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To:

**The Secretary of the Committee of Ministers
Council of Europe**
Avenue de l'Europe
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**UPDATED COMMUNICATION FROM THE HELSINKI FOUNDATION FOR
HUMAN RIGHTS**

CONCERNING

**EXECUTION OF ECtHR JUDGMENTS IN CASES *ADAMKOWSKI V. POLAND*
(APP. NO. 57814/12) AND *PAROL V. POLAND* (APP. NO. 65379/13)**

To the attention of:

1. Mr. Jan Sobczak

Plenipotentiary of the Minister of Foreign Affairs for cases and procedures before the European
Court of Human Rights
Agent of Polish Government

I. Introduction

1. The Helsinki Foundation for Human Rights (“the HFHR”, or “the Foundation”) respectfully presents updated opinion on the execution of the judgments of the European Court of Human Rights (“the ECtHR”, “the Court”) of 28 March 2019 in the case of *Adamkowski v. Poland* (application no. 57814/12) and of 11 October 2018 in the case of *Parol v. Poland* (application no. 65379/13). We submit this update due to the recent amendments to the Code of Civil Procedure (“CCP”).

2. In this update, the HFHR also wishes to refer to the Government's response to the Foundation's latest communication of 12 September 2019 and the Updated Action Report of 6 February 2020. In the response, the Government noted that *„(...) due to the time-frame set up in Article 9 § 1 (2) of the amendment of the Code of Civil Procedure of 4 July 2019, which envisages that the provision obliging the Minister of Justice to issue the regulation in question will enter into force after 12 months of the promulgation of the amendment, which took place on 8 August 2019, the legislative works on the regulation are currently at the initial stage. Therefore, it is too early at the moment to provide detailed information on the substantive elements of the particular model instructions.”*¹

3. At the same time, the HFHR would like to emphasize that it fully supports all claims and conclusions indicated in its communication of 12 September 2019.

II. The most recent amendment to the CCP.

4. As indicated by the Foundation in para. 8 of the Communication of 12 September 2019, *“The HFHR agrees with the Government that in order to implement analysed judgments of the ECtHR it is not necessary to change “the existing legal provisions requiring submission of multiple copies of one’s pleadings for the purposes of their service on the court and other parties to the proceedings (Article 128 § 1 of the CCP, and Articles 368 § 1 and 370 of that Code – in respect of the appeal proceedings) or the established practice requiring the copies of pleadings to faithfully reflect the content of an original pleading, as only then they can be*

¹ The Government’s response to the HFHR communication of 12 September 2019, DPT.432.103.2019/9, p. 1, [http://hudoc.exec.coe.int/eng?i=DH-DD\(2019\)1066E](http://hudoc.exec.coe.int/eng?i=DH-DD(2019)1066E), Updated Action Report of 6 February 2020, DH-DD(2020)115, p. 4, [http://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)115E](http://hudoc.exec.coe.int/eng?i=DH-DD(2020)115E).

regarded as real copies.”² However, in our opinion it is necessary to undertake general measures in order to ensure that parties to the civil proceedings, who are not represented by professional lawyers, are adequately, and in understandable manner, instructed by court about their procedural rights and obligations.”

5. It should be noted at this point that Article 1 (2) of the Act of 4 July 2019 amending the Code of Civil Procedure and certain other acts³ (“CCP Amendment”) was intended to modify the wording of Article 5 CCP. The amended Article 5 CCP was to read as follows: “§ 1 *If a justified need arises, the court may provide the parties to, and participants in, the proceedings who are not represented by an advocate, a legal adviser, a patent attorney or the State Treasury Solicitors’ Office of the Republic of Poland with necessary instructions concerning procedural steps.* § 2 *The Minister of Justice shall specify, in a regulation, model instructions which must be provided in writing under the Code [CCP], in view of the need to ensure the intelligibility of the message.* § 3 *Model instructions referred to in § 2, together with their translations into foreign languages most commonly used in international circulation, shall be made available by the Minister of Justice on the website of the office supporting the Minister.*” Accordingly, the Minister of Justice was obliged to prepare a regulation that would introduce model instructions. In accordance with Article 17(2) of the CCP Amendment, the new wording of Article 5 CCP was to become effective after 12 months from the date of publication of the CCP Amendment, i.e. 8 August 2020.

6. In a letter to the Minister of Justice dated 8 January 2020, the Ombudsman pointed out that the recent major amendment to the Code of Civil Procedure, which entered into force in November 2019, led to many participants in civil proceedings finding themselves in a new legal reality. At the same time, as the Ombudsman emphasised, the overhaul of civil procedure meant that they had not received “... *the instructions devised as part of the rationale for the amendment, guaranteeing adequate protection of their procedural rights. In this state of affairs, until the Ministry of Justice issues the regulation [on instructions – author's note], the content, scope and form of the instructions concerning the new provisions of the CCP will depend on the practices of a given court, which, unfortunately, involves the creation of significant discrepancies and*

² Information about the measures to comply with the judgments in the cases of *Parol against Poland* and *Adamkowski against Poland* submitted by the Government on Poland to the Committee of Ministers on 21 August 2019, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168096fb5b.

