[This is a translation of the notification from Polish into English]

Warsaw, 31 January 2025

Bogdan Święczkowski
President of the Constitutional Tribunal

Deputy Public Prosecutor-General
Michał Ostrowski
National Prosecution Service
Ul. Postępu 3
02-676 Warszawa

NOTIFICATION OF A REASONABLE SUSPICION OF A CRIMINAL OFFENCE HAVING BEEN COMMITTED

I hereby:

I. on the basis of Article 304(2) of the Polish Criminal Procedure Code, notify about a reasonable suspicion that the President of the Council of Ministers [hereinafter: the Prime Minister], ministers, the Marshal of the Sejm[1], the Marshal of the Senate, Sejm deputies [hereinafter: MPs][2] and senators of the ruling coalition, the President of the Governmental Legislation Centre, certain judges and public prosecutors, as well as other persons, may have committed a criminal offence which comprised the following:

during the period from 13 December 2023 until the date of the submission of this notification, in Warsaw as well as in other locations in Poland, the aforementioned persons

[1] [the translator's note: in the Polish parliamentary tradition the official titles for the speakers in each of the two Houses of the Polish Parliament (i.e. the Sejm and the Senate), are, respectively: the Marshal of the Sejm and the Marshal of the Senate]

[2] [the translator's note: representatives elected by voters to the Sejm are often referred to in English as 'Sejm deputies', however in this translation for the sake of both brevity and clarity the term 'MP' has been used].

acting as an organised criminal group, in relatively short intervals, with a premeditated intent, aiming to change the constitutional order of the Republic of Poland, as well as acting with the purpose of eliminating – or ceasing the activity of – the Constitutional Tribunal, i.e. a constitutional authority of the Republic of Poland, as well as other constitutional authorities, including the National Council of the Judiciary and the Supreme Court, undertook, in collusion with other persons, the activity aimed at achieving those purposes, by force and by an unlawful threat, by way of depriving the Constitutional Tribunal and other constitutional authorities, including the National Council of the Judiciary and the Supreme Court, of the possibility of functioning, resorting to *modus operandi* that, *inter alia*:

(1) resulted in the situation where – derived from legal norms regulating the constitutional order – the systemic status of the Supreme Court's Extraordinary Review and Public Affairs Chamber, and the systemic status of Supreme Court judges, as well as the legal force of rulings issued by the Supreme Court, and, in particular, by its Chamber of Extraordinary Review and Public Affairs, were undermined;

(2) resulted in the situation where the Government Legislation Centre ceased publishing rulings of the Constitutional Tribunal, by undermining the status of legally appointed judges of the Constitutional Tribunal;

(3) resulted in the adoption of the resolution of 6 March 2024 by the Sejm of the Republic of Poland with regard to eliminating the effects of the 2015-2023 constitutional crisis in the context of the activity of the Constitutional Tribunal (Official Gazette – *Monitor Polski*, M. P. of 2024, item 198);

(4) resulted in the adoption of the resolution no. 162 of 18 December 2024 by the Council of Ministers with regard to counteracting the negative effects of the constitutional crisis in the judicial system (Official Gazette – *Monitor Polski*, M. P. of 2024, item 1068);

(5) resulted in the situation where mandatory participants in proceedings before the Constitutional Tribunal ceased to provide their submissions and participate in hearings;

(6) resulted in the situation where judicial vacancies at the Constitutional Tribunal were not filled;

(7) resulted in the enactment of the 2025 State Budget Act (the Sejm's 10th parliamentary term; Sejm Paper no. 687), depriving the Constitutional Tribunal of the funds for the remuneration of the Constitutional Tribunal's judges;

(8) resulted in the situation where – derived from legal norms regulating the constitutional order – the systemic status of the National Council of the Judiciary, and of its members, as well as the systemic status of judicial appointments made with the Council's involvement, were undermined;

i.e., concurrently, the criminal offences under Article 127(1) and Article 128(1) and (3) of the Polish Criminal Code, in conjunction with Article 65 of the Criminal Code in conjunction with Article 12 of the Criminal Code and Article 258(1) of the Criminal Code.

II. I request that an investigation within the scope of the case specified above be launched.

III. I request that:

1) evidence be admitted in the form of a transcript from a witness hearing of the notifying person, President of the Constitutional Tribunal Bogdan Święczkowski, and thus that a relevant hearing be conducted for that purpose (address for the service of documents: al. Jana Chrystiana Szucha 12A; 00-918 Warszawa), with regard to the circumstances indicated below in the statement of reasons for this notification;
2) evidence be admitted, and relevant evidentiary material be provided, as presented below in the statement of reasons for this notification, with regard to the circumstances indicated therein.

IV. In view of the fact that this notification concerns a reasonable suspicion of a criminal offence having been committed by persons holding the highest public offices, and in particular the Prime Minister and the Minister of Justice – Public Prosecutor-General, I request that criminal proceedings be conducted in that regard **within the scope of a public prosecutor's investigation by the legally appointed Deputy Public Prosecutor-General, Michał Ostrowski.**

STATEMENT OF REASONS

I. The factual grounds of this notification

Since 13 December 2023, i.e. since the current ruling coalition came into power, wide-scale measures have been taken to undermine the proper functioning of constitutional state authorities, primarily those within the structure of the broadly-construed judicial branch of government. This, in particular, refers to the Constitutional Tribunal, the Supreme Court, and the National Council of the Judiciary. The said measures are focused on: (1) undermining the status of persons holding offices in the indicated constitutional authorities; (2) systemically delegitimising those authorities, and undermining the legal force of rulings and other acts issued by the said authorities; (3) acutely limiting funds allocated from the state budget for the functioning of the above-mentioned authorities.

The measures indicated in the previous paragraph not only lead to the annihilation of the aforementioned constitutional authorities, but also undermine the systemic foundations of the constitutional order of the Republic of Poland, the fundamental component of which is the independence of judicial authorities from the other branches of government, namely the executive and the legislature.

Bearing in mind the forthcoming elections to the office of President of the Republic of Poland, the measures taken with regard to the Supreme Court's Chamber of Extraordinary Review and Public Affairs, which adjudicates on the validity of presidential elections, should be deemed as particularly threatening to the constitutional order and the continuity of state power. Therefore, in the first place, that set of measures is presented in this statement of reasons. Next, what follows is a detailed factual and legal analysis of steps/conduct/measures taken with regard to the Constitutional Tribunal and the National Council of the Judiciary.

The undermining of the systemic status (as derived from legal norms regulating the constitutional order) assigned to the Supreme Court's Extraordinary Review and Public Affairs Chamber and to Supreme Court judges,
as well as the questioning of the legal force of rulings issued by the Supreme Court, and in particular by its Chamber of Extraordinary Review and Public Affairs

1.1. After 13 December 2023, with regard to the Supreme Court, representatives of political power took measures aimed at undermining the systemic position of the said authority.

Those measures arose from the adopted assumption that the Supreme Court judges appointed after December 2017 by the President of the Republic of Poland upon the motion of the National Council of the Judiciary constituted under Article 9a of the Act of 12 May 2011 on the National Council of the Judiciary (at present: Journal of Laws – Dz. U. of 2024, item 1186; hereinafter: The NCJ Act) are not, in fact, judges within the meaning of the Constitution, since the motions for their appointments were not put forward by the National Council of the Judiciary constituted in accordance with Article 187(1)(2) of the Constitution, and consequently the said judges have no right to adjudicate, and any adjudicating panel comprising those judges does not constitute the Supreme Court.

What is indicated as the basis of the adopted assessment is the resolution of 23 January 2020 (ref. no. BSA I-4110-1/20) issued by the joined Civil, Criminal, and Labour and Social Security Chambers of the Supreme Court, in which it is stated that a court is improperly composed within the meaning of Article 439(1)(2) of the Criminal Procedure Code, or the court's composition contradicts legal provisions within the meaning of Article 379(4) of the Civil Procedure Code, also when the court's composition includes a person appointed to the office of a judge of the Supreme Court upon the motion of National Council of the Judiciary constituted in accordance with the provisions of the Act of 8 December 2017 amending the National Council of the Judiciary and certain other statutes (Journal of Laws – Dz. U. of 2018, item 3) – (point 1 of the resolution). The interpretation of Article 439(1)(2) of the Criminal Procedure Code and of Article 379(4) of the Civil Procedure Code, arrived at in points 1 and 2 of the aforementioned resolution, does not apply to the rulings issued by courts prior to the date of the adoption of the resolution as well as to the rulings that will be issued in court proceedings that were pending before a given court panel, on that date, under the Criminal Procedure Code (point 3 of the resolution).

The said resolution may not, however, be seen as authorisation to challenge the validity of a judicial appointment made by the Polish President upon the motion of the National Council of the Judiciary. Firstly, it should be noted that, by adopting the said resolution, the Supreme Court exceeded its jurisdiction for resolving legal issues arising from discrepancies in courts' jurisprudence (i.e. case law) as to the interpretation of legal provisions and (bearing in mind that the said resolution would have the legal force of a legal principle and thus would bind all adjudicating panels of the Supreme Court, and also – due to the Supreme Court's authority – would indirectly impose an obligation on common and military courts over which the Supreme Court exercises judicial oversight through judicial review) effectuated a kind of "insertion" into

the legal system of norms providing for a new absolute ground of appeal in criminal proceedings as well as a new ground for invalidating civil proceedings. Thus, the Supreme Court resorted to quasi-legislative activity, which is reserved for the legislature, and hence the Court acted outside its jurisdiction. It is worth noting that, in the decision of 21 April 2020 (ref. no. Kpt 1/20, OTK ZU A/2020, item 60; Official Gazette – *Monitor Polski*, item 379), the Constitutional Tribunal held that: "the Supreme Court – also in connection with an international court ruling – has no jurisdiction to provide "a law-making interpretation" of legal provisions which leads to modifications in the legal situation regarding the organisational structure of the judiciary, by means of adopting a resolution referred to in Article 83(1) of the Supreme Court Act of 8 December 2017 (…) on the basis of Art. 10, Art. 95(1), Art. 176(2), Art. 183(2) as well as Art. 187(4) of the Constitution of the Republic of Poland, the introduction of any modifications within that the scope (…) falls within the exclusive ambit of the legislature".

Secondly, the said resolution was eliminated from the legal order, By the Constitutional Tribunal's judgment of 20 April 2020 (ref. no. U 2/20, OTK ZU A/2020, item 61; Official Gazette – *Monitor Polski*, item 376), as the resolution was inconsistent with the Constitution and ratified international agreements. Consequently, it may not be taken into account in courts' jurisprudence (i.e. case law). The said resolution does not constitute (and formally – it could never have constituted), for political authorities, a legal basis for taking measures (actual and legal ones) aimed at undermining the status of the Supreme Court judges appointed by the President of Poland upon the motion of the National Council of the Judiciary constituted under Article 9a of the NCJ Act.

As determined by the Constitutional Tribunal in its decision of 21 April 2020, "in the light of Article 179 in conjunction with Article 144(3)(17) of the Constitution, the appointment of a judge falls within the exclusive competence of the President of the Republic of Poland, which the said President exercises upon a motion of the National Council of the Judiciary, and the President does so single-handedly, irrevocably, and without any involvement or interference on the part of the Supreme Court (…) Article 183 of the Constitution grants no jurisdiction to the Supreme Court to oversee the Polish President's exercise of the competence referred to in Article 179 in conjunction with Article 144(3)(17) of the Constitution, and, in particular, to provide a binding interpretation of provisions which entails specifying the prerequisites of the Polish President's effective exercise of the said competence".

It should be noted that since the provisions of the Constitution do not permit the possibility of the Supreme Court's interference with the Polish President's competence to appoint judges upon a motion of the NCJ, then it is even more apt to assert that such interference is inadmissible on the part of other authorities – especially authorities that are political in nature, i.e. the legislature and the executive.

The aforementioned adopted assumption about the defectiveness of judicial appointments has given rise to subsequent measures and assessment, lacking legal grounds and entailing that:

– firstly, Małgorzata Manowska has not been effectively appointed to the position of First President of the Supreme Court, because the First President of the Supreme Court is to be appointed by the President of Poland from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court (see Art. 183(3) of the Constitution), i.e. only Supreme Court judges may be candidates in that regard. However, as Małgorzata Manowska has been appointed to the office of a Supreme Court judge by the Polish President upon the motion of the National Council of the Judiciary constituted under Article 9a of the NCJ Act, therefore she is not a Supreme Court judge, which in turn implies that the President of Poland could not have entrusted her with the above-mentioned managerial position at the Supreme Court.

– Secondly, Joanna Misztal-Konecka, Joanna Lemańska and Zbigniew Kapiński have not been effectively appointed to the positions of the Supreme Court's Presidents overseeing and managing, respectively, the Civil Chamber, the Extraordinary Review and Public Affairs Chamber, as well as the Criminal Chamber. In the view of political authorities, the appointments to the said managerial positions at the Supreme Court have been ineffective due to the circumstances in which the aforementioned persons were appointed as Supreme Court judges, in an analogous procedure to the one set forth in the previous paragraph with regard to Małgorzata Manowska.

The fact that the Prime Minister has assessed the status of Joanna Misztal-Konecka has been manifested by him by refraining from fulfilling his obligation to publish forthwith, in the Official Gazette of the Republic of Poland – *Monitor Polski*, the Polish President's decision of 26 September 2024 on the appointment of Judge Misztal-Konecka to the position of the Supreme Court's President overseeing and managing the work of the Civil Chamber. However, it needs to be recalled that, pursuant to Article 10(2)(4)(h) of the Act of 20 July 2000

on the Promulgation of Normative Acts and Certain Other Legal Acts (Journal of Laws – Dz. U. of 2019, item 1461; hereinafter: the Act on Promulgation), the Official Gazette of the Republic of Poland – *Monitor Polski* also publishes the official acts of the President of Poland on appointments and dismissals concerning state offices, as specified in the Constitution and statutes. Thus – having regard to the relevant statutory provisions invoked further on herein, when addressing the obligation to publish rulings of the Constitutional Tribunal – it ought to be noted that the legal obligation lies with the Prime Minister to forthwith publish the Polish President's decision to appoint Judge Joanna Misztal-Konecka to the position of the President of the Supreme Court overseeing and managing the work of the Civil Chamber. The said obligation should be fulfilled by Prime Minister Donald Tusk, through the Government Legislation Centre (hereinafter: the GLC), headed by Joanna Kanpińska, the President of the GLC. The failure to forthwith publish an official act of the Polish President – although this does not cause the said act to be invalid or ineffective; nor does this make it impossible for Joanna Misztal-Konecka to oversee and manage the work of the Civil Chamber – constitutes conduct that is contrary to statutory requirements. Indeed, the publisher of an appropriate official journal has no right to assess the legality of an official act of the President of Poland, which also implies that the publisher may not assess, in a legally effective manner, whether a person appointed by the Polish President to the position of the Supreme Court's President has been properly appointed as a judge of that Court. Pursuant to Article 144(3)(23) of the Constitution, the appointing of the Supreme Court's Presidents falls within the scope of presidential prerogatives, and thus the head of state exercises that competence without any involvement of the Prime Minister, i.e. the said presidential act requires no countersignature of the Prime Minister (for the validity of the act; *a contrario*, see Art. 144(2) of the Constitution). In view of the above, it is apt to stress that the promulgation of the aforementioned official act of the head of state constitutes a purely technical action. *Nota bene* it should be noted that the Prime Minister also refrained from fulfilling the obligation to publish the Polish President's decision of 9 December 2024 on the appointment of Judge Bogdan Święczkowski to the position of President of the Constitutional Tribunal. Similarly to the aforementioned case of Judge Joanna Misztal-Konecka, the Prime Minister's conduct which consisted in refraining from action in that regard is, in its nature, totally unlawful and completely discretionary, but it does not void the effects of the Polish President's decision by which he exercised his presidential prerogative under Article 194(2) in conjunction with Article 144(3)(21) of the Constitution.

There is indeed no doubt that in a democratic state ruled by law, where the constitutional order is based on the principle of the separation of and balance between powers, the Prime Minister does not hold the position of a superior (supreme) authority superseding any other state authorities and supervising them in an unlimited, unlawful and discretionary manner. The Prime Minister, just as any other public authority, pursuant to Article 7 of the Constitution, may only function on the basis of, and within the limits of, the law. In other words, the Prime Minister may only do what the law explicitly permits him/her to do. What is of significance is that, in the course of his/her activity, the Prime Minister should act on the basis of the law as it is interpreted in accordance with the canons adopted in the Polish legal culture (the universal rules for the exegesis of the law), and not on the basis of the law interpreted in an arbitrary way, from the standpoint of an authority representing state coercion (from the position of a stronger one), not in the way the Prime Minister currently in office understands the law, or not in the way he would like the law to be.

