POLAND/POLOGNE

A. Mechanisms to ensure the compatibility of draft legislation (draft statutes or executive acts)[1]

1. Verification of draft legislation by the Government Agent

Since October 2012 the Government Agent has been regularly analysing draft legislation of the Government (draft statutes or ordinances) from the point of view of their compatibility with the Convention and the Court's case-law.

On the same basis, the Government Agent analyses draft Government opinions on draft legislation proposed by other bodies (e.g. parliamentarians).

- *How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)?*

If potential problems in the draft legislation are identified by the Government Agent, upon his/her initiative, the Minister of Foreign Affairs submits comments and proposals within the framework of legislative consultations held by the Government.

The mechanism is systematic as it concerns – in principle – all draft legislation received by the Government Agent.

It is optional as it has been introduced upon the initiative of the Minister of Foreign Affairs[2] and is implemented as part of the competences of the Minister of Foreign Affairs (as a member of the Government) and within the framework of inter-ministerial consultations. It is optional also in the sense that the opinions submitted by the Minister for Foreign Affairs on the compatibility of draft legislation with the Convention are not formally binding upon other ministers, including the author of the draft.

- *What are the advantages of the mechanism chosen?*

As the Government Agent has the most up-to-date information on the Court's case-law concerning both Poland and other countries and also information on communicated cases (including repetitive ones), it is possible for him/her to signal those issues that may be most problematic in practice.

- *What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?*

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[1] In Poland the term "administrative practice" does not apply to normative acts but would rather apply to *e.g.* administrative decisions issued in individual cases on the basis of statutes, or more broadly to the overall functioning of administrative authorities. The term "executive acts" proposed here would concern in particular ordinances issued by the relevant executive authorities on the basis of the authorisation included in a statute, within the limits of that authorisation and in order to execute the statute. The same rules and governmental procedures apply equally in respect of executive acts as in cases of statutes, with an additional requirement that executive acts, which have lower rank, should comply not only with the Constitution and the relevant international acts, but also with statutes. The term "statutes" is used here in accordance with the official translation of the Polish Constitution. It may be referred to "laws."

[2] To this end, in 2012 the competences of the Government Agent's Office (formally called "Department of Proceedings before International Human Rights Protection Bodies") at the Ministry of Foreign Affairs of Poland, were extended to include the following task: The Department issues opinions on proposed statute guidelines, draft statutes as well as other legal acts as to their compatibility with international human rights protection standards, including the Convention for the protection of human rights and fundamental freedoms, and prepares the necessary analyses in this respect.

The following obstacles have been encountered by the Government Agent in establishing or applying this mechanism:

- **significant number of draft legal acts** prepared by the Government in relation to staff capacities of the Government Agent Office. Obviously, some draft legal acts do not concern the Convention rights and freedoms at all as they relate to areas not covered by the Convention. The Government Agent elaborated a thematic list of areas where regulation could potentially affect human rights and fundamental freedoms – this could serve as a basis for other departments of the Ministry, signalling to them those areas where the Government Agent should be consulted. Nevertheless, in practice the workload is significant.
- **short time-limits** – the Government Agent is bound by usually rather short time-limits that apply to the procedure of inter-ministerial consultations. This may affect the ability of the Government Agent to search the relevant case-law of the ECtHR.
- **highly technical or specialist nature of some areas covered by the draft legislation** requiring specialist knowledge. Even good knowledge of the Convention and the ECtHR case-law by the staff of the Government Agent Office may be insufficient to identify possible future problems that could arise in connection with the operation in practice of some detailed legal regulations concerning such specialist areas.
- in many cases – **lack of a relevant Court ruling** concerning an issue sufficiently similar to the one addressed in the draft legislation that could serve as a point of reference. Obviously, the authority of the opinions of the Government Agent is lower if they are based only on his/her own interpretation of the Convention (even if this interpretation is made on the basis of general principles found in the Court's case-law).
- **the constantly developing case-law of the Court** sometimes makes it impossible to prejudge with sufficient certainty the outcome of possible proceedings before the Court if an application is lodged in connection with the draft legislation in question.
- **difficulties linked with the so-called balancing exercise** – the assessment by the Court of whether the legislation in question strikes a fair balance between the public and individual interests may differ from the assessment of the national authorities, including of the Government Agent.

