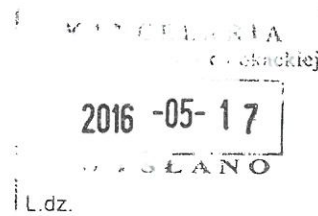




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FROM:

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TO:

Venice Commission for Democracy through Law

Council of Europe

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**Observations of the Polish Bar Council
on the Act of 15 January 2016
amending the Act on the Police and other Acts
(Journal of Laws of the Republic of Poland of 2016, item 147)**

1. The Polish Bar Council (hereinafter referred to as **"the PBC"**) hereby present to the Venice Commission for Democracy through Law (hereinafter referred to as **"the Venice Commission"**) its observations on the Act of 15 January 2016 amending the Act on the Police and other Acts (Journal of Laws of the Republic of Poland of 2016, item 147, hereinafter referred to as **"the Amendment of 15 January 2016"** and **"the Amendment to the Act on the Police"**).
2. The PBC represents the Polish Bar, which is an association of advocates and advocate trainees. Support for the observance of human rights and civic freedoms, as well as for shaping and application of the law, constitute the most important statutory tasks

of the Bar association. Convinced of the need to ensure an effective protection of human rights and freedoms, such as the right to privacy and confidentiality of correspondence, particularly the need to respect of legal professional privilege, the PBC hopes that the information presented herein will support the Venice Commission in examination of the Amendment to the Act on the Police, in the preparation of an opinion requested by the Parliamentary Assembly of the Council of Europe in January 2016.

3. The observations of the PBC present the information on the course of legislative works on the Amendment of 15 January 2016, as well as information on the initial legislative works on the Amendment on the Act on the Police carried in 2015. The observations introduce the main arguments presented by the PBC during the legislative works on the Amendment to the Act on the Police (**Attachment no. 1**) carried out in 2015. English translation of this document is attached hereto as **Attachment no. 2** to enable the Venice Commission to acquaint itself comprehensively with the legal arguments presented by the PBC.

The course of legislative works on the Amendment of 15 January 2016

4. The legislative works on the Amendment on the Act on the Police were initiated for the first time in mid-2015. The initial draft amending the Act on the Police aimed at implementing the Constitutional Court's judgment issued on 30 July 2014, in the case no. K 23/11. The main declared purpose of the draft was to amend the unconstitutional provisions of the Act on the Police and other Acts on the operation of other special services in Poland. Pursuant to the Constitutional Court's judgment in the case no. K 23/11, these provisions were binding only until 7 February 2016.
5. The initial legislative works on the amendment to the Act on the Police were carried out by the Parliament of the previous term in mid-2015. The first draft of the Amendment to the Act on the Police was prepared by a group of senators on 25 June 2015 and proceeded as *draft no. 967*¹. The PBC submitted its opinion on the draft legislation throughout the legislative works in the previous Parliamentary term. The PBC pointed to its shortcomings, especially in terms of the protection of confidential communication, including threats to legal professional privilege.
6. By a letter of 20 July 2015, the PBC appealed to the Prime Minister of Poland for the suspension of further legislative works, emphasizing that the legislation proposed in *draft no. 967* would enable surveillance of citizens without proper court supervision. Moreover, the PBC stressed that the proposed amendments may lead to an

¹ *Draft no. 967* is available in Polish at www.senat.gov.pl/download/gfx/senat/pl/senatdruki/6737/druk/967.pdf.

