**Replies to the questions of the Human Rights Committee in connection with the presentation of the Seventh Periodic Report on the implementation by the Republic of Poland of the International Covenant on Civil and Political Rights**

**Budget of the Human Rights’ Commissioner (Ombudsman)**

The 2016 draft budget submitted by the Human Rights’ Commissioner (Ombudsman) envisaged a marked increase of outlays on investments in the Ombudsman’s Office. Furthermore, the Ombudsman planned an over 14% increase in remuneration outlays, including a raise of employees’ remuneration by 11%. In 2009, state institutions froze remuneration expenses, with the Ombudsman’s Office being an exception. Furthermore, in 2012 and 2013, the Office received additional funds (PLN 1 m and PLN 667,000, respectively) for new employments. During work on the 2016 budget, the Sejm of the Republic of Poland reduced the Ombudsman’s spending to the level of 94.7% of the 2015 budget, limiting investment outlays and employees’ raises; the budget allocation for the operation of the Ombudsman’s Office is at the level of other public institutions.

**Non-reception of certificates allowing concluding a civil partnership abroad**

Under Polish law, if a marriage is to be concluded outside of the Republic of Poland by a Polish national or an alien whose eligibility for marriage is defined under Polish law, they may receive a written relevant certificate. This certificate corresponds to Polish legislation on the institution of marriage, in particular with Poland’s Constitution, which sets out that marriage is a monogamous relation of woman and man.

We should stress the objective for issuing the relevant certificate, i.e. a confirmation that under Polish law a given person may marry the other person indicated in the certificate. Its essence lies in the confirmation of eligibility for marriage and an absence of statutory impediments to marriage set out in Polish law, both regarding one party (i.e. ineligible age, complete incapacitation, mental illness or mental retardation) and both parties (i.e. being a relative by blood or marriage, existence of an adoption relationship, or an absence of a different gender between the future spouses).

**International Covenant on Civil and Political Rights in case law of Polish courts**

The Ministry of Justice has no access to files of particular judicial proceedings and as a result has no data on cases where the Covenant provisions would be invoked as the basis for judicial decisions. Nevertheless, since many court rulings are published on a dedicated website, on the basis of this source we can indicate that common courts in Poland have invoked the Covenant in at least 242 cases:

[https://orzeczenia.ms.gov.pl/search/simple/mi$0119dzynarodowy$0020pakt$0020praw$0020obywatelskich$0020i$0020politycznych/$N/$N/$N/1](https://orzeczenia.ms.gov.pl/search/simple/mi%240119dzynarodowy%240020pakt%240020praw%240020obywatelskich%240020i%240020politycznych/%24N/%24N/%24N/1)

**Freedom of speech vs. e.g. the offence of defamation**

At present no work is being carried out on de-penalising defamation. In a court ruling of 30 October 2006, P 10/06, the Constitutional Tribunal recognised the criminal accountability for defamation as an indispensable measure for the protection of the honour and good name of other people (invoking e.g. Art. 17 of ICCPR).

Moreover, the Constitutional Tribunal recognised that the penalisation of insults against someone’s religion restricts the freedom of speech. In a democratic state, it is however indispensable to restrict the freedom of speech when someone else’s religious beliefs are dishonoured or offended (court ruling of 6 October 2015, SK 54/13). Furthermore, according to the Tribunal, public order requires that a public demonstration of disrespect for the Polish Nation, the Republic of Poland or its constitutional authorities should be unlawful (court ruling of 21 September 2015, K 28/13). This act is a not a criminal offence. It is comparable to violations of traffic rules and could result in imposing a ticket by the police (such as in the case of violation of parking rules) - of course, the liable party might request a judicial review.

**Non-appointment of judges by the President of Poland**

President’s decision is in line with the verdicts of:

* the Supreme Court of 10 June 2009 (case n. III KRS 9/08) where the Court noted that the National Judicial Council should not present the President with just one candidate for each vacant judicial position;
* the Constitutional Tribunal of 5 June 2012 (case n. K 18/09) where the Court took a view that the President may refuse the National Judicial Council’s motion for appointment.

**Pre-trial detention**

In Poland there is no precisely stipulated deadline for the discontinuation of pre-trial detention. In principle, it may not exceed one year in preparatory proceedings and may not exceed a total of 2 years since the first decision of the court of first instance. Pre-trial detention can be extended beyond those periods exclusively by the Appellate Court (the highest common court), exclusively in especially justified cases, laid down in a relevant law.

