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**ROUND-TABLE:
PROPERTY RESTITUTION/COMPENSATION:
GENERAL MEASURES TO COMPLY WITH THE
EUROPEAN COURT'S JUDGMENTS**

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The views expressed are those of the author only

Round-Table

Property Restitution/ Compensation **General measures to comply with the European Court's judgments** **Bucharest, February 17th, 2011**

Polish experience of pilot procedure and implementation of judgment Hutten-Czapska against Poland – an example of specific not compensatory redress

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The introductory note

Most of the problems which relate to pilot judgments are having their roots in past facts and events. That was true in the case in the case of *Hutten-Czapska against Poland*. The roots of the problem in this case is connected with systemic issues in Poland after World War II and with the country's war-time destruction. Nowadays, Warsaw is a beautiful city but immediately after the war it was reduced to rubbles. The downtown area of the city was destroyed almost in 100 percent . According to estimates, made after the war, about 80-85% of the total city area was obliterated (including 90% of industrial plants, 72% of residential developments and 90% of cultural heritage treasures and architectural monuments. During the Nazi occupation, lasting between 1939-1945, approximately 700 000 inhabitants of Warsaw lost their lives. The number of the victims surpassed the combined toll of human casualties suffered by the US and Britain during the war. According to revised estimates, submitted in 2004, the material losses, suffered by Warsaw during World War II were very huge.

The situation in many other Polish was not much better. The number of buildings and flats, capable of providing an accommodation to the war survivors was not sufficient.. So the political decision was taken to put up tenants in buildings, which were left undestroyed but were privately-owned. At the same time the rents were set a at a minimum level.

The owners of tenements survived the communist period and retained their ownership rights. However they had to carry the burden of unwanted tenants, who were paying low regulated rents that did not cover renovation costs, not to mention the possibility of having any profits

Already at the beginning of the systemic transformation in 1989 the authorities started to consider ways of restoring a proper balance between the rights of owners and the rights of tenants, in a situation when each group had contradictory interests. It was decided that the ultimate goal

consisted in restoring full rights to building owners, including the right to set market rents. However, due to social considerations, the period of attaining market rents was stretched out over ten years, with the rights of the owners gradually extended each year through relevant changes in regulated rents. Regulated rents and other restrictions imposed on the owners were supposed disappear from Polish law effective January 1 2005. Thus, we were dealing with a typical temporary restriction of the right of ownership, justified by public interest.

Had those restrictions been removed effective January 1 2005, the European Court of Human Rights probably would not have criticized the actions of the Polish State in its judgment in the case of *Hutten-Czapska against Poland*. As it happened, the restrictions did not disappear on prescribed time-limit and the court, in its judgment of February 22 2005, found that the Republic of Poland had not fulfilled its promise and in fact extended the application of regulated rents. The Polish State quickly ameliorated its mistake, but that had no bearing on the Court's finding that violation had occurred of Article 1 of Protocol 1 (the right to enjoy possessions) to the Convention, due to the fact that the applicant was unable to enjoy her possession and collect proper rent; that position was affirmed in a judgment of the Grand Chamber dated June 19 2006. The Court's judgment was stern but just. Because of misconceived political decision to extend regulated rents, Poland was found liable not only for the effects of that move following January 1 2005, but also for the preceding 10-year period of application of regulated rents, which had been treated by the authorities as permitted interference of the state in the right of ownership.

The role of the then Ministry of Transport and Construction in the case of *Hutten-Czapska against Poland* basically began at the moment of implementing the Judgment of the Grand Chamber on June 19 2006. The Grand Chamber had found that the violation was part of a systemic problem, i.e. faulty housing legislation, and called on Poland to find a national remedy, that would allow owners to obtain profits from their property, while at the same time satisfying the housing needs of persons with low incomes. When it comes to individual and general measures, an agreement was to be concluded between the Government and the applicant.

Since agreement could not be reached, the Government Agent asked for assistance of the Court Registry, as had earlier happened during the agreement proceedings in the case of *Broniowski against Poland*. The Court responded favourably and dispatched a two-man delegation to Poland. I feel that the involvement of the Registry representatives was decisive in attaining an agreement. They played a mediating role and explained to the parties the scope of possible negotiations. The Registry representatives did not propose their own solutions but encouraged the parties to move closer together, with due reference to the Court's case law.

