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Good administration in the case-law of the European Court of Human Rights – Polish experience

REPORT PRESENTED BY

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INTRODUCTORY REMARKS

I was invited by the organizers of the Conference to present the Polish experiences regarding two principle matters:

- execution of judgments of the European Court of Human Rights in cases concerning Poland, and
- application of the Act of 17 June 2004 on the complaint against the violation of the right to a trail within the „reasonable" time in relation to the administrative proceedings.

Both of the above mentioned matters are not directly linked to the main topic of the Conference, however their importance for pursuit of good administration is unquestionable and evident. The European Court of Human Rights on many occasions examined the cases concerning various aspects of administrative proceedings. In its judgments the Court examined those aspects as regards their compatibility with the Article 6 of the European Convention on Human Rights and Fundamental Freedoms (fair trial) and Article 1 of the Protocol no.1 (property rights). Precisely the above mentioned provisions constitute the legal grounds to verify the compatibility of various actions of local and governmental administration with the Convention. The rest of the provisions of the Convention constitutes the grounds for examination of actions of judicial bodies.

Here arises the question whether the European Court of Human Rights has a cognition to examine the actions of the administrative bodies and, in particular, to examine the administrative proceedings conducted by the bodies of local and governmental administration. The most essential problem is to formulate the definition of the civil case.

In general it is considered that each case examined in the administrative proceedings is an administrative case (*per analogiam* criminal cases are examined in criminal proceedings and civil cases are examined in civil proceedings). It is not a proper opinion. Among the cases examined before the administrative bodies, apart from the *sui generis* administrative cases, are also the civil cases.

The Polish Constitutional Court in its judgment of 10 July 2000 determined the question of the admissibility of the administrative – litigious cases in the proceedings before common courts. The constitutional review of the Article 1 of the Code of Civil Procedure reads as follows: „The Code of Civil Procedure shall regulate court proceedings in matters arising from civil law, family and guardianship law and labour law relationships, as well as the matters pertaining to social insurance and other matters to which the provisions of this Code shall apply by virtue of special legislation (civil matters)".

In the reasons of the abovementioned judgement the Constitutional Court held that the right to a fair and public trial, guaranteed in Article 45 of the Constitution, is not the instrument which enables to exercise other constitutional rights and freedoms but it exists independently and it is protected irrespective of other subjective rights. The right to a fair and public trial consists of three elements i.e. the right to institute proceedings before a competent, independent and impartial court; the right to proceedings in accordance with the rule of justice and the rule of public openness; the right to legally binding adjudication by the court. The term „case" used in Article 45 of the Constitution encompass civil and administrative litigations as well as adjudicating on the relevance of criminal charges. The meaning of the above term is not exhausted by the above enumeration; in general it regards

adjudicating on the rights of a given individual. The scope of the term „civil matter" used in Article 1 of the Code of Civil Procedure includes also claims regarding pecuniary obligations arising from administrative acts and in particular claims for interests arising from due benefits, which were not paid in a due time. The situation where the pecuniary benefits arising from the administrative law relations were not paid in due time, constitutes civil law event and the law does not provide jurisdiction of the administrative courts to adjudicate on civil law effects resulting form the lack or undue implementation of the administrative decision.

The similar opinions are expressed in the judgments of the European Court of Human Rights. As an example I adduce the part of the reasons of a judgment of 24 May 2005 in the case *J.S. and A.S. v. Poland* (application no. 40732/98):

> „The Court recalls that Article 6 applies under its „civil head" if there was a „dispute" („*contestation"*) over a „right" which can be said, at least on arguable grounds, to be recognised under domestic law. That dispute must be genuine and serious; it may relate not only to the existence of a right but also to its scope and the manner of its exercise. The Court must also be satisfied that the result of the proceedings at issue was directly decisive for the right asserted (see, *mutatis mutandis*, *Georgiadis v. Greece*, judgment of 29 May 1997, *Reports of Judgments and Decisions* 1997-III, pp. 958-959, § 30, and *Rolf Gustafson v. Sweden*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1160, § 38).
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> On the question of whether or not a given right is „civil" for the purposes of Article 6 § 1, the Court has consistently held that the concept of „civil rights and obligations" is not to be interpreted solely by reference to the respondent State's domestic law and that this provision applies irrespective of the status of the parties, the character of the legislation which governs how the dispute is to be determined and the character of the authority which is invested with jurisdiction in the matter (see *Georgiadis v. Greece*, loc. cit., § 34).
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> The Court notes that the proceedings began on 15 February 1990 and are still continuing. They have therefore already lasted over fifteen years, of which over eleven years falls within the Court's temporal competence, Poland having recognised the right of individual petition as from 1 May 1993. Given its jurisdiction *ratione temporis*, the Court can only consider the period which has elapsed since 1 May 1993, although it will have regard to the stage reached in the proceedings on that date (see, among other authorities, *Zwierzyński v. Poland*, no. 30210/96, § 123, ECHR 2000-XI).
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> The Court will assess the reasonableness of the length of the proceedings in the light of the circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. It will also take account of what is at stake for the applicant (see, among many other authorities, *Beller v. Poland*, no. 51837/99, § 67).
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> The applicants argue that the proceedings in the case were exceedingly lengthy. The Government contest their arguments.

