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TO:

The Secretary of the Committee of Ministers

Council of Europe

Avenue de l'Europe

F-67075 Strasbourg Cedex

COMMUNICATION FROM THE HELSINSKI FOUNDATION FOR HUMAN RIGTHS CONCERNING THE EXECUTION OF ECtHR JUDGMENT IN THE CASE *XERO FLOR W POLSCE SP. Z O.O. V. POLAND* (APPLICATION NO. 4907/18)

To the attention of:

1. Mr Jan Sobczak

Plenipotentiary of the Minister of Foreign Affairs for cases and procedures before the European Court of Human Rights

Agent of the Polish Government

2. Mr Marcin Wiącek

Commissioner for Human Rights

16 Wiejska Street, 00-490 Warsaw, phone: (48 22) 556-44-40, fax: (48 22)556-44-50; e-mail: hfhr@hfhr.pl, www.hfhr.pl
TAX NUMBER: 525-12-61-255, account: Santander Bank Polska S.A. 25 1090 1854 0000 0001 4763 6887, SWIFT WBKPPLPP

EXECUTIVE SUMMARY:

- On 7 May 2021 the European Court of Human Rights issued judgment in the case of *Xero Flor w Polsce sp. z o.o. v. Poland* (application no. 4907/18). The Court ruled that participation of unlawfully elected person in a panel of the Constitutional Tribunal which discontinued the proceedings initiated by constitutional complaint led to violation of Article 6 § 1 ECHR (right to a tribunal established by law).
- On 24 November 2021 the Constitutional Tribunal issued a judgment declaring that Article 6 ECHR, insofar as it is applicable to the Constitutional Tribunal, violates the Constitution. Even before this judgment the Constitutional Tribunal issued a decision in which held that the *Xero Flor* judgment is legally non-existent (*sententia non existens*).
- As a result of these actions and omissions the *Xero Flor* judgment has not been implemented yet. Unlawfully elected persons continue to adjudicate in the Constitutional Tribunal. The legal status of ruling issued by the Constitutional Tribunal in unlawful personal composition has not been regulated yet.

RECOMMENDATIONS:

- With regards to individual measures, the authorities should consider introducing a procedure for reopening of proceedings initiated by constitutional complaints which were discontinued by the Constitutional Tribunal acting in unlawful personal composition.
- The competent domestic authorities must ensure that unlawfully elected persons do not participate in adjudicating panels of the Constitutional Tribunal. For that purpose, all three unlawfully elected persons should be immediately prevented from adjudication and removed from the Constitutional Tribunal.
- The law should regulate status of rulings of the Constitutional Tribunal issued by unlawfully composed panels. Such regulation should ensure the respect for legal certainty and rights of individuals who acted on the basis of judgments of the Constitutional Tribunal in good faith.
- The procedure of election of judges of the Constitutional Tribunal should be modified in order to prevent external undue influences on this process. This could be achieved via adoption of legislative measures which would allow non-political actors to participate in the procedure of election of judges of the Constitutional Tribunal at least on the stage of nomination of candidates for election.
- All final judgments of the ECtHR must be duly implemented and cannot be questioned in the domestic proceedings. Public authorities must not challenge validity of the ECtHR's judgments via motions to the Constitutional Tribunal.

1. Introduction.

1. The Helsinki Foundation for Human Rights ("HFHR") of Warsaw respectfully submits this communication to the Committee of Ministers of the Council of Europe ("CoM")

concerning the execution of the judgment issued by the European Court of Human Rights ("ECtHR") in the case of *Xero Flor w Polsce sp. z o.o. v. Poland* (application no. 4907/18).

2. The HFHR is a Polish non-governmental organisation established in 1989. Its principal objectives include the promotion of human rights, the rule of law and the development of an open society in Poland and abroad. The HFHR actively disseminates human rights standards based on the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, "ECHR") and works to ensure the proper execution of ECtHR judgments. One of the areas of the HFHR's activity is the protection of the rule of law. In this regard, the HFHR submitted, among others, *amicus curiae* opinion to the ECtHR in the case of *Xero Flor w Polsce sp. z o.o. v. Poland*, the implementation of which is the subject of this opinion.

