



Election to Constitutional Court irregular, rendering bench unlawful

In today's Chamber judgment¹ in the case of [Xero Flor w Polsce sp. z o.o. v. Poland](#) (application no. 4907/18) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights as regards the right to a fair hearing, and

a violation Article 6 § 1 as regards the right to a tribunal established by law.

The case concerned attempts by the applicant company to get compensation from the State for damage to one of its products (turf) by game. In particular, it had sued in 2012 but had been awarded only 60% of what it had sought. It had been unable to get satisfaction through the domestic courts. Although it had asked on several occasions that the question of the constitutionality of the relevant law be referred to the Constitutional Court, it had been turned down by the first-instance and appellate courts. Ultimately it had lodged a constitutional complaint that the Constitutional Court had declared inadmissible in 2017. The bench that had heard that case had contained Judge M.M., who had been elected by the new *Sejm* despite his seat having already been filled by the old *Sejm*.

The Court found in particular that – despite the applicant company's repeated raising of the matter – the domestic courts had not answered its arguments that the law applied in its case had been incompatible with the Constitution and, consequently, had failed in their duty under Article 6 § 1 of the Convention to provide reasoned decisions, denying the applicant company a fair trial.

It furthermore adjudged that the actions of the authorities in appointing one of the judges who had been on the bench in the applicant company's case and the ignoring of the Constitutional Court's judgments in that connection had meant that the panel that had tried the case had not been a "tribunal established by law".

Principal facts

The applicant, Xero Flor w Polsce sp. z o.o., is a company based in Leszno Dolne (Poland). It is a leading producer of rolls of turf (*trawnik rolowany*).

It had been involved in litigation for a number of years over damage to its turf caused by wild boar and deer. In 2012 it sued the State Treasury for game damaging its turf in the autumn of 2010 and spring of 2011. In its claim it submitted that the reduced percentage rates for calculating compensation for crops, provided for in the Hunting Act and the 2010 Regulation of the Minister of the Environment, were only relevant for annual crops. It also argued that such a limitation on the level of compensation, which came via subordinate legislation, should not be applied to its case as it was unconstitutional.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

However, referring to a court-ordered expert report, the Regional Court found that turf was not a multiannual crop and, applying the 2010 Regulation to calculate the damage, only partly granted the applicant company's claim, awarding it about 60% of the amount sought.

The Court of Appeal upheld the lower court's findings and dismissed an appeal by the applicant company in 2014. The Supreme Court then refused to examine a cassation appeal by the applicant company in 2015. Throughout those proceedings the applicant company consistently, but unsuccessfully, requested that the courts refer legal questions on the constitutionality of the Hunting Act and the 2010 Regulation to the Constitutional Court.

It ultimately lodged a constitutional complaint, reiterating its objections to the constitutionality of the Act and the Regulation, but the Constitutional Court, by a majority of 3 to 2, decided in 2017 that the complaint was inadmissible.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to fair trial) of the European Convention on Human Rights, the applicant company complained of the courts' refusal to refer legal questions on the constitutionality of the Hunting Act and the 2010 Regulation to the Constitutional Court.

Also relying on Article 6 § 1, the applicant company also alleged that the bench of five judges of the Constitutional Court which had examined its case had been composed in violation of the Constitution. In particular, Judge M.M. had been elected by the *Sejm* (the lower house of the Parliament), despite that post having already been filled by another judge elected by the preceding *Sejm*.

Lastly, the applicant company alleged a breach of Article 1 of Protocol No. 1 (protection of property) to the Convention because it had not been able to obtain full compensation for the damage to its property.

The application was lodged with the European Court of Human Rights on 3 January 2018.

Judgment was given by a Chamber of seven judges, composed as follows:

Ksenija **Turković** (Croatia), *President*,
Krzysztof **Wojtyczek** (Poland),
Gilberto **Felici** (San Marino),
Erik **Wennerström** (Sweden),
Raffaele **Sabato** (Italy),
Lorraine **Schembri Orland** (Malta),
Ioannis **Ktistakis** (Greece),

and also Renata **Degener**, *Section Registrar*.

Decision of the Court

[Article 6 § 1](#)

Right to a fair hearing

The applicant company alleged that the reasoning of the ordinary courts had been insufficient and that questions around constitutionality of law should have been sent to the Constitutional Court.

The Court reiterated that detailed judgments were important, but that did not necessarily require an answer to every question. It acknowledged that there was no right to have a case referred to another national court for a preliminary ruling.

However, in the current case the Court determined that the domestic courts had not answered the applicant company's arguments that the law applied to its case, limiting the level of compensation due, had been incompatible with the Constitution, despite its having raised that issue several times. The domestic courts fell short of their duty under the Convention to provide reasoned decisions for their refusal to refer a pertinent legal question to the Constitutional Court, leading to a violation of the applicant company's right to a fair hearing.

Right to a tribunal established by law

The Court firstly decided that Article 6 § 1 was applicable to the proceedings before the Constitutional Court and rejected the Government's objection in that connection.

The applicant company argued that the election in December 2015 of three judges, including Judge M.M., to the Constitutional Court in an allegedly irregular procedure had infringed its right to a tribunal established by law.

The Court referred to its *Guðmundur Andri Ástráðsson v. Iceland* judgment, in which it clarified the scope of and meaning to be given to the concept of a "tribunal established by law". The Grand Chamber established a three-step test of whether particular appointments were violations of the Convention: was there a manifest breach of domestic law? Did the appointment allow the court to operate while preserving the rule of law and the separation of powers? What was the assessment of the national courts with regard to the appointment? Accordingly, the Court examined whether the judicial election procedure at issue had the effect of depriving the applicant company of its right to a "tribunal established by law" in the light of that three-step test.

The Court found that the President of Poland had refused to swear in three judges who had been legally elected in October 2015 by the old *Sejm*. It also found that the new *Sejm* had elected in December 2015 three new judges, including Judge M.M., to seats that had been already filled. The Court saw no reason to disagree with the Constitutional Court's findings that there had been irregularities amounting to manifest breaches of domestic law in the appointment of those judges. It found that the actions of the legislature and executive, in particular the authorities' failure to abide by the relevant Constitutional Court judgments, was linked to their challenging – with a view to usurping – the Constitutional Court's role as the ultimate interpreter of the Constitution and the constitutionality of the law.

It thus considered that the applicant company had been denied its right to a "tribunal established by law" owing to the irregularities in the appointment of Judge M.M. specifically.

There had therefore been a violation of the applicant company's rights in that regard.

[Other articles](#)

The Court decided that there was no need to give a separate ruling under Article 1 of Protocol No. 1.

[Just satisfaction \(Article 41\)](#)

The Court held that Poland was to pay the applicant company 3,418 euros (EUR) in respect of costs and expenses.

Separate opinion

Judge Wojtyczek expressed a partly concurring and partly dissenting opinion, which is annexed to the judgment.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.