> The Court observes that the proceedings, instituted on 15 February 1990, remained dormant from 1990 to 1995, when the applicants availed themselves of the procedure provided for by the Code of Administrative Procedure and complained to the Supreme Administrative Court about the failure of the administration to rule on their application. That court, by its judgment of October 1995, obliged the administrative authorities to give a decision within two months. This judgment was not complied with and no decision was rendered, either within the time-limit set out by the Supreme Administrative Court, or later. Subsequently, on 17 April 1996 the Ministry of Agriculture took steps in order to obtain evidence relevant for the legal assessment of the application. However, the proceedings were stayed in 1997 as the Ministry ordered that H.S. submit documents to prove her rights to the property (see § 20 above). The applicant's appeal against this decision was unsuccessful. Later on, on 6 August 1997, the applicant reiterated their arguments and requested that the proceedings be resumed. They argued that the civil law questions pursued by the Ministry were entirely irrelevant to the administrative case they had launched. Their efforts were unsuccessful, and the restitution proceedings have remained stayed ever since, essentially as a consequence of civil claims to the property having been raised at a late stage of the proceedings.
>
> Having regard to all the circumstances of the case, the Court considers that the overall length of the proceedings complained of has exceeded what was reasonable. There has therefore been a violation of Article 6 § 1 of the Convention."

The European Court of Human Rights held that due to its nature the case ralates the civil law rights *ergo* it is subjected to the review of Article 6 § 1 of the Convention and Article 1 of the Protocol 1. As regards the remedies available for the applicant in the administrative proceedings, the Government stressed out that under Article 35 of the Code of Administrative Procedure of 1960, the administration is obliged to deal with cases without undue delay. Simple cases should be dealt without any delay. In cases requiring some enquiry a first-instance decision should be given in no more than one month. In particularly complex cases decisions shall be taken within two months. If the decision has not been given within those time limits, a complaint under Article 37 of the Code may be filed with the higher-instance authority, which shall fix an additional time limit, establish the persons responsible for the failure to deal with the case within the time-limits, and, if need be, arrange for preventive measures to be adopted in order to prevent further delays. In 1995 the Supreme Administrative Court Act was adopted, which entered into force on 1 October 1995. It created further procedures in which a complaint about the administration's failure to act could be raised. Under Article 17 of that Act, that court is competent to examine complaints about the administration's inactivity in administrative proceedings in cases referred to in Article 16 of the Act. Pursuant to Article 26 of the Act, if a complaint about the inactivity of an administrative authority is well-founded, the court shall oblige the competent authority to give a decision, or to carry out the factual act, or to confer or acknowledge an individual entitlement, right or obligation.

However, the European Court of Human Right considered that the above mentioned remedies, in particular, a complaint against non-activity of the administration doesn't fulfil the requirements for effective remedy stipulated in Art. 13 of the Convention. When the judgement in the case *J.S. and A.S. v. Poland* was given, the Act of 17 June 2004 on a

complaint against violation of party's right to have the case examined without undue delay in a judicial proceedings entered into force.

The scope of the review procedure provided by the Act encompasses exclusively the proceedings before the administrative courts. The Act does not provide the review procedure regarding the administrative proceedings before the bodies of the governmental and local administration.

IMPLEMENTATION OF THE POLISH ACT OF 17 JUNE 2004 ON A COMPLAINT AGAINST VIOLATION OF THE PARTY'S RIGHT TO HAVE THE CASE EXAMINED WITHOUT UNDUE DELAY IN A JUDICIAL PROCCEDINGS

Over three years have passed since Poland introduced an effective domestic remedy against unreasonable length of judicial proceedings. By introducing this remedy the Polish Parliament followed the suggestions of the European Court of Human Rights expressed in the *Kudła v. Poland* judgment of 2000. Indeed, an effective remedy to combat unreasonable length of proceedings was absent in our domestic legal order until the adoption of the 2004 Act. As of 17 September 2004 any party to judicial proceedings may lodge a complaint seeking to determine that there has been a violation of the party's right to have a case examined within a reasonable time.

I wish to share with you some brief remarks concerning the implementation of the new remedy in our judicial system. I will also deal with certain shortcomings of our domestic legal practice indicated in the case-law of the European Court as regards the interpretation and application of the 2004 Act.

Irrespective of some shortcomings, I wish to stress that the practice of Polish domestic courts in applying the „special" remedy generally allows for optimism. We need to remember that our courts required and still require some time to „learn" the new Act and understand the philosophy which underpins this remedy. The 2004 Act attracted much interest both within judges as well as advocates and academic writers in Poland. In the last months a first commentary to the 2004 Act was published. The new remedy becomes more and more known to the parties of judicial proceedings. It is also worth noting that the Act introducing the new remedy was also of interest to some states which were considering similar developments in their domestic legal systems.

Understandably, the implementation of the 2004 Act and the courts' practice has given rise to some controversies. However, let me first focus on the positive aspects of the new remedy and then move on to the problems we encountered in the application of the 2004 Act.

I have no doubts that the main goal of the 2004 Act involved a creation of a judicial remedy which would serve a two-fold function – to accelerate delayed proceedings on the one hand and on the other – to provide adequate just satisfaction if it is appropriate. We wanted the remedy to be a practical tool in the hands of parties in all cases pending in Polish courts. We also intended to ensure that the remedy was a simple way of speeding up the proceedings without excessive formalism. I think we managed to achieve this aim. The courts are obliged to adjudicate on the complaints brought under the 2004 Act in a very prompt procedure. Apart from establishing that the right to a trial within a reasonable time was

violated, the court examining the complaint may also provide the court which deals with the merits of the case with specific „recommendations". Last but not least, a just satisfaction might be awarded at the request of the complaining party. Such satisfaction does not deprive the applicant of the possibility to claim further compensation for both pecuniary or non-pecuniary damage before civil courts in regular civil proceedings. In such circumstances the regular conditions of civil liability for damage caused by actions or omissions of state officials apply.