In the context of the procedure for appointing the Supreme Court's President to oversee and manage the work of the Civil Chamber, what needs to be merely signalled is the Prime Minister's attempt to rescind his countersignature from the Polish President's decision of 17 August 2024 (ref. no. 1131.18.2024) to designate the presiding judge of the assembly of the judges of the Supreme Court's Civil Chamber. Initially, the Prime Minister countersigned the above-mentioned decision of the Polish President, which was then published in the Official Gazette – *Monitor Polski* on 27 August 2024 under item 799. The purpose of the said decision was to designate – on the basis of Article 15(3) in conjunction with Article 13(3) on the Supreme Court Act – Supreme Court Judge Krzysztof Wesołowski to preside over the assembly of the judges of the Supreme Court's Civil Chamber, tasked with selecting candidates for the position of the Supreme Court's President to oversee and manage the work of the Supreme Court's Civil Chamber. Pursuant to Article 144(2) of the Constitution, since the said decision did not constitute the exercise of any of the presidential prerogatives under Article 144(3) of the Constitution, the aforementioned decision – for its validity – required the Prime Minister's countersignature. After the publication of the decision, the Prime Minister announced to the public that his countersigning of the said presidential decision had resulted from the legal service staff's mistake as they had failed to recognise the "political" character of the Polish President's decision, aimed at designating the role of the presiding judge of the aforementioned assembly to the person considered, by political authorities, not to be a Supreme Court judge. Under the pretext of two Supreme Court judges' complaints having been lodged

with the Voivodeship Administrative Court in Warsaw against the presidential decision of 17 August 2024 and against the Prime Minister's countersigning of the said decision, the Prime Minister announced to the public that – by way of "a self-review" of the contested act, he had decided to rescind his countersignature.

What follows from the information provided by the Voivodeship Administrative Court in Warsaw is that: "On 6 September 2024, the Voivodeship Administrative Court in Warsaw received a complaint, lodged by Supreme Court Judges Dariusz Zawistowski and Karol Weitz, against the decision of 17 August 2024, ref. no. 1131.18.2024, issued by the President of the Republic of Poland, to designate the presiding judge of the assembly of the judges of the Supreme Court's Civil Chamber. By the letter of 9 September 2024, pursuant to Article 54(1) and (2) of the Act of 30 August 2002 on Proceedings Before Administrative Courts (Journal of Laws – Dz. U. of 2024, item 935), the said complaint was referred to the President of the Republic of Poland, for the said President to respond to the complaint. By the letter of 18 September 2024, the complainants withdrew their complaint and requested that the proceedings be discontinued, indicating that on 9 September 2024 the Prime Minister fully granted their complaint against his countersignature. The President of the Republic of Poland, in his response to the complaint, requested that the complaint be dismissed as inadmissible. In its ruling of 29 October 2024, the Voivodeship Administrative Court in Warsaw dismissed as inadmissible the complaint of Supreme Court Judges Dariusz Zawistowski and Karol Weitz against the decision of 17 August 2024, issued by the President of the Republic of Poland, to designate the presiding judge of the assembly of the judges of the Supreme Court's Civil Chamber, holding that the aforementioned decision of the Polish President did not fall within the realm of public administration over which administrative courts had jurisdiction, but it exclusively constituted an official act that was organisational in nature – as it was related to the internal organisation of the Supreme Court" (see WSA w Warszawie rozpatrzył skargę na postanowienie Prezydenta Rzeczypospolitej Polskiej w sprawie wyznaczenia przewodniczącego zgromadzenia sędziów Izby Cywilnej Sądu Najwyższego. - Wojewódzki Sąd Administracyjny w Warszawie; accessed 24 January 2025).

Moreover, the Voivodeship Administrative Court in Warsaw informed that: "On 10 October 2024, it was noted that the Court had received the complaint of Supreme Court Judges Dariusz Zawistowski and Karol Weitz against the Prime Minister's countersigning of the decision of 17 August 2024, ref. no. 1131.18.2024, issued by the President of the Republic of Poland, to designate the presiding judge of the assembly of the judges of the Supreme Court's

Civil Chamber. With reference to the complaint, the Prime Minister submitted his response thereto, in which he requested that the case be referred for consideration in simplified proceedings and that the administrative-court proceedings be discontinued, indicating that on 9 September 2024 he had rescinded his countersignature from the Polish President's decision of 17 August 2024 to designate the presiding judge of the assembly of the judges of the Supreme Court's Civil Chamber as well as he had refused to countersign the aforementioned decision of the President of the Republic of Poland. In its ruling of 31 October 2024, the Voivodeship Administrative Court in Warsaw dismissed as inadmissible the complaint of Supreme Court Judges Dariusz Zawistowski and Karol Weitz against the Prime Minister's countersigning of the decision of 17 August 2024, ref. no. 1131.18.2024, issued by the President of the Republic of Poland, to designate the presiding judge of the assembly of the judges of the Supreme Court's Civil Chamber, holding that the Prime Minister's countersigning of an official act of the President of Poland did not, in any way, constitute a determination of an administrative case by shaping the legal situation of the addressee in a direct and legally effective manner, which in turn ruled out the possibility of categorising the Prime Minister's countersignature not only as a decision but also as an act or an action, as referred to in Article 3(2)(4) of the Act of 30 August 2002 on Proceedings Before Administrative Courts (Journal of Laws – Dz. U. of 2024, item 935). Consequently, this meant that the Prime Minister's countersigning of an official act of the Polish President fell outside the jurisdiction of administrative courts, and a complaint in that regard was subject to dismissal as inadmissible, pursuant to Article 58(1)(1) of the Act on Proceedings Before Administrative Courts (see Postanowienie WSA w Warszawie w sprawie kontrasygnaty Prezesa Rady Ministrów wobec postanowienia Prezydenta RP w przedmiocie wyznaczenia przewodniczącego zgromadzenia sędziów Izby Cywilnej Sądu Najwyższego. - Wojewódzki Sąd Administracyjny w Warszawie; accessed 24 January 2025).

Irrespective of the above assessment arrived at by the Voivodeship Administrative Court in Warsaw with regard to the inadmissibility of the aforementioned complaints, it ought to be firmly emphasised that, in the light of Polish constitutional law, it is not admissible for the Prime Minister to rescind (or alternatively withdraw) the countersignature where the Prime Minister has already countersigned the relevant official act of the President of Poland, and the said act has already been published in an appropriate official journal. Whereas one may agree with the assumption about the admissibility of refusal to countersign a specific official act (in particular, where the issuance of such an act by the President of Poland is not mandatory,

but is optional), however, one may not accept the view about the Prime Minister's possibility of "rescinding" the countersignature that has already been given. In particular, the basis for this may not be found by applying – *mutatis mutandis* – legal provisions on proceedings before administrative courts, namely the provisions on the so-called "self-review". The matter of the countersignature has been regulated at the constitutional level, and thus only the Constitution could regulate a procedure for rescinding the countersignature.

Although the actions of the Prime Minister and the Supreme Court judges who filed the complaints with the Voivodeship Administrative Court in Warsaw did not result in eliminating the legal effects of the Polish President's decision of 17 August 2024 (ultimately the selection assembly of the Civil Chamber was held, and the President of Poland was presented with the candidates selected for the position of the Supreme Court's President to oversee and manage the work of the Civil Chamber, from among whom the President of Poland designated Judge Joanna Misztal-Konecka), nevertheless the Prime Minister's activity (a failed attempt) undermined the stability of the legal security the Republic of Poland.

Additionally, it should be noted that the judicial status of Judge Zbigniew Kapiński, the Supreme Court's President overseeing and managing the work of the Criminal Chamber, was undermined by the Public Prosecutor-General and the present top management of the National Prosecution Service, with relation to the fact that the Supreme Court, with the involvement of Judge Kapiński, had issued the resolution of 27 September 2024 (ref. no. I KZP 3/24) on the interpretation of the provisions constituting the legal grounds for the return of Public Prosecutor Dariusz Barski to active service in 2022, who had, after the said return, been appointed to the position of First Deputy Public Prosecutor-General – the National Prosecutor.

The above-mentioned resolution of the Supreme Court read as follows: "The provisions of Article 47(1) and (2) of the Act of 28 January 2016 – the Introductory Provisions to the Public Prosecution Service Act (Journal of Laws – Dz. U. of 2016, item 178, as amended) neither are of episodic nature, nor do they specify a temporal limitation to their binding force. The said provisions are systemic in nature, and remain binding until their possible repeal carried out in accordance with the law. This entails that a public prosecutor who is retired on the day of the entry into force of the aforementioned Act may, upon his/her request, return to his/her last held position or to an equivalent one. This right is not merely granted to the public prosecutors who have retired for health reasons. A public prosecutor who has exercised the right becomes a public prosecutor remaining in active service. The Public Prosecutor-General's decisions taken on the above-mentioned legal basis may not be regarded as defective, non-

binding, or devoid of legal effects. Consequently, due to the fact that the adoption of the relevant decision on the return of the retired public prosecutor to active service, under Article 47(1) and (2) of the Act of 28 January 2016 – the Introductory Provisions to the Public Prosecution Service Act (Journal of Laws – Dz. U. of 2016, item 178, as amended), and that the subsequent appointment of the said prosecutor (by the Prime Minister, upon the motion of the Public Prosecutor-General) to the position of First Deputy Public Prosecutor-General – the National Prosecutor, were both based on the binding legal norms regulating the constitutional order, hence the said appointment was legally effective". In view of the effective appointment of Dariusz Barski to the position of National Prosecutor (confirmed by the Supreme Court), a change of the person holding that position – consisting in the recall of the National Prosecutor and the appointment of his successor – required applying the procedure set out in Article 14(1) of the Public Prosecution Service Act of 28 January 2016 (Journal of Laws – Dz. U. of 2024, item 390). The non-application of the said procedure resulted in an ineffective attempt at appointing Public Prosecutor Dariusz Korneluk to the non-vacant position of National Prosecutor. Even if it had been assumed – prior to the adoption of the Supreme Court's resolution of 27 September 2024 – that the Public Prosecutor-General and the Prime Minister had aptly claimed that they had effectively changed the person holding the position of National Prosecutor, then, after the date of the adoption of the resolution, they were obliged take restitutive measures, restoring the lawful top management of the National Prosecution Service. In fact, on the contrary, the Prime Minister, the Public Prosecutor-General, and Public Prosecutor Dariusz Korneluk regarded the resolution of 27 September [2024] as non-existent. In a press release signed by the spokesperson of the National Prosecution Service, it was stated that: "At a sitting on 6 March 2024, the District Court for the District of Gdańsk-Południe in Gdańsk, having considered the received complaint, deemed that, in the context of the case, a question of law had arisen which required a substantial interpretation of a relevant statute. Pursuant to Article 441(1) of the Criminal Procedure Code, the District Court decided to make a referral to the Supreme Court for it to resolve the legal question concerning, *inter alia*, the interpretation of the provisions of Article 47(1) and (2) of the Act of 28 March 2016 – the Introductory Provisions to the Public Prosecution Service Act, as to the possibility of holding the position of National Prosecutor by Public Prosecutor Dariusz Barski. The case was registered in the Supreme Court under ref. no. I KZP 3/24. The case was to be considered by Zbigniew Kapiński, Marek Siwek and Igor Zgoliński. Those persons had been appointed to hold judicial offices in the Supreme Court by the President of Poland as a result of a defective procedure – i.e. upon the motion of the National Council of the Judiciary constituted

under the Act of 8 December 2017. Therefore, those persons lack impartiality and independence, which in turn entails that the Supreme Court with their involvement lacks the status of an independent court within the meaning of Articles 45, 173 and 178 of the Constitution, as well as Article 6 of the European Convention on Human Rights, and Article 47 of the EU Charter of Fundamental Rights. The procedure for appointing judges on the basis of the said Act has been the subject of rulings issued by the Supreme Court and international courts. The most crucial of which are: the resolution of 23 January 2020 by the joined Civil, Criminal, and Labour and Social Security Chambers of the Supreme Court; as well as the resolution of 2 June 2022 (ref. no. I KZP 2/22) by the adjudicating panel of 7 judges of the Supreme Court. Taking the above into account, the public prosecutor on two occasions (on 13 and 27 September 2024) moved for the recusal of Zbigniew Kapiński, Marek Siwek, and Igor Zgoliński, due to the fact that the Court with their involvement did not constitute an independent and impartial court. The said motions were left unconsidered. None of those motions for recusal were considered by a properly appointed judge. For the above reasons, the stance presented today in the case ref. no. I KZP 3/24 does not constitute the Supreme Court's resolution within the meaning of Article 441 of the Criminal Procedure Code. The said stance has no legal effects, as it has been adopted by unauthorised persons" (see Oświadczenie Prokuratury Krajowej w sprawie dzisiejszego stanowiska wyrażonego w Sądzie Najwyższym - Prokuratura Krajowa - Portal Gov.pl; accessed 24 January 2025).

Thus, the public prosecution service headed by Public Prosecutor-General Adam Bodnar has granted itself the right to assess the status of the judges making up the adjudicating panel and, as a result, it deemed that the ruling of the Court had no legal effects. Such conduct is obviously contrary to the provisions of the law, for the public prosecution service (*nota bene* represented in those proceedings before the Supreme Court) has no competence to assess the status of judges making up an adjudicating panel of a court. The above conclusion about the inadmissibility of the public prosecution service's assessment of the status of the judges adopting the resolution is not affected by the circumstance that the said resolution was issued due to the consideration of a question of law referred by the particular court on the basis of Article 441(1) of the Criminal Procedure Code, and thus – pursuant to para 3 of that provision – the resolution is binding in that particular case. Indeed, formally, only the court referring a question of law is obliged to adhere to the interpretation of the law arrived at in the resolution of 27 September 2024 (also, the said resolution does not have the legal force of a legal principle, as it was issued by the adjudicating panel of 3 judges). Nevertheless,

the adoption of the Supreme Court's resolution may not be regarded as being of no consequence to the practice of applying the law in similar cases. Moreover, the formal limitation – in the light of Article 441(3) of the Criminal Procedure Code – to the binding character of the resolution (the interpretation of the law arrived at therein) may not lead to the assumption that the persons who are at present actually in charge of the National Prosecution Service may carry out assessment as to whether there were any defects in judicial appointments to the Supreme Court.

To sum up the above, in the view of political authorities, the Supreme Court is composed of improperly appointed judges – the so-called neo-judges (who make up a majority of the Supreme Court judges), and the Court is also overseen and managed by persons who lack legitimacy in that respect. Consequently, in the opinion of political authorities, what may be regarded as the Supreme Court is only those adjudicating panels of the Court that are fully made up of the judges appointed by the President of Poland upon the motion of the National Council of the Judiciary whose 15 judge-members were not selected by the Sejm on the basis of Article 9a of the NCJ Act. The other adjudicating panels of the Court are not regarded as the Supreme Court, and the approach of political authorities is that any rulings issued by those Supreme Court panels are bypassed.

1.2. Political authorities also undermine the Supreme Court's internal organisational structure set forth in the Act of 8 December 2017 (Journal of Laws – Dz. U. of 2024, item 622; hereinafter: the Supreme Court Act), as well as the constitutional and statutory position of the Supreme Court's Extraordinary Review and Public Affairs Chamber. The above has arisen from the following circumstances:

– firstly, the Supreme Court's Chamber of Extraordinary Review and Public Affairs is composed only of judges appointed by the President of Poland upon the motion of the National Council of the Judiciary constituted under Article 9a of the NCJ Act;

– secondly, the work of the said Chamber is overseen and managed by Joanna Lemańska, who – in the view of political authorities – has not been effectively appointed to the office of a judge of the Supreme Court, and consequently also to the position of the Supreme Court's President;

– thirdly, the Extraordinary Review and Public Affairs Chamber meets the criteria of a constitutionally prohibited "special court", which is claimed to be caused by the special

jurisdiction which makes the said Chamber competent to adjudicate on cases concerning matters of utmost importance and on cases of "political nature" (considering extraordinary appeals, examining election cases, considering complaints to determine the unlawfulness of final court rulings if the alleged unlawfulness consists in undermining the status of a person appointed to hold a judicial office who has issued the contested ruling – for more, see Art. 26 of the Supreme Court Act; resolving legal questions pertaining to the independence of a judge or a court – for more, see Art. 82 of the Supreme Court Act).

At this point it is worth noting that, in the legal order, there is no judgment of the Constitutional Tribunal declaring that the legal norms pertaining to the Extraordinary Review and Public Affairs Chamber, as well as to the judges adjudicating in that Chamber, are inconsistent with higher-level legal norms. By contrast, the rulings of international courts (the ECtHR and the CJEU) – issued with regard to the Extraordinary Review and Public Affairs Chamber as well as, generally, with regard to the Supreme Court judges appointed by President Andrzej Duda upon the motion of the NCJ constituted under Article 9a of the NCJ Act – may not create a legal basis for undermining the systemic position of that Chamber and the status of the judges of the Chamber, because international courts have no competence to adjudicate with a legal effect for the organisation of the judicial branch of government in the Republic of Poland.

Since 13 December 2023, the undermining of the systemic position of the Extraordinary Review and Public Affairs Chamber as the Supreme Court, as well as the status of the judges adjudicating in that Chamber, has been manifested in the following publicly known cases:

– Firstly, Szymon Hołownia, the Marshal of the Sejm (in the current (10th) parliamentary term), ignored two decisions of the Supreme Court's Chamber of Extraordinary Review and Public Affairs, dated 4 January 2024 (ref. no. I NSW 1268/23) and 5 January 2024 (ref. no. I NSW 1267/23), which had set aside the said Marshal's decisions determining the expiry of the parliamentary mandates, respectively, of Maciej Wąsik MP and Mariusz Kamiński MP. Contrary to the Supreme Court's rulings, the Marshal of the Sejm maintained his stance that the mandates of the aforementioned MPs had expired, and consequently he kept preventing them from participating in the Sejm's work. In fact, until the date of the actual expiry of the said mandates, due to the election of Mariusz Kamiński and Maciej Wąsik as European Parliament members, the Marshal of the Sejm did not implement the Supreme Court's decisions of 4 and 5 January 2024. The said Marshal's non-implementation of the Supreme Court's decisions constituted a flagrant breach of law.