It is in order to add that since 2015 excessive pre-trial detention in Poland has no longer been considered as a systemic problem by the European Court of Human Rights.

Pre-trial detention over 12 months is applied less and less often:

1. Use of pre-trial detention from 12 to 24 months: 2010 – 1,123 (Provincial Court) and 362 (District Court); 2015 – 553 (Provincial Court) and 231 (District Court)
2. Use of pre-trial detention over 24 months: 2010 – 604 (Provincial Court) and 60 (District Court); 2015 – 276 (Provincial Court) and 28 (District Court)

As to persons in pre-trial detention, data of the Central Administration of the Prison Service indicates that as at 30 September 2016 there were 5,324 detainees in penitentiary units, including 245 women.

**Pharmacological therapy (so-called “chemical castration”)**

Polish law allows the use of therapy as a preventive measure with respect to past offenders (“preventive measures”). This therapy may, but does not have to, aim at reducing libido. In particular, although it is legally mandatory, no one may be forced to take the requisite medication. Another measure, adjudicated irrespective of therapy, is a stay in a psychiatric institution and therapy may be linked with it.

Therapy is adjudicated by a court of law under the provisions of the Code of Criminal Procedure, when it is considered necessary to prevent the individual from re-offending, and other legal measures are inadequate. It should be proportionate to the social impact of the offence to be committed by the perpetrator, and the probability of its commission. Therapy may be applied to individuals who are not answerable for their actions due to incapacitation and to individuals with legal capacity with certain disorders (post-penal).

It is in order to stress that therapy is not a penalty (it is neither retributive nor deterrent) and its inclusion in the Penal Code is connected only with the fact that it is conditional on the perpetration of an offence. A reaction to an offence need not be a sanction but precisely therapy, carried out by doctors in line with medical expertise. Under Art. 20 of the 2015 law amending the Penal Code, “amended provisions apply to the execution of preventive measures adjudicated prior to the day of entry into force of a new law”. This means that retroactivity applies only to the “execution” of already adjudicated preventive measures. In all other circumstances current provisions should be applied and as a result there is no retroactivity. At present, 9 people are in therapy. It is in order to point out that the European Court of Human Rights has not recognised complaints against Poland as to the retroactive use of preventive measures.

**Government administration and public media**

First of all, it should be stressed that the principle of an independence of broadcasters, including public ones, is one of the fundamental principles of the Polish law on radio and television broadcasting. Pursuant to Art. 13 of the law, broadcasters develop their programs on their own and pursuant to Art. 14 – the imposition of an obligation or ban on the dissemination of a particular broadcast may take place exclusively by law. No legal provisions authorise any public administrative authority to impact the program of any broadcaster, including a public one.

As to the appointments of public media management, the law of 29 December 2015 vests the right to appoint boards of directors and supervisory boards of such media with the Minister of Treasury. The legislators themselves have considered this solution inappropriate and made the law provisional, in force by 31 July 2016.

Prior to this date was adopted a law on the National Media Council which vests in it the right to appoint boards of directors and supervisory boards of public media. The Council is composed of 5 people: 3 are appointed by the Sejm and 2 by the President. It is in order to stress that the President appoints Council members from among the candidates submitted by parliamentary opposition. The Government has no impact on the composition and operation of the National Media Council. As a result we should stress that for the first time in history the Government cannot influence the composition of the authorities of public media (previously at least six members of the supervisory boards of such media were appointed by a government representative). All the relevant competences were entrusted to an institution independent of the Government. Furthermore, when creating the National Media Council, the legislator guaranteed to the opposition the possibility of monitoring the operation of public media.

**Activities carried out in the Police to reduce the use of violence among Police officers**

Police officers in Poland, ca. 100,000 people, carry out over a dozen million interventions yearly involving direct contact with other people. The use of excessive force by Police officers are absolutely incidental, as witnessed by the high degree of social trust in the Police force, at the level of 65% in 2016.

