at stake, the ECtHR does not require more than annullability of decisions. The Venice Commission therefore considers it crucial to clarify under what conditions a decision is removed or not, and under what conditions proceedings can be reopened. It therefore maintains that Article 10 of the Act on the provisions introducing the Act on the Constitutional Tribunal should be reconsidered.

42. While it is correct in principle that the legislator establishes a mechanism that applies to *all* decisions involving irregularly appointed judges (given that it would not be for the legislator to make a selection as to which judgments would be invalid and which not), the Venice Commission favours a more tailored approach, by not providing for an *ex lege* invalidation (but – as indicated above – allowing for a reopening of cases on the basis of predetermined criteria, clearly defining the legal effects new judgments may have).[56] For example, it can be provided that within a period of three months following the publication of the list of eligible judgments (i.e. all judgments that involved irregularly appointed judges), entities with standing before the Constitutional Tribunal (which would include the Commissioner for Human Rights) and individual applicants who have had their constitutional complaint rejected can request a reopening of proceedings. Such an extraordinary judicial remedy would have the benefit of preserving the validity of uncontested judgments, thereby ensuring legal certainty and limiting the legal turmoil and potential human rights violations[57] that may follow the *ex lege* invalidation of more than 100 judgments. The Venice Commission notes in this respect that such possibilities for the reopening of procedures already exist in the Polish legal order.[58]

43. Furthermore, the Venice Commission notes that subsequent judicial decisions and final administrative decisions rendered in individual cases on the basis of these judgments of the Constitutional Tribunal, and which are no longer appealable at the time of entry into force of this Act, remain in effect. While the legislator has in this case understandably let legal certainty prevail, to limit the legal instability that might ensue, this may nevertheless not in all circumstances lead to a satisfactory outcome (e.g. a person having been convicted for abortion following the Constitutional Tribunal's judgment in case K 1/20). In the view of the Venice Commission, there could be compelling reasons to allow on the basis of predetermined criteria within a limited period of time a possibility to have a subsequent judicial or administrative decision reconsidered, should the Tribunal's judgment upon reopening of proceedings differ from its initial judgment that

[56] As mentioned above and demonstrated by the analysis of the Helsinki Foundation, there is a great variety in the issues at stake and even if it is unlikely that the Constitutional Tribunal in its current composition would in these cases come to a different conclusion than those adjudicated by a panel involving an irregularly appointed judge, it would be important to clarify whether in situations in which the Constitutional Tribunal would reach a different conclusion on a legal provision that was previously concluded to be incompatible with the Constitution, it means that this legal provision would for example come back in force, and, if so, from which moment.

[57] In addition to legal certainty, the right to a fair trial within a reasonable time, as enshrined in Article 6 of the Convention, must also be taken into account, as the re-adjudication of 100 cases - in addition to the adjudication of the pending and new cases - would significantly increase the duration of the proceedings.

[58] For example, both Article 53 of the new Act on the Constitutional Tribunal and Article 36 of the 2016 Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings before the Constitutional Tribunal provide that, for matters not regulated by the Act, the Civil Procedure Code shall be applied. In turn, the Civil Procedure Code provides for a possible "invalidity of proceedings" (not "invalidity of judgments"), which may lead to revocation of a judgment. To this end, Article 401 of the Code provides "*It is possible to request the reopening of proceedings due to invalidity, 1) if an unauthorised person participated in the court or if a judge disqualified by law ruled (…)*". It should furthermore be noted that Article 540, para. 3 of the Code of Criminal Procedure also allows for the reopening of domestic proceedings if "*such a need results from a ruling of an international body acting on the basis of an international agreement ratified by the Republic of Poland*". See in this respect also the decision of the ECtHR on 8 December 2024 to strike out the applications in the cases of *Dudek and Lazur v. Poland* (applications nos. 41097/20 and 39577/22), paras. 26-27.

involved an irregularly appointed judge.[59] It is welcomed that while decisions on discontinuation of proceedings generally remain in effect, in case of discontinued constitutional complaints, the complaint can be re-filed within three months of entry into force of the Act (if the decision on the discontinuation is made by a judge who has been irregularly appointed).

C. As concerns preventing undue influence on the appointment of judges of the Constitutional Tribunal

44. A third objective of the reform should be to "*prevent the undue influence on the appointment of judges of the Constitutional Tribunal*". This requires adding in the Constitution or in legislation, as appropriate, provisions on the appointment (and dismissal) of constitutional judges. Enshrinement at the level of the constitution shields these essential rules from possible partisan intervention of the majority of the day and would thus be preferable over ordinary legislation. Given the unlikelihood of the draft constitutional amendments being adopted anytime soon, the Venice Commission welcomes that provisions to address the aforementioned objective have been included in the Act on the Constitutional Tribunal, as adopted by the Sejm on 13 September 2024. The Act introduces some important changes to the method of selection of constitutional judges as compared to the 2016 Act on the Constitutional Tribunal currently in force, in particular in respect of the required majority in the Sejm, incompatibilities for candidates and the range of entities who can propose candidates for constitutional judges.

