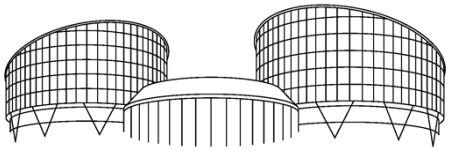

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF XERO FLOR w POLSCE sp. z o.o. v. POLAND

(Application no. 4907/18)

JUDGMENT

Art 6 § 1 (civil) • Tribunal established by law • Grave irregularities vitiating election of Constitutional Court judge sitting on the panel which examined the applicant company's constitutional complaint • Art 6 § 1 applicable as constitutional complaint proceedings directly decisive for the asserted civil right • Application of three-step test formulated in *Guðmundur Andri Ástráðsson* Art 6 § 1 (civil) • Fair hearing • Insufficient reasons of courts for refusal to refer a legal question to the Constitutional Court

STRASBOURG

7 May 2021

FINAL

07/08/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Xero Flor w Polsce sp. z o.o. v. Poland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Ksenija Turković, *President,*
Krzysztof Wojtyczek,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, *judges,*

and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 4907/18) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a limited liability company, Xero Flor w Polsce sp. z o.o. ("the applicant company"), on 3 January 2018;

the decision to give notice to the Polish Government ("the Government") of the complaints concerning the alleged insufficiency of reasons for a refusal to refer a legal question to the Constitutional Court, the Constitutional Court's lack of attributes of a "tribunal established by law" on account of the allegedly invalid election of a judge to the Constitutional Court, and the limitations on the level of compensation, and to declare inadmissible the remainder of the application;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant company;

the comments submitted by the Commissioner for Human Rights of the Republic of Poland and the Helsinki Foundation for Human Rights, both having been granted leave to intervene by the President of the Section;

the decision to grant priority to the application under Rule 41 of the Rules of Court;

Having deliberated in private on 30 March 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant company alleged, in particular, that the ordinary courts had failed to duly provide reasons for their refusal to refer a legal question to the Constitutional Court (*Trybunał Konstytucyjny*)[1].

[1] The Court notes that the Polish *Trybunał Konstytucyjny* has consistently been referred to in its judgments and decisions as "the Constitutional Court" (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V). Several bodies of the Council of Europe, in particular the Venice Commission, and other international organisations use the term "the Constitutional Tribunal". The Court will continue to use the term "the Constitutional Court", in accordance with its established practice. However, when other sources are cited, the term "the Constitutional Tribunal" will be kept.

It also complained that one of the judges on the bench of the Constitutional Court which had examined its constitutional complaint had not been elected in accordance with the domestic law. The applicant company relied on Article 6 § 1 of the Convention.

THE FACTS

2. The applicant company is a limited liability company whose registered office is in Leszno Dolne. It was represented by Mr P. Piątek, a lawyer practising in Zielona Góra.

3. The Government were represented by their Agent, Mr J. Sobczak, of the Ministry of Foreign Affairs.

I. THE BACKGROUND TO THE CASE RELATING TO THE CONSTITUTIONAL COURT

A. The Act on the Constitutional Court of 25 June 2015

4. On 10 July 2013 the then President of the Republic submitted a bill on the Constitutional Court to the *Sejm* (the lower house of Parliament).

5. On 25 June 2015 the *Sejm* adopted the Act on the Constitutional Court. Section 19(1) of the Act provided that the right to nominate a candidate for judge of the Constitutional Court was vested in the Presidium of the *Sejm* and a group of at least fifty deputies. Section 19(2) of the Act provided that nominations for the office of judge of the Constitutional Court had to be submitted to the Speaker of the *Sejm* no later than three months before the expiry of the term of office of an outgoing judge.

6. Section 137 of the Act, one of the transitional provisions, provided that with regard to judges of the Constitutional Court whose term of office was to expire in 2015, the time-limit for the submission of nominations referred to in section 19(2) of the Act was thirty days from the entry into force of the Act. The Act entered into force on 30 August 2015.

7. Section 21(1) of the Act provided that a person elected to the office of judge of the Constitutional Court had to take the relevant oath before the President of the Republic.

B. Election of the Constitutional Court's judges on 8 October 2015

8. On 8 October 2015, during its last session, the seventh-term *Sejm* adopted resolutions on the election of five judges of the Constitutional Court: three judges (R.H., A.J. and K.Ś.) to replace judges whose term of office was to come to an end on 6 November 2015, and two judges to

replace those whose term of office was due to expire on 2 and 8 December 2015 respectively.

9. The President of the Republic, elected on 24 May 2015, did not receive the oath from any of the judges elected by the seventh-term *Sejm* on 8 October 2015.

10. On 23 October 2015 a group of *Sejm* deputies from the Law and Justice (*Prawo i Sprawiedliwość*) Party, then in opposition, filed an application with the Constitutional Court challenging, *inter alia*, the constitutionality of section 137 of the Act on the Constitutional Court, arguing that it established a procedure violating the right of the incoming eighth-term *Sejm* to elect a judge of the Constitutional Court. That application was withdrawn on 10 November 2015 and, consequently, the Constitutional Court discontinued the proceedings.

11. On 17 November 2015 a group of deputies from the Civic Platform (*Platforma Obywatelska*) Party filed with the Constitutional Court the same application that had been withdrawn on 10 November 2015 (case no. K 34/15).

12. The new eighth-term *Sejm* was elected on 25 October 2015. It held its first session on 12 November 2015, which meant that, in accordance with the Constitution, the term of the previous *Sejm* had come to an end on the previous day.

C. The Act of 19 November 2015 Amending the Act on the Constitutional Court

13. On 13 November 2015 a group of deputies from the new majority formed primarily by the Law and Justice Party submitted a bill amending the Act on the Constitutional Court.

14. On 19 November 2015, in an accelerated procedure, the *Sejm* adopted the Act Amending the Act on the Constitutional Court of 25 June 2015 ("the Amending Act of 19 November 2015"). On 20 November 2015 the Senate (the upper house of Parliament) adopted the Act, and the President of the Republic signed it on the same day. The Act entered into force on 5 December 2015.

15. The Amending Act of 19 November 2015 modified section 21(1) of the Act on the Constitutional Court by providing that a person elected to the office of judge of the Constitutional Court had to take the oath before the President of the Republic "within thirty days of the date of [his or her] election". It also introduced a new subsection 1a into section 21 which provided that "The taking of the oath shall commence the term of office of a judge of the Constitutional Court."

16. The Amending Act of 19 November 2015 further repealed section 137 of the Act on the Constitutional Court and replaced it with a new section 137a. This provision fixed a new time-limit of seven days from the entry into force of the Amending Act of 19 November 2015 for the

submission of nominations in respect of posts at the Constitutional Court that became vacant in 2015.

17. On 23 November 2015 a group of deputies from the opposition lodged an application with the Constitutional Court challenging several provisions of the Amending Act of 19 November 2015 (case no. K 35/15). On the same day the Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*) filed a similar application. Two further applications were lodged by the National Council of the Judiciary (*Krajowa Rada Sądownictwa*) and the First President of the Supreme Court on 24 and 30 November 2015 respectively.

D. Election of the Constitutional Court's judges on 2 December 2015

18. On 25 November 2015, during its second session, the eighth-term *Sejm* adopted five respective resolutions on "the lack of legal effect" (*w sprawie stwierdzenia braku mocy prawnej*) of the resolutions on the election of five judges of the Constitutional Court adopted by the previous *Sejm* on 8 October 2015. It also requested that the President of the Republic refrain from receiving the oath from those judges. The impugned resolutions did not cite any legal basis for their adoption.

19. On 1 December 2015 a group of deputies from the majority submitted a list of five candidates for judges of the Constitutional Court. On 2 December 2015 the eighth-term *Sejm* adopted resolutions on the election of H.C., L.M., M.M., P.P. and J.P. as judges of the Constitutional Court. The resolutions on the appointment of those judges were published in the Official Gazette of the Republic of Poland on 2 December 2015.

20. The President of the Republic received the oath from four of the judges on the night of 2-3 December, and from the fifth judge (J.P.) on 9 December 2015.

21. On the morning of 3 December 2015 the four judges sworn in by the President of the Republic appeared at the Constitutional Court. The President of the Constitutional Court, A. Rzepliński, refused to admit them to the bench until it was clarified whether their election had been valid.

22. On 4 December 2015 a group of *Sejm* deputies filed an application with the Constitutional Court alleging that the resolutions of the *Sejm* of 25 November 2015 and the resolutions on the election of five judges adopted on 2 December 2015 were unconstitutional (case no. U 8/15).

E. Judgment of the Constitutional Court of 3 December 2015 in case no. K 34/15

23. In its judgment of 3 December 2015 (case no. K 34/15), the Constitutional Court ruled on the application challenging the

constitutionality of several provisions of the Act on the Constitutional Court of 25 June 2015. It held, *inter alia*, that section 137 of that Act was compatible with Article 194 § 1 of the Constitution in so far as it concerned the posts of Constitutional Court judges whose term of office had expired on 6 November 2015, and was incompatible with the same provision of the Constitution as regards the posts of judges whose term of office had expired or would expire on 2 and 8 December 2015 respectively.

24. The Constitutional Court also held that the President's competence to receive the oath had to be interpreted as the obligation to immediately receive the oath from a judge elected to the Constitutional Court by the *Sejm*, and that if section 21(1) of the Act were to be interpreted in any other way then it would be incompatible with Article 194 § 1 of the Constitution.

25. With regard to section 137, the Constitutional Court firstly determined that this provision could be subjected to constitutional review in so far as it concerned procedures regarding the election of a judge of the Constitutional Court which had been initiated in 2015 and had not yet been terminated by the taking of the oath before the President of the Republic on the day of the adjudication by the Constitutional Court. In this context, the Constitutional Court examined the relevance of the *Sejm*'s resolutions of 25 November 2015 on the lack of legal effect of the *Sejm*'s resolutions of 8 October 2015 on the election of judges of the Constitutional Court by the seventh-term *Sejm*. The Constitutional Court found that from a legal point of view, the resolutions of 25 November 2015 contained firstly a presentation of the *Sejm*'s political stance, and secondly a legally non-binding call to the President of the Republic to undertake a particular action. The impugned resolutions, by definition, had not had any legal effect on the resolutions of the seventh-term *Sejm* on the election of judges of the Constitutional Court. The Constitutional Court further noted that in accordance with Article 194 § 1 of the Constitution, a judge of the Constitutional Court acquired such status at the moment when the election procedure by the *Sejm* was completed. A resolution of the *Sejm* in that regard was final and could not be challenged. The same *Sejm* or a subsequent *Sejm* could not revoke such a decision on an election, invalidate it, determine that it was devoid of purpose ("[lacked] legal effect") or "rectify" it *ex post facto*. The Constitutional Court also observed that the Act on the Constitutional Court did not provide for any procedural mechanism to invalidate or resume a procedure on the election of a judge of the Constitutional Court in respect of whom the *Sejm* had already adopted a resolution on his or her election to office.

26. In reviewing the constitutionality of section 137, the Constitutional Court noted that the term of office of three judges of the Constitutional Court had been due to expire on 6 November 2015, and those of two other judges had expired or would expire on 2 and 8 December 2015 respectively.

Accordingly, the end of the three judges' term of office had been during the seventh term of the *Sejm*, and the remaining two judges' term of office had come to an end during the eighth term of the *Sejm*. In this regard, the Constitutional Court found, in so far as relevant:

> "6.15. Pursuant to Article 194 § 1 of the Constitution, 'The Constitutional Court shall be composed of fifteen judges elected individually by the *Sejm* for a term of office of nine years from amongst persons distinguished by their knowledge of the law. No person may be elected for more than one term of office.'
>
> In the case of a vacant seat at the Constitutional Court, it is a constitutional obligation of the *Sejm*, in accordance with the established procedures, to fill the vacancy forthwith ...
>
> Article 194 § 1 of the Constitution prescribes that the term of office of a Constitutional Court judge is a fixed period of nine years. The introduction of a relatively long term of office [for Constitutional Court judges] confirms that, in the Polish constitutional system, there has been a breaking of any bonds between the Constitutional Court and a political composition of the *Sejm* during a given parliamentary term. The constitutional norms implicitly provide that the Constitutional Court's composition may include judges elected by the *Sejm* during its two (and sometimes even three) consecutive parliamentary terms, which ensures *sui generis* pluralism in the Constitutional Court's composition, and facilitates the preservation of impartiality and independence in relation to changing parliamentary majorities.
>
> ...
>
> 6.17. The Constitutional Court holds that it follows from Article 194 § 1 of the Constitution that the [*Sejm*'s] obligation to elect a judge of the Constitutional Court applies to the *Sejm* whose term of office covers the period during which the seat of a judge of the Constitutional Court becomes vacant. The wording [of Article 194 § 1 that] "the Constitutional Court shall be composed of fifteen judges elected individually by the *Sejm*" indicates that not just any *Sejm* is concerned, but the one whose temporal scope of activity corresponds to the day on which the term of office of a judge of the Constitutional Court expires or is terminated. Obviously, it is possible that the *Sejm* will be unable to fill a judicial post at the Constitutional Court owing to various factual circumstances, such as the lack of support for a candidate, or short time-limits to carry out the election procedure owing to forthcoming parliamentary elections. In such a case, the obligation to elect a judge of the Constitutional Court passes naturally to the subsequent *Sejm*. ...
>
> The Constitutional Court agrees with the applicant's allegations that section 137 of the Act on the Constitutional Court is incompatible with Article 194 § 1 of the Constitution in so far as it applies to the election of judges to replace the judges whose term of office expired [or will expire on] on 2 and 8 December 2015 (that is, the judges whose term of office expired after the start of the eighth-term *Sejm*). These judges were elected by an unauthorised body. A judge of the Constitutional Court cannot be elected ... in advance ... in respect of a judicial post which will become vacant only in the course of the term of office of the subsequent *Sejm*. Applying the principle of *reductio ad absurdum*, the mechanism provided for in section 137 of the Act on the Constitutional Court could have been used not only in

respect of judges whose term of office expired in 2015, but also [those whose] posts would become vacant in the years to come. This would be a dangerous precedent."

27. With regard to the alleged unconstitutionality of section 21(1) of the Act, the Constitutional Court firstly made some observations on Article 194 § 1 of the Constitution. The Constitutional Court found, in so far as relevant:

"8.4. The principle expressed in Article 194 § 1 of the Constitution, that the *Sejm* elects judges of the Constitutional Court, grants this house of Parliament exclusive competence to determine the personal composition of the Constitutional Court. ...

8.5. The contested section 21(1) of the Act on the Constitutional Court expresses a norm relating to competence which imposes on the President an obligation to immediately receive the oath from a judge of the Constitutional Court. Adopting a different view, namely that the head of State enjoys a discretion in deciding whether or not to receive the oath from a judge elected by the *Sejm*, would entail the creation of a statutory norm which would make the President, in addition to the *Sejm*, an authority vested with the right to decide on the personal composition of the Constitutional Court. Such an interpretation of section 21(1) of the Act has no legal basis in Article 194 § 1 or any other provision of the Constitution. ...

The receiving of the oath from judges of the Constitutional Court cannot be regarded as falling within the possible discretion of the head of State. The President [of the Republic] has an obligation to receive the oath from judges elected by the *Sejm*, on the basis of Article 194 § 1. In this regard, [the President] has no possibility to make an independent and free – based solely on his discretion – assessment of the legal bases of the election, or the correctness of the procedure that was followed by the *Sejm* in a given case. The President [of the Republic], as an organ of the executive, has ... no competence to determine the conformity of legal norms to the Constitution in a manner that is final and binding on other State authorities. Nor does he have the competence to assess the legality of acts by the *Sejm* carried out on the basis of the law. ...

8.5.1. The President [of the Republic] has an obligation to receive the oath from a judge of the Constitutional Court elected by the *Sejm*. However, the President [of the Republic]'s competence as provided for in section 21(1) of the Act on the Constitutional Court does not consist in his participation in determining the personal composition of the Constitutional Court. This task is conferred exclusively on the *Sejm* on the basis of Article 194 § 1 of the Constitution. The President [of the Republic], by his actions, is to create conditions so that a judge elected by the *Sejm* can immediately commence the performance of the official duties which have been entrusted [to him or her]. Thus, in essence, the President [of the Republic]'s role is secondary and at the same time subordinate to the effect of the *Sejm* exercising its competence to elect judges of the Constitutional Court. The President [of the Republic] is not an organ that elects judges of the Constitutional Court, and he is obliged to exercise his competence to receive the oath from judges of the Constitutional Court, in accordance with the rules specified in, *inter alia*, the Constitution (Article 126 § 3 of the Constitution). ...

8.5.2. As has already been emphasised, it is the President [of the Republic]'s obligation to receive the oath from a newly elected judge of the Constitutional Court. The lack of a time-limit in the provision on fulfilling the obligation to receive the oath should be construed in such a way that the obligation must be fulfilled without delay, so as to enable the Constitutional Court to act in the composition of fifteen judges. ...

> ... [E]xtraordinary circumstances may lead ... to the extension of a period falling within the scope of "time necessary" for the fulfilment of the obligation. However, this may not constitute a basis for creating the competence to refuse to take the oath. The Constitutional Court excludes the possibility of such an interpretation of section 21(1) of the Act, which would give the President a basis to refuse to receive the oath from a Constitutional Court judge elected by the *Sejm*."

28. The judgment included a final part which reads, in so far as relevant:

> "12. The consequences of the judgment.
>
> The Constitutional Court has ruled that section 137 of the Act on the Constitutional Court is unconstitutional in part. However, irrespective of the Constitutional Court's ruling, the transitional character of this provision renders it inapplicable in any event as a basis for proposing candidates for judge[s] of the Constitutional Court in the future (after the entry into force of this judgment). ...
>
> However, the consequence of the finding that section 137 of the Act is unconstitutional in part produces significant legal effects of a systemic nature ... triggered by the Constitutional Court's judgment. In the case of the two judges of the Constitutional Court elected [on 8 October 2015] to take the seats of judges whose term of office expired on or will expire on 2 and 8 December 2015 respectively, the legal basis for a significant step in the procedure for their election has been disqualified by the Constitutional Court as unconstitutional. Since the judicial posts have not yet been assumed, as the last legally significant act was not concluded (that is, the judges taking the oath before the President), the repeal of the respective part of section 137 of the Act on the Constitutional Court leads to the result that the further procedure should be discontinued and closed ... This procedure cannot be completed, since the legal basis of one of the steps [in that procedure] has been declared unconstitutional by the Constitutional Court.
>
> Since, in accordance with Article 190 § 1 of the Constitution, a ruling of the Constitutional Court is universally binding and final, the entry into force of the present ruling means that no State authority has a legal basis to challenge – as unconstitutional – those provisions regulating a part of the procedure for the election of a judge of the Constitutional Court which the Constitutional Court has found to be compatible with the Constitution in this judgment.
>
> However, the legal basis of the election of three judges of the [Constitutional] Court to the seats of those judges whose term of office expired on 6 November 2015 does not raise constitutional doubts. A repeal in part of section 137 of the Act on the Constitutional Court did not affect the validity of their election. In accordance with the rule that a judge of the Constitutional Court is elected by the *Sejm* whose term of office covers the period during which his seat becomes vacant, the election carried out on that basis in this case was valid, and there are no obstacles to the procedure being finalised by the persons elected to the office of judge of the Constitutional Court taking the oath before the President.
>
> Due to the entry into force of this judgment, the *Sejm* has an obligation to elect two judges of the Constitutional Court [to replace judges] whose term of office expired or will expire on 2 and 8 December 2015 respectively."

29. The Government submitted that the Chancellery of the President of the Republic took the position that it was not possible to receive the oath from the judges elected by the seventh-term *Sejm*, since the President had already sworn in five judges elected by the eighth-term *Sejm*.

F. Judgment of the Constitutional Court of 9 December 2015 in case no. K 35/15

30. In its judgment of 9 December 2015 (case no. K 35/15), the Constitutional Court ruled on several applications challenging the constitutionality of the Amending Act of 19 November 2015. The Constitutional Court held, *inter alia*, that section 137a of the Act on the Constitutional Court was incompatible with Article 194 § 1 taken in conjunction with Article 7 of the Constitution, in so far as it concerned proposing a candidate for judge of the Constitutional Court to replace a judge whose term of office had expired on 6 November 2015.

31. The Constitutional Court further found that the time-limit of thirty days which had been added to section 21(1) of the Act was incompatible with Article 194 § 1 of the Constitution. It also held that the new subsection 1a in section 21 of the Act providing that the taking of the oath by a judge of the Constitutional Court marked the beginning of his or her term of office was incompatible with Article 194 § 1 taken in conjunction with Article 10, Article 45 § 1, Article 173 and Article 180 §§ 1 and 2 of the Constitution.

32. With regard to the alleged unconstitutionality of section 137a, the Constitutional Court referred to its earlier judgment of 3 December 2015, in which it had confirmed the presumption that section 137 of the Act on the Constitutional Court was constitutional in so far as it concerned the judges of the Constitutional Court whose term of office had expired on 6 November 2015 (see paragraph 23 above). That finding that section 137 was constitutional had been binding on all State authorities from the moment when the judgment of 3 December 2015 had been delivered. Since, in the later judgment, the Constitutional Court confirmed the constitutionality of section 137 of the Act on the Constitutional Court as the legal basis for the election of three judges to replace those judges whose term of office had expired on 6 November 2015 and who had been elected by the seventh-term *Sejm*, the eighth-term *Sejm*'s election of judges to the same seats, on the basis of a different provision (section 137a of the Act), would have resulted in the number of Constitutional Court judges being increased to eighteen. In consequence, the Constitutional Court held that section 137a of Act on the Constitutional Court was incompatible with Article 194 § 1 taken in conjunction with Article 7 of the Constitution, in so far as it concerned proposing candidates for judges of the Constitutional Court to replace those judges whose term of office had expired on 6 November 2015.

33. As regards the alleged unconstitutionality of the thirty-day time-limit on receiving the oath from a person elected as a judge of the Constitutional Court (section 21(1) of the Act on the Constitutional Court as amended), the Constitutional Court again referred to the findings made in its earlier judgment of 3 December 2015 in respect of the initial version of section 21(1) (see paragraph 24 above). It found that the introduction of the

time-limit was incompatible with the judgment of 3 December 2015, in which it had held that section 21(1) of the Act on the Constitutional Court had to be interpreted as meaning that the President had an obligation to immediately receive the oath from a judge elected to the Constitutional Court by the *Sejm*. Any other interpretation would be contrary to Article 194 § 1 of the Constitution.

34. In this context, the Constitutional Court noted that it followed from the principles of legality and the rule of law that if legal norms did not expressly provide for a State organ to have a particular competence, for example, the power to make decisions about the election of judges of the Constitutional Court by refusing to receive the oath from them, then such competence could not be presumed. In conclusion, the Constitutional Court confirmed the finding made in its judgment of 3 December 2015 that section 21(1) as amended was incompatible with Article 194 § 1 of the Constitution. It found that the legislature, when specifying the procedure for the election of a judge of the Constitutional Court, remained bound by the constitutional principles, including Article 194 § 1 of the Constitution, which provided that the *Sejm* had competence to elect judges of the Constitutional Court. The legislature could not confer such competence on another State organ, or introduce provisions that would allow the competence to determine the composition of the Constitutional Court to be transferred from the *Sejm* to another State authority.

35. The Constitutional Court agreed with the applicants' allegation that section 21(1a) of the Act on the Constitutional Court was unconstitutional. It noted that in accordance with the well-established practice of State organs, the term of office of a judge of the Constitutional Court commenced on the day of his election by the *Sejm*, unless the seat to which he was elected remained occupied, in which case the term of office commenced when the seat became vacant as a result of the expiry of the term of office of the judge occupying that seat. The Constitutional Court found that the new solution, which consisted in making the commencement of the term of office of a judge of the Constitutional Court elected by the legislative authority (the *Sejm*) dependent on the taking of the oath before the President of the Republic, would result in a delay in counting the beginning of the term of office. In addition, it would also amount to indirectly including the President in the procedure of electing a judge of the Constitutional Court, even though the Constitution provided solely for the involvement of the *Sejm* in that procedure.

G. The Act of 22 December 2015 Amending the Act on the Constitutional Court

36. On 15 December 2015 a group of deputies from the majority submitted a bill amending the Act on the Constitutional Court. On

22 December 2015 the *Sejm*, in an accelerated procedure, adopted the Act Amending the Act on the Constitutional Court ("the Amending Act of 22 December 2015"). The Senate adopted the Act on 24 December 2015. The President of the Republic signed the Act on 28 December 2015. It entered into force on the same date. The amendments concerned, *inter alia*, the procedure before the Constitutional Court, which was considerably changed.

37. The Amending Act of 22 December 2015 provided, *inter alia*, that the Constitutional Court should, in general, hear cases as a full bench in a composition of at least thirteen out of fifteen judges, apart from constitutional complaints and requests for a preliminary ruling, which could be heard by benches of seven judges. Decisions in cases heard by a full bench required a two-thirds majority, instead of a simple majority, as had previously been the case. The Constitutional Court was also required to hear applications in the sequence in which they were lodged.

38. The Amending Act of 22 December 2015 was challenged before the Constitutional Court by two groups of deputies of the *Sejm*, the First President of the Supreme Court, the Commissioner for Human Rights and the National Council of the Judiciary (case no. K 47/15).

H. Decision of the Constitutional Court of 7 January 2016 in case no. U 8/15

39. In a decision of 7 January 2016, sitting as a full bench composed of ten judges, the Constitutional Court discontinued the proceedings in case no. U 8/15. It found that it had no jurisdiction to examine the case on the merits, since the *Sejm*'s resolutions of 25 November 2015 on the invalidity of the resolutions of 8 October 2015 could not be regarded as normative acts in either a formal or substantive sense. It reached the same conclusion in respect of the resolutions of 2 December 2015 on the election of five judges.

40. As regards the classification of the resolutions of 25 November 2015, the Constitutional Court fully maintained the position which it had adopted in its judgment of 3 December 2015 (see paragraph 25 above) – i.e. that the impugned resolutions had not affected the validity of the earlier resolutions of 8 October 2015 on the election of five judges, and they had to be regarded as legally non-binding. The Constitutional Court noted that there were no legal rules providing for any State organ, including the *Sejm*, being able to determine that a resolution of a previous *Sejm* on the election of a judge of the Constitutional Court was invalid. Accordingly, the resolutions of 25 November 2015 could not be classified as a legally binding determination that the election of judges on 8 October 2015 had been invalid.

41. Having regard to the significance of the issues raised in the application and the fact that it could not examine the case on the merits, the Constitutional Court considered it necessary to make some observations on

the election of judges of the Constitutional Court which had been held on 8 October 2015. It analysed the documents relating to that election, but did not establish that the relevant legal rules had been breached in the course of the election. The Constitutional Court found that it was even more likely that there were no grounds to establish the existence of an obvious, undisputable and manifest defect in the impugned act (the election) that would enable it to consider the act invalid. In particular, certain erroneous arguments, such as the argument that the candidates had been proposed by allegedly unauthorised entities, could not lead to the determination that the election had been invalid. The Constitutional Court noted that it was of particular significance that the explanatory notes to the draft resolutions did not indicate any specific defects in the election held on 8 October 2015, but merely mentioned some unspecified irregularities in the procedure.

42. Following the decision in case no. U 8/15, on 12 January 2016 the President of the Constitutional Court admitted to the bench the two judges who had been elected on 2 December 2015 (P.P. and J.P.), who replaced the judges whose term of office had expired on 2 and 8 December 2015 respectively.

I. Judgment of the Constitutional Court of 9 March 2016 in case no. K 47/15

43. In this case, the Constitutional Court examined the constitutionality of the Amending Act of 22 December 2015. It decided to consider the case on the basis of the directly applicable provisions of the Constitution and the Act on the Constitutional Court as amended by the Amending Act of 22 December 2015, excluding certain provisions of the latter Act. The Constitutional Court excluded those challenged provisions which concerned the procedure before it and could potentially have been applied in the case. It found that the same provisions could not simultaneously be the basis of and the subject of the adjudication.

44. In its judgment of 9 March 2016 (case no. K 47/15), sitting as a full bench composed of twelve judges, the Constitutional Court held that the entire Amending Act of 22 December 2015 was unconstitutional owing to the defective way in which it had been enacted. In addition, it declared several provisions of the Amending Act of 22 December 2015 unconstitutional. With regard to the new procedural provisions, the Constitutional Court held that they were in breach of several provisions of the Constitution, in that they rendered the efficient operation of the Constitutional Court impossible and interfered with its independence from the other branches of the Government. It noted that taken together, the impugned provisions made up a mechanism paralysing the activity of the Constitutional Court.