The Marshal of the Sejm expressed his assessment of the status of the Extraordinary Review and Public Affairs Chamber, and the status of the judges adjudicating therein, already at the stage of referring the MPs' complaints against his decisions on the expiry of their parliamentary mandates to the Supreme Court. Indeed, the Marshal of the Sejm referred those complaints to the Labour and Social Security Chamber, which had no jurisdiction in such matters. As noted by the Constitutional Tribunal, "contrary to the explicit wording of the binding provisions the Supreme Court Act specifying the jurisdiction *ratione materiae* of the particular chambers of the Supreme Court, as well as contrary to the express indication of the competent court in the complaints filed by the said MPs, Mariusz Kamiński and Maciej Wąsik, the Marshal of the Sejm still referred the MPs' complaints directly to the Labour and Social Security Chamber, which had no jurisdiction in that respect, bypassing the Supreme Court's office for the service of procedural documents" (the Constitutional Tribunal's judgment of 26 November 2024, ref. no. K 14/24, OTK ZU A/2024, item 121).

The said Marshal's non-implementation of the Supreme Court's decisions of 4 and 5 January 2024 – which consisted in persistently preventing the aforementioned MPs from exercising their mandates – constitutes the reason why the Constitutional Tribunal has already adjudicated three times on the unconstitutionality of acts adopted by the Sejm during its current (10th) parliamentary term (see the cases ref. nos. K 7/24, U 4/24, and K 14/24).

– Secondly, the Minister of Finance has not implemented the National Electoral Commission's resolution no. 421/2024 of 30 December 2024 on the financial statements of the electoral committee of the Law and Justice Party with regard to the elections to the Sejm and Senate of the Republic of Poland held on 15 October 2023. By way of implementing the Supreme Court's decision of 11 December 2024 (ref. no. I NSW 55/24), the National Electoral Commission decided to accept the financial statements of the electoral committee of the Law and Justice Party, concerning the committee's cash flows and liabilities, including obtained bank loans and the terms of those loans with regard to participation in the elections to the Sejm and Senate of the Republic of Poland held on 15 October 2023 (§ 1).

What follows from the publicly available information furnished by representatives of political authorities is that the non-implementation of the aforementioned resolution has arisen from the non-recognition of the Extraordinary Review and Public Affairs Chamber as the Supreme Court, where the said Chamber – in its decision of 11 December 2024 (ref. no. I NSW 55/24) – granted, as well-founded, the complaint of the electoral committee of the Law and Justice Party against the National Electoral Commission's resolution

no. 316/2024 of 29 August 2024 on the financial statements of the electoral committee of the Law and Justice Party pertaining to the elections to the Sejm and Senate of the Republic of Poland held on 15 October 2023. The contested resolution of the National Electoral Commission rejected the financial statements of the said committee concerning its cash flows and liabilities, including obtained bank loans and the terms of those loans with regard to participation in the indicated elections. Due to the Supreme Court's issuance of its decision of 11 December 2024, the National Electoral Commission was – pursuant to Article 145(6) of the Electoral Code – obliged to forthwith decide on the acceptance of the financial statements in question. Then, it was the duty of the Minister of Finance to transfer the relevant subsidy, in the full amount, to the Law and Justice Party (see the letter of 30 December 2024 from the Chairman of the National Electoral Commission to the Minister of Finance). At this point, it needs to be emphasised that, although the Minister of Finance's action of implementing the National Electoral Commission's resolution of 30 December 2024 was merely "of technical and accounting nature", the Minister did not implement the resolution forthwith. Instead, the Minister has been conducting correspondence with the National Electoral Commission, so as to clarify alleged ambiguities in the content of the resolution of 30 December 2024 (see Treść_pisma_Ministra_Finansów_do_PKW.pdf and Treść_pisma_Ministra_Finansów_do_PKW_15012025.pdf; accessed 24 January 2025).

It may not be ruled out that the above-described conduct of the Minister of Finance was caused by the Council of Ministers' adoption of its resolution of 18 December 2024 (also referred to further on herein, in the context of remarks on the Constitutional Tribunal and the National Council of the Judiciary). Pursuant to § 2(2) of the resolution of 18 December 2024: "[T]he actions taken in the years 2018-2023 in the process of appointing judges to the Supreme Court manifested a total disregard for the authority, independence, and role of the judiciary. As a result, the Supreme Court – adjudicating via panels which include a person appointed to a judicial office by the President of the Republic of Poland upon the motion of the National Council of the Judiciary, constituted under the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other statutes – may not be regarded as 'an independent and impartial court' within the meaning of the Constitution of the Republic of Poland as well as 'a tribunal established by law' within the meaning of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In the judgment of 7 November 2024 issued in the case of *C.A. S.A. and Others v. Prezes Urzędu Ochrony Konkurencji i Konsumentów* [*the President of the Office of Competition*

and Consumer Protection], case C-326/23, the Court of Justice of the European Union did not consider, dismissing as inadmissible, the request for a preliminary ruling made by the Supreme Court's Civil Chamber, sitting as a single judge who had been appointed to the Supreme Court upon the motion of the National Council of the Judiciary after 2018". In § 2(5) of its resolution, the Council of Ministers stated as follows: "The Supreme Court – adjudicating via panels which include a person appointed to a judicial office by the President of the Republic of Poland upon the motion of the National Council of the Judiciary, constituted under the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other statutes – does not meet the requirements of independence and impartiality. For this reason, the Council of Ministers deems it necessary to take actions aimed at resolving the systemic problems arising from the Supreme Court's rulings issued by the Court's questionable adjudicating panels".

Refraining from the substantive assessment of the Council of Ministers' stance as to its aptness, at this point it should merely be noted that the resolution of 18 December 2024 may not constitute, for the Minister of Finance, a legal basis for exempting him from the statutory duty to implement the National Electoral Commission's resolution 30 December 2024 (see Art. 150(6) in conjunction with Art. 150(1) of the Electoral Code).

Indeed, legal acts of an internal character may not introduce an exemption from statutory duties for public officials. Statutory duties may only be eliminated by statute.

Moreover, it ought to be recalled – by analogy to the remarks on the National Council of the Judiciary – that § 2(7) of the resolution of 18 December 2024 may not constitute, for the publisher of an official journal, a legal basis for annotating the published rulings of the Supreme Court with the following note: "In accordance with the judgments of the European Court of Human Rights in the cases: *Wałęsa v. Poland* (application no. 50849/21), *Reczkowicz v. Poland* (application no. 43447/19), *Dolińska-Ficek and Ozimek v. Poland* (applications nos. 49868/19 and 57511/19), *Advance Pharma sp. z o.o. v. Poland* (application no. 1469/20), and *Grzęda v. Poland* (application no. 43572/18), as well as in accordance with the case law of the Court of Justice of the European Union, including the judgement of 21 December 2023, *L.G. v. Krajowej Radzie Sądownictwa* [*the National Council of the Judiciary*], case C-718/21, as well as the judgment of 7 November 2024, *C.A. S.A. and Others v. Prezes Urzędu Ochrony Konkurencji i Konsumentów* [*the President of the Office of Competition and Consumer Protection*], case C-326/23, the National Council of the Judiciary, constituted under the provisions of the Act of 8 December 2017 amending the Act on the National Council of the

Judiciary and certain other statutes (Journal of Laws – Dz. U. of 2018, item 3) does not provide guarantees of independence from the legislature and the executive, and also the irregularities in the process of appointing judges entails that the Supreme Court – adjudicating via panels which include a person appointed to a judicial office by the President of the Republic of Poland upon the motion of the National Council of the Judiciary, constituted under the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other statutes – may not be regarded as 'a tribunal established by law'.".

It should be firmly stressed that if a statutory provision stipulates that a specific ruling of the Supreme Court is to be promulgated (e.g. Art. 244(6) of the Electoral Code) in an official journal, the publisher of the said journal is obliged to publish the ruling forthwith, in accordance with the Act on Promulgation. The legislation in force does not provide for the possibility of annotating a published ruling with any notes that the publisher of the relevant official journal deems to be justified, or even based on a legal act of an internal character such as the Council of Ministers' resolution.

1.3. At this point once again attention should be drawn to effects for the continuity of state power which may – within the scope of the process of the 2025 presidential election – be brought about by any further undermining of the systemic position of the Supreme Court's Extraordinary Review and Public Affairs Chamber as well as the status of judges adjudicating therein.

Pursuant to Article 129(1) of the Constitution, the Supreme Court adjudicates on the validity of the election of the President of the Republic. A voter has the right to submit a complaint to the Supreme Court concerning the validity of the election of the President of the Republic in accordance with relevant rules specified by statute (see Art. 129(2) of the Constitution). Should the Supreme Court deem that the presidential election is invalid, a new election will be held in accordance with the procedure set out in Article 128(2) in relation to a vacancy in the office of President of the Republic (see Art. 129(3) of the Constitution). The Constitution does not determine whether a resolution on the validity of a presidential election must be adopted prior to admitting the president-elect to take, before the National Assembly, the oath of office specified in Article 130 of the Constitution. Indeed, the President of the Republic of Poland assumes office "upon taking the following oath in the presence of the National Assembly: 'Assuming, by the will of the Nation, the office of President of the Republic of Poland, I do solemnly swear to be faithful to the provisions of the Constitution; I pledge that I shall steadfastly safeguard the dignity of the Nation, the independence and security of the

State, and also that the good of the Homeland and the prosperity of its citizens shall forever remain my supreme obligation'. The oath may also be taken with the additional sentence 'So help me, God'." Pursuant to Article 128(1) of the Constitution, the term of office of the President of Poland commences on the date when s/he assumes the office.

What further specifies the constitutional regulation is Article 324 of the Electoral Code. Pursuant to § 1 thereof, on the basis of the election report submitted by the National Electoral Commission and after considering any complaints, the Supreme Court determines the validity of the election of the President of the Republic. In the case referred to in § 1, the Supreme Court adjudicates, sitting as a panel composed of the judges of the entire competent chamber (§ 1a). The Supreme Court adopts a resolution in the case referred to in § 1 within 30 days from the date the election results are made public by the National Electoral Commission, at a sitting in the presence of the Public Prosecutor-General and the Chairman of the National Electoral Commission (§ 2). The resolution of the Supreme Court is to be presented forthwith to the Marshal of the Sejm, as well as sent to the National Electoral Commission and published in the Journal of Laws of the Republic of Poland (§3).

Leaving aside the issue of whether it is constitutionally admissible to assume the office by the Polish President before the Supreme Court adopts its resolution on the validity of the presidential election, it should be indicated that Article 324 of the Electoral Code, in its § 2, provided a specific time-limit for the adoption of the resolution, i.e. within 30 days from the date the election results are made public by the National Electoral Commission. Taking into account that the Marshal of the Sejm has ordered the presidential election for 18 May 2025, if another round of voting is necessary, the Nation will vote on 1 June 2025 (the date of the so-called 2nd round of the presidential election). Assuming that the National Electoral Commission will announce the election results after 2 to 3 days from the date of voting at the latest (namely, in early June; in 2020, the official results of the 2nd round of the presidential election held on 12 July 2020 were announced by the National Electoral Commission the following day), the deadline for adopting a resolution under Article 324 of the Electoral Code will expire at the beginning of July, which will be about a month before the day on which the president-elect should take the oath of office before the National Assembly (i.e. 6 August 2025). Any possible undermining of the legality of the adoption of the aformentioned resolution by the Supreme Court's Extraordinary Review and Public Affairs Chamber in the period of July-August 2025 can bring about systemic and social effects which are difficult to forsee, in

terms of destabilising the state situation and public order, as well as deepening social polarisation.

The continuation of actions undermining the the systemic status (as derived from legal norms regulating the constitutional order) assigned to the Supreme Court's Extraordinary Review and Public Affairs Chamber may result in legal chaos as regards the president-elect's assumption of office. If it is assumed that the adoption of the resolution on the validity of the presidential election is indispensable for the swearing-in of the president (and this is indicated by the time-limit set out in Article 324(2) of the Electoral Code, as the time-limit expires long before the day on which the president-elect takes office – *nota bene* this time-limit is much shorter than the time-limit for adopting a resolution on the validity of elections to the Sejm and the Senate, as well as to the European Parliament, where the relevant resolution is to be adopted no later than on the 90th day after the election day, i.e. in practice already after the commencement of the new term of office of a particular parliamentary assembly, e.g. the resolution on the validity of the 2023 elections to the Sejm and the Senate was adopted on 11 January 2024, where the parliamentary term of the Sejm had commenced on 13 November 2023; see Art. 244(1) and (2), Art. 244(1) and (2) in conjunction with Art. 258 and Art. 244(1) and (2) in conjunction with Art. 336 of the Electoral Code), any failure to adopt the said resolution within the statutory time-limit, or political authorities' non-recognition of the resolution adopted by the Supreme Court's Extraordinary Review and Public Affairs Chamber as a resolution referred to in Article 129 of the Constitution, will have far-reaching systemic consequences; also, this may be taken advantage in the particular interests of stakeholders playing a political game who, because of being dissatisfied with the election outcome, will – by invoking the requirement to ensure the validity of the election in accordance with the Constitution – manage to contest the voters' verdict, which is favourable to their political opponents.

Such a state of affairs will lead to Poland leaving the group of democratic states ruled by law.

Improper or no publication of the Constitutional Tribunal's judgments, combined with the undermining of the status of legally appointed judges of the Tribunal

2. Immediately after the new government was formed on 13 December 2023, executive authorities, in their activities, developed a practice which consisted in annotating selected

rulings of the Constitutional Tribunal with additional "notes", thus indicating alleged defectiveness of the Constitutional Tribunal's panel adjudicating on a particular case. Subsequently, executive authorities' approach became more radical – namely, they refrained from fulfilling the obligation to publish judgments of the Constitutional Tribunal. The factual circumstances surrounding the non-publication of rulings (or publication with "notes") were as follows.

2.1. On 18 December 2023, Maciej Berek (Minister – a member of the Council of Ministers, Chairman of the Permanent Committee of the Council of Ministers) informed the public that selected rulings of the Constitutional Tribunal would be published with "an appropriate note" (see Maciej Berek (@MaciejBerek) / the X platform; accessed 22 January 2025).

Evidence: printout of an excerpt from Maciej Berek's account on the X platform (annex no. 1).

On the same day, the Constitutional Tribunal's judgment of 5 December 2023, ref. no. P 2/17, was published in the Journal of Laws of the Republic of Poland (Journal of Laws – Dz. U. of 2023, item 2698). Between the indication of the item under which the judgment was published and the first line of the judgment's operative part, the following note was inserted: "In accordance with the judgments of the European Court of Human Rights in the cases *Xero Flor v. Poland* (dated 7 May 2021, application no. 4907/18), *Wałęsa v. Poland* (dated 23 November 2023, application no. 50849/21), and *M.L. v. Poland* (dated 14 December 2023, application no. 40119/21), the Constitutional Tribunal lacks the attributes of a tribunal established by law when an adjudicating panel of the Constitutional Tribunal includes an unauthorised person. In the light of the afomentioned rulings [of the ECtHR], the Constitutional Tribunal's judgment published below was issued by the adjudicating panel composed in breach of the fundamental principle applicable to the process of selecting judges to the Constitutional Tribunal, and thus this violates the essence of the right to a tribunal established by law".

Evidence: printout of the published version of the Constitutional Tribunal's judgment of 5 December 2023, ref. no. P 2/17 (annex no. 2).

Equivalent notes were also inserted into subsequent judgments of the Constitutional Tribunal, namely the judgments of:

a) 11 December 2023, ref. no. K 8/21 (Journal of Laws – Dz. U. of 2023, item 2735);
b) 11 December 2023, ref. no. Kp 1/23 (Official Gazette – *Monitor Polski*, M. P. of 2023, item 1468);
c) 18 January 2024, ref. no. K 29/23 (Journal of Laws – Dz. U. of 2024, item 960).

Evidence: printouts of the published versions of the Constitutional Tribunal's judgments of: 11 December 2023, ref. no. K 8/21; 11 December 2023, ref. no. Kp 1/23; 18 January 2024, ref. no. K 29/23 (annex no. 3).

The other judgments from December 2023 (issued in the cases ref. nos.: SK 110/20, P 20/19, P 12/20, and SK 109/20) as well as the judgment from January 2024 (issued in the case ref. no. K 23/23) were published in their original versions.

The last published judgment of the Constitutional Tribunal was its judgment of 27 February 2024, ref. no. SK 90/22. It was published in the Journal of Laws on 4 March 2024, under item 300.

The subsequent rulings of the Constitutional Tribunal were not published (as determined on the date of filing this notification; those were the judgments issued in the cases with the following ref. nos.: SK 123/20, SK 59/21, U 1/24, K 27/23, U 5/24, SK 140/20, SK 22/21, K 7/24, K 13/20, K 8/24, U 4/24, K 15/23, K 2/24, P 3/23, SK 58/22, SK 67/20, U 2/24, P 11/24, SK 13/24, K 14/24, U 10/24 oraz SK 89/19 – a total of 22 rulings).

Evidence: transcript from the hearing of the notifying person

It ought to be noted that initially the judgment ref. no. SK 123/20 was included in the register of documents awaiting publication, which is run by the Government Legislation Centre. Moreover, it was also indicated when the judgment would be published at the latest. Ultimately, however, the judgment was removed from the register. What is worth noting is that none of the other indicated judgments was included in the register.

The President of the Constitutional Tribunal on a number of occasions appealed to the Prime Minister and the President of the Government Legislation Centre to publish the rulings of the Tribunal in accordance with legal provisions.