Ultimately, a compromise solution was found. On April 28 2008 the European Court of Human Rights endorsed the agreement. At the same time, the Court decided unanimously to strike down

the application, keeping in mind the individual measures contained in the agreement (just satisfaction and relocation of tenants) and general measures designed to resolve fundamental problems in Polish housing legislation, potentially affecting some 100 thousand real estate owners.

In implementing this judgment, the Government took a number of legislative measures to resolve some fundamental problems in the Polish legal system. These moves included:

- the introduction of a financial mechanism of state support for social housing, social dwelling units and protected flats;
- amendment of the law of the protection of tenants' rights of December 2006, allowing owners to raise rents in order to ensure proper maintenance of the buildings, obtainment of a return on capital investments and a "fair profit";
- allowing owners of dwelling units to claim compensation from local authorities on the basis of Article 417 of the Civil Code, in line with the judgments of the Constitutional Tribunal of May 23 and September 11 2006)
- partial reimbursement of loans obtained by owners for renovation and/or thermal modernization of residential tenement buildings.

This latter-mentioned solution is contained in the law of November 21 2008 on support for thermal modernization and renovation (Journal of Laws No. 223, item 1459). It entered into force on March 19 2009 . The law incorporates solutions designed to support thermal modernization and renovation projects and introduces support for owners of tenements previously affected by regulated rents.

In each instance, support is granted in the form of a bonus, or partial repayment of a loan obtained to finance the project. The relevant resources are provided by the Renovation and Thermal Modernization Fund, operated by the Bank Gospodarstwa Krajowego (National Economy Bank) and financed out of the state budget.

The role of compensatory bonus

The compensatory bonus (the kind of compensation) may be awarded only once to a natural person who on April 25, 2005 either owned the residential building on its own or was an heir to a an owner, whose residential building contained at least one flat, subjected to a regulated rent.

The amount of the compensatory bonus is determined on the basis of the usable area of the flat, subjected to regulated rents, the number of such flats in the building, the period of time during which the person entitled to receive the support owned the residential building in question and the periods of time he/she was eligible for support with regard to the respective flats, subjected to regulated rents, and also on the basis of the indicator of the cost of replacement of 1 square meter of usable area of residential buildings , in line with the law of June 21 2001 on the protection of

tenants' rights, communal housing assets and amendment of the Civil Code. The choice of that particular indicator stems from the assumption that the amount of the compensatory bonus should be determined on the basis of such an indicator which during the period of occurrences, considered as decisive for determining the eligibility for the bonus was seen as a point of reference for the restrictions regarding the amount of the chargeable rent, imposed upon the building owners.

For each year, covering the period of regulated rents application (from November 12 1994 till April 25 2005) , the compensatory bonus, depending on the scale of the renovation project and seen in relation to the replacement cost of the given building, amounts to between 1% and 1.4% of the replacement cost of 1 square meter of the residential buildings area. This means that in the case of an investor who is entitled to a compensatory bonus calculated on the basis of all flats in a given building (building containing only communal flats) and for the entire period between November 12 1994 till April 25 2005, the compensation bonus, relative to 1 square meter of a flat, subjected to regulated rents, will amount to at least 10.5% and not more than 14.7% of the indicator of the cost of replacement of 1 square meter of usable area of residential buildings.

Since under the law, as a matter of principle , the compensatory bonus is used to repay part of a loan obtained for a project eligible for support in line with general principles, an owner of a multi-family buildings submits an application for a compensatory bonus together with an application for a renovation bonus. The examples, illustrating the intensity of support, provided in form of compensatory and renovation bonuses are given in an attachment.

The timing of an entry into law of an *Act on Supporting Thermo-Modernization and Renovation efforts* has coincided with the ongoing financial crisis. This crisis have prompted commercial banks to adopt drastically stringent lending criteria. As a result of this, the persons, eligible to get a compensatory bonus have very often seen their loan applications rejected. Therefore just several months after the entry into force of the above-mentioned Law, a decision has been taken to launch a fast-track legislative works on providing some additional regulations, which will make it easier to seek compensatory payment in adverse economic conditions.

