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BY E-MAIL and REGISTERED MAIL

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TO:

Secretariat of the Committee of Ministers

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Re: cases Broda-Bojara v. Poland (application nos. 26691/18 and 27367/18), Reczkowicz v. Poland (application no. 43447/19), Xero Flor w Polsce sp. z o.o. v. Poland (application no. 4907/18) and Grzęda v. Poland (application no. 43572/18)

Observations of the Polish Bar Council

on the execution of the judgments of the European Court of Human Rights

on the rule of law by the Republic of Poland

To the attention of:

1. Marcin Wiącek – Commissioner for Human Rights
2. Jan Sobczak - Plenipotentiary of the Minister of Foreign Affairs for cases and procedures before the European Court for Human Rights Agent of the Polish Government

Introduction

1. The Polish Bar Council (hereinafter referred to as **the PBC**) is a body which represents the Polish Bar, an association of advocates and advocate trainees. Support for the observance of human rights and civic freedoms, as well as for shaping and application of law, constitute the most important statutory objectives of the Bar.
2. The PBC, alongside with the Human Rights Commission of the Polish Bar Council (hereinafter referred to as **the HRC PBC**) pay a great deal of attention to issues of respect for human rights and freedoms guaranteed by the Convention of Human Rights and Fundamental Freedoms (hereinafter referred to as **the Convention**) in Poland. Much attention and effort is also devoted to the observance of procedural guarantees aimed at ensuring effective protection of human rights and freedoms by the national legal system, as these guarantees ought to be effective not only in theory but also in practice. The PBC and the HRC PBC actively participate in the monitoring of the process of execution of judgments of the ECHR by the Polish authorities and have submitted their written observations concerning the execution of judgements issued in the most important cases brought against Poland. Over the past several years in a number of cases, the PBC has pointed to changes in practice and legislation introduced into the national legal system to improve the implementation of the standards established by the jurisprudence of the European Court of Human Rights (hereinafter referred to as **the ECHR** or **the Court**).
3. Pursuant to the Rule 9 Chapter 2 of the Rules of the Committee of Ministers for the supervision of the execution of judgement and terms of friendly settlements, the PBC would like to present its observations concerning the execution of judgements of ECHR addressing the rule of law issues by Polish authorities, hoping that the present observations will support the Committee of Ministers of the Council of Europe in effective supervision of the execution by Polish authorities of their international obligations resulting from Poland's membership in the Council of Europe.
4. As a self-governing body of advocates in Poland and within the scope of its statutory competences, the PBC constantly monitors issues related to the rule of law in Poland, paying particular attention to the question of the right to court and the right to a fair trial, including the right to a fair and public hearing by a competent, independent, impartial and sovereign court. Against this background, the PBC and HRC PBC would like to present their following comments and observations.

The principles of the right to a fair trial and the violations identified by the ECHR case-law in the Polish context

5. In recent years, the Court has issued several judgments regarding the standard of the right to a fair trial, including the right to a court “established by law” on grounds of Article 6 of the Convention. Those judgements had been delivered in the context of appointments of Supreme Court judges upon the recommendation of the National Council of the Judiciary (hereinafter referred to as **NCJ**) in the composition established by the Act of 8 December 2017 amending the Act on the NCJ and certain other acts (hereinafter referred to as **the 2017 Amending Act**; cf. judgement in *Broda and Bojara v. Poland*, application nos. 26691/18 and 27367/18, *Reczkowicz v. Poland*, application no. 43447/19, *Dolińska-Ficek and Ozimek v. Poland*, application nos. 49868/19 and 57511/19, *Advance Pharma sp. z o.o. v. Poland*, application no. 1469/20). The mere fact of shortening the term of office of the judges-members of the NCJ elected prior to the entry into force of the 2017 Amending Acts was found by the Court’s Grand Chamber to be in breach of the guarantees ensured by Article 6 of the Convention in the case of *Grzęda v. Poland*, application no. 43572/18. Moreover, in cases *Juszczyszyn v. Poland* (application no. 35599/20) and *Żurek v. Poland* (application 39650/18) the Court found violations of the Convention on grounds of sanctions applied against judges who voiced their criticism against the recent reforms of the judiciary. In the case of *Xero Flor w Polsce sp. z o.o. against Poland* (application no. 4907/18) the Court found the violation of the guarantees of the Article 6 of the Convention in the context of the appointment of judges of the Constitutional Tribunal.

