



## Systemic dysfunction in judicial appointments procedure in Poland

The Civil Chamber of the Supreme Court consisting of newly appointed judges is not an “independent and impartial tribunal established by law”

In today’s Chamber judgment<sup>1</sup> in the case of [Advance Pharma sp. z o.o v. Poland](#) (application no. 1469/20) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights.**

The case concerned a complaint brought by the applicant company that the Civil Chamber of the Supreme Court, which had decided on a case concerning it, had not been a “tribunal established by law” and had lacked impartiality and independence.

It complained in particular that the Civil Chamber of the Supreme Court had been composed of judges appointed by the President of Poland on the recommendation of the National Council of the Judiciary (“the NCJ”), the constitutional organ in Poland which safeguards the independence of courts and judges and which has been the subject of controversy since the entry into force of new legislation providing, among other things, that its judicial members are no longer elected by judges but by the *Sejm* (the lower house of Parliament).

The case is one of 94 currently pending applications against Poland, mostly lodged in 2018-2022, concerning various aspects of the reorganisation of the Polish judicial system initiated in 2017\*. To date, the Court has delivered four judgments, three of which are final. As in previous cases, the Court emphasised that its task was not to assess the legitimacy of the reorganisation of the Polish judiciary as a whole, but to determine whether, and if so how, the changes had affected the applicant company’s rights under Article 6 § 1 of the Convention.

The Court found that the procedure for appointing judges to the Civil Chamber of the Supreme Court had been unduly influenced by the legislative and executive powers. That amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the Civil Chamber of the Supreme Court, which had examined the applicant company’s case. The Civil Chamber was not therefore an “independent and impartial tribunal established by law” within the meaning of the European Convention.

The judgment resembles closely that of [Reczkowicz v. Poland](#) (no. 43447/19) of 22 July 2021 and [Dolińska-Ficek and Ozimek v. Poland](#) (nos. 49868/19 and 57511/19) of 8 November 2021 regarding the other Chambers of the Supreme Court. As in the latter case, an additional manifest breach of domestic law was also found in this judgment because the President of Poland had carried out judicial appointments despite a final court order staying the implementation of the NCJ’s resolutions recommending judges to the Supreme Court.

The Court found that the violation of the applicant company’s rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial

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](http://www.coe.int/t/dghl/monitoring/execution).

appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges appointed in that way.

It was an inescapable conclusion that the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuated the systemic dysfunction established by the Court and might lead to further aggravation of the rule of law crisis in Poland. Therefore, rapid action on the part of the Polish State to remedy this is required.

It falls upon the State of Poland to draw the necessary conclusions from this judgment and to take appropriate measures in order to resolve the problems at the root of the violations found by the Court and to prevent similar violations from taking place in the future.

## Principal facts

The applicant, Advance Pharma sp. z o.o, is a limited liability company registered in Warsaw that distributed a dietary supplement intended for men wishing to enhance their sexual performance. The sale of that supplement was the sole source of income for the company, which in 2010 amounted to 20 million Polish zlotys (approximately 4.8 million euros).

In 2010 the product was withdrawn from the market following checks by the National Pharmaceutical Institute in which some samples of the product were found to contain an active molecule not allowed in dietary supplements and not listed on the product's label. The applicant company suspended its activities and appealed against the Main Pharmaceutical Inspector's decision to withdraw the product from the market. In the course of the appellate proceedings, the administrative courts quashed that decision finding that the Inspector had failed to establish whether the supplement had been a dietary supplement or a medicinal product and that the decision had been given in breach of domestic law.

The applicant company, which in the meantime had destroyed its stocks of the supplement, instituted a claim for damages in tort against the State in 2014. The courts notably found that the applicant company had destroyed the supplement on its own initiative; the Inspector had only ordered its withdrawal from the market. Moreover, the company had not proven that it had been prevented from reintroducing the supplement once it had been made compliant with the relevant regulations. The applicant company had therefore failed to prove the causal link between the damages sought and the Inspector's action.

After failing at two levels of jurisdiction, the applicant company lodged a cassation appeal with the Supreme Court. The panel of three judges of the Civil Chamber of the Supreme Court, which examined – and dismissed – the appeal, was entirely composed of judges newly appointed through the procedure involving the new National Council of the Judiciary (NCJ) established in 2018.

## Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair hearing), the applicant company complained that the formation of the Civil Chamber of the Supreme Court, which had examined its appeal, had not been a "tribunal established by law" because it was composed of judges recommended by the NCJ, a body which had not offered any guarantees of independence or impartiality. It alleged that the entire appointment procedure of the three judges that had heard its case had been neither transparent nor independent and had not been subject to judicial review. It referred in particular to proceedings before the Court of Justice of the European Union which ended in a ruling of 19 November 2019 and rulings by the Polish Supreme Court and the Supreme Administrative Court finding that the judges of the Supreme Court appointed in the procedure involving the NCJ were not a court constituted in accordance with domestic law.

It also complained that the President of Poland had initiated the appointment of the judges recommended by the NCJ without the requisite countersignature of the Prime Minister.

The application was lodged with the European Court of Human Rights on 2 December 2019.

Third party submissions were received from the Association “Lawyers for Poland”, the Polish Commissioner for Human Rights, the Polish Judges Association “Iustitia”, and the Helsinki Foundation for Human Rights.