Those supplementary regulations have been introduced, following the adoption of the Law, enacted on 5th of March, 2010 which amends an *Act on supporting thermo-modernization and renovation efforts (Official Journal, No. 76, pos. 493)*. This newly- amended law has taken its effect on June 7th 2010. The most important regulations, foreseen under this amended law include notably the adoption of an alternative, more-simplified procedure of seeking the compensatory bonus, while at the same time retaining the eligibility rights to apply for two remaining bonuses types, especially in a case when thermo-modernization or renovation project is to be undertaken at a later date.

It is worth stressing the fact that this more- simplified procedure of using the compensatory bonus does not require:

- making use of a loan
- generating energy savings
- preparing an audit of a renovation project
- preparing a building project.

This procedure does not also set any requirements regarding the minimal extent of the renovation project, with one condition attached, however, stipulating that the cost of this project shall not be lower than the amount of an expected compensatory bonus. It was also allowed that renovation works could also be performed in the housing flats and not solely with regard to so called shared floor space of the building.

Generally speaking, this additional procedure of seeking the compensation bonus, introduced by a newly-amended Law is far easier to apply and takes less time to complete, as is illustrated below:

The differences, regarding the normal and simplified procedure of granting a compensation bonus		
	NORMAL PROCEDURE	SIMPLIFIED PROCEDURE
The extent of works	Only shared floor space of the building	also residential flats are covered
Minimal value of the project **	The ratio of a project cost cannot be lower than 0,05 and cannot exceed 0,70.	No requirements
Funding sources	It is required to obtain a loan from a lending bank for covering the total or partial investment costs.	Optional funding source
Application for a bonus	is submitted to BGK (National Economy Bank) through the good offices of the lending bank	is submitted directly to BGK
The documents which shall be attached to the application (excluding those, specified under an Art.15, paragraphs. 2 and 3)	The contract for obtaining a loan is concluded under a condition of granting a bonus and documents, specified in an Art.14	only documents, depicting the material scope and estimated project costs
Preparing construction project	required	not required

* the term "lending bank" refers to a definition, specified in line with the provisions an Act on supporting thermo-modernization and renovation (Art.2, paragraph11)

** apart from an obvious stipulation that the cost of the project cannot be lower than the combined amount of expected bonuses

The amended Law have also introduced more-thoroughly formulated regulations regarding the complex legal situations, which in turn make it easier for eligible persons to determine their rights to receive a compensatory bonus and the amount of expected bonus. The computer-based support tools, which are available for every interested person and can be downloaded from the website of the state-owned National Economy Bank(Bank Gospodarstwa Krajowego are also designed to attain the same goal. The above-mentioned support includes:

- making available text of the Law on supporting thermo-modernization and renovation and the text of an amended version of this Law
- code of conduct for investors ,
- exemplary forms of compensatory bonus application , separate forms for each of the two statutory procedures which are foreseen for those seeking to receive a bonus.
- conversion indicators which relate to the replacement cost of 1 m² (square meter) of usable floor space in residential buildings and a calculator of the compensatory bonus.

Despite numerous signs of a relatively high interest among eligible persons in seeking the compensatory bonus, only one application has been submitted in 2009. This latter-mentioned application was approved.

Following the entry into force on 7th of June, 2010 of the new Law which amends an *Act on supporting thermo-modernization and renovation efforts* (*Official Journal, No. 76 ,pos. 493*), the situation has improved. 58 new compensatory bonus applications were submitted until the end of 2010 (during the period of 7 months). No single application was rejected. As a result 26 compensatory bonuses were awarded. The remaining applications require to be supplemented by some additional documentation.

The lack of documentation is the main hurdle, hampering more-faster granting of compensatory bonuses. Such a situation very often relates to the documents, which confirm the eligibility rights to receive a compensatory bonus. It is very difficult to restore those documents when they are lost.