1. Act on the Constitutional Tribunal

45. Similar to the draft constitutional amendments (see further below), pursuant to Article 16 of the Act, the election of a judge to the Constitutional Tribunal will require a majority of three-fifths in the Sejm with at least half of the statutory number of members of the Sejm present. The Venice Commission recalls that currently the Constitution does not specify the method of election of constitutional judges other than that this is done by the Sejm (Article 194 of the Constitution). The 2016 Act on the Status of the Judges of the Constitutional Tribunal (Article 2), as currently in force, only provides that the terms of election of judges of the Constitutional Tribunal shall be specified by the rules of procedure of the Sejm. The rules of procedure of the Sejm (Article 31) in turn provide that constitutional judges are elected by an absolute majority in the Sejm. Even if under similar rules before the entry into force of the 2016 Act, constitutional judges were in practice elected by an at times even higher majority than the three-fifths proposed now, formally an absolute majority of votes in the Sejm has sufficed. The Venice Commission welcomes that a three-fifths majority has now been included both in the Act on the Constitutional Tribunal and the draft constitutional amendments, to ensure cross-party support in the Sejm, with the aim of de-politicising the election of constitutional judges, also in light of its earlier recommendation to Poland for the Constitution "*to be amended in the long run to introduce a qualified majority for the election of Constitutional Tribunal judges by the Sejm, combined with an effective anti-deadlock mechanism*".[60]

46. Increasing the majority required for the election of constitutional judges also increases the importance of an anti-deadlock mechanism. However, the Act on the Constitutional Tribunal only foresees in Article 19, para. 5, that if the Sejm fails to elect a judge of the Tribunal, the Speaker of the Sejm will reinitiate the procedure, providing additionally in Article 16 of the Act that, upon expiration of their term of office, judges shall serve until a successor is elected. While the Venice Commission welcomes the inclusion of the latter provision (as is common practice in other Venice Commission member states and in line with what it has recommended in respect of the tenure of

[59] It is noted however that in respect of judicial decisions a solution may be provided by Article 401 of the Code of Civil Procedure, Article 540 of the Criminal Procedure Code (as mentioned above), as well as Article 272 of the Act on the proceedings before administrative courts.
[60] CDL-AD(2016)001, para. 140.

judges of other constitutional courts),[61] it does not consider that a reinitiation of proceedings is an effective anti-deadlock mechanism. While some of the Venice Commission interlocutors were positive that, once a certain period of time had lapsed, a three-fifths majority in the Sejm for the election of constitutional judges would be reached – given that the whole political class would be under public scrutiny to find and agree on appropriate candidates – the current strongly polarised political situation shows that an effective anti-deadlock mechanism is a necessity. Such an anti-deadlock mechanism would ultimately have to be included in the Constitution, as it would be too easy to lower the required majority by the ruling majority of the day. However, given the current absence of the requisite constitutional majority, the Venice Commission recommends to include an effective anti-deadlock mechanism already now in the Act on the Constitutional Tribunal, which would need to be stronger than reinitiation of the proceedings. As it has said before, "*It may assist the process of encouraging agreement if the anti-deadlock mechanism is one which is unattractive both to the majority and the minority*".[62]

47. With this in mind and while an appropriate threshold of votes to obtain is essentially a political rather than a legal question,[63] it could for example be envisaged that constitutional judges are elected by a two-thirds majority of votes in the Sejm as a rule, whereby a three-fifths majority is used as an anti-deadlock mechanism. Recalling what the Venice Commission has said in respect of Poland in 2016, a valid alternative would certainly be to introduce a system by which a third of the constitutional judges are each elected by three State powers, the President of Poland, the Sejm and the judiciary.[64] This would go some way in detaching the election of constitutional judges from the political majority of the day. However, even in such a system, it would be important for the parliamentary component to be elected by a qualified majority.[65]

48. Furthermore, with the aim of meeting the third objective mentioned above, Article 17, para. 2 of the Act on the Constitutional Tribunal foresees the introduction of certain incompatibilities: the position of a judge in the Constitutional Tribunal cannot be held by a person who in the preceding four years was President of the Republic, member of Parliament, member of the European Parliament, member of the Council of Ministers, secretary of state, undersecretary of state or government plenipotentiary. While such a cooling-off period is not a European standard, and notwithstanding the amendments of the rules on recusal in Articles 55-57 of the new Act on the Constitutional Tribunal, given the perceptions of partiality relating to the election of former members of Parliament to the Tribunal,[66] the Venice Commission welcomes this approach in the current Polish context. A period of four years coinciding with a parliamentary term is indeed reasonable in this regard.