3. This submission concerns only aspects related to the implementation of judgment on the general level. At the same time, this submission is limited only to those matters that we had not discussed in our previous submission dated 30 March 2022. Therefore, we will focus mostly on the proper way of restoration of legality of composition of the Constitutional Tribunal and on the regulation of status of rulings passed by panels including unlawfully elected persons.

2. Judgment of the ECtHR.

4. The Applicant in the case of *Xero Flor w Polsce sp. z o.o. v. Poland* was a company which submitted a constitutional complaint to the Constitutional Tribunal. The Constitutional Tribunal eventually discontinued the proceedings on formal grounds. However, the decision in this regard was issued in the panel which included Mr Mariusz Muszyński, a person who was elected to the position of a judge of the Constitutional Tribunal with violation of law in 2015. The violation of law resulted from the fact that the seat to which Mr Muszyński was elected had been already occupied by a person elected on a legal basis which was found to be consistent with the Constitution by the Constitutional Tribunal, but which was questioned, without justified reasons, by the ruling party.

5. The ECtHR ruled that there was a violation of a right to a tribunal established by law guaranteed under Article 6 § 1 ECHR. The Court held that despite limitations of the Constitutional Tribunal's jurisdiction, the proceedings initiated by the constitutional complaint fall within the scope of Article 6 § 1 ECHR. This finding allowed the ECtHR to consider the merits of the case. It therefore analysed the circumstances leading to the election of Mr Muszyński to his position and found that this person was elected with "manifest breach of domestic law". The ECtHR based its findings in this regard on the case-law of the Constitutional Tribunal – in particular judgment of 3 December 2015 (K 34/15). The ECtHR specified that the breached provisions of domestic law: "concerned a fundamental rule of the election procedure, namely the rule that a judge of the Constitutional Court was to be elected by the Sejm whose term of office covered the date on which his seat became vacant" (§ 277). In addition, the organs of legislative and executive power violated the law by trying to force the Constitutional Tribunal to recognise status of unlawfully elected persons and refusing to publish some of the

Tribunal's rulings. The Court therefore concluded that "the actions of the legislature and the executive amounted to unlawful external influence on the Constitutional Court. It finds that the breaches in the procedure for electing three judges, including Judge M.M., to the Constitutional Court on 2 December 2015 were of such gravity as to impair the legitimacy of the election process and undermine the very essence of the right to a "tribunal established by law". Due to the fact these irregularities were not reviewed and remedied by any domestic court, the Court ruled that there was a violation of Article 6 § 1 ECHR.

6. The Polish Government did not request the referral of the case to the Grand Chamber of the ECtHR under Article 43 ECHR. Therefore, the judgment became final on 7 August 2021.

3. Decision of the Committee of Ministers.

7. In the most recent decision, dated 8 December 2022, the Committee of Ministers referred to both individual as well as general measures necessary for a full implementation of the *Xero Flor* judgment.

8. With regards to the individual measures the Committee noted with concern that the domestic authorities had not provided sufficient explanation as to what measures could be used to ensure *restitutio in integrum* for the applicant.

9. With regards to the general measures the Committee underlined the obligation of domestic authorities to implement judgments of the Court and recalled that to fully implement the *Xero Flor* judgment, the Government should take following remedial actions: "(i) to ensure that the Constitutional Court is composed of lawfully elected judges, and should therefore allow the three judges elected in October 2015 to be admitted to the bench and serve until the end of their nine-year mandate, while also excluding from the bench judges who were irregularly elected; (ii) to address the status of decisions already adopted in cases concerning constitutional complaints with the participation of irregularly appointed judge(s); and (iii) to propose measures to prevent external undue influence on the appointment of judges in the future".