I should also mention that the introduction of the new remedy proved to be beneficial for the European Court itself, as the number of cases raising a charge against Poland based on the „reasonable time" requirement could be considerably reduced. In the ideal world it might be expected that the domestic remedy almost completely holds the flow of repetitive cases under this head. The reality shows, however, that some improvements are still required to ensure the effectiveness of the 2004 Act.

One of the most positive aspects of the remedy against unreasonable length of proceedings in Poland is the fact that all complaints are examined in a speedy one-instance procedure. The determination of whether or not there has been a violation of the „reasonable time" requirement comes within several weeks and not months. As was indicated above, if an applicant claims further compensation, he or she is free to go also to a civil court, even when the proceedings as to the merits were already completed.

The second positive aspect of the remedy is that it can be used as a means of verifying the applicant's complaint about the unreasonable length of proceedings more than once. The 2004 Act provides for a possibility of lodging a complaint in the course of judicial proceedings every 12 months and in case of enforcement proceedings – every 6 months since the court's decision concerning the previous complaint.

Another positive aspect of the remedy is that it is easily accessible for the parties wishing to lodge a complaint against the length of proceedings before a district or regional court. Such complaints don't need to be filed by professional lawyers. The same applies to complaints about criminal proceedings pending in the courts of appeal, which are examined by the Supreme Court. The only exception concerns the complaints about civil proceedings pending in the courts of appeal and examined by the Civil Chamber of the Supreme Court – in these cases a complaint must be signed by an advocate or legal adviser.

The new remedy attracted a considerable popularity. In 2005 the Regional Courts received 665 complaints in civil law cases, 2042 complaints in criminal law cases, 265 complaints in labour law and social insurances cases and 205 complaints in commercial law cases. The courts of appeal, which adjudicate on the complaints against unreasonable length of proceedings in regional courts, received altogether 1295 complaints.

In 2006 the courts received altogether 2659 complaints, that is 37% less than in 2005. Approximately one-third of complaints was declared inadmissible. The rate of cases declared well-founded was similar since the entry into force of the 2004 Act and amounted to 20%. Two-thirds of cases which were declared admissible and well-founded involved an award of just satisfaction.

As I mentioned earlier, the domestic case-law is still developing and the courts are gradually learning the new remedy. This was the main reason why we encountered some

problems with the compensatory function of the remedy introduced by the 2004 Act. In the first months of adjudicating on the complaints against unreasonable length of proceedings, the domestic courts were relatively unwilling to exercise their competence as regards the award of just satisfaction. Let me remind that according to the 2004 Act, the domestic court may at the complainant's request award an appropriate sum of money from the State Treasury, which shall not exceed 10.000 Polish zlotys (equivalent to ca. 2,800 Euro).

However, the courts started gradually to adopt a more progressive approach towards this issue. A review of the case-law of Polish courts shows that they more and more often decide to award just satisfaction for the applicants.

The European Court seems to accept the statutory ceiling of PLN 10,000, but only when it remains open to the applicant to lodge a civil claim and thus seek full compensation. The 2004 Act provides for such possibility and refers to adequate provisions of the Civil Code. I need to admit, however, that the case-law of Polish courts with regard to compensation and/or just satisfaction for damage suffered as a result of the unreasonable length of proceedings is not as developed as we wished. It is particularly worrying that some courts have difficulty in applying Civil Code provisions on the liability of State Treasury for non-pecuniary damage. The practice shows that the vast majority of cases concerning the length proceedings involves this type of damage rather than strictly material or pecuniary damage. Therefore it is of utmost importance to develop the practice of domestic courts in a way which allows for effective application of the provisions of Civil Code which concern compensation for non-pecuniary damage.

This is equally important for the applicants who did not lodge a complaint on the basis of the 2004 Act in the course of pending proceedings. Such applicants are not deprived of any legal remedies, because they may claim compensation for pecuniary and non-pecuniary damage under relevant provisions of the Civil Code. In case of these applicants the remedy under 2004 Act cannot be lodged as the purpose of the Act is to accelerate pending proceedings. Nevertheless, the 2004 Act directly indicates that the civil law remedy is available to applicants whose proceedings were already terminated. Again, the courts need some time to develop their case-law regarding the application of Civil Code in such cases.

It can be presumed that some guidance in this respect would be given by the Polish Supreme Court. In fact, the Supreme Court has already issued several resolutions concerning the interpretation of the 2004 Act. One of them covered its application *ratione temporis.* More specifically, the Supreme Court ruled that while the 2004 Act produced legal effects as from the date of its entry into force, its provisions applied retrospectively to all proceedings in which delays had occurred before that date and had not yet been remedied. The Supreme Court noted, however, that *„the Act on the complaint against the violation of the right to a trial within „reasonable time" can be applied to all proceedings which were delayed at the moment of the Act's entry into force, but – on the other hand – cannot be applied to pending proceedings if they ceased to be delayed before the Act entered into force".*

Another resolution of the Supreme Court concerned the competence to examine a complaint if it refers not only to the current phase of pending proceedings, but also to previous instance or phase within the same proceedings. It needs to be stressed in this regard that the 2004 Act vests the competence to adjudicate a complaint to the court directly superior over the court that conducts the proceedings complained of. In other words, courts of appeal are competent to examine complaints about proceedings pending in regional courts,

but not in district courts. The Supreme Court – on the other hand – is competent to adjudicate on complaints about proceedings pending in the courts of appeal or in the Supreme Court itself, but is not competent to asses the reasonable time of proceedings pending before regional courts. The Supreme Court in its resolution of 2005 held that: *„the competence of the Supreme Court covers the complaints concerning proceedings which are pending in the courts of appeal, but there are no grounds to assume that the Supreme Court has also jurisdiction to adjudicate on complaints concerning proceedings before regional courts. The 2004 Act does not provide that if a complaint concerns proceedings pending at different instances, the competence to adjudicate such complaint belongs to the court superior over the court of upper instance"*.