49. Moreover, the entities allowed to propose candidates for the position of constitutional judges will be significantly extended. Currently, Article 30 of the rules of procedure of the Sejm provides that a candidate can be proposed by at least 50 members of the Sejm or its Presidium. Pursuant to Article 18 of the Act on the Constitutional Tribunal, this will now also include (in addition to the 50 members of the Sejm and/or its Presidium) the President of the Republic, at least 30 senators, the General Assemblies of the Supreme Court and the Supreme Administrative Court, as well as the central organs of certain legal professions' associations (National Council of Prosecutors, Bar Council etc.). Given the monopoly of the Sejm on the selection of candidates for constitutional judges, the Venice Commission welcomes that this is broadened to include other branches of

[61] See for an overview: Venice Commission, CDL-AD(2024)002, Bosnia and Herzegovina – Opinion on certain questions relating to the functioning of the Constitutional Court of Bosnia and Herzegovina, paras. 22-23.
[62] Venice Commission, CDL-AD(2013)028, Montenegro – Opinion on the draft amendments to three constitutional provisions relation to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council, para. 7.
[63] Venice Commission, CDL-AD(2016)009, Albania – Final Opinion on the revised draft constitutional amendments on the judiciary, para. 13.
[64] CDL-AD(2016)001, para. 141.
[65] *Ibid.*
[66] See for example the issue raised by the applicant in the ECtHR case *M.L. v. Poland*, see above, paras. 43, 73, 128 and 131. A recent ruling of the Constitutional Tribunal in case U 4/24 that the resolution of the Sejm establishing an investigative committee on Pegasus was unconstitutional raised similar concerns.

power and the legal profession, which should allow for a greater diversity of candidates and – given that the candidate is not necessarily being proposed by a political party – may facilitate the reaching of an agreement between different parties in the Sejm (especially in light of the required three-fifths majority needed under the new Act for the election of constitutional judges).

50. The Venice Commission also notes that Article 19 of the Act provides that an opinion of the National Council of the Judiciary is to be sought on the candidates for constitutional judge, whereby the Council would hear such candidates. The need for and desirability of such an opinion is not immediately clear given that candidates are not necessarily professional magistrates, but – also given that the opinion of the National Council of the Judiciary is in any case not binding on the Sejm – the Commission considers that it may contribute to the depoliticisation of the selection process, provided that the National Council of the Judiciary is indeed reformed as planned[67].

2. Draft constitutional amendments

51. Similar to the Act on the Constitutional Tribunal, Article 1 of the Bill on amendments to the Constitution foresees the introduction of certain incompatibilities for candidates for constitutional judges (in para. 2 of Article 194 of the Constitution) and Article 2 of the Bill foresees a three-fifths majority for the election of the 15 judges (see in respect also the comments made in part A in respect of the complete renewal of the Constitutional Tribunal), within 14 days of the entry into force of the constitutional amendments. The Venice Commission refers to the observations it made above in respect of the Act on the Constitutional Tribunal as regards these incompatibilities and the qualified majority.

52. However, in respect of the three-fifths majority, the Venice Commission notes that because this provision is included in Article 3 of the Bill and not in the constitutional amendments themselves, it will only be valid for a first election following the termination of the term of office of the current constitutional judges, with the Act on the Constitutional Tribunal regulating the elections thereafter. As it has said above, changing the majority needed for the election of constitutional judges should not only be left to ordinary legislation.

53. When it comes to the anti-deadlock mechanism, unlike the Act on the Constitutional Tribunal which does not contain an anti-deadlock mechanism (but – as mentioned above – only provides that the Speaker of the Sejm reinitiates the procedure for selecting judges to the Constitutional Tribunal and that judges remain in office upon expiration of their term until a successor has been elected), Article 3 of the Bill envisages an election by an absolute majority if after two months no judges have been elected by a three-fifths majority. Similarly to the qualified majority, an anti-deadlock mechanism needs to be included in the Constitution itself, and not just in the Bill regulating the transitional provisions to the constitutional amendments, as it would need to be applicable to all elections of constitutional judges. Furthermore, in the view of the Venice Commission, the proposed anti-deadlock mechanism is not conducive to finding a consensus on candidates and will not prevent the ruling majority of the day from delaying proceedings in order to have its preferred candidates elected by an absolute majority. Recalling its 2016 recommendation, the Venice Commission recommends once again that the Constitution be amended "*to introduce a qualified majority for the election of Constitutional Tribunal judges by the Sejm, combined with an effective anti-deadlock mechanism*".[68]

D. As concerns other elements of the two Acts and the draft constitutional amendments

54. In addition to provisions directed at achieving the implementation of the three general measures spelled out by the Committee of Ministers for the execution of the *Xero Flor* judgment,

[67] See on this issue: CDL-AD(2024)018.
[68] CDL-AD(2016)001, para. 140.

the Act on the provisions introducing the Act on the Constitutional Tribunal, the Act on the Constitutional Tribunal and the draft constitutional amendments contain a number of other noteworthy provisions.