unacceptable interference with individual rights and freedoms by the police and special services, including confidential communication, especially the legal professional privilege, safeguarding performance of rights and freedoms². Subsequently, by letters of 30 July 2015 addressed to the Speaker of Sejm and the MPs, the PBC expressed its deep concern about the proposed legislation. The PBC pointed out that the proposed legislation could not lead to a proper implementation of the Constitutional Court's judgment in the case no. K 23/11, wherein the Court had repeatedly and critically evaluated the current legal solutions in the area of surveillance activities of the police and other special services. In the PBC's opinion, contrary to its declared objective, *draft no. 967* proposal could not solve the problems indicated by the Constitutional Court. The PBC underlined that the new draft provisions pertaining to professional privileged communication (including a notary, lawyer, legal adviser, tax adviser, doctor, journalist, detective professional secrecy) raise most serious concerns. Although the Constitutional Court found, among others, that no obligation to destroy materials (eg. wiretaps) obtained with surveillance measures is unconstitutional, *draft no. 967* may further weaken protection of professional secrecy. The PBC stated that the representatives of legal professions could be subjected to surveillance measures, such as wiretapping or collecting data about the location of mobile phones. The PBC underlined that the proposed legislation implies that it would be the special services agents who would assess whether a given material obtained through surveillance is covered by professional secrecy or not. The draft stipulated that the court may authorize the use of such data in criminal proceedings if it is required by the interest of justice. The PBC pointed that both the trustee of a professional secrecy privilege, and the person whose secret is concerned would not even be informed that they were subjected to such forms of surveillance and could not appeal against it. In the PBC's opinion such solutions render the professional secrecy and privileged communication fictional, thus cannot be reconciled with the principle of a democratic state ruled by law.

7. *Draft no. 967* was later proceeded as *draft no. 3765* by the Sejm. In August 2015, *draft no. 3765* was directed for the Council of Minister's opinion and was subject to further deliberation and arrangements, i.a. among the representatives of the Police and special services. The PBC took an active part in further consultations, although originally the PBC was not invited to participate in the government's consultations³.
8. The legislative works on *draft no. 3765* were not concluded by the Parliament of the previous term before its end. Consequently, they were discontinued.

² The PBC's appeal and opinion on *draft no. 967* is available in Polish at www.adwokatura.pl/admin/wgrane_pliki/file-2015-07-20-apel-do-premier-kopaczustawa-o-policji-12275.pdf and www.adwokatura.pl/admin/wgrane_pliki/file-2015-07-20-zal-do-apelu-do-premier-kopaczuwagi-druk-967-12635.doc.

³ The PBC's request to join the Government's consultation is available in Polish at www.adwokatura.pl/admin/wgrane_pliki/file-mswlistapel-12385.pdf

9. The subsequent legislative works on the amendment to the Act on the Police were initiated by the current Parliament. The draft of the Amendment to the Act on the Police was submitted by a group of MPs from the leading political party and was later proceeded as *draft no. 154* (hereinafter: “**draft no. 154**” or “**draft of the Amendment to the Act on the Police**”). The initial draft of the Amendment to the Act on the Police was submitted to the Sejm on 23 December 2015. The legislative works on the draft on Amendment to the Act on the Police were carried out during less than 2 months. It was underlined that the new legislation would have to enter into force before 7 February 2016.
10. The PBC submitted its opinion on the proposed legislation to the Speaker of the Sejm on 29 December 2015. **The PBC’s main arguments referred to the accuracy of provisions aimed at implementing the Constitutional Court’s judgment in the case no. K 23/11, the proposed mechanism of selecting information covered by privileged communication, the absence of right to appeal against surveillance measures and use of information covered by professional privilege, the possibility of gathering “internet data” without court order and effectiveness of the court supervision over the special services’ activities in this field.** The views expressed by the PBC’s on the draft of the Amendment to the Act on the Police remain valid today and they have not changed.
11. The PBC underlined that the legislative proposal put forward in *draft no. 154* leads to serious limitations of individual’s ability to exercise constitutional rights and freedoms, particularly the right to privacy, confidentiality of correspondence and the principle of information autonomy. The PBC disagreed with the arguments presented in the reasoning of *draft no. 154*, that its purpose is to adjust the law to conform with the judgment of the Constitutional Court issued in the case no. K 23/11. In the PBC’s opinion, *draft no. 154* refers to the above judgment only in some aspects. In essence, the new draft repeats solutions presented in *draft no. 3765*, proceeded by the previous Parliament, which were criticized by the PBC⁴. In the PBC’s opinion, *draft no. 154* also introduces new solutions, which limit the standards of protection of citizens’ rights and freedoms. The new solutions are not required for implementing the judgment of the Constitutional Court issued in case no. K 23/11.
12. In the opinion of 29 December 2015, the PBC underlined that under the proposed provisions of the Amendment to the Act on the Police and other Acts, essentially identical with the proposals of *draft no. 3765*, advocates would be subjected to the most interfering measures of surveillance – wiretapping and obtaining telecommunication data. This may violate constitutional rights and freedoms, in particular the right to defense, which is indispensable for the existence of trust between a lawyer and his or her mandatary. In the PBC’s opinion, the proposed *draft*