Evidence:

- letter of 27 January 2025 from the President of the Constitutional Tribunal to the Prime Minister (annex no. 4);

- transcript from the hearing of the notifying person

2.2. At this point, it should be noted that the actions of the public authorities managing the relevant official journals (i.e. the Journal of Laws and the Official Gazette – *Monitor Polski*) – which consisted in annotating selected judgments of the Constitutional Tribunal with "appropriate notes" and, ultimately, in refraining completely from fulfilling the obligation to publish the Constitutional Tribunal's rulings forthwith – lack legal grounds.

Pursuant to Article 190(2) of the Constitution: "Judgments of the Constitutional Tribunal regarding matters specified in Article 188, shall be required to 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*". The matters specified in Article 188 comprise adjudicating with regard to the following: (1) the conformity of statutes and international agreements to the Constitution; (2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute; (3) the conformity of legal provisions issued by central state athorities to the Constitution, ratified international agreements and statutes; (4) the conformity to the Constitution of the purposes or activities of political parties; (5) constitutional complaints.

The constitutional regulation with regard to the publication of the Constitutional Tribunal's rulings is further specified in more detail in the aforementioned Act on Promulgation, which sets out the rules and procedure for publishing normative acts and certain other legal acts, as well as the rules and procedure for publishing official journals. Pursuant to Article 2(1) of the Act on Promulgation, "[t]he publication of a normative act in an appropriate official journal shall be mandatory", while Article 3 of the said Act provides that normative acts are to be published forthwith.

Normative acts and other legal acts subject to publication shall be published in the form of an electronic document within the meaning of the Act of 17 February 2005 on the digitalisation of the activity of entities assigned with the performance of public tasks (Journal of Laws of 2019, items 700, 730 and 848), unless otherwise provided by statute. Official journals are to be published in electronic forms, unless otherwise provided by statute.

For each official journal published in an electronic form, the publisher is required to maintain a separate website (see Art. 2a of the Act on Promulgation).

Pursuant to Article 9(1)(6) of the Act on Promulgation, rulings of the Constitutional Tribunal concerning normative acts published in the Journal of Laws are also to be published in the Journal of Laws; by contrast, Article 10(1)(4) of the Act on Promulgation requires that the Constitutional Tribunal's rulings concerning normative acts published in the Official Gazette – *Monitor Polski* or normative acts which have not been promulgated are to be published the Official Gazette – *Monitor Polski*. Also, decisions of the Constitutional Tribunal to determine whether or not there exists an impediment to the exercise of the office by the President of the Republic and to entrust the Marshal of the Sejm with the temporary performance of the duties of the President of the Republic of Poland, as well as Constitutional Tribunal's decisions to resolve disputes over powers between central constitutional authorities of the state are also required to be published in the Official Gazette – *Monitor Polski* (see, respectively, Art. 10(2)(5) and (6) of the Act on Promulgation).

Moreover, the Constitutional Tribunal's rulings on normative acts of the authority publishing a relevant official journal and of the central offices the said authority supervises, as well as the Council of Ministers' resolutions revoking orders of the minister publishing a relevant official journal, are to be published in the official journals of the ministers in charge of government administration departments and in the official journals of central offices (see Art. 12(1)(3) in conjunction with (1) and (2) of the Act on Promulgation).

Pursuant to Article 15(1) of the Act on Promulgation, "[t]he basis for the publication of a normative act or another legal act shall be an act in the form of an electronic document with a qualified electronic signature of the authority that is competent to issue the act". If the published act is a ruling, the basis for the publication thereof is a copy of the ruling in the form of an electronic document, certified as a true copy of the original, and affixed with a qualified electronic signature of a person authorised to prepare the said copy, as well as a copy of the ruling in the form of a paper document (see Art. 15(4) of the Act on Promulgation). In the case of a ruling, the note certifying that a given copy is a true copy of the original, as referred to in para 4, also includes the indication of the institution and the names and surnames of the members of the adjudicating panel who have issued and signed the ruling, as well as a mention of any dissenting opinions submitted by the judges, where applicable (see Art. 15(5) of the Act on Promulgation).

In accordance with Article 21(1)(1) of the Act on Promulagtion, the Journal of Laws and the Official Gazette – *Monitor Polski* are published by the Prime Minister, with the assistance of the Government Legislation Centre, where the said Centre may commission specialised entities to perform certain activities related to the publication of those official journals in the manner specified in Article 2a(2), i.e. in an electronic form, unless otherwise provided by statute.

Reference to the Act on Promulgation is made in Article 114(1) of the Act of 30 November 2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal (Journal of Laws – Dz. U. of 2019, item 2393; hereinafter: the Act on the Organisation of the Constitutional Tribunal), which stipulates that the rulings of the Tribunal are published in an appropriate official journal in accordance with the rules and procedure laid down in the Constitution and in the Act on Promulgation.

Article 14a of the Act of 8 August 1996 on the Council of Ministers (Journal of Laws – Dz. U. of 2024, item 1050; hereinafter: the Act on the Council of Ministers) provides that the Government Legislation Centre (hereinafter also: the GLC) operates in cooperation with the Prime Minister as a state organisational unit subordinate to the Prime Minister. Pursuant to Article 14c(6) of the Act on the Council of Ministers, the GLC provides legal services to the Council of Ministers by publishing, with the authorisation granted by the Prime Minister – in accordance with the rules and procedure laid down in separate provisions – the Journal of Law [Pol. *Dziennik Ustaw*] and the Official Gazette of the Republic of Poland – *Monitor Polski*. The GLC is overseen and managed by the President of the GLC, with the assistance of Vice-Presidents of the GLC and directors of organisational units of the GLC. The President of the GLC is appointed by the Prime Minister from among candidates selected through an open and competitive recruitment process. The President of the GLC is dismissed by the Prime Minister (see Art. 14e(1) and (2) of the Act on the Council of Ministers).

2.3. Taking account of the normative regulations in subpoint 2.2., it ought to be stated that:

– Firstly, the obligation to publish a specified category of the Constitutional Tribunal's rulings, including those listed in subsection 2.1., has a constitutional and statutory basis;

– Secondly, Prime Minister Donald Tusk, by virtue of having assumed the office on 13 December 2023, is legally obliged to publish forthwith all judgments of the Constitutional Tribunal the publication of which has been ordered by the President of the Tribunal (or the judge

overseeing and managing the work of the Tribunal pursuant to Article 11(2) of the Act on the Organisation of the Constitutional Tribunal);

– Thirdly, the legal obligation to forthwith publish the Constitutional Tribunal's rulings should be fulfilled by the Prime Minister, through the GLC, headed by the President of the GLC, who is appointed and dismissed by the Prime Minister – at present Joanna Knapińska (appointed on 19 January 2024);

– Fourthly, the publication of the Constitutional Tribunal's ruling in an appropriate official journal is an action of technical nature, i.e. it merely consists in publishing, intact, the content of the operative part of the Tribunal's ruling (as provided by the President of the Constitutional Tribunal) in the form of an electronic document in the official journal issued in an electronic form.

In the binding legal system, there is no legal norm authorising the publishers of official journals to annotate published acts with content constituting political assessment of the activity of the authority that has issued the act provided for publication. The publisher of an official journal may lawfully add the names of the journal such as *Dziennik Ustaw* and *Monitor Polski* as well as graphic images of vignettes (including, in particular, the name of the official journal, the image of the eagle with the crown, and the place and date of the promulgation of the legal act). Moreover, the publisher of the publication may not eliminate specific content from the published ruling.

Consequently, the above entails that it is unlawful to insert into the content of the act subject to publication (between the indication of the item under which the ruling is published and the first line of the rulings's operative part) the following note: "In accordance with the judgments of the European Court of Human Rights in the cases *Xero Flor v. Poland* (dated 7 May 2021, application no. 4907/18), *Wałęsa v. Poland* (dated 23 November 2023, application no. 50849/21), and *M.L. v. Poland* (dated 14 December 2023, application no. 40119/21), the Constitutional Tribunal lacks the attributes of a tribunal established by law when an adjudicating panel of the Constitutional Tribunal includes an unauthorised person. In the light of the afomentioned rulings [of the ECtHR], the Constitutional Tribunal's judgment published below was issued by the adjudicating panel composed in breach of the fundamental principle applicable to the process of selecting judges to the Constitutional Tribunal, and thus this violates the essence of the right to a tribunal established by law", or a similar note. Such an action lacks a legal basis and goes beyond the technical nature of the action of publishing the Constitutional Tribunal's ruling. Also, it leads to the presentation of political authorities' assessment of a particular ruling of the Constitutional Tribunal, which represents a separate branch of

government, i.e. the judiciary, and this may be seen by the addressees of the published act (especially the authorities applying the law) as an attempt to review the said ruling, despite the fact that, pursuant to Article 190(1) of the Constitution, rulings of the Constitutional Tribunal are universally binding and final, and the legislation in force does not provide for renewal procedures to contest the Tribunal's rulings. What is more, even the Constitutional Tribunal itself has no jurisdiction to review its own rulings, except for the possibility of deviating from the legal view expressed in the statement of reasons for its ruling.

Fifthly, the Polish law in force provides for certain automatism of the publication process in the case of the Constitutional Tribunal’s rulings. After the President of the Tribunal (or the judge overseeing and managing the work of the Tribunal pursuant to Art. 11(2) of the Act on the Organisation of the Constitutional Tribunal) has ordered the publication of a ruling of the Constitutional Tribunal, on the basis of Article 114(2) of the Act on the Organisation of the Constitutional Tribunal, the ruling is to be published forthwith. This means that the authorities publishing relevant official journals have no competence to review the submitted ruling, whether in terms of assessing the admissibility of adjudication in the case or conducting the substantive evaluation of the way the case has been determined by the Tribunal’s adjudicating panel.

Taking the above into consideration, it ought to be concluded that the instances of the insertion of “an appropriate note” into the content of published judgments of the Constitutional Tribunal, and of the non-publication of the Constitutional Tribunal’s rulings submitted for publication, constitute flagrant breaches of the law, and thus persons resorting to such practices should face legal liability, including criminal liability.

The adoption of the resolution of 6 March 2024 by the Sejm of the Republic of Poland with regard to eliminating the effects of the 2015-2023 constitutional crisis in the context of the activity of the Constitutional Tribunal

2.4. On 6 March 2024, the Sejm of the Republic of Poland adopted its resolution with regard to eliminating the effects of the 2015-2023 constitutional crisis in the context of the activity of the Constitutional Tribunal (Official Gazette – *Monitor Polski* (M. P.), item 198).

The resolution of 6 March 2024 read as follows: “The Sejm of the Republic of Poland – acting for the purpose of eliminating the effects of the constitutional crisis and restoring the compliance of the Constitutional Tribunal’s activity with the requirements of Article 7 and

Article 194(1) of the Constitution of the Republic of Poland as well as Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws – Dz. U. of 1993, No. 61, item 284 [; hereinafter: the Convention]), implementing the Constitutional Tribunal's judgments of 3 December 2015, in the case ref. no. K 34/15 (Journal of Laws – Dz. U., item 2129), and of 9 December 2015, in the case ref. no. K 35/15 (Journal of Laws – Dz. U., item 2147), as well as the judgments of the European Court of Human Rights in the case of *Xero Flor v. Poland* (application no. 4907/18), dated 7 May 2021, and in the case of *M.L. v. Poland* (application no. 40119/21), dated 14 December 2023 – states the following:

(1) the resolution of 8 October 2015 adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Bronisław Sitek), published in the Official Gazette – *Monitor Polski* of 23 October 2015 (item 1041);

(2) the resolution of 8 October 2015 adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Andrzej Jan Sokala), published in the Official Gazette – *Monitor Polski* of 23 October 2015 (item 1042);

(3) the resolution of 25 November 2015 adopted by the Sejm of the Republic of Poland to determine the lack of legal force of the resolution of 8 October 2015 adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Roman Hauser), published in the Official Gazette – *Monitor Polski* of 26 November 2015 (item 1131);

(4) the resolution of 25 November 2015 adopted by the Sejm of the Republic of Poland to determine the lack of legal force of the resolution of 8 October 2015 adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Andrzej Jakubecki), published in the Official Gazette – *Monitor Polski* of 26 November 2015 (item 1132);

(5) the resolution of 25 November 2015 adopted by the Sejm of the Republic of Poland to determine the lack of legal force of the resolution of 8 October 2015 adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Krzysztof Ślebzak), published in the Official Gazette – *Monitor Polski* of 26 November 2015 (item 1133);

(6) the resolution of 2 December 2015 adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Mariusz Muszyński), published in the Official Gazette – *Monitor Polski* of 2 December 2015 (item 1184);

(7) the resolution of 2 December 2015 adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Henryk Cioch), published in the Official Gazette – *Monitor Polski* of 2 December 2015 (item 1182);

(8) the resolution of 2 December 2015 adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Lech Morawski), published in the Official Gazette – *Monitor Polski* of 2 December 2015 (item 1183);

(9) the resolution of 15 September 2017 adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Justyn Piskorski), published in the Official Gazette – *Monitor Polski* of 19 September 2017 (item 873);

(10) the resolution of 26 January 2018 adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Jarosław Wyrembak), published in the Official Gazette – *Monitor Polski* of 31 January 2018 (item 134);

– were adopted in a manifest breach of law, in particular the Constitution of the Republic of Poland as well as the Convention for the Portection of Human Rights and Fundamental Freedoms, and thus they lack legal force and have not had the legal effects envisaged therein.

Consequently, the Sejm of the Republic of Poland deems that Mariusz Muszyński, Justyn Piskorski and Jarosław Wyrembak are not judges of the Constitutional Tribunal. Numerous rulings of the Constitutional Tribunal are legally defective, because:

– Mariusz Muszyński, Justyn Piskorski and Jarosław Wyrembak (and earlier Henryk Cioch and Lech Morawski) participated in the Constitutional Tribunal's adjudication activity, being involved in issuing determinations when the Tribunal was adjudicating as a single judge or as a panel of several judges;

– recusal applications concerning the above-mentioned persons, filed by the parties to those proceedings, were consistently dismissed;

– judges of the Constitutional Tribunal dimissed recusal applications for excluding of the above-mentioned persons from adjudicating, as well as – together with the unauthorised persons – they were also involved in the Constitutional Tribunal's adjudication activity.

The Sejm of the Republic of Poland also states that the function of the President of the Constitutional Tribunal is exercised by an unauthorised person. Julia Przyłębska has been in charge of the Constitutional Tribunal since 21 December 2016, when the President of the Republic of Poland appointed her to exercise the function of the President of the Constitutional Tribunal. The said appointment, which has on numerous occasions been contested, was made without the prior obtaining of the relevant legally required resolution of the General Assembly of the Judges of the Constitutional Tribunal. Moreover, even if one were to acknowledge the fact of the defective appointment, then it follows from Article 10(2) of the Act of 30 November 2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal (Journal of Laws – Dz. U. item 2072) that

the term of office of the President of the Constitutional Tribunal shall be six years. This entails that Julia Przyłębska's term of office [as the President of the CT] expired as of 21 December 2022. Consequently, all procedural decisions within the scope of oveseeing and managing the work of the Constitutional Tribunal, and in particular the decisions to determine the composition of particular adjudicating panels, made by Julia Przyłębska, may be challenged.

Seven judges of the Constitutional Tribunal, in their letters of 28 June 2018 and of 5 December 2018, pointed out that, in the practice of the Constitutional Tribunal's activity, there were instances of manipulating the composition of particular adjudicating panels. Those statements have not effected any change in the functioning of the Constitutional Tribunal, or any change in the conduct of the person in charge of the Constitutional Tribunal, i.e. Julia Przyłębska.

Due to the situation in the Constitutional Tribunal, on 15 February 2023 the European Commission referred Poland to the Court of Justice of the European Union for violations of EU law. In the view of the European Commission, the Constitutional Tribunal does not meet the requirements for an independent court within the meaning of Article 19 of the Treaty on European Union.

The violations of the Polish Constitution and of the law, committed in the course of the Constitutional Tribunal's activity, have reached a scale that makes it impossible for the said authority to carry out its constitutional tasks within the ambit of the constitutional review of law, including the protection of the rights of persons and citizens.

In the opinion of the Sejm of the Republic of Poland, the state of incapacity of the currently functioning authority to carry out the tasks of the Constitutional Tribunal set out in Article 188 and Article 189 of the Polish Constitution requires that the constitutional court be established anew, in compliance with the constitutional principles as well as by taking account of the voices of all political powers respecting the constitutional order. The judges of a renewed Constitutional Tribunal should be elected with the inclusion of votes of opposition factions. Determining the new composition should be spread out in time to confirm the will to establish that authority in the way that is free from the perspective of the current term of office of the Sejm of the Republic of Poland and the Senate of the Republic of Poland.

It is not disputable that public authorities are obliged to adhere to the Polish Constitution, and in particular to the principle that public authorities are to function on the basis of, and within the limits of, the law, which arises from Article 7 of the Constitution. The Sejm holds the view that, as regards the Constitutional Tribunal's rulings issued in breach of law, the taking account of those rulings by public authorities in their activities may be considered as

those authorities' violations of the principle that public authorities are to function on the basis of, and within the limits of, the law.

The Sejm of the Republic of Poland calls upon the judges of the Constitutional Tribunal to resign, and thus to join the process of democratic changes.

The resolution is subject to publication in the Official Gazette of the Republic of Poland – *Monitor Polski*".

Evidence: resolution of 6 March 2024 (annex no. 5).