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

The Court examined the case in the light of the criteria laid down by the Grand Chamber of the Court in the case of *Guðmundur Andri Ástráðsson v. Iceland* (no. 26374/18) of December 2020 and also applied in *Reczkowicz v. Poland* (no. 43447/19) of July 2021 and in *Dolińska-Ficek and Ozimek v. Poland* (nos. 49868/19 and 57511/19) of November 2021.

First, the Court established that there had been a manifest breach of domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Civil Chamber of the Supreme Court. That was because the NCJ, as established under the Amending Act on the NCJ of 8 December 2017, did not provide sufficient guarantees of independence from the legislative or executive powers.

The Court then went on to find that the President of Poland’s appointment of the judges recommended by the NCJ (resolution no. 330/2018) to the Civil Chamber, notwithstanding the ruling of the Supreme Administrative Court of 27 September 2018 suspending the NCJ’s resolution, amounted to another manifest breach of the domestic law. As in *Dolińska-Ficek and Ozimek*, deliberate disregard of a binding judicial decision and interference with the course of justice in order to minimise the validity of a pending judicial review of the appointment of judges could only be characterised as blatant defiance of the rule of law. In light of the above, the Court did not find it necessary to determine whether there was also a separate breach of the domestic law resulting from the fact that the President’s announcement of vacant positions in the Supreme Court had been made without the Prime Minister’s countersignature.

The Court found that a procedure for appointing judges which was unduly influenced by the legislative and executive powers was in itself incompatible with Article 6 § 1 of the Convention and, as such, compromised the legitimacy of the Civil Chamber of the Supreme Court. The applicant company’s right to a “tribunal established by law” had been impaired.

In coming to this conclusion, the Court referred in particular to rulings by the Polish Supreme Court finding that the judges of the Supreme Court appointed in the procedure involving the NCJ were not a court constituted in accordance with domestic law. The Court considered that those rulings were based on convincing arguments, including a thorough and careful evaluation of the relevant Polish

law from the perspective of the Convention's fundamental standards and of EU law. It also took into account rulings of the Court of Justice of the European Union, as well as multiple reports and assessments by European and international institutions.

The Court concluded that the formation of the Civil Chamber of the Supreme Court, which had examined the applicant company's case, was not a "tribunal established by law". There had therefore been a violation of Article 6 § 1 of the Convention.

As regards the question whether the same irregularities also compromised the independence and impartiality of the Civil Chamber of the Supreme Court, the Court held that it was linked with the same underlying problem of the inherently deficient procedure for judicial appointments and that it had already been answered in its examination of the complaint alleging that that chamber lacked attributes of a "tribunal established by law". It did not therefore require further examination.

#### Article 46 (binding force and execution of judgments)

When the Court finds a breach of the Convention, the State has a legal obligation to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress the situation.

The violation of the applicant company's rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges appointed in that way. In this situation and in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, rapid action on the part of the Polish State to remedy this is required.

The Court refrained from giving any specific indications as to the type of individual and/or general measures that might be taken in order to remedy the situation and limited its considerations to general guidance. It was, however, an inescapable conclusion that the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuated the systemic dysfunction established by the Court and might in the future result in potentially multiple violations of the right to an "independent and impartial tribunal established by law", thus leading to further aggravation of the rule of law crisis in Poland. One of the possibilities to be contemplated by the Polish State is to incorporate into the necessary general measures the conclusions of the Supreme Court's interpretative resolution of 23 January 2020 regarding its application to the judgments of the Supreme Court and the ordinary courts.

It therefore falls upon the State of Poland to draw the necessary conclusions from this judgment and to take any individual or general measures as appropriate in order to resolve the problems at the root of the violation found by the Court and to prevent similar violations from taking place in the future.

#### Just satisfaction (Article 41)

The Court did not discern any causal link between the violation found and the pecuniary damage alleged, and rejected that claim. However, it held that Poland was to pay the applicant company 15,000 euros (EUR) in respect of non-pecuniary damage and EUR 3,000 in respect of costs and expenses.

#### Separate opinions

Judge Wojtyczek expressed a concurring opinion. This opinion is annexed to the judgment.

*The judgment is available only in English.*

\*See also previous press releases concerning pending cases of [Grzęda v. Poland](#) (no. 43572/18), [Brodowiak and Dżus v. Poland](#) (nos. 28122/20 and 48599/20), [Biliński v. Poland](#) (no. 13278/20), [Pionka v. Poland](#) (no. 26004/20), [Juszczyszyn v. Poland](#) (no. 35599/20), [Żurek v. Poland](#) (no. 39650/18), and [Tuleya v. Poland](#) (no. 21181/19), and the press releases in the judgments [Xero Flor w Polsce sp. z o.o. v. Poland](#) (no. 4907/18), [Broda and Bojara v. Poland](#) (nos. 26691/18 and 27367/18), [Rczkowicz v. Poland](#) (no. 43447/19) and [Dolinska-Ficek and Ozimek v. Poland](#) (nos. 49868/19 and 57511/19; not final).

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#### Press contacts

[echrpress@echr.coe.int](mailto:echrpress@echr.coe.int) | tel.: +33 3 90 21 42 08

**Jane Swift (tel : + 33 3 88 41 29 04)**

Tracey Turner-Tretz (tel : + 33 3 88 41 35 30)

Denis Lambert (tel : + 33 3 90 21 41 09)

Inci Ertekin (tel : + 33 3 90 21 55 30)

Neil Connolly (tel : + 33 3 90 21 48 05)

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