1. *Act on the provisions introducing the Act on the Constitutional Tribunal*

55. Article 15 of the Act envisages the possibility for judges appointed before the entry into force of the new Act on the Constitutional Tribunal to retire (while retaining their status as retired judges and benefits, thereby providing a financial incentive to end their office before their term comes to an end).[69] The Venice Commission has previously criticised early retirement schemes from the perspective of security of tenure (as an essential guarantee of their independence and irremovability of judges), also in respect of Poland, when they were mandatory[70] or when they affected a large number of judges.[71] However, as it has indicated before, as a matter of principle, where the early retirement scheme remains truly voluntary, i.e. excluding any undue (political or personal) pressure on the judges concerned, or when it is not designed to influence the outcome of pending cases, there are no standards that leads the Venice Commission to oppose this possibility.[72]

2. *Act on the Constitutional Tribunal*

56. Similar to the draft constitutional amendments (see further below), Article 11 of the Act on the Constitutional Tribunal provides for a limit to the term of the President and Vice-President of the Constitutional Tribunal (i.e. three years, renewable once, as compared to a six-year non-renewable term before) and provides that two candidates for each position are to be proposed (by the General Assembly of the Judges of the Constitutional Tribunal, as before) to the President of the Republic. Practices in Venice Commission member states regarding the selection of presidents (and vice-presidents) of constitutional courts vary widely and no common European standard can be identified in this area.[73]

57. In addition to the functional incompatibilities for candidates for constitutional judges mentioned above, Article 17, para. 3 of the Act adds that "*a person who was a member of a political party may run for the position of a judge of the Tribunal if at least four years have passed since the termination of membership in a political party*", with additionally Article 26, para. 1 providing that "*A judge of the Tribunal may not belong to a political party or a trade union (…)*", mirroring a similar provision in Article 195, para. 3 of the Constitution. As the Venice Commission has stated before,[74] a simple party membership in the last four years should not disqualify a person from becoming a constitutional judge and the Venice Commission therefore recommends to remove this prohibition from Article 17 of the Act. When it comes to the prohibition of party membership while in office (Article 26, para. 1 of the Act), the Venice Commission notes that there is no European standard on this, with practices varying across Venice Commission member states (generally, however, with the importance of restraint on the side of judges in exercising

[69] Early departure of a judge of the Constitutional Tribunal, would normally - under Articles 41 and 42 of the new Act on the Constitutional Tribunal - only be possible if a judge "*due to illness, infirmity or loss of strength, (…) has been declared permanently incapable of performing the duties of a judge of the Tribunal by the Social Insurance Institution's medical examiner*".
[70] CDL-AD(2017)031, Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, paras. 44-52 and 130.
[71] Venice Commission, CDL-AD(2012)001, Hungary - Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts, paras. 102-110.
[72] CDL-AD(2019)024, para. 60.
[73] CDL-AD(2016)026, para. 27. See also Venice Commission, CDL-STD(1997)020, The Composition of Constitutional Courts, sections 3.1 and 3.2
[74] Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 32.

political activities being recognised) and considers that – in the interest of safeguarding the appearance of the independence and impartiality judges of the Constitutional Tribunal – such a prohibition could be justified.[75] Similarly, the practice of membership of trade unions by judges (constitutional or administrative, civil and criminal judges) varies in Venice Commission member states and, provided that these trade unions, as a rule, do not engage in political activities beyond issues concerning the judiciary, the Venice Commission considers that joining a trade union representing the interests of judges should not *a priori* be considered to be incompatible with the position of a judge of the Constitutional Tribunal, also in light of the additional safeguard in Article 26 of the Act prohibiting "*any professional or public activities that are incompatible with the principles of the independence of the judiciary and of judges*".[76] Noting that this would require a constitutional amendment, the Venice Commission recommends in the long run to reconsider whether the limitations on trade union membership in the Constitution and the Act should be maintained.

58. Pursuant to Article 20 of the Act, the President of the Republic of Poland will have the obligation to accept the oath of a newly elected judge of the Constitutional Tribunal no later than 14 days after her of his election by the Sejm (and if this is not possible, the oath shall be made in writing, with the judge's signature notarised and submitted to the Speaker of the Sejm). As highlighted by the Venice Commission in respect of Poland before, unlike the oath of deputies and members of the government, the taking of the oath of constitutional judges is not mentioned in the Constitution and it can thus not "*be seen as required for validating the election of constitutional judges"*.[77] The Commission has furthermore stated that "*The acceptance of the oath by the President is certainly important – also as a visible sign of loyalty to the Constitution – but it has a primarily ceremonial function*".[78] Against the background of the situation in 2015, when lawfully elected judges of the Constitutional Tribunal were prevented from taking up their duties by the refusal of the President to take their oath in defiance of the judgments of the Constitutional Tribunal of 3 and 9 December 2015, the Commission welcomes that the Act clarifies that accepting the oath on the side of the President is obligatory, not optional, and that in cases where it is not made possible for judges to have their oath accepted, this can be done in writing.