4. Current state of implementation of the *Xero Flor* judgment.

10. The *Xero Flor* judgment remains unimplemented. Unlawfully appointed persons continue to adjudicate in the Constitutional Tribunal. Status of rulings passed by unlawfully composed panels has not been regulated yet. In this regard we would like to underline that observations provided in our last submission are still fully relevant.

11. In some aspects the situation in the Constitutional Tribunal is even worse than before. At the moment there are disputes as to the legality of actions of the current President of the Tribunal, Mrs. Julia Przyłębska. According to some, her term of office expired in December 2022, after 6 years from her appointment.[1] However, Mrs. Przyłębska argues

[1] See e.g. *Stanowisko Zespołu Ekspertów Prawnych Fundacji im. Stefana Batorego w związku z upływem w dniu 20 grudnia 2022 r. kadencji Prezesa Trybunału Konstytucyjnego*, 6 December 2022, https://www.batory.org.pl/oswiadczenie/stanowisko-zespolu-ekspertow-prawnych-fundacji-im-stefana-

that the provision which regulates the duration of term of office of the President of the Constitutional Tribunal is not applicable to her as it was not in force at the moment of her appointment.[2] This dispute led to a crisis in the Constitutional Tribunal as group of judges openly challenge the status of Mrs. Przyłębska and even refuse to adjudicate in cases allocated to them by her.[3] As a result, the Constitutional Tribunal was unable to gather a sufficient number of judges to issue a judgment in full bench (at least 11 judges).[4] The dispute in question has provided additional evidence of the Constitutional Tribunal's lack of independence. M. Muszyński, one of the persons unlawfully elected to the position of a judge of the Constitutional Court, reported on his blog that he kept a list of people who had come to the Constitutional Court since 2021 'with various appeals,' and that juxtaposing the dates of these visits with various important events could lead to 'conspiratorial' conclusions.[5]

5. Individual measures.

12. In the abovementioned decision the Committee of Ministers asked the Government to provide explanation on how to ensure *restitutio in integrum* to the applicant. In our opinion this problem is very complicated and requires further analysis.

13. At the moment, the law does not provide any legal means to reopen proceedings before the Constitutional Tribunal. Therefore, to provide the applicant with adequate remedies allowing for *restitutio in integrum*, an adoption of amendment to the current law would be necessary. The question is, however, whether it would be possible to adopt such law without changing the current Constitution.

14. The Constitution provides that rulings of the Constitutional Tribunal are final (Article 190 section 1) what is interpreted by many lawyers as impermissibility of introducing any ordinary or extraordinary means of appeal against such rulings.[6] Such interpretation was accepted also by the Constitutional Tribunal itself.[7] However, there are also lawyers who argue that, at least to some extent, reopening of proceedings before the Constitutional Tribunal would be permissible. This could concern judgments issued with

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[2] See e.g. *Julia Przyłębska odpowiada na pismo sędziów TK. Pismo prezes skierowane do prezydenta*, "PAP", 5 January 2023, https://www.pap.pl/aktualnosci/news%2C1517880%2Cjulia-przylebska-odpowiada-na-pismo-sedziow-tk-pismo-prezes-skierowane-do.

[3] See e.g. *Bunt w Trybunale Konstytucyjnym. Wyciekł list sędziego do Przyłębskiej*, "Wprost", 12 January 2023, https://www.wprost.pl/polityka/11043637/bunt-w-trybunale-konstytucyjnym-wyciekl-list-sedziego-do-przylebskiej.html; E. Siedlecka, *W Trybunale Przyłębskiej poszło na noże. A bunt się wzmacnia*, "Polityka", 13 April 2023, https://www.polityka.pl/tygodnikpolityka/kraj/2208908,1,w-trybunale-przylebskiej-poszlo-na-noze-a-bunt-sie-wzmacnia.read.

[4] See e.g. Ł. Woźnicki, *Paraliż w Trybunale Przyłębskiej. Nie udało się zebrać pełnego składu*, "Wyborcza.pl", 9 May 2023, https://wyborcza.pl/7,75398,29736519,sprawa-ulaskawienia-kaminskiego-i-wasika-testem-dla-tk-czy.html.