The above rules concerning the courts' competence might give an impression that the court examining a complaint disregards the previous instance within the same set of proceedings.

This is however not exactly the case. We should remember that the remedy aims at accelerating proceedings which are already delayed. This is why the courts examining the complaint take into account the current phase of pending proceedings. Nevertheless, in assessing the just satisfaction for the applicant the domestic court would take into account – among other factors – also the overall length of proceedings. The same applies to examining the applicants' claims on the basis of Civil Code.

It should also be mentioned that the solution adopted in the 2004 Act as to the courts competent to examine the complaints allows for the verification of the „reasonable time" requirement in every instance of pending proceedings. It is thus for the benefit of the applicants who might wish to lodge subsequent complaints to a relevant court if they find that the proceedings in their case last longer than it is necessary. In any event, the „fragmentation" of proceedings for the purpose of applying the 2004 Act does not mean that an applicant is offered a weaker protection against unreasonable length of proceedings.

As I already said, there is some scope for improvement as regards the implementation of the 2004 Act. The success of the new remedy depends mostly on the prudence of the courts examining the complaints. It is therefore particularly important for the courts to understand that they should be guided by the case-law of the European Court, both in terms of assessing the length of proceedings, as well as in determining the value of compensation or just satisfaction when they found a violation of the „reasonable time requirement".

Apart from necessary development of the courts' practice, the Government was also preliminarily considering some amendments to the 2004 Act. In particular, there has been an exchange of views between the Polish Ombudsman and the Ministry of Justice as to the possibility of widening the scope of the 2004 Act, so that it comprised also the preparatory criminal proceedings, since they in fact constitute a part of regular criminal proceedings and therefore their length might be assessed under Article 6 of the Convention. Various opinions were expressed as to the necessity of amending the 2004 Act to that effect. The National Prosecutor's Office argued that the existing legal mechanisms provide adequate guarantees and remedies to combat delays in preparatory proceedings. It is however not yet determined whether this proposal would be given further elaboration.

Similarly, the Ministry of Justice was indicating the need to amend the Code of Administrative Proceedings by introducing in a remedy equivalent to the 2004 Act with

regard to regular administrative proceedings. For now the 2004 remedy can only be used in administrative judicial proceedings and not in proceedings pending before organs of administration. It can be expected that this proposal will be further discussed.

To sum up, I believe that the identification of strengths and weaknesses of the 2004 Act after three years of its application allows for some improvement both as regards courts' practice, and possibly also with respect to some provisions of the Act itself. However, the main assumptions underlying the 2004 Act turned out to be correct. We see the room for improvement, but we should not forget that we had made a significant progress since the *Kudła* judgment of 2000. It is in the best interest of the applicants and for the efficiency of our judicial system to maintain the effectiveness of the 2004 Act.

I do believe that the European Court is also interested in providing us with some feedback and support as regards effective implementation of the new remedy. The Polish Government analyse very carefully all judgments of the Court, which indicate some shortcomings. One of the recent examples is the case of *Tur v. Poland*. In the judgment of 23 October 2007 the Court expressed its concerns as to the adequate redress offered to the applicant, as well as the possibility of expediting the pending proceedings. In the particular circumstances of that case, the Court refused to regard to remedy under the 2004 Act as effective within the meaning of Article 13 of the Convention. I hope that this judgment will not reverse the Court's general attitude to our remedy aimed at combating undue delays of proceedings.

EUROPEAN COURT'S REQUIREMENTS TO EFFECTIVE DOMESTIC REMEDY AGAINST EXESSIVE LENGHT OF PROCEEDINGS

Ubi ius, ibi remedium - where there is law, there is a remedy. The Roman maxim reflects a fundamental principle of every law system based on remedial justice: if wrong was done, there should be remedies available for the injured party in order to provide him or her with adequate redress. That principle is also well-established in international and regional systems of human rights protection.

The law of remedies in the field of human rights protection is highly diversified.

Various distinctions can be drawn in this regard, taking as a point of departure – by way of example – their legal basis (domestic or international law), the character of the proceedings (judicial, quasi-judicial or non-judicial), their accessibility or effectiveness.

It could be argued that remedies available on national level in case of human rights violations are an illustration of the principle of subsidiarity. Especially the requirement of exhaustion of domestic remedies before taking advantage of international complaint procedures shows the significance of domestic avenues in redressing human rights violations.

The same applies to the European system of human rights protection, based on the European Convention on Human Rights and Fundamental Freedoms (ECHR). The Strasbourg Court has reiterated on many occasions that the domestic authorities – and notably the courts – are generally in a better position to interpret and apply national law than an international court. Therefore the domestic courts should be perceived as a main front-line in an effective system of human rights protection.

The ECHR contains in its Article 13 the right to an effective remedy before a national authority. For reasons explained further, that provision plays an important role as a procedural guarantee and a „filter" for cases which may end up in Strasbourg. It is worth to be noted that Article 13 implies a certain standard of effectiveness – the standard which nowadays attracts much attention in the context of the difficulties experienced by Convention system.