2. Verification of draft legislation by other bodies

Any authority is obliged to examine, and ensure, at every stage of the legislative process, conformity to the Constitution (thus also to constitutional rights and freedoms) of any legal act it drafts. As the Convention is an integral part of the generally binding law in Poland[3] and by operation of the Constitution takes precedence over statutes, if they cannot be reconciled with the Convention (Article 91(2) of the Constitution in connection with Article 241(1)), the authorities should examine draft legal acts and ensure their compatibility with the Convention as well.

- *How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)?*

[3] By operation of Article 87(1) of the Polish Constitution ratified international agreements constitute universally binding law of the Republic of Poland. In accordance with Article 91(1) of the Constitution, a ratified international agreement (after its promulgation in the Journal of Laws of the Republic of Poland) constitutes part of the domestic legal order and is applied directly, unless its application depends on the enactment of a statute.

1) On 1 March 2016, on the initiative of the Minister of Foreign Affairs, an amendment was introduced to the Rules of Legislative Technique specifying that an analysis of the legal order (required before drafting any new statute) should also take into account international human rights agreements ratified by Poland[4].

The Rules of the Legislative Technique were adopted by an ordinance of the Prime Minister and are binding upon the government administration (but not on *e.g.* parliamentary legislative initiatives). At this stage there is no data available on how this new provision will be enforced by the relevant ministers. In principle, it constitutes a basis for regular and systematic analysis by the competent ministers (at the early stage of the legislative process) of international human rights obligations binding upon Poland pursuant to ratified human rights agreements, notably the Convention.

2) Once a draft legal act is prepared and submitted by a relevant minister, its compliance with the Convention may be examined (and challenged, if necessary) in the general process of inter-ministerial consultations and in the framework of the process of adopting opinions on draft legal acts involving a wide range of bodies, including those outside the government administration.

In particular, both the Legislative Council attached to the Prime Minister and the Government Legislative Centre pay attention to the compatibility of draft legal acts of the Government with the Constitution and the Convention. Standards stemming from the well-established case-law of the Court are referred to by them whenever they are relevant to their analyses and proposals. In its annual reports submitted to the Council of Ministers, the Legislative Council also draws attention to the issues related *inter alia* to the application of the Convention. Also the Supreme Court is tasked with preparing opinions on draft statutes and other normative acts which form the basis for proceedings and the functioning of courts (it may also issue opinions on other acts, if appropriate). When preparing such opinions the compatibility with the Convention and the standards stemming from the Court's case-law are analysed by the Supreme Court and its expert staff. This concerns, in particular, acts governing court procedures and Article 6 guarantees. Likewise, analyses of the compliance with the Constitution and ratified international agreements, among them the Convention, are often prepared by the Prosecutor General and the National Prosecutor who participate in the process of submitting opinions on draft legal acts. /The above information is provided as an example, as there are many other authorities that may submit opinions on draft legal acts. /

3) The compatibility of draft statutes (and those that are in force) with the Convention (among others) may also be examined by Parliament, specifically by the relevant Sejm and Senate committees. The Sejm's Legislative Committee may be asked by the Speaker for an opinion in the case of doubts as to the possible incompatibility of a draft statute with the law. The relevant organs of both chambers of the Parliament or even individual parliamentarians may raise issues as to the compatibility with e.g. the Convention. Expert opinions may be commissioned from the chancelleries of the Sejm and Senate. Independent advice may also be sought. Again, other authorities and civil society organisations may also (and often do) contribute with their opinions and the Convention is often referred to in the legislative work of the Parliament.

- *What are the advantages of the mechanism chosen?*

A broad range of authorities and representatives of the civil society may contribute to the legislative process, submitting comments and proposals on the compliance with the Convention and other matters.

[4] § 1. 1 of the Rules of the Legislative Technique states as follows: A decision on preparing a draft statute should be preceded in particular by: […] 2) an analysis of the current legal order, taking into account the law of the European Union, international agreements binding upon Poland, including agreements concerning protection of human rights, as well as the law of international organisations and bodies of which Poland is a member.