59. Articles 28-31 of the Act address the immunity of judges, providing that a judge may not be held criminally liable or deprived of his/her liberty without consent of the General Assembly of the Constitutional Tribunal and may not be arrested or detained except in cases where s/he has been caught *in flagrante delicto.* The Venice Commission welcomes that, with the amendments adopted by the Sejm, it is no longer a disciplinary court but the General Assembly which provides its consent for holding a constitutional judge criminally liable or depriving him/her of his/her liberty, which more clearly delineates criminal and disciplinary liability.[79] It is however not clear from these provisions that the immunity provided to constitutional judges is limited to acts committed in the exercise of their functions. The Venice Commission has consistently pointed out that judges, including constitutional judges, should benefit from immunity only in the exercise of his/her lawful

[75] CDL-STD(1997)020, section 5, p. 16.
[76] See in respect of ordinary judges: Venice Commission, CDL-AD(2015)018, Report on the Freedom of expression of Judges, para. 13; Consultative Council of European Judges (CCJE), Opinion no. 23 (2020) on the role of associations of judges in supporting judicial independence, paras. 66-69; See also on trade union membership, United Nations, Economic and Social Council, the Bangalore Principles of Judicial Conduct (2002), Article 4.13 and commentary para. 176.
[77] CDL-AD(2016)001, para. 108. Pursuant to Article 104, para. 2 of the Constitution, deputies of the Sejm take their oath in the presence of the Sejm; Pursuant to Article 151 of the Constitution, members of the government taken their oath in the presence of the President of the Republic.
[78] *Ibid.*
[79] Venice Commission, CDL-AD(2013)014, Ukraine – Opinion on the draft Law on amendments to the Constitution, strengthening the independence of judges and on the changes to the Constitution proposed by the Constitutional Assembly, para. 49.

functions.[80] A judge, even a constitutional judge, must be subject to ordinary criminal law for acts detachable from his/her office. It is therefore recommended to clarify in the Act that the immunity provided to judges comprises functional immunity only (with the expectation that the rules of procedure of the Tribunal will contain further criteria on the procedure for the lifting of this immunity by the General Assembly of the Tribunal).

60. Pursuant to Article 33 of the Act, judges are disciplinarily liable for "*manifest and flagrant misconduct or a violation of the law, a violation of the dignity of the office of a judge of the Tribunal, or other unethical behaviour that may undermine confidence in his/her impartiality and independence"* and shall also be liable for conduct prior to taking office "*if his/her conduct resulted in failure to fulfil the duty of the state or proved unworthy of the office of judge of the Tribunal"*. As regards the latter, the Venice Commission welcomes that, in the adopted version of the Act, disciplinary liability for conduct prior to taking office is now limited to situations in which the circumstances of this conduct were not known on the day of his/her election, which limits the retroactive application of the provisions on disciplinary liability. It is furthermore welcomed that, in the adopted version of the Act, the President of the Republic and the Prosecutor General can no longer apply to have disciplinary proceedings initiated against a judge; this can only be done by a judge or a retired judge of the Tribunal.

61. In spite of these positive points, the provisions as they currently stand could be further improved. In principle, disciplinary breaches need to be formulated with sufficient precision in a law, to allow judges to foresee what kind of conduct may lead to disciplinary liability.[81] The grounds for disciplinary liability (e.g. "*violation of the dignity of the office of a judge of the Tribunal"* and – prior to taking office – conduct resulting in "*failure to fulfil the duty of the state office*" or "*unworthy of the office of judge of the Tribunal*") are rather vaguely defined. Even if the use of some general formulas is common in provisions on disciplinary offences, such terms carry a risk of being misused, especially in the absence of jurisprudence allowing for a consistent interpretation of such terms[82] or when not compensated by further procedural safeguards.[83] In the current polarised context in Poland, it is important to avoid any perceptions that this could be the case. Moreover, while it is positive that Article 37 of the Act sets forth a variety of possible disciplinary sanctions (i.e. warning, reprimand, financial penalty, removal from the position of a judge of the Tribunal and deprivation of the status of a retired judge), it does not specify which type of sanction can be applied to which disciplinary offence, nor does it provide that the sanctions should be proportionate to the severity of the offence.[84] Finally and related to the previous point, the disciplinary sanctions include removal from office. As noted earlier, irremovability of judges is a sub-principle of judicial independence and any exceptions to this principle should be based on constitutional provisions.[85] In general, removal from office should only be possible in exceptional cases, for very serious disciplinary offences. It would thus need to be specified, which type of conduct may lead to removal from office. In view of the foregoing, the Venice Commission recommends formulating with greater precision which conduct constitutes a disciplinary offence (or to have any unavoidable lack of precision compensated by additional procedural safeguards for disciplinary offences for which particularly severe sanctions can be applied) and which

[80] Venice Commission, CDL-AD(2017)011, Armenia – Opinion on the draft Constitutional Law on the Constitutional Court, para. 36.
[81] Venice Commission, CDL-AD(2016)013, Kazakhstan – Opinion on the draft Code of Judicial Ethics, paras. 24 and 25. See also CDL-AD(2016)007, para. 77: "*Offences leading to disciplinary sanctions and their legal consequences should be set out clearly in law".*
[82] ECtHR, *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013, paras. 179-184.
[83] For example, in case of disciplinary violations which would lead to a removal from office, as the conduct had been "*unworthy of the office of judge of the Tribunal*", a requirement of a two-thirds majority or even unanimity of judges could be provided for. See: Venice Commission, CDL-AD(2012)009, Hungary – Opinion on Act CLI of 2011 on the Constitutional Court, para. 19.
[84] See in a similar vein, Venice Commission, CDL-AD(2022)020, Lebanon – Opinion on the draft Law on the independence of judicial courts, para. 97.
[85] Article 180 of the Constitution of Poland provides that removal of a judge from office "*may only occur by virtue of a court judgment and only in those instances described by statute"*.