Currently, it is too early to predict in a credible way on how many compensatory bonus applications are going to be submitted in a subsequent period. However taking into account, that:

- every previously implemented government-sponsored housing program have reached an appropriate level of efficiency after 1-2 years following the adoption of the relevant legislative framework

- one can visibly notice the adoption by the banks of the more lenient and flexible borrowing policy
- amending regulations regarding the compensatory bonus have sparked positive reactions of the eligible persons

We can expect in every subsequent year the significant rise in the number of renovation projects, which are performed by the persons, eligible to receive a compensatory bonus. The expected growing interest in seeking the compensatory bonuses will require an increase in financial support from the State's budget to the Thermo- modernization and Renovation Fund, which is tasked with providing funding for such bonuses.

Other legislative arrangements

As I have already mentioned, the activities of the Government, designed to comply with the ECHR's judgment in the *case of Hutten- Czapska* are not solely confined to the partial reimbursement of loans, obtained by the property owners to finance renovation and/or thermo-modernization of rental buildings. Those activities include also **the introduction of mechanism which serves to monitor the level of the rents.**

The aim of the above-mentioned mechanism is to get a transparent picture of the rents increases and at the same time make it easier to set an amount of the rent and fees, which are applied with regard to particular buildings in given locations, for the purpose of individual contracts, determining the so called *initial rent*. The subsequent aim is to give to the courts an additional supervising mechanism, allowing them to check the rent-setting basis as well as the justification of its increase.

The mechanism which serves to monitor the level of the rents has been launched following the adoption of amendments to the Real Estate Management Law and introduces in Poland the so called 'rental mirror'. That is why starting from January the 1st, 2008, an obligation has been imposed upon real-estate managers, making it mandatory for them to provide data on rents, charged in residential flats, which are not part of a publicly-owned housing stock. Such data can be also provided from other sources.

The Government is consequent in taking some subsequent initiatives concerning the rental market . It is very important to remind that the regulations concerning an increase of the rent has been subjected to a change following an entry into force (on January 1st, 2007) of the Law on the Protection of the Tenants rights, Municipal Housing Stock and on amending Civil Code.

The existing legal regulations stipulate that the rent increase which will not exceed 3% of the replacement is not subjected to any limitations if the prior termination notice is given in a period which is not shorter than 3 months.

The increase, which results in a situation when the amount of the rent either exceeds or is calculated in relation to a level which is higher than 3% of the replacement value can only be allowed under well-justified circumstances.

Currently, it is justified for an owner to receive an amount of the rent which is sufficient to cover the costs of keeping the flat in a good order, ensure returns on the invested capital and some gains.

The expenses which are made to pay the costs of maintaining a flat are set in proportion to the usable floor space of the flat, seen in relation to the usable floor space of all flats in the building and include the perpetual leasehold fee, property tax and costs of maintaining a property.

By increasing an amount of the rent, the owner can set and receive

1) the annual return rate, which does not exceed:

a) 1,5% of expenses, incurred for the construction or the purchase of the flat

b) 10% of expenses, incurred for providing the lasting improvements for the existing flat, thus increasing its functional value

- incl. the possibility of having the full return of those expenses:

2) decent gain

If the municipality is not able to provide a social dwelling to an eligible person in accordance with the court's eviction ruling, the owners of residential flats are entitled to seek compensation claims which will fully cover the resulting losses. The corresponding regulations are contained in an Article 18 paragraph.5, and in relation to an Article 417 of Civil Code.

From 17th of December 2009, following an amendment of the *Law on the protection of the tenants' rights, municipal housing stock and on amending the Civil Code*, the legal form of the so called lease, granted on occasional basis (najem okazjonalny) has been introduced. The short-term lease has taken its effect since 2010. .

The so called occasionally-granted lease is being characterized by the following features

1. it applies to residential flats, owned by natural persons, who are not involved in conducting business activities related to the renting of flats
2. putting such a flat into use shall be based on a contract which is concluded for a fixed period of time, not exceeding 10 years

3. stipulates, that, the statement , made by the tenant in the form of a legal deed, expressing consent of such a person to comply with an enforceable duty to vacate a flat shall be considered as as a writ of execution which becomes valid after the decision of the court to grant the enforcement clause.
4. does not set any limits regarding the amount of the rent. The increase of the rent shall be made only in accordance with the provisions of the contract.