In its judgment of 28 May 2024 (ref. no. U 5/24, OTK ZU A/2024, item 65), the Constitutional Tribunal conducted the constitutional review of the resolution of 6 March 2024, declaring the resolution (as a whole) to be inconsistent with Article 7 in conjunction with Article 87(1), Article 10 in conjunction with Article 173 and Article 190(1) of the Constitution of the Republic of Poland. Already at the outset of its examination, "due to the obviousness of the case under consideration, the Constitutional Tribunal held that in the resolution issued without any legal basis, which is absent from the constitutional catalogue of the sources of universally binding law, the Sejm prohibited the implementation of the Constitutional Tribunal's judgments which – in the light of the resolution – might be regarded as issued in breach of law. By manifestly violating the standards of a democratic state ruled by law in the form of the constitutional principle of the rule of law in its formal aspect and the constitutional principle of the separation and balance of powers, the Sejm "ruled" by resolution that the judges of the Constitutional Tribunal who had been holding their judicial offices for several years were not judges of the Constitutional Tribunal, and that the President of the Constitutional Tribunal appointed by the decision of the President of the Republic of Poland was not the President of the Constitutional Tribunal. For the above reasons, the Constitutional Tribunal stated that the assumptions set out in the resolution are not based on the Constitution but implicitly allude to the concept of "behavioural" (*de facto*) binding force of law, which envisages that mere adherence to a given legal norm and the perception thereof as lawful by an entity applying the law would weigh in favour of the binding force of the said norm, contrary to the unambiguous constitutional provisions. The adoption of the resolution manifestly violating Article 10 of the Constitution – due to undermining the constitutional principle of the separation of powers – amounts to an unprecedented abuse of state power committed by the Sejm" (the Constitutional Tribunal's judgment ref. no. U 5/24).

With reference to political authorities' practice of refraining from fulfilling their legal obligation to forthwith publish rulings of the Polish constitutional court: "The Constitutional Tribunal noted that the media cited a statement made by Minister Maciej Berek, who is a member of the Council of Ministers, on 5 March 2024, in which he asserted that '[i]t follows from the resolution that the Tribunal's jurisprudence from now on in its entirety is legally flawed. And whether or not the rulings are published with the reservation that one has to look at this resolution and its effects, the outcome will be the same effect. This means that those rulings of the Tribunal should in fact be ignored in the system of state authorities from the moment of the adoption of the resolution'. 'When asked whether, in this situation, the government will publish the rulings, Berek replied: 'After this resolution, we will have to pause and consider whether to publish these rulings all with an asterisk referring to this Sejm resolution, which may be the neatest solution, or whether to adopt another approach'" ("Dlaczego rząd nie publikuje najnowszych wyroków TK", www.rp.pl, accessed 19 May 2024)" (*ibidem*).

Further on, the Constitutional Tribunal deemed that: "The practice of non-publication of the CT's judgments in the Journal of Laws by the President of the Government Legislation Centre indicates that, also on the basis of the entire content of the resolution, he reconstructed the norm excluding the application of Article 190(2) of the Constitution and Article 9(1)(6) of the Act of 20 July 2000 on the Promulgation of Normative Acts and Certain Other Legal Acts (Journal of Laws – Dz. U. of 2019, item 1461), pursuant to which 'the CT's judgments concerning normative acts published in the Journal of Laws shall be published in the Journal of Laws'" (*ibidem*).

Indicating the effects of its judgment issued in the case ref. no. U 5/24, with regard to the issue of the non-publication of the Polish constitutional court's rulings, the Tribunal noted that: "the legal norms derived from the substance of the resolution are clearly unconstitutional, as they were created outside of the scope of relevant competence and are manifestly inconsistent with the principles of the separation of powers, the independence of the judiciary as the branch of government and the independence of judges, as well as with the principle of the universal binding force of the Constitutional Tribunal's final rulings. Consequently, any actions taken by public authorities based on the norms derived from the resolution are also unconstitutional". (…) the ruling that the resolution is inconsistent with Article 7 in conjunction with Article 87(1) of the Constitution, and therefore the declaration of its unconstitutionality in the formal-legal aspect, is linked to the loss of validity of the normative act. As of the date of publication of the judgment in the official journal, the resolution is eliminated from the legal system, but the

presumption of the constitutionality of that act was overturned as soon as the ruling was announced by the presiding judge. Secondly, the ruling that the impugned resolution is inconsistent with Article 10 in conjunction with Article 173 and Article 190(1) of the Constitution – i.e. declaring it to be unconstitutional in the substantive legal aspect – does not merely mean that it ceases to be legally binding, and does not merely imply the earlier overthrowing of the presumption of constitutionality of the legal provisions contained therein, in which the elements of the legal norm(s) are encoded. Indeed, the indicated simple derogation effect is included in the consequences arising from the determination of the non-conformity of the resolution to Article 7 in conjunction with Article 87(1) of the Constitution. By contrast, the consequences arising from the determination of the non-conformity of the resolution with Article 10 in conjunction with Article 173 and Article 190(1) of the Constitution are more complex. Their essence entails the elimination from the legal system of all the individual necessary elements, or co-determining, the content of the legal norm (legal norms) expressed in the resolution, which makes it possible to decode legal norms that are syntactically or substantively "compartmentalised" also in other provisions of the law which amount to questioning the course of the proceedings before the Constitutional Tribunal, including undermining the status of its judges or President, and consequently the attributes of universally binding force and finality of the Tribunal's rulings, as well as prohibiting public authorities from taking account of those rulings in their activities" (*ibidem*).

Moreover, with regard to the fact that public authorities took account of the resolution of 6 March 2024, the Tribunal stated that such actions on the part of public authorities "**may be regarded as those authorities' violation of the principle that public authorities are to function on the basis of, and within the limits of, the law, which may in turn imply liability – especially constitutional, criminal, or disciplinary liability – for persons exercising those public functions and holding public offices. The occurrence of such a violation is not conditioned, at the same time, by the publication of this judgment in the relevant official journal, for it is determined by the very circumstance of failure to respect constitutional norms, which, in accordance with the conflict of laws rule (*lex superior derogat legi inferiori*), deprive legal norms of lower legal rank, and even more so those set out in acts that do not belong to the sources of universally binding law. (…) Elaborating on the above remarks, the Constitutional Tribunal noted in passing that the resolution did not constitute a normative change that in no way excluded or limited the responsibility of the entities obliged to publish the Tribunal's rulings in the relevant official journals, in**

particular, the resolution did not justify the instances of exceeding the scope of competence and of failing to fulfill duties in the aforementioned ambit” (*ibidem*; emphasis mine).

Evidence: judgment of 28 May 2024, ref. no. U 5/24, issued by the Constitutional Tribunal (annex no. 6)

In the context of the above, at this point, it should be clearly stated that – due to the fact that the issue of the publication of the Constitutional Tribunal’s rulings is regulated at the constitutional and statutory level – the resolution of 6 March 2024, constituting the Sejm’s legal act of an internal character, could not be a basis for an effective exemption of public authorities from their obligation to forthwith publish the Constitutional Tribunal’s rulings. There is no doubt that in the legal system built on the principle of the hierarchy of legal norms – where public authorities may only function on the basis of, and within the limits of, the law – the Sejm’s legal act of an internal character amy not constitute a legal basis for a public official to refrain from fulfilling the obligation regulated by the Constitution and statutes. This means that the Sejm, acting outside the scope of its competence and in violation of fundamental constitutional principles, made a failed attempt at legalising the illegal actions of public authorities. In other words, the Sejm attempted to create a legal basis that would rule out the unlawfulness of the actions of the publishers of relevant official journals, thus protecting certain persons holding public offices from possible legal liability, including criminal liability.

Thus, taking account of the normative provisions in force and the operative part of the Constitutional Tribunal’s judgment issued in the case ref. U 5/24 (together with the theses, extensively quoted above, from the statement of reasons thereof), it should be emphasised that the resolution of 6 March 2024 has never constituted a legal basis for Prime Minister Donald Tusk's approach of refraing from fulfilling the legal obligation to forthwith publish the Constitutional Tribunal’s rulings (starting with the judgment issued in case ref. no. SK 123/20); the said obligation should be fulfilled by the Prime Minister through the Government Legislation Centre, headed by the President of the GLC – Joanna Knapińska.

The Council of Ministers’ adoption of the resolution no. 162 of 18 December 2024 with regard to counteracting the negative effects of the constitutional crisis in the judicial system

2.5. On 18 December 2024, the Council of Ministers adopted its resolution no. 162 with regard to counteracting the negative effects of the constitutional crisis in the judicial system (Official Gazette – *Monitor Polski*, M. P. item 1068; hereinafer: the resolution of 18 December 2024).

The section with numbered paragraphs in the resolution of 18 December 2024 is preceded by the preamble which stated that that the Council of Ministers – having regard to the need to remove the effects of the constitutional crisis concerning the Constitutional Tribunal, the National Council of the Judiciary and the Supreme Court; emphasising the fundamental importance of these state authorities for the protection of individual rights and for the conduct of review of the activities of other state authorities in the light of the systemic principle of the balancing of powers; noting the significant legal and factual risks associated with the failure to recognise fundamental legal flaws in the activities of the indicated authorities; acting in order to implement and take into account the case law of international courts – adopted the following.

The Constitutional Tribunal is addressed in § 1 of the resolution of 18 December 2024, divided into five subparagraphs. The first one constitutes a kind of diagnosis/assessment by the Council of Ministers with regard to the Constitutional Tribunal and the irregularities in the Tribunal's operation that occurred, in the Council's opinion, in the years 2015-2023. Importantly, the Council of Ministers referred to the assessment presented in the resolution of 6 March 2024, disregarding the circumstance of the unconstitutionality of that resolution as established by the Tribunal in the judgment ref. no. U 5/24, which already at this point should raise reservations in terms of accuracy.

In § 1(2) of the resolution of 18 December 2024, the Council of Ministers expressed the political assessment that "the Constitutional Tribunal, due to its current composition, is incapable of performing the tasks set out in Articles 188 and 189 of the Constitution of the Republic of Poland. The Council of Ministers considers it justified to consistently take corrective measures to restore the functioning of the constitutional court in accordance with the constitutional standard".

With regard to the issue of the publication of judgments of the Tribunal, the Council of Ministers assessed – reasonably – that the obligation to publish rulings in official journals may only apply to acts that have been adopted by a legitimate authority in the procedure provided for by law (see § 1(3) of the resolution of 18 December 2024). As also noted by the Council of Ministers, it is undisputed that the measures taken to resolve the crisis of the rule of law must begin by preventing further effects of the Constitutional Tribunal's activities that are contrary to the Constitution of the Republic of Poland, international law and EU law. This

implies the necessity to rule out the possibility of introducing further determinations of the Constitutional Tribunal into the legal system (see § 1(4) of the resolution of 18 December 2024).

The crux of the resolution of 18 December 2024, as regards the approach to the Constitutional Tribunal, is expressed in § 1(5), which reads as follows: "**having considered the above, the Council of Ministers holds the view that the publication of Constitutional Tribunal's determinations in official journals could perpetuate the rule-of-law. Therefore, the Council of Ministers considers that it is not admissible to publish documents that have been issued by an authority lacking legitimacy. This is because, in accordance with the resolution of 6 March 2024 by the Sejm of the Republic of Poland with regard to eliminating the effects of the 2015-2023 constitutional crisis in the context of the activity of the Constitutional Tribunal, the taking account of the Tribunal's determinations by public authorities in their activities may be considered as those authorities' violations of the principle that public authorities are to function on the basis of, and within the limits of, the law**." (emphasis mine).

Pursuant to § 3 of the resolution of 18 December 2024, the obligation to implement the resolution lies with the Prime Minister and the Minister of Justice.

Evidence: resolution of 18 December 2024 (annex no. 7).

When assessing the impact of the resolution of 18 December 2024 on the fulfilment of the legal obligation of Prime Minister Donald Tusk to forthwith publish the Constitutional Tribunal's rulings, through the Government Legislation Centre, headed by the President of the GLC, Joanna Knapińska, it should be noted that:

- Firstly, the Council of Ministers's resolution of 18 December 2024 makes reference to the Sejm's resolution of 6 March 2024, where the latter was declared unconstitutional by the Constitutional Tribunal's judgment in the case ref. no. U 5/24. Consequently, the Council of Ministers invokes an act that (in its entirety) is no longer binding, due to having been deemed unconstitutional. It is hard to reasonably assume that any action of a public authority may be taken on the basis of, or at least in connection with, an act inflicted with numerous legal defects, which then are identified and indicated by the Constitutional Tribunal in the statement of reasons for its judgment ref. no. U 5/24, and the entire act is repealed as manifestly violating the foundations of the constitutional order of the Republic of Poland. In other words, the Council of Ministers, as an executive authority, by means of its resolution of 18 December 2024, referring to the act of legislative lawlessness by the Sejm, attempts to bring about –

beneficial from the perspective of its activity – neutralisation/annihilation of the constitutional court, which conducts the review of normative acts issued by the government (regulations) and those adopted with the involvement of the government (e.g. government bills).

- Secondly, in the light of Article 93(1) of the Constitution, the Council of Ministers' resolution of 18 December 2024 is solely of an internal character and is binding only for those organisational units subordinate to the authority which issues such an act, i.e. the Council of Ministers. Even if one were to assume that the resolution of 18 December 2024 is formally binding for Prime Minister Donald Tusk (*nota bene* who is a member of the Council of Ministers within the meaning of Article 147(1) of the Constitution, and not an organisational unit subordinate to the Council of Ministers; representing the Council of Ministers and managing the Council's work, pursuant to Article 148(1) and (2) of the Constitution) and for the President of the Government Legislation Centre, Joanna Knapińska (*nota bene* within the meaning of Article 14a of the Act on the Council of Ministers, the Government Legislation Centre (hereinafter also: the GLC) operates in cooperation with the Prime Minister, and not the Council of Ministers, as a state organisational unit subordinate to the Prime Minister, and not to the Council of Ministers), it is impossible to accept the legal opinion that the said resolution may constitute a legal basis for the Prime Minister's approach of refraing from fulfilling the legal obligation to forthwith publish the Constitutional Tribunal's rulings, where the said obligation should be fulfilled by the Prime Minister through the Government Legislation Centre, headed by the President of the GLC – Joanna Knapińska

The legal views expressed in the context of the defectiveness of the Sejm's resolution of 6 March 2024, generally, remain valid also in the context of the Council of Ministers' resolution of 18 December 2024. It is impossible to accept the view that a legal act of an internal character may abolish the legal obligation arising from the Constitution and the legislation in force, which lies with public authorities – that, pursuant to Article 7 of the Constitution, are to function on the basis of, and within the limits of, the law. –including the legal provisions on the obligation to forthwith publish rulings of the Constitutional Tribunal.

It should be strongly emphasised that a legal act of an internal character may not cause constitutional and statutory regulations to be devoid of the normative content of establishing a legal obligation to publish judgments of the Constitutional Tribunal.

Also, is it not possible to create a mechanism for the review of the Constitutional Tribunal's rulings by authorities publishing official journals, where such a mechanism has not been provided for in the Constitutution. It should be noted that since the Constitution defines the attributes of the Tribunal's rulings – namely, finality and universal binding force (see Article

190(1)) and expresses the obligation that the rulings are to be published forthwith (see Article 190(2)), a possible mechanism of reviewing the rulings by any public authority (constituting a departure from, an exception to the indicated provisions) should also be regulated in the Constitution. No ratified international agreement whose ratification required prior consent granted by statute, as well as no statute, may provide for competence that is incompatible with a constitutional norm. Therefore, a legal act of an internal character is even less appropriate for creating such competence.

The adoption of a different position would result in undermining the fundamental elements of the Polish legal order, in particular, the following: the principle of a democratic state ruled by law, implementing the principles of social justice (see Art. 2 of the Constitution); the principle that public authorities function on the basis of, and within the limits of, the law (see Art. 7 of the Constitution); the separation of and balance between the legislative, executive and judicial powers (Art. 10 of the Constitution); the independence of the judiciary from the other branches of government (see Art. 173 of the Constitution); the principle that the Constitutional Tribunal's rulings are universally binding and final (see Art. 190(1) of the Constitution).

In a democratic state ruled by law, the above-presented usurpation of powers should constitute grounds for legal liability, including criminal liability, of persons who resort to such usurpation.

- Thirdly, the Council of Ministers' resolution of 18 December 2024 may be seen as a means of inciting Prime Minister Donald Tusk (who is legally obliged to forthwith publish the Constitutional Tribunal's rulings, and who should fulfil the said obligation through the Government Legislation Centre, headed by the President of the GLC – Joanna Knapińska) to act contrary to the Constitution and statutes.

Refraining from providing submissions and participating in hearings on the part of mandatory participants in proceedings before the Constitutional Tribunal

2.6. Another area of activity undertaken by the legislature and the executive against the Constitutional Tribunal after 13 December 2023 is the practice of refraining to fulfil the statutory obligation to provide submissions in cases considered by the Constitutional Tribunal and the practice of notorious non-appearance at hearings in the Tribunal's building.

2.7. Article 42 of the Act on the Organisation of the Constitutional Tribunal comprises the catalogue of participants in proceedings before the Tribunal. By virtue of the Act, the the Public Prosecutor General is required to participate in proceedings in every case heard by the Tribunal (Art. 42(7) of the Act on the Organisation of the Constitutional Tribunal). Also, what is of significance is Article 42(3) of the said Act, which provides that an authority that has issued a normative act which is the subject of the Tribunal's review is also a participant in those proceedings – statistics show that the Tribunal most often conducts a review of statutory provisions, hence the Sejm is frequently such a participant.

Pursuant to Article 63(1) of the said Act, the President of the Tribunal notifies participants in proceedings about the referral of an application, a question of law or a constitutional complaint for consideration by an adjudicating panel, provide them with certified copies of the application, the question of law or the complaint, as well as instruct them about their right to submit written statements. The President of the Tribunal may set a time-limit for a participant in proceedings within which the participant is to submit his/her written statement.