sanctions apply, explicitly providing that disciplinary sanctions should be proportionate to the respective disciplinary offence and clarifying which disciplinary offences may lead to removal from office *ultima ratio.*

62. Article 35 of the Act provides for a two-instance disciplinary process, as is the case for the 2016 Act on the Status of Judges of the Constitutional Tribunal, but with the difference that the first instance panel comprises five judges (instead of three as it is now) and the second instance panel seven judges (instead of five as it is now). Similarly to the current Act, the composition of the adjudicating panel is decided on by a draw carried out by the President of the Tribunal with a noteworthy difference that this may also include retired judges of the Tribunal, if they consent to this. Given that judges of the Tribunal sitting as the first instance disciplinary court cannot be included in second instance, and the accused judge, the President of the Tribunal and the judge acting as disciplinary ombudsman are also excluded, it is a way to ensure there are sufficient judges to sit as the disciplinary court in first and second instance.

63. Some of the Venice Commission's interlocutors questioned the legitimacy of this, given that retired judges are no longer acting judges of the Tribunal. However, it is noted that both the 2016 Act on the Status of Judges of the Constitutional Tribunal, currently in force, and the new Act confer a special status upon retired judges of the Tribunal (different from that of public officials or other judges who retire), whereby they continue to be bound by certain provisions (subject to disciplinary liability). In the view of the Venice Commission, retired judges are still very much tied to the Constitutional Tribunal, which could justify providing them with a role in disciplinary proceedings. While the Venice Commission has some reservations about the workability of this (also in that it may lead to a great variety in disciplinary jurisprudence), it appreciates the creativity of this somewhat unusual scheme, in that it ensures that the competency to adjudicate in disciplinary proceedings remains with the Tribunal, while guaranteeing that there are an adequate number of judges to provide for a solid appeal procedure (which is all the more important to avoid any misuse of disciplinary proceedings – or perception thereof – to change the composition of the Tribunal) and ensuring at the same time that the fact that all the current judges of the Constitutional Tribunal have been appointed by the same political majority does not constitute an obstacle to holding constitutional judges to account.

64. Article 112 of the Act now provides that decisions of the Tribunal are to be promulgated in accordance with the principles and procedure laid down in the Constitution.[86] In this respect, it would have been welcome if it was made unequivocal (either in this Act or in the Act of 20 July 2000 on the promulgation of normative acts and certain other legal acts) that publication of Constitutional Tribunal judgments does not require any intervention by the Prime Minister, the government or any other political body. In this context, it is also recalled that the Venice Commission has strongly criticised the refusal by a previous government to publish judgments of the Constitutional Tribunal.[87] Once more, in a similar move, following the adoption of the 6 March resolution by the *Sejm*, the government has refused to publish any judgment of the Constitutional Tribunal (whereas, before this resolution was adopted, judgments of the Constitutional Tribunal in which irregularly appointed judges had participated were published with a notice referring to the legal situation as determined by the ECtHR in the *Xero Flor* judgment). In view of the Venice Commission, for judgments of the Constitutional Tribunal in which one or more irregularly appointed judges have participated, it can indeed be stipulated that these judgments are subject to a potential reopening of proceedings, as outlined above in respect of the Act on the Introductory Provisions to the Act on the Constitutional Tribunal, but they nevertheless must be published. All other judgments must be published without any further interference by the government. Doing

[86] Article 190, para. 2 of the Constitution provides that judgments of the Constitutional Tribunal "*shall be immediately published in the official publication in which the original normative act was promulgated. If a normative act has not been promulgated, then the judgment shall be published in the Official Gazette of the Republic of Poland, Monitor Polski"*. In turn, para. 3 provides "*A judgment of the Constitutional Tribunal shall take effect from the day of its publication (…)*"

[87] CDL-AD(2016)001, para. 143.

any differently and allowing the government to control the legal force of a judgment would "*egregiously violate the independence of the court and the rule of law*".[88] In short, as the Venice Commission has stated before, "*no valid system of constitutional justice can be conceived of where the validity of the judgments of the Court depends on the goodwill of political authorities*".[89]

3. Draft constitutional amendments

65. The draft constitutional amendments furthermore envisage the inclusion in Article 193 of the Constitution of a second precondition for the referral of a normative act, ratified international agreement or statute to the Constitutional Tribunal:[90] that the direct application of the Constitution, as outlined in Article 8, para. 2, is insufficient to achieve such a ruling. As indicated by the Minister of Justice in his letter to the Venice Commission, this amendment is intended to facilitate a broader, more direct application of the Constitution within the judicial practices of courts. It would appear that this amendment codifies the situation of diffuse constitutional control that has been developed over the last eight years. This does not raise any issue with European standards.

66. Similar to the Act on the Constitutional Tribunal (see above), the constitutional amendments foresee a limit to the term of the President and Vice-President of the Constitutional Tribunal (i.e. three years, renewable once) and provide that two candidates for each position are to be proposed (by the General Assembly of the Judges of the Constitutional Tribunal, as before) to the President of the Republic. The Venice Commission refers to the observations it has made above in respect of this.