The right to an effective remedy in the ECHR is an accessory (auxiliary) guarantee which means that it does not have an independent role to play in the Convention system. An applicant may not claim a violation of Article 13 in abstracto, i.e. with no link whatsoever to a material right or freedom secured by the Convention or Additional Protocols thereto. The dependent character of Article 13 is similar to Article 14 of the Convention (prohibition of discrimination).

The relation between the right to a fair trial and the right to an effective remedy seems to be more convoluted. Article 6 § 1 of the Convention provides:

„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. (…)"

In the *Kudla v. Poland* judgment of 26.10.2000 the Grand Chamber of the Court has reversed its case-law as regards the relation between Articles 6 § 1 and 13 of the Convention. The Court has decided that there was no absorption of the safeguards of Article 13 by those of Article 6 § 1 where the alleged violation concerned the right to trial within a reasonable time. Therefore the Court has found necessary to examine separately the applicant's complaint under Article 13. One of the most significant reasons for such a change in the established case-law was the growing frequency of violations of the reasonable time requirement laid down in Article 6 § 1. The Court has underlined 'the important danger' that exists for the rule of law within the national legal orders of the State Parties when excessive delays in the administration of justice occur in respect of which litigants have no domestic remedy. (§ 148 of the *Kudla* judgment).

The correlation between Article 13 and Article 6 §1 – as regards the protection from unreasonable time of proceedings – has been determined conclusively in § 152 of the Kudla judgment: the requirements of Article 13 are to be seen as reinforcing those of Article 6 § 1, rather than being absorbed by the general obligation imposed by that Article not to subject individuals to inordinate delays in legal proceedings.

The best survey on the case law is presented in the Report on the effectiveness of national remedies in respect of excessive length of proceedings adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006). This Report shows that, although States often refer in their litigation before European Court to particular types of domestic remedies as being available for allegations of the excessive length of proceedings, according to the Court's assessments a significant number of these remedies can not be considered as effective in practice.

However it seems to be evident that those standards, while being examined, develop, change or are being modified. The only and the unique standard does not exist and cannot be

established once forever. It is rather a running and steady process of searching the best and the most optimum solutions not just to find the remedy but much less to eliminate the problem of the excessive length of proceedings.

Consequently referring to the requirements of Article 13 of the Convention in respect of unreasonably lengthy proceedings established by the case-law of the European Court of Human Rights it should be taken into consideration that those standards are binding at present.

In such objective way the Report of the Venice Commission embrace the substance of the requirements to the effective remedy (in paragraphs: 134-168).

> *„134. Below is an outline of the principles which can be derived to-date from the case-law of the Strasbourg Court.*
>
> ***A. As regards the kind of remedy***
>
> *135. As was previously underlined, in terms of the Court's case-law, it is an obligation of result that is required by Article 13. Even when none of the remedies available to an individual, taken alone, would satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may be considered as „effective" in terms of this article.*
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> *136. The Court has indicated in the first place that „the best solution [to the problem of excessive length of proceedings] in absolute terms is indisputably, as in many spheres, prevention."*
>
> *137. Where the judicial system of a State is deficient in terms of ensuring compliance with the reasonable time requirement, „a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation, since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach a posteriori, as does a compensatory remedy […]."*
>
> *138. While stating expressly that such acceleratory remedy would be „the most effective solution", the Court has refrained from indicating that the provision of such a remedy is required by Article 13 of the Convention. This reluctance is, no doubt, in conformity with the general principles of international law and motivated by the need to afford the Contracting States a certain discretion as to the manner in which they provide individuals with the relief required by Article 13 and conform to their Convention obligation under that provision.*
>
> *139. The Court does, however, express a clear preference for an acceleratory remedy over a mere compensatory remedy, at least within legal systems which have consistently proven unable to secure the right to a trial within a reasonable time. In this respect, it may be taken that the Court's position has somewhat shifted from that previously expressed that Article 13 offers an alternative between a remedy which can be used to expedite a decision by the courts dealing with the case, and a remedy which can provide the litigant with adequate redress for delays that have already*

occurred. The latter, in fact, only offer an a posteriori remedy and are unable to prevent successive violations.

140. The same preference for an acceleratory remedy has been expressed by the United Nations Human Rights Committee, which has stated that all stages of judicial proceedings must take place without undue delay and that, to make this right effective, a procedure must be available to ensure that this applies in all instances. Furthermore, according to the Committee, „the mere possibility of obtaining compensation after, and independently of, a trial that was unduly prolonged does not constitute an effective remedy" for the purposes of the International Covenant on Political and Civil Rights.

141. Where „the proceedings have clearly already been excessively long", mere prevention may not be adequate. In this case, compensatory remedies may be appropriate instead.

142. Indeed, the Court indicates that a combination of two types of remedy, one designed to expedite the proceedings and the other to afford compensation, may appear as the best solution.

143. A compensatory remedy may take the form of financial reparation of the damage (pecuniary and non-pecuniary) suffered.

144. Other kinds of „compensatory" remedy may constitute an appropriate redress for the violation of the reasonable time requirement and an „effective remedy" in the sense of Article 13. This is true, for example, for a discontinuance of the prosecution, a mitigation of sentence,an exemption from paying legal costs, an acquittal, the suspension of the sentence, the lowering of a fine and the non-deprivation of civil and political rights (possibly more than one form of redress being applied at the same time). These measures must be taken in an express and measurable manner.