Execution of judgements on the rule of law by Polish authorities

6. In November 2022, the PBC presented to the Committee of Ministers its observations on the execution of the judgment of the ECHR in the case of *Xero Flor sp. z o.o. w Polsce v. Poland*. With regard to the implementation of general measures the PBC recommended that:
- a. persons who have been appointed to the Constitutional Tribunal in violation of the law should not take part in the hearing of any case, since the judgements made with their participation may be questioned and, as a result, affect rights and obligations in the sense given by Article 6(1) of the Convention.
 - b. public authorities should refrain from publicly challenging the Court’s judgment in the case of *Xero Flor sp. z o.o. w Polsce v. Poland*, as well as subsequent judgments of the ECHR on the so-called rule of law cases (i.e. *Broda and Bojara v. Poland*, *Reczkowicz v. Poland*, *Dolińska-Ficek and Ozimek v. Poland*, *Advance Pharma sp. z o.o. v. Poland*). This questioning should not take place either in the form of public statements or through the use of available legal means (applications submitted to the Constitutional Tribunal and rulings of that body).

- c. in order to minimize the negative effects of the current situation concerning the Constitutional Tribunal, it is necessary to undertake actions encouraging common, administrative and military courts, as well as the judges adjudicating therein, to apply the so-called *dispersed constitutional control*, which will allow to ensure protection of individuals' rights and freedoms in situations where regulations being the basis for adjudication are contrary to the Constitution of the Republic of Poland and/or ratified international agreements binding Poland.
7. The PBC and the HRC PBC must indicate that the situation described in their previous submission has not changed. The PBC and HRC PBC underline that in the communication of 5 April 2023 addressed to the Committee of Ministers, Polish Government consequently refers to Constitutional Tribunal's judgement issued in the case K 6/21, where Constitutional Tribunal found that Article 6(1) first sentence of the Convention, to the extent that the notion of court used in that provision includes the Constitutional Tribunal, is inconsistent with Article 173 in conjunction with Article 10(2), Article 175(1) and Article 8(1) of the Polish Constitution, and that Article 6(1) first sentence of the Convention, insofar as it confers on the European Court of Human Rights the competence to assess the legality of the election of judges to the Constitutional Tribunal, is inconsistent with Article 194(1) in conjunction with Article 8(1) of the Polish Constitution¹. On that basis the Polish Government expressly indicated that *„it is not possible to admit three judges elected in October 2015 to performing their functions in the Constitutional Tribunal until the end of their nine-year term of office, while at the same time to exclude from the adjudicating bench the judges who were allegedly incorrectly selected”*². For the above reason the recommendations included in PBC's observations of 11 November 2022 remain valid.
8. The PBC and HRC PBC must underline that also the Court's judgments issued in cases: *Broda and Bojara v. Poland*, *Reczkowicz v. Poland*, *Dolińska-Ficek and Ozimek v. Poland*, *Advance Pharma sp. z o.o. v. Poland*, *Grzęda v. Poland* and *Żurek v. Poland* have not been executed yet. With regard to those judgments, the Polish Government claims that these judgements will not be executed because of the judgement of the Constitutional Court issued in the case no. K 7/21. The Polish Government also emphasizes that on 15 July 2022, the Act of 9 June 2022 amending the Act on the Supreme Court and certain other acts (hereinafter referred to as **the Act of 9 June 2022**) entered into force. In the Polish Government's opinion, the purpose of this Act was to liquidate the Disciplinary Chamber of the Supreme Court and to implement the decision of the vice-president Court of Justice of the European Union of 14 July 2021 issued in the case no. C-204/21.