45. The Constitutional Court decided not to apply, *inter alia*, section 44(3) of the Act on the Constitutional Court as amended. This provision required the Constitutional Court to examine the case as a full bench composed of at least thirteen judges. In this regard, the Constitutional Court made the following observations:

> "1.10 When determining the proper composition of the bench in the present case, the Constitutional Court took account of the following circumstances.
>
> Firstly, in the factual and legal conditions that prevail on the day of the delivery of the present judgment, the full bench of the Constitutional Court comprises twelve judges. In its judgment of 3 December 2015 (no. K 34/15), the Constitutional Court held that the two judges of the Constitutional Court elected on 8 October 2015 by the seventh-term *Sejm* to replace the judges whose term of office had expired [or would expire] on 2 and 8 December 2015 respectively had not been duly elected. However, the three judges of the Constitutional Court who were to take the seats which had been vacated on 6 November 2015 were elected by the *Sejm* on the same day [8 October 2015] on a legal basis which complied with the Constitution, but they have not yet taken the oath of office before the President of the Republic. The above-mentioned judgment, which is known to the [Constitutional] Court *ex officio*, is final and universally binding (Article 190 § 1 of the Constitution) on the Constitutional Court as well.
>
> Secondly, in the light of Article 194 § 1 of the Constitution, there is no doubt that a full bench of the Constitutional Court may be composed of a maximum of fifteen judges. At the same time, those are all judges who have the constitutional legitimacy to give rulings. Thus, if the Constitutional Court gives a ruling in a situation where a few judges are unable to adjudicate because a required act by another State organ has not been carried out (see the above-mentioned judgment no. K 34/15), and at the same time all judges who are authorised to adjudicate take part in the issuing of the relevant ruling, then the composition so determined is indeed a 'full bench'.
>
> Having regard to the above, the Constitutional Court finds that a full bench of the [Constitutional] Court is a composition comprising all judges of the court who may adjudicate in a given case (with the possible exclusion of some judges from the bench if, in accordance with the applicable law, there are reasons justifying this). In other words, a full bench is a full composition of the Constitutional Court within the meaning of the Constitution [which is] capable of adjudicating in a case (see Article 194 § 1 of the Constitution).
>
> Therefore, the Constitutional Court has to reject the result of the interpretation of section 44(3) of the Act on the Constitutional Court, on the basis of the assumption that the legislature, being aware of the operative part of the judgment in case no. K 34/15 ..., adopted provisions whose implementation would result in an action contrary to [the Constitutional Court's] own judgment, which had universally binding force, or adopted a provision which could in no way be applied. ..."

46. The Prime Minster refused to publish the judgment of 9 March 2016. The judgment was eventually published on 5 June 2018 in the Journal of Laws of 2018, item 1077, with the following annotation: "Ruling issued in

breach of the provisions of the Act on the Constitutional Court of 25 June 2015, concerned a normative act which ceased to have effect"[2].

J. The Act on the Constitutional Court of 22 July 2016

47. On 22 July 2016 the *Sejm* adopted the new Act on the Constitutional Court, which was due to enter into force on 16 August 2016.

48. Section 90, included in the chapter on transitional provisions, read as follows:

> "Judges of the [Constitutional] Court who have taken the oath of office before the President of the Republic and who have so far not assumed judicial duties shall be included in adjudicating benches and shall be assigned cases by the President of the [Constitutional] Court from the date on which the present Act enters into force".

49. Two groups of *Sejm* deputies, the Commissioner for Human Rights and the First President of the Supreme Court lodged applications with the Constitutional Court alleging that various provisions of the new Act on the Constitutional Court were unconstitutional.

K. Judgment of the Constitutional Court of 11 August 2016 in case no. K 39/16

50. In its judgment of 11 August 2016 (case no. K 39/16), the Constitutional Court declared several provisions of the new Act on the Constitutional Court of 22 July 2016 unconstitutional. Among other things, it held that section 90 of the Act was incompatible with Article 194 § 1 of the Constitution.

51. The Constitutional Court noted that section 90 of the Act on the Constitutional Court of 2016 was an adjusting provision, whose scope of application was limited to the factual situation that had existed on the day on which the Act had been promulgated. This implied that the legislature had intended to regulate the legal status of particular judges of the Constitutional Court, some of whom had been elected by the seventh-term *Sejm*, and some of whom had been elected by the eighth-term *Sejm*. The latter group of judges had taken the oath before the President of the Republic.

52. The Constitutional Court found as follows:

> "10.2. ... In this context, the Constitutional Court holds that section 90 of the Act on the Constitutional Court of 2016 raises two kinds of constitutional objections.
>
> Firstly, the procedure for the election of a judge of the Constitutional Court is comprehensively regulated by Article 194 § 1 of the Constitution and the relevant provisions of the Act on the Constitutional Court**.** The individual legal acts relating to

[2] This was based on section 89 of the Act on the Constitutional Court of 2016, which was also declared unconstitutional by the Constitutional Court in its judgment of 11 August 2016 (no. K 39/16).

the election of a judge by the *Sejm*, as well as a judge's taking of the oath before the President, are acts [carried out in the] application of the law, [and are] always carried out with regard to particular candidates and particular judges of the Constitutional Court. The legislature cannot replace those acts by a general act of universal application: on the one hand ..., assuming the duties of the President of the Constitutional Court, and on the other hand, determining which acts in the election [process] of a judge of the Constitutional Court carried out in the past by the seventh-term *Sejm* and the eighth-term *Sejm* are valid.

Secondly, the Constitutional Court has already presented its final view on the legal bases for the election of judges of the Constitutional Court to the posts vacated in 2015, and this view remains valid in respect of the present proceedings as well (see the judgments of the Constitutional Court of: 3 December 2015, no. K 34/15; 9 December 2015, no. K 35/15; [and] 9 March 2016, no. K 47/15; [and the] decision of 7 January 2016, no. U 8/15). In the light of this, the President of the Constitutional Court's implementation of the directives contained in section 90 of the Act on the Constitutional Court of 2016 would amount to an act contrary to the Constitutional Court's judgments, which are universally binding and also bind the Constitutional Court and its President.

It should be reiterated that in the judgment of 3 December 2015, no. K 34/15, the Constitutional Court held that the legal basis for the election of judges of the Constitutional Court [to replace judges] whose term of office had expired on 6 November 2015 was compatible with the Constitution, and that the *Sejm*'s resolutions of 25 November 2015 on the lack of legal effect of the *Sejm*'s resolutions of 8 December 2015 on the election of judges of the Constitutional Court by the seventh-term *Sejm* (the Official Gazette of the Republic of Poland, items 1131-1135) in no way concerned the election procedure for judges of the Constitutional Court – [those resolutions] had some characteristics of a statement, and some of a non-binding resolution. In that situation, the election of new judges of the Constitutional Court by the eighth-term *Sejm* was also carried out with regard to posts that were not vacant. Section 90 of the Act on the Constitutional Court of 2016 concerns this exact situation.

Having regard to the above, the Constitutional Court holds that section 90 of the Act on the Constitutional Court of 2016 is incompatible with Article 194 § 1 of the Constitution."

53. The Prime Minister refused to publish the judgment of 11 August 2016. The judgment was eventually published on 5 June 2018 in the Journal of Laws of 2018, item 1078, with the following annotation: "Ruling issued in breach of the provisions of the Act on the Constitutional Court of 25 June 2015, concerned a normative act which ceased to have effect"[3].

L. Current statutory regulations on the Constitutional Court

54. On 30 November 2016 the *Sejm* adopted the Act on Organisation and Procedure before the Constitutional Court (*Ustawa o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym*). On the same day it adopted the Act on the Status of Judges of the Constitutional Court (*Ustawa o statusie sędziów Trybunału Konstytucyjnego*).

[3] See footnote 2 above.

55. On 13 December 2016 the *Sejm* adopted the Act on the Introductory Provisions to the Act on Organisation and Procedure before the Constitutional Court and the Act on the Status of Judges of the Constitutional Court (*Ustawa – Przepisy wprowadzające ustawę o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym oraz ustawę o statusie sędziów Trybunału Konstytucyjnego* – "the Introductory Provisions Act"). That Act, along with the other Acts referred to in the paragraph above, entered into force on 3 January 2017, except for certain provisions that had entered into force earlier.

56. The Introductory Provisions Act provided for the position of the acting President of the Constitutional Court. Pursuant to section 18(2) of the Introductory Provisions Act, the acting President of the Constitutional Court had to assign cases to judges of the Constitutional Court who had taken the oath of office before the President of the Republic. Section 21(2) of the same Act provided that those judges had to attend the meeting of the General Assembly of Judges with a view to presenting the President of the Republic with candidates for the position of President of the Constitutional Court.

57. The Commissioner for Human Rights challenged the constitutionality of the Introductory Provisions Act. He alleged, in particular, that sections 18(2) and 21(2) of that Act were incompatible with Article 190 § 1 and Article 194 § 1 of the Constitution. The Commissioner argued that the impugned provisions constituted an attempt by the legislature to change the composition of the Constitutional Court by excluding judges who had been properly elected by the seventh-term *Sejm* and replacing those judges with persons who had been elected by the eighth-term *Sejm* in breach of the Constitution, that is, elected to posts that had already been filled. The Commissioner maintained that the Constitutional Court had confirmed the validity of the seventh-term *Sejm*'s election of the three judges in several rulings.

M. Admission of Judge M.M. to the bench

58. On 19 December 2016 the term of office of the President of the Constitutional Court, Mr A. Rzepliński, came to an end.

59. On 20 December 2016 the President of the Republic appointed Judge J. Przyłębska to the position of acting President of the Constitutional Court, as provided for in the Introductory Provisions Act (see paragraph 56 above). On the same day the acting President of the Constitutional Court admitted H.C., L.M. and M.M. to the bench.

60. On 5 July 2017 the President of the Republic appointed Judge M.M. as Vice-President of the Constitutional Court.

N. Judgment of the Constitutional Court of 24 October 2017 in case no. K 1/17

61. In its judgment of 24 October 2017 (case no. K 1/17), the Constitutional Court ruled on the Commissioner for Human Rights' application challenging, *inter alia*, sections 18(2) and 21(2) of the Introductory Provisions Act. The judgment was given by a bench of five judges composed of M.M. (the president), H.C., Z.J., L.K. and A.Z. The Constitutional Court, by a majority of four to one, held that the impugned provisions were compatible with Article 194 § 1 of the Constitution in so far as they concerned judges of the Constitutional Court who had been elected by the *Sejm* and had taken the oath before the President of the Republic.

62. As regards the argument that the impugned provisions were incompatible with Article 190 § 1 of the Constitution, which concerned the binding force of the Constitutional Court's judgments, the Constitutional Court held that this constitutional provision was an inadequate benchmark for reviewing the constitutionality of the impugned provisions, and discontinued that part of the proceedings. It found that it was not competent to examine whether the impugned provisions were in conformity with a given judgment of the Constitutional Court. The Constitutional Court emphasised that its rulings which had been relied on by the Commissioner did not justify a conclusion that the judges elected in December 2015 had not been properly elected. The Constitutional Court noted that no previous rulings of the Constitutional Court, in particular the judgments of 3 and 9 December 2015 (nos. K 34/15 and K 35/15 respectively) and the decision of 7 January 2016 (no. U 8/15), had determined the legal status of any of the judges of the Constitutional Court who had been sworn in by the President of the Republic. It reiterated that the Constitutional Court's judgment of 3 December 2015 (no. K 34/15) had not taken into account the eighth-term *Sejm*'s election of five judges on 2 December 2015 and their taking of the oath.

63. The Constitutional Court further held that the impugned provisions of the Introductory Provisions Act were compatible with Article 194 § 1 of the Constitution. It noted that the Constitution did determine when a judge elected by the *Sejm* began his term of office and when he assumed office. This issue was regulated in section 5 of the Act on the Status of Judges of the Constitutional Court, which provided that a judge's employment relationship commenced after he had taken the oath of office. The Constitutional Court disagreed with the Commissioner's view that the taking of the oath of office by a person elected to the post of judge of the Constitutional Court was not a necessary condition for assuming office.

II. THE CIRCUMSTANCES OF THE CASE

64. The applicant company is one of the leading producers of turf (*trawnik rolowany*) in Poland. The surface area of its turf cultivation covers 65 hectares (ha). It is located within the territory of the hunting grounds where the State Forests Holding (*Lasy Państwowe*) operates a game breeding area. The breeding area is managed by the Szprotawa forest district (*nadleśnictwo*).

65. In September and October 2010 the applicant company notified the forest district about damage to its turf caused by game (boar and deer). The representatives of the forest district and the applicant company, accompanied by an expert, viewed the affected areas on 12 October 2010. They decided that, owing to the continuous nature of damage caused by game, a final assessment of the damage would take place in the spring of 2011.

66. On 21 March 2011 the applicant company notified the forest district about further damage caused by game. On 7 April 2011 it called on the forest district to carry out the assessment of the damage.

67. The representatives of the parties, accompanied by an expert, viewed the affected areas and assessed the damage on 13 April 2011. The expert drew up a report assessing, *inter alia*, that the total area of crop which had been damaged measured 3.36 ha (1.90 ha in autumn 2010 and 1.46 ha in spring 2011), and that the value of the damage was 199,920 Polish zlotys (PLN – approximately 50,000 euros (EUR)). This was agreed by the parties. However, the applicant company objected to compensation for the damage sustained in the period prior to 15 April 2010 being fixed at 25% of the calculated value.

68. On 5 May 2011 the forest district paid PLN 42,800 in compensation to the applicant company.

A. First-instance proceedings

69. On 18 September 2012 the applicant company brought a claim against the State Treasury, represented by the Szprotawa forest district, before the Zielona Góra Regional Court. It sought PLN 142,800 (approximately EUR 35,700) in compensation for damage caused to its turf cultivation by game. The applicant company calculated the amount of compensation on the basis of the report on the final assessment of the damage of 13 April 2011 as agreed by the parties, which was PLN 199,920. This amount was reduced by the cost of collecting the turf (PLN 14,280) and the amount that had been already paid by the defendant (PLN 42,800).

70. The applicant company further requested that the court refer three legal questions to the Constitutional Court for a preliminary ruling. The questions were as follows.

(1) Is paragraph 5 of the Ordinance of the Minister of the Environment of 8 March 2010 concerning the procedures for damage assessment and the payment of compensation in respect of damage to crops (*Rozporządzenie Ministra Środowiska z dnia 8 marca 2010 r. w sprawie sposobu postępowania przy szacowaniu szkód oraz wypłat odszkodowań za szkody w uprawach i płodach rolnych* – "the Ordinance") compatible, *inter alia*, with Article 32 §§ 1 and 2 and Article 64 § 2 of the Constitution, in so far as it puts persons growing perennial crops (*uprawa wieloletnia*) in a less favourable position than persons growing annual crops (*uprawa jednoroczna*) by limiting the relevant level of compensation by linking it with the period in which damage was sustained, without specifying the basis for such a limitation?

(2) Is section 49 of the Hunting Act compatible, *inter alia*, with Article 64 § 3 and Article 92 § 1 of the Constitution, in so far as it delegates matters of statute to the level of subordinate legislation (*akt podustawowy*), and in so doing interferes with the constitutional right of property by unlawfully restricting it by means of subordinate legislation?

(3) Are paragraphs 4 and 5 of the Ordinance compatible, *inter alia*, with Article 92 § 1 and Article 64 § 3 of the Constitution, in so far as they exceed statutory authorisation and restrict the constitutional right of property by limiting the right to compensation for damage?

71. The applicant company submitted that the percentage rates provided for in paragraph 5 of the Ordinance could not be applied to the calculation of compensation for damage caused to turf, because this provision was relevant only to annual crops, whereas turf was a perennial crop. It further submitted that turf matured twelve to eighteen months after being sown, and could be collected and sold at any point during the thirty-six months following the date when it reached maturity. Accordingly, damage to turf during the period of its maturity should be treated as damage to a fully developed crop. There was no justification for any reduction in the level of compensation.

72. With regard to questions 2 and 3, the applicant company referred to Article 64 § 3 of the Constitution, which provided that the right of property could only be limited by means of a statute. Nonetheless, paragraphs 4 and 5 of the Ordinance, a rule ranking as subordinate legislation, interfered with the right of property by limiting owners' right to compensation for damage caused by game. The company further submitted that the impugned provisions of subordinate legislation had been issued in breach of the statutory authorisation in section 49 of the Hunting Act. In this regard, the applicant company argued that the legislature had not authorised the Minister of the Environment to limit owners' right to compensation for damage caused by game.

73. The applicant company submitted that the referral of those legal questions to the Constitutional Court was necessary, since it did not have

any other means of defending itself against the unjust law. If the Regional Court were to dismiss its request and compel it to lodge a constitutional complaint only after the civil proceedings had been terminated, this would mean that the unconstitutional provision would remain in force for a prolonged period of time.

74. The applicant company stated that the problem of damage to its turf cultivation by game had persisted since 2004. Since that time it had been involved in many sets of court proceedings against the forest district.

75. The State Treasury accepted the claim up to the value of PLN 58,140 (approximately EUR 14,500)

76. In a partial judgment (*wyrok częściowy*) of 6 February 2013, the Regional Court awarded that sum to the applicant company.

77. In a judgment of 16 September 2014, the court awarded a further PLN 517.72 (approximately EUR 129) in compensation.

78. The court ordered an expert report. Relying on the expert report, it established that turf was not a perennial crop. It was a highly specialised and atypical crop, because it was ready for collection for a period of about two years after reaching maturity. For that reason, the cultivation of turf was not comparable to the cultivation of traditional crops, such as cereals, corn or potatoes.

79. The court established that on 13 April 2011 an expert had made the final assessment of the damage. The parties had agreed that the area of damaged crop was 3.36 ha and that the damage amounted to PLN 199,920. The applicant company had disagreed with compensation for the damage sustained in spring 2010 being limited to 25% of the total value of the damage.

80. The court ruled that the costs of collecting the turf were to be fixed at PLN 0.84 per square metre. It established that the area damaged in autumn 2010 had measured 1.90 ha, and the area damaged in spring 2011 had measured 1.46 ha. Following the findings of the expert, as regards compensation, the court applied the rate of 85% of the total calculated value to the area damaged in the autumn, and the rate of 25% to the area damaged in the spring, in accordance with paragraph 5 of the Ordinance. The value of the damage was calculated at PLN 84,561 and PLN 19,111 for each area respectively, which amounted to a total sum of PLN 103,672. The defendant had already paid PLN 103,154.28 to the claimant, and therefore the court ruled that the remaining amount of PLN 517.72 should be paid in compensation.

81. The court noted that the legal basis for the applicant company's claim was section 46(1)(1) of the Hunting Act. The procedure for the assessment of damage and the payment of compensation was regulated by the Ordinance of the Minister of the Environment. Paragraph 5 of the Ordinance provided that the level of compensation was to be determined by applying percentage rates depending on the period during which the damage

was sustained (see relevant domestic law below). That provision stated that, as regards compensation, a rate of 25% of the total calculated value was to be applied in respect of damage sustained in the period prior to 15 April, and a rate of 85% in respect of damage sustained in the period after 11 June.

82. Having regard to the expert report's conclusions, the court found unjustified the applicant company's assertion that turf was a perennial crop and that therefore the rates prescribed in paragraph 5 of the Ordinance should not have been applied to its case since they were solely applicable to annual crops.

The court referred to the definition of "permanent pasture" in Commission Regulation (EC) No 1120/2009[4], and noted that in order to distinguish between arable land and permanent crops or permanent pasture, a five-year criterion was to be applied. In accordance with the criterion adopted by the European Commission, turf was not a permanent crop.

83. With regard to the applicant company's constitutional arguments, the court stated as follows:

> "In the course of the proceedings, the claimant (the applicant company) consistently argued that paragraph 5 of the Ordinance ... was incompatible with the Constitution, in so far as it discriminated against persons growing highly specialised crops which could be harvested over the course of a few years, and [that it] should not apply to the case at issue.
>
> In the court's opinion, the provisions of the Ordinance ... fully apply to the determination of the amount of compensation due to the claimant (the applicant company) for damage caused by game. The cultivation of turf is a specialised cultivation carried out on arable land, [and is] so far not regulated by distinct provisions. Turf cultivated on arable land is not a perennial crop either. Therefore, there are no grounds for excluding the application of that Ordinance. In addition, the court does not share the claimant's view on the unconstitutionality of the impugned Ordinance owing to the limits set forth in respect of the amount of compensation".

B. Proceedings before the Court of Appeal

84. The applicant company lodged an appeal. It alleged, *inter alia*, that the first-instance court had

(i) erred on the facts in considering that turf was not a perennial crop, as its cultivation lasted more than twelve months;

(ii) erred in law in finding that paragraphs 4 and 5 of the Ordinance were not unconstitutional;

(iii) breached civil procedure by failing to give proper reasons for its assessment that paragraphs 4 and 5 of the Ordinance were constitutional and by failing to address the argument regarding the unconstitutionality of section 49 of the Hunting Act;

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[4] Commission Regulation (EC) No 1120/2009 of 29 October 2009 laying down detailed rules for the implementation of the single payment scheme provided for in Title III of Council Regulation (EC) No 73/2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers.

(iv) breached Article 193 of the Constitution by failing to refer to the Constitutional Court the legal questions on the constitutionality of paragraphs 4 and 5 of the Ordinance and section 49 of the Hunting Act, when substantiated doubts in this regard existed; and

(v) wrongly held that paragraphs 4 and 5 of the Ordinance were applicable to the case.

85. The applicant company requested that the first-instance judgment be amended and that it be awarded PLN 84,142.88 (approximately EUR 21,000) in respect of the remaining compensation which was due to it. The applicant company further requested that the Court of Appeal refer to the Constitutional Court the same legal questions which it had submitted to the first-instance court.

86. On 16 December 2014 the Poznań Court of Appeal dismissed most of the appeal, amending the first-instance judgment only in respect of the date relevant for the calculation of interest.

87. The Court of Appeal accepted the findings of the lower court and found that the arguments raised in the appeal were unjustified. It confirmed that turf was not a perennial crop and that, accordingly, the Ordinance was applicable to the calculation of damage.

88. With regard to the applicant's company constitutional arguments, the Court of Appeal found as follows:

> "[The Court of Appeal] does not approve of the appellant's position that the impugned provisions of the Ordinance are incompatible with the Constitution and that the challenged judgment was issued in breach of Article 193 of the Constitution owing to the fact that the Regional Court failed to refer to the Constitutional Court a legal question on the conformity of those provisions [of the Ordinance] with the Constitution.
>
> It should be emphasised that in accordance with Article 193 of the Constitution, "Any court may refer to the Constitutional Court a question of law as to whether a normative act is in conformity with the Constitution, ratified international agreements or statutes, if the answer to such a question of law will determine an issue [pending] before such a court". This was not so in the present case, since the determination of [the case] was not in any way contingent on the answer to a legal question referred to the Constitutional Court, as there are no doubts whatsoever that, in the light of the provisions in force, turf is not a perennial crop, since the length of its cultivation is shorter than five years, and so the provisions of the Ordinance apply to the determination of the amount of compensation.
>
> The Court of Appeal, while sharing this view, finds, at the same time, that there was no basis to refer to the Constitutional Court questions of law regarding the unconstitutionality of the provisions referred to by the claimant (the applicant company) in its appeal.
>
> There are no particular provisions which would regulate this matter differently, and [in the way] corresponding to the specificity of the cultivation of turf. The claimant (the applicant company), while contesting the applicable rules for calculating the amount of damage, did not indicate any reasonable arguments in favour of turf being classified as a perennial crop ... In the Court of Appeal's view, the lack of distinct provisions taking into account the specificity of this crop cannot constitute

grounds for finding paragraphs 4 and 5 of the Ordinance unconstitutional. In this situation, the court also finds the allegations of violations of Articles 7 and 92 of the Constitution misguided, as these provisions state that public authorities function on the basis of and within the limits of the law. In determining the amount of compensation due to the claimant, the Regional Court adjudicated on the basis of the applicable law, giving the correct interpretation of it, which was reflected in the reasoning of the challenged judgment. The allegation of a violation of Article 64 § 3 of the Constitution, regarding the limitation of property rights, should be considered groundless and unsubstantiated, since these issues did not constitute the subject matter of the decision in the case."

C. Proceedings before the Supreme Court

89. The applicant company lodged a cassation appeal. It argued that the Court of Appeal had erroneously applied paragraphs 4 and 5 of the Ordinance to turf, while those provisions could only be applied to a crop whose production cycle was limited to one year. The applicant company further claimed that those provisions were unconstitutional and thus should not have been applied. It reiterated its earlier objections to the constitutionality of paragraphs 4 and 5 of the Ordinance and section 49 of the Hunting Act.

90. The applicant company also alleged that the Court of Appeal had erred in relying on Commission Regulation (EC) No 1120/2009, whose subject matter had not concerned issues relating to compensation for damage caused by game.

91. On 3 December 2015 the Supreme Court declined to entertain the applicant company's cassation appeal, finding that it had not substantiated the two reasons given to justify its examination. The Supreme Court held that the applicant company had failed to establish that its case concerned a significant legal issue or that there was a need for an interpretation of provisions raising serious doubts. It found that the question of the interpretation and conformity with the Constitution of section 49 of the Hunting Act and paragraphs 4 and 5 of the Ordinance did not constitute a significant legal issue. It noted that an interpretation of the above provisions was not necessary for the examination of the case, since the dispute had in fact concerned the notion of "permanent pasture" and factual findings regarding the cultivation of turf.

D. Proceedings before the Constitutional Court

92. On 15 April 2015 the applicant company lodged a constitutional complaint. It alleged that

(i) section 49 of the Hunting Act was incompatible, *inter alia*, with Article 64 § 3 and Article 92 § 1 of the Constitution, in so far as it delegated statutory matters to the level of subordinate legislation, and in so doing

interfered with the constitutional right of property by unlawfully restricting it by means of subordinate legislation;

(ii) paragraphs 4 and 5 of the Ordinance were incompatible, *inter alia*, with Article 92 § 1 and Article 64 § 3 of the Constitution and section 49 of the Hunting Act, in so far as they exceeded statutory authorisation and restricted the constitutional right of property by limiting the right to compensation for damage; and

(iii) paragraph 5 of the Ordinance was incompatible, *inter alia*, with Article 32 §§ 1 and 2 and Article 64 § 2 of the Constitution, in so far as it put persons growing crops whose production cycle from sowing to harvest was not limited to one year in a less favourable position than persons growing annual crops, by limiting the relevant level of compensation by linking it with the period in which damage was sustained, without specifying the basis for such a limitation.

93. The applicant company argued that the ordinary courts' judgments given in its case had violated, *inter alia*, its constitutional property rights, and in particular the rule specified in Article 64 § 3 that any limitation on those rights had to be regulated in a statute.

94. The applicant company submitted that paragraphs 4 and 5 of the Ordinance, which had constituted the basis of the final decision in its case, predetermined that compensation would be reduced in accordance with the percentage rates laid down in paragraph 5 of the Ordinance. It argued, *inter alia*, that the limitation on its right to compensation for damage caused by game, which ranked as subordinate legislation, was incompatible with Article 64 § 3 of the Constitution. It also invoked Article 1 of the Protocol No. 1 to the Convention.

95. The applicant company submitted that the impugned provisions of the Ordinance should not have constituted the basis of a decision in the case, owing to their unconstitutionality. However, the ordinary courts had not accepted that argument without questions being referred to the Constitutional Court for a preliminary ruling. Thus, for the applicant company, lodging a constitutional complaint against those provisions had been its last opportunity to defend its rights.

96. Following a preliminary examination, the Constitutional Court found that the constitutional complaint met the relevant statutory requirements. It subsequently sent the case for examination on the merits. A panel of five judges was constituted to examine the constitutional complaint (no. SK 8/16). It was composed of Judges L.K. (the president of the panel), M.M. (the rapporteur), J.P., M.P.-S. and P.T.

97. The Constitutional Court gave notice of the constitutional complaint to the Prosecutor General, the *Sejm*, the Council of Ministers and the Minister of the Environment. It received observations from the first two authorities.

98. On 5 July 2017 the Constitutional Court, by a majority of three to two, decided to discontinue the proceedings and not issue a judgment, on the grounds that there had been a failure to satisfy one of the relevant statutory conditions of admissibility. The decision was given after a hearing held in camera. The Constitutional Court noted that a panel examining the merits of a constitutional complaint was not bound by an earlier decision admitting it for examination, relying on its case-law to this effect (for example, the decision of 27 January 2004, no. SK 50/03, and the decision of 21 March 2007, no. SK 40/05).

99. With regard to section 49 of the Hunting Act, the Constitutional Court found that this provision had not constituted the basis for the final decision in the complainant's case. Section 49 was addressed to the Minister of the Environment, and authorised him to issue an ordinance. In contrast to the impugned provisions of the Ordinance, this provision did not have a direct effect on the complainant's rights and freedoms. Accordingly, the court discontinued the proceedings in relation to that part of the complaint.

100. With regard to paragraphs 4 and 5 of the Ordinance, the Constitutional Court noted that these provisions had constituted the basis for the final decision in the complainant's case. However, it observed that the complainant was required to provide arguments substantiating its allegation that the impugned provisions were unconstitutional. It found that the applicant company's constitutional complaint had been related to the application of the impugned provisions, and not their content. In the court proceedings, the complainant had argued that its crop had been perennial and the courts had erroneously applied the impugned provisions to its situation. In conclusion, the Constitutional Court decided not to issue a judgment on the constitutionality of paragraphs 4 and 5 of the Ordinance, on the grounds that there had been a failure to satisfy one of the relevant statutory conditions, since the complainant had challenged how those provisions had been applied and had failed to demonstrate how their content had infringed its constitutional rights and freedoms. For these reasons, the Constitutional Court also discontinued the proceedings in relation to that part of the complaint.

101. Judge M.P.-S., in her dissenting opinion, disagreed with the discontinuation of the proceedings, and found that the constitutional complaint should have been examined on the merits in relation to the part concerning the compliance of the impugned provisions of the Ordinance with Article 92 § 1 and Article 64 of the Constitution. She noted that the complainant had sufficiently demonstrated that the provisions of the Ordinance had been enacted in breach of the statutory authorisation contained in section 49 of the Hunting Act, and violated the constitutional guarantees of property rights.