Each case of the use of force is examined by the Prosecution Authority, independent of the Police. Internal investigations are carried out by the Internal Bureau, so-called police within the police, inner audit divisions and professional discipline auditors. Preventive measures are carried out by the Internal Bureau and the only in European police forces human rights plenipotentiaries. In 2013 there were 82 cases of beating by a Police officer, in 2014 there were 71 such cases, and in 2015 – 61 cases. This was a downward trend. In 2009 there were 1,300 complaints on inhuman or degrading treatment by Police officers, while in 2015 there were 570 such complaints, a decrease of nearly 730 complaints. Allegations were confirmed in no more than 3% of the complaints filed. In 2014 and 2015 there were ca. 600 notifications about crimes with the use of violence. Only in 50 cases (2014) and in 70 cases (2015) investigations were refused. In the other cases there were transparent investigations carried out outside the Police. For years there has been a model of notifications other than complaints, or a system of notifying the Ombudsman about the possible irregularities during the performance of professional duties by Police officers. The Ombudsman recognises cases independent of the Police and Prosecution Authority.

**Presence of a Police officer during a communication between a detainee and a legal counsel**

In line with the criminal procedure, a Police officer can be present in exceptional cases warranted by special circumstances. When reserving his or her right to be present, a Police officer should notify the legal counsel about the reasons. A lack of such a legal possibility might in fact prohibit such presence, even in cases when an advocate expects the presence of a Police officer fearing for his life. Standards of the European Court of Human Rights, set out in the documents of the European Committee Against Torture indicate that a detainee in police custody must be released in no worse a state. Due to the fact that some detainees are aggressive towards others or themselves, a provision allows a provisional presence of a Police officer. Police do not abuse this entitlement and the presence should be discreet and cannot as much as possible violate the right of a detainee to freely contact a lawyer.

**Prerogatives of the Prosecutor General during criminal proceedings**

The Prosecutor General heads the operations of the Prosecution Authority himself or through the National Prosecutor and other deputies of the Prosecutor General. The Prosecutor General as the superior of prosecutors of organisational units of the Prosecution Authority, responsible for the adequate operation of this institution, must have prerogatives to carry out his statutory obligations and therefore has the right to issue regulations, guidelines (upon consulting the National Council of Public Prosecutors) and orders. The Prosecutor General, National Prosecutor or a prosecutor authorised by them also monitors the operational and reconnaissance actions, having access to the material collected during an operations audit, controlled purchase, controlled donation or acceptance of pecuniary benefits or a secretly monitored parcel, in conditions envisaged for the transfer, storage and making available classified information. The Prosecutor General may order operational and reconnaissance actions carried out by authorised institutions, if they were directly linked to the pending preparatory proceedings. The Prosecutor General may moreover familiarise himself with the materials collected as a result of such actions.

Polish law follows the principle of an independence of a public prosecutor during the performance of activities set out in laws. The prosecutor, however, is obliged to follow the regulations, guidelines and orders of his superior. The law on the Prosecution Authority currently in force lays down the principle of transparent orders. In practice this means that an order concerning the content of a procedural action is issued by a superior in writing, and at the request of the prosecutor along with a *ratio decidendi*. The request is submitted in writing along with a justification to the superior who has issued the order. When it is impossible to deliver the order in writing it is possible to issue it orally; the superior is obliged to confirm it in writing without delay. An order is included into the case file. If the prosecutor disagrees with the order concerning the content of a procedural action, he may request a change of the order or his exclusion from the performance of action or from participation in the case. Exclusion is decided on by the prosecutor directly superior to the prosecutor issuing the order. The superior prosecutor is also authorised to change or revoke a decision of a subordinate prosecutor. A change or revocation of a decision must be made in writing and are included into the file case. A change or revocation of a decision delivered to parties, their representatives or advocated and other authorised subjects may take place exclusively under the circumstances and in a manner laid down in a relevant law.

The superior prosecutor may entrust the subordinate prosecutors with activities he is in charge of, unless the law reserves this action exclusively to his duties. The superior prosecutor may also take over cases of subordinate prosecutors and perform their actions, unless the law stipulates otherwise.

When in the judicial proceedings new circumstances present themselves, the prosecutor himself makes decisions on a further course of such proceedings. If as a result of this decision it may be necessary to spend money above the limit set out by the head of an organisational unit, the prosecutor may make a decision upon the consent of the head of the organisational unit.