[5] M. Muszyński, *O apelach do sędziów*, 'Blog o prawie, polityce i życiu', 28 April 2023, http://www.mariuszmuszynski.pl/2023/04/28/o-apelach-do-sedziow/.

[6] See e.g. A. Mączyński, J. Podkowik, *Komentarz do art. 190 Konstytucji RP*, in: *Konstytucja RP. Komentarz*, vol. II, ed. M. Safjan, L. Bosek, Warszawa 2016, p. 1193

[7] See e.g. Constitutional Tribunal, decision of 17 July 2003, case ref. K 13/02.

the most serious violations of law[8]. Moreover, some lawyers do not exclude that the law could give parties to proceedings right to appeal against decisions on discontinuation of proceedings.[9]

15. In the opinion of the HFHR, introduction of procedure for reopening of proceedings in which the Constitutional Tribunal issued judgment, especially judgment declaring unconstitutionality of law, would be problematic for many reasons (see below). However, we do not see any particular problems with introducing the procedure for reopening of proceedings which were discontinued by the Constitutional Tribunal in an unlawful composition.

16. In this regard we would like to underline that, unlike judgments declaring unconstitutionality of laws, decisions on discontinuation of proceedings do not produce any irreversible consequences.[10] They do not lead to any changes in the legal system and do not constitute an obstacle in challenging the same law again in a formally correct manner. Moreover, even at the moment certain procedural decisions of the Constitutional Tribunal are not 'final' – decisions issued in the preliminary examination procedure (for example, concerning inadmissibility of constitutional complaint) issued by one judge of the Tribunal may be challenged to the panel of three judges. This shows, in our opinion, that 'finality' of procedural decisions negative for complainants should not be interpreted as restrictively as finality of judgments on the merits of the case.

17. To conclude, HFHR believes that the Polish authorities should consider introducing a procedure in which individuals whose constitutional complaints were rejected by the Constitutional Tribunal acting in unlawful personal composition could request a re-examination of their case. Certainly, domestic authorities should have some margin appreciation with regards to regulating procedural aspects of such a mechanism, for example time limits, possible preliminary examination of formal admissibility of motions etc.

6. General measures.

6.1. Removal of unlawfully elected persons.

18. The Committee recommended to the Government 'to ensure that the Constitutional Court is composed of lawfully elected judges (…)'. HFHR believes that this could be achieved via removal of unlawfully elected persons from the Constitutional Tribunal.

19. In this regard we would like to reiterate that at the moment there are three unlawfully elected persons in the Constitutional Tribunal. First of them is M. Muszyński elected in December 2015. To other persons, J. Piskorski and J. Wyrembak, were elected to the seats 'vacated' by unlawfully elected persons who died before the end of their terms of office.

[8] M. Wiącek, *Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle*, in: *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions*, eds. A. von Bogdandy, P. Bogdanowicz, I. Canor, C. Grabenwarter, M. Taborowski, M. Schmidt, Springer 2021, p. 30.
[9] A. Mączyński, J. Podkowik, *Komentarz*…, p. 1193.
[10] See also: M. Ziółkowski, *Niedopuszczalność wznowienia postępowania przed Trybunałem Konstytucyjnym*, in: *Na straży państwa prawa. Trzydzieści lat orzecznictwa Trybunału Konstytucyjnego*, ed. M. Derlatka, L. Garlicki, M. Wiącek, Warszawa 2016, p. 479-483.

In our opinion their status is the same as status of Mr. Muszyński. The death of their predecessors did not result in a lawful vacancy in the Constitutional Tribunal – there are still have three lawful judges, from whom the President did not take the oath and whose term has not been legally terminated.[11] Therefore, their participation in adjudication can lead to violation of a right to a tribunal established by law.