¹ <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny> [access date: 01.11.2022]

² <https://rm.coe.int/0900001680aad1e0>

9. Apart from the regulations concerning liquidation of the Disciplinary Chamber of the Supreme Court, the Act of 9 June 2022 introduced the so-called *test of independence and impartiality of a judge*³ (hereinafter referred to as **the impartiality test**). In the explanatory memorandum to the presidential draft, it was indicated that the impartiality test is a “*new procedural institution enabling the examination of a judge’s fulfilment of the requirements of independence and impartiality, taking into account circumstances surrounding his appointment and the judge’s conduct after his appointment, if doubts are raised in the circumstances of a particular case as to the breach of the standard of independence or impartiality affecting the outcome of the case*”, and the impartiality test’ purpose was to “*provide participants in court or administrative court proceedings with procedural guarantees that there are no doubts as to the impartiality and independence of the judge adjudicating in the case*”⁴. It seems that real intention behind introducing the impartiality test was an attempt to solve problems resulting from the defective procedure of appointment of judges on the basis of resolutions of the new NCJ, which - in its current composition - is not an independent body of the legislative and the executive authorities and judges recommended by the new NCJ (and presented for appointment to the President of Poland) cannot be considered as meeting the standards of independence and impartiality, as required by Article 6 of the Convention.
10. PBC and HRC PBC are of the opinion that the impartiality test does not meet any of the above-mentioned objectives. Along with its introduction, it was stipulated that the circumstances surrounding the appointment of a judge may not constitute the sole basis for challenging a judgment issued with the participation of a given judge nominated upon the recommendation of new NCJ. As a result, parties of court proceedings requesting the conduction of the impartiality test must provide evidence of the circumstances surrounding the appointment of a given judge and his/her conduct after the appointment, and furthermore, prove not only that these circumstances may lead to a breach of the standard of independence and impartiality, but also to prove that breach of this standard would affect the outcome of the case, which in turn should be determined “taking into account the circumstances concerning the entitled person and the nature of the case”⁵.
11. Moreover, the regulations concerning the impartiality test stipulate a number of additional procedural requirements, which significantly limit the party’s right to verify whether his/her case is to be examined in accordance with the standard of the right to a fair trial. Firstly, the fixed time-limit for applying for the impartiality test is 7 days from the date of notification of the composition of a court examining the case. Secondly, a party of court proceedings must indicate the circumstances justifying the application of the

³ <http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=848-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia>

⁴ <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2011>

⁵ <https://palestra.pl/pl/czasopismo/wydanie/10-2022/artukul/ustawowy-test-niezawislosci-i-bezstronnosci-sedziego-w-sprawach-karnych>

impartiality test together with supporting evidence. Taking into account the fact that required circumstances refer to the information regarding the nomination procedure to which the party does not have the access to, this requirement is almost impossible to fulfill. Thirdly, a party of the proceedings may apply for the impartiality test only in cases indicated in relevant regulations concerning judges of the Supreme Court and judges of common and administrative courts. As a result, it is doubtful whether a party of court proceedings may apply for the impartiality test of the judge of Supreme Court examining the application for the impartiality test. Fourthly, if the above requirements are not fulfilled, and the application for the impartiality test was submitted by a professional lawyer representing a party, the court recognizing the application must inform the relevant lawyer's self-government body to which the professional lawyer belongs about such situation. This provision obviously leads to creating a chilling effect, because – as mentioned above – the procedural and material requirements of the impartiality test are almost impossible to fulfill. Finally, it should be noted, that while introducing the impartiality test, the legislator did not repeal the provisions of Article 42a(1) and (2) and of Article 55(4) of the Law relating to the organization of the common courts, and of Article 26(3) and Article 29(2) and (3) of the Law on the Supreme Court, as they prohibit national courts from verifying compliance with the requirements of the European Union relating to an independent and impartial tribunal previously established by law, as well as points 2 and 3 of Article 107(1) of the Law relating to the organization of the common courts, and of points 1 to 3 of Article 72(1) of the Law on the Supreme Court, which allow the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law. Maintaining these provisions in force lead to a situation that judges, when examining applications for the impartiality test, expose themselves to disciplinary charges and their disciplinary liability. Moreover, the impartiality test can only be initiated upon a party's request. No ex-officio court's decisions can be taken in that respect.