**Disciplinary liability of public prosecutors**

The prosecutor bears disciplinary liability for professional negligence, including obvious and blatant abuse of law and disrespect of the dignity of his office. The Prosecutor General is the disciplinary superior with respect to public prosecutors of common organisational units; the regional prosecutor with respect to public prosecutors of regional prosecution authority, public prosecutors of provincial and district prosecution authorities in the area of operation of regional prosecution authority, and the district prosecutor with respect to public prosecutors of provincial and district prosecution authorities in the area of operation of district prosecution authority. Adjudicating in disciplinary cases are disciplinary courts at the Prosecutor General: in first instance – Disciplinary Court; in second instance – Appellate Disciplinary Court. Disciplinary Courts chairperson and deputy chairperson are appointed by the Prosecutor General for a term of office of 4 years from among the prosecutors elected to be members of disciplinary courts. A term of office of members of Disciplinary Courts is 4 years, and their members are independent in their decisions and are subject only to laws. As a principle, disciplinary proceedings in a Disciplinary Court are open.

**Credibility of data provided by the National Prosecution Authority**

In the opinion of Poland, there is no ground for questioning the reliability and credibility of the data included in semi-annual and annual reports drawn up in the Department of Preparatory Proceedings. The discrepancies between official data and those presented by civil society organisations are caused by:

- the fact that NGOs are the most active in Warsaw and see the issues through the prism of activities of the Warsaw Prosecution Authority, where the results in combating this category of offences are far worse than across the country;

- the fact that NGOs’ data relate to notifications by NGOs themselves rather than to all the notifications and proceedings of the Prosecution Authority;

- different methodologies and understanding of certain notions used in reports.

**Number of proceedings with charges (hate crimes)**

The Prosecution Authority investigates all acts of discrimination, whether motivated by racism, xenophobia or antisemitism, however in many cases it is difficult to conclude that an offense has been committed. Sometimes acts eligible for court protection within civil law procedures do not meet conditions stipulated in the Penal Code. There are also cases where for objective reasons it is impossible to identify persecutors, e.g. when offenses have been committed on websites owned by companies registered in the US. It turns out that in such cases international legal aid is ineffective. Data for the first six months of 2016 indicate that there is an increasing trend of the number of proceedings with charges (formerly 21.2 % whereas now 26 %). The same concerns indictments (formerly 19 % and now 23.4 %).

**Proceedings against hate crimes**

In the first half of 2016, compared against the first half of 2015, the number of offenses against people of Jewish origin decreased significantly, i.e. from 142 (16.7 %) to 102 (11.8 %). Out of 102 proceedings, 11 ended with the identification of perpetrators against whom charges were pressed and indictments were filed in courts, following which applications for voluntary acceptance of sanctions and those for conditional discontinuation of proceedings were made.

The Prosecution Authority is collecting data on sales of anti-Semitic literature and gathers data on the total number of hate crimes irrespective of perpetrators’ motivation, however it does not have specific data on the number on press and literature publications concerning anti-Semitic written matter. In the first half of 2016 there were altogether 10 proceedings concerning press and literature publications. No increase was noticed in recent years.

In the first half of 2015 most attacks were performed on people of Roma origin, then on people of Jewish origin and then on people of African origin. In the first half of 2016 most attacks were performed on Muslims, then on people of Jewish origin, then on people of Roma origin and on people of African origin. The number of offenses against Muslims increased three times (from 61, i.e. 8.1 % to 250, i.e. 29 % of all proceedings). The number of proceedings in which victims were of Roma origin went down (from 177, i.e. 21 % to 65, i.e. 7.5 % of all proceedings). The number of proceedings against people of African origin decreased significantly (from 94, i.e. 11 % to 52, i.e. 6 % of all proceedings).

**Selected proceedings in hate crimes**

1. A decision on the refusal to initiate proceedings with the argument that swastika is an ancient symbol of love was revoked by Prosecutor General and the proceedings were initiated. As can be seen there are mechanisms in place in the Prosecution Authority allowing control and the elimination of wrong decisions.
2. The proceedings conducted by the Prosecutor confirmed that football fans shouted racist slogans during a match between Lech Poznan and Widzew Lodz, however the proceedings were discontinued as perpetrators among 17.000 football fans were not identified. Such events are not ignored however which may be exemplified by the fact that in the end the football fans’ leader was convicted in 2016 and sentenced for a deprivation of liberty for shouting racist slogans during another sports event.

**Proceedings against the use of force by Police officers in Olsztyn**

**Actions taken by the Prosecution Authority**

Guidelines were issued in 2014 on proceedings concerning Police officers and Prison Service officers conducted by prosecutors. These guidelines indicate that all such proceedings are conducted personally by prosecutors at the absence of the Police. Moreover, should it be necessary, such proceedings are moved to another unit to ensure impartiality.