20. HFHR believes that those three persons are not and have never been judges of the Constitutional Tribunal. According to the Constitution, judges of the Constitutional Tribunal are elected by the Sejm. In 2015 the Sejm elected three judges of the Constitutional Tribunal on the basis of law which was subsequently found to be consistent with the Constitution. Therefore, there were completely no legal grounds to question legality of such election. The Sejm does not have a power to invalidate a resolution on the election adopted by the Sejm of previous term and therefore such resolutions adopted in November 2015 must be considered as devoid of legal force. Because of that, the election of three persons in December 2015 was legally ineffective. It is impossible to elect a person to the office which was legally occupied by another person.

21. Taking into account that three persons elected in December 2015 have never become judges of the Constitutional Tribunal they may be simply removed from their positions without any special formalities. In particular, they are not protected by the principle of irremovability which is applicable to judges only.

6.2. Regulation of the status of rulings issued by the Constitutional Tribunal in unlawful personal composition.

26. The Committee of Ministers recommended Polish authorities "to address the status of decisions already adopted in cases concerning constitutional complaints with the participation of irregularly appointed judge(s)". Even though the Committee mentioned directly only decisions concerning constitutional complaints, in the HFHR opinion it would be necessary analyse the proper way of dealing with all rulings of the Constitutional Tribunal issued by unlawfully composed panels.

27. In Poland, there has been an ongoing discussion for some time about how to regulate the effects of Constitutional Tribunal (CT) judgments rendered with the participation of improperly selected individuals. Various proposals for detailed solutions in this regard have been presented. For example, the team of experts from the Institute of Strategy 2050, which is part of the "Polska 2050" movement, proposed conducting a verification of the legality of such judgments by the Constitutional Tribunal itself.[12] The authors of the report believed that "there should not be an automatic elimination of all judgments of the current flawed Constitutional Tribunal in this matter, as it would certainly undermine legal

[11] See also: M. Szwed, *The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights*, "European Constitutional Law Review"2022, vol. 18, issue 1, p. 141-142.
[12] M. Radwan-Röhrenschef, D. Sześciło, M. Zagłoba, *System kontroli konstytucyjnosci prawa w Polsce Jak wyjść z zapaści? Diagnoza i rekomendacje ekspertów Instytutu Strategie 2050*, ed. S. Zakroczymski, https://strategie2050.pl/wp-content/uploads/2021/12/System-kontroli-konstytucyjnos%CC%81ci-prawa-w-Polsce.pdf

certainty." [13] In their opinion, the verification should primarily apply to judgments rendered in constitutional complaint procedures unfavourable to the complainants, as well as "judgments concerning 'political' cases and those where the composition of the adjudicating panels was manipulated."[14] Further proposals for reform were put forward by the Legal Experts Team of the Stefan Batory Foundation.[15] Article 7(1) of the draft law introducing a new Constitutional Tribunal Act, prepared by this team (hereinafter referred to as the "draft law of the Legal Experts Team of the Stefan Batory Foundation"), states that judgments of the Constitutional Tribunal rendered with the participation of improperly selected individuals "do not produce the effects specified in Article 190(1) and (3) of the Constitution of the Republic of Poland." The same approach is taken in the draft regarding Constitutional Tribunal decisions on competency disputes. According to Article 7(3) of the draft, all actions in proceedings concluded with judgments and decisions deemed "not producing the effects" specified in the Constitution would require repetition. However, the draft does not automatically invalidate all decisions to discontinue proceedings or decisions rendered in preliminary review procedures with the participation of improperly selected individuals, but only grants the complainants the possibility of filing a constitutional complaint again. Moreover, the draft also protects the legal force of judgments and decisions issued by courts and other authorities based on Constitutional Tribunal judgments rendered with improperly composed panels in legal question procedures and constitutional complaints.