⁴ The time table of the work and activities of the PBC in relation to the *draft no. 965* and *draft no. 3765* on the Act on the Police and other Acts is available in Polish at <http://www.adwokatura.pl/z-zycia-nra/kalendarium-dzialan-nra-dotyczacych-projektu-ustawy-o-policji/>.

no. 154 introduces a mechanism based on the assumption that it will be up to Police officers and other special services' agents to decide whether information obtained with use of surveillance measures is covered by a legal professional privilege and what further action is to be taken with regard to use of such information for criminal proceedings. Such an assumption seriously compromises privileged communication as well as rights and freedoms that privileged communication protects.

13. In line with the position presented in the course of legislative work in 2015 on the *draft no. 3765*, the PBC reemphasized that in the judgment in the case *no. 23/11* the Constitutional Court ruled that Article 19 of the Act on the Police, Article 9e of the Act on the Border Guard, Article 36c of the Act on the Tax Control Act, Article 31 of the Act on Military Police and other military law and other bodies, Article 27 of the Act on the Internal Security Agency and Intelligence Agency, Article 31 of the Act on Military Counterintelligence Service and Military Intelligence Service, Article 17 of the Act on the Central Anticorruption Bureau, to the extent they do not provide guarantees of prompt, monitored and recorded destruction of materials containing inadmissible evidence (with regard to which the court did not waive professional secrecy or such waiver was inadmissible), do not comply with Article 42 sec. 2, Article 47, Article 49, Article 51 sec. 2 and Article 54 sec. 1 in connection with Article 31 sec. 3 of the Polish Constitution. The PBC underlined that *draft no. 154* expressly indicates that use of surveillance measures may lead to obtaining information protected as legal professional or journalist's privilege, as lawyers and journalists are not excluded from use of surveillance measures. The PBC underlined that *draft no. 154* stipulates that special service agents using surveillance measures would be required to assess whether the information gathered contains data covered by the privilege referred to in Article 178 of the Code of Criminal Proceedings or privilege referred to in Article 180 § 2 of the Code of Criminal Proceedings. If it was determined that privileged communication was involved, the requirement to destroy the collected data would come into force. In case of obtaining data protected by legal professional privilege, the Police or special service agent would be obliged to pass on such data to the prosecutor, who in turn would be obliged to promptly request the court to issue a decision 1) approving the use of such data in criminal proceedings, or 2) ordering immediate, monitored and recorded destruction of such data.
14. The PBC criticized the proposed solution whereby a Police officer or an agent of a given special service, interested in initiating and/or conducting criminal proceedings based, among other, on evidence obtained through surveillance measures, would assess whether this evidence contains content protected by legal professional privilege. The PBC pointed out that most often investigative measures including surveillance measures are and will be used at the early, pre-trial stage of proceedings. For that reason all materials concerning each confidential communication between an advocate and a person who is not formally a suspect yet, may be easily argued not to be covered by legal professional privilege or as containing professional secrecy as set out in Article 180 § 2 of the Code of Criminal

Proceedings. Such practice could lead to manifest violations of the right to defense. The latter comes into effect upon the client approaching an advocate, and not upon a formal accusation by the prosecution. In addition, if surveillance measures were used in relation to an anonymous person, it would be impossible to determine whether the gathered information are protected by professional secrecy, including legal professional secrecy.