Proceedings initiated on April 10th, 2015 on abuse of power by Police officers in Olsztyn relating to professional negligence and the use of unlawful threat and force in order to elicit explanations, are conducted in the Regional Prosecution Authority in Ostrołęka and supervised by the Regional Prosecution Authority in Białystok. These proceedings are conducted against 17 suspects against whom different preventive measures have been used. The Prosecution Authority has been consistently acting towards investigating these events in detail, identifying perpetrators and trying them in courts.

**Proceedings against Mr. Andrzej Rzepliński, President of the Constitutional Court**

The Regional Prosecution Authority in Katowice has been conducting proceedings related to negligence of professional duties and the abuse of power by the president of the Constitutional Court relating to his deprivation of nominated judges of the Constitutional Court of possibilities to rule. These proceedings are not conducted against any individual, including Mr. Andrzej Rzepliński. After several notifications, acting in line with the principle of legality, the Prosecution Authority has been conducting proceedings in order to establish whether or not an offense was committed and whether the particular act was a crime.

**Human Trafficking**

Human trafficking is penalized in the Polish law order as set out in Article 189a § 1 of the Penal Code, whereas the definition of the crime is set out in Article 115 § 22 and reflects provisions of the international law. Forced labor and services are a form of abusing victims in this crime. The national law does not contain a definition of forced labor and in practice the definition contained in Convention 29 of the ILO is used. Both the latter as well as instructions and recommendations and a document on the methodology of conducting proceedings against human traffickers developed by the former Office of Prosecutor General are part of the Polish law order. In the case of such crimes, pre-trial proceedings are conducted and supervised by the Prosecution Authority as well as by the enforcement authorities, i.e. the Police and the Border Guards. The number of identified perpetrators/suspects is small as these crimes are rarely committed in Poland. In 2015 67 proceedings were initiated on crimes under Article 189a § 1 of the Penal Code. It should be emphasized that the number of perpetrators quoted by Ms. Seifert-Fohr relates to suspects in proceedings conducted by Border Guards and the Police. This figure does not fully reflect the situation in Poland. The Border Guards and the Police are responsible for the identification of victims and they act on the basis of algorithms. In the course of investigations, the Prosecution Authority contributes to it as well. Even though the Polish law order does not expressly contain a criminality clause, it has appropriate ways allowing the fulfillment of Poland’s international obligations as indicated in the Seventh Report.

**Receiving refugees in Poland in the context of the so called migration crisis**

The government of the Republic of Poland is seriously committed to its international obligations to receive refugees also stemming from the Council Decision of the EU 2015/1523 of September 14th, 2015 introducing temporary measures in the field of international protection for Italy and Greece. An Inter-ministerial Team has been established in order to implement the said obligations, particularly with reference to providing security to the resettled and relocated aliens.

Taking into account practical aspects, a political decision was made to receive in Poland in 2016 no more than 400 aliens relocated from the territories of Greece and Italy.

Each decision to receive immigrants in is based on the condition that security for Poles and for Poland is assured. For these reasons, first relocations will take place after a group of refugees meeting relocation criteria has been selected. This refers to those refugees who have been identified, require international protection and whose fingerprints have been taken. Individuals who pose threat to national security and public order and those who are reasonably suspected of not requiring international protection will be considered illegible.

The Polish law enforcement institutions have made extensive efforts to overcome insurmountable difficulties in confirming identity and screening refugees to be relocated from the point of view of their potential threat for public order. These difficulties were related to activities taken by partners from Greece and Italy.

**Legal aid for individuals seeking the provision of international protection**

In September 2015 the law on providing aid to aliens on the territory of Poland was modified by adding a provision on free legal counsel and free legal aid.

Free legal counsel in first instance proceedings is available for applicants who filed applications for international protection and for aliens against whom proceedings aimed at revoking their refugee status or complementary protection are being conducted. When applicants and aliens act without professional lawyers or legal advisers and receive decisions revoking their refugee status and complementary protection, they are also eligible for legal aid. Applicants and aliens whose refugee status and complementary protection were revoked and whose income is higher than the income set out in the provisions on social aid, are not eligible for legal aid. Moreover, a bill changing the law on aliens and broadening the access to legal aid is being currently considered.