102. In her view, paragraphs 4 and 5 of the Ordinance clearly exceeded the scope of the statutory authorisation laid down in section 49 of the

Hunting Act. This statutory provision authorised the Minister of the Environment to determine the procedure for assessing damage caused by game. The impugned paragraph 5 of the Ordinance introduced far-reaching percentage limitations in relation to the level of compensation determined on the basis of paragraph 4 of the Ordinance. However, the minister was not authorised to decrease the level of compensation. Moreover, in the light of Article 64 § 3 of the Constitution, the legislature could not allow a piece of subordinate legislation to limit compensation for a breach of property rights. This had been noted by the Prosecutor General, who had emphasised in his submissions that under Polish law, section 46 of the Hunting Act contained the sole, permissible limitation on the scope of compensation for damage caused by game (in comparison with the general principles of civil law).

103. Judge P.T., in his dissenting opinion, disagreed with the finding that section 49 of the Hunting Act had not constituted the basis for the decision in the complainant's case and had not infringed the complainant's rights within the meaning of Article 79 of the Constitution.

104. In his view, individual rights and freedom could be infringed by statutory provisions authorising the enactment of an ordinance determining the legal situation of an individual. If Article 64 § 3 of the Constitution prescribed that property rights could be restricted only by a statute, then a statutory provision allowing for such restrictions by an ordinance would violate that guarantee. He disagreed with the majority's approach, which implied that in constitutional complaint proceedings it was not possible to raise an allegation that rights and freedoms could be restricted by only a statute. This requirement constituted a key guarantee for permissible limitations of constitutional rights. Excluding that possibility would undermine the logic of a constitutional complaint.

105. For similar reasons, Judge P.T. did not share the view that section 49 of the Hunting Act had not constituted the basis of the court decision within the meaning of Article 79 of the Constitution. He noted that the Constitutional Court had repeatedly emphasised the necessity of interpreting the term "normative act on the basis of which a court ... has issued a final decision on [a person's] freedoms or rights" in an autonomous manner. This term comprised all provisions which influenced the normative basis for a court decision, and consequently influenced the position of a claimant.

106. Judge P.T.'s dissenting opinion further addressed the composition of the panel of the Constitutional Court which had examined the case. He noted that the panel had been composed in violation of the Constitution, in particular Article 194 § 1. M.M., who had been assigned to the panel, had been elected by the *Sejm* to a post that had already been filled, and the eighth-term *Sejm* had had no power to proceed with his election. The seventh-term *Sejm* had elected R.H., A.J. and K.Ś. as judges of the Constitutional Court. Doubts with regard to the statutory basis for their

election had been dispelled in the Constitutional Court's judgment of 3 December 2015 (case no. K 34/15). That ruling had subsequently been confirmed by the Constitutional Court's decision of 7 January 2016 (case no. U 8/15). The statutory basis for the election of those three judges had been in compliance with the Constitution, since the Constitutional Court's competence to review the constitutionality of the law was provided for in Article 188 §§ 1 and 3 of the Constitution. In consequence, an independent assessment by the *Sejm* with regard to the unconstitutionality of the legal basis for the election of judges to the Constitutional Court could not constitute the basis for adopting a legally binding resolution declaring that the election of a judge to the Constitutional Court had not been affected.

107. The Constitutional Court's decision was served on the applicant company on 10 July 2017.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Domestic law

1. The Constitution of the Republic of Poland

108. The relevant provisions of the Constitution read as follows:

Article 7

"The organs of public authority shall function on the basis of, and within the limits of, the law."

Article 8

"1. The Constitution shall be the supreme law of the Republic of Poland.

2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise."

Article 10

"1. The system of government of the Republic of Poland shall be based on the separation of and balance between legislative, executive and judicial powers.

2. Legislative power shall be vested in the *Sejm* and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and judicial power shall be vested in courts and tribunals."

Article 45 § 1

"Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court."

Article 64

"1. Everyone shall have the right of ownership, other property rights and the right of succession.

2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.

3. The right of ownership may be limited only by means of a statute, and only to the extent that this does not violate the essence of such a right."

Means for the defence of freedoms and rights
Article 79 § 1

"In accordance with the principles specified by statute, anyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or other normative act on the basis of which a court or an administrative authority has issued a final decision on his freedoms or rights or on his obligations specified in the Constitution."

Article 92 § 1

"1. Regulations shall be issued on the basis of specific authorisation contained in, and for the purpose of implementing, statutes by the organs specified in the Constitution. The authorisation shall specify which organ is the appropriate one to issue a regulation and the scope of matters to be regulated, as well as guidelines concerning the provisions of such an act."

Chapter VIII. Courts and tribunals
Article 173

"The courts and tribunals shall constitute a separate power and shall be independent of other branches of power."

Article 175 § 1

"The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the ordinary courts, administrative courts and military courts."

Article 188

"The Constitutional Court shall adjudicate on the following matters:

(1) the conformity of statutes and international agreements with the Constitution;

(2) the conformity of a statute with ratified international agreements whose ratification required prior consent granted by statute;

(3) the conformity of legal provisions issued by central State organs with the Constitution, ratified international agreements and statutes;

(4) the conformity of the purposes or activities of political parties with the Constitution;

(5) a constitutional complaint, as specified in Article 79 § 1."

Article 189

"The Constitutional Court shall settle disputes over competence between central constitutional organs of the State."

Article 190

"1. Judgments of the Constitutional Court shall be universally binding and final.

2. Judgments of the Constitutional Court regarding matters specified in Article 188 shall immediately be published in the official publication in which the original normative act was promulgated. ...

3. A judgment of the Constitutional Court shall take effect from the day of its publication; however, the Constitutional Court may specify another date for when the binding force of a normative act will end. Such a time-limit may not exceed eighteen months in relation to a statute, or twelve months in relation to any other normative act. ...

4. A judgment of the Constitutional Court on a normative act's non-conformity with the Constitution, an international agreement or a statute, [a normative act] on the basis of which a final and enforceable judicial decision or a final administrative decision ... [has been] given, shall be a basis for reopening the proceedings or for quashing the decision ... in a manner specified in provisions applicable to the given proceedings and on the basis of principles [specified in such provisions].

5. ..."

Article 193

"Any court may refer to the Constitutional Court a question of law as to whether a normative act is in conformity with the Constitution, ratified international agreements or statutes, if the answer to such a question of law will determine an issue [pending] before such a court."

Article 194

"1. The Constitutional Court shall be composed of fifteen judges chosen individually by the *Sejm* for a term of office of nine years from amongst persons distinguished by their knowledge of the law. ..."

Article 195 § 1

"1. Judges of the Constitutional Court, in the exercise of their office, shall be independent and subject only to the Constitution."

2. The Act on the Constitutional Court of 25 June 2015

109. The relevant provisions of the Act on the Constitutional Court of 25 June 2015 provide as follows:

Section 18

"A person eligible for election as a Constitutional Court judge shall be distinguished by his legal knowledge and:

(1) possess the qualifications required for the office of a Supreme Court judge;

(2) have reached the age of 40 and be under 67 years of age by the date of his election."

Section 19(1) and (2)

"1. The right to nominate a candidate for judge of the Constitutional Court is vested in the Presidium of the *Sejm* and a group of at least fifty deputies.

2. Nominations for a candidate for judge of the Constitutional Court shall be submitted to the Speaker of the *Sejm* no later than three months before the expiry of the term of office of the [relevant] judge of the Constitutional Court."

Section 21(1)

"1. A person elected to the office of judge of the Constitutional Court shall take the following oath before the President of the Republic of Poland:

'I do solemnly swear that in discharging the duties which have been entrusted to me as a judge of the Constitutional Court, I shall faithfully serve the Polish Nation, safeguard the Constitution and perform all such duties impartially, in accordance with my conscience and with the utmost diligence, while safeguarding the dignity of the office held.' The oath may be taken with the additional sentence 'So help me, God.'"

Section 137

"In the case of judges of the Constitutional Court whose term of office expires in 2015, the time-limit for submitting a nomination referred to in section 19(2) shall be thirty days from the Act's entry into force."

3. The Act of 19 November 2015 Amending the Act on the Constitutional Court ("the Amending Act of 19 November 2015")

110. The Amending Act of 19 November 2015 modified section 21(1) of the Act on the Constitutional Court and added a new subsection 1a. Section 21(1) and (1a), as amended, read as follows:

"1. A person elected to the office of judge of the Constitutional Court shall take the following oath before the President of the Republic of Poland within thirty days of the date of his election:

[the text of the oath remained identical]

1a. The taking of the oath shall commence the term of office of a judge of the Constitutional Court."

111. The Amending Act of 19 November 2015 repealed section 137 and added a new section 137a, which reads as follows:

"In the case of judges of the Constitutional Court whose term of office expires in 2015, the time-limit for submitting a nomination referred to in section 19(2) shall be seven days from this provision's entry into force."

4. The Code of Civil Procedure

112. Article 401^1 of the Code of Civil Procedure provides, in so far as relevant:

"1. A case may also be reopened when the Constitutional Court has declared a normative act ... on which a judgment was based unconstitutional."

5. *The Hunting Act of 13 October 1995*

113. The relevant provisions of the Hunting Act provide as follows:

Section 46

"1. The lessee or manager of hunting grounds shall provide compensation for damage caused

1. by boar, elk, deer, fallow deer and roe deer to harvested crops and crops being cultivated; [or]

2. during a hunt."

Section 49

" The Minister of the Environment, in agreement with the Minister of Agriculture, shall issue an ordinance prescribing the procedures for damage assessment and the payment of compensation for damage caused to crops under cultivation and harvested crops, taking into account the moment when notice of the damage was given, the obligation to have an initial and final damage assessment, and the size of the damaged crop."

Section 50(1)

"The State Treasury shall be responsible for damage referred to in section 46(1) which is caused by game under permanent protection."

6. *Ordinance of the Minister of the Environment of 8 March 2010 concerning the procedures for damage assessment and the payment of compensation in respect of damage to crops*

114. The Ordinance was issued on the basis of section 49 of the Hunting Act. It contained, *inter alia* in paragraph 4 detailed rules and procedures for the assessment of damage caused by game and for calculation of compensation.

115. Paragraph 5 of the Ordinance read as follows:

"In the final assessment of damage, with regard to crops requiring ploughing, the amount of compensation shall be fixed, if the damage occurred in the period

(1) prior to 15 April – at 25%,

(2) between 16 April and 20 May – at 40%,

(3) between 21 May and 10 June – at 60%,

(4) after 11 June – at 85%

of the amount calculated in the manner specified in paragraph 4 (7) of the Ordinance."

B. Domestic practice

Case-law regarding compensation for damage caused by game

116. In its resolution of 19 May 2015 (no. III CZP 114/14), the Supreme Court noted that the liability of hunting grounds or the State Treasury, regulated by sections 46-50 of the Hunting Act, was a form of strict (objective) liability which could be excluded only by one of the exonerating circumstances set out in section 48 of the Act. These provisions of the Hunting Act, which constituted *lex specialis* to the Civil Code, while modifying the rules of civil liability, did not amend its essence. The Supreme Court noted that the civil law rule of full compensation was not absolute, but the exemptions to it had to be set out in a statute. It stated that section 46(1)(1) of the Hunting Act was an example of such an exception. At the same time, the Supreme Court clearly stated that the scope of damage could not be defined by reference to subordinate legislation, such as the Ordinance of the Minister of the Environment.

117. In its judgment of 6 March 2014 (no.I Aca 886/13), the Szczecin Court of Appeal noted that, with regard to the amended section 49 of the Hunting Act, the Minister of the Environment was no longer able to prescribe rules for damage assessment, including with regard to the limitations of liability in comparison with the rules of the Civil Code.

II. INTERNATIONAL MATERIAL

A. The United Nations

1. The Human Rights Committee

118. In its concluding observations on the seventh periodic report of Poland adopted on 31 October 2016, the Human Rights Committee stated as follows:

> "Constitutional and legal framework within which the Covenant is implemented.
>
> 7. The Committee is concerned about the negative impact of legislative reforms, including the amendments of November and December 2015 and July 2016 to the law on the Constitutional Tribunal, and the fact that some judgments of the Constitutional Tribunal have been disregarded, on the functioning and independence of the Tribunal and on the implementation of the Covenant. The Committee is also concerned about the Prime Minister's refusal to publish the Tribunal's judgments of March and August 2016 in the Journal of Laws, about the efforts of the Government to change the composition of the Tribunal in ways that the Tribunal regards as unconstitutional, ...
>
> 8. The State party should ensure respect for and protection of the integrity and independence of the Constitutional Tribunal and its judges, and ensure the implementation of all its judgments. The Committee urges the State party to officially publish all the judgments of the Tribunal immediately, to refrain from introducing measures that obstruct its effective functioning, and to ensure a transparent and

impartial process for the appointment of its members and security of tenure that meets all the requirements of legality under domestic and international law."

2. The Special Rapporteur on the Independence of Judges and Lawyers

119. The UN Special Rapporteur on the Independence of Judges and Lawyers, Mr Diego García-Sayán visited Poland from 23 to 27 October 2017 to assess the measures adopted by Poland to protect and promote the independence of the judiciary. In the report of 5 April 2018 (A/HRC/38/38/Add.1) on his mission to Poland, the Special Rapporteur expressed his deep concern about the ongoing constitutional crisis, which had been developing at a fast pace since soon after the political elections of October 2015. He noted that the crisis had resulted from a conflict of views between the new parliamentary majority and the outgoing governing political party over their right to appoint new constitutional judges. With regard to the appointment of judges of the Constitutional Court, the Special Rapporteur stated as follows:

"29. The Special Rapporteur regrets that the judgments issued by the Constitutional Tribunal on 3 and 9 December 2015 have not been implemented. This constitutes a flagrant breach of the principles of judicial independence and the separation of powers, as well as a violation of the Polish Constitution. The duty to respect and abide by the judgments and decisions of the judiciary constitutes a necessary corollary of the principle of institutional independence of the judiciary ... The jurisprudence of the European Court of Human Rights confirms that the principle of the independence of the judiciary requires national authorities that are not part of the judiciary to respect and abide by the decisions of national courts."

120. The Special Rapporteur was also concerned that selected judgments of the Constitutional Court had not yet been published in the Official Journal.

121. In his recommendations concerning the Constitutional Court, the Special Rapporteur stated as follows:

"80. The Special Rapporteur urges all political forces to work together to restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution. Loyal cooperation among the various State institutions is a necessary precondition for achieving a durable solution to the constitutional crisis. Any political solution should build upon previous rulings of the Constitutional Tribunal, in particular those of 3 and 9 December 2015.

81. The Special Rapporteur urges the Polish authorities to refrain from any interference with the work of the Constitutional Tribunal. Decisions of the Tribunal are binding under Polish constitutional law, and the national authorities must respect and abide by them. Under no circumstances can the publication of judgments of the Tribunal be dependent on a decision of the executive or legislative branch. In this regard, the Special Rapporteur calls on the national authorities to publish with no additional delay, and implement fully, the judgments issued by the Tribunal on 9 March 2016, 11 August 2016 and 7 November 2016."

B. The Council of Europe

1. The Committee of Ministers

122. The Recommendation adopted by the Committee of Ministers on 17 November 2010 (CM/Rec(2010)12) entitled "Judges: independence, efficiency and responsibilities" provides, in so far as relevant:

> "**Chapter I – General aspects**
>
> **Scope of the recommendation**
>
> 1. This recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional matters.
>
> ...
>
> **Judicial independence and the level at which it should be safeguarded**
>
> 3. The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence.
>
> 4. The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law.
>
> ...
>
> **Chapter VI - Status of the judge**
>
> **Selection and career**
>
> 44. Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.
>
> ...
>
> 46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.
>
> 47. However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice."

2. The Venice Commission

123. The relevant extracts from the Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the

Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016, CDL-AD(2016)001), read as follows:

"**E. Composition of the Court**

104. On 3 December 2015, the Constitutional Tribunal ruled that Article 137 of the Act is consistent with Article 194(1) of the Constitution in respect to the three judges of the Constitutional Tribunal whose term of office expired on 6 November 2015, but is unconstitutional in respect to the two judges of the Constitutional Tribunal whose term of office expired on 2 and on 8 December 2015.

105. On 9 December 2015, the Constitutional Tribunal ruled that Article 137a of the Act is inconsistent with Article 194(1) in conjunction with Article 7 of the Constitution in respect to the three vacancies of 6 November 2015.

106. Following the inadmissibility decision in case no. U 8/15 of 7 January 2016 (announced on 11 January 2016), dismissing the complaint against the *Sejm's* resolutions of 2 December 2015 because they are not normative acts subject to the jurisdiction of the Tribunal, the President of the Tribunal admitted to the bench the two judges elected on 2 December 2015 in respect of the vacancies opened on 2 and on 8 December 2015 but not the three judges elected in respect of the vacancies opened on 6 November 2015.

107. As a consequence, the Tribunal now has 12 sitting judges and two sets of three judges each, the so-called 'October judges' elected by the 7th *Sejm* and the 'December judges', elected by the 8th *Sejm*. However, their respective mandates have a very different legal basis. The December elections were held notwithstanding the Constitutional Tribunal's injunction to the *Sejm* not to elect new judges. The *Sejm* elected five persons a day before the hearing of the Tribunal on the validity of the June Act and its Article 137. While the President by then had not taken the oath of the October judges for nearly two months, referring to doubts as to the validity of their election, it seems that the President had no doubts as to the validity of the election of the December judges, even though Article 137a, providing for the election of successors to all judges whose mandate ended in 2015, was being challenged in a case pending before the Tribunal. Without waiting for the judgment of the Tribunal, the President immediately accepted their oaths.

108 Government experts argue that this oath is decisive for the final validity of the appointment. However, in contrast to the oath by Members of Parliament (in the presence of the *Sejm*, Article 104(2) of the Constitution) and members of the Government (in the presence of the President of the Republic, Article 151 Constitution), the oath of judges of the Constitutional Tribunal is regulated only in the law on the Tribunal, but not in the Constitution itself. Against this legal background, taking the oath cannot be seen as required for validating the election of constitutional judges. The acceptance of the oath by the President is certainly important – also as a visible sign of loyalty to the Constitution – but it has a primarily ceremonial function.

109. It must be recalled that the judgment of 9 December 2015 held that the beginning of the judges of the Tribunal's term of office is their election by the *Sejm* (possibly a later date if the election process takes place before the vacancy occurs), not the solemn moment of the oath-taking. This judgment must be respected. Under the Polish Constitution, the Constitutional Tribunal and not the President is the final arbiter in cases involving the interpretation of the Constitution. The President of the Republic and the other State authorities have a responsibility to ensure the implementation of the Tribunal's judgments.

...

124. Decisions of a constitutional court which are binding under national constitutional law must be respected by other political organs; this is a European and international standard that is fundamental to the separation of powers, judicial independence, and the proper functioning of the rule of law. This is particularly valid in the case of the decision of the Tribunal on the nomination of new judges in October/December 2015. The Constitutional Tribunal decided that the election of those judges, whose vacancy opened up in December 2015, i.e. after the new *Sejm* has resumed work, was not a competence of the old *Sejm*. This verdict has to be respected by the old government, now the opposition. The election of these judges by the 8th *Sejm* had a constitutional basis. On the other hand, the election of the judges who occupy a position that opened up during the mandate of the 7th *Sejm* has a constitutional basis as well and the new *Sejm* has to respect that election.

...

126. As shown by the judgments of the Constitutional Tribunal of Poland, both the previous and the present majorities of the *Sejm* have taken unconstitutional actions, which seem to be based on the view that a (simple) parliamentary majority may change the legal situation in its favour, going right to the constitutional limits – and beyond. This practice runs against the model of a democratic system based on the rule of law, governed by the principle of separation of powers.

...

136. A solution to the current conflict over the composition of the Constitutional Tribunal, which originated from the actions of the previous *Sejm*, must be found. The Venice Commission calls both on majority and opposition to do their utmost to find a solution in this situation. In a State based on the rule of law, any such solution must be based on the obligation to respect and fully implement the judgments of the Constitutional Tribunal. The Venice Commission therefore calls on all State organs and notably the *Sejm* to fully respect and implement the judgments of the Tribunal."

124. The relevant extracts from the Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016, CDL-AD(2016)026), read as follows:

"L. Composition of the Tribunal

103. Since January 2016, the Constitutional Tribunal has had twelve sitting judges. The President of Poland refused to accept the oath of the 'October judges', but he accepted the oath of the three 'December judges', who according to the case law of the Tribunal were elected in violation of the Constitution. Article 90 would oblige the President of the Tribunal to assign cases to the three December judges.

104. The Opinion recommended solving the issue of the appointment of the judges by fully respecting the judgments of the Tribunal. A full respect of the Tribunal's judgments, notably that of 3 December 2015, would result in the integration of the October judges into the Tribunal. This has not happened.

...

106. The problem of the appointment of judges has not been solved as recommended. Article 90 is not a solution in line with the principle of the rule of law. (footnote omitted).

107. In its judgment of 11 August 2016, the Constitutional Tribunal held that Article 90 is inconsistent with Article 194.1 of the Constitution (appointment of the judges of the Constitutional Tribunal). Referring to its judgments in the cases K 34/15, K 35/15 and K 47/15, as well as its decision in the case ref. no. U 8/15, the Tribunal reiterated that the legal basis for the election of the three October judges had been valid and that therefore there were no vacancies to be filled when the *Sejm* proceeded to the election of the December judges. Therefore, the implementation of Article 90 requesting the Tribunal's President to assign cases to the December judges would be contrary to the Tribunal's judgments, which are universally binding and thus bind all state authorities, including the Tribunal and its President.

108. The annulment by the Tribunal of the provisions purporting to create an obligation to assign cases to the December judges is consistent with the recommendations of the Venice Commission because through that provision the legislative power improperly made itself the final arbiter in constitutional issues.

...

125. Article 90, obliging the President of the Tribunal to attribute cases to the 'December judges' immediately after the entry into force of the Act, does not respect the judgments of the Tribunal and cannot solve the issue of appointment of judges in accordance with the rule of law. In addition, Judgment 47/15 of 9 March 2016 has not been published in the official journal, contrary to the strong recommendation in the Opinion.

126. Without any constitutional basis, the Chancellery of the Prime Minister has purported to arrogate the power to control the validity of the judgments of the Constitutional Tribunal, by refusing to publish its judgments. ...

127. By adopting the Act of 22 July (and the Amendments of 22 December), the Polish Parliament assumed powers of constitutional revision which it does not have when it acts as the ordinary legislature, without the requisite majority for constitutional amendments.

128. Individually and cumulatively, these shortcomings show that instead of unblocking the precarious situation of the Constitutional Tribunal, the Parliament and Government continue to challenge the Tribunal's position as the final arbiter of constitutional issues and attribute this authority to themselves. They have created new obstacles to the effective functioning of the Tribunal instead of seeking a solution on the basis of the Constitution and the Tribunal's judgments, and have acted to further undermine its independence. By prolonging the constitutional crisis, they have obstructed the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights.

129. On 11 August 2016, during the *vacatio legis*, the Constitutional Tribunal examined the adopted Act and found several of the abovementioned provisions unconstitutional. However, the Chancellery of the Prime Minister published 21 other judgments adopted since 9 March, but not the judgments of 9 March and 11 August 2016, which the Government continues to view as legally ineffective. ...

130. Since the judgment of 11 August has not been published and is not recognised as legally effective by the Government and Parliament, this judgment of itself also cannot solve the constitutional crisis and or restore the rule of law in Poland, since the other organs of the Government continue to reject it."

125. The relevant extracts from the Rule of Law Checklist (CDL-AD(2016)007), adopted by the Venice Commission at its 106th Plenary Session (11-12 March 2016)[5], read as follows:

> "44. State action must be in accordance with and authorised by law. ... [footnote omitted].
>
> 45. A basic requirement of the Rule of Law is that the powers of the public authorities are defined by law. In so far as legality addresses the actions of public officials, it also requires that they have authorisation to act and that they subsequently act within the limits of the powers that have been conferred upon them, and consequently respect both procedural and substantive law [footnote omitted].
>
> ...
>
> 74. The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.
>
> ...
>
> 107. Judicial decisions are essential to the implementation of the Constitution and of legislation. The right to a fair trial and the Rule of Law in general would be devoid of any substance if judicial decisions were not executed.
>
> ...
>
> 110. The right to a fair trial imposes the implementation of all courts' decisions, including those of the constitutional jurisdiction. The mere cancellation of legislation violating the Constitution is not sufficient to eliminate every effect of a violation, and would at any rate be impossible in cases of unconstitutional legislative omission.
>
> 111. This is why this document underlines the importance of Parliament adopting legislation in line with the decision of the Constitutional Court or equivalent body [footnote omitted] ..."

3. The Council of Europe Commissioner for Human Rights

126. The Council of Europe Commissioner for Human Rights, Mr Nils Muižnieks carried out a visit to Poland from 9 to 12 February 2016. The report from his visit, published on 15 June 2016, read as follows, in so far as relevant:

> "43. The Commissioner is seriously concerned at the current paralysis of the Constitutional Tribunal which bears heavy consequences for the human rights of all Polish citizens. He calls on the Polish authorities to urgently find a way out of the current deadlock following the Opinion of the Venice Commission. As already stated by the latter institution, the rule of law requires that any such solution be based on respect and full implementation of the judgments of the Tribunal. As the

[5] Endorsed by the Ministers' Deputies at the 1263th Meeting (6-7 September 2016), by the Congress of Local and Regional Authorities of the Council of Europe at its 31st Session (19-21 October 2016) and by the Parliamentary Assembly of the Council of Europe at its 4th part Session (11 October 2017).

> Commissioner stated at the end of his visit, there can be no real human rights protection without mechanisms guaranteeing the rule of law, in particular by ensuring checks and balances among the different state powers. The Commissioner is particularly concerned that proceedings regarding the compliance of statutes and decisions with human rights obligations and standards in Poland might be left in limbo for an undetermined period."

127. The Commissioner for Human Rights, Ms Dunja Mijatović carried out a subsequent visit to Poland from 11 to 15 March 2019. In her report following the visit, published on 28 June 2019, she stated as follows:

> "10. The Constitutional Tribunal has a fundamental role as the main control mechanism allowing for a review of the compliance of legislation with the Polish Constitution and Poland's international human rights obligations. The Commissioner deeply regrets that despite the recommendations by her predecessor, the Venice Commission, and other international and domestic actors mandated to foster the observance of international standards in the area of judicial independence, the Polish authorities have not yet found a solution to the prolonged deadlock affecting the functioning of this essential institution. In the Commissioner's view, the independence and credibility of the Constitutional Tribunal have been seriously compromised. In particular, the Commissioner regrets the persisting controversy surrounding the election and the status of the Tribunal's new President and several of its new judges. She urges the Polish authorities to take urgent steps to resolve the deadlock regarding the composition and functioning of the Constitutional Tribunal, in line with the recommendations of the Venice Commission's opinions adopted in March and October 2016. This should include recognition of the legitimacy of the election of the three judges in October 2015 by the previous *Sejm* and their swearing into office, and re-establishing dialogue and cooperation between the Constitutional Tribunal and other constitutional bodies, including the Supreme Court and the Ombudsman."

4. The Parliamentary Assembly of the Council of Europe

128. The Parliamentary Assembly, in its resolution of 11 October 2017 on new threats to the rule of law in Council of Europe member States (Resolution 2188 (2017)), expressed concerns about developments in Poland which put respect for the rule of law at risk, and in particular the independence of the judiciary and the principle of the separation of powers. It called on the Polish authorities to, *inter alia*, fully cooperate with the Venice Commission and implement its recommendations, especially those with respect to the composition and functioning of the Constitutional Court.

129. On 28 January 2020 the Parliamentary Assembly decided to open its monitoring procedure in respect of Poland. Poland is the only Member State of the Council of Europe, among those belonging to the European Union, currently undergoing that procedure. In its resolution of the same date entitled "The functioning of democratic institutions in Poland", the Assembly stated:

> "6. The constitutional crisis that ensued over the composition of the Constitutional Court remains of concern and should be resolved. No democratic government that respects the rule of law can selectively ignore court decisions it does not like, especially those of the Constitutional Court. The full and unconditional implementation of all Constitutional Court decisions by the authorities, including with

regard to the composition of the Constitutional Court itself, should be the cornerstone of the resolution of the crisis. The restoration of the legality of the composition of the Constitutional Court, in line with European standards, is essential and should be a priority. The Assembly is especially concerned about the potential impact of the Constitutional Court's apparently illegal composition on Poland's obligations under the European Convention on Human Rights."

130. On 26 January 2021 the Parliamentary Assembly adopted a resolution entitled "Judges in Poland and in the Republic of Moldova must remain independent" (2359 (2021)). The Assembly, referring to the concerns expressed in Resolution 2316 (2020), noted "the 'constitutional crisis' has not been resolved and the Constitutional Tribunal seems to be firmly under the control of the ruling authorities, preventing it from being an impartial and independent arbiter of constitutionality and the rule of law". The Assembly further called on the Polish authorities to, *inter alia*, "review the changes made to the functioning of the Constitutional Tribunal and the ordinary justice system in the light of Council of Europe standards relating to the rule of law, democracy and human rights".

5. Consultative Council of European Judges

131. In its opinion on the "Position of the judiciary and its relation with the other powers of state in a modern democracy" dated 16 October 2015 (Opinion no. 18/2015), the Consultative Council of European Judges (CCJE) made the following findings, as relevant (footnotes omitted):

"IV. The legitimacy of judicial power and its elements

...