28. According to the HFHR, when regulating the effects of Constitutional Tribunal judgments rendered by improperly composed panels, the principle of legal certainty and the protection of the rights of individuals who have acquired certain rights or taken certain actions in good faith, relying on the decisions of the Constitutional Tribunal, should be followed. Between 2017 and 2022, the Constitutional Tribunal issued a total of 85 judgments (i.e., decisions on the merits of cases) with the participation of improperly selected individuals. Only some of these judgments were controversial and related, for example, to judicial reforms implemented by the government. The Constitutional Tribunal also issued several undoubtedly correct judgments concerning social benefits for caregivers of people with disabilities, workers' rights, or unfavourable interpretations of tax law provisions for taxpayers. Therefore, if we were to consider all these decisions as non-existent, it would mean that the provisions declared unconstitutional would still be in force, potentially resulting in the reinstatement of many regulations that are detrimental to citizens. This raises the question of how to treat individuals who have acquired certain rights based on judgments of the Constitutional Tribunal declared as non-existent. Furthermore, in many cases, the law has already been changed following the Constitutional Tribunal's judgment, and in such situations, reviving a provision declared

[13] Ibid., p. 11-12.
[14] Ibid.
[15] *Projekt ustawy wprowadzającej ustawę o Trybunale Konstytucyjnym przygotowany przez Zespół Ekspertów Prawnych Fundacji im. Stefana Batorego*, https://www.batory.org.pl/wp-content/uploads/2022/11/Spoleczny.projekt.ustawy.o.Trybunale.Konstytucyjnym.pdf.

unconstitutional in a non-existent judgment would either be impossible or would lead to even greater complications.

29. The concept of non-existence of Constitutional Tribunal judgments would be highly problematic from the perspective of the principle of legal certainty. A somewhat safer solution in this regard would be to introduce a procedure for reopening proceedings. This would not automatically invalidate all Constitutional Tribunal judgments rendered by improperly composed panels, but would only allow for the challenge of some of them (either upon request or ex officio by the Constitutional Tribunal itself). However, there are serious doubts as to whether allowing the reopening of proceedings concluded with a Constitutional Tribunal judgment would be consistent with the aforementioned principle of the finality of Constitutional Tribunal judgments. Moreover, even in this case, the aforementioned concerns about the consequences of challenging Constitutional Tribunal judgments declaring the unconstitutionality of provisions would arise, particularly regarding whether the repealed provisions would be automatically revived.

30. This shows that the issue of the status of Constitutional Tribunal judgments rendered by improperly composed panels is highly complex, and there is no perfect solution that has strong theoretical foundations and leads to clear and unproblematic consequences. Therefore, perhaps the most appropriate approach would be to adopt a more nuanced method that avoids the aforementioned threats to legal certainty. For example, as mentioned earlier, it is conceivable to introduce a reopening procedure that allows for a re-examination of cases concluded with a dismissal of a complaint or a decision to discontinue proceedings. Perhaps, even though it would be more controversial, it would be permissible to introduce the possibility of reopening proceedings concluded with a Constitutional Tribunal judgment affirming the conformity or non-infringement of the Constitution, but rendered by improperly composed panels. Such judgments, unlike judgments declaring unconstitutionality, do not have far-reaching legal effects, so challenging them would not result in excessive complications. Moreover, from the perspective of individual rights, it is precisely the possibility of reopening proceedings in cases concluded unfavourably for the complainant that is of the utmost importance. In the case of proceedings concluded with a Constitutional Tribunal judgment declaring unconstitutionality, it would be permissible for the Constitutional Tribunal to declare that the judgment was rendered unlawfully, without reviving the repealed provision. At the same time, nothing would prevent the Parliament from taking corrective actions aimed at reinstating certain provisions unjustifiably abrogated by the Constitutional Tribunal (e.g., in the case of access to lawful abortion).

6.3. Prevention of external undue influence on the appointment of judges in the future.

31. The Committee of Ministers also urged Polish authorities 'to propose measures to prevent external undue influence on the appointment of judges in the future'. HFHR agrees with this recommendation. In our opinion this goal could be achieved with the use of various means.