E. Other issues

67. The current crisis surrounding the Constitutional Tribunal may entice further steps being taken to cripple the Constitutional Tribunal (for example, if the Sejm would be unwilling to elect judges to the Constitutional Tribunal until a sufficient number of new judges can be appointed to change the direction of the Tribunal or a majority to adopt constitutional amendments is reached). Regardless of what the view of the Constitutional Tribunal may be, crippling the Constitutional Tribunal will do little to resolve the constitutional crisis and will only give a different ruling political majority in future arguments to do the same. Polish citizens are not served by such a constitutional vacuum. As the Venice Commission has said before: *"Respect for the fundamental democratic principle of separation of powers requires that no branch of power (…) should be permitted, by way of deliberate inaction (…), to block the functioning of another branch of power*".[91] It thus urges all state organs to be guided by the principle of loyal cooperation between institutions.[92] Respect for the rule of law presupposes a willingness to abide by the rules of the game, however arduous these rules may be, to work within the bounds of the constitutional system to change it from within.[93]

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[88] CDL-AD(2016)026, para. 82.
[89] *Ibid.*, para. 81.
[90] The first – already existing – precondition is that the pending case before a court hinges upon the answer to the question referred by that court to the Constitutional Tribunal.
[91] CDL-AD(2024)002, para. 11.
[92] See in a similar vein, Venice Commission, CDL-AD(2012)026, Romania - Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, para. 73.
[93] *Ibid.*, para. 72 "*It also implies constitutional behaviour and practices, which facilitate the compliance with the formal rules by all the constitutional bodies and the mutual respect between them."*

IV. Conclusion

68. At the request of the Minister of Justice of Poland, the Venice Commission has assessed the Act on the Introductory Provisions to the Act on the Constitutional Tribunal and the Act on the Constitutional Tribunal and the draft constitutional amendments.

69. In this Opinion, the Venice Commission, while emphasising the necessity of a holistic view on the restoration of rule of law in Poland and without losing sight of the magnitude of the problem and the context of the reform of the Constitutional Tribunal, assesses the reforms proposed first and foremost as a measure of execution of the judgments of the ECtHR, notably the case of *Xero Flor w Polsce sp. z o.o. v. Poland*, which Poland is under an international obligation to execute. As spelled out by the Committee of Ministers of the Council of Europe, the execution of this judgment (and others, like *M.L. v. Poland*) requires Poland to take measures to 1) ensure the lawful composition of the Constitutional Tribunal 2) address the status of decisions adopted with the participation or irregularly appointed judges and 3) prevent undue influence on the appointment of judges of the Constitutional Tribunal. In this respect, the Venice Commission stresses that it welcomes the authorities' determination to reform the Constitutional Tribunal. It recognises the complexity of the endeavour to restore the legitimacy of the Constitutional Tribunal and – more in general – the rule of law in Poland in line with the judgments of the ECtHR and in compliance with the principles of the rule of law. Restoring the rule of law means rejecting the root of its backsliding: the idea that the winner takes all, that the majority may rule disregarding the rights and legitimate aspirations of the minority.

70. As concerns ensuring the lawful composition of the Constitutional Tribunal, the Venice Commission notes that the Act on the provisions introducing the Act on Constitutional Tribunal does not unequivocally address the status of the three irregularly appointed judges, nor the consequences of their continued involvement in pending decisions. For the Venice Commission this is a crucial matter, which should be addressed as a matter or priority at the legislative level: the three irregularly appointed judges should be required to immediately withdraw from all pending cases, with no new cases being allocated to them. Such a withdrawal should be mandatory and operate *ex lege*, should the judges not withdraw themselves within a short deadline.

71. The solution proposed in the draft constitutional amendments to restore the lawful composition of the Constitutional Tribunal by completely renewing its membership is something that the Venice Commission cannot support. All the criticism that can be levelled at the Constitutional Tribunal for its role in undermining the Polish constitutional order and contributing to the systemic deficiencies of the judicial system (as highlighted in the case-law of the ECtHR and CJEU) does not change the fact that 12 out of the 15 current judges of the Constitutional Tribunal have been elected in accordance with the constitutionally prescribed procedure, with their mandates not yet having come to an end. As the Venice Commission has stated before "*security of tenure of constitutional court judges is an essential guarantee of their independence. Irremovability is designed to shield the constitutional court judges from influence of the political majority of the day*", so as to avoid that each new government could replace sitting judges with newly elected ones of their choice.[94] At the same time, the Venice Commission has accepted that, in case of reforms introducing a significant improvement of the overall system, the tenure of sitting office holders could be prematurely terminated, in order not to paralyse the necessary reform efforts. However, in Poland, given that before any amendments can be made to the Constitution, new appointments could already lead to a more pluralistic composition of the Constitutional Tribunal, it cannot be said that the irremovability of the sitting judges of the Constitutional Tribunal would "*paralyse the necessary reform efforts*" and that at the time of the future adoption of the constitutional amendments there would be a pressing need to interrupt the mandate of all sitting judges of the Constitutional Tribunal. Indeed, as the draft constitutional

[94] CDL-AD(2019)024, para. 58.

amendments currently do not stand a credible chance of being adopted, the best chances of changing the composition of the Constitutional Tribunal are by filling any upcoming vacancies. Maintaining the term of office of the current judges whose mandate will not have expired at that point in time would have an added benefit of staggering future appointments, preventing that the same qualified majority would be able to elect 15 judges in one go. While radical measures, even if adopted by a constitutional majority, may seem necessary, this may run the risk of appearing to be prompted by a desire to rid the Tribunal of any remaining judges appointed by a previous majority, giving the draft amendments an objectionable *ad personam* character, and simply providing arguments to a future constitutional majority to do the same.