B. Different elements of legitimacy of judicial power

...

(2) Constitutional or formal legitimacy of individual judges

14. In order to perform the judicial functions legitimised by the constitution, each judge needs to be appointed and thus become part of the judiciary. Each individual judge who is appointed in accordance with the constitution and other applicable rules thereby obtains his or her constitutional authority and legitimacy. It is implicit in this appointment in accordance with constitutional and legal rules that individual judges are thereby given the authority and appropriate powers to apply the law as created by the legislature or as formulated by other judges. The legitimacy conferred on an individual judge by his appointment in accordance with the constitution and other legal rules of a particular state constitutes an individual judge's 'constitutional or formal legitimacy'."

132. On 7 February 2018 the CCJE published a report on "Judicial independence and impartiality in the Council of Europe member States in 2017". The relevant parts of this report read as follows (footnotes omitted):

"II. Overview of relevant European standards

A. Functional independence: appointment and security of tenure of judges

15. The ECtHR and the CCJE have recognised the importance of institutions and procedures guaranteeing the independent appointment of judges. The CCJE has recommended that every decision relating to a judge's appointment, career and disciplinary action should be regulated by law, based on objective criteria and be either taken by an independent authority or subject to guarantees, for example judicial review, to ensure that it is not taken other than on the basis of such criteria. Political considerations should be inadmissible irrespective of whether they are made within Councils for the Judiciary, the executive, or the legislature.

16. There are different appointment procedures of judges in the member States. These include, for example: appointment by a Council for the Judiciary or another independent body, election by parliament and appointment by the executive. Formal rules and Councils for the Judiciary have been introduced in the member States to safeguard the independence of judges and prosecutors. However, as welcome as such developments may be, formal rules alone do not guarantee that appointment decisions are taken impartially, according to objective criteria, and free from political influence. The influence of the executive and legislative powers on the appointment decisions should be limited in order to prevent appointments for political reasons ..."

133. The Bureau of the CCJE and the Bureau of the Consultative Council of European Prosecutors prepared jointly, for the attention of the Secretary General of the Council of Europe, a report entitled "Challenges for judicial independence and impartiality in the member States of the Council of Europe", dated 24 March 2016. Among the given examples of such challenges in respect of Poland, the report refers to the appointment of constitutional judges and the conflict with the Constitutional Court, and describes events relating to the impugned appointments in October-December 2015.

C. The European Union

1. The European Commission

(a) Initiation of the rule of law framework

134. The rule of law framework provides guidance for a dialogue between the Commission and the member State concerned to prevent the escalation of systemic threats to the rule of law.

135. On 23 December 2015 the Commission wrote to the Polish Government, asking about the constitutional situation in Poland, including the steps envisaged with respect to the judgments of the Constitutional Court of 3 and 9 December 2015. On 11 January the Commission received a response from the Polish Government which did not eradicate existing concerns.

136. On 13 January 2016 the Commission decided to examine the situation in Poland under the rule of law framework. The exchanges between the Commission and the Polish Government were not able to resolve the concerns of the Commission.

(b) The Rule of Law Recommendation (EU) 2016/1374 (first recommendation)

137. On 27 July 2016 the Commission adopted a recommendation regarding the rule of law in Poland. In its recommendation, the Commission found that there was a systemic threat to the rule of law in Poland, and recommended that the Polish authorities take appropriate action to address this threat as a matter of urgency. In particular, the Commission recommended, *inter alia*, that the Polish authorities: (a) implement fully the judgments of the Constitutional Court of 3 and 9 December 2015 which required that the three judges who had been lawfully nominated in October 2015 by the previous legislature be permitted to take up their judicial duties as judges of the Constitutional Court, and that the three judges nominated by the new legislature in the absence of a valid legal basis be not permitted to take up their judicial duties without being validly elected; and (b) publish and implement fully the judgments of the Constitutional Court of 9 March 2016, and ensure that the publication of future judgments was automatic and did not depend on any decision of the executive or legislative powers.

138. The Polish Government, in its reply of 27 October 2016, disagreed on all points relating to the position expressed in the recommendation, and did not announce any new measures to alleviate the rule of law concerns raised by the Commission. The Polish Government considered that the judgments of 3 and 9 December 2015 of the Constitutional Court had not specified which judges were to take up their duties, and considered that the new legislature of the *Sejm* had lawfully nominated the five judges in December 2015. In the Commission's view, that reasoning raised serious concerns regarding the rule of law, as it denied the effect of the two December judgments and contradicted the reasoning which the Constitutional Court had consistently reiterated, including in its judgment of 11 August 2016.

139. The Commission noted that the reply from the Government conceded that in the operative part of the judgment of 3 December 2015, the Constitutional Court had addressed the duty of the President of the Republic to immediately receive the oath from a judge elected to the Constitutional Court by the *Sejm*. However, the Government took the view that that judgment could not bind other authorities and make them apply provisions in the manner specified in a given case. In the Commission's view, that interpretation limited the impact of the judgments of 3 and 9 December 2015 to a mere obligation that the Government publish the judgments, but denied them any further legal and operational effect, in particular as regards the obligation that the President of the Republic receive the oath from the judges in question.

(c) The Rule of Law Recommendation (EU) 2016/146 (second recommendation)

140. On 21 December 2016 the Commission adopted a second recommendation regarding the rule of law in Poland. The Commission

found that whereas some of the issues raised in its first recommendation had been addressed, important issues remained unresolved, and new concerns had arisen in the meantime. The Commission concluded that there continued to be a systemic threat to the rule of law in Poland, and invited the Polish Government to solve the problems identified as a matter of urgency, within two months.

(d) Rule of Law Recommendation (EU) 2017/1520 (third recommendation)

141. On 26 July 2017 the Commission adopted a third recommendation regarding the rule of law in Poland which complemented its two earlier recommendations. The concerns of the Commission related to the lack of an independent and legitimate constitutional review, and the new legislation relating to the Polish judiciary which raised grave concerns as regards judicial independence. In its third recommendation, the Commission considered that the situation whereby there was a systemic threat to the rule of law in Poland, as presented in its two earlier recommendations, had seriously deteriorated. With regard to the Constitutional Court, the Commission noted, *inter alia*, that the following events had *de facto* led to a complete recomposition of the court outside the framework of the normal constitutional process for the appointment of judges: the admission of the three judges nominated by the eighth-term *Sejm* in the absence of a valid legal basis; the fact that one of those judges has been appointed as Vice-President of the Constitutional Court; and the fact that the three judges who had been lawfully nominated in October 2015 by the previous legislature had not been able to take up their judicial duties at the Constitutional Court. For this reason, the Commission considered that the independence and legitimacy of the Constitutional Court had been seriously undermined, and consequently that the constitutionality of Polish laws could no longer be effectively guaranteed.

142. With regard to the Constitutional Court, the Commission recommended the Polish authorities: restore the independence and legitimacy of the Constitutional Court as the guarantor of the Polish Constitution, by ensuring that its judges, its President and its Vice-President were lawfully elected and appointed, and by implementing fully the judgments of the Constitutional Court of 3 and 9 December 2015; and publish and implement fully the judgments of the Constitutional Court of 9 March, 11 August and 7 November 2016.

143. On 28 August 2017 the Polish Government replied to the third recommendation. The reply disagreed with all the assessments set out in the recommendation, and did not announce any new action to address the concerns identified by the Commission.

(e) Reasoned Proposal in Accordance with Article 7 § 1 of the Treaty on European Union Regarding the Rule of Law in Poland

144. On 20 December 2017 the Commission launched the procedure under Article 7 § 1 of the Treaty on European Union (TEU). This was the first time the procedure had been used. The Commission submitted a reasoned proposal to the Council of the European Union, inviting it to determine that there was a clear risk of a serious breach by the Republic of Poland of the rule of law, which was one of the values referred to in Article 2 of the TEU, and to address appropriate recommendations to Poland in this regard.

145. The Commission noted that the situation in Poland had continuously deteriorated, despite the three recommendations issued under the rule of law framework. The Commission considered that the situation in Poland represented a clear risk of a serious breach by the Republic of Poland of the rule of law, referred to in Article 2 of the TEU. The Commission referred to the lack of an independent and legitimate constitutional review, and the threats to the independence of the ordinary judiciary. The Commission observed that over a period of two years more than thirteen consecutive laws had been adopted affecting the entire structure of the justice system in Poland. The common pattern in all these legislative changes was the executive or legislative powers being systematically enabled to interfere significantly with the composition, powers, administration and functioning of those authorities and bodies.

146. As regards the Constitutional Court, the Commission considered that as a result of the laws adopted in 2016 and the developments following the appointment of the acting President, the independence and legitimacy of the Constitutional Court had been seriously undermined, and the constitutionality of Polish laws could no longer be effectively guaranteed. This was a matter of particular concern as regards respect for the rule of law, since a number of particularly sensitive new legislative acts had been adopted by the Polish Parliament.

147. The Commission noted that none of the actions set out by the Commission in the third recommendation of 26 July 2017 had been implemented, in particular as regards the composition of the Constitutional Court. The three judges who had been lawfully nominated in October 2015 by the previous legislature had still not been able to take up their judicial duties at the Constitutional Court. By contrast, the three judges nominated by the eighth-term *Sejm*, in the absence of a valid legal basis, had been admitted by the acting President of the court to take up their judicial duties.

148. The procedure under Article 7 § 1 is still under consideration by the Council of the European Union.

2. The European Parliament

149. The European Parliament, in its resolution of 13 April 2016 on the situation in Poland (2015/3031(RSP)), expressed serious concern that the effective paralysis of the Constitutional Court posed a danger to democracy, human rights and the rule of law. It urged the Polish Government to respect, publish and fully implement without further delay the Constitutional Court's judgment of 9 March 2016, and implement the judgments of 3 and 9 December 2015. It also called on the Polish Government to fully implement the recommendations of the Venice Commission made in its opinion of 12 March 2016.

150. In its resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union (2016/2774(RSP)), the European Parliament, *inter alia*, reiterated its earlier position on the paralysis of the Constitutional Court. It also expressed regret that the Venice Commission's recommendations of 11 March 2016 had not been implemented.

151. On 15 November 2017 the European Parliament adopted a resolution on the situation of the rule of law and democracy in Poland (2017/2931(RSP)). It expressed deep regret that no compromise solution had been found to the fundamental problem of the proper functioning of the Constitutional Court (its independence and legitimacy, and the publication and implementation of all its judgments), which seriously undermined the Polish Constitution and democracy and the rule of law in Poland.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE RIGHT TO A FAIR HEARING

152. The applicant company alleged that its right to a fair hearing had been violated on account of the courts' refusal to refer a legal question to the Constitutional Court on the conformity of paragraphs and 5 of the Ordinance and section 49 of the Hunting Act with the Constitution and the Convention.

153. The applicant company relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

154. The Court notes that in respect of the proceedings before the ordinary courts the Government have not raised an objection of

incompatibility *ratione materiae* with the provisions of Article 6 § 1 of the Convention. However, since this is a matter which goes to the Court's jurisdiction, the Court may examine it of its own motion (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III; and *Mirovni Inštitut v. Slovenia*, no. 32303/13, § 27, 13 March 2018). In the instant case, the applicant company lodged a civil action against the State Treasury, seeking full compensation for damage caused to its turf cultivation by game. The liability of hunting grounds or the State Treasury in this context was expressly recognised in sections 46-50 of the Hunting Act. In principle, the domestic courts found in favour of the applicant company, but reduced the amount of compensation awarded by applying paragraph 5 of the Ordinance to its calculation. Thus, the dispute in the proceedings before the ordinary courts concerned the scope of the applicant company's right to compensation and, consequently, a civil right within the meaning of Article 6 § 1 of the Convention.

155. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The applicant company's submissions

156. The applicant company argued that the reasoning contained in the judgments of the ordinary courts had not been sufficient to comply with the courts' obligation under Article 6 § 1 of the Convention to give reasons for their judgments. The ordinary courts had not adequately considered the applicant company's arguments as to the alleged unconstitutionality of section 49 of the Hunting Act and paragraph 5 of the Ordinance. For this reason, it was necessary to decide on the merits of the applicant company's constitutional complaint in which it had challenged the conformity of the impugned provisions with the Constitution.

2. The Government's submissions

157. The Government submitted that under Polish law, the ordinary courts were entitled to refer to the Constitutional Court a legal question (*pytanie prawne*) regarding the compliance of normative acts with the Constitution, ratified international agreements or statutes, if the answer to such a legal question was determinative for an issue pending before a court (Article 193 of the Constitution). That provision provided for a way to initiate proceedings to review the constitutionality of normative acts, in the framework of a so-called concrete review. Unlike proceedings initiated by a constitutional complaint, proceedings concerning a legal question were of a prospective and preventive character, in that they sought to prevent the case

concerned from being settled on the basis of a norm that was inconsistent with a hierarchically superior norm.

158. The Government maintained that a party to court proceedings did not have any constitutional or statutory right to oblige a court to submit a legal question to the Constitutional Court. The adjudicating panel was the only entity competent to decide on the legitimacy of referring a legal question. A panel should follow its own assessment of the case, and not be influenced by the conclusions of the parties or the importance of a legal issue. A person whose rights or freedoms had been violated by a final court ruling based on an allegedly unconstitutional legal provision had his or her own right to file a constitutional complaint.

159. The Government reiterated that the obligation on the part of a court to refer a legal question to the Constitutional Court arose when the court adjudicating on the case had doubts as to a normative act's compliance with the Constitution or another norm of superior rank. In the event of the court considering that a party's request to refer a legal question to the Constitutional Court was not legitimate or justified, the panel was obliged to duly provide justification for its reasons.

160. However, this system could not be understood as requiring the ordinary courts to examine in detail every issue of constitutionality raised by a party to civil proceedings. The courts exercised a certain margin of discretion in dealing with issues of constitutionality which had been raised in the framework of civil proceedings. The rights and interests of a party were sufficiently secured by the right vested in that party to subsequently file a constitutional complaint based on Article 79 of the Constitution.

161. The Government noted that from the outset and at every stage of the proceedings the applicant company had claimed that section 49 of the Hunting Act and paragraphs 4 and 5 of the Ordinance were inconsistent with the Constitution. The domestic courts had examined the issue within the remit of their competence in matters of constitutionality, and had referred to those allegations in the reasoning for their judgments, providing specific arguments in favour of the constitutionality of the impugned provisions.

162. The Government argued that the conclusions of the courts as regards the constitutionality of those provisions had subsequently been corroborated in 2017 by the Constitutional Court within the framework of the constitutional complaint proceedings initiated by the applicant company.

They maintained that the domestic courts had undertaken an effective and successful attempt to analyse the applicant company's claim from the point of view of the constitutionality of the challenged provisions. The analysis in question met the Court's standards for the substantiation of decisions of domestic courts.

163. The Government submitted that the factual circumstances of the present case were not comparable to those of the case of *Pronina v. Ukraine*

(no. 63566/00, 18 July 2006), in which the Ukrainian courts, in their rulings, had completely disregarded the allegations regarding the constitutionality of the relevant provisions, and had thus failed to fulfil their obligations arising under Article 6 § 1 of the Convention. Such a situation had not occurred in the present case, since the domestic courts had duly considered and explicitly addressed the applicant company's arguments regarding the alleged unconstitutionality of section 49 of the Hunting Act and paragraphs 4 and 5 of the Ordinance, and its requests to refer a legal question to the Constitutional Court. Moreover, unlike in the case of *Pronina* (ibid.), the applicant company had been entitled, under Polish law, to submit a constitutional complaint directly to the Constitutional Court, and had availed itself of this right.

164. Accordingly, the reasoning contained in the judgments given by the domestic courts in the applicant company's case had been sufficient to comply with the courts' obligation under Article 6 § 1 of the Convention to give reasons for their judgments. In particular, the ordinary courts had adequately considered the applicant company's arguments as to the alleged unconstitutionality of section 49 of the Hunting Act and paragraph 5 of the Ordinance.

3. The Court's assessment

165. The Court reiterates that Article 6 § 1 of the Convention obliges courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is, moreover, necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may make before the courts, and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. Thus, the question of whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case (see *Ruiz Torija v. Spain*, 9 December 1994, § 29, Series A no. 303-A; *Higgins and Others v. France*, 19 February 1998, § 42, *Reports of Judgments and Decisions* 1998-I; *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I; and *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 84, 11 July 2017).

166. The Court also reiterates that the Convention does not guarantee any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling, including on the constitutionality of a legal provision (see *Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, § 114, ECHR 2000-VII, and *Renard and Others v. France* (dec.), no. 3569/12, § 21, 25 August 2015). However, the Court does not rule out the possibility that, where a preliminary reference

mechanism exists, refusal by a domestic court to grant a request for such a referral may, in certain circumstances, infringe the fairness of proceedings (see *Coëme and Others*, § 114; *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, § 59, 20 September 2011; and *Renard and Others*, cited above, § 22).

167. In the present case, from the outset of the litigation and in support of its claim for compensation, the applicant company raised two constitutional objections to the Ordinance. Firstly, it alleged that the Ordinance treated persons growing perennial crops less favourably than persons growing annual ones, with regard to compensation for damage caused by game. In this regard, the Court notes that the domestic courts addressed this specific point at length and dismissed the applicant's objections as to the unconstitutionality of the relevant provision of the Ordinance in this part of the complaint (see paragraphs 83 and 88 above). The Court thus finds that in respect of this point, the domestic courts complied with their obligation to state reasons for their decisions.

168. Secondly, the applicant company alleged that paragraph 5 of the Ordinance, prescribing reduced rates for the calculation of damage, constituted a limitation of owners' right to compensation for damage (see paragraph 115 above). This limitation in subordinate legislation was, in the applicant company's view, incompatible with Article 64 § 3 of the Constitution. The latter provision provided that any restriction on property rights had to be regulated by a statute enacted by Parliament (see paragraph 108 above).

169. The applicant company further argued that the limitation at issue in the subordinate legislation was also incompatible with section 49 of the Hunting Act, in that it exceeded the statutory authorisation laid down in that provision. The limitation in the subordinate legislation was therefore also incompatible with Article 92 § 1 of the Constitution, the provision setting out the constitutional requirements applicable to the issuance of an ordinance (see paragraph 108 above).

170. The Court finds that the question of the constitutional validity of the subordinate legislation limiting the level of compensation, in the light of Article 64 § 3 of the Constitution, was an issue of key importance for the case. Had that argument been accepted, the courts would have been precluded from applying that subordinate legislation to the compensation due to the applicant company. Despite the importance of this question, the Regional Court simply stated that "it [did] not share the claimant's view on the unconstitutionality of the impugned Ordinance owing to the limits set forth in respect of the amount of compensation" (see paragraph 83 above), while the Court of Appeal held that "the allegation of a violation of Article 64 § 3 of the Constitution, regarding the limitation of property rights, should be considered groundless and unsubstantiated, since these issues [had] not constitute[d] the subject matter of the decision in the case"

(see paragraph 88 above). The Supreme Court found that the question of the conformity of paragraph 5 of the Ordinance with the Constitution did not give rise to a significant legal issue (see paragraph 91 above).

171. The Court accepts the Government's argument that, as regards the procedure for legal questions regulated by Article 193 of the Constitution, the ordinary courts exercise a certain discretion in dealing with issues of constitutionality raised by parties. However, where, as in the present case, a party to civil proceedings raises a constitutional issue of importance for the determination of a case and requests that this issue be referred to the Constitutional Court for examination, a domestic court has to provide specific reasons justifying its refusal to refer the question. The Court notes that the ordinary courts in the instant case summarily dismissed the applicant company's request for referral to the Constitutional Court of the issue regarding the alleged incompatibility of paragraph 5 of the Ordinance with Article 64 § 3 of the Constitution, and thus failed to duly provide reasons for their refusal to refer the relevant question. It reiterates that where an applicant's pleas relate to the "rights and freedoms" guaranteed by the Convention (in this case, the right of property), the courts are required to examine them with particular rigour and care (see *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 96, 28 June 2007, and *Fabris v. France* [GC], no. 16574/08, § 72 *in fine*, ECHR 2013 (extracts)).

172. The Court notes that the applicant company eventually lodged a constitutional complaint and raised the same constitutional issues before the Constitutional Court. Nonetheless, that court decided not to give a judgment on the issue and discontinued the proceedings (see paragraph 98 above).

Thus, the applicant company's plea – that the subordinate legislation limiting its right to compensation should not have been applied in the case, owing to its incompatibility with Article 64 § 3 of the Constitution – was not properly addressed. The Court finds that neither the ordinary courts nor the Supreme Court made any attempt to analyse the applicant company's argument from that standpoint, despite the explicit references made at every level of jurisdiction (see, *mutatis mutandis*, *Pronina*, cited above, § 25; *Wagner and J.M.W.L*, cited above, § 97; and *a contrario*, *Ivanciuc v. Romania* (dec.), no. 18624/03, ECHR 2005-XI). Consequently, the domestic courts failed to duly examine this point, even though it was specific, pertinent and important, and by doing so they fell short of their obligations under Article 6 § 1 of the Convention (see *Pronina*, cited above, § 25).

173. There has accordingly been a violation of Article 6 § 1 of the Convention as regards the right to a fair hearing, on account of the reasons given by the courts for the refusal to refer a legal question to the Constitutional Court being insufficient.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE RIGHT TO A TRIBUNAL ESTABLISHED BY LAW

174. The applicant company complained that its right to a "tribunal established by law" had been breached because the Constitutional Court had examined its constitutional complaint in a panel composed in violation of the Constitution. In particular, Judge M.M., who had been assigned to the panel, had been elected by the eighth-term *Sejm* to a judicial post at the Constitutional Court that had already been filled by another judge elected by the previous *Sejm*.

175. The applicant company invoked Article 6 § 1 of the Convention, which, in its relevant part, reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Admissibility

1. Applicability of Article 6 § 1

(a) The Government's submissions

176. The Government disputed the applicability of Article 6 § 1 of the Convention under its civil head to the proceedings before the Constitutional Court.

177. With regard to the Constitutional Court's constitutional position, the Government noted that in accordance with Article 10 § 2 of the Constitution, the Constitutional Court was defined as part of the judiciary. However, unlike other courts, the Constitutional Court did not administer justice, in that it did not settle civil disputes or determine criminal cases. Indeed, Article 175 § 1 of the Constitution provided that "the administration of justice ... shall be exercised by the Supreme Court, ordinary courts, administrative courts and military courts", without referring to the Constitutional Court.

178. The Constitution deliberately distinguished between courts and tribunals (compare Article 10 § 2 and Article 173) and conferred on them separate functions and competences. The Constitution used separate names to define those bodies and in Chapter VIII, entitled "Courts and Tribunals", included provisions common to both groups (Articles 173-174), as well as ones specific to the courts (Articles 175-185), to the Constitutional Court (Articles 188-197) and to the Tribunal of State (Articles 198-201). In the Government's view, this meant that the Constitutional Court could not be regarded as a court which ensured that individuals could exercise their right to a court as referred to in Article 45 § 1 of the Constitution.

179. Having regard to its specific competences regulated by, *inter alia*, Articles 188, 189 and 193 of the Constitution, the Constitutional Court could not be considered a typical court within the meaning of both Article 45 § 1 of the Constitution and Article 6 § 1 of the Convention. The Constitutional Court's competences demonstrated that it was an authority which dealt with review of the constitutionality of the law, as well as certain other matters of a constitutional nature. The Constitutional Court's judgments were final and universally binding pursuant to Article 190 § 1 of the Constitution, but they did not have the effect of a judgment in cassation. Thus, they could not quash judgments, decisions or other rulings issued by courts or other authorities on the basis of provisions which had been found unconstitutional.

180. Similarly, in cases initiated by constitutional complaints under Article 79 § 1 of the Constitution, the Constitutional Court did not rule on judgments or decisions, or on the application of the law in a particular case. In such proceedings, the Constitutional Court could only assess the legal provisions on the basis of which a final decision concerning a complainant had been made. A judgment by the Constitutional Court finding the impugned provisions unconstitutional did not automatically quash the decision in question. Under Article 190 § 4 of the Constitution, such a judgment constituted a basis for reopening the proceedings or quashing the decision or other ruling in the manner specified in the provisions applicable to the particular procedure, at the request of the person concerned.

181. In conclusion, since the Constitutional Court did not administer justice in the sense of deciding on individual civil rights and obligations or on the merits of a case, as this did not fall within the ambit of its constitutional and statutory powers, Article 6 § 1 of the Convention was not applicable in the particular circumstances of the case.

182. The Government further submitted that there was no analogy between the cases of *Ruiz-Mateos v. Spain* (23 June 1993, Series A no. 262), *Süßmann v. Germany* (16 September 1996, *Reports of Judgments and Decisions* 1996-IV) and *Voggenreiter v. Germany* (no. 47169/99, ECHR 2004-I (extracts)) – in which the Court had found Article 6 § 1 applicable to the proceedings before the respective constitutional courts – and the applicant company's case. In the present case, the applicant company's view that the outcome of the proceedings before the Constitutional Court could have had an impact on its civil rights was purely hypothetical.

183. The Government further pointed to the differences between the scope of a constitutional complaint in the Polish and German legal systems. They noted that the scope of a constitutional complaint in Polish law related exclusively to the constitutionality of normative acts, and therefore

proceedings before the Polish Constitutional Court did not concern the determination of an individual's civil rights and obligations.

184. The Government submitted that the legal basis for the applicant company's claim for damages in the proceedings before the ordinary courts had been section 46(1)(1) of the Hunting Act, and not section 49 of that Act, which the company had subsequently challenged before the Constitutional Court. For this reason, the Government claimed that a hypothetical ruling on the unconstitutionality of section 49 of the Hunting Act would have had a purely theoretical effect on the amount of compensation awarded to the applicant company. Additionally, the applicant company's constitutional complaint had mainly concerned the application of the law rather than the law as such, and the Constitutional Court had considered that the applicant company had not sufficiently substantiated its complaint as regards the alleged unconstitutionality of the law. As such, the complaint lodged by the applicant company could not have been considered an arguable complaint within the meaning of Article 79 § 1 of the Constitution, or an arguable claim within the meaning of Article 6 § 1 of the Convention.

185. The Government concluded by stating that the result of the proceedings before the Constitutional Court had not been directly decisive for the applicant company's civil rights or obligations. Furthermore, the constitutional position and competences of the Constitutional Court demonstrated that Article 6 § 1 of the Convention did not apply to proceedings before that court.

(b) The applicant company's submissions

186. The applicant company maintained that Article 6 § 1 under its civil head was applicable to the proceedings before the Constitutional Court in its case. It asserted that the proceedings before the Constitutional Court had been decisive for its civil rights and obligations, since its case had concerned compensation for damage caused by game.

(c) The Court's assessment

(i) General principles

187. For Article 6 § 1 in its civil limb to be applicable, there must be a "dispute" regarding a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right, but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among many other authorities, *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 43, ECHR 2000-IV; *Károly Nagy v. Hungary* [GC], no. 56665/09, § 60, 14 September 2017; and *Denisov*

v. Ukraine [GC], no. 76639/11, § 44, 25 September 2018, with further references).

188. The Court reiterates that, in accordance with its established case-law, proceedings can come within the scope of Article 6 § 1 even if they take place before a constitutional court (see *Kraska v. Switzerland*, 19 April 1993, § 26, Series A no. 254-B; *Pauger v. Austria*, 28 May 1997, § 46, *Reports* 1997-III; *Pierre-Bloch v. France*, 21 October 1997, § 48, *Reports* 1997-VI; *Krčmář and Others v. the Czech Republic*, no. 35376/97, § 36, 3 March 2000; *Klein v. Germany*, no. 33379/96, § 26, 27 July 2000; *Janković v. Croatia* (dec.), no. 43440/98, ECHR 2000-X; *Tričković v. Slovenia*, no. 39914/98, §§ 36-41, 12 June 2001; and *Soffer v. the Czech Republic*, no. 31419/04, §§ 31-32, 8 November 2007).

189. In that connection, it matters little whether the Constitutional Court considered the case following a question being referred for a preliminary ruling (see *Ruiz-Mateos*, cited above, §§ 35-38; *Pammel v. Germany*, 1 July 1997, §§ 53-58, *Reports* 1997-IV; and *Probstmeier v. Germany*, 1 July 1997, §§ 48-53, *Reports* 1997-IV), or following a constitutional appeal being lodged against judicial decisions (see *Becker v. Germany*, no. 45448/99, 26 September 2002; *Soto Sanchez v. Spain*, no. 66990/01, 25 November 2003; and *Dos Santos Calado and Others v. Portugal*, nos. 55997/14 and 3 others, §§ 111-112, 31 March 2020).

190. The same is true where the Constitutional Court examines an appeal lodged directly against a law, if the domestic legislation provides for such a remedy (see *Hesse-Anger and Anger v. Germany* (dec.), no. 45835/99, ECHR 2001-VI (extracts); *mutatis mutandis*, *Wendenburg and Others v. Germany* (dec.), no. 71630/01, 6 February 2003; and *Voggenreiter v. Germany*, no. 47169/99, § 33, ECHR 2004-I (extracts); see also *Süßmann v. Germany*, 16 September 1996, § 40, *Reports* 1996-IV).

191. The Court reiterates that according to its well-established case-law on this issue, the relevant test in determining whether proceedings come within the scope of Article 6 § 1 of the Convention, even if they are conducted before a constitutional court, is whether their outcome is decisive for the determination of the applicant's civil rights and obligations (see *Süßmann*, ibid., § 41; *Pammel*, cited above, § 53; and *Voggenreiter*, cited above, §§ 42-43).