The said issue was already pointed out in the Constitutional Tribunal's statement of reasons for its judgment in the case ref. no. U 5/24, where the Tribunal stated that: "[a]lso on the basis of the entire resolution [of 6 March 2024], rather than a specific excerpt, the mandatory participants in the proceedings before the Constitutional Tribunal refuse to participate in those proceedings, thus reconstructing a legal norm (general and abstract), which excludes the application of the provisions of the Act on the Organisation of the Constitutional Tribunal".

After the Sejm's adoption of its resolution of 6 March 2024, certain participants in proceedings before the Constitutional Tribunal are fail to fulfil the obligation assigned to them by the lawmaker within the scope of the constitutional-court proceedings.

In this regard, it is necessary, in the first place, to mention Public Prosecutor-General Adam Bodnar, who since 6 March 2024 has not provided any substantive submissions in any case (earlier, in the first months in office, Public Prosecutor-General Adam Bodnar provided a substantive submission in, *inter alia*, the case ref. no. SK 13/24). Since 6 March 2024, representatives of the Public Prosecutor General have not attended any hearing held at the Tribunal's building (previously, a representative of the said Prosecutor attended, e.g., the hearing on 11 January 2024 in the case ref. no. K 23/23). In lieu of fulfilling the statutory obligations of a participant in the proceedings, the Public Prosecutor General has consistently been sent letters to the Tribunal, informing that he will not take a substantive stance in a particular case, due to alleged irregularities in the Tribunal's activity (see, instead of many, the

letter of the Public Prosecutor General of 17 November 2024 concerning the case ref. no. K 14/24).

Evidence:

- Public Prosecutor- General's letter of 17 November 2024 with regard to the case ref. no. K 14/24 (annex no. 8);

- transcript from the hearing of the notifying person.

A similar procedural approach has been manifested by Adam Bodnar in his role as the Minister of Justice (see e.g. the Minister of Justice's letter of 22 March 2024 with regard to the case ref. no. U 1/24).

Evidence:

- Minister of Justice's letter of 22 March 2024 with regard to the case ref. no. U 1/24 (annex no. 9);

- transcript from the hearing of the notifying person

Also, Minister of Education Barbara Nowacka did not present her stance on the case in which, on the basis of statutory provisions, the minister – as the authority that had issued the act under review – was a participant in the proceedings (see her letter of 24 September 2024 with regard to the case ref. no. U 10/24).

Evidence:

- letter of 24 September 2024 by Minister of Education Barbara Nowacka with regard to the case ref. no. U 10/24 (annex no. 10);

- transcript from the hearing of the notifying person

A slightly different procedural approach was taken by the Sejm, represented by its Marshal, Szymon Hołownia. Firstly, the representative of the Sejm participated in hearings before the Constitutional Tribunal even after the adoption of the resolution of 6 March 2024 (Paweł Śliz MP participated in the hearing on 28 May 2024 in the case ref. no. U 5/24 and in the hearing on 19 June 2024 in the case ref. no. K 7/24, but in both cases the said MP left the courtroom during the hearing, without the consent of the presiding judge). Secondly, (see,

instead of many, the motion of 5 December 2024 for the recusal of Judge Justyn Piskorski and Judge Jarosław Wyrembak from the case ref. no. Kp 3/24).

Evidence:

- motion of 5 December 2024 for the recusal of Judge Justyn Piskorski and Judge Jarosław Wyrembak from the case ref. no. Kp 3/24 (annex no. 11);

- przesłuchanie zawiadamiającego. transcript from the hearing of the notifying person.

However, what is worth pointing out is that the Marshal of the Sejm does not, provide the Tribunal with the Sejm's substantive submission presenting stance on a case, despite the fact that drafts of such submission are prepared by the legal service staff of the Sejm, and also the legislative committee gives its opinion on the draft submissions put forward to the committee (e.g., in cases ref. nos. U 6/24, SK 57/24, P 4/24).

Failure to provide substantive submission by participants of proceedings with regard to the issues considered by the Tribunal also results limits the possibility of the Tribunal's adjudication at sittings in camera, necessitating the holding of hearings (even in cases sufficiently examined in the existing jurisprudence (case law)), which considerable prolongs the proceedings. Pursuant to Article 92(2), second sentence, of the Act on the Organisation of the Constitutional Tribunal, for the consideration of an application, a question of law or a constitutional complaint at a sitting in camera, it is necessary to receive relevant submissions from all participants in proceedings. The notorious failure to provide substantive submissions by the Public Prosecutor-General (a participant in all proceedings pending before the Tribunal) may in the very near future completely rule out the possibility of applying Article 92 of the Act on the Organisation of the Constitutional Tribunal as a legal basis for issuing a judgment at a sitting in camera.

2.8. To sum up the above, it should be stated that participants in the proceedings should comply with the letters addressed to them by the Constitutional Tribunal or the Constitutional Tribunal's authorities, adequately to their content. If a participant is obliged to provide a substantive submission, then in the letter constituting the response contain the participant's stance on the merits of the case, taking account, in particular, of the allegations formulated by the applicant, the court referring a qiestion of law, or the complainant with regard to the normative act under review. Failure to comply with that obligation should be regarded as unlawful.

Refraining from filling three judicial vacancies at the Constitutional Tribunal

2.9. Another approach aimed at annihilating the Constitutional Tribunal is the failure to fulfil the Sejm's obligation to fill judicial vacancies at the Constitutional Tribunal.

2.10. On 3 December 2024, the terms of office of Constitutional Tribunal Judges Mariusz Muszyński and Piotr Pszczółkowski expired, and on 9 December 2024, the term of office of Constitutional Tribunal Judge Julia Przyłębska ended. Thus, as of 10 December 2024, the Tribunal has been composed of twelve judges.

Pursuant to Article 194(1) of the Constitution, "[t]he Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office". Thus, the Sejm is responsible for filling judicial vacancies at the Tribunal and this is the Sejm's duty, not a right that may be exercised in a discretionary manner by the political decision-makers of a particular parliamentary majority. The Constitutional Tribunal is a constitutional institution, and the Constitution-maker assigned the Tribunal with responsibility for an important area of the functioning of the state, i.e. the review of the law enacted in Poland. The constitutional-maker constitutes the Tribunal and determines its composition (by indicating the number of judges), as well as indicates the body selecting persons who, upon the completion of the procedure provided for by the law, will assume judicial offices at the Tribunal; hence, there is no doubt that it is the task of the Sejm to take actions to ensure that judcial offices at the Tribunal are filled at all times. Obviously, the occurrence of temporary, short-term vacancies is permissible (which may arise, for example, from completing previous employment duties of a person elected to to the office of a judge, at a stage prior to taking the oath of office before the President); however, such a situation should not ensue from deliberate actions by the Sejm and the persons overseeing and managing its work, which is currently the case in Poland. The consequences of such an approach are nowhere close to the standards of a democratic state ruled by law.

Pursuant to Article 2(2), second sentence, of the Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal (Journal of Laws – Dz. U. of 2018, item 1422), "[t]he terms of election and dates for carrying out proceedings shall be specified by the rules of procedure of the Sejm". In this respect, the statutory provision makes reference to the Sejm's resolution of 30 July 1992 (Official Gazette – *Monitor Polski*, M.P. of 2022, item 990;

hereinafter: the Sejm's Rules of Procedure[3]), which stipulates in Article 26(1) that the Sejm elects the Judges of the Constitutional Tribunal. Pursuant to Article 30(1) of the Rules of Procedure, "Recommendations concerning the election or appointment by the Sejm of individual persons to particular State offices specified in Articles 26 and 29 may be submitted by the Marshal of the Sejm or at least 35 MPs, except for the office of a judge of the Constitutional Tribunal for which recommendations shall be made by the Presidium of the Sejm or at least 50 MPs, and for the office of the Ombudsman for Children for which recommendations shall be made by the Marshal of the Sejm, the Marshal of the Senate or a group of at least 35 MPs or at least 15 Senators. Article 4(2), second sentence, shall apply *mutatis mutandis*". Recommendations are to be lodged with the Marshal of the Sejm within a time limit of 30 days before the expiry of the term of office (see Article 30(3)(1) of the Rules of Procedure). Recommendations concerning the election or appointment by the Sejm of individual persons to particular State offices specified, *inter alia*, in Article 26, may be put to a vote of no earlier than on the 7th day following the delivery of the paper containing the candidacies, unless the Sejm decides otherwise (see Article 30(4) of the Rules of Procedure). Recommendations concerning the election or appointment by the Sejm of individual persons to particular State offices specified, *inter alia*, in Article 26 or dismissal therefrom shall be referred by the Marshal of the Sejm to an appropriate Sejm committee for its opinion. Other committees concerned may send representatives to the sitting of a relevant committee. (see Article 30(5)). Pursuant to Article 30(6) of the Rules of Procedure, opinions in relation to recommendations, referred to in Article 30(1), shall be given by the committee, in writing, to the Marshal of the Sejm, who order delivery to the MPs of a printed copy of the committee's opinion (see Article 30(7)). In accordance with Article 30(8) of the Rules of Procedure, consideration by the Sejm of the recommendation may occur no sooner than the day following the delivery to the MPs of a printed copy of the committee's opinion. Article 30(9) of the Rules of Procedure provides a basis for shortening the proceedings.

Pursuant to Article 31(1) of the Rules of Procedure, the election or appointment of individual persons to State offices specified in Articles 26–29 (including the Constitutional Tribunal) shall be passed by an absolute majority of votes. A resolution concerning such

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[3] [the translator's note: the full text of an English translation of the rules of procedure of the Sejm (officially entitled: The Standing Orders of the Sejm of the Republic of Poland) is available at the Sejm's website: http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14798:the-standing-orders-of-the-sejm-of-the-republic-of-poland&catid=7&Itemid=361 .

election, appointment or dismissal shall be published in the Official Gazette of the Republic of Poland – *Monitor Polski* (see Article 31(3) of the Rules of Procedure).

Based on publicly available information, it should be noted that within the original time-limit set out in Article 30(3)(1) of the Rules of Procedure, the eligible persons did not propose any candidates for judicial vacancies at the Constitutional Tribunal, to replace the judges whose terms of office ended on 3 and 9 December 2024.

In view of the above, the Marshal of the Sejm set an additional deadline for the submission of candidates. In the renewed procedure, two candidates were proposed by groups of MPs on 11 December 2024: Marek Ast (Sejm Paper no. 898) and Artur Kotowski (Sejm Paper no. 899). On 12 December 2024, both motions were referred to the Justice and Human Rights Committee for its opinion. The matters do not appear on the list of planned work of the committee in January 2025 (see Justice and Human Rights Committee – Sejm of the Republic of Poland; accessed 15 January 2025).

At the same time, in the media, representatives of the parliamentary majority make consistent claims that the Sejm will not fill the judcial vacancies at the Tribunal in the near future. As a result, for over a month, the Tribunal has been carrying out its work, composed of only twelve judges (with the terms of office of another two judges ending later this year).

Evidence:

- letter of 27 January 2025 from the President of the Constitutional Tribunal to the Marshal of the Sejm (annex no. 12)

- transcript from the hearing of the notifying person

2.11. The state of affairs presented above results in a violation of the law; it also significantly hinders (and in the future it may prevent) the Constitutional Tribunal's performance of its constitutional tasks.

Firstly, once again it should be emphasised that the constitutional requirement is the Tribunal's composition of the fifteen judges. The Sejm should not decide to temporarily reduce the number of the judges, below the constitutionally indicated number. Although the Sejm has considerable freedom when it comes to selecting particular lawyers to the Tribunal (as long as these persons meet the formal requirements, i.e. they are distinguished by their knowledge of law and also hold qualifications required for the office of a judge of the Supreme Court or for the office of a judge of the Supreme Administrative Court), it is an absolutely unacceptable practice to permanently shape the smaller composition of the Tribunal than the number of the

Tribunal's judges specified in the Constitution. In other words, there should be as many judges as provided for in the Constitution, i.e. fifteen.

Secondly, in the near future, the non-fulfilment of the Tribunal's judicial vacancies may result in the Tribunal's inability adjudicate *en banc* (the requirement of at least 11 judges), which in turn will prevent the Tribunal from performing its tasks specified by the Constitution.

Thirdly, the Sejm's intentional inaction in that regard prolongs the situation where certain judicial offices at the Tribunal remain vacant; this entails more excessive workload for the remaining judges of the Tribunal, which in turn may cause lengthiness of proceedings and diminished efficiency of judicial activity, which will have real consequences for persons instituting proceedings before the Tribunal, especially for the rights of citizens and other persons who file constitutional complaints under Article 79(1) of the Constitution.

The enactment of the 2025 State Budget Act, depriving the Constitutional Tribunal of the funds for the remuneration of the Constitutional Tribunal's judges

2.12. On 9 January 2025, the State Budget Act was enacted for the year 2025. The State Budget Act, submitted to the President of the Republic of Poland for signature, does not provide for the necessary funds for the remuneration of the judges of the Constitutional Court.

2.13. The original State Budget Bill for the year 2025 allocated funds for the remuneration of the judges of the Constitutional Court, since the Council of Ministers, as the sponsor of the Bill, was obliged to include in the Bill the submission made by the Constitutional Tribunal. Pursuant to Article 139(2) of the Public Finance Act of 27 August 2009 (Journal of Laws 2024, item. 1530), "the Minister of Finance shall include in the State Budget Bill the revenues and expenditures of: the Chancellery of the Sejm, the Chancellery of the Senate, the Chancellery of the President of the Republic of Poland, the Constitutional Tribunal, the Supreme Audit Office, the Supreme Court, the Supreme Administrative Court together with voivodeship administrative courts, the National Council of the Judiciary, common courts, the Ombudsman, the Ombudsman for Children's Rights, the National Council for TV and Radio Broadcasting, the President of the Office for Personal Data Protection, the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation, the National Electoral Office, and the State Labour Inspectorate". (emphasis mine).

As the sponsor of the State Budget Bill, the Council of Ministers lacks competence to modify the revenues and expenditures of the Constitutional Tribunal. Any relevant changes can only be introduced in the course of parliamentary work on the said Bill.

At the stage of the Sejm's legislative work, the amount of current expenditures of the Constitutional Tribunal was reduced by PLN 10 million in comparison to the amount in the government proposal. The reduced amount corresponds to the total sum of the annual remuneration of all the judges of the Constitutional Tribunal. The purpose for the introduced change was bluntly indicated by the chairman of the Sejm's public finance committee, Janusz Cichoń MP. During the meeting on 21 November 2024, with regard to the changes in the expenditures of the Constitutional Tribunal, he stated that '[t]hey [the Judges of the Constitutional Tribunal – addition mine] have no legitimacy to adjudicate, in our opinion. Hence such a decision", and he also acknowledged that "[t]he intention of the sponsors of the Bill was that there should be no funds for the remuneration of the members of the Tribunal in this budget" (see Record of proceedings - Sejm of the Republic of Poland; accessed 15 January 2025). The above-mentioned statements of the chairman of the Sejm's public finance committee demonstrate emphatically that the amendment to the Tribunal's budget expenditure was not caused by objective factors of economic nature, e.g. the difficult situation of public finance and the need for savings in the public sector, but the undisguised purpose for the amendment was an attempt to exert pressure on the judges of the Tribunal to compel the to cease their judicial activity. Such an action not only constitutes an attempt to interfere with the independence of constitutional judges, but it is also an example of the instrumental treatment of the State Budget Act as a mechanism for exerting political pressure and an attempt to illegally interfere with the activities of an independent judicial authority. However, this is not what the role of the State Budget Act should be, which by definition should only serve the purpose of implementing budgetary policies in a given year, i.e. financing the activities of the state.

Although the Senate submitted amendments to the 2025 State Budget Act, none of them addressed the issue of the Constitutional Tribunal's expenditures. Thus, the reduced expenditure amount was provided for in the final version of the State Budget Act, as sent to the President of Poland for signature.

Evidence:

- **appendix part of the 2025 State Budget Bill in the part concerning the Constitutional Tribunal and the appendix part of he 2025 State Budget Act**

submitted to the President of the Republic of Poland for signature, in the part concerning the Constitutional Tribunal (appendix no. 13).

2.14. Taking the above into consideration, it ought to be noted that:

-Firstly, in the light of the preamble to the Constitution, the constitution-maker wanted to ensure diligence and efficiency in the work of public institutions. It is impossible to guarantee the efficient operation of a public institution if *de facto* the judges who adjudicate therein are deprived of their remuneration. The Constitutional Tribunal as a judicial authority – established first and foremost to conduct the review of the constitutionality of the law – can only perform its constitutional tasks with the participation of judges who form particular panels designated to adjudicate on specific cases. Pursuant to the provisions of the Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, the participation of the judges of the Tribunal and its President at all stages of the adjudication process (from the registration of the case, the appointment of the panel, through the preliminary review - when required - to the conclusion of the proceedings in the case) is mandatory. Even the best-qualified legal service and administrative staff (due to obvious legal constraints) cannot replace the work done by the said judges.

Thus, depriving the judges of their remuneration may result in the abolition of the constitutional review of law in Poland, and would entail depriving citizens and other subjects of law of their legal protection. Parties entitled to submit applications, legal questions and constitutional complaints have the right to expect their cases to be heard without undue delay, but such a state of affairs may not be attainable in the situation of depriving the judges of the Constitutional Tribunal of their remuneration, which in principle constitutes their only source of income.