72. As concerns addressing the status of decisions adopted with the participation or irregularly appointed judges, the Act on the introductory provisions to the Act on the Constitutional Tribunal envisages an *ex lege* invalidation of all judgments and orders of the Constitutional Tribunal rendered by panels that included irregularly appointed judges. The Venice Commission considers that, in normal circumstances, it cannot be accepted that the legislator invalidates by an ordinary law the judgments of the Constitutional Tribunal. A fundamental difference in this respect is that it is not the Polish legislator but an international court rendering binding judgments, the ECtHR, that decided that judgments involving irregularly appointed judges cannot be considered as judgments handed down by an "independent and impartial tribunal established by law". However, any solution in addressing the status of these judgments would have to be proportionate to its aim, striking a careful balance between addressing violations of the right to a fair trial and the need for legal certainty (*res judicata,* in particular in view of persons having acquired rights in good faith). While recognising the margin of appreciation of member states in deciding on the exact nature of the general measures to be taken to execute ECtHR judgments, the Venice Commission takes the view that the aim of addressing violations of the right to a fair trial could be achieved through more moderate means than by declaring all judgments that involve irregularly appointed judges invalid. This is all the more so since it does not follow from the ECtHR judgment in the case of *Xero Flor* that all decisions adopted with the participation of irregularly appointed judges should be declared null and void. Rather, the reopening of proceedings should be possible. In this context, the Venice Commission emphasises the importance of distinguishing between effects *ex nunc* and *ex tunc*. While absolute nullity of decisions could entail *ex tunc* effects, annullability may imply *ex nunc* effects only. In the context relevant for the situation at stake, the ECtHR does not require more than annullability of decisions. The Venice Commission therefore considers it crucial to clarify under what conditions a decision is removed or not, and under what conditions proceedings can be reopened. With this in mind, it recommends that the authorities reconsider the *ex lege* invalidation of judgments and orders involving irregularly appointed judges, providing for a more tailored approach, thereby safeguarding legal certainty, through envisaging the possibility for persons concerned and entities with standing before the Constitutional Tribunal to apply to have proceedings reopened.

73. As concerns preventing undue influence on the appointment of judges of the Constitutional Tribunal, the Venice Commission welcomes that a three-fifths majority for election of constitutional judges and new incompatibility requirements have now been included both in the Act on the Constitutional Tribunal and the draft constitutional amendments, with the aim of de-politicising the election of constitutional judges, and that a broader category of entities than just the Sejm and the Presidium of the Sejm can propose candidates for judges of the Constitutional Tribunal. The qualified majority needed for the election of constitutional judges under the new Act (and the constitutional amendments in the future) underlines the need for an effective anti-deadlock mechanism, in particular in the current polarised political climate. Such an anti-deadlock mechanism would need to be stronger than a reinitiation of proceedings (and/or the election by a simple majority after two months, as is envisaged by the draft constitutional amendments). Recalling what the Venice Commission has said in respect of Poland in 2016, a valid alternative would certainly be to introduce a system by which a third of the constitutional judges are each

elected by three State powers, the President of Poland, the Sejm and the judiciary.[95] This would go some way in detaching the election of constitutional judges from the political majority of the day. However, even in such a system, it would be important for the parliamentary component to be elected by a qualified majority.[96]

74. Apart from measures directed at the implementation of the *Xero Flor* judgment, both the Act on the Constitutional Tribunal and the draft constitutional amendments contain a number of positive features, inspired by the events of the last nine years. This includes the clarification that accepting the oath of constitutional judges by the President of the Republic is mandatory, not optional. However, the Venice Commission recommends to make further amendments to the Act on the Constitutional Tribunal, reconsidering membership of a political party (in the last four years) as an ineligibility requirement for candidates for judges of the Constitutional Tribunal, reconsidering the limitations on judges' trade union membership in the Act (and eventually the Constitution), clarifying that the immunity provided to constitutional judges comprises functional immunity only and formulating with greater precision which conduct constitutes a disciplinary offence (or having this lack of precision compensated by additional procedural safeguards for disciplinary offences for which particularly severe sanctions can be applied) and which sanctions apply, while also explicitly providing that disciplinary sanctions should be proportionate to the disciplinary offence and clarifying which disciplinary offences may lead to removal from office *ultima ratio.*

75. The Venice Commission remains at the disposal of the Polish authorities for further assistance in this matter.

[95] CDL-AD(2016)001, para. 141.
[96] *Ibid.*