Situation at the Terespol border crossing

Until the end of September 2016, the Border Guards received 7431 applications for the refugee status. In the entire year of 2015 the number was 8250. It is true that the Border Guards refuse entry to Poland to many individuals. Until the end of September 2016 the total number of refusals was 60916. The majority of those who were refused entry to Poland are economic migrants motivated by difficult living conditions in their countries of origin. These migrants’ goal is to enter Poland and continue their migration to other Schengen countries. In such cases aliens are refused entry to Poland but they make numerous attempts at entering Poland on the same grounds. The situation at the Terespol border crossing is closely monitored also by representatives of UNHCR who visited the venue several times this year.

**Identity control of refugees by Border Guards**

The Border Guards have adopted an algorithm of acting with refugees seeking international protection. The main principle is that each refugee is considered individually. Detailed control of aliens wanting to enter the territory of Poland without appropriate permission serves as a preventive measure against those aliens who under the pretext of asylum seeking wish to enter the territory of our country without meeting requirements for asylum seekers. According to the algorithm, in each case of asylum seeking expressed directly or indirectly may stem from the alien’s appearance or attitude indicating consequences of traumatic experience. Among other questions, aliens are asked about reasons for which they have left their country, why they fear a return to their country of origin and what expectations relating to their entry to Poland they have. The algorithm indicates that the Border Guards are not to verify the credibility of information provided by aliens. It is recommended that aliens are interviewed in the area of the second border line to ensure free conversation at the absence of other individuals and the assistance of an interpreter if necessary.

**Child detention in refugee proceedings**

Following changes in the law on providing aliens with international protection on the territory of the Republic of Poland new provisions aimed at limiting the placement of minors in guarded centers for aliens were introduced. Minors without care cannot be placed in guarded centers. Such individuals are placed in temporary educational centers or provided foster care in adoptive families. Minors who are cared for are only exceptionally placed in guarded centers for aliens since individuals seeking international protection are subject to alternative detention measure and are required to report to Border Guards within certain periods of time, provide pecuniary collateral, deposit their identity documents with the authority indicated in the decision and reside in the venue indicated in the decision. Also grounds for placing aliens in guarded centers, particularly those referring to minors, are very narrowly defined. Minor aliens are believed to be in need of particular treatment.

**Child education in guarded centers**

Compulsory education is guaranteed in centers where minor aliens have been placed. Competent local elementary, middle and high school teachers provide appropriate schooling. The curriculums are adjusted to the age of the minors and to the duration of minors’ stay in Poland. Classes are taught from Monday to Friday. Special educational teams have been established for minors placed in guarded centers. Their role is to conduct classes relating to culture and education.

**Protection of Poland’s good name**

For many years, also abroad, such expressions as “Polish death camps”, “Polish extermination camps” or “Polish concentration camps” have been used by the same individuals, press titles, TV or radio stations. Between 2008 and 2015 the Polish Ministry of Foreign Affairs intervened 913 times when the above mentioned expressions were used. In the first half of 2016 there have been 64 such interventions. There are also publishing companies and programs which consciously falsify history, particularly modern history. As a result, the Polish public opinion protests since the use of such expressions may make an impression upon the readers, listeners and viewers that the Polish People and the Polish State are responsible for the crimes committed by the Third Reich. It should be emphasized that notes of protest issued by ambassadors of the Republic of Poland remain ineffective.

It is for these reasons that the government of the Republic of Poland considered it necessary to ensure penalization of acts attributing, in a public manner and contrary to facts, responsibility or co-responsibility for Nazi crimes committed by the Third German Reich. The bill sets out that if such act is committed within the framework of artistic or scholarly activities it will not be considered a crime. Penalization is to act here as a preventive measure. Currently the Polish Parliament is working on this bill.

**Big data. Retaining and storing telecommunications data. Control measures of collecting telecommunications, internet and postal data by intelligence law enforcement authorities**

Article 180a of the Law on Telecommunications regulates the retention of data as a duty of telecommunications operators in order to ensure the security of the state and public order.

Under Article 180a of the said Law a public telecommunications network operator and a provider of public telecommunications services are obliged at their own cost to:

1. retain and store data as set out in Article 180c[[1]](#footnote-1), generated in the telecommunications network or processed there on the territory of Poland for a period of 12 months starting from the day of connection or an unsuccessful attempt at a connection, and when the said period of time expires, destroy the data with the exception of the secured data in line with other legislation,
2. make data referred to in point 1 available to authorized entities including the Customs Service, courts and to the prosecutor according to principles and in the manner stipulated under a separate law,
3. protect data referred to in point 1, against incidental and unlawful damage, loss or change, unauthorized or unlawful storage, processing, availability or disclosure in accordance with binding legislation.