This regulation and the corresponding amendment of the Civil Procedure Code, which excludes a right to receive a temporary dwelling with regard to persons who have lost a legal title to a flat, rented in accordance with the contract on the so called occasionally-granted lease , makes it easier in a significant manner to carry out an eviction procedure. The owner does not have to wait for an eviction order and the bailiff can start to act once enforcement clause is granted by the court.

The second remarkable change, introduced under the discussed Law, which is beneficial to owners, refers to the income tax and consists in allowing for the revenue, earned from each type of lease contract to be taxed according to a single and favourable tax rate in the form of a lump sum (8,5%). This change also applies from 1 st of January 2010. Before that date, the lump sum tax of 8,5 % was levied only on the amount of income, not exceeding 4 thousand Euro per year. The amount of income, lying above this threshold was subjected to a 20% income tax rate.

Having recognized the problems of local governments in managing the housing stock ,**the Government takes also some actions, designed to make it easier for them to fulfil an obligation of providing shelter to the poorest citizens and those, who are at risk of becoming homeless.**

The support of the State, designed to create housing stock for the poorest citizens and families and those in need of care is provided in accordance with the provisions of an *Act on financial support for the creation of social dwellings, protected flats, shelters and dwellings for the homeless people* (Official Journal No. 251, item 251, with subsequent amendments). This law sets out the principles of seeking financial support from the state's budget, which are binding for those entities, who in accordance with legal or statutory regulations are responsible for providing flats or shelters to those in need.

Depending on the type of the implemented project, the municipality, association, comprising some neighbouring municipalities, county or an organization of public purpose can receive financial support to partially cover the cost of the project, which is designed to create social dwellings, protected flats, shelters or dwellings for homeless people.

The financial support is provided from the Subsidies Fund which is managed by the state-owned Bank Gospodarstwa krajowego (National Economy Bank). The Subsidies Fund is responsible for

signing contracts with eligible entities and subsequently for making a payment and preparing an account of the money which have been spent.

The Law on amending an *Act on financial support for the creation of social dwellings, protected flats, shelters and dwellings for the homeless people* (Official Journal No. 39, item 309) has been enacted on February 12th, 2009, following a government's initiative.

The changes, which have been introduced by an amended Act, include:

- a) making it possible for municipalities to use financial support of the State and acquire the flats , subjected to regulated rents, which do not have the status of social dwellings.
- b) increasing(to 30-50% of the costs, spent on the project) maximum amount of financial support, which the applicants can seek. Prior to an amendment of an Act, the respective limits were set at 20%-40% of the project's costs).
- c) the possibility of purchasing and refunding the purchase of residential buildings (and not only single flats).

According to an amended Act, the municipalities can use the financial support to build or to acquire the flats, subjected to regulated rents. However, there is also a condition, attached, stipulating that the municipalities shall at the same time, without resorting to the Subsidies Fund, create social dwellings, the number and floor space of which, is equal to the expected results of supported investment.

By concluding, I wish to underline that the pilot judgment procedure in the case of *Hutten-Czapska against Poland* has been successful. Another crucial issue is connected with this case. The Government was considering what general measures would be appropriate in view of the ascertained violation,, while entering into negotiations on the agreement in the case, For many years the Court's case law upheld the position that compensation was the best way of *restitutio in integrum* , in cases involving violations of Article 1 Protocol 1 of the Convention. In this particular case that formula would have been difficult, primarily due to problems with calculating the compensation. That is why we rejected that concept in favour of a solution that rewards a proactive attitude by potential applicants. Let me remind you that we are talking about 100 thousand people. Instead of empty money for hard-to-calculate losses in the past, the applicants have received an instrument designed to implement their future investment goals. The Court's acceptance of such a formula testifies to the wisdom of the Judges and their willingness to depart from routine solutions.

EXAMPLE illustrating intensity of support, granted for the implementation of a renovation project in the form of both renovation and compensatory bonus..