(ii) Application of the principles to the present case

192. The Court notes at the outset that, according to the Government, the Constitutional Court did not administer justice and was not a typical court within the meaning of Article 6 § 1. Its main task was to review the constitutionality of the law. In constitutional complaint proceedings, the Constitutional Court could only examine the alleged unconstitutionality of a normative act that had constituted the basis of a final decision in a case. The Government contended that the requirements of Article 6 § 1 did not

apply to the Constitutional Court because it did not decide on individual civil rights and obligations or the merits of a case. Furthermore, in their view, the result of the proceedings before the Constitutional Court had not been directly decisive for the applicant company's civil rights (see paragraphs 177, 179-181 and 185 above).

193. As the Court stated in the judgment in *Süßmann* (cited above, § 37), it is fully aware of the special role and status of a constitutional court, whose task is to ensure that the legislative, executive and judicial authorities comply with the Constitution, and which, in those States that have made provision for a right of individual petition, affords additional legal protection to citizens at national level in respect of their fundamental rights guaranteed in the Constitution.

194. The Court takes note of the Government's arguments regarding the position and competences of the Constitutional Court. It is true that, in accordance with the Constitution, the Constitutional Court does not administer justice. However, the Constitution defines the Constitutional Court as a judicial authority charged principally with reviewing the constitutionality of the law. Its judges enjoy independence in the exercise of their office (see Article 195 § 1 of the Constitution). According to the Court's settled case-law, a "tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of legal rules and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements, such as "independence, in particular of the executive; impartiality; duration of its members' terms of office" (see, for example, *Belilos v. Switzerland*, 29 April 1988, § 64, Series A no. 132). The Court has no doubt that the Constitutional Court should be regarded as a "tribunal" within the autonomous meaning of Article 6 § 1.

195. The Court will next examine the specificities of the Polish model of a constitutional complaint with reference to the Government's arguments in that respect (see paragraphs 180-184 above).

196. To begin with, the Court notes that under Polish law, a constitutional complaint can be lodged to challenge the constitutionality of a statute or other normative act which constituted the legal grounds for a final individual decision whereby a court or an administrative authority determined constitutional rights and obligations (see Article 79 of the Constitution). It also observes that Article 79 of the Constitution, which regulates the right to a constitutional complaint, is located in the sub-chapter entitled "Means of defending freedoms and rights" of Chapter II of the Constitution entitled "The freedoms, rights and obligations of persons and citizens", which would suggest that it was intended to serve as a remedy against violations of constitutional rights and freedoms. In addition, it is a remedy that is linked to a concrete judicial or administrative decision whose legal basis allegedly infringed those rights and freedoms.

197. The Court reiterates that in the decision in *Szott-Medyńska v. Poland* (no. 47414/99, 9 October 2003) concerning the right of access to a court, when examining the question of the effectiveness of a constitutional complaint for the purposes of Article 35 § 1 of the Convention, it considered two important limitations of the Polish model of a constitutional complaint, namely its scope and the form of redress it provided.

198. The first limitation is that a constitutional complaint can only be lodged against a statutory provision or another type of provision, and not against a judicial or administrative decision as such. Therefore, recourse to a constitutional complaint can only be had in a situation in which the alleged violation of constitutional rights and freedoms has resulted from the application of a legal provision which can reasonably be questioned as unconstitutional. Furthermore, such a provision has to constitute the direct legal basis for the individual decision in respect of which the violation is alleged. Thus, the constitutional complaint procedure cannot serve as an effective remedy if the alleged violation has resulted only from the erroneous application or interpretation of a statutory provision which, in its content, is not unconstitutional (see, for example, *Palusiński v. Poland* (dec.), no. 62414/00, 3 October 2006; and *Długołęcki v. Poland*, no. 23806/03, § 25, 24 February 2009, both cases concerning freedom of expression).

199. The second limitation of a constitutional complaint under Polish law concerns the redress which a constitutional complaint provides to an individual. The Court notes that, in accordance with Article 190 of the Constitution, the only direct effect of a judgment of the Constitutional Court is the repeal of the statutory or other type of provision which has been found unconstitutional. Such a judgment, however, does not automatically quash an individual decision in relation to the constitutional complaint which has been lodged. Article 190 § 4 of the Constitution grants a person who lodges a successful constitutional complaint the right to request that the procedure in his case be reopened or otherwise revised, "in a manner and on the basis of principles specified in provisions applicable to the given proceedings".

200. Having analysed the above-mentioned limitations of a Polish constitutional complaint in the decision in *Szott-Medyńska* (cited above), the Court observed that such a complaint could be recognised as an effective remedy within the meaning of the Convention only where: (i) the individual decision which allegedly violated the Convention had been adopted in direct application of an unconstitutional provision of national legislation; and (ii) procedural regulations applicable to the revision of such individual decisions provided for the reopening of a case or the quashing of a final decision following a judgment of the Constitutional Court finding unconstitutionality (this approach was followed, among other authorities, in *Pachla v. Poland* (dec.), no. 8812/02, 8 November 2005 concerning freedom of expression; *Tereba v. Poland* (dec.), no. 30263/04,

21 November 2006; *Liss v. Poland* (dec.), no. 14337/02, 16 March 2010, both cases relating to the right to the peaceful enjoyment of property and the right not to be discriminated against; *Urban v. Poland* (dec.), no. 29690/06, 7 September 2010; and *Hösl-Daum and Others v. Poland* (dec.), no. 10613/07, § 42, 7 October 2014, both cases concerning freedom of expression). In all these cases the Court allowed the Government's plea of non-exhaustion considering that a constitutional complaint was capable of providing the applicants with an effective relief.

201. The Court considers that the above findings in the context of Article 35 § 1 with regard to the effectiveness of a constitutional complaint are relevant for the issue of the applicability of Article 6 § 1 to the proceedings before the Constitutional Court initiated by the complaint in the present case. Moreover, the Government have not questioned that the "final decision" for the purposes of Article 35 § 1 was the Constitutional Court's decision of 5 July 2017, and not the Supreme Court's decision of 3 December 2015 (see paragraphs 91 and 98 above).

202. The Government argued that a person whose rights had been violated by a final court ruling based on an allegedly unconstitutional legal provision had his own right to file a constitutional complaint (see paragraph 158 above). In the instant case, the applicant company availed itself of this right and directed its constitutional complaint against the domestic law, in particular paragraph 5 of the Ordinance. It alleged that the impugned provision of subordinate legislation contained percentage rates limiting its right to full compensation for damage. In the applicant company's submission, the provision was incompatible with Article 64 § 3 of the Constitution, which guaranteed that any restriction on the constitutional right of property had to be regulated by a statute (see paragraph 92 above).

203. The Court has already established that this issue was of key importance for the applicant company's case (see paragraph 170 above). It also notes that the applicant company raised the constitutional issue from the outset of the litigation and pursued it consistently in the proceedings up until the Constitutional Court, asserting that it was of crucial significance for the determination of the amount of compensation (see paragraphs 70, 72, 85, 89 and 92-93 above). In view of the foregoing, the Court considers that the impugned constitutional issue was inseparably linked with the applicant company's claim and was therefore relevant for the determination of its civil rights.

204. Furthermore, the Court has already found that the dispute in the proceedings before the ordinary courts concerned the scope of the applicant company's right to compensation, to which Article 6 § 1 of the Convention applied (see paragraph 154 above). Once the proceedings before the ordinary courts had been terminated, the only avenue through which the applicant company could pursue further determination of that dispute was

a constitutional complaint whereby it alleged a breach of its constitutional right of property due to the limitation in the subordinate legislation (see, *mutatis mutandis*, *Süßmann*, cited above, § 42). The proceedings before the Constitutional Court could accordingly be regarded as a continuation of the proceedings before the ordinary courts involving a dispute over a civil right.

205. In this connection, the Court notes that in the decision in *Pasławski v. Poland* (no. 38678/97, 11 June 2002) it dealt with a similar complaint, albeit under Article 1 of Protocol No. 1, that an applicant was unable to obtain compensation for damage caused to his plantation of spruce trees by, *inter alia*, game, owing to defective legislation. In that case, the Court allowed the Government's objection stating that the applicant had been required to seek compensation before civil courts and, if unsuccessful, lodge a constitutional complaint, and declared the relevant complaint inadmissible for non-exhaustion of domestic remedies.

206. Admittedly, in the instant case, a panel of five judges of the Constitutional Court eventually decided, by a majority, to discontinue the proceedings and not issue a judgment, on the grounds that there had been a failure to satisfy one of the relevant statutory conditions of admissibility. The Court notes that at a preliminary stage of the examination of the case, the Constitutional Court had held that the constitutional complaint met the statutory requirements and had sent it for examination on the merits (see paragraph 96 above). It had also invited the relevant State authorities to submit their observations on the case (see paragraph 97 above). At the same time, under the Constitutional Court's case-law, a panel examining the merits of a constitutional complaint could reject it for failure to satisfy the admissibility conditions (see paragraph 98 above).

207. Be it as it may, the Constitutional Court found, in its decision of 5 July 2017, that paragraph 5 of the Ordinance had constituted the basis of the final decision in the case (see paragraph 100 above). While, after the examination of the parties' pleadings, the Constitutional Court held in the same decision, by a majority of three against two, that the applicant company had not substantiated its allegation of unconstitutionality in respect of paragraph 5 of the Ordinance, this assessment was not limited to a purely formal review, but involved elements relating to the determination of the applicant company's claim in the context of Article 64 of the Constitution guaranteeing the right of property (see also paragraphs 101-105 above). In this connection, the Court finds that the Government have not shown that a decision declaring the provision in question unconstitutional would have had no effect on the applicant company's right to compensation.

208. In the present case, had the Constitutional Court found that paragraph 5 of the Ordinance, which constituted the basis of the final decision in the case, infringed the applicant company's constitutional right of property, the company would have been able to request that the

competent court reopen the civil proceedings under Article 190 § 4 of the Constitution and Article 401[1] of the Code of Civil Procedure (see paragraph 112 above). In the renewed examination of the case, the courts would have had to disregard the normative act which had been declared unconstitutional and examine the applicant company's claim for compensation exclusively under section 46 of the Hunting Act, while having regard to the general principle in civil law of full compensation for damage (see, *mutatis mutandis*, *Ruiz-Mateos*, cited above, § 59).

(iii) Conclusion

209. Having regard to the foregoing, the Court holds that the proceedings before the Constitutional Court were directly decisive for the civil right asserted by the applicant company. It finds accordingly that Article 6 § 1 was applicable to the proceedings before the Constitutional Court in the instant case.

210. The Court further notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. *The applicant company's submissions*

211. The applicant company argued that the seventh-term *Sejm* had elected R.H., A.J. and K.Ś. as judges of the Constitutional Court. The Constitutional Court had confirmed, in its judgment of 3 December 2015 (no. K 34/15) and its decision of 7 January 2016 (no. U 8/15), that those three judges had been elected on the proper legal basis. Accordingly, the eighth-term *Sejm* had not had competence to decide that the election of those judges had been contrary to the Constitution and to elect other judges of the Constitutional Court, including Judge M.M., to posts that had already been filled. The applicant company referred to the dissenting opinion of Judge P.T. in its case (see paragraph 106 above).

212. The applicant company submitted that the three-step threshold test established by the Grand Chamber in the case of *Guðmundur Andri Ástráðsson v. Iceland* ([GC], no. 26374/18, 1 December 2020) should be applied in the present case. Applying the test, the bench of the Constitutional Court, which included Judge M.M., was not a "tribunal established by law" within the meaning of Article 6 § 1 of the Convention, since that judge had not been elected in compliance with the applicable law.

2. *The Government's submissions*

213. The Government maintained that the composition of the Constitutional Court in the applicant company's case had been formed in

accordance with the law, that is, the Constitution and the Act of 30 November 2016 on Organisation and Proceedings before the Constitutional Court. In the light of section 38(1) of that Act, members of the adjudicating panel, including the president of the panel and the judge rapporteur, were appointed by the President of the Constitutional Court in alphabetical order, taking into account the type of case, the number of cases pending, and the sequence in which cases had been submitted to the Constitutional Court.

214. In this context, the Government noted that under Polish law, there was a constitutional and statutory system of safeguards guaranteeing the independence of the Constitutional Court's judges. The Constitutional Court was composed of fifteen judges elected individually by the *Sejm* for a nine-year term of office from amongst persons distinguished by their outstanding knowledge of the law (which implied that candidates should qualify for a judicial position at the Supreme Court or the Supreme Administrative Court). The election by the *Sejm* was carried out by means of a procedure necessitating an absolute majority. The Constitutional Court consisted of judges elected by two or three successive *Sejm*s, which minimised the potential risk of politicisation of the body. Furthermore, Polish law provided that a judge could serve only one term, which in turn was intended to minimise the potential risk of pressure being put on judges. Moreover, the Constitutional Court's judges could not be removed during their term of office, and were vested with legal immunity. They were entitled to remuneration appropriate to their high position within the Polish constitutional system. They also maintained their status after their term of office had been terminated, which meant that judges retired regardless of their actual age and as such were entitled to a pension of 75% of their final salary at the Constitutional Court.

215. The Government emphasised the importance of the Constitutional Court's judges taking the oath before the President of the Republic. This had been confirmed by the Constitutional Court in its judgment of 24 October 2017 (case no. K 1/17). There was a presumption that a person elected by the *Sejm* who had taken the oath before the President of the Republic was a judge of the Constitutional Court. The Government noted that there was no mechanism under Polish law to rebut this presumption. They submitted that the final verification of a judge's election took place at the stage of taking the oath before the President of the Republic.

216. They maintained that the applicant company's arguments as to the validity of the election of Judge M.M. actually had no legal basis. They were founded on a false premise regarding the legality of the election of some of the Constitutional Court's judges, which referred to the rulings of the Constitutional Court in cases nos. K 34/15, U 8/15 and K 39/16. Contrary to the applicant company's allegations, the Constitutional Court had not decided on the legal status of any of its judges. The only application

concerning the election of judges of the Constitutional Court on 2 December 2015 had been examined by the Constitutional Court in its decision of 7 January 2016 (case no. U 8/15). In that decision, the Constitutional Court had found that it did not have competence to assess the legality of the election of its judges. Therefore, since that position had been taken by the Constitutional Court in its full composition, none of its rulings could be considered decisive in the matter of the legality of the election of its judges. Furthermore, in its case-law, the Constitutional Court had repeatedly expressed its opinion on this matter when examining several requests for recusal (see, among many authorities, judgment no. K 1/17 of 24 October 2017).

217. The Government further noted that rulings nos. K 34/15, U 8/15 and K 39/16 had been given in a procedure reviewing the constitutionality of normative acts. The constitutional basis for the procedure in each case had been Article 188 § 1 of the Constitution. Therefore, since in those judgments the Constitutional Court had ruled on norms and not facts, the judgments could not be linked to content which had not been included in them and effects which they had not intended to cause.

218. The Government observed that Judge M.M., like other judges of the Constitutional Court, had been elected on the basis of Article 194 § 1 of the Constitution. They stressed that this provision, which was of a supreme, constitutional level, could not be challenged by the Constitutional Court.

219. As regards the Constitutional Court's judgment of 3 December 2015 (no. K 34/15), its operative part had declared that section 137 of the Act of 25 June 2015 on the Constitutional Court was compatible with Article 194 § 1 of the Constitution in so far as it concerned judges whose term of office had expired on 6 November 2015, and was in turn incompatible with the same constitutional provision in so far as it concerned judges whose term of office had expired or would expire on 2 and 8 December 2015. The content of the operative part of the judgment indicated that the Constitutional Court had not ruled on the election of judges, but on the hierarchical compatibility of section 137 of the 2015 Act with Article 194 § 1 of the Constitution. The impugned statutory provision had pertained only to the time-limit for the submission of nominations for judges of the Constitutional Court who were to replace five judges whose term of office had come to an end or would come to an end in November and December 2015.

220. They argued that judgment no. K 34/15 had been delivered in the course of an abstract review of the constitutionality of legal norms. Consequently, its subject matter had been the examination of a legal provision, and not the legality of the election of individual judges. Section 137 of the 2015 Act, which had been found to be unconstitutional in part, had not constituted the basis for the election of judges on 2 December

2015, since the basis for the election of a judge of the Constitutional Court was always the Constitution itself.

221. The Constitutional Court's ruling of 7 January 2016 (no. U 8/15) had not prejudged the legality of the election of any of the judges of the Constitutional Court either. That decision had discontinued the proceedings before the Constitutional Court which had been initiated by an application to examine the compatibility with the Constitution of the resolutions on the basis of which Parliament had elected the Constitutional Court's judges. Regardless of the arguments presented by the panel in its reasoning, the Constitutional Court had found that it did not have competence to examine the case. It had confirmed that under the Polish constitutional system, there were no mechanisms aimed at verifying the election of Constitutional Court judges who had taken the oath before the President of the Republic. In this context, the Government emphasised that the only binding element of the Constitutional Court's judgment was its operative part. The reasoning served to explain reasons for the Court's ruling, but one could not derive from it any universally binding content.

222. The Government next submitted that the Constitutional Court's judgment of 11 August 2016 in case no. K 39/16 had boiled down to an abstract review of the constitutionality of legal provisions, and had not concerned the lawfulness of the election of the Constitutional Court's judges.

223. They maintained that the above-mentioned case-law of the Constitutional Court, as referred to by the applicant company, was not relevant to the case. The rulings in question had been issued in the course of a review of the constitutionality of the law, and had not aimed to challenge the lawfulness of the election of Judge M.M. Consequently, they could not be cited as an argument concerning the composition of the Constitutional Court in the applicant company's case.

224. The Government averred that the correctness of the Constitutional Court's composition in the applicant company's case did not fall within the scope of the Court's review, since the Constitutional Court was not a court within the meaning of Article 6 § 1 of the Convention, and the applicant company's constitutional complaint had not concerned its civil rights or obligations within the meaning of that provision.

225. In any event, the Government claimed that, taking into account the tenor of the Polish Constitution and the laws further developing the Constitution, the composition of the Constitutional Court in the applicant company's case had been lawful and regular. All judges sitting on the panel had been legally elected and appointed, since no body, including the Constitutional Court, had validly questioned the status of any judge who had been elected by the *Sejm* and had taken the oath of office before the President of the Republic. Furthermore, the Government stressed that under the Polish legal system there was neither an authority nor a mechanism to

challenge an election by the *Sejm*. The common and administrative courts were not entrusted with that competence, nor was the Constitutional Court itself. Any ruling in this regard would lead to a breach of the exclusive competences of the *Sejm* and the President of the Republic of Poland enshrined in the principle of the separation and balance of powers. Such a procedure, if it were to exist, would have to be introduced directly into the Constitution and would imply a remodelling of the constitutional relations between the legislative, executive and judicial authorities.

226. The Government made some observations on the three-step threshold test set out in *Guðmundur Andri Ástráðsson* (ibid.) to identify a possible violation of the right to a tribunal established by law. As regards the first step of the test, they submitted that the composition of the Constitutional Court in the applicant company's case had been formed in accordance with the law (see paragraph 213 above). In their view, there had been no "manifest breach of the domestic law" with regard to the composition of the bench of the Constitutional Court in the present case, since all the judges had been elected by the *Sejm* and sworn in by the President of the Republic.

227. With regard to the second step of the test, the Government maintained that the appointment of judges of the Constitutional Court by the *Sejm* and their subsequent taking of the oath before the President of the Republic did not make the judges subordinate to those authorities. The Government referred to the system of constitutional and statutory safeguards guaranteeing the independence of the Constitutional Court's judges. They further submitted that there were no data to suggest that the applicant company had argued that Judge M.M. had acted on the orders of the *Sejm* or the President of the Republic when examining its case. They maintained that the manner of composition of the bench of the Constitutional Court in the present case had had no negative effect on the object and purpose of the requirement that there be a "tribunal established by law".

228. With regard to the third step of the test, the Government argued that the Constitutional Court had not validly decided on the legal status of any of its judges. As regards the various dissenting opinions of judges who had sat on a panel with Judge M.M., opinions which had questioned the validity of his election, the Government noted that they were minority views.

229. The Government concluded that the composition of the bench of the Constitutional Court in the present case had been lawful, and that there had been no violation of Article 6 § 1.

3. The third-party interveners

(a) The Commissioner for Human Rights of the Republic of Poland

230. The Commissioner submitted that the three persons appointed in 2015 to the posts of judges of the Constitutional Court, posts that had

already been filled by judges lawfully elected by the seventh-term *Sejm*, had not been properly appointed because the process of their appointment had been carried out in flagrant breach of the law. The same could be said of those persons who had subsequently taken up those posts in their place, since the posts had still not been vacant. Inasmuch as the prerequisite that there be a tribunal "established by law" was rooted in the rule of law, the requirement that a judge be appointed in accordance with the law implemented the same principle. In the Commissioner's view, the expression "established by law" referred not only to the legal basis for the very existence of a tribunal, but also to its composition in each case pending before it. This necessarily brought the process of appointing judges into the concept of a tribunal "established by law" within the meaning of Article 6 § 1. The requirements applicable to a "tribunal", identified in the Court's case-law, were expressly intended to avoid arbitrary influence on judicial bodies by other branches of government, and thus to safeguard judicial independence. The Commissioner argued that a flagrant breach of domestic legal rules on the appointment of judges amounted to a breach of Article 6 § 1. In such a case, a violation of that Article could be established without the need to examine other aspects of the right to a fair trial.

231. The Commissioner submitted that a person appointed as a judge in a flagrant breach of the domestic law should not be allowed to exercise judicial functions. Accordingly, a judicial authority of which such a person was a member should not be deemed to be a "tribunal established by law" within the meaning of the Convention. In the Commissioner's view, it was reasonable to presume that any infringement of a fundamental legal rule amounted to a flagrant breach of the law. This included constitutional provisions, essential standards of Article 6 § 1, as well as core principles of European Union law: effective judicial protection and the right to a fair trial. Such a presumption was particularly justified where a breach had already been established by a final judicial decision of the Constitutional Court, the Supreme Court, the European Court of Human Rights or the Court of Justice of the European Union.

232. As regards the requirement to demonstrate that a breach of the domestic rules on appointment had been deliberate, the Commissioner observed that the constitutional mandate of the *Sejm* to elect judges of the Constitutional Court was binding on the *Sejm* as to the scope of the entrusted competence, and did not allow it to step beyond the constitutional limits and arbitrarily shape the composition of the Constitutional Court. The competence to elect persons to judicial posts at the Constitutional Court did not result in the competence to annul or invalidate previous elections. Therefore, the Commissioner argued that both the *Sejm*'s resolutions of 25 November 2015 on the lack of legal force of the previous *Sejm*'s resolutions on the election of five judges of the Constitutional Court, as well as the resolutions of 2 December 2015 appointing new judges in their place,

had been adopted without the required legal basis, and thus in manifest breach of the law. In the light of the Constitutional Court's judgment of 3 December (no. K 34/15), solely the election of two judges to the posts vacated during the eighth term of the *Sejm* had been permissible.

233. Furthermore, the failure of the President of the Republic to receive the oath from lawfully elected judges had constituted a breach of the Constitution and had also amounted to a flagrant breach of the law in the process of staffing the Constitutional Court. The Commissioner qualified in the same terms the President's rushed swearing-in of new judges despite the binding decision of the Constitutional Court on interim measures. In his view, the President had intentionally created a situation where the implementation of a judgment of the Constitutional Court delivered a few hours later had been made impossible or extremely difficult. The deliberate infringements of law by the eighth-term *Sejm* and the President of the Republic should result in the arguments relating to the principle of the irremovability of judges, the principle of legal certainty and the stability of judicial decisions being disregarded. The Commissioner emphasised that an intention to bypass or violate the applicable law could not be rewarded by acceptance of the situation thus created (*ex inuria ius non oritur*).

234. The Commissioner submitted that the changes initiated in the Constitutional Court in 2015 by the unlawful appointment of persons not authorised to adjudicate had brought profound changes to the functioning of that body. The political authorities had achieved two goals that they had clearly intended. Firstly, they had incapacitated the body that could review the constitutionality of legislation. This had cleared the way for further developments, including major changes in the judiciary. Secondly, the political power had gained an additional instrument to formally legitimise unconstitutional legislation adopted by the Parliament.

235. The Commissioner maintained that the changes had also affected other aspects of the functioning of the Constitutional Court. For example, the Commissioner had repeatedly filed requests for persons wrongfully appointed as judges to be recused from the Constitutional Court's adjudicating panels. His applications, made in a total of sixteen cases, had been examined by persons including those to whom the applications had related. Legal issues had therefore been decided by those directly concerned, in a clear breach of the principle of *nemo iudex in causa sua*. These circumstances, among other things, had led the Commissioner to withdraw several of his applications for judicial review of important legislation affecting individual rights.

236. The Commissioner submitted that the Constitutional Court had lost it credibility and no longer fulfilled the role entrusted to it by the Constitution. The legitimacy of its judgments issued with the involvement of unauthorised judges had been called into question. This negative perception was also reflected in the body's drastic decline in judicial

efficiency, and in a decrease in the number of constitutional complaints and requests from ordinary courts for preliminary rulings.

(b) The Helsinki Foundation for Human Rights

237. The Helsinki Foundation considered that the present case concerned problems of the utmost importance for the protection of the rule of law in Poland. The unlawful personal and structural changes in the organisation of the Constitutional Court in 2015-2016 had led to a serious constitutional crisis which had resulted in a significant weakening of the mechanisms of the protection of human rights and the rule of law.

238. The Helsinki Foundation argued that the direct cause of the constitutional crisis had been the unlawful election of three judges of the Constitutional Court on 2 December 2015. It submitted that there had been no ruling of the Constitutional Court which had explicitly invalidated the eighth-term *Sejm*'s election of three judges. Nonetheless, the logical consequence of the Constitutional Court's judgment of 3 December 2015 (no. K 34/15) was that their election had been unlawful and devoid of any legal effect. This was so because those three judges had been elected to seats that had already been filled by judges lawfully elected by the seventh-term *Sejm*. On this basis, the election of the three judges by the eighth-term *Sejm* had been invalid, and they could not be regarded as lawful judges of the Constitutional Court. This had also been the official position of the then President of the Constitutional Court, who had refused to allocate cases to the three judges.

239. The Helsinki Foundation noted that the ruling majority had tried to force the President of the Constitutional Court to admit the three judges to the bench by means of legislative amendments to the Act on the Constitutional Court adopted in December 2015 and a new Act on the Constitutional Court of 22 July 2016. However, the Constitutional Court had ruled that the legislative acts were unconstitutional, in its respective judgments of 9 March and 11 August 2016. This stage of the constitutional crisis had ended in December 2016, when the newly appointed President of the Constitutional Court had allocated cases to the three judges elected on 2 December 2015, thus recognising the lawfulness of their election.

240. The Helsinki Foundation noted that the admission to the bench of the three judges elected on 2 December 2015 by the new President of the Constitutional Court had caused controversy among other, lawfully elected, judges of the Constitutional Court. For instance, in one of her dissenting opinions on the Constitutional Court's judgment of 16 March 2017 (no. Kp 1/17), Judge S.W.-J. had stated that the three persons had been elected to the Constitutional Court in violation of Article 190 of the Constitution, and that such a legal flaw had not been, and could not be, cured by the *Sejm*. For this reason, they were unauthorised to take part in adjudication.

241. Similarly, the Polish Commissioner for Human Rights had not recognised the legality of the election of the three judges to the Constitutional Court. In his opinion, on the basis of the Constitutional Court's case-law and the views expressed by legal scholars, these persons had not been validly elected. The Commissioner for Human Rights had consistently asked the Constitutional Court to recuse those persons from panels to which his applications for constitutional review had been allocated, and had withdrawn his applications when his requests had been rejected.

242. The legality of the election of the three persons had been questioned in some judgments of the Polish courts, although in most cases only in *obiter dicta*. Opinions questioning the validity of the eighth-term *Sejm*'s election of three judges of the Constitutional Court had been expressed by many legal scholars. The Helsinki Foundation noted that the irregularities in the election of the three judges had also been noted by some international bodies, like the Council of Europe Commissioner for Human Rights and the UN Special Rapporteur on the Independence of Judges and Lawyers. It also referred to the relevant findings made in the four recommendations of the European Commission regarding the rule of law in Poland.

4. The Court's assessment

(a) General principles

243. In its recent judgment in *Guðmundur Andri Ástráðsson*, the Grand Chamber of the Court clarified the scope of and meaning to be given to the concept of a "tribunal established by law" (cited above, § 218). It firstly analysed the individual components of that concept and considered how they should be interpreted so as to best reflect its purpose and, ultimately, ensure that the protection it offered was truly effective.

244. As regards the notion of a "tribunal", in addition to the requirements stemming from the Court's settled case-law, it was also inherent in its very notion that a "tribunal" be composed of judges selected on the basis of merit – that is, judges who fulfilled the requirements of technical competence and moral integrity. The Court noted that the higher a tribunal was placed in the judicial hierarchy, the more demanding the applicable selection criteria should be (ibid., §§ 220-222).

245. As regards the phrase "established", the Court referred to the purpose of that requirement, which was to protect the judiciary against unlawful external influence, in particular from the executive, but also from the legislature or from within the judiciary itself. In this connection, it found that the process of appointing judges necessarily constituted an inherent element of the concept "established by law" and that it called for strict scrutiny. Breaches of the law regulating the judicial appointment process

might render the participation of the relevant judge in the examination of a case "irregular" (ibid., §§ 226-227).