- *What obstacles have been encountered in establishing or applying these mechanisms?*

There have been no obstacles encountered in establishing the above mechanisms. As regards their application in the context of ensuring the compliance with the Convention, the following obstacles or challenges have been identified by the authorities consulted by the Government Agent before this exchange:

- **few Court judgments or decisions** in the areas of competence of some authorities that could serve as a point of reference for them;
- difficulties stemming from the need to take into account **differences in the legal systems** of other member states to which the Court's judgments or decisions apply;
- sometimes **insufficient knowledge** about the Convention and the Court's case-law on the part of persons dealing with the legislative process and **problems with finding the relevant case-law** of the Court on the part of persons who do not deal with the Court's case-law on a daily basis – due to the vast number of judgments adopted by the Court, the fact that only a small part has been translated into Polish and because information on the case-law may be fragmented or dispersed (it is published on websites of various authorities, NGOs, courts, etc.).

- *How have these been overcome?*

Training of legislators

In 2015 a new ordinance of the Prime Minister was adopted governing the professional training of legislators (the so-called legislative apprenticeship organised by the Government Legislative Centre). Upon the initiative of the Minister of Foreign Affairs, the scope of training was extended to formally include the impact of international obligations of Poland in the area of human rights on the law-making process.

Even earlier though, within the framework of legislative apprenticeship courses organised by the Government Legislative Centre in the 2013/14 and 2014/15 academic years, the topic of human rights protection in the legislative context was introduced and more than 60 legislative apprentices participated in those courses.

In addition, in 2012-15 the Government Legislative Centre carried out a project "Improving legislative techniques in offices supporting public authority organs," in which the Helsinki Foundation of Human Rights participated. In the framework of this project, training and workshops were organised for the management staff and other staff of the Government Legislative Centre, directors of legal and legislative departments of ministries and other central offices, as well as legislative apprentices. The purpose of the training was to increase awareness of the necessity to take the Convention standards and the role of the Court's case-law into account in the legislative process. In sum, 23 legislative workshops have been organised for 237 persons.

Awareness-raising of the need to take the Convention into account

In March 2013, the Undersecretary of State at the Ministry of Foreign Affairs and the President of the Government Legislation Centre took a joint initiative by sending a letter to undersecretaries of state of all the other ministries, drawing their attention to the need to take the provisions of the Convention and its Protocols into account when drafting new legislation.

Various authorities consulted by the Government Agent have presented their initiatives to raise their staff's awareness of the Convention and the Court's case-law standards (training, publishing information on the Convention and the relevant ECtHR judgments on their websites). In some ministries the relevant departments and their staff have been asked to follow the Court's case-law on a regular basis. For instance, the tasks of the Department of International Cooperation and Human Rights of the Ministry of Justice include the monitoring and analysing the Court's case-law

and its impact on the legal acts falling within the competence of the Ministry of Justice. The Department is consulted in the process of preparing draft legal acts by the Ministry of Justice and the Minister's opinions on draft legislation.

Increasing access to the Court's case-law and information thereon

In 2014 an agreement was signed between the Ministry of Justice, the Ministry of Foreign Affairs, the Constitutional Tribunal and the Supreme Administrative Court in order to increase the availability of judgments of the Court in respect of other countries. The signatories jointly select the Court's judgments to be translated on the basis of overviews prepared by the Government Agent and mutually share the translations prepared by them. In 2015 the Prosecutor General acceded to the agreement. Over 70 ECtHR judgments or decisions concerning other States Parties have been translated and published by the parties to the agreement so far. One should add that obligation of the competent ministers to translate "violation" judgments in Polish cases is explicitly envisaged by the Order of Prime Minister on the establishment of the Committee for Matters of the European Court of Human Rights. All translations (about 500 texts) are collected in an on-line database run by the Ministry of Justice which also prepares and disseminates many publications with analyses and comments concerning various aspects of the Convention (more information on the awareness-raising activities – see the report by Poland on the implementation of the Brighton Declaration).

The Government Agent has prepared two overviews of the leading 2014 and 2015 ECtHR judgments and decisions concerning other countries (*i.e.* leading cases selected by the Court's Bureau). Those overviews have been annexed to the 2014 and 2015 annual reports by the Government on the state of execution of the Court's judgments by Poland.

In 2015, the Government Agent started preparing monthly newsletters on the Court's case-law concerning other countries, while the Ministry of Justice has been preparing such newsletters concerning the Court's case-law in respect of Poland for many years now. Both newsletters are distributed to a wide range of contact persons from other ministries and institutions.

Dialogue between the Government Agent and other ministries

On some occasions meetings are organised between representatives of the competent ministry and the Government Agent to clarify obligations stemming from the Convention. For instance, in October 2015 a meeting was organised between the experts of the Government Agent's Office and the ministry responsible for spatial planning (at its request) in order to discuss legislative plans of the ministry from the point of view of the standards stemming from the Court's case-law concerning the protection of property.