15. The PBC again criticized the mechanism enabling exemption from professional secrecy. The proposed mechanism assumes that if data covering professional secrecy referred to in Article 180 § 2 of the Code of Criminal Proceedings have been gathered by use of surveillance measures, the Police or other special services agent is not entitled to independently order destruction of materials containing such data. Moreover, he or she is not entitled to apply to the court for a decision on destruction or use of such materials, but is only required to pass them on to the prosecutor, who in turn is obliged to request the court for issuing a decision on the use of information obtained through surveillance, containing professional secrecy. The PBC also underlined that contrary to Article 180 § 2 of the Code of Criminal Proceedings⁵, the proposed regulations did not specify on what grounds the court may base its decision to use the information obtained through surveillance. This creates a risk of arbitrary decisions in this regard.
16. The PBC, referring to its previous opinion concerning *draft no. 3765*, recalled that the judgment of the Constitutional Court in the case no. K 23/11 discussed also the absence of regulations requiring destruction of materials covered by professional secrecy. The Court emphasized that mechanisms such as the one provided for in art. 180 § 2 of the Code of Criminal Proceedings, should apply also to protection of professional secrets in the course of investigative and surveillance activities, including use of surveillance measures.) The Constitutional Court pointed out that there is no justified ground for applying more lenient standards at the investigative stage of proceedings than provided for in the course of trial proceedings. On the contrary, due to the confidential nature of surveillance and the fact that it is usually used at the investigative stage of criminal proceedings, the standards ought to be at least similar to those applied at trial. The PBC underlined that implementation of the Constitutional Court's judgment in the current shape is below the standard of protection of professional secrecy as set out in Article 180 § 2 of the Code of Criminal Proceedings.
17. Importantly, the PBC underlined that the legislation proposed in *draft no. 154* does not introduce any mechanisms guaranteeing a person subjected to surveillance the right to challenge, even *ex post*, lawfulness of the use of such measures. The PBC recalled that Constitutional Court noted the need to introduce such guarantees

⁵ Pursuant to Article 180 § 2 of the Code of Criminal Proceedings the grounds for exemption from secrecy consist in necessity for the system of justice and inability to determine a given fact on the basis of any other evidence.

already in its judgment of 12 December 2005 in the case no. K 32/04, and in the signaling decision of 25 January 2006 in the case no. S 2/06. The PBC underlined that the inability to challenge the lawfulness of use of surveillance measures by a person concerned does not ensure effective protection of confidentiality of correspondence and information autonomy guaranteed by the Polish Constitution.

18. The PBC also pointed that the proposals in *draft no. 154* went significantly beyond the purpose of implementing the judgment of the Constitutional Court in case no. K 23/11, authorizing the Police and other special service agents to access so-called "internet data". Specifically, granting these entities access to such data without any kind of prior, external and substantive control, must be considered as creating room for serious abuse. The PBC pointed that introduction of the legal term "internet data" with a reference to Article 18 sec. 1 – 5 of the Act of 18 July 2002 on provision of online services was also doubtful, as the latter provision did not use the term at all. Absence of a legal definition of the term "internet data" is an incorrect solution.
19. The PBC underlined that *draft no. 154* envisaged a very general legal ground for obtaining telecommunications data by the Police and other special services. Essentially, it would be possible for these entities to acquire such data just within the framework of "performing statutory tasks". The PBC underlined that the proposed solutions only perpetuate the current *status quo*, which contradict the objectives of introducing data retention, enabling more effective prosecution of particularly serious crimes. The PBC pointed out that the proposed standard of obtaining telecommunications data does not comply with the judgment of the Constitutional Court in case no. K 23/11, as well as with the jurisprudence of Court of Justice of the European Union (judgment of 8 April 2014 in cases C-293/12 and C-594/12).
20. As for the telecommunications data, the PBC pointed out that the proposed legislation does not introduce effective review mechanisms for obtaining telecommunications data, internet data and postal data, by the Police and other special services. The proposed procedure whereby the Police and other special services agents would be required to submit semi-annual reports to the appropriate District Court could not be considered an effective review remedy. Submitting reports alone does not serve the purpose of efficient court supervision over the lawfulness, purpose or grounds and legitimacy for obtaining telecommunications data in any given case. Such procedure merely provides a statistical picture of gathering data about citizens and is not considered as a mean of effective court supervision over obtaining telecommunications data. In addition, the reporting procedure would not precede the gathering data but would be optional and be held *ex post*. PBC underlined that the proposed court supervision procedure over obtaining telecommunications, internet or postal data exercised by the District Court *ex post* could not be considered effective in any case. The PBC stressed that the proposed legislation does not specify what exactly would be the object of "*control over obtaining telecommunications, postal and internet data by the Police [and other*