12. It is also worth mentioning that the current practice observed by Polish advocates also shows that applications for the impartiality test are not examined on their merits and are rejected due to non-compliance with the procedural and material requirements, or in the case of the Supreme Court – cannot be examined due to the exclusion of subsequent judges from examining them. Another effect of the new, defective regulations is the limitation of party's right to verify judge's independence and impartiality on the basis of instruments already existing in Polish legal system, such motion for exclusion of a judge from recognizing the case and/or appeal charges concerning the appointment of judge sitting in the adjudicating panel. Advocates report cases where courts refuse to recognize motion for exclusion of a given judge based on improper appointment procedure (with the participation of NCJ), with a justification pointing that the impartiality test is the only

and exclusive legal instrument allowing to verify judge's independence and impartiality. Such findings are obviously unjustified in the light of newly introduced regulations, and again show that the courts' practice leads to chilling effect, resulting from the fact that regulations which allow the disciplinary liability of judges for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law are still in force.

Summary

13. The test of independence as introduced by the Act of 9 June 2022 does not solve any problems occurring in the Polish legal system resulting from the defective procedure of appointment of judges on the basis of resolutions of the new NCJ. The current practice observed by Polish advocates also shows that parties of court proceedings are concerned whether judgments issued in their case could be challenged because of improper appointment procedure of adjudicating judge. Parties also show their concern with regard to the effectiveness of the request for impartiality test and practical consequences.
14. The PBC and HRC PBC strongly emphasize that the implementation of the Court's judgments in cases: *Broda and Bojara v. Poland*, *Reczkowicz v. Poland*, *Dolińska-Ficek and Ozimek v. Poland*, *Advance Pharma sp. z o.o. v. Poland*, *Grzęda v. Poland* and *Żurek v. Poland* is necessary to ensure the procedural protection of rights and freedoms guaranteed in the Convention and in the Polish Constitution.
15. The current situation, in which the public national authorities, including the Constitutional Tribunal, undermine the final judgments of the Court, leads to subsequent human rights violations. Already now, the Court is dealing with about 300 applications against Poland submitted in the context of the current rule of law crisis, and more specifically, the allegations of violation of the right to "a court established by law" due to the participation of judges appointed to their offices with the participation of the neo-NCJ in recognizing individual's cases.
16. The PBC and HRC PBC must underline that currently over 2,500 judges (i.e. 1/4 of all judges) have been nominated upon the recommendation of the NCJ in the composition as provided by the 2017 Amending Act. Statistically speaking, as over 14 million cases are recognized in Poland annually, there is a risk that a significant number of the judgements issued by Polish courts could potentially be questioned by parties of court proceedings, which, given the ineffectiveness of domestic remedies, will probably result in an avalanche of applications to the Court alleging various violations of the right to a fair trial on ground of Article 6 (1) of the Convention. This will undoubtedly affect the functioning of the Court, its authority and effectiveness.
17. Therefore, the PBC and HRC PBC ask the Committee of Ministers and all Bodies of the Council of Europe to take all available measures to enforce a rapid implementation of

judgments of the Court in terms of general measures, necessary to ensure effective protection of human rights of Polish individuals.

On behalf of the Polish Bar Council,

advocate Przemysław Rosati
President
Polish Bar Council

These observations have been prepared by advocate Natalia Klima-Piotrowska - Chairwoman of the Human Rights Commission of the Polish Bar Council.