246. As regards "by law", the Court clarified that the third component also meant a "tribunal established in accordance with the law". It observed that the relevant domestic law on judicial appointments should be couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process (ibid., §§ 229-230).

247. Subsequently, the Court examined the interaction between the requirement that there be a "tribunal established by law" and the conditions of independence and impartiality. It noted that although the right to a "tribunal established by law" was a stand-alone right under Article 6 § 1 of the Convention, a very close interrelationship had been formulated in the Court's case-law between that specific right and the guarantees of "independence" and "impartiality". The institutional requirements of Article 6 § 1 shared the common purpose of upholding the fundamental principles of the rule of law and the separation of powers. The Court found that the examination under the "tribunal established by law" requirement had to systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the aforementioned fundamental principles and to compromise the independence of the court in question (ibid., §§ 231-234).

248. In order to assess whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law, and whether the balance between the competing principles had been struck by State authorities, the Court developed a threshold test made up of three criteria, taken cumulatively (ibid., § 243).

249. In the first place, there must, in principle, be a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation of the right to a tribunal established by law, since a procedure that is seemingly in compliance with the domestic rules may nevertheless produce results that are incompatible with the object and purpose of that right (ibid., §§ 244-245).

250. Secondly, the breach in question must be assessed in the light of the object and purpose of the requirement of a "tribunal established by law", namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers. Accordingly, breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold. To the contrary, breaches that wholly disregard the most fundamental rules in the appointment or breaches that may otherwise undermine the purpose and effect of the "established by law"

requirement must be considered to be in violation of that requirement (ibid., § 246).

251. Thirdly, the review conducted by national courts, if any, as to the legal consequences – in terms of an individual's Convention rights – of a breach of a domestic rule on judicial appointments plays a significant role in determining whether such a breach amounted to a violation of the right to a "tribunal established by law", and thus forms part of the test itself. The assessment by the national courts of the legal effects of such a breach must be carried out on the basis of the relevant Convention case-law and the principles derived therefrom (ibid., §§ 248 and 250).

(b) Application of the principles to the present case

(i) Preliminary remarks

252. The Court would reiterate at the outset that there are a variety of different systems in Europe for the selection and appointment of judges, rather than a single model that would apply to all countries (see *Guðmundur Andri Ástráðsson*, cited above, § 207). Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in its case-law, appointment of judges by the executive or the legislature is permissible under the Convention, provided that appointees are free from influence or pressure when carrying out their adjudicatory role. The question is always whether, in a given case, the requirements of the Convention are met (ibid., § 207, case-law references omitted).

253. In the present case the alleged violation of the right to a "tribunal established by law" concerns a judge of the Constitutional Court. In particular, the issue before the Court pertains to an allegation that the relevant domestic law was breached during the process of electing three judges, including Judge M.M., to the Constitutional Court on 2 December 2015.

254. Accordingly, the Court will examine whether the irregularities encountered in the judicial election procedure at issue had the effect of depriving the applicant company of its right to a "tribunal established by law". It will do so in the light of the three-step test formulated by the Court in the case of *Guðmundur Andri Ástráðsson* (ibid.).

(ii) Whether there was a manifest breach of the domestic law

255. The Court firstly has to determine whether the relevant domestic law was contravened during the process of Judge M.M.'s election to the Constitutional Court.

256. The Government argued, *inter alia*, that the applicant company's allegation as to the validity of Judge M.M.'s election had no legal basis, since in the rulings the company had relied upon the Constitutional Court

had not decided on the legal status of any of its judges. They submitted that in the decision of 7 January 2016, which was the only decision that concerned the election of Constitutional Court judges, the Constitutional Court had found that it did not have competence to assess the legality of the election of its judges. The Government further maintained that in rulings nos. K 34/15, U 8/15 and K 39/16 the Constitutional Court had ruled on the constitutionality of norms and not on facts, so those rulings could not be linked to content which had not been included in them and effects which they had not intended to cause (see paragraph 217 above).

257. The Court will review the relevant legal and factual developments regarding the election of the Constitutional Court judges at the end of 2015. The Court is aware of the significant controversy that surrounded the election process of those judges at the time when the term of the outgoing *Sejm* was approaching its end and the new legislature, with a different majority, was elected (see paragraphs 8 and 18-22 above).

258. In that context, the Court notes that at the end of 2015 five seats at the Constitutional Court were to become vacant: the term of office of three judges would end on 6 November, and the term of office of two judges would end on 2 and 8 December respectively. The seventh-term *Sejm* adopted the Act of 25 June 2015 on the Constitutional Court, which granted it the power to elect judges to all seats becoming vacant in 2015. The outgoing seventh-term *Sejm* then elected five judges to the Constitutional Court during its last session on 8 October 2015. The President of the Republic did not receive the oath of office from any of those judges, and consequently they did not take up their judicial duties (see paragraph 9 above).

259. A new eighth-term *Sejm*, with a different majority, was elected on 25 October 2015 and had its first sitting on 12 November 2015. On 25 November 2015 the eighth-term *Sejm* passed five resolutions on the "lack of legal effect" of the resolutions on the election of five judges of the Constitutional Court adopted by the previous *Sejm* on 8 October 2015. Subsequently, on 2 December 2015, the eighth-term *Sejm* proceeded to elect five new judges, including Judge M.M., to the Constitutional Court. The President of the Republic immediately received the oath of office from four of those judges on the night of 2-3 December 2015 (see paragraph 20 above).

260. The Court notes that the instant case concerns a particular context of the *Sejm*'s appointment of judges to the Constitutional Court, which is primarily regulated by the Constitution and the Act on the Constitutional Court. It considers that in this specific context the Constitutional Court was the only judicial authority that could, within the limits of its jurisdiction, review the lawfulness of the election in question. The Constitutional Court, in a series of four judgments (nos. K 34/15, K 35/15, K 47/15 and K 39/16; see respectively paragraphs 23-28, 30-35, 43-45 and 50-52) complemented

by one decision (no. U 8/15; see paragraph 39-42 above), examined the constitutionality of the relevant statutory provisions constituting the basis of the election and interpreted the pertinent constitutional rules. The Court finds that the Constitutional Court's judgment of 3 December 2015 (no. K 34/15) was of key significance in setting out the legal principles applicable to the controversy surrounding the disputed election of the Constitutional Court judges.

261. The Court will focus its analysis on the election of the three judges, including Judge M.M., to the Constitutional Court on 2 December 2015. It notes that in the light of the above-mentioned Constitutional Court's rulings, no questions were raised as to the validity of the election of the other two judges (J.P. and P.P.) on 2 December 2015. Following the Constitutional Court's decision of 7 January 2016, the then President of the Constitutional Court admitted those two judges to the bench (see paragraph 42 above).

262. The Court considers that the findings made in the above-mentioned Constitutional Court's rulings permit it to establish whether the domestic law was complied with in the process of the election of Constitutional Court judges, including Judge M.M., on 2 December 2015.

263. Firstly, as regards the resolutions of 25 November 2015, the Court notes that in its judgment of 3 December 2015 (no. K 34/15), the Constitutional Court found that those resolutions had had no legal effect on the resolutions of the seventh-term *Sejm* on the election of judges, since neither that *Sejm* nor the subsequent *Sejm* had any power to alter an earlier decision on the election of a Constitutional Court judge (see paragraph 25 above). In its decision of 7 January 2016 (no. U 8/15), the Constitutional Court added that there were no legal regulations allowing any State organ, including the *Sejm*, to declare a resolution of the *Sejm* on the election of a Constitutional Court judge invalid. Accordingly, the Constitutional Court established that the impugned resolutions had been legally irrelevant, and there had been no legal basis for their adoption (see paragraphs 25 and 40 above). In the light of those findings, the Court considers that there was a breach of domestic law as regards the adoption of the resolutions of 25 November 2015.

264. Secondly, in the same judgment of 3 December 2015, the Constitutional Court confirmed the constitutionality of the legal basis for the election of the three judges of the Constitutional Court who were to take the seats which had been vacated on 6 November 2015, that is, before the end of the term of the outgoing *Sejm*. On the other hand, it declared the legal basis for the election of the other two judges on 8 October 2015 unconstitutional, since it had permitted the outgoing *Sejm* to fill the seats that had become vacant after that *Sejm*'s mandate had expired. That finding was based on the rule deriving from Article 194 § 1 of the Constitution that a judge of the Constitutional Court shall be elected by the *Sejm* whose term

of office covers the date on which his seat becomes vacant. In this regard, the Court notes that the seventh-term *Sejm* transgressed its powers when electing two judges to the seats which were vacated in December 2015 (see paragraph 26 above).

265. As regards the consequences of its judgment of 3 December 2015, the Constitutional Court stated, in unequivocal terms, that the election of the three judges of the Constitutional Court to the seats vacated on 6 November 2015 had been valid, and that there were no obstacles to the procedure being finalised by the taking of the oath of office (see paragraph 28 above). In other words, the Constitutional Court established that the three judges elected by the seventh-term *Sejm* had been duly elected, and consequently their respective seats at the Constitutional Court had been filled.

266. The Court notes that the Constitutional Court confirmed the same finding as to the validity of the seventh-term *Sejm*'s election of the three judges in its judgments of 9 December 2015 (no. K 35/15), 9 March 2016 (no. K 47/15) and 11 August 2016 (no. K 39/16) and decision of 7 January 2016 (no. U 8/15; see respectively paragraphs 32, 45, 52 and 40 above).

267. In this context, the Court attaches particular importance to the Constitutional Court's judgment of 11 August 2016 (no. K 39/16). In this judgment, the Constitutional Court found that the statutory rule requiring the President of the Constitutional Court to admit to the bench the three judges elected on 2 December 2015 would amount to an act contrary to the earlier binding judgments of the same court (see paragraph 52 above). In this way, the Constitutional Court clearly indicated, contrary to what the Government have claimed, that the effect of the series of Constitutional Court judgments was recognition of the validity of the election of the three judges on 8 October 2015.

268. In the light of the foregoing, and in agreement with the series of Constitutional Court rulings referred to above, the Court finds that the election of the three judges, including Judge M.M., to the Constitutional Court on 2 December 2015 was carried out in breach of Article 194 § 1 of the Constitution, namely the rule that a judge should be elected by the *Sejm* whose term of office covers the date on which his seat becomes vacant. In addition, as established by the Constitutional Court in its judgments of 9 December 2015, 9 March and 11 August 2016, the election of the three judges on 2 December 2015 concerned seats at the Constitutional Court that had already been filled by the judges duly elected by the seventh-term *Sejm*. For these reasons, the resolutions on the election of the three judges on 2 December 2015 constituted a second breach of the domestic law in respect of the election procedure for Constitutional Court judges.

269. Thirdly, the Constitutional Court held, in its judgment of 3 December 2015, that the President of the Republic was under an obligation to immediately receive the oath from a Constitutional Court judge elected by the *Sejm*. It emphasised that the President's competence to

swear in Constitutional Court judges was not tantamount to his participation in determining the personal composition of the Constitutional Court, since the Constitution conferred the latter competence exclusively on the *Sejm* (see paragraph 27 above). The Constitutional Court added, in its judgment of 9 December 2015 (no. K 35/15), that the Constitution did not provide for the President having competence to refuse to receive the oath from a Constitutional Court judge elected by the *Sejm*, and that such competence could not be presumed (see paragraphs 33-35 above).

270. The Court notes that the President of the Republic refused to receive the oath of office from the three judges duly elected by the seventh-term *Sejm*. At the same time, he received the oath of office from the judges elected on 2 December 2015 immediately, in a matter of a few hours after they had been elected by the eighth-term *Sejm*. In the light of the two Constitutional Court judgments of December 2015, the Court finds that those acts and omissions of the President of the Republic should be regarded as a contravention of the domestic law in respect of the election process for Constitutional Court judges.

271. The Court is unable to accept the Government's argument that the above-mentioned Constitutional Court rulings had no relevance for the validity of Judge M.M.'s election (see paragraph 223 above). It finds that the Government's arguments essentially contradicted the relevant Constitutional Court findings in several respects. Those arguments must be rejected for the following reasons.

In particular, referring to the Constitutional Court's judgment of 24 October 2017 (no. K 1/17, see paragraphs 61-63 above), the Government asserted that the final verification of the election of a Constitutional Court judge took place at the stage of taking the oath before the President of the Republic, and emphasised the importance of that act (see paragraph 215 above). The Court observes that in the above-mentioned judgment the Constitutional Court upheld the constitutionality of the provisions of the Introductory Provisions Act which were aimed at admitting to the bench judges of the Constitutional Court who had taken the oath of office (see paragraphs 61-63 above). In doing so, the Constitutional Court rejected the Commissioner for Human Rights' argument that the impugned provisions constituted an attempt to change the composition of that court by excluding judges who had been properly elected by the seventh-term *Sejm* (see paragraph 57 above).

272. However, the Court finds that the judgment of 24 October 2017, without relying on any substantive grounds, entirely disregarded the earlier judgment of 3 December 2015 in which the Constitutional Court had held that the President of the Republic had no power to determine the composition of the Constitutional Court and that his role in receiving the oath was subordinate to the *Sejm*'s exclusive competence to elect judges (see paragraph 27 above). Furthermore, the Court notes that the judgment of

24 October 2017 also contradicted the other earlier judgment of the Constitutional Court of 11 August 2016 which had declared unconstitutional the provision requiring that the three judges elected by the eighth-term *Sejm* be admitted to the bench (see paragraph 267 above). In the circumstances, the judgment of 24 October 2017 could not cure the fundamental defects in the election of those three judges, including M.M., as identified in clear terms in the Constitutional Court's earlier rulings referred to above, nor could it legitimise their election.

273. Furthermore, the Court cannot but note that the panel of five judges which gave that judgment included two judges (M.M. and H.C.) elected by the eight-term *Sejm* whose very status was at stake in the proceedings (see also paragraphs 61-63 and 235 above). In view of the foregoing, the Court considers that the judgment of 24 October 2017 carries little, if any, weight in the assessment of the validity of the election of Constitutional Court judges on 2 December 2015.

274. Lastly, the Court observes that when referring to Judge M.M.'s election, the Government argued that under Polish law there was no mechanism to challenge an election by the *Sejm* (see paragraph 225 above). However, in respect of this argument, the Government did not explain the grounds which permitted the eighth-term *Sejm* and the President of the Republic to challenge the previous *Sejm*'s election of three judges on 8 October 2015.

275. The Court notes that the Constitutional Court found, in its rulings referred to above, that the domestic law had not been complied with in three respects in the process of the election of Constitutional Court judges on 2 December 2015. These contraventions were objectively and genuinely identified by the Constitutional Court. The Court sees no reason to call into question the Constitutional Court's interpretation of the relevant provisions of the domestic law, in particular those of constitutional rank. It therefore concludes that the contraventions at issue should be regarded as manifest breaches of the domestic law for the purposes of the first step of the test.

(iii) Whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges

276. When determining whether a particular defect in the judicial appointment process was of such gravity as to amount to a violation of the right to a "tribunal established by law", regard must be had, *inter alia*, to the purpose of the law breached, that is, whether it sought to prevent any undue interference by the executive or the legislature with the judiciary, and whether the breach in question undermined the very essence of the right to a "tribunal established by law" (see *Guðmundur Andri Ástráðsson*, cited above, §§ 226 and 255).

277. The Court finds that the breaches of the domestic law that it has established above 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. This fundamental rule deriving from Article 194 § 1 of the Constitution was recognised by the Constitutional Court in its judgment of 3 December 2015 (no. K 34/15) and confirmed in its four subsequent rulings referred to above. The Court reiterates that the eighth-term *Sejm* acted contrary to this fundamental rule when proceeding to elect the three Constitutional Court judges on 2 December 2015, since the seats to which they were purportedly elected had already been filled by the three judges elected by the previous *Sejm*.

278. The Court has further established that the President of the Republic also acted, in essence, in contravention of the same fundamental rule when refusing to swear in the three judges elected on 8 October 2015 and receiving the oath of office from the three judges elected on 2 December 2015 (see paragraph 270 above).

279. The Court notes that the election of the three judges on 2 December 2015 and their swearing-in took place just before the Constitutional Court was to deliver its judgment in case no. K 34/15. In its view, the precipitate actions of the eighth-term *Sejm* and the President of the Republic, who were aware of the imminent decision of the Constitutional Court, raise doubts about irregular interference by those authorities in the election process for constitutional judges.

280. The Court considers that the breaches of the fundamental rule were further compounded by two elements. Firstly, the eighth-term *Sejm* and the President of the Republic persisted in defying the finding initially made in the Constitutional Court's judgment of 3 December 2015 and later confirmed in the subsequent rulings – the finding that the three judges elected by the previous *Sejm* had been duly elected. Secondly, the legislature attempted – by means of legislative acts – to force the admission to the bench of the three judges, including Judge M.M., who had been elected on 2 December 2015. In this connection, the Court is particularly concerned by the fact that the Constitutional Court, in its judgments of 9 March and 11 August 2016, declared two statutory provisions aimed at forcing the three judges' admission to the bench unconstitutional. In both of those judgments, the Constitutional Court held that the implementation of the impugned legislative acts would be contrary to its earlier judgments, which were final and universally binding on all State authorities in accordance with Article 190 § 1 of the Constitution. It should also be noted that the Prime Minister refused to publish those two judgments. Moreover, the eighth-term *Sejm* continued defying the Constitutional Court's rulings and eventually adopted the Introductory Provisions Act (see paragraphs 55-56 above), which ultimately led to the three judges' admission to the bench of the Constitutional Court.

281. The Court considers that the legislative and executive organs' failure to abide by the relevant Constitutional Court judgments regarding the validity of the election of the court's judges undermined the purpose of the "established by law" requirement to protect the judiciary against unlawful external influence. In this connection, the Court reiterates that the right to "a tribunal established by law" is a reflection of the very principle of the rule of law and, as such, it plays an important role in upholding the separation of powers and the independence and legitimacy of the judiciary as required in a democratic society (see *Guðmundur Andri Ástráðsson*, cited above, § 237).

282. The Court also reiterates that one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that when the courts have finally determined an issue, their ruling should not be called into question (see, among other authorities, *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII, and *Agrokompleks v. Ukraine*, no. 23465/03, § 144, 6 October 2011). In the present case, the legislative and executive authorities failed to respect their duty to comply with the relevant judgments of the Constitutional Court, which determined the controversy relating to the election of judges of the Constitutional Court, and thus their actions were incompatible with the rule of law. Their failure in this respect further demonstrates their disregard for the principle of legality, which requires that State action must be in accordance with and authorised by the law (see the Rule of Law Checklist prepared by the Venice Commission, paragraph 125 above, where legality is identified as one of the benchmarks of the rule of law).

283. In this context, the Court notes that the Venice Commission observed in its Opinion adopted on 11-12 March 2016 that "decisions of a constitutional court which are binding under national constitutional law must be respected by other political organs; this is a European and international standard that is fundamental to the separation of powers, judicial independence and the proper functioning of the rule of law" (see paragraph 123 above; see also the Rule of Law Checklist, paragraph 125 above, where the Venice Commission observed that the right to a fair trial and the rule of law in general would be devoid of any substance if judicial decisions were not executed).

284. A number of other international bodies, among them the Human Rights Committee, the UN Special Rapporteur on the Independence of Judges and Lawyers, the Council of Europe Commissioner for Human Rights, the Parliamentary Assembly of the Council of Europe and the European Commission, also urged the Polish authorities to fully implement the Constitutional Court's judgments regarding the election of constitutional judges, in particular those of 3 and 9 December 2015 (see paragraphs 118-121, 126-130 and 137-143 above). In this connection, the European Commission noted in its Reasoned Proposal in Accordance with

Article 7 § 1 of the TEU that the three judges who had been lawfully nominated in October 2015 by the previous legislature had still not been able to take up their judicial duties at the Constitutional Court, while the three judges nominated by the eighth-term *Sejm*, in the absence of a valid legal basis, had been admitted by the acting President of the court to take up their judicial duties (see paragraph 147 above).

285. The Court further finds that the question of the authorities' failure to abide by the relevant Constitutional Court judgments is also linked with their challenging the role of the Constitutional Court as the ultimate arbiter in cases involving the interpretation of the Constitution and the constitutionality of the law. The Venice Commission commented on this point and stated, *inter alia*, "the Parliament and Government continue to challenge the Tribunal's position as the final arbiter of constitutional issues and attribute this authority to themselves" (see the Opinion adopted on 14-15 October 2016, paragraph 121 above). In the Court's view, this aspect of the case should also be regarded as undermining the purpose of the "established by law" requirement.

286. Lastly, the same can be said of the Prime Minister's refusal to publish the two Constitutional Court judgments of 9 March and 11 August 2016 (see paragraphs 46 and 53 above), in contravention of the constitutional provision stating that judgments of the Constitutional Court shall be published immediately (see Article 190 § 2 of the Constitution).

287. Having regard to the above, the Court considers 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".

(iv) Whether the allegations regarding the right to a "tribunal established by law" were effectively reviewed by the domestic courts, and whether remedies were provided

288. The Government acknowledged that there was no procedure under Polish law whereby the applicant company could challenge the alleged defects in the election process for judges of the Constitutional Court (see paragraph 225 above). The Court finds no reason to disagree with the Government that there was no such procedure directly available to the applicant company. Consequently, no remedies were provided (see *Guðmundur Andri Ástráðsson*, cited above, § 248).

(v) Overall conclusion

289. The Court has established that the fundamental rule applicable to the election of Constitutional Court judges was breached, particularly by the

eighth-term *Sejm* and the President of the Republic (see paragraphs 275 and 277-278 above). The eighth-term *Sejm* proceeded to elect three Constitutional Court judges, including M.M., on 2 December 2015, even though the respective seats had already been filled by the three judges elected by the previous *Sejm*. The President of the Republic refused to swear in the three judges elected by the previous *Sejm*, and received the oath of office from the three judges elected on 2 December 2015.

290. In the light of the foregoing, and having regard to the three-step test set out above (see paragraphs 248-251 above), the Court considers that the applicant company was denied its right to a "tribunal established by law" on account of the participation in the proceedings before the Constitutional Court of Judge M.M., whose election was vitiated by grave irregularities that impaired the very essence of the right at issue.

291. The Court therefore concludes that there has been a violation of Article 6 § 1 of the Convention in this regard.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

292. Lastly, the applicant company alleged a violation of Article 1 of Protocol No. 1 to the Convention because it could not obtain full compensation for the damage sustained to its property.

293. The applicant company argued that there had been an interference with its right to the peaceful enjoyment of its possessions through the application of section 49 of the Hunting Act and paragraph 5 of the Ordinance. The interference had been unlawful in the light of Article 64 of the Constitution, because it had consisted in limiting the applicant company's right to full compensation for damage to its property on the basis of subordinate legislation. Moreover, the interference had not been necessary to control the use of property in accordance with the general interest.

294. The Government submitted that there had been no interference with the applicant company's possessions within the meaning of Article 1 of Protocol No. 1. Alternatively, they maintained that the alleged interference had been lawful and necessary to control the use of property in accordance with the general interest, and had not imposed an excessive burden on the applicant company.

295. Having regard to the facts of the case, the submissions of the parties and its findings under Article 6 § 1 of the Convention, the Court considers that it has examined the main legal questions raised in the present application and that there is no need to give a separate ruling on the complaint under Article 1 of Protocol No. 1 (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, and the cases cited therein).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

296. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

297. The applicant company claimed 84,142.88 Polish zlotys (PLN – an amount equivalent to 18,488.06 euros (EUR)) in respect of pecuniary damage. This amount corresponded to the compensation for damage sought by the applicant company which had not been awarded by the domestic courts as a result of the proceedings conducted in violation of the provisions of the Convention. The applicant company did not make a claim for non-pecuniary damage.

298. The Government submitted that the claim was unfounded.

299. The Court cannot speculate as to what the outcome of the proceedings would have been had the applicant company had the benefit of the guarantees of Article 6 of the Convention. It does not discern any causal link between the violations found and the pecuniary damage alleged and it therefore rejects this claim.

B. Costs and expenses

300. The applicant company claimed PLN 15,556 (an amount equivalent to EUR 3,418) for costs incurred before the domestic courts, and supported this claim with documentary evidence. It also claimed an unspecified amount for costs incurred before the Court.

301. The Government submitted that the applicant company had not detailed any costs incurred in the Court proceedings, and had not submitted any bills in support of this claim. Therefore, no award should be made under this head.

302. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,418 for costs and expenses in the domestic proceedings, plus any tax that may be chargeable to the applicant company.

C. Default interest

303. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaints under Article 6 § 1 as regards the right to a fair hearing and the right to a tribunal established by law admissible;

2. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention as regards the right to a fair hearing;

3. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention as regards the right to a tribunal established by law;

4. *Holds*, by six votes to one, that it is not necessary to examine the admissibility and merits of the complaint under Article 1 of Protocol No. 1 to the Convention;

5. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,418 (three thousand four hundred and eighteen euros), plus any tax that may be chargeable, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, unanimously, the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 7 May 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Ksenija Turković
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

K.T.U.
R.D.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE WOJTYCZEK

"*Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.*

This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (24 February 1803)).

1. The instant case raises fundamental legal questions connected to the right of access to a court with power to perform constitutional review of legislation (under Article 6 of the Convention) and also raises important issues concerning the right to the peaceful enjoyment of possessions (under Article 1 of Protocol No. 1 to the Convention).

The applicant company complained under Article 6 about (i) a failure to provide adequate reasons on issues of constitutionality of legislation, and (ii) a denial of access to a tribunal established by law in respect of claims to have unconstitutional legal provisions overridden or invalidated. The right to obtain adequately reasoned judgments deciding questions of constitutionality of legislation and the right to have these questions determined by a tribunal established by law are two elements of a broader right: the right to have all arguable claims in respect of civil rights (including claims to have unconstitutional legal provisions overridden or invalidated) determined in fair proceedings, within a reasonable time, by an independent and impartial tribunal established by law.

While I agree with the finding of violations of Article 6 (points 2 and 3 of the operative part), I have reservations concerning the reasoning under this provision. At the same time, I respectfully disagree with the view of my colleagues that there is no need to examine the complaint under Article 1 of Protocol No. 1 (point 4).

I. PROCEDURAL AND FACTUAL ISSUES

2. The instant case has raised the following procedural difficulty for the parties. According to established practice (the immediate and simplified communication procedure aside), the Court gives notice of an applicant's complaint together with a statement of facts and specific questions to the parties. This statement of facts plays an important role, because it guides the parties in their pleadings. The facts included therein and not contested by any party are usually accepted as established. In the newly introduced immediate and simplified communication procedure, the statement of facts

is prepared by the respondent Government and the applicant may then submit observations about it.

In the instant case, the Court decided to give notice to the Government of the applicant company's application together with a statement of facts prepared by the Court. This statement encompassed facts now described in paragraphs 64-107 of the instant judgment. The facts described in paragraphs 4-63 of the instant judgment were not included therein.

On the one hand, it is true that the following Constitutional Court judgments were mentioned in the communication report: 3 December 2015, no. K 34/15; 9 December 2015, no. K 35/15; 11 August 2016, no. K 39/16; as well as the decision of 7 January 2016, no. U 8/15. At the same time, under the universally recognised general principles of law, international courts and tribunals may take note of facts which are official or concern matters of common knowledge and public notoriety (see Ch.T. Kotuby, Jr, L.A. Sobota, *General Principles of Law and International Due Process. Principles and Norms applicable in Transnational Disputes*, Oxford, Oxford University Press 2017, pp. 190-191 and 265-266). The facts described in paragraphs 4-63 of the instant judgment belong to this category (like many of the factual elements described in paragraphs 64-107).

On the other hand, the facts described in paragraphs 4-63 are essential for the purpose of assessing the complaint concerning the right to a tribunal established by law (see paragraphs 252-291). A more complete statement of facts would have provided useful guidance for the parties and would have helped the Court to establish a broader picture of the constitutional crisis in Poland. The non-inclusion in the statement of facts of the facts now described in paragraphs 4-63 of the judgment made it more difficult for both parties to plead the case.

3. I note that important questions connected with the election of judges to the Constitutional Court in 2015 have been examined by ordinary courts and administrative courts in several judgments (see for instance: Supreme Court, resolution of 17 March 2016, III CZP 102/15; judgment of 5 December 2019, III PO 7/18; Warsaw Administrative Court, judgment V SA/Wa 459/18, 20 June 2018; Supreme Administrative Court, judgment of 11 September 2018, I FSK 158/18). There are also decisions of the Constitutional Court dealing with the issue of recusal of judges elected in 2015 (see for instance: decision of 15 February 2017; K 2/15; decision of 19 April 2017, K 10/15). It would have been preferable to take into account these judgments and decisions in the description of the relevant factual circumstances and the legal analysis.

It is also necessary to underline that important legal issues concerning the election of constitutional judges in 2015 were addressed in several separate opinions of Constitutional Court judges, in particular: the separate opinion of Judge Pyziak-Szafnicka, appended to the judgment 23 February 2017,

K 2/15; the separate opinions of Judge Kieres, Judge Pyziak-Szafnicka and Judge Wronkowska-Jaśkiewicz, appended to the judgment of 16 March 2017, Kp. 1/17; the separate opinion of Judge Rymar appended to the judgment of 4 April 2017, P 56/14; the separate opinion of Judge Wronkowska-Jaśkiewicz, appended to the judgment of 20 April 2017, K 10/15; the separate opinions of Judge Tuleja and of Judge Wronkowska-Jaśkiewicz, appended to the decision of 20 April 2017, K 23/15; and the separate opinion of Judge Kieres, appended to the judgment of 24 October 2017, K 1/17. All these separate opinions make up an important element of the circumstances of the instant case.