services]”. Unlike the previous *draft no. 3765*, *draft no. 154* does not require a prompt removal of telecommunications, postal or internet data, obtained by the Police and other services upon the District Court’s decision on unjustified of gathering them.

21. In the opinion of the PBC there is a contradiction between the proposed solutions concerning reporting to the appropriate District Courts by the Police and other special services in relation to obtaining telecommunications, postal and internet data and the grounds for obtaining such data. An analysis of the proposed solutions indicates that the District Courts would not be informed about instances of obtaining telecommunications, postal or internet data by the Police and other services, if such data may be obtained in the course of performing tasks other than prosecution of a crime.
22. The proposed legislation does not implement the principle of introducing an external, expert body to review the activities of the Police and other special services in relation to their investigative and surveillance activities.
23. Critical opinions on the draft of the Amendment to the Act on the Police were also submitted by leading NGOs (including the Helsinki Foundation for Human Rights⁶ and the Panoptikon Foundation⁷), the National Council of Legal Advisers⁸ and state entities (such as i.a. the Supreme Court⁹ and the Inspector General for Personal Data Protection¹⁰). Moreover, after a round-table consultations organized by the Ministry of Digitalization at the beginning of January 2016, the Council for Digitalization – an expert and advisory body to the Ministry of Digitalization – issued a resolution expressing its concerns that the draft Amendment to the Act on the Police is not proceeded in accordance with good law-making practice required by a democratic state, which require public consultations and preparation of impact assessment. The Council for Digitalization pointed out that the draft raises many doubts as to its compatibility with the Polish Constitution and requires further legislative work to adapt it to the requirements arising from the judgment of the Constitutional Court in the case no. K 23/11 and to the European Union law¹¹.
24. During further legislative works in Sejm, some changes to the draft of the Amendment to the Act on the Police were adopted, including the rules of gathering

⁶ The opinion of the Helsinki Foundation for Human Rights is available in Polish at: http://www.hfhr.pl/wp-content/uploads/2015/12/HFPC_opinia_ustawa_o_policji_30122015.pdf.

⁷ The opinion of the Panoptikon Foundation is available in Polish at: https://panoptikon.org/sites/default/files/leadimage-biblioteka/panoptikon_ustawa_o_policji_opinia_27.12.2015_0.pdf.

⁸ The opinion of the National Council of Legal Advisers is available in Polish at: <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?documentId=6DD6555FEF040B65C1257F4700373DF8>.

⁹ The opinion of the Supreme Court is available in Polish at: <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?documentId=6DD6555FEF040B65C1257F4700373DF8>.

¹⁰ The opinion of the Inspector General for Personal Data Protection is available in Polish at: <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?documentId=6DD6555FEF040B65C1257F4700373DF8>.