Assumptions :

- there are only flats, subjected to regulated rents, in the given building
- the entitlement to get a compensatory bonus covers the whole period from November 12th, 1994 to April 25th 2005, so it is 10 years and a half
- the renovation project, implemented in the building is in at least three-quarters financed by a loan, obtained from the lending bank

Considering those assumptions, the eligible person will be able to make use of both the renovation bonus which amounts to 15 % of renovation project costs and the compensatory bonus, which is at least 10,5 % of the replacement costs of the building. As far as the large-scale renovation projects are concerned, when the ratio of project cost, which illustrates the relation between the costs of the renovation project and the replacement value of the building, exceeds 0,5 (meaning that the cost of the project surpasses 50 % of the building's replacement value), the increase of the compensatory bonus is directly proportional to the ratio of project cost. Such an increase can reach maximum value , which is 14,7 % of building's replacement value in a situation when the cost of renovation projects is at least 70% of building's replacement value: That is why, if :

a) the ratio of the project cost is equal to 0,124,

the compensatory bonus will amount to $0,5 * 2\% * 10,5 = 10,5\%$ of building's replacement value

the renovation bonus will amount to $15\% * 0,124 = 1,86\%$ of this value:

both of those bonuses will amount to 12,36% of building's replacement value , which given the fact that the ratio of project cost is equal to 0,124, represents almost 100% of the project costs.

As we can see , the intensity of total support from public sources, provided in the form of compensatory and renovation bonuses , can get very close to 100 % of project costs in a case when we are talking about standard renovation projects. However, one should underscore that in such cases it would be necessary to implement a renovation project, the cost of which amounts to approximately 12,4% of building's replacement value. Moreover, such a renovation project would have to be financed only by loan, obtained from the lending bank.

Examples

b) the ratio of the project cost is equal to 0,5,
the compensatory bonus will amount to $0,5 * 2\% * 10,5 = 10,5\%$ of building's replacement value. ,

the renovation bonus will amount to $15\% * 0,5 = 7,5\%$ of this value

both of those bonuses will amount to 18% of building's replacement value, which given the fact that the ratio of project cost is equal to 0,5 , represents 36% of the project costs.

c) the ratio of the project cost is equal to 0,6,
the compensatory bonus will amount to $0,6 * 2\% * 10,5 = 12,6\%$ of building's replacement value,

the renovation bonus will amount to $15\% * 0,6 = 9,0\%$ of this value;

both of those bonuses will amount to 21,6% of building's replacement value , which given the fact that the ratio of project cost is equal to 0,6, represents 36% of the project costs the ratio of the project cost is equal to 0,7,

the compensatory bonus will amount to $0,7 * 2\% * 10,5 = 14,7\%$ of building's replacement value ,

the renovation bonus will amount to $15\% * 0,7 = 10,5\%$ of this value

both of those bonuses will amount to 25,2% of building's replacement value, which given the fact that the ratio of project cost is 0,7 also represents 36% of the project costs.

As we can see, in the case of large-scale renovation projects (when the ratio of project costs is between 0,5 and 0,7), the intensity of total support from public sources, provided in the form of compensation and renovation bonuses is constant and represents 36% of building's replacement value.

In a case, when we are dealing with larger renovation projects, the value of compensatory bonus does not increase because of a declining economic rationality of such projects. However, as far as standard renovation projects are concerned, the value of expected compensatory bonus does not depend on the extent of the project.

The results, obtained in four above-mentioned cases have been shown below:

bonus	a)	b)	c)	d)
compensatory	10,50	10,5	12,6	14,7
renovation	1,86	7,5	9,0	10,5
TOTAL - as a percentage share of building's replacement value	12,36	18,00	21,6	25,2

- as a percentage share of the project cost	99,7	36,0	36,0	36,0
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Useful sources

1. You can download from <http://www.bgk.com.pl/fundusz-termomodernizacji-i-remontow-2/premia-kompensacyjna> an appropriate calculating device, which helps to determine the amount of compensatory bonus.
2. The Polish text of an *Act on Supporting Thermo-Modernization and Renovation efforts*, enacted on 21st of November 2008 is available under <http://infor.pl/skany/spis.php?rodzaj=dzu&rok=2008&num=223&poz=1459&str=0001>