145. The quashing of a ruling on a procedural issue (including the non respect of the relevant time-limit) following complaints by the applicant does not amount to an appropriate redress to the extent that it is irrelevant for and incapable of expediting the proceedings or providing the applicant with redress for the delays occurred.

146. The favourable outcome of the proceedings as such cannot be considered to constitute adequate redress for their length.

147. A disciplinary action against the dilatory judge may amount to an effective remedy against the length of the proceedings in terms of Article 13 of the Convention only if it has a „direct and immediate consequence for the proceedings which have given rise to the complaint". This entails that the disciplinary action must present certain specific features. There must be an obligation for the supervisory organ to take up the matter with the dilatory judge, if a complaint is lodged. The applicant must be a party to the proceedings. The effect of any decision taken must not merely concern the personal position of the responsible judge.

148. Whatever form the redress takes, it must be coupled with the acknowledgement of the occurred violation. Indeed, the national jurisdiction must acknowledge that the reasonable-time requirement has not been met and a specific measure has to be taken with the aim of repairing the over-stepping of the „reasonable time" in the meaning of Article 6 § 1 of the Convention. This acknowledgement needs to be made „in substance at least".

149. Such acknowledgement is an indispensable, though not a sufficient, component of any effective remedy set up under Articles 6 and 13 of the Convention.

150. In conclusion, according to the Strasbourg Court, States have to:

- organise their legal system so as to prevent unreasonable procedural delays from taking place;

- if excessive delays occur, acknowledge the violation of Article 6 of the Convention and provide adequate redress;

- when their legal system is deficient in terms of reasonableness of the length of proceedings, provide an acceleratory remedy;

- if they chose not to do this, and also in cases when excessive delays have indeed already taken place, provide a compensatory remedy, in the form of either financial compensation or other forms such as mitigation of the sentence and discontinuance of the prosecution.

B. As regards the legal basis for the remedy and its clarity/accessibility

151. Article 13 does not require the provision of a specific remedy in respect of the excessive length of proceedings; a general constitutional or legal action, such as an action to establish non-contractual liability on the part of the State, may be sufficient. Such action, however, must be effective both in law and in practice.

152. In the absence of a specific legal basis, the availability of a remedy and its scope of application must be clearly set out and confirmed or complemented by the practice of the competent organs and/or through appropriate case-law.

153. Whatever measure may be ordered by a competent authority, a domestic remedy in respect of unreasonable delays will conform to the requirements of the Convention only when it has acquired a sufficient legal certainty, in theory and in practice, enabling the applicant to have used it at the date on which an application is lodged with the Court.

154. If the remedy is set up through legislation, it will acquire „a sufficient level of certainty" on the date of entry into force of that legislation, independently of the existence of any case-law confirming its applicability, provided that the wording of the legal text in question is clear and indicates that it is specifically designed to address the issue of the excessive length of proceedings before the domestic authorities. Mere doubts as to the effective functioning of a newly created statutory remedy does not dispense the applicant from having recourse to it.

155. If the effectiveness of a general remedy in respect of claims of unreasonable duration of proceedings is acquired or proved after its entry into force through specific case-law, a certain lapse of time after the judgment concerned may be necessary before a sufficient level of certainty is acquired. Such length of time may vary.

156. In respect of a remedy consisting in providing financial compensation for the excessive length of proceedings, the legal basis for the State's liability to pay damages and the criteria of how such damages would be calculated or what amount of damages could be expected must be clear.

C. As regards the general characteristics of the remedial procedure

157. A remedy in respect of the excessive length of judicial proceedings must be effective, sufficient and accessible.

158. A national „complaint about delays" must not be merely theoretical: there must exist sufficient case-law proving that the application can actually result in the acceleration of a procedure or in adequate redress.

159. In the absence of specific case-law, a remedy may be considered „effective" when the wording of the legislation in question clearly indicates that it is specifically designed to address the issue of the excessive length of proceedings before the domestic authorities.

160. The possibility to apply to a higher authority for speeding-up proceedings (imposing an appropriate time-limit for the taking of necessary procedural steps or putting forward a hearing) will not be considered effective in the absence of a specific procedure, when the result of such application depends on the discretion of the authority concerned and where the applicant is not given the right to compel the State to exercise its supervisory powers.

161. The efficiency and sufficiency requirements entail in particular that the duration of the remedial procedure needs to be reasonably short, and indeed requires „special attention" on the part of the competent authorities in order to avoid infringements of Article 6 in this respect (this applies to the remedial procedure). An unreasonable duration of the remedial procedure may amount to a disproportionate hurdle to the effective exercise by an applicant of the right to individual application within the meaning of Article 34 of the Convention and exempt an individual from the obligation to exhaust it.

162. The duration of the phase of enforcement of decisions on the reasonable time requirement is crucial: the payment of the awarded compensation must be made within six months from the date when the relevant domestic decision becomes enforceable. Indeed, in order to be effective, a compensatory remedy must be accompanied by an adequate budgetary provision so that effect can be given to decisions of the court awarding compensation within six months of their being deposited with the registry (or from the date when they become enforceable).

163. With regard to the requirement that a remedy affording compensation complies with the reasonable-time requirement, it may well be that the procedural rules are not exactly the same as for ordinary applications for damages. It is for each State to determine, on the basis of the rules applicable in its judicial system, which procedure will best meet the requirement of „effectiveness", provided that the procedure conforms to the principles of fairness guaranteed by Article 6 of the Convention.

164. Special rules concerning legal costs (particularly fixed expenses such as the fees of registration of judicial decisions) in the remedial procedure would be appropriate (lower than in ordinary proceedings) in order to avoid that excessive costs may constitute an unreasonable restriction on the right to lodge such claims.