¹¹ The resolution of the Council for Digitalization is available in Polish at: https://mc.gov.pl/files/rdc_uchwala_nr_10_bip.pdf.

and destroying data covered by legal professional privilege. According to the final wording of the Amendment to the Act on Police, in case of obtaining data including information covered by legal professional privilege indicated in Article 178 of the Code of Criminal Proceedings, the Police and other special services authorities are obliged to order immediate, officially recorded destruction of such data. However, this requirement does not apply to information covered by professional secrecy as referred to in Article 180 of the Code of Criminal Proceedings.

25. The draft of the Amendment to the Act on the Police was later proceeded by the Senate and no further amendments were introduced. The Amendment to the Act on the Police was signed by the President of the Republic of Poland on 3 February 2016 and entered into force on 7 February 2016.
26. The PBC would also like to draw the Venice Commission's attention to the ongoing proceedings before the constitutional Court regarding the use of surveillance measures by the Police and other special services.
27. Even before the legislative works on *draft no. 156* were initiated in the Parliament, the Commissioner for Human Rights filed an application to the Constitutional Court regarding the use of surveillance measures¹². Specifically, on 4 December 2015, the Commissioner for Human Rights requested the Constitutional Court to determine the incompliance of:
 - 1) Article 19 sec. 1a of the Act on the Police, Article 27 sec. 1 of the Act on the Internal Security Agency and Intelligence Agency, Article 17 sec. 1a of the Act on the Central Anticorruption Bureau, Article 9e sec. 1a of the Act on the Border Guard, Article 36c sec. 1 of the Act on Tax Control, Article 31 sec. 1a of the Act on the Military Counterintelligence Service and Military Intelligence Service and Article 31 sec. 1a of the Act on Military Police, in the extent they limit the transfer of materials to the competent court only to materials justifying the need to order surveillance measures with Article 45 sec. 1 of the Polish Constitution;
 - 2) Article 19 sec. 9 of the Act on the Police, Article 27 sec. 9 of the Act on the Internal Security Agency and Intelligence Agency, Article 17 sec. 9 of the Act on the Central Anticorruption Bureau, Article 9e sec. 10 of the Act on the Border Guard, Article 36c sec. 7 of the Act on Tax Control, Article 31 sec. 7 of the Act on the Military Counterintelligence Service and Military Intelligence Service and Article 31 sec. 10 of the Act on Military Police, in the extent they do not set a time limit for use of surveillance measures with Article 47 in conjunction with Article 31 sec. 3 of the Polish Constitution;

¹² The application of the Commissioner for Human Rights to Constitutional Court is available in Polish at https://www.rpo.gov.pl/sites/default/files/Wniosek_do_TK_ws_kontroli_operacyjne.pdf.

- 3) Article 19 sec. 20 of the Act on the Police, Article 27 sec. 11a of the Act on the Internal Security Agency and Intelligence Agency, Article 17 sec. 15 of the Act on the Central Anticorruption Bureau, Article 9e sec. 19 of the Act on the Border Guard, Article 36c sec. 14 of the Act on Tax Control, Article 31 sec. 10 of the Act on the Military Counterintelligence Service and Military Intelligence Service and Article 31 sec. 19 of the Act on Military Police, to the extent they do not envisage that upon termination of surveillance and/or risks to the proper course of the criminal proceedings, the person subjected to surveillance is serviced with the court decision on the matter. This would allow the person concerned to appeal against such a decision and exercise his/her right as guaranteed by article 45 sec. 1 and article 78 of the Polish Constitution, .

The Commissioner for Human Rights's application is registered under case no. K 41/15 and will be heard jointly with the application of the Prosecutor General, under case no. K 32/15. At this time, no hearing has been scheduled in this case.