On the other hand, in the manner of Penal Code Procedure as set out in Article 218a § 1 of the Code of Criminal Procedure, authorities, institutions and telecommunications operators are obliged to secure without delay, upon the court’s or prosecutor’s demand contained in the decision, for a defined period of time no greater than 90 days, IT data stored in devices containing the data on a carrier or in an IT system.

At the same time the provision of Article 218 of the Penal Code Procedure introduces an obligation on authorities, institutions and postal and telecommunications operators, customs authorities and transportation institutions and companies to provide to the court or the prosecutor, on demand contained in the decision, correspondence, shipments and data referred to in Article 180c and 180d of the Telecommunications Law if they are significant for the pending proceedings. Only the court or the prosecutor may open them or order their opening.

**Operational control of aliens in the light of the Law of June 10th, 2016 on antiterrorist actions**

Pursuant to Article 9 of the Law of June 10th, 2016 on antiterrorist actions in order to detect, prevent or combat crimes of terrorist nature, Head of the National Security Agency may ordain confidential operations against a national who is not a citizen of the Republic of Poland for no longer than 3 months if there are concerns that the said national may conduct terrorist activities.

It is worth noting that the Constitutional Court ruled that it is admissible to introduce exceptions to the law referring to aliens who are subject to Polish Law as set out in Article 37 point 2 of the Constitution of the Republic of Poland, with the reservation that under such cases Article 31 point 3 of the Constitution applies which stipulates that “ Limitations in the scope of using constitutional freedoms and rights may be legislated only in acts of law and only when they are necessary in a state governed by the rule of law for its security or public order or for the protection of environment, health and public morality or for the freedom and rights of other people. These limitations may not infringe the sense of freedoms and rights. “In this ruling the Constitutional Court did not preclude the admissibility of different grounds on which data may be collected from nationals who are not citizens of the Republic of Poland and used yet it stressed that in each case such operations performed by public authorities must meet the standards of the rule of law. The legislator balanced the interest of the state and the good of its citizens. For a reason the subject area of confidential operations conducted by the head of the National Security Agency has been limited because having analyzed terrorism it is beyond any doubt that the phenomenon is of exogenous character.

It should be stressed that the legislator defined an inclusive catalog of confidential operations conducted by the head of the National Security Agency. They include the collecting and storing contents of conversations with the use of technical devices, also from telecommunications networks, collecting and recording of images and sounds generated by people from rooms, means of transportation or non-public places, acquiring and recording contents of correspondence including correspondence made with of electronic means of communication, acquiring and recording data contained in IT data carriers, telecommunications terminals, IT systems and tele-informatic systems and acquiring access to and controlling shipments.

The main objective of conducting confidential operations by the head of the National Security Agency is to neutralize potential threats to state security and to prevent the implementation phase. The process of detecting a probability of conducting terrorist activities may take a long time, so when a crime of terrorist nature is committed then the reaction by the head of the National Security Agency might turn out to be too slow therefore the legislation in place is to serve an effective implementation of objectives of enforcement authorities, such as to detect, prevent and combat crimes of terrorist nature.

A mechanism ensuring the Prosecutor General’s control of confidential operations conducted by the head of the National Security Agency is very significant for the provision of appropriate standard of protecting rights of the individual. Prosecutor General has a competency to order the discontinuation of those operations. Then he also orders the acquired operational materials to be obligatorily destroyed without delay.

Moreover, the head of the National Security Agency passes to Prosecutor General and to the Intelligence Service Coordinator an ordinance on initiating confidential operations along with a justification as well as all operational materials acquired during operational work. It should be emphasized that since justification is an obligatory element of the ordinance it excludes the freedom of using these operations in practice.

Considering the fact that Prosecutor General conducts or supervises pre-trial proceedings in penal cases and performs the function of a public prosecutor, the legislator assigned Prosecutor General the role of the authority controlling confidential operations conducted by the head of the National Security Agency. Under Article 311 § 1 of the Law of June 6th, 1997, the Penal Code Procedure, the prosecutor plays a vital role in all investigation operations with the status of proceedings on crimes of terrorist nature.

1. Data necessary for:

1) identifying the end of a network, ICT end device, end user: a) placing the call, b) the addressee of a call;

2) identifying: a) the date, hour and duration of the call, b) kind of call, c) location of the ICT end device. [↑](#footnote-ref-1)