165. Reparation refers to both pecuniary and non-pecuniary damage. The existence and quantum of the pecuniary damage are to be determined by the domestic courts. As for the non-pecuniary damage, there is a strong but rebuttable assumption that such damage will be occasioned by excessively lengthy proceedings It may however be minimal or even non existent; domestic courts have to provide sufficient reasons to prove such to be the case.

166. The sufficiency of the remedy may depend on the level of compensation. The determination of non-pecuniary damage for excessive length of proceedings „must be done in a legally defined framework since reference has to be made to the amounts awarded, in similar cases, by the Strasbourg Court. Some divergence is permissible, within reason".

167. A compensation that is lower than the amount usually awarded for comparable delays by the Court itself may nevertheless be considered „adequate" in the light of the specific circumstances of the case, such as the standard of living in the State concerned, the promptness of the finding and award by the national court as well as the promptness of the payment within the national legal system. A lower level of compensation awarded by a State which has introduced a number of remedies, one of which is designed to expedite proceedings and one to afford compensation, is acceptable, provided that it is not unreasonable and that the relevant decisions are consonant with the legal tradition and the standard of living in the country concerned, are speedy, reasoned and executed very quickly.

168. The remedy must be available both for proceedings that have already ended and for those that are still pending."

The Polish Act seems to be a good starting point for the future works to elaborate an effective domestic remedy in respect of excessive length of proceedings in different States of the Council of Europe.

It is evident that the sole model of effective domestic remedy in respect of excessive length of proceedings does not exist. The States are entitled to choose *a la carte* remedies which are adequate for them. Nevertheless, by choosing the adequate remedies the States have to be aware that the effectiveness of the chosen model will be verified by the European Court of Human Rights. States, which so far have not introduced effective remedy into their legal systems, are in a very comfortable situation because they do not have to learn from their

own mistakes, but may choose the best models of domestic remedies that succeeded in other States. The best solution for the States lawmakers would be the model combining the aacceleratory remedies with a rapid and flexible procedure to establish the violation of the right as well as the possibility to award, in event of establishing the violation, a just satisfaction for the pecuniary or non-pecuniary damage respecting the civil law rules. The combination of those two remedial systems has succeeded recently in Poland. The key to success was the effective legal model aiming at establishing the violation uncontested as regards the amount of compensation as well as taking the acceleratory measures. In the model at issue the calculation of the amount of just satisfaction is not the most important factor since the amount of just satisfaction is not essential. The just satisfaction can be considered as a specific moral recovery and it is not a substitute of indemnity. On the other hand the individuals who had sustained a pecuniary or non – pecuniary damage as a result a violation of a right may in a separate proceedings seek a compensation. The experiences of Poland prove that after having established the violation of the right by the court the majority of the complainants after having received the adequate just satisfaction and having obtained the guarantee of acceleration of the proceedings gave up the time-consuming, expensive and many instances compensation procedure. This is complainants' choice to choose between the rapid, effective procedure and long, expensive one without any prospects for success.

On the other hand, in the States with a compensation model of procedure the collapse of the system took place in a very short time. The complainants did not have the choice between a rapid and accessible procedure and a very complex and time – consuming one and, in consequence they generated by their own the excessive length of proceedings in proceedings against the undue delay of proceedings. In effect, in such states the increasing number of the cases to the European Court of Human Rights can be observed. This situation can lead to the „vicious circle" fenomenom.

The inappropriate choice of a model of domestic remedy in respect of excessive length of proceedings may generate the mechanism of a specific „perpetuum mobile" destroying the rule of law in the State.

EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN POLAND

The aim of complaints proceedings before the European Court of Human Rights is to supervise the law and practice of states as regards to rights and freedoms protected by the Convention. If breach of those rights and freedoms is declared, the Court is issuing a judgment and execution proceeding begins. Time to time, execution of the judgment is even more important than proceeding before the Court itself. The main purpose of execution of judgments, except a redress on behalf of a claimant, is to identify the cause of breach. If this cause of breach is structural, then it is a clear sign to change wrong law and practice. Only such activity may block new breaches and, in consequence, new judgments. In Poland we came to those conclusions after 15 years.

On 17 May 2007 the Council of Ministers of Poland adopted the *„Action Plan of the Government for the implementation of the judgments of the European Court of Human Rights in respect of Poland*" (*Program Działań Rządu w sprawie wykonywania wyroków Europejskiego Trybunału Praw Człowieka wobec Rzeczypospolitej Polskiej*).

The elaboration of the Action Plan was proposed by the Government Agent before the European Court of Human Rights. In this respect, he took into account conclusions drawn from the Report on his activities in 2001 – 2005. In those conclusions the Government Agent identified the most important areas which in view of the Court's case-law in respect of Poland required taking general measures.

This initiative was approved by the Minister for Foreign Affairs who presented it to the Council of Ministers in February 2006.

Bearing in mind that the execution of the Court's judgments falls within the competence of various Ministers, the Government Agent proposed the establishment of a special inter-ministerial Task Force acting at the Minister of Foreign Affairs which was to be charged with the preparation of proposals for the Action Plan. The initiative was endorsed by the Council of Ministers and the Task Force started its operation in August 2006 upon the Ordinance of the Minister for Foreign Affairs.

The experts appointed by 14 Ministers (for Construction Issues, National Education, Finance, Economy, Maritime Economy, Science and Higher Education, Labour and Social Policy, Agriculture and Rural Development, State Treasury, Justice, Interior and Administration, Foreign Affairs, Transport and Health) participated in the Task Force. Their works were supported also by the General Solicitor of the State Treasury (*Prokuratoria Generalna Skarbu Państwa*), State Electoral Commission and Central Board of the Prison Service.