32. In our opinion, an optimal solution would be to amend the Constitution by changing the principles of selecting judges for the Constitutional Tribunal. The current model of selection, in which judges are chosen by the Sejm (Parliament) by an absolute majority, is inherently susceptible to politicization. Therefore, it would be necessary to change the selection rules, for example, by granting the right to choose a group of Constitutional Tribunal judges to other bodies besides the Sejm (such as the Senate or an independent National Council of the Judiciary) or at least by raising the majority required for the election of a judge, which would compel political factions in the Sejm to reach certain consensus. The Venice Commission has also proposed the introduction of this latter solution.[16]

33. Unfortunately, given the current political situation in Poland, the likelihood of amending the Constitution is very low. Therefore, measures aimed at limiting political manipulation in the process of selecting judges will have to be introduced through ordinary legislation. One such solution would be to grant non-political bodies the ability to nominate candidates for Constitutional Tribunal judges. The proposal to introduce such regulation has been put forward by the Stefan Batory Foundation, among others. In the project for a new law on the Constitutional Tribunal presented by their team of experts,[17] candidates for Constitutional Tribunal judges could be nominated by the President, the Presidium of the Sejm, a group of at least 50 Members of Parliament, a group of at least 30 Senators, the General Assembly of Judges of the Supreme Court, the General Assembly of Judges of the Supreme Administrative Court, the National Council of Legal Advisers, the National Bar Council, and the National Council of Prosecutors.

7. Recommendations of the HFHR.

34. HFHR believes that to fully implement judgment of the Court in Xero Flor, following steps must be taken.

35. First, with regards to individual measures, the authorities should consider introducing a procedure for reopening of proceedings initiated by constitutional complaints which were discontinued by the Constitutional Tribunal acting in unlawful personal composition. Introduction of such procedure would allow the applicant to request re-examination of its case.

36. Second, the competent domestic authorities must ensure that unlawfully elected persons do not participate in adjudicating panels of the Constitutional Tribunal. The X*ero Flor* case concerned proceedings initiated by constitutional complaint, but in the HFHR opinion also some proceedings concerning legal questions of courts may affect "civil rights and obligations" within the meaning of Article 6 § 1 ECHR. However, in our opinion unlawfully elected persons should not participate in any types of proceedings concerning

[16] Venice Commission, Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, 11 March 2016, CDL-AD(2016)001, para. 140, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e.

[17] *Projekt ustawy o Trybunale Konstytucyjnym przygotowany przez Zespół Ekspertów Prawnych Fundacji im. Stefana Batorego*, https://www.batory.org.pl/wp-content/uploads/2022/11/Spoleczny.projekt.ustawy.o.Trybunale.Konstytucyjnym.pdf.

review of constitutionality of law, regardless of the form of their initiation. To achieve this purpose, unlawfully elected persons must be simply removed from the Constitutional Tribunal – as they are not judges, they are not protected by the principle of irremovability.

37. Third, domestic authorities must regulate status of rulings issued by the Constitutional Tribunal in panels involving unlawfully elected persons in such a way as to ensure the respect for the principle of legal certainty and legal interests of persons who acquired certain rights acting in good faith with a trust towards organs of the State. For this reason, in the HFHR opinion, the authorities should refrain from adopting measures which would invalidate or declare as non-existent of all rulings of the Constitutional Tribunal issued in irregular composition. More moderate and individualised approach in this regard should be preferred.

38. Fourth, domestic authorities should modify the procedure of election of judges of the Constitutional Tribunal as to prevent external undue influences. In the HFHR opinion this could be achieved via adoption of legislative measures which would allow non-political actors to participate in the procedure of election of judges of the Constitutional Tribunal at least on the stage of nomination of candidates for election.

39. Fifth and finally, all state authorities must accept that all final judgments of the ECtHR must be duly implemented and cannot be questioned in the domestic proceedings. Public authorities must not challenge validity of the ECtHR's judgments via motions to the Constitutional Tribunal.

On behalf of the Helsinki Foundation for Human Rights,