28. Shortly after the Amendment to the Act on the Police entered into force, on 18 February 2016, the Commissioner for Human Rights filed an application to the Constitutional Court questioning some of the provisions of the Act on the Police and other Acts on secret service's operation, including the use of surveillance measures¹³. The Commissioner for Human Rights pointed that the questioned provisions do not meet the standard derived from the Constitutional Court judgment in the case no. K 23/11, but seriously interfere with constitutional rights and freedoms and international law. The Commissioner for Human Rights submitted an application to the Constitutional Court requesting the Court to determine the incompliance of:

- 1) Article 19 sec. 9 of the Act on the Police, Article 9e sec. 10 of the Act on the Border Guard, Article 36c sec. 7 of the Act on Tax Control, Article 31 sec. 10 of the Act on Military Police and Article 17 sec. 9 of the Act on the Anticorruption Bureau, to the extent that they provide for the prolongation of the use of surveillance measures for longer than 12 months, what results in the possibility of using surveillance measures for the period of 18 months with Article 2, Article 47, Article 49, Article 51 sec. 2 in conjunction with Article 31 sec. 3 of the Polish Constitution;
- 2) Article 19 sec. 15h of the Act on the Police, Article 9e sec. 16h of the Act on the Border Guard, Article 36c sec. 1h of the Act on Tax Control, Article 31 sec. 16h of the Act on Military Police, Article 27 sec. 14h of the Act on the Internal Security Agency and Intelligence Agency, Article 31 sec. 10 of the Act on the Military Counterintelligence Service and Military Intelligence Service and Article 17 sec. 15h of the Act on the Anticorruption Bureau to the extent they

¹³ The application of the Commissioner for Human Rights to the Constitutional Court is available in Polish at https://www.rpo.gov.pl/sites/default/files/Wniosek_do_TK_kontrola_operacyjna.pdf

refer to the unspecified criterion of "interest of justice" and fail to specify the weight of circumstances, allowing to use information referred to in Article 178a, Article 180 sec. 2 and Article 180 sec. 3 of the Code of Criminal Proceedings with Article 2, Article 42 sec. 2, Article 47, Article 49, Article 51 sec. 2 in conjunction with Article 31 sec. 3 of the Polish Constitution and Article 6 of the European Convention of Human Rights;

- 3) Article 20c sec. 1 and Article 20cb sec. 1 of the Act on the Police, Article 10 sec. 1 and Article 10bb sec. 1 of the Act on the Border Guard, Article 36b sec. 1 and Article 36bb sec. 1 of the Act on Tax Control, Article 30 sec. 1 and Article 30c sec. 1 of the Act on Military Police, Article 28 sec. 1 and Article 28b sec. 1 of the Act on the Internal Security Agency and Intelligence Agency, Article 32 sec. 1 and Article 32b sec. 1 of the Act on the Military Counterintelligence Service and Military Intelligence Service, Article 18 sec. 1 and Article 18b sec. 1 of the Act on the Anticorruption Bureau and Article 75d sec. 1 and Article 75db sec. 1 of the Act on Custom Service with Article 2, Article 30, Article 47, Article 49, Article 51 sec. 2 in conjunction with Article 31 sec. 3 of the Polish Constitution and Article 8 of the European Convention on Human Rights and Article 7 and Article 8 in conjunction with Article 52 sec. 1 of the Charter of Fundamental Rights;
- 4) Article 20c sec. 3 in conjunction with Article 20c sec. 2 of the Act on the Police, Article 10b sec. 3 in conjunction with Article 10b sec. 2 of the Act on the Border Guard, Article 36b sec. 3 in conjunction with Article 36b sec. 2 of the Act on Tax Control, Article 30 sec. 3 in conjunction with Article 30 sec. 2 of the Act on Military Police, Article 28 sec. 3 in conjunction with Article 28 sec. 2 of the Act on the Internal Security Agency and Intelligence Agency, Article 32 sec. 3 in conjunction with Article 32 sec. 2 of the Act on the Military Counterintelligence Service and Military Intelligence Service, Article 18 sec. 3 in conjunction with Article 18 sec. 2 of the Act on the Anticorruption Bureau and Article 75d sec. 3 in conjunction with Article 75d sec. 2 of the Act on Custom Service with Article 2, Article 20, Article 47 and Article 51 sec. 2 in conjunction with Article 31 sec. 3 of the Polish Constitution;
- 5) Article 20ca of the Act on the Police, Article 10ba of the Act on the Border Guard, Article 36ba of the Act on Tax Control, Article 30b of the Act on Military Police, Article 28a of the Act on the Internal Security Agency and Intelligence Agency, Article 32a of the Act on the Military Counterintelligence Service and Military Intelligence Service, Article 18a of the Act on the Anticorruption Bureau and Article 75da of the Act on Custom Service to the extent they do not provide for independent and real supervision over access to data, with Article 2, Article 47, Article 51 sec. 2 in conjunction with Article 31 sec. 3 of the Polish Constitution and Article 8 of the European Convention