The draft Action Plan was presented by the Task Force to the Council of Ministers in November 2006. After additional inter-ministerial consultations it was approved by the Council of Ministers on 17 May 2007.

The proposals of actions included in the Action Plan aim at increasing the efficiency of the execution of the Court's judgments in respect of Poland and preventing new violations of the Convention by Poland. Thus, the implementation of the Action Plan will contribute to respect for human rights and rule of law in Poland.

The Action Plan contains proposals of legislative reforms, improvement of practice of application of law and regular dissemination of the Court's case-law among the society, judges, prosecutors, administrative organs and other public officials. The Action Plan focuses on such areas as:

- rules governing the application and prolongation of detention on remand;
- prevention of the protraction of judicial and administrative proceedings and increasing the effectiveness of domestic remedies to complain about the lenght of the proceedings;
- extention of the access to a court (*e.g.* creation of procedures of appeal to a court in cases conducted by maritime and medical chambers, improving guarantees for persons benefiting from free legal aid or applying for exemption from court fees);
- prevention of censorship of correspondence of persons deprived of liberty addressed at the Court;
- increasing the effectiveness of the parental contacts with children ordered by courts;
- effective realisation of Bug river claims,
- introduction of mechanisms ensuring a proper balance between the interest of private owners of flats and those of tenants in the area of the State-controlled rent.

The Action Plan contains also some crucial provisions concerning the co-operation between the Minister for Foreign Affairs and other Ministers in respect of the proceedings before the Court and the execution of its judgments. In particular, the Action Plan envisages the establishment of permanent inter-ministerial Committee for matters concerning the European Court of Human Rights.

The Action Plan will serve as a basis for further actions aimed at improving Polish law and practice, as well as awareness-raising of human rights. It gives an impetus for further works, including legislative reforms that would be undertaken by the relevant Ministers.

The Action Plan contains a follow-up mechanism. The respective tasks are being realised by the relevant Ministers within their competence. The Minister for Foreign Affairs assures assistance and information on the Court's case-law. Special role is played by the aforementioned Committee for matters concerning the European Court of Human Rights. The Committee is charged with preparation of reports on the implementation of the Action Plan. It may also propose solutions in case of difficulties in realising the Action Plan.

The first report was submitted to the Council of Ministers in November 2007.

According to this report, nine draft laws have been prepared in connection with various tasks envisaged in the Action Plan (some of them were introduced to the Parliament). Minister of Justice issued an ordinance which improved regulations concerning personal search of persons deprived of liberty (in connection with the Court's judgment in the case of *Iwańczuk v. Poland*). Works on a special Instruction on the procedures concerning the correspondence of persons deprived of liberty with the Court (and other international organs for human rights protection) are currently underway. An analysis of the possible reforms of administrative procedures has been commenced (*e.g.* local administration was asked for suggestions based on their experience).

Upon the request of the Ministry of Justice the presidents of the courts of appeal will start a regular supervision of the courts' practice concerning the prolongation of the detention on remand, granting free legal aid and execution of judicial decisions on parental contacts with children. Ministry of Justice has prepared a comprehensive analysis of the functioning of the 2004 Law on a complaint against violation of the party's right to have a case examined without undue delay in judicial proceedings. The conclusions of this analysis will serve as a basis for further actions in this field. Furthermore, issues concerning the case-law of the Court will be introduced to the curricula of training courses for judges and prosecutors within a newly established Centre for Training of Staff of Common Courts and Prosecution.

It is also worth underlining that certain actions suggested in the draft Action Plan by the Task Force were implemented even before its formal adoption, *e.g.* as regards the legislative reforms in the field of the State-controlled rent system.

On 19 July 2007 the Prime Minister established the inter-ministerial *Committee for matters concerning the European Court of Human Rights (Zespół do spraw Europejskiego Trybunału Praw Człowieka*) as his advisory and consultative organ.

The demand to establish permanent inter-ministerial organ dealing on a regular basis with issues concerning the Convention for the protection of human rights and fundamental

freedom as well as the case-law of the European Court of Human Rights, was formulated for the first time in the aforementioned Action Plan of the Government for the implementation of the judgments of the European Court of Human Rights in respect of Poland.

The Committee is tasked *inter alia* with:

- preparation of proposals of actions aiming at the execution of the Court's judgments in respect of Poland,
- analysing problems stemming from the applications communicated to the Government by the Court and formulating proposals of actions,
- issuing opinions concerning the compatibility with the Convention of the most important draft laws,
- monitoring the implementation of the Action Plan and submitting reports and proposals.

The Committee constitutes a platform for the exchange of information on the Court's case-law within the Government. It raises the awareness of the European Convention for Human Rights system within the Government administration.

The Committee is composed of experts of all Ministers, Chancellery of the Prime Minister and the General Solicitor of the State Treasury. It acts under the chairmanship of the Government Agent before the ECHR. At present, 37 experts have been appointed to participate in the Committee who represent various departments of all Ministries and the Chancellery of the Prime Minister.

The representatives of other administrative organs, courts or Ombudsman may also be invited at the meetings of the Committee *e.g.* to hold exchange of views. Working groups may be established within the Committee to deal with particular issues.

The experts of the Committee provide assistance to the Government Agent and his staff in connection with the proceedings before the Court and the Committee of Ministers also on *ad hoc* basis, outside the meetings of the Committee.