- Secondly, the deprivation of remuneration clearly violates Article 195(2) of the Constitution, pursuant to which judges of the Constitutional Tribunal shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of the office and the scope of their duties. Thus, a judge of the Constitutional Tribunal has a constitutional right to be provided with adequate remuneration. The rules for determining the amounts of remuneration of the judges are set out in Article 16 of the Act of 30 November 2016 on the Status of Judges of the Constitutional Tribunal. Pursuant to para one of that provision, the basic remuneration of a judge of the Tribunal shall be the multiple of a remuneration base obtained by applying the multiplier of 5.0. Pursuant to para two, The remuneration base used for the determination of the basic remuneration of a judge of the Tribunal in a particular year

shall be the average remuneration in the second quarter of the previous year, as published in the Official Gazette of the Republic of Poland – *Monitor Polski* by the President of the Central Statistical Office, in accordance with Article 20(2) of the Act of 17 December 1998 on Old-Age and Disability Pensions from the Social Insurance Fund (Journal of Laws – Dz. U. of 2016, item 887).

Actions taken with regard the National Council of the Judiciary

3.1. Since 13 December 2023 representatives of the legislature and the executive (with the exception of the President of the Republic of Poland) have consistently undermined the systemic position of the National Council of the Judiciary, whose judicial composition, as of 2018 is shaped on the basis of the Act of 12 May 2011 on the National Council of the Judiciary (at present Journal of Laws of 2024, item 1186), as amended by the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other statutes (Journal of Laws of 2018, item 3; hereinafter: the Amending Act). Introduced by the Amending Act, Article 9a(1) of the NCJ Act provides that fifteen judges-members of the NCJ are elected by the Sejm from among judges of the Supreme Court, common courts, administrative courts and military courts, for a joint four-year term. Also introduced by the Amending Act, Article 11d(5) of the NCJ Act stipulates that the Sejm elects the judges-members of the NCJ for a joint four-year term by a three-fifths majority vote in the presence of at least half of the statutory number of MPs, voting on the list of candidates. However, the lawmaker provided for an emergency procedure - should the Sejm fail to elect by a qualified majority, then pursuant to Article 11d(6) of the NCJ Act, the Sejm elects the judges-members of the NCJ by an absolute majority of votes in the presence of at least half of the statutory number of MPs, voting on the list of candidates.

Thus, the normative model for the election of judges-members of the NCJ, introduced by the Amending Act, departed from the existing co-optation model, in favour of election by the Sejm constituted by general elections, deciding (as a rule) by a qualified majority, and therefore with the participation and influence of the parliamentary opposition.

3.2. Since 13 December 2023 representatives of the legislature and the executive, as well as particular adjudicating panels of the Supreme Court and of other courts, have been questioning the conformity of the provisions introduced by the Amending Act with the Constitution of the Republic of Poland, international law and EU law. However, it should be strongly emphasised that, in the Polish legal order, there is no ruling of the Constitutional Tribunal (the court of last word in constitutional matters) which would declare the non-

conformity of the cited provisions with the Constitution or ratified international agreements, including the treaties constituting the European Union. Therefore, the presumption of constitutionality of the said provisions (determining the new model for the election of judges-members of the NCJ) has not be overthrown in the procedure provided for by the law. On the contrary, the constitutionality of Article 9a of the NCJ Act was confirmed by the Constitutional Tribunal in its judgment of 12 March 2019, ref. no. K 12/18 (OTK ZU A/2019, item 17; Journal of Laws of 2019, item 609). The Tribunal, the the final and universally binding effect, held that the aforementioned provision complies with a number of higher-level norms for constitutionla review, i.e. with Article 187(1)(2) and (4) in conjunction with Article 2, Article 10(1) and Article 173 and with Article 186(1) of the Constitution of the Republic of Poland. In the statement of reasons for its ruling (with reference to the views expressed earlier in the case concluded by the judgment of 20 June 2017, ref. K 5/17, OTK ZU No. A/2017, item 48), the Tribunal aptly pointed out that the constitution-maker had not determined who should elect the judges-members of the NCJ, and therefore that issue belonged to statutory matters. The Tribunal in the cases ref. nos. K 5/17 and K 12/18 did not agree with the view expressed in the Tribunal's judgment of 18 July 2007. (ref. K 25/07, OTK ZU No 7/A/007, item 80), which assumed that, "the Constitution, in Article 187(1)(2), directly regulates the principle of electability of judges to the NCJ, thus deciding on the composition of the Council. It expressly stipulates that members of the NCJ may be judges, elected by judges, without indicating any additional qualities that would condition their membership of the Council". In fact, Article 187(1)(2) of the Constitution "provides only that these persons shall be elected from among the judges. However, the constitution-maker has not indicated who is to elect these judges. Thus, it clearly follows from the Constitution who can be an elected member of the NCJ, but it is not specified how to elect the judges-members of the NCJ to this Council. These issues have been delegated to be regulated by statute. There is nothing preventing judges from being elected by judges to the NCJ. However, one cannot agree with the assertion that judges exclusively must be vested active electoral rights. While Article 187(1)(3) of the Constitution clearly indicates that MPs are elected to the NCJ by the Sejm and senators – by the Senate, there is no constitutional guidance in this regard for judges of the NCJ members. Thus, the Constitution does not determine who can elect judges-members to the NCJ. Therefore, it must be concluded that, within the limits of legislative freedom, this issue can be regulated in various ways" (K 5/17). (...) The statement that Article 187(1)(2) "clearly specifies that members of the NCJ may be judges, elected by judges" finds no basis in the wording of the cited provision. A different interpretation goes beyond both the literal wording of the provision and the belief in the

rationality of the lawmaker. Since the constitution-maker in Article 187 (1) (1) and (3) of the Constitution indicates precisely whom enjoys active electoral rights to elect members of the NCJ, the fact that the constitution-maker does not do so with regard to representatives of courts allows one to conclude that the constitution-maker did not regulate this issue on purpose and placed it in the hands of the lawmaker. Such a conclusion can also be drawn from the discussion held during the deliberations of the National Assembly's Constitutional Committee on the draft Constitution, where it was discussed whether the NCJ should be a constitutional body at all, and it was considered under whose chairmanship it should operate, who would be part of its composition. At the time, however, the focus was on the fact that it should be dominated by representatives of the judicial community, because this would guarantee its independence on the one hand, and efficient and effective operation on the other (Constitutional Commission of the National Assembly, Bulletin XXIV, Warsaw 1996, pp. 20 et seq.)" (the Constitutional Tribunal's judgment ref. no. K 12/18).

Thus, the constitutional-law objections to Article 9a of the NCJ Act, since the judgment ref. no. K 12/18, have been completely unfounded and should not be the basis for actions aimed at undermining the constitutional position of the National Council of the Judiciary formed on the basis of the regulations introduced by the Amending Act.

3.3. On 20 December 2023, the Sejm adopted its resolution with regard to eliminating the effects of the constitutional crisis in the context of the systemic position and functions of the National Council of the Judiciary in a democratic state ruled by law (M. P. item 1457; hereinafter: the resolution of 20 December 2023), in which it presented its own assessment of the activities of the NCJ and pointed out the irregularities in connection with the composition of the "judicial" part of this body. The Sejm stated that: "1) the resolution of 6 March 2018 on the election of members of the National Council of the Judiciary, issued by the Sejm of the Republic of Poland, published in the Official Gazette – *Monitor Polski* of 12 March 12 2018. (item 276); 2) Resolution of 20 May 2021 on the election of a member of the National Council of the Judiciary, issued b y the Sejm of the Republic of Poland, published in *Monitor Polski* of 27 May 2021. (item 497); 3) the resolution of 12 May 2022 on the election of members of the National Council of the Judiciary, issued by the Sejm of the Republic of Poland, published in in *Monitor Polski* of 19 May 2022 (item 485) – were adopted in flagrant violation of the Constitution of the Republic of Poland.". The basis for the Sejm's assessment comprised the rulings of the Supreme Court, the Supreme Administrative Court, the Court of Justice of the European Union and the European Court of Human Rights, cited in the text of the resolution.

However, in its argumentation, the Sejm completely disregarded the fact that the resolutions of the 8th and 9th parliamentary term of the Sejm on the election of judges-members of the NCJ were adopted on the basis of a statute with regard to which the presumption of constitutionality had not be overthrown(the first resolution as adopted before the judgment ref. no. K 12/18 case), and whose conformity to the Constitution was confirmed by the Constitutional Tribunal (the second and third resolutions as adopted after the judgment ref. no. K 12/18 case). Therefore, it is impossible to make an effective allegation that the Sejm's resolutions adopted on the basis of the constitutional regulation "were adopted in flagrant violation of the Constitution." The grounds for expressing such an assessment by the Sejm in the resolution of 20 December 2023 cannot be provided by the rulings of the Supreme Court, the Supreme Administrative Court and international courts mentioned in its content, since these bodies do not have the competence to adjudicate, with legal effects, on matters relating to: the constitutionality of statutes, the legality and constitutionality of the Sejm's acts adopted by that House of Parliament on the basis of statute, or the appropriateness of the composition of the constitutional authorities of the Republic of Poland.

The Sejm's call for the judges-members of the National Council of the Judiciary to immediately cease their activities in the National Council of the Judiciary should be qualified as an abuse of the constitutional position of the Sejm, as it undermines the constitutional order of the Republic of Poland. It was the Sejm's attempt to interfere with the activities of a constitutional state authority such as the National Council of the Judiciary by way of the resolution of 20 December 2023, which was aimed at undermining the constitutional order. Obviously, the Sejm retains certain powers of authority over the NCJ - i.e., the election of NCJ members and the ability to pass a law regarding the NCJ. However, those power can only be exercised in accordance with rules provided by generally applicable law. Meanwhile, the resolution of 20 December 2023 does not correspond to such rules.

3.4. The occurrence of significant irregularities in the activities between the Minister of Justice and the National Council of the Judiciary – at the level of the Minister's exercise of his law-making function (issuance of regulations) – was stated by the Constitutional Tribunal in its judgment of 16 May 2024 (ref. U 1/24, OTK ZU A/2024, item 47), where the Tribunal held that § 1, § 2 and § 3 of the the Minister of Justice's regulation of 6 February 2024, amending the regulation – the Rules of Procedure of Common Courts (Journal of Laws, item 149; hereinafter: the regulation) are inconsistent with Article 7 in conjunction with Article 186(1) of the Constitution. This is because the regulation under review was issued without the Minister of

Justice's consultation as to the opinion of the National Council of the Judiciary, which resulted the regulation's unconstitutionality. The Minister of Justice, having consulted the opinion of the NCJ expressed against the original submission, made significant normative changes to the content of the draft, resulting in the issuance of the regulation with wording that differed from the version previously consulted with the NCJ. In other words, the changes introduced by the Minister of Justice, after receiving the opinion of the National Council of the Judiciary, were not again submitted for a second opinion - thus a normative act was introduced into the legal system, selected elements of which were not subject to the NCJ's opinion at all. In justifying the direction of the ruling, the Tribunal noted that "[t]he Council's opinion on normative acts is the implementation of its constitutional duty to uphold the independence of courts and the independence of judges (Article 186(1) of the Constitution). Therefore, it is not permissible to bypass – in the process of issuing a normative act, including a regulation – the Council's opinion on the content of the act. (...) Although the obligation to consult several times before issuing a regulation by the executive body cannot be interpreted from the Constitution and the laws, it should be noted that in the case under review, the essential elements of this regulation were changed in the draft regulation, and therefore the content of the NCJ's opinion of 9 January 2024 could not be complete. To sum up, an analysis of the circumstances of the work on the draft amending regulation leads to the conclusion that in the course of its issuance, by the Minister of Justice, the NCJ's ability to perform its constitutional function was restricted. Consequently, it must be concluded that the challenged provisions of the amending regulation were enacted in a manner that does not meet the constitutional requirements of Article 186(1) of the Constitution, and therefore also the requirements of the principle of legalism expressed in Article 7 of the Constitution. The Tribunal found that the omission of the stage of the NCJ's opinion on the normative act in the contested scope constitutes a violation of Article 7 in conjunction with Article 186(1) of the Constitution. Such action constitutes a violation of the constitutional role of the NCJ, preventing it from giving an opinion on an act that is important from the point of view of the independence of the courts and the independence of judges" (the Constitutional Tribunal's judgment ref. no. U 1/24).

3.5. On 3 July 2024, a search of office premises in the building at the address of ul. Rakowiecka 30, 02-528 Warsaw, was conducted. The indicated address is the location of the seat of the National Council of the Judiciary.

In an issued statement, the NCJ assessed that the activities "were conducted in violation of the law and in violation of all fundamental principles of a democratic state of law. They led to a violation of the separateness, independence and autonomy of the National Council of the

Judiciary, and consequently to a violation of the constitutional legal order of the Republic of Poland, the principles of legalism and separation of powers, as well as the independence of the judiciary and the independence of judges, and the right of the citizen to effective judicial protection" (see Resolution of the Presidium of the National Council of the Judiciary dated 5 July 2024; accessed 22 January 22 2025).

3.6. In the resolution of 18 December 2024 – which has already been presented in the context of the Constitutional Tribunal – the Council of Ministers stated in § 2(7) that the acts of the NCJ published in an appropriate official journal would be annotated with the following note: "In accordance with the judgments of the European Court of Human Rights in the cases: *Wałęsa v. Poland* (application no. 50849/21), *Reczkowicz v. Poland* (application no. 43447/19), *Dolińska-Ficek and Ozimek v. Poland* (applications nos. 49868/19 and 57511/19), *Advance Pharma sp. z o.o. v. Poland* (application no. 1469/20), and *Grzęda v. Poland* (application no. 43572/18), as well as in accordance with the case law of the Court of Justice of the European Union, including the judgement of 21 December 2023, *L.G. v. Krajowej Radzie Sądownictwa* [*the National Council of the Judiciary*], case C-718/21, as well as the judgment of 7 November 2024, *C.A. S.A. and Others v. Prezes Urzędu Ochrony Konkurencji i Konsumentów* [*the President of the Office of Competition and Consumer Protection*], case C-326/23, the National Council of the Judiciary, constituted under the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other statutes (Journal of Laws – Dz. U. of 2018, item 3) does not provide guarantees of independence from the legislature and the executive, and also the irregularities in the process of appointing judges entails that the Supreme Court – adjudicating via panels which include a person appointed to a judicial office by the President of the Republic of Poland upon the motion of the National Council of the Judiciary, constituted under the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other statutes – may not be regarded as 'a tribunal established by law'."

On the following day, i.e. 19 December 2024, a resolution of the NCJ with the above-mentioned note was published in the Official Gazette – Monitor Polski (see M. P. item 1077). At this point, the considerations made with regard to the issue of annotating selected decisions of the Constitutional Court with "relevant" notes remain relevant. Also with regard to the issue of publication of resolutions of the National Council of the Judiciary, it should be strongly emphasised that the publisher of a promulgation journal is obliged to announce the act without the possibility of any interference with its content. Although the obligation to publish a certain

category of resolutions of the NCJ does not derive from the Constitution, it is a statutory obligation (see Article 22(2) of the NCJ Act).

The interference which consists in annotating a published act of the NCJ with additional notes has no statutory basis. The resolution of 18 December 2024 does not constitute a legal authorisation for the publisher of an appropriate official journal to resort to such practice.

Public statements made with regard to the Constitutional Tribunal, the National Council of the Judiciary, and the Supreme Court

Finally, it ought to be pointed out that since 13 December 2023, in the public realm, there have been press publications and media statements undermining the systemic status [i.e. the status set by relevant legal norms regulating the Polish constitutional order] of the Constitutional Tribunal and its judges, the National Council of the Judiciary, and the Supreme Court judges, as well as also the publications and statements calling for non-recognition of the aforementioned constitutional authorities of the Polish state by other public authorities.

Evidence: excerpts from press publications and media statements (annex 14)

Taking into account the above-presented facts, it may supplement the evidentiary material in the present case in a valuable way to hold a hearing to obtain witness statements from the persons currently overseeing and managing the work of the Supreme Court and the National Council of the Judiciary.

II. The legal basis of this notification

Pursuant to Article 127(1) of the Criminal Code, whoever, with the purpose of depriving the Republic of Poland of its independence, detaching part of its territory, or overthrowing, by force, its constitutional order, undertakes activity directly aimed at achieving such a purpose in collusion with other persons, shall be subject to the penalty of the deprivation of liberty for no fewer than 10 years or the penalty of the deprivation of liberty for life. The said provision specifies the criminal offence also referred to as ‘the crime of coup d’état’. Article 127(2) of the said Code introduces penalisation for the preparation of the criminal offence specified in

para 1, providing for the penalty of the deprivation of liberty ranging from 3 to 20 years for the involvement in the said preparation.

In the case of coup d'état, the subject of legal protection comprises such legal values as the existence of the state, as well as its sovereignty, internal security, and constitutional order. This criminal offence falls under the legal category of "generic-perpetrator-profile offences" [i.e. the criminal offences the scope *ratione personae* of which is not narrowed down to persons displaying particular perpetrator characteristics[4]]; moreover, this criminal offence may be committed only intentionally, with the direct intent to achieve the purpose set out in Article 127(1)[5]. An analysis of the prerequisites of coup d'état clearly indicates that, for the determination of the commission of this offence, it suffices that the prohibited conduct specified in Article 127(1) has occurred, whereas the occurrence of any effect is irrelevant for such determination[6]. For this reason, it is not necessary – for the commission of the offence – to effectively achieve the purpose set by the perpetrator; it is sufficient that the perpetrator's prohibited conduct merely poses a threat to the protected legal values. The perpetrator's conduct consists in undertaking – in collusion with other persons – the activity which is directly aimed at achieving the purpose of depriving the Republic of Poland of its independence, detaching part of its territory, or overthrowing, by force, its constitutional order.