on Human Rights and Article 7, Article 8 in conjunction with Article 52 sec. 1 of the Charter of Fundamental Rights;

- 6) Article 20c of the Act on the Police, Article 10b of the Act on the Border Guard, Article 36b of the Act on Tax Control, Article 30 of the Act on Military Police, Article 28 of the Act on the Internal Security Agency and Intelligence Agency, Article 32 of the Act on the Military Counterintelligence Service and Military Intelligence Service, Article 18 of the Act on the Anticorruption Bureau and Article 75d of the Act on Custom Service to the extent they do not indicate the categories of data that can be obtained under applicable law, they do not determine the disclosure obligations to persons, whose data were obtained and they do not specify the time by which the authorized entities may process collected data, with Article 2, Article 30, Article 47, Article 49, Article 51 sec. 2, 3 and 4 in conjunction with Article 31 sec. 3 of the Polish Constitution and Article 8 of the European Convention of Human Rights and Article 7, Article 8 in conjunction with Article 52 sec. 1 of the Charter of Fundamental Rights;
- 7) Article 28 sec 7 of the Act on the Internal Security Agency and Intelligence Agency and Article 32 sec. 9 of the Act on the Military Counterintelligence Service and Military Intelligence Service to the extent they do not provide for the obligation of destroying all telecommunications, postal and internet data other than data that are irrelevant for the purposes of conducted criminal proceedings with Article 51 sec. 2 in conjunction with Article 31 sec. 3 of the Polish Constitution and Article 8 of the European Convention on Human Rights and Article 7, Article 8 in conjunction with Article 52 sec. 1 of the Charter of Fundamental Rights;
- 8) Article 13 and Article 16 of the Amendment to the Act on the Police to the extent they order to apply the provisions of law that lost their binding force upon the judgment of the Constitutional Court of 30 July 2014, case no. K 23/11 with Article 2 and Article 190 sec. 1 and 3 of the Polish Constitution.

The Commissioner for Human Rights's application is registered under case no. K 9/16. At this time, no hearing date has been scheduled in this case.

Conclusions

29. The PBC hopes that the above observations and comments relating to the course of legislative works on the Amendment to the Act on the Police, together with the arguments presented by the PBC during the legislation works, will support the Venice Commission in its examination of the Amendment to the Act of the Police, hence in the preparation of the opinion requested by the Parliamentary Assembly of the Council of Europe.

30. In concern for the need to implement effective safeguards for the protection of basic human rights and freedoms, such as the right to privacy and confidentiality of correspondence, and particularly the need to respect legal professional privilege, the PBC expresses its readiness to cooperate with the Venice Commission in promoting the rule of law and democracy, so as to enhance the protection of human rights and civic freedoms, one of the statutory duties of the Polish Bar.

On behalf of the Polish Bar Council,



Andrzej Zwara
Advocate
President of the Polish Bar Council

Attached:

- 1) the PBC opinion to *draft no. 154* (in Polish);
- 2) the PBC opinion to *draft no. 154* (English Translation).