B. Mechanisms to ensure the compatibility of laws (statutes and executive acts) in force

1. Competences of the Constitutional Tribunal

a) *in abstracto* verification of compatibility of legislation with the Convention:

Ex post verification of compatibility of Polish law with the Convention is performed by the Constitutional Tribunal upon an application of the competent authorities, including the courts[5].

[5] The President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights may make applications to the Constitutional Tribunal to adjudicate the conformity of all legal acts. An application may also be submitted by the National Council of the Judiciary regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges. Also some other bodies (the constitutive organs of units of local government, the national organs of trade unions as well as the national authorities of employers'

According to Article 188 of the Polish Constitution, the Constitutional Tribunal's competences encompass adjudicating *inter alia* regarding:

2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;

Consequently, the Constitutional Tribunal may adjudicate on the conformity of both statutes and other legal acts not only to the Polish Constitution but also the Convention, and may declare a given legal act to be incompatible with the latter, as a result of which the relevant provisions would lose their binding force.

b) *in concreto* verification of compatibility of legislation with human rights (individual constitutional complaints):

In accordance with Article 79(1) of the Constitution, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision with respect to his freedoms or rights or his obligations specified in the Constitution.

Formally, the verification by the Constitutional Tribunal in such cases is performed according to the Constitution only. Nevertheless, in view of the convergence between constitutional and conventional rights and freedoms and also the fact that the Constitutional Tribunal often relies on the Convention and the Court's case-law in the reasoning of its judgments, constitutional complaints in practice often serve to eliminate provisions which are also incompatible with the Convention from the legal order.

- *What are the advantages of the mechanism chosen?*

The main advantage of the above mechanisms is that they result in legal provisions found by the Constitutional Tribunal to be incompatible with *e.g.* the Convention being removed from the legal system (together with their legal effects). A judgment of the Constitutional Tribunal on the non-conformity to the Constitution, international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, is a basis for reopening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to such proceedings (Article 190(4) of the Constitution).

One could also mention here that upon the initiative of the Minister of Foreign Affairs in 2015 a special consultation procedure was added to the Rules of Procedure of the Council of Ministers. The Government Legislative Centre prepares the observations of the Government in proceedings before the Constitutional Tribunal. According to the new rules, it consults the Minister of Foreign Affairs if the subject of the case pending before the Constitutional Tribunal relates to the compatibility of a normative act with international regulations concerning human rights, in particular the Convention (the latter is specifically mentioned in the Rules). This procedure made it possible for the Government Agent to signal to the Government Legislative Centre for instance the problem of incompatibility of some legislation which has been found problematic by the ECtHR in the case of

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organizations and occupational organizations as well as churches and religious organisations) may submit such applications if the normative act relates to matters relevant to the scope of their activity (Article 191 of the Polish Constitution). Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court (Article 193 of the Polish Constitution).

Kędzior v. Poland. The observations prepared by the Government Legislative Centre in the proceedings before the Constitutional Tribunal concerning this legislation reflected the position of the Government Agent in this respect.

- *What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?*

No particular obstacles have been encountered in establishing or applying the above mechanisms of verification of conformity of legislation to the Convention.

2. Competences of the courts

If a statute contains provisions that cannot be reconciled with the Convention, in accordance with the Polish Constitution, the Convention takes precedence (on the basis of Article 91(2) in conjunction with Article 241(1)). In consequence, if the courts encounter such a situation in the context of court cases examined by them, and the incompatibility of the statute with the Conventions is of such nature that it may not be removed e.g. by interpretation, they may not rely on such provisions when delivering their decisions. In such event the courts may address a legal question to the Constitutional Tribunal (see footnote no. 5 above).

Considering the purpose of the current exchange, this complex matter, including the courts' competences to review executive acts, will not be discussed here in detail for it would require a long presentation, but additional information can be submitted upon request.

It would be useful to highlight the following practical mechanism aimed at helping the law-maker to adjust the legislation. In accordance with Article 5 of the Act on the Supreme Court, the First President of the Supreme Court submits to the competent authorities his/her comments concerning shortcomings or lacunae in the binding law that should be removed with a view to ensuring coherence of the Polish legal system. As an example, in the information submitted in 2015, the First President of the Supreme Court pointed to a lacuna in the Act on Proceedings in Cases Concerning Minors. This lacuna had resulted in inappropriate application of the law by the authorities (the same problem has been identified by the ECtHR in the case of *Grabowski v. Poland*).

