

Warsaw, 5 April 2016

PK VIII TK 074.1.2016

**Mr Andrzej Rzepliński**  
**President**  
**Constitutional Court**

*Dear Mr President,*

In view of received reports that the Constitutional Court reviews cases in adjudicating panels different than those required by the Act and in breach of statutory regulations governing the dates of hearing and sittings to review cases pending before the Constitutional Court, I am forced to inform you that the General Prosecutor is unable to participate in such actions of the Court. This also implies that written positions on cases being reviewed by the Constitutional Court cannot be presented as the presentation of such position under the circumstances could be seen, for instance by the general public, as the General Prosecutor's acquiescence to actions in breach of the applicable Act on the Constitutional Court and, consequently, in breach of the Constitution, whose Article 197 expressly provides that the Court may only function pursuant to the Act.

The assessment of the current actions of the Constitutional Court, for instance in case no. P 5/14, as being in breach of the applicable Act follows from the current legal status as described below.

The Act of 25 June 2015 on the Constitutional Court, promulgated in the Journal of Laws on 30 July 2015, item 1064, took effect on 30 August 2015.

The section containing transitional and amending provisions in the original text of the Act includes Article 134, which provides among others that "[i]n cases initiated and not completed before coming into force of the Act, in the proceedings at the Court ... if there are grounds for discontinuing the proceedings, the provisions existing until that time shall be applied," i.e., the provisions of the Act of 1 August 1997 on the Constitutional Court (Journal of Laws No. 102, item 643, as amended).

The provisions of Article 134 of the Act of 25 June 2015 on the Constitutional Court have not been amended (cf. consolidated text of the normative act published in the Journal of Laws of 2016, item 293).

However, the legal situation governed by the intertemporal provisions has changed on the entry into force on 28 December 2015 of the Act of 22 December 2015 amending the Act on the Constitutional Court (Journal of Laws, item 2217, “December amendment”). Article 2 of the December amendment establishes intertemporal rules governing the application of the principles laid down in the Act (i.e. the December amendment) in proceedings before the Constitutional Court in cases pending before the Court up to the effective date of the amendment. Hence, these provisions should be considered a modification of the transitional regulations contained in Article 134 of the Act of 25 June 2015 on the Constitutional Court. It is a subsequent norm of the same rank in the system of sources of generally applicable law governing the same matter. The new norm should apply in all cases pending before the Constitutional Court on the entry into force of the December amendment. This means that the intertemporal rules laid down in Article 134 of the Act of 25 June 2015 on the Constitutional Court shall apply in such cases, as of 28 December 2015, as modified according to the December amendment.

Therefore, to determine the principles under which proceedings should now be handled (continued) in a case pending before the Constitutional Court, one should establish to what extent the transitional regulations of Article 134 of the Act on the Constitutional Court have been amended by the principles laid down in Article 2 of the December amendment with regard to a given procedural issue. This, in turn, will allow to identify specific procedural norms applicable to a given issue.

Consequently, the principle laid down in the second sentence of Article 2(1) of the December amendment should apply in all cases currently pending before the Constitutional Court, irrespective of the date of their submission to the Court. The first sentence of Article 2(1) specifies in which cases all of the principles laid down in the December amendment should apply. Notwithstanding certain simplifications in the wording of the provision, it is obvious that it concerns the application of the norms of the Act on the Constitutional Court in the wording of the December amendment. However, there can be doubt as to the categorical wording of the second sentence of Article 2(1): “However, in each case, the adjudicating panel shall be established pursuant to the provisions of this Act.” An editorial simplification, a kind of intellectual shortcut, is used here as well; however, the wording arouses no doubt

because the only provisions applicable to the appointment of adjudicating panels of the Constitutional Court, contained in the December amendment, are the relevant amendments to the amended Act. The intent of the legislator is explicit in the wording: “However, in each case.” This implies that the second sentence contains a rule which is completely autonomous in relation to the norm laid down in the first sentence, and that the rule is generally applicable with no exception. Therefore, in each case reviewed by the Constitutional Court after the effective date of the December amendment, irrespective of the phase of the proceedings, the adjudicating panel should be established according to the provisions of the Act of 25 June 2015 on the Constitutional Court in the wording of the December amendment. The wording is included in the consolidated text of the Act on the Constitutional Court published, to repeat, in the Journal of Laws of 2016, item 293. The adjudicating panels must be composed of the full bench of at least 13 judges of the Court, passing judgements by a majority of 2/3 of all votes, or panels composed of 7 or 3 judges.

The dates of hearings and sittings where applications are reviewed must be determined in the same order in which cases are submitted to the Court.

The principles governing the period of time between the date when parties to the proceedings receive a notice of the date of a hearing and the date of the hearing also apply.

In view of the foregoing, since the Act of 25 June 2015 on the Constitutional Court in the wording of the amending Act of 22 December 2015 has not been amended by the Sejm of the Republic of Poland by means of another Act, it continues to be a part of the applicable legal order of the Republic of Poland. There is no judgement of the Constitutional Court which would effectively eliminate those norms from the legal order. In this context, the Constitutional Court has the legal obligation to proceed according to the Act. Any attempt of the Constitutional Court to take actions in breach of the regime established in the Constitution and the Act will not be legitimised by any form of participation of the General Prosecutor. They may only be subject to a legal compliance review by the General Prosecutor.

I request you, Mr President, to communicate this information to all of the other 14 judges of the Constitutional Court.

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Zbigniew Ziobro