I also note, in this context, that while one judgment of the Constitutional Court (judgment of 5 July 2017, SK 8/16) is presented with extensive summaries of separate opinions (paragraphs 101-106), this is not the case for other relevant judgments mentioned in the reasoning. This selective approach is difficult to explain (compare *Cichopek and Others v. Poland* (dec.), no. 15189/10, §§ 107-111, 14 May 2013).

II. RELEVANT DOMESTIC LAW

4. In the instant case, the content of domestic law plays an important role in the assessment of the national authorities' actions and omissions from the viewpoint of compliance with the Convention.

The 1997 Polish Constitution put in place a complex and refined system of judicial review of legislation, combining different types of procedures and involving numerous judicial bodies. Firstly, all courts perform a review of secondary legislation with an *inter partes* effect (Article 178 § 1 of the Constitution). Secondly, all courts and other public bodies can disapply national legislation conflicting with self-executing provisions of international treaties or with the EU law, with *inter partes* effect (Article 91 §§ 2 and 3 of the Constitution). Thirdly, administrative courts perform a review of local secondary legislation with *erga omnes* effect (Article 184 of the Constitution). Fourthly, the Constitutional Court performs a review of international treaties, primary legislation and secondary legislation enacted by central State organs, and its judgments have *erga omnes* effect (Articles 187 to 197 of the Constitution). The scope of the powers of the different bodies involved in constitutional review may partly overlap.

The review by the Constitutional Court may be initiated by certain public bodies, trade unions or professional organisations (abstract review), by referrals from courts examining individual cases and in connection with these cases (concrete review) or by way of a constitutional complaint in connection with an individual case decided by a final judicial or other decision (concrete review). In the Polish legal system, a constitutional complaint may be lodged only against general legal provisions, being the basis of an individual act, after exhaustion of ordinary remedies. Unlike –

for instance – in the Spanish, Croatian or German systems, it can never be lodged against individual acts. Whatever the manner of initiating proceedings before the Constitutional Court, their object as well as the effects of judgments are exactly the same: the Constitutional Court determines whether or not a legal rule is compatible with a superior legal rule. The proceedings before the Polish Constitutional Court – be they abstract or concrete – always deal with objective law issues (in French *contentieux objectif*), namely relations (inconsistencies) between legal rules; the Court does not determine whether individual (subjective) rights of specific persons have been infringed. There is no *contentieux subjectif* before the Polish Constitutional Court.

5. The reasoning of the instant judgment shows that the Court has not correctly established certain relevant aspects of the domestic law. Without intending to exhaust this issue, I would like to point briefly to a certain number of misunderstandings.

5.1. The judgment states the following in paragraph 173 (all emphasis throughout this opinion has been added):

> "There has accordingly been a violation of Article 6 § 1 of the Convention as regards the right to a fair hearing, on account of the reasons given by the courts for **the refusal to refer** a legal question to the Constitutional Court being insufficient."

In this and other parts of the reasoning (see in particular paragraphs 166 and 171), the Court seems to address the legal issues as if the request for a preliminary ruling by the Constitutional Court was the only avenue for the judicial review of secondary legislation, overlooking an important feature of the Polish legal system. Yet all Polish courts are empowered to perform judicial review of secondary legislation and to disapply secondary legislation which is in conflict with any superior legal rule (Constitution, international treaty or primary legislation). All the courts have two options: either to perform the review themselves (with *inter partes* effect) or to refer the issue to the Constitutional Court (which will render a judgment with *erga omnes* effect).

All Polish courts are also empowered to perform judicial review of primary legislation and to disapply secondary legislation which is in conflict with self-executing provisions of international treaties but – in principle – not with the Constitution. In a situation of conflict between primary legislation and self-executing provisions of an international treaty all the courts have two options: either to perform the review themselves (with *inter partes* effect) or to refer the issue to the Constitutional Court (which will render a judgment with *erga omnes* effect). In a situation of conflict between primary legislation and the Constitution they have – in principle – one option: to refer the issue to the Constitutional Court. However, under the Supreme Court's case-law, in some exceptional

circumstances, even ordinary courts may carry out constitutional review of primary legislation with *inter partes* effect (see for instance the Supreme Court resolution of 17 March 2016, III CZP 102/15).

I would note in this context that, in the instant case, the constitutional question raised by the applicant company was decided authoritatively at a total of four levels of domestic jurisdiction: by the Regional Court (paragraphs 75-83), by the Court of Appeal (paragraphs 86-88), by the Supreme Court (paragraphs 91) and by the Constitutional Court (paragraphs 98-107). The Regional Court, the Court of Appeal and the Supreme Court met the Article 6 criteria of an independent and impartial tribunal established by law but – at least the first two (see below point 9) – failed to provide adequate reasons for their judgments, whereas the Constitutional Court provided extensive reasons but failed to satisfy the criterion of a tribunal established by law.

5.2. The reasoning of the present judgment states the following:

> "It also observes that Article 79 of the Constitution, which regulates the right to a constitutional complaint, is located in the sub-chapter entitled 'Means of defending freedoms and rights' of Chapter II of the Constitution entitled 'The freedoms, rights and obligations of persons and citizens', which would suggest that it was intended to serve as a remedy against violations of constitutional rights and freedoms."

This argument is correct but the reasoning overlooks the fact that – even, under the Polish Constitutional Court's case-law, if a person lodging a constitutional complaint has to show that a contested provision touches upon his constitutional rights – the constitutional complaint proceedings, as shaped by the detailed constitutional provisions and ordinary legislation, are objective law proceedings (*contentieux objectif*).

In this context, the reasoning further states as follows in paragraph 208:

> "In the present case, had the Constitutional Court found that paragraph 5 of the Ordinance, which constituted the basis of the final decision in the case, infringed the applicant company's constitutional right of property ..."

The problem is that – under the Polish law – the Constitutional Court never makes such findings. It does not decide whether the impugned provisions infringed the applicant's constitutional rights but whether the contested provisions are compatible or not with constitutional provisions. The two questions are not identical.

5.3. The reasoning states the following (paragraph 199):

> "Article 190 § 4 of the Constitution grants a person who lodges a successful constitutional complaint the right to request that the procedure in his case be reopened or otherwise revised, 'in a manner and on the basis of principles specified in provisions applicable to the given proceedings'."

This is not accurate. The specificity of the Polish system is the extremely broad scope of *erga omnes* effects of the judgments of the Constitutional Court, much broader than in other European States (on this question see M. Florczak-Wątor: *Orzeczenia Trybunału Konstucyjnego i ich skutki prawne*, Poznań, Ars boni et aequi 2006, p. 200). Unless the Constitutional Court limits in some way the *erga omnes* effects of its judgment, everyone affected by the contested provisions is able to request that the competent court reopen the civil proceedings under Article 190 § 4 of the Constitution. It would therefore be more correct to say the following in paragraph 208:

> "In the present case, had the Constitutional Court found that paragraph 5 of the Ordinance, which constituted the basis of the final decision in the case, was **contrary to the constitutional provisions guaranteeing the constitutional right of property, not only** the company **but everyone affected by the contested provisions** would have been able to request that the competent court reopen the civil proceedings under Article 190 § 4 of the Constitution and Article 401^1 of the Code of Civil Procedure."

If the proceedings before the Constitutional Court were directly decisive for the civil right asserted by the applicant company, these proceedings were also directly decisive in the same way for the civil rights of all other persons affected by the contested provisions.

5.4. In this connection, it should be noted that the judgment overlooks an additional consequence of Constitutional Court judgments finding the unconstitutionality or illegality of legal provisions. All persons concerned may claim compensation for the damage caused by the unconstitutional legislation (Article 77 § 2 of the Constitution and Article 417^1 § 1 of the Civil Code). Had the applicant company been successful before the Constitutional Court, it could have tried to claim compensation for damage caused by unconstitutional provisions, although the actual prospects of success of such a claim would require a detailed analysis of all relevant circumstances in the light of the national courts' (cautious) case-law concerning lawsuits for damages caused by unconstitutional legislation.

5.5. The reasoning states the following (paragraph 260):

> "It [the Court] considers that in this specific context the Constitutional Court was the only judicial authority that could, within the limits of its jurisdiction, review the lawfulness of the election in question."

This statement is problematic. Firstly, the Constitutional Court could neither review the lawfulness of the act of election of constitutional judges as such, nor issue a ruling deciding it (see the Constitutional Court's decision of 7 January 2016, U 8/15, presented in paragraphs 39-41). It nonetheless had jurisdiction to decide on the recusal of judges as an ancillary issue in judicial review proceedings (see above, point 3). Moreover, it could and did express its views on the matter while examining the factual context of the different legislative provisions under review

(see in particular the judgments of: 3 December 2015, no. K 34/15; 9 December 2015, no. K 35/15; 11 August 2016, no. K 39/16 and the decision of 7 January 2016, no. U 8/15); these views were supported by strong legal arguments. Secondly, the lawfulness of the election in question was also examined by some other Polish courts (see for instance Warsaw Administrative Court, judgment V SA/Wa 459/18, 20 June 2018; and Supreme Court, judgment of 5 December 2019, III PO 7/18). The Court's finding may call these judgments into question.

5.6. The reasoning identifies in paragraph 277 the following rule as the fundamental procedural rule which was breached by the domestic authorities: "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". The gist of the problem lies, however, elsewhere (see in particular point 6.7 of the reasoning of the Constitutional Court judgment of 3 December 2015, K 34/15, and the separate opinions mentioned in point 18) and is more fundamental: in Polish law, there is no legal rule empowering the Sejm to invalidate an election of a constitutional judge (such an invalidation is therefore *ultra vires*).

5.7. The reasoning states the following (paragraph 282):

> "In the present case, the legislative and executive authorities failed to respect their duty to comply with the relevant judgments of the Constitutional Court, which determined the controversy relating to the election of judges of the Constitutional Court, and thus their actions were incompatible with the rule of law."

The reasoning enters the very complex issue of execution of Constitutional Court judgments, without sufficiently taking into account all the relevant domestic law. Without proposing a detailed analysis of these questions, it suffices to note here briefly that the scope of these judgments' binding force is limited to the issues decided in the operative part. At the same time, when a Constitutional Court judgment finds that a legal rule is not compatible with the Constitution, there is a constitutional obligation to take all necessary steps to restore the state of conformity with the Constitution (on these questions see M. Florczak-Wątor, op. cit., p. 84-88). The instant case is not so much a case of non-compliance with the relevant judgments of the Constitutional Court, as – much more importantly – one of non-compliance with the Constitution as such. It would be more correct to say:

> "In the present case, the legislative and executive authorities failed to respect their duty to comply with their constitutional and legislative obligations whose content was explained in the relevant judgments of the Constitutional Court, and thus their actions were incompatible with the rule of law."

5.8. The instant case illustrates the difficulties that the Court faces when trying to establish and understand relevant elements of the domestic legal system. Even if the misunderstandings and inaccuracies pointed out above have – fortunately – not impacted upon the outcome of the instant case, they have nevertheless affected both the way the Court characterised the nature of the violation of the right to a fair hearing (before the ordinary courts and the Supreme Court) and the way the Court addressed the complaint concerning the denial of the right to a tribunal established by law.

III. PRELIMINARY METHODOLOGICAL REMARKS

6. The instant case raises serious questions affecting the interpretation of the Convention. The Court has stated the directives of Convention interpretation, *inter alia*, in *Magyar Helsinki Bizottság v. Hungary* ([GC], no. 18030/11, §§ 118-125, 8 November 2016) and summarised them recently in *Slovenia v. Croatia* ((dec.) [GC], no. 54155/16, § 60, 18 November 2020). The above-mentioned judgment and decision contextualise the applicable interpretative rules, as codified in the Vienna Convention on the Law of Treaties, in respect of the Convention for the Protection of Human Rights and Fundamental Freedoms. The applicable rules of treaty interpretation should be the point of departure for addressing the interpretive issues arising in every "hard" case.

IV. THE RIGHT TO A FAIR HEARING BEFORE ORDINARY COURTS AND THE SUPREME COURT

7. The first aspect of the right to a tribunal with power to perform constitutional review of legislation concerns the reasoning of judgments dealing with constitutional issues. According to the Court's established case-law under Article 6, judgments of courts and tribunals should adequately state the reasons on which they are based. Compliance with this requirement must be determined in the light of the circumstances of the specific case.

In this context, it is necessary to highlight the following points, which are relevant for the assessment but have not been reported in the facts part of the judgment. The applicant company argued the constitutional question extensively in its statement of claim. Subsequently, on appeal, the applicant company restated the substance of the constitutional question very briefly (basically in one sentence). However, under the domestic law the civil court examining the appeal had an obligation to establish *ex proprio motu* the applicable substantive law, which means that it should have taken into account the relevant constitutional rules. The constitutional question was argued once again and more extensively in the cassation appeal.

8. As stated above, the reasoning identifies the nature of the violation in the following terms (paragraph 173): "on account of the reasons given by the courts for **the refusal to refer a legal question to the Constitutional Court** being insufficient."

The judgment focuses on the refusal to refer a legal question to the Constitutional Court. Under the approach adopted – in this and many other judgments – referral or non-referral for a preliminary ruling becomes more important than the substantive constitutional issue to which the referral may pertain (see also paragraphs 166 and 171).

Given the features of the domestic system of judicial review, as presented above (see point 5.1), the domestic courts could have decided the question of constitutionality of the ordinance themselves and could have refused to apply it, without any referral to the Constitutional Court. In this context, the Court's approach misses the gist of the instant case. It is not the referral or non-referral which should matter most, but rather the substantive constitutional question. It is not the reasons given by the courts for the refusal to refer a legal question to the Constitutional Court which are problematic, but the reasons given by the courts on the substantive constitutional question.

If it is the refusal to refer a legal question to the Constitutional Court which has to be duly reasoned, then the underlying implicit assumption on which the reasoning is based is that the ordinary courts should refer questions of constitutionality of secondary legislation to the Constitutional Court rather than decide the issue themselves. Under the approach adopted, had the domestic courts decided not to apply the impugned provisions of secondary legislation while examining the applicant company's case, giving due reasons for this decision, they still could have been reproached for not duly providing reasoning for the decision not to refer the case to the Constitutional Court.

9. I would note that the Court (see *Baydar v. the Netherlands*, no. 55385/14, § 46, 24 April 2018) adopted the following stance concerning reasoning in respect of cassation appeals (appeals on points of law):

> "46. The Court recalls that it has previously held that it is acceptable under Article 6 § 1 of the Convention for national superior courts to dismiss a complaint by mere reference to the relevant legal provisions governing such complaints if the matter raises no fundamentally important legal issue (see *John*, cited above). **It has also considered that it is likewise not contrary to that provision for these courts to dismiss an appeal on points of law as having no prospect of success, without further explanation** (see *Wnuk v. Poland* (dec.), no. 38308/05, 1 September 2009, and *Gorou v. Greece (no. 2)* [GC], no. 12686/03, § 41, 20 March 2009). This principle was reiterated by the Court in *Talmane v. Latvia* (no. 47938/07, § 29, 13 October 2016 with further references). It must, also in this context, ascertain that decisions of national courts are not flawed by arbitrariness or otherwise manifestly unreasonable, this being the limit of the Court's competence in assessing whether domestic law has been correctly interpreted and applied (see *Talmane*, cited above, § 31)."

Moreover, the Court itself, sitting in a single judge formation, dismisses applications without reasoning and – even in judgments – often fails to address important arguments put forward by the parties.

Under these circumstances, the violation of the Convention stems from the lower courts' judgments. The Supreme Court should not be blamed for the reasoning of the dismissal of the cassation appeal in the instant case, even though its decision did not cure the flaws of the lower courts' judgments. In this context, the nature of the violation of the right to a fair hearing should rather have been presented as follows:

> "There has accordingly been a violation of Article 6 § 1 of the Convention as regards the right to a fair hearing, on account of the reasons – given by the Regional Court and the Court of Appeal on the constitutional question raised by the applicant company – being insufficient."

10. The reasoning of the present judgment refers to the case-law concerning the referral of legal issues by one court for a preliminary ruling by another court. I note in this context that in some similar cases the Court has declared manifestly ill-founded applications complaining of a lack of sufficient reasoning in respect of the refusal to refer a constitutional issue to a constitutional court for a preliminary ruling (see *Sheidl v. Ukraine* (dec.), no. 3460/03, 25 March 2008; *Lisichenko v. Ukraine* (dec.), no. 5598/03, 23 August 2011; *Kislyak v. Ukraine* (dec.), no. 44977/09, 11 December 2012; A*car and Others v. Turkey* (dec.), no. 26878/07 and 32446/07, 12 December 2017; see also the finding of no violation in the case of *Kristiana Ltd. v. Lithuania*, no. 36184/13, 6 February 2018).

In my view, this case-law points to a conclusion of no violation of Article 6 on account of a lack of sufficient reasoning in the instant case. It was therefore necessary to revisit the whole question of reasoning standards under Article 6 on issues of constitutionality of legislation raised by litigants in civil litigation at the domestic level and to state and apply stricter reasoning standards than those developed for the mere assessment of reasoning on the question of referral of a legal issue for a preliminary ruling by another court.

V. THE RIGHT TO A TRIBUNAL ESTABLISHED BY LAW

11. The second aspect of the right to a tribunal with power to perform constitutional review of legislation concerns the determination of the relevant claims by a tribunal established by law.

A. The Court's case-law

12. The Court usually refers to its own judgments and decisions addressing substantive law issues. The examination of this aspect of the

case, the most difficult one, should begin with the identification and analysis of the relevant case-law.

13. In my view, it is necessary to note here the case-law concerning three general questions connected with the right protected by Article 6.

13.1. The Court has expressed the following view on access to a tribunal (*Golder v. the United Kingdom,* 21 February 1975, §§ 35-36, Series A no. 18):

> "35. ... Were Article 6 para. 1 to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. ...
>
> It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.
>
> 36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1."

Under this approach, the scope of application of the right to a fair trial and the scope of application of the right of access to a court are coextensive. Moreover, access to a court is not divisible and should cover all the elements of a lawsuit, as relevant under the domestic law. The logic of the judgment in the case of *Golder* (cited above) should be applicable, in particular, to proceedings aimed at determining the constitutionality of legal provisions applicable in a lawsuit: it would be inconceivable that Article 6 § 1 should describe in detail the procedural guarantees afforded to parties in proceedings aimed at determining the constitutionality of legal provisions, applicable in a lawsuit, and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court in respect of determining the constitutionality of legal provisions.

13.2. The determination of civil rights or a criminal charge by a tribunal may be delayed by non-judicial stages of the proceedings. For the purpose of assessing the length of proceedings under Article 6, non-judicial stages delaying the determination of civil rights or a criminal charge have to be taken into account, such as proceedings before administrative bodies (see for instance *König v. Germany*, 28 June 1978, §§ 97-98, Series A no. 27; *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, §§ 65-66, ECHR 2007-II) or proceedings conducted by prosecuting authorities (see for instance *Diamantides v. Greece*, no. 60821/00, § 20-21,

23 January 2004, and most recently, *Petrella v. Italy*, no. 24340/07, § 41, 18 March 2021). The application of Article 6 for the purpose of assessing the length of proceedings does not mean that all stages under consideration are or have to be judicial. Similarly, Article 6 requires that the execution of a civil judgment be carried out within a reasonable time, whereas this also involves a non-judicial stage of the civil proceedings. The fact that Article 6 has been declared applicable to proceedings before a constitutional court for the purpose of assessing the length of proceedings does not necessarily mean that these proceedings are judicial. The scope of applicability of Article 6 for the purpose of assessing the length of proceedings and the scope of applicability of this provision for the purpose of assessing the fairness of the proceedings do not coincide.

13.3. The constitutional complaint in Poland and many other legal systems is an extraordinary appeal seeking the reopening of terminated judicial proceedings. The Court has also expressed the following views – which I find problematic – on extraordinary appeals (*Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, ECHR 2015):

> "44. ... according to long-standing and established case-law, the Convention does not guarantee a right to have a terminated case reopened**. Extraordinary appeals seeking the reopening of terminated judicial proceedings do not normally involve the determination of 'civil rights and obligations' or of 'any criminal charge' and therefore Article 6 is deemed inapplicable to them** ... This is because, in so far as the matter is covered by the principle of *res judicata* of a final judgment in national proceedings, it cannot in principle be maintained that a subsequent extraordinary application or appeal seeking revision of that judgment gives rise to an arguable claim as to the existence of a right recognised under national law or that the outcome of the proceedings in which it is decided whether or not to reconsider the same case is decisive for the 'determination of ... civil rights or obligations or of any criminal charge' ...
>
> 45. **This approach has been followed also in cases where reopening of terminated domestic judicial proceedings has been sought on the ground of a finding by the Court of a violation of the Convention** ...
>
> 47. Moreover, Article 6 has also been found to be applicable in certain instances where the proceedings, although characterised as 'extraordinary' or 'exceptional' in domestic law, were deemed to be similar in nature and scope to ordinary appeal proceedings, the national characterisation of the proceedings not being regarded as decisive for the issue of applicability. ...
>
> 50. In sum, while Article 6 § 1 is not normally applicable to extraordinary appeals seeking the reopening of terminated judicial proceedings, the nature, scope and specific features of the proceedings on a given extraordinary appeal in the particular legal system concerned may be such as to bring the proceedings on that kind of appeal within the ambit of Article 6 § 1 and of the safeguards of a fair trial that it affords to litigants. The Court must accordingly examine the nature, scope and specific features of the exceptional appeal in issue in the instant case."

This view has been further confirmed in *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 60, 11 July 2017.

In the Polish legal system, the proceedings concerning the constitutional complaint do not appear *to be similar in nature and scope to ordinary appeal proceedings.* Moreover, if we accept that Article 6 does not apply to the reopening of the proceedings on the ground of a finding by the Court of a violation of the Convention, there are also strong reasons to consider that it does not apply to the reopening of the proceedings on the ground of a finding by a domestic court of a violation of the national Constitution.

14. There is a rich body of case-law addressing the issue of applicability of Article 6 to the constitutional review of legislation. The following points should be noted in this context.

14.1. Firstly, the European Commission on Human Rights expressed the following view (*Ruiz-Mateos and Others v. Spain*, application no. 14324/88, Commission decision of 19 April 1991, DR 69, p. 227):

> "The Commission notes that the applicants' complaint essentially concerns the fact that they are unable to contest the provisions of Article 5 of Law No. 7/1983 before the ordinary Spanish courts. But in Spain, as in a number of other member States of the Council of Europe, **private individuals have no right to petition the courts seeking redress in respect of grievances arising from laws**, in the formal sense of the term, i.e provisions emanating from the legislative authority. Moreover, and above all, **enactment of a legislative measure by the parliament of a High Contracting Party does not constitute a determination of civil rights and obligations within the meaning of Article 6 para. 1 of the Convention** (No. 8531/79, Dec. 10.3.81, D.R 23 pp 203, 208). It follows that this provision cannot guarantee the applicants the right to contest before the courts the validity of Law No. 7/1983 enacted by the Cortes."

The decision in the case of *Gorizdra v. Moldova* (no. 53180/99, 2 July 2002) restates this principle in the following terms:

> "The Court recalls that Article 6 of the Convention does not guarantee a right of access to a court with competence to invalidate or override a law (see *Ruiz-Mateos and Others v. Spain*, application no. 14324/88, Commission's report of 14 September 1991, DR 69 p. 227)."

The same view has been repeated in numerous Court decisions and judgments: *Aschan and Others v. Finland* (dec.), no. 37858/97, 15 February 2001; *Nelson v. the United Kingdom* (dec.), nos. 61878/00 and 49 others, 10 September 2002; *Des Fours Walderode v. the Czech Republic* (dec.), no. 40057/98, 4 March 2003; *M.A. and Others v. Finland* (dec.), no. 27793/95, 10 June 2003; *Alatulkkila and Others v. Finland*, no. 33538/96, § 50, 28 July 2005; *Pronina v. Ukraine*, no. 63566/00, 18 July 2006; *Furdik v. Slovakia* (dec.), no. 42994/05, 2 December 2008; *Allianz-Slovenska Poistovna, A.S. and Others v. Slovakia* (dec.), no. 19276/05, 9 November 2010; *Interdnestrcom v. Moldova* (dec.),

no. 48814/06, § 26, 13 March 2012; *Kristiana Ltd. v. Lithuania,* cited above; *Alminovich v. Russia* (dec.), no. 24192/05, § 24, 22 October 2019.

This has also been the constant approach in cases against Poland decided by the Commission (*Walicki v. Poland* (dec.), no. 28240/95, 16 October 1996; *Wardziak v. Poland*, 28617/95, 16 October 1996; *Tkaczyk v. Poland*. 28999/95, 16 October 1996; *Kwaskiewicz, Lesniewski, Sutarzewicz and Gorczak v. Poland,* nos. 27702/95, 28237/95, 28355/95, 16 October 1996), and by the Court (*Szyszkiewicz v. Poland,* (dec.), no. 33576/96, 9 December 1999, and *Biziuk and Biziuk v. Poland* (dec.), no. 12413/03, 12 December 2006).

It should be stressed that this view has been expressed, among others, in the context of legal systems which provide certain forms of access to the Constitutional Court for the purpose of a constitutionality review of legislation. Under this approach, even if an individual has an arguable claim based upon constitutional provisions to invalidate or override legislative provisions pertaining to civil rights and even if certain forms of access to a constitutional court are provided for this purpose, this access cannot be a right protected by Article 6.

14.2. Secondly, under the Court's case-law, Article 6 applies if a person contests before a constitutional court judgments or decisions pertaining to individual cases (see for instance: *Süßmann v. Germany*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV; *Kraska v. Switzerland*, 19 April 1993, Series A no. 254-B; *Pauger v. Austria*, 28 May 1997, *Reports of Judgments and Decisions* 1997-III; and *Gast and Popp v. Germany*, no. 29357/95, ECHR 2000-II). This is logical, because under Article 6 a judicial decision can only be quashed by a judicial body.

At the same time, a constitutional court empowered to examine individual complaints does not necessarily satisfy the criteria of Article 6, as the Court found in *Zumtobel v. Austria* (21 September 1993, § 30, Series A no. 268-A):

> "In this instance it [the Constitutional Court] could inquire into the contested proceedings only from the point of view of their conformity with the Constitution, which, on the Government's own admission, did not make it possible for it to examine all the relevant facts. **The Constitutional Court did not therefore have the power required under Article 6 para. 1**."

14.3. Thirdly, some case-law has been developed concerning concrete constitutional review of legislation. In *Ruiz-Mateos* (cited above), the Court expressed the following views in this respect:

> "57. The Court is not called upon to give an abstract ruling on the applicability of Article 6 para. 1 to constitutional courts in general or to the constitutional courts of Germany and Portugal or even of Spain. It must, however, determine whether any rights guaranteed to the applicants under that provision were affected in the present case.

58. The applicants conceded that constitutional proceedings did not in general deal with disputes over civil rights and obligations. However, they stressed the special features of Law no. 7/1983 on the expropriation of RUMASA S.A., of which they were the shareholders. **Despite its status as a formal law, it was a concrete and specific measure aimed at a group of companies listed in its annex** (see paragraph 10 above). The applicants emphasised that they could not contest the expropriation in the civil courts unless the law was declared invalid; yet such a ruling could only be made by the Constitutional Court, following referral of the matter to it by Madrid Court no. 18 or the *Audiencia provincial*.

59. The Court observes that there was indeed a close link between the subject-matter of the two types of proceedings. The annulment, by the Constitutional Court, of the contested provisions would have led the civil courts to allow the claims of the Ruiz-Mateos family (see paragraphs 15-16, 20, 22-24, 27 and 37 above). In the present case, the civil and the constitutional proceedings even appeared so interrelated that to deal with them separately would be artificial and would considerably weaken the protection afforded in respect of the applicants' rights. The Court notes that by raising questions of constitutionality, **the applicants were using the sole - and indirect - means available to them of complaining of an interference with their right of property: an *amparo* appeal does not lie in connection with Article 33 of the Spanish Constitution** (see paragraph 26 above).

60. Accordingly, Article 6 para. 1 applied to the contested proceedings."

Article 6 was declared applicable to the proceedings concerning the constitutionality of a concrete and specific measure aimed at a group of individually listed companies. This approach was confirmed in *Gorriaz Lizarraga and Others v. Spain* (no. 62543/00, ECHR 2004-III) which also concerned a peculiar piece of legislation, applying to a finite number of factual situations.

14.4. Fourthly, the Court has declared Article 6 applicable in cases concerning the length of proceedings before a constitutional court, initiated by a request for a preliminary ruling (see *Pammel v. Germany*, 1 July 1997, § 57, *Reports of Judgments and Decisions* 1997-IV), stating the following:

"In the present case the proceedings in the Federal Constitutional Court were therefore closely linked to those in the civil courts; not only was the former's decision directly decisive for the applicant's civil right, but in addition, as the proceedings arose from an application for a preliminary ruling, the Hamm Court of Appeal was obliged to wait for the Federal Constitutional Court's decision before it could give judgment."

In the same vein, see *Probstmeier v. Germany* (1 July 1997, § 52, *Reports of Judgments and Decisions* 1997-IV) and *Padalevicius v. Lithuania* (no. 12278/03, § 47, 7 July 2009).