- *What are the advantages of the mechanism chosen?*

The courts are particularly well-placed to identify, remedy and signal any possible shortcomings of the legislation that arise in the application of the law.

- *What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?*

No particular obstacles have been encountered in establishing the above mechanisms. As regards their application, the same issues may be mentioned as in case of other authorities assessing the (draft) legislation, such as:

- **few Court judgments or decisions** in some of the areas of the courts' competence that could serve as a point of reference for them;
- difficulties stemming from the need to take into account **differences in the legal systems** of other member states to which the Court judgments or decisions apply;
- sometimes **insufficient knowledge** of the Convention and the Court's case-law by judges and **problems in finding the relevant case-law** of the Court – due to the vast number of judgments adopted by the Court, the fact that only a small part has been translated into Polish and because information on the case-law may be fragmented or dispersed (it is published on websites of various authorities, NGOs, courts, etc.).

- *How have these been overcome?*

By means of awareness-raising and educational activities, notably conducted by the Ministry of Justice and the National School for Judges and Prosecutors. See the above information on p. 5 and the report on the measures taken by Poland as a follow-up to the Brighton Declaration.

3. Competences of the inter-ministerial Committee for matters of the European Court on Human Rights

In the annual reports on the execution of ECtHR judgments by Poland, adopted by the Government, there is a separate annex with information on the outstanding legislative work that is needed in order to ensure the execution of pending ECtHR judgments in respect of Poland.

On 23 April 2015, a comprehensive amendment to the *Order of the Prime Minister on the establishment of the Inter-ministerial Committee for matters of the European Court of Human Rights* entered into force with a view to streamlining the process of execution of the Court's judgments, including where relevant by adopting the necessary legislative reforms.

The 2015 amendment sets out obligations and introduces a detailed schedule for the submission of action plans and action reports by the relevant ministers. It also provides for deadlines for the translation of judgments and the dissemination of judgments and decisions among the relevant stakeholders. The amendment is based on the Committee of Ministers' regulations regarding the deadlines and definitions of general and individual measures and requirements concerning action plan/reports.

- *What are the advantages of the mechanism chosen?*

The 2015 amendment increases the transparency of tasks in the process of the execution of judgments incumbent on the respective ministers. Hence, it also increases their accountability for the timely introduction of the necessary legislative and other reforms and for the timely drafting of documents for the Committee of Ministers. It is expected that the amendment will accelerate the execution process, including the adoption of amendments to the law necessary to conform to the Convention.

- *What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?*

Among others, there were no time-limits in the Polish law governing the execution of judgments, including the preparation of action plans and actions reports by the competent ministers. The adoption of the above-mentioned amendment was intended to remedy this problem.

C. Mechanisms to ensure the compatibility of administrative practice

The same mechanisms apply both to statutes and executive acts – see above.

D. Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?

The process of execution of the ECtHR judgments in respect of Poland by the relevant ministers is monitored by the inter-ministerial Committee chaired by the Government Agent. The necessary legislative work is regularly discussed at plenary meetings of the Committee and within the framework of bilateral contacts between the Government Agent (the Committee's Chair) and the relevant ministries.

Moreover, in the annual reports on the execution of ECtHR judgments by Poland there is an annex with detailed information on changes to the law (or to the practice of its application) which are required in order to execute the respective judgments of the Court. This may serve as a basis for possible evaluation of the progress made.

No other special mechanisms have been put in place so far to assess other mechanisms described here from the point of view of their appropriateness and effectiveness in ensuring the compliance of law and practice with the Convention.

Nevertheless, the Government Agent regularly analyses the case-law of the Court in order to identify the main reasons behind the Court's judgments finding a violation by Poland. It may be concluded therefrom that the vast majority of violations found in respect of Poland stemmed from the inappropriate application of the law by courts or administrative authorities rather than from the law as such. In those cases where the violation did stem from the law in force, most often it was due to its insufficient character rather than its direct incompatibility with the Convention (compare *e.g.* the case of *Rutkowski and Others v. Poland* – the legislation provided for an effective domestic remedy capable of ensuring appropriate redress for the applicants in the case of excessive length of domestic proceedings, but the manner in which it was applied by the courts did not always fully comply with the ECHR criteria).