With reference to the wording of Article 127(1) of the Criminal Code which specifies the prohibited conduct, the Polish constitutional order should be construed as the entirety of institutions and mechanisms by way of which the state operates, as set forth in the Constitution. In this context, what should be deemed crucial is the content of Article 10 of the Constitution, which provides for the systemic principle of the separation of powers. In the light of Article 10 of the Constitution, there may be no doubt that the fundamental component of the constitutional order of the Republic of Poland is the independence and separateness of judicial powers, exercised by courts and tribunals (including the Constitutional Tribunal and the Supreme Court).

Pursuant to Article 128(1) of the Criminal Code, whoever, with the purpose of removing by force a constitutional authority of the Republic of Poland, undertakes activity aimed directly at achieving such a purpose, shall be subject to the penalty of the deprivation of liberty ranging from 3 to 20 years. The said provision specifies the criminal offence also referred to as 'high treason'. In Article 127(2) of the said Code, the legislature has introduced penalisation for the

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[4] In Polish legal terminology: *przestępstwo powszechne*.
[5] In Polish legal terminology: *zamiar bezpośredni kierunkowy*.
[6] In Polish legal terminology: *przestępstwo formalne (bezskutkowe)*.

preparation of the criminal offence specified in para 1, providing for the penalty of the deprivation of liberty ranging from 3 months to 5 years for the involvement in the said preparation.

In the case of high treason, the subject of legal protection comprises constitutional state authorities, and in particular the proper functioning of those authorities, i.e. their capacity to properly perform their systemic functions prescribed for them in the Constitution. Similarly to the crime of coup d'état, high treason falls under the legal category of "generic-perpetrator-profile offences" [i.e. the criminal offences the scope *ratione personae* of which is not narrowed down to persons displaying particular perpetrator characteristics]; moreover, this criminal offence may be committed only intentionally, with the direct intent to achieve the purpose set out in Article 128(1). Also, for the determination of the commission of this offence, it suffices that the prohibited conduct specified in Article 128(1) has occurred, whereas the occurrence of any effect is irrelevant for such determination. For this reason, it is not necessary – for the commission of the offence – to effectively achieve the purpose set by the perpetrator, which implies removing by force a constitutional authority of the Republic of Poland, but it is sufficient that the perpetrator has merely taken actions aimed at achieving the said purpose.

As aptly assumed by the Court of Appeal in Białystok, in its judgment of 11 June 2019 (ref. no. II AKa 36/19, LEX nr 2718214), "[f]or the existence of the criminal offence under Article 128(1) of the Criminal Code, it is irrelevant whether the perpetrator has the objective possibility of achieving the purpose specified in that provision, or whether the preparatory action itself stands a chance of success. It is sufficient to take specific action that constitutes preparation for the achievement of the said purpose".

Pursuant to Article 128(3) of the Criminal Code, whoever – by force or by an unlawful threat – influences official actions of a constitutional authority of the Republic of Poland, shall be subject to the penalty of the deprivation of liberty ranging from one year to 10 years. The said provision penalises exerting undue influence on the official activity of constitutional authorities of the Republic of Poland, which includes forcing certain actions, obstructing actions, as well as preventing a constitutional authority of the Republic of Poland from taking the said actions. The criminal offence under Article 128(3) of the Criminal Code also falls under the legal category of "generic-perpetrator-profile offences" [i.e. the criminal offences the scope *ratione personae* of which is not narrowed down to persons displaying particular perpetrator characteristics]; moreover, this criminal offence may be committed only intentionally, with the direct intent, either by taking action or refraining from action.

As regards the catalogue of constitutional authorities that are subject to legal protection in the light of Article 128(1) and (3) of the Criminal Code, it is worth recalling the Constitutional Tribunal's judgment of 4 December 2012 (ref. no. U 3/11, OTK ZU 11A/2012, item 131), where the Tribunal, taking account of views of legal scholars, underlined that a constitutional authority "is an authority that has been individually recognised in the Constitution, as well as an authority that is indicated by category, where the manner of appointment and the scope of fundamental competence have been regulated at the constitutional level". In the light of the above, no further justification is required for the statement that the Constitutional Tribunal, the Supreme Court and the National Council of the Judiciary belong to the category of constitutional authorities, and are subject to the legal protection provided in Article 128(1) and (3) of the Criminal Code.

Article 127(1) as well as Article 128(1) and (3) of the Criminal Code mention 'force' as an element of the prohibited conduct of the perpetrator who aims at achieving the purposes specified in those provisions. Seeking an appropriate way of interpreting the said prerequisite, one should invoke the rules of linguistic interpretation (which takes precedence in the context of criminal-law norms). According to a dictionary definition, 'force' is understood as: 'advantage used to impose one's will on someone else, to coerce someone into doing something; also: power illegally imposed on someone" (quoted from: https://sjp.pwn.pl/sjp/przemoc;2510670.html; accessed 22 January 2025). In the context of the above, it should be firmly emphasised that the Criminal Code draws a clear distiction between the notion of 'force' (e.g.: Art. 124(1), Art. 127(1), Art. 128(1) and (3), Art. 197(1), Art. 202(3), Arts. 203, 246, 250, 260, Art. 264(2), Art. 282, Art. 289(3) of the said Code) and the notion of 'force used against another person' (e.g.: Art. 191(1), Art. 191a(1), Arts. 280, 281 of the said Code). The wording which specifies the prohibited conduct in Article 127(1) as well as Article 128(1) and (3) of the Criminal Code makes general reference to 'force', which weighs in favour of a broader interpretation of the said prerequisite. Article 128(3) of the Criminal Code, among the statutory prerequisites for the prohibited act, also mentions 'an unlawful threat', the legal definition of which has been laid down in Article 115(12) of the Criminal Code. In accordance with the said provision, an unlawful threat is considered to be a threat provided for in Article 190 of the Criminal Code as well as a threat of bringing about criminal proceedings or other proceedings in which an administrative fine may be imposed or publicising information that is damaging to the honour of the threatened person or his/her close person; a declaration of bringing about criminal proceedings or other proceedings in which an administrative fine may be imposed, with the sole purpose of protecting a legal right infringed

by a criminal offence or by conduct subject to an administrative fine, does not constitute such a threat.

The above analysis juxtaposed with the facts presented in part I of the statement of reasons for this notifocation leads to the assumption that, in the case outlined within the scope of this notification, there are grounds for a resonable suspicion that the aforementioned criminal offence may have been committed, which implies – in accordance with the principle of legalism specified in Article 10 of the Criminal Procedure Code – the legal duty to institute preliminary proceedings by issuing a decision to commence an investigation (see Art. 303 of the Criminal Procedure Code). In the light of Article 303 of the Criminal Procedure Code, there is no doubt that what suffices for the institution of preliminary proceedings is the probability of the commission of a criminal offence, which must be clearly distinguished from the proof of the offence. Moreover, the degree of the indicated probability does not have to be considerable (unlike with regard to the application of preventive measures where the degree of high probability of the commision of a criminal offence is required).

The conduct of the most important persons in the state, enumerated at the beginning of this notification, and then subsequently presented in more detail in part I of the statement of reasons for this notification – considered both individually as well as cumulatively – may be deemed as aiming to annihilate the Constitutional Tribunal (as well as the Supreme Court and the National Council of the Judiciary), and thus to actually eliminate the judicial review of the hierarchical conformity of legal norms. The achievement of such an effect would be tantamount to a change of the constitutional order of the Republic of Poland (at least within the remit of the activity of the judicial branch of government), without any formal amendment to the Constitution, i.e. by bypassing Chapter XII of the Constitution. In this context, what should be borne in mind is the systemic significance of the Constitutional Tribunal's jurisdiction, which comprises the following: examining the hierarchical conformity of legal norms (Art. 188 (1)-(3) and (5) and Art. 193 of the Constitution); resolving disputes over powers between central constitutional authorities of the state (Art. 189 of the Constitution); examining the conformity to the Constitution of the purposes or activities of political parties (Art. 188(4) of the Constitution); determining whether there exists an impediment to the exercise of the office by the President of the Republic, where s/he is unable to notify the Marshal of the Sejm about her/his temporary inability to discharge the duties of the office (Art. 131(1) of the Constitution). Similar observations should be made with regard to the constitutional powers of the Supreme Court, which oversees the adjudication activity of common and military courts (see Art. 183(1)

of the Constitution), as well as with reference to the National Council of the Judiciary, which safeguards the independence of courts and judges (see Art. 186(1) of the Constitution).

The conduct described in this notification may display characteristics of force construed as using an advantage over others – in this case by persons representing the executive and the legislature, belonging to the broadly understood ruling coalition, for the purpose of imposing their will on the Constitutional Tribunal (as well as the Supreme Court and the National Council of the Judiciary), by coercing the Tribunal to cease to exercise its judicial powers in the manner that is independent of the other branches of government, as well as for the purpose of coercing the Tribunal's judges to cease to adjudicate independently (likewise, coercing the Supreme Court and the National Council of the Judiciary to cease to perform their constitutional tasks). By contrast, what may be regarded as an unlawful threat is the call – adressed to public authorities – for refusal to recognise rulings and other acts issued by the aforementuioned aconstitutional authorities, with the concurrent proviso that non-compliance may imply activity in breach of law, which in turn poses the risk of legal liability, including criminal liability (see, *inter alia*, the excerpt from the resolution of 6 March 2024: "The Sejm holds the view that, as regards the Constitutional Tribunal's rulings issued in breach of law, the taking account of those rulings by public authorities in their activities may be considered as those authorities' violations of the principle that public authorities are to function on the basis of, and within the limits of, the law.").

An analysis of the sequence of events makes it possible to state that this case gives rise to a reasonable suspicion that the above-mentioned actions were taken intentionally with the premeditated intent to achieve the aforementioned purpose – namely, the purpose of changing the constitutional order of the Republic of Poland and eliminating a constitutional authority of the Republic of Poland. In this context, it is hard not to get the impression that the actions carried out after 13 December 2023 followed a pre-planned scenario, related to the gradual undermining of the systemic position of the Tribunal and its judges and the Tribunal's capacity to perform its systemic tasks; first by attempting to render the Tribunal's rulings ineffective and undermining the status of legally elected judges of the Tribunal, and then by the complete paralysis of the institution caused by depriving it of funds and the failure to fill judicial vacancies. Similar remarks can be applied to the actions taken against the Supreme Court and the National Council of the Judiciary. The deliberate, intentional actions of the persons covered by this notice can also be evidenced by their media statements relating to the Constitutional Court, the Supreme Court and the National Council of the Judiciary. Similar observations should be made with regard to actions taken against the Supreme Court and the National

Council of the Judiciary. What may also manifest the intentional and purposeful activity on the part of the persons indicated in this notification is a number of their statements expressed in the media, with regard to the Constitutional Tribunal, the Supreme Court, and the National Council of the Judiciary.

In view of the above, it should be concluded that the actions of the persons indicated in this notification may have met the statutory prerequisites of the criminal offences specified in Articles 127 and 128 of the Criminal Code. The above conclusion appears to be even more justified since, as previously indicated, in the case of the criminal offences under Articles 127 and 128 of the Criminal Code, the lawmaker penalises mere preparation for their commission of the said offences.

Taking into account the broad catalogue of persons involved in the actions aimed at annihilating the Constitutional Tribunal, as exemplified in this notification, the hierarchical interconnections among them, the timeframe of the undertaken actions, as well as the complexity of the forms of effectuating executive actions, in the present case, there are grounds for a reasonable suspicion that an organised criminal group has been formed, as referred to in Article 258 of the Criminal Code. In this context, it is worth invoking one of the more recent rulings of the Supreme Court (its judgment of 4 January 2023, ref. no. I KK 368/22, LEX no. 3454384), in which the Supreme Court stated that the correct interpretation of Article 258(1) of the Criminal Code entails that:

"- the criminal offence of being involved in an organised criminal group constitutes an offence for the commission of which the effect of the prohibited conduct is irrelevant;
- members of the group do not need to know one another, may be bound by loose organisational ties, the structure of the group does not need to be complex, it suffices if the group is barely organised;
- for the commission of the criminal offence, what suffices is passive involvement, with the awareness of being a member of the group;
- members of the group may share mere readiness to commit criminal offences as part of, and for the benefit of, the group;
- the group may be formed for the purpose of committing many criminal offences, but also solely and exclusively to commit one".

III. The Competence of the Deputy Public Prosecutor-General

Taking into consideration that this notification concerns a reasonable suspicion that the aforementioned criminal offence may have been committed by persons holding the highest offices within the realm of public authority, including the Prime Minister and the Minister of Justice – the Public Prosecutor-General, it is justified that the criminal proceedings in that regard should be conducted, within the scope of a public prosecutor's investigation, by legally appointed Deputy Public Prosecutor-General, Michał Ostrowski.

The above stance is justified, *inter alia*, by the following:
(1) the Supreme Court's resolution of 27 September 2024 (ref. no. I KZP 3/24, LEX no. 3760705), in which the Supreme Court held that "[t]he provisions of Article 47(1) and (2) of the Act of 28 January 2016 – the Introductory Provisions to the Public Prosecution Service Act (Journal of Laws – Dz. U. of 2016, item 178, as amended) neither are of episodic nature, nor do they specify a temporal limitation to their binding force. The said provisions are systemic in nature, and remain binding until their possible repeal carried out in accordance with the law. This entails that a public prosecutor who is retired on the day of the entry into force of the aforementioned Act may, upon his/her request, return to his/her last held position or to an equivalent one. This right is not merely granted to the public prosecutors who have retired for health reasons. A public prosecutor who has exercised the right becomes a public prosecutor remaining in active service. The Public Prosecutor-General's decisions taken on the above-mentioned legal basis may not be regarded as defective, non-binding, or devoid of legal effects. Consequently, due to the fact that the adoption of the relevant decision on the return of the retired public prosecutor to active service, under Article 47(1) and (2) of the Act of 28 January 2016 – the Introductory Provisions to the Public Prosecution Service Act (Journal of Laws – Dz. U. of 2016, item 178, as amended), and that the subsequent appointment of the said prosecutor (by the Prime Minister, upon the motion of the Public Prosecutor-General) to the position of First Deputy Public Prosecutor-General – the National Prosecutor, were both based on the binding legal norms regulating the constitutional order, hence the said appointment was legally effective".

as well as

(2) the Constitutional Tribunal's judgment of 22 November 2024 (ref. no. SK 13/24, OTK ZU A/2024, item 120), in which the Constitutional Tribunal held that "Article 47(1) and (2) of the Act of 28 January 2016 – the Introductory Provisions to the Public Prosecution Service

Act (Journal of Laws – Dz. U., item 178) in conjunction with Article 19(3) of the Act of 9 October 2009 amending the Public Prosecution Service Act and certain other acts (Journal of Laws – Dz. U. No. 178, item 1375) – construed in the way that a public prosecutor who remains retired on the day of the entry into force of the Act of 28 January 2016 – the Introductory Provisions to the Public Prosecution Service Act may, upon his/her request, return to active service in the last held position, or an equivalent one, only within the period of two months from the entry into force of the said Act, i.e. within the period from 4 March 2016 until 4 May 2016 – in inconsistent with Article 60 in conjunction with Article 31(3) of the Constitution of the Republic of Poland".

What arises from the above-quoted determinations is that the staff and organisational changes made in the National Prosecution Service after 13 December 2023 – which in particular consisted in depriving Dariusz Barski, who had been properly appointed, of the actual possibility of exercising the duties of the National Prosecutor, and the related appointments of unauthorised persons as his successors – were illegal in nature. In view of the above, in order to ensure the objective consideration of this notification, it is indispensable that a decision to institute, or to refuse to institute, proceedings in the present case be taken by a Deputy Public Prosecuter-General who was legally appointed, before 13 December 2023.

IV. Conclusion

Taking account of all the arguments presented above, it apears to be fully justified to institute preliminary proceedings in the present case.

In view of the above, I request as stated at the beginning of this notification.

List of Annexes:

1) printout of an excerpt from Maciej Berek's account on the X platform;
2) printout of the published version of the Constitutional Tribunal's judgment of 5 December 2023, ref. no. P 2/17;

3) printouts of the published versions of the Constitutional Tribunal's judgments of: 11 December 2023, ref. no. K 8/21; 11 December 2023, ref. no. Kp 1/23; 18 January 2024, ref. no. K 29/23;
4) letter of 27 January 2025 from the President of the Constitutional Tribunal to the Prime Minister;
5) resolution of 6 March 2024;
6) judgment of 28 May 2024, ref. no. U 5/24, issued by the Constitutional Tribunal;
7) resolution of 18 December 2024;
8) Public Prosecutor- General's letter of 17 November 2024 with regard to the case ref. no. K 14/24;
9) Minister of Justice's letter of 22 March 2024 with regard to the case ref. no. U 1/24;
10) letter of 24 September 2024 by Minister of Education Barbara Nowacka with regard to the case ref. no. U 10/24;
11) motion of 5 December 2024 for the recusal of Judge Justyn Piskorski and Judge Jarosław Wyrembak from the case ref. no. Kp 3/24;
12) letter of 27 January 2025 from the President of the Constitutional Tribunal to the Marshal of the Sejm;
13) appendix part of the 2025 State Budget Bill in the part concerning the Constitutional Tribunal and the appendix part of he 2025 State Budget Act submitted to the President of the Republic of Poland for signature, in the part concerning the Constitutional Tribunal;
14) excerpts from press publications and media statements.