While the Constitutional Court's decisions were considered directly decisive for the applicant's civil rights, these cases concerned the overall length of proceedings in which the civil rights were to be determined.

14.5. Fifthly, concerning the issue whether Article 6 applies to a constitutionality review of legislation, the European Commission of Human Rights and later the Court have given a negative answer in numerous cases.

14.5.1. The European Commission of Human Rights stated the following in *Austrian Communes (1) and Some of Their Councillors v. Austria* ((dec.) 31 May 1974, no. 767/72):

> "2. [Law Part] The applicants further complain that their right to a fair hearing under Article 6 of the Convention was violated by the Constitutional Court. However, the proceedings before that Court **concerned the determination of constitutional and not civil rights and thus fall outside the scope of Article 6**. It follows that this complaint is equally incompatible *ratione materiae* with the provisions of the Convention."

14.5.2. In *Bakarić v. Croatia* ((dec.), no. 48077/99, ECHR 2001-IX), the Court expressed the following view:

> "In these proceedings the Constitutional Court could not, however, examine the lower bodies' decisions which reduced the applicant's military pension, but was **only asked to give its ruling in the abstract on the constitutionality of the contested laws.**
>
> **Therefore, these proceedings were not decisive for the determination of the applicant's civil rights** and, accordingly, Article 6 of the Convention does not apply thereto."

This view has been restated several times (see *Labus v. Croatia* (dec.), no. 50965/99, 18 October 2001; *Kisic v. Croatia* (dec.), no. 50912/99, 18 October 2001; *Acimovic v. Croatia* (dec.), no. 48776/99, 18 October 2001; and *Andelkovic v. Croatia* (dec.), no. 48773/99, 18 October 2001). It pertains to proceedings which could have led to the application of the following provision of domestic law, quoted therein: "Each person whose rights have been violated by a decision based on the legislation declared unconstitutional or unlawful may ask the body that took the decision to vary it ..." (section 23(2) of the 1991 Constitutional Act on the Constitutional Court, as worded at that time, bearing similarities with Article 190 § 4 of the Polish Constitution, referred to in paragraphs 108, 199 and 208; replaced later by section 58 of the 1999 Constitutional Act on the Constitutional Court).

14.5.3. A similar approach was adopted in *Novotka v. Slovakia* ((dec.), no. 47244/99, 4 November 2003):

> "a) To the extent that the applicant complained about the proceedings before the Constitutional Court [initiated by an individual petition based upon Article 130 of the Constitution], the Government contended that Article 6 § 1 of the Convention was not applicable as those proceedings concerned the determination neither of the applicant's civil rights and obligations nor of a criminal charge against him.

> The applicant disagreed and alleged that the proceedings before the Constitutional Court had been unfair.
>
> The Court notes that the proceedings complained of did not concern the determination of any criminal charge against the applicant. Even assuming that the proceedings concerned the applicant's civil rights or obligations within the meaning of Article 6 § 1, **their outcome was not directly decisive for their determination as at the relevant time the Constitutional Court lacked jurisdiction to take any action with a view to remedying the violation found** (see also *Süssmann v. Germany*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, §§ 41-44). Article 6 § 1 is therefore not applicable."

As explained by the Court in this decision, "[i]n the Constitutional Court's view, it was therefore **for the authority concerned to provide redress** to the person whose rights were violated".

14.5.4. The most recent authority on the applicability of Article 6 to constitutional review proceedings is *Ponomaryov and Others v. Bulgaria* ((dec.), no. 5335/05, 18 September 2007):

> "In respect of their complaint about the fairness of the proceedings against Tariff no. 4 the applicants relied on Article 6 § 1 of the Convention, which provides, as relevant:
>
> 'In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...'
>
> The Court notes that in these proceedings the applicants directly challenged the provisions of a piece of subordinate legislation. **However, as Article 6 of the Convention does not guarantee a right of access to a court with competence to invalidate or override a law** (see *Ruiz-Mateos and Others v. Spain*, no. 14324/88, Commission decision of 19 April 1991, Decisions and Reports 69, p. 227; and *Szyszkiewicz v. Poland* (dec.), no. 33576/96, 9 December 1999), **by a similar token it does not apply to proceedings in which litigants seek to invalidate primary or secondary legislation, because they are not directly decisive for their civil rights and obligations.**
>
> It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4."

14.6. At the same time, the Court has declared Article 6 applicable to proceedings before the German Federal Constitutional Court, initiated by a constitutional complaint, even if their sole object was the constitutionality of legislation (*Hesse-Anger and Anger v. Germany* (dec.), no. 45835/99, ECHR 2001-VI (extracts), a case concerning solely the length of proceedings; *Wendenburg and Others v. Germany* (dec.), no. 71630/01, 6 February 2003, concerning the right to a fair trial, with a cautious approach: "These proceedings **could therefore be regarded** as 'decisive for civil rights and obligations' of the applicants for the purposes of Article 6 § 1 ..."; and *Voggenreiter v. Germany*, no. 47169/99, ECHR 2004-I (extracts), another case concerning solely the length of proceedings). Interestingly, the Court deliberately left the same issue undecided

(as controversial) in respect of Latvia (*Meimanis v. Latvia*, no. 70597/11, § 44, 21 July 2015) and Russia (*Roshka v. Russia* (dec.), no. 63343/00, 6 November 2003).

It should also be noted that the case of *Süssmann* (cited above) is not relevant here, because the applicant contested both the decision of the Arbitration Appeals Tribunal of 10 March 1989 and its legal basis and the two issues were examined together by the Federal Constitutional Court, which was focusing on the subjective rights of the applicant not on objective questions.

One has to note, in this context, the following specificities of the German system of constitutional review.

(i) Proceedings initiated by a constitutional complaint pertain mainly to individual acts, sometimes to both an individual act and the legislation as its basis, exceptionally to legislation alone. The Court did not want to restrict the applicability of Article 6 to constitutional proceedings which dealt mainly with individual acts.

(ii) In Germany, a litigant may contest legislation directly by way of constitutional complaint if it *directly*, personally, and actually affects him in his fundamental (subjective) rights (*Voggenreiter*, cited above, § 36):

> "in accordance with Article 93 § 1, paragraph 4 (a) of the Basic Law ..., a constitutional appeal can only be lodged where the party concerned considers that the public authorities **have infringed one of his or her fundamental rights**."

(iii) The proceedings always have a strong subjective dimension. The Federal Constitutional Court determines whether the (subjective) fundamental rights of an applicant have been infringed (ibid.):

> "the Federal Constitutional Court held that the appeal was neither manifestly inadmissible nor manifestly ill-founded on the merits and that it raised serious issues regarding the scope and extent of freedom of occupation where measures taken by the State which **did not amount to a 'classic' interference with the exercise of that right were concerned**."

(iv) Proceedings initiated by a constitutional complaint may lead to effective remedial measures pertaining to the individual situation of the applicant (ibid., § 42):

> "It can hardly be claimed that had the Federal Constitutional Court given a decision within a reasonable time allowing the applicant's appeal, it would not have had any **means at its disposal to improve her position.** It does not immediately appear to be beyond the bounds of possibility that it might have ordered the legislature to insert into the Act in question a provision for compensation in some cases or for a transitional period. Moreover, the Federal Constitutional Court could have ordered interim measures."

14.7. The Court's case-law presented above may be summarised in the following terms.

(i) The Convention does not require States to guarantee the right of access to a court (nor to any other non-judicial body) with competence to

invalidate or override a law, even if a form of such access is provided for in domestic law.

(ii) Article 6 is applicable to proceedings before constitutional courts, if these proceedings pertain to an individual case or an individual legal act, especially if the constitutional court is empowered in these proceedings to quash an individual judicial decision.

(iii) Article 6 has been declared – in some cases – applicable to proceedings before a constitutional court, following a request for a preliminary ruling in proceedings:

(a) concerning legislation pertaining to a finite set of individual situations; or

(b) before constitutional courts in cases concerning the length of proceedings; the Court has stated in this context that not only was the constitutional court's decision directly decisive for the applicant's civil right, but in addition the ordinary court was obliged to wait for that court's decision before it could give judgment.

(iv) Article 6 – in other cases – has explicitly been declared inapplicable to proceedings in which litigants seek to invalidate primary or secondary legislation, because they are not directly decisive for their civil rights and obligations (even if such proceedings exist in the domestic legal system and even if there is a possibility of reopening civil proceedings after a finding of a violation of the Constitution).

(v) Article 6 has been considered applicable to some proceedings in which litigants seek to invalidate primary or secondary legislation directly affecting their subjective rights, if the competent body (the constitutional court) has the duty to determine whether subjective rights of the applicants have been infringed and if this body has the power to take effective remedial measures pertaining to the applicant's individual situation.

In conclusion, the Court's case-law on the applicability of Article 6 does not give any clear answer to this question. It is contradictory and it seems impossible to put it into a coherent system. In any event, the exclusion of the applicability of Article 6 to constitutional review of legislation seems to be the rule, whereas judgments and decisions declaring Article 6 applicable to constitutional review of legislation appear rather to be an exception, justified by certain specific grounds.

B. The reasoning of the Court

15. The reasoning in the instant case is problematic for several reasons.

15.1. As the case raises serious issues of interpretation, the point of departure should have been the relevant rules of treaty interpretation. Yet the applicable rules of treaty interpretation were completely ignored.

It is not clear why in some cases raising serious interpretive questions the Court refers to these rules, while in most other such cases it does not.

15.2. In a case such as the present one, on which there is a very rich body of Strasbourg case-law, it is necessary to duly take it into account and to present it in the most faithful way. The case-law concerning the applicability of Article 6 is chaotic and fragmented. There is therefore an urgent need to develop a comprehensive and coherent interpretation of this Article encompassing various detailed issues which emerge in the context of this provision. Yet no attempt to clarify the case-law, or to remove any contradictions, has been made. The Court has sought to avoid inserting the question of applicability of Article 6 to judicial review of legislation into a more comprehensive and coherent interpretation of Article 6.

Instead of such an approach, the Court decided to copy and paste in paragraphs 187-190 the general principles from the judgment in the case of *Voggenreiter* (cited above), with only a few minor additions concerning case-law references. It remained silent as to any adverse precedent. This manner of reasoning is an easy target for critics. Cherry-picking in the case-law as a method of reasoning only enhances the risk of further and more acute contradictions in the case-law, because in subsequent cases concerning similar issues the Court may cherry-pick other cases and reach the opposite conclusion.

15.3. The Court declared the proceedings before the Constitutional Court "directly decisive" for the civil right asserted by the applicant company (paragraph 209), contradicting the views expressed in numerous other cases, such as *Bakarić*, *Novotka* and *Ponomaryov and Others* (all cited above), without explaining why it rejected the views expressed therein.

15.4. The Court relies mainly on the case of *Voggenreiter* (cited above). The problem with such an approach is that the proceedings before the Polish Constitutional Court do not meet the criteria set forth in *Voggenreiter*. In particular, the Polish Constitutional Court does not determine whether the individual rights of the applicant have been infringed and does not have any power to take remedial measures.

15.5. The case raises the question whether the approach adopted is compatible with the assertion that the Convention does not require States to guarantee the right of access to a court with competence to invalidate or override a law. If this last assertion were true, then logically Article 6 would not apply to proceedings in which litigants seek to invalidate primary or secondary legislation (as underlined in *Ponomaryov and Others*, cited above) and no issue of procedural fairness should emerge in connection with such proceedings (see *Golder*, cited above). The instant judgment tries

to avoid taking an explicit stance on these questions. For the reasons explained below, the approach adopted in the instant case is impossible to reconcile with the general view that the Convention does not require States to guarantee the right of access to a court with competence to invalidate or override a law. It would have been preferable to address this issue explicitly.

15.6. I further note that the approach adopted in the instant case is in contradiction with the criteria of applicability of Article 6 to extraordinary remedies developed in the Court's case-law (see *Bochan (no. 2)* and *Morreira Ferreira*, both cited above). There is a need to revisit the case-law on extraordinary remedies in order to take into account the specificities of remedies such as the constitutional complaint in the Polish legal system.

15.7. The key question in the instant case is the following: does the determination of the civil rights encompass the determination of the constitutionality of the applicable legal provisions defining the scope of these rights.

The reasoning concerning the applicability of Article 6 is structured around the following test (paragraph 191):

> "The Court reiterates that according to its well-established case-law on this issue, the relevant test in determining whether proceedings come within the scope of Article 6 § 1 of the Convention, even if they are conducted before a constitutional court, is whether their outcome is decisive for the determination of the applicant's civil rights and obligations (see *Süßmann*, ibid., § 41; *Pammel*, cited above, § 53; and *Voggenreiter*, cited above, §§ 42-43)."

In other words, the Court has sought to answer the question whether the outcome of the proceedings in respect of the constitutional complaint lodged by the applicant was decisive for the determination of its civil rights and obligations. In my view (see below, point 16) the Court should look first and foremost at the applicant company's claims and decide *whether the applicant company's claims to have unconstitutional legal provisions overridden or invalidated (i) are arguable and (ii) are a constitutive element of claims concerning its civil rights and obligations and only then (iii) whether the Constitutional Court took part in the determination of these claims.*

The relevant test formulated in the reasoning was not applied fully or consistently. Firstly, the Court seems somewhat hesitant as to whether the test should be "decisive" or "directly decisive" (as stated in paragraphs 187 and 209).

Secondly, and more importantly, in paragraph 282, relying on its own case-law (*Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999 VII*,* and *Agrokompleks v. Ukraine*, no. 23465/03, § 144, 6 October 2011), developed under Article 6 and limited to Article 6, the Court restated the principle that *when the courts have finally determined an issue, their ruling*

should not be called into question. In the instant case, this principle was applied to Constitutional Court judgments which do not concern civil rights and which do not fall within the scope of Article 6. The test relying upon the "decisive result for civil rights" is therefore implicitly set aside in paragraph 282. Instead of invoking the case-law under Article 6, this part of the reasoning should have relied on the universally recognised general principle of the rule of law.

Moreover, in my view, the principle that *when the courts have finally determined an issue, their ruling should not be called into question* seems too broad and too categorical. The very purpose of the constitutional complaint lodged by the applicant company in the instant case was precisely to call into question an issue finally determined by a ruling of a national court. Similarly, litigants lodge applications before this Court in order to call into question issues finally determined by a ruling of a national court. It would be more correct to say that *when the courts issue a final judgment, the legal consequences of this judgment – as defined in domestic law – should not be called into question by any public body.*

15.8. The application of the above-mentioned test is spoiled by the following element:

> "According to the Court's settled case-law, a 'tribunal' is characterised in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of legal rules and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements, such as 'independence, in particular of the executive; impartiality; duration of its members' terms of office' (see, for example, *Belilos v. Switzerland*, 29 April 1988, § 64, Series A no. 132). **The Court has no doubt that the Constitutional Court should be regarded as a 'tribunal' within the autonomous meaning of Article 6 § 1."**

This very strong and categorical statement triggers several remarks. Firstly, it is a scholarly example of *petitio principii*. Whether the Constitutional Court satisfies Article 6 requirements requires proof, criterion by criterion. Secondly, the statement – which is a response to the Government's argument – is irrelevant for the issue of applicability of Article 6. Under the methodology adopted by the Court, the question to be answered, namely whether the proceedings before the Constitutional Court are directly decisive for civil rights, does not depend on the answer to the question whether the Constitutional Court should be regarded as a "tribunal" within the meaning of Article 6. Had it not been a "tribunal" in this sense, the proceedings would have been decisive or undecisive for civil rights in exactly the same way. Thirdly, the very statement is disputed in domestic public debate and contradicted later by the Court itself, in particular in paragraphs 273, 287 and 290, because the Constitutional Court's composition in general and – often – the specific bench dealing with particular cases do not fulfil the criteria of a tribunal established by law.

15.9. Some detailed arguments used in the reasoning are also questionable.

Paragraph 206 points to the contradiction between the Constitutional Court's decision accepting the constitutional complaint for examination on the merits and the subsequent decision to discontinue the proceedings. The question arises as to why these facts are relevant if – as rightly noted in the same paragraph – a panel examining the merits of a constitutional complaint can reject it for failure to satisfy the admissibility conditions.

In paragraph 272 it is argued that the judgment of 24 October 2017 disregards or contradicts earlier judgments (of 3 December 2015 and of 11 August 2016). What matters is not the chronology but only the strength of argument: the fact that the judgment of 24 October 2017 contradicts earlier judgments is of little relevance, the most important thing is that it is based on weak arguments, whereas the judgments of 3 December 2015 and of 11 August 2016 are based on strong legal arguments.

Paragraphs 276-287 are placed under the heading: "Whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges". The legal rules which were breached are labelled as "fundamental", but this view is not supported by any explanation concerning their nature and meaning for the validity of appointments.

15.10. In paragraph 277, the *per curiam* opinion expresses the following view:

> "The Court further finds that the question of the authorities' failure to abide by the relevant Constitutional Court judgments is also linked with their challenging the role of the Constitutional Court as the **ultimate arbiter in cases involving the interpretation of the Constitution and the constitutionality of the law.** The Venice Commission commented on this point and stated, *inter alia*, 'the Parliament and Government continue to challenge the Tribunal's position as the **final arbiter of constitutional issues** and attribute this authority to themselves' (see the Opinion adopted on 14-15 October 2016, paragraph 121 above)."

The view that a constitutional court should be the ultimate arbiter in cases involving the interpretation of the Constitution is problematic. A democratic society is "an open society of Constitution interpreters" (P. Häberle, "Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und „prozessualen" Verfassungsinterpretation", *Juristenzeitung*, Vol. 30 (1975), No 10, pp. 297-305). Legal scholarship often explains that the last word – as the ultimate arbiter of constitutional issues goes to *le pouvoir constituant*, which belongs to the people, usually represented by Parliament, which sometimes shares its constitution-making powers with citizens participating directly in the process by way of referendum. In a constitutional democracy, *le pouvoir constituant* can overrule a constitutional court by way of constitutional revision.

C. The meaning of Article 6

16. The point of departure for the interpretation of Article 6 § 1, first sentence, should be its letter:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The wording of that sentence supports the following interpretation: everyone seeking the determination of his civil rights is entitled to obtain such a determination: (i) by an independent and impartial tribunal established by law; (ii) in fair proceedings; and (iii) within a reasonable time.

The right to obtain the determination of civil rights presupposes the right to initiate appropriate proceedings before an independent and impartial tribunal established by law. Moreover, any determination of civil rights can only be performed: (i) by an independent and impartial tribunal established by law and (ii) in fair proceedings with a public hearing.

The Court's case-law reads the phrase "determination of his civil rights" in the following way (see *Baka v. Hungary* [GC], no. 20261/12, § 100, 23 June 2016):

> "The Court reiterates that for Article 6 § 1 in its 'civil' limb to be applicable, there must be a dispute ('*contestation*' in the French text) over a 'right' which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention."

Under this approach, it should not matter whether the dispute concerns a right recognised only in ordinary legislation or in the Constitution. All factual and legal elements of the dispute concerning a right, be it claims based upon ordinary legislation or claims based upon the Constitution, should be encompassed by the right protected under Article 6.

The wording of Article 6 § 1, first sentence therefore supports the following interpretation: *every time a litigant raises an arguable claim concerning his civil rights, even if this claim is based upon constitutional provisions conflicting with ordinary legislation defining the content of civil rights, he has the right to have his claim determined in a fair and public hearing, within a reasonable time, by an independent and impartial tribunal established by law.*

In other words, everyone seeking the determination of his civil rights, even if his claim is based upon constitutional provisions conflicting with ordinary legislation defining the content of civil rights, is entitled to obtain such a determination: (i) by an independent and impartial tribunal established by law (ii) in fair proceedings and (iii) within a reasonable time.

The right to a tribunal established by law, referred to in the reasoning and in the operative part of the judgment, is a right of **access** to a tribunal established by law. As explained in *Golder* (see above point 13.1), it would

be inconceivable that Article 6 § 1 should describe in detail the procedural guarantees afforded to parties in proceedings aimed at determining the constitutionality of legal provisions, applicable in a lawsuit, but should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court in respect of determining the constitutionality of legal provisions. All factual and legal elements of the dispute concerning a right, be it claims based upon ordinary legislation or claims based upon the Constitution, should be encompassed by the right protected under Article 6.

As a result, Article 6 of the Convention guarantees a right of access to a court with competence to invalidate or override a law every time a litigant raises an arguable claim to have unconstitutional provisions pertaining to his civil rights overridden or invalidated. This access may take the form, in particular, of a decision on the constitutional issue by the court competent to examine the individual case, of a referral of the constitutional question for a preliminary ruling to a constitutional court, or of a constitutional complaint. The refusal to refer a question to a constitutional court is not only a question of adequate reasoning but also and more importantly an issue of access to a court with jurisdiction to decide an essential element of an arguable claim.

In any event, to declare Article 6 applicable to judicial review of legislation, it is necessary to explicitly reject the case-law stating that: (i) the Convention does not require a guarantee of the right of access to a court with competence to invalidate or override a law; and (ii) Article 6 does not apply to proceedings in which litigants seek to invalidate primary or secondary legislation. It is also necessary to – at least – nuance or – even better – reject the entrenched view that (iii) extraordinary appeals seeking the reopening of terminated judicial proceedings do not normally involve the determination of "civil rights and obligations" or of "any criminal charge" and therefore Article 6 is deemed inapplicable to them.

D. The difficulties stemming from the application of Article 6 to judicial review of legislation

17. Declaring Article 6 applicable to judicial review of legislation, be it on the basis of argumentation developed in the judgment or on the basis of the argumentation outlined above, is not without difficulties and may trigger objections and concerns which should be treated with the utmost respect.

17.1. Firstly, one has to stress that the scope of application of Article 6 is limited to the determination of civil rights and obligations or of a criminal charge. Article 6 does not apply to the judicial review of legislation which does not pertain to civil rights or obligations or to criminal charges, within the autonomous meaning of this provision. Outside the domain of Article 6,

States can organise the judicial review of such legislation free from any constraints stemming from this provision. Had an applicant contested, for instance, the composition of the Constitutional Court's bench in a case concerning electoral rights, there would have been no issue under Article 6. This raises the question whether the interpretation according to which "Article 13 of the Convention does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention" (*Paksas v. Lithuania* [GC], no. 34932/04, § 114, ECHR 2011 (extracts)) is the correct one. There should be a coherent approach to the judicial review of legislation under both Article 6 and Article 13.

17.2. Secondly, the question arises whether the Convention excludes non-judicial review of legislation. Comparative constitutional law provides examples of mechanisms for the review of legislation which are non-judicial (see, among others, M. Tushnet, "Non-Judicial Review", *Harvard Journal on Legislation*, vol. 40(2), October 2003, and A. Hartel, A. Shinar, "Between judicial and legislative supremacy: A cautious defense of constrained judicial review", *International Journal of Constitutional Law* (2012), vol. 10 no. 4). It also provides examples of systems which mix judicial and non-judicial elements, with the last word belonging to political bodies. One can cite here a few examples of review systems with non-judicial elements: the 1946 French Constitution, Canada with the "notwithstanding clause", Poland from 1986 to 1997, the United Kingdom with the Human Rights Act. It may be argued that a system of non-judicial or semi-judicial review of legislation is always better than no review of legislation at all. Declaring Article 6 applicable to judicial review of legislation means that non-judicial or semi-judicial review of legislation is not sufficient in respect of claims concerning civil rights and obligations or in cases involving the determination of criminal charges.

17.3. Thirdly, a constitutional court is a "negative legislator". It has the power to abrogate legislation. Parliament also has the power to abrogate legislation, especially if it is unconstitutional. It happens – from time to time – that legislation contested before a constitutional court is changed or abrogated while the proceedings are pending. The constitutional courts usually discontinue the review proceedings in such a situation. Under the proposed approach, such legislative proceedings may be decisive for the civil rights asserted by the litigants. This raises the question of how to delineate the determination of civil rights by a parliament from the determination of civil rights by a court performing constitutional review of legislation. The main differences seem to be that (i) the determination of civil rights by a constitutional court is a result of a judgment deciding a legal dispute (concerning the constitutionality of legal provisions), and (ii)

such a judgment may (albeit not in all legal systems and not in respect of every person involved in constitutional litigation) pave the way for some individual remedial measures and may therefore have at least a limited retroactive effect.

17.4. Fourthly, given the specificities of constitutional courts, the applicability of Article 6 to judicial review of legislation considerably downgrades the guarantees of independence, impartiality and fair trial enshrined in Article 6 (see the Partly Concurring, Partly Dissenting Opinion of Judge Matscher, appended to the judgment in the case of *Ruiz-Mateos*, cited above).

17.5. Fifthly, if Article 6 is applicable to constitutional review with *erga omnes* effect, it means prima facie that in principle all persons directly concerned should be parties to the proceedings before the Constitutional Court (see Partly Dissenting Opinion of Judge Pettiti, approved by Judges Lopes Rocha and Ruiz-Jarabo Colomer, appended to the judgment in the case of *Ruiz-Mateos*, ibid.). In the instant case, as explained above, the proceedings were directly decisive for a large number of persons in a similar situation. All these persons, including the defendant in the civil proceedings initiated by the applicant company, were denied their right to a "tribunal established by law". The Court has already addressed the problem of representation of persons concerned and proposed the following solution in the case of *Wendenburg* (cited above; compare also *Roshka,* cited above):

> "... in proceedings involving a decision for a collective number of individuals, it is not always required or even possible that every individual concerned is heard before the court (see *Lithgow and Others v. the United Kingdom*, cited above, p. 71, § 196). In the present case, the legislative change resulting from the Federal Constitutional Court's decision affected the position of numerous lawyers. The Court considers that, given the practical implications, the Federal Constitutional Court had sufficiently fulfilled the requirements of Article 6 of the Convention by hearing associations defending the professional interests of lawyers on all matters including the transitional arrangements."

17.6. In concluding on this point, it is necessary to stress that the applicability of Article 6 to judicial review of legislation may entail, in some States, far-reaching adaptations of the existing system to the Convention standards.

E. The composition of the Constitutional Court's bench from the viewpoint of domestic law

18. As mentioned above, the gist of the constitutional problem was identified in point 6.7. of the reasoning of the Constitutional Court's judgment of 3 December 2015, K 34/15. The issue of the composition of the Constitutional Court's bench after 2015, from the viewpoint of domestic

law, has been further addressed in several separate opinions of Constitutional Court judges, in particular in: the separate opinion of Judge Wronkowska-Jaśkiewicz, appended to the judgment of 16 March 2017, Kp. 1/17; the separate opinion of Judge Rymar appended to the judgment of 4 April 2017, P 56/14; the separate opinion of Judge Wronkowska-Jaśkiewicz, appended to the judgment of 20 April 2017, K 10/15; the separate opinions of Judge Tuleja and of Judge Wronkowska-Jaśkiewicz, appended to the decision of 20 April 2017, K 23/15; the separate opinion of Judge Kieres, appended to the judgment of 24 October 2017, K 1/17. I agree with the views expressed therein on the issue of the validity of the election of judges to the Constitutional Court in 2015. As a result, the applicant company has been denied the right of access to a tribunal – with competence to invalidate or override a law – established by law.

VI. ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

19. The judgment states the following:

> "Having regard to the facts of the case, the submissions of the parties and its findings under Article 6 § 1 of the Convention, the Court considers that it has examined **the main legal questions** raised in the present application and that there is no need to give a separate ruling on the complaint under Article 1 of Protocol No. 1 (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, and the cases cited therein)."

It is difficult to agree with this approach. Article 1 of Protocol No. 1 guarantees a human right of fundamental importance. The Court has only examined the main legal questions raised in the present application under Article 6. There is no relation between the alleged violation of Article 1 of Protocol No. 1 and the violation of Article 6 complained of by the applicant. These are two distinct sets of issues. Claims raised under Article 1 of Protocol No. 1 are equally important for a company. The fact that they do not have the same general and political dimension is not a reason to refuse to entertain this part of the application.

The applicant raises a strongly arguable claim of a violation of Article 1 of Protocol No. 1. This claim is further supported by domestic case-law and especially the Supreme Court resolution of 19 May 2015 (no. III CZP 114/14), mentioned in paragraph 119. I do not see any valid reason not to examine the applicant's complaint. The Court should at least have given reasons for its ruling. It was also necessary to check, in particular, whether domestic law provides for a re-examination of the applicant company's case and possible redress.

The applicant's claims concerning protection of its possessions raised under the domestic Constitution have been dismissed without sufficient reasons. The analogous claim raised under Article 1 of Protocol No. 1 was

set aside in an even more summary manner by the Court. I regret that the applicant company's pleas relating to its fundamental right protected by Article 1 of Protocol No. 1 have not been examined with *particular rigour and care* (see the requirements set forth in *Fabris v. France*, no. 16574/08, § 71, 7 February 2013) neither by the domestic courts nor by this Court.

VII. CONCLUSION

20. To sum up: the reasoning in this case is unfortunately flawed by the somewhat fuzzy and approximate picture of the domestic law which interplays with the distorted presentation of the Court's case-law, carefully omitting all adverse precedent. The approach chosen by the Court in order to uphold the rule of law in the respondent State is suboptimal.

The instant case bears numerous similarities with the "midnight appointments case" of *Marbury v. Madison*, decided by the United States Supreme Court in 1803. There are also some differences. William Marbury, even though he eventually lost his case, had the privilege of obtaining one of the most important judgments in Western constitutional history. The present case brought by the applicant company would have deserved a judgment with the same power of argument, brio and magnitude as that of *Marbury v. Madison*.