³ Journal of Laws (“JL”) of 2019, item 1469.

does have a certain, negative impact on the parties' procedural situation. The scope and nature of the amendment and the adopted intertemporal solutions, unfortunately, result in mistakes in instructions given to the parties...⁴. In this way, the Ombudsman pointed out in his statement that the greatest difficulty in applying a law clearly emerges in the first months following the law's adoption. According to the Ombudsman, it is in this very period when "... appropriate instructions (or normative guidelines for their preparation) are most needed. In consequence, given the innovative nature of many changes to the CCP, as well as the objective of standardising the instructions, the Ministry of Justice as the initiator of new measures developed in the course of many months of conceptual and legislative work is arguably particularly predestined to timely develop appropriate model instructions to be used by courts and members of the public. The implementation of this obligation may not involve an idle waiting for model instructions to be developed in the practice of individual courts to be later unified in an anticipated normative act."⁵ The response to the above Ombudsman's letter signed by Dr Anna Dalkowska, Undersecretary of State in the Ministry of Justice suggested that works on standardized content of the instructions were at an advanced stage⁶. The response further reads "... the scope and purpose of the planned work do not allow for any significant increase of the pace of undertaken activities. As aptly stressed in the letter quoted at the outset, the last year's amendment of civil procedure is indeed extensive. It focuses on the implementation of procedural guarantees of parties to civil proceedings. Activities aimed at developing instructions that not only are clear and comprehensible but also properly reflect the intention of the legislator, require a considerable input of work from both the Ministry of Justice and a dedicated external research unit."⁷ The Ministry of Justice further indicated that under the current wording of Article 5 CCP, the court may give instructions to persons who do not have professional representation.

7. However, Article 71 (1) of the Act of 19 June 2020 on the interest relief available for business operators affected by consequences of the COVID-19 pandemic who have taken out bank credit and on the simplified procedure for the ratification of arrangements with creditors in connection

⁴ Letter of the Ombudsman to the Minister of Justice of 8 January 2020, ref. IV.510.50.2019.KPa, <https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20MS%20%20ws.%20wzor%C3%B3w%20pouczenie%C5%84%20w%20procedurze%20cywilnej.%208.01.2010.pdf>.

⁵ *Ibid.*

⁶ Response of the Ministry of Justice of 3 February 2020 to the Ombudsman's letter, ref. DLPC-V.053.3.2019, <https://www.rpo.gov.pl/sites/default/files/Odpowied%C5%BA%20MS%2C%20%203.02.2020.pdf>.

⁷ *Ibid.*

with the emergence of COVID-198 (“Repealing Act”) have repealed Article 1 (2) of the CCP Amendment. This means that Article 5 CCP will not be amended on 6 August. Consequently, neither the Minister of Justice nor any other authority will prepare standardised model instructions for the parties to civil proceedings.

8. An explanatory memorandum to the proposal of the Repealing Act indicated that “... *in the course of legislative works on the implementation of this obligation, which have been undertaken to draft an appropriate regulation, it was found that the Code requires that a party to, or participant in, the proceedings should be provided with written instructions in a significant number of situations (which means that dozens of different types of instructions are needed). Moreover, many of these situations – even concerning a single procedural institution – must be approached to differently, depending on who receives the instructions. Therefore, it is very difficult to anticipate such a multitude of procedural situations at the level of a normative act. The problem is aggravated by the fact that the instructions required by some laws are very extensive.*”⁹ By way of illustration, the drafters of the Amending Act referred to the instructions under Article 805 CCP, which in their view would need to be 31 pages long. This, in their opinion, calls into question the relevance of the discussed provisions as a means to achieve the intended purpose.¹⁰ At the same time, the explanatory memorandum notes that “... *individual statutory provisions that set out the obligation to provide written instructions contain references to other subdivisions of the law in question. This fact fully justifies the assumption that the wording of the instructions, which is based on the statutory provisions, would need to be frequently amended in the future.*”¹¹ It is further argued in the explanatory memorandum that “*The task entrusted to the Minister of Justice is further complicated by the fact that the rules of civil procedure are subject to frequent changes, and in many cases, the legislator resorts to the “intertemporal continuity rule” according to which proceedings initiated under the old law are to be governed by that old law. Obviously, the wording of the instructions drawn up by the Minister of Justice would have to reflect this circumstance.*”¹² The drafters also pointed out that the preparation of instructions requires the collaboration of many entities.

⁸ JL of 2020, item 1086.

⁹ Explanatory memorandum to a proposal of the Act on the interest relief available for business operators who have taken out bank credit to ameliorate the consequences of the COVID-19 pandemic, amending certain other acts, Sejm Paper No. 382, p. 46, <http://orka.sejm.gov.pl/Druki9ka.nsf/0/B2E9AA1082EE4696C12585700042D075/%24File/382.pdf>.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

Moreover, as it became apparent in the course of the legislative works, the proposed provisions need to be consulted with judges, other legal professionals, as well as with specialists in social communication and linguistics. Consequently, as the drafters pointed out, given the time-intensive nature of the required efforts, and also the current state of the COVID-19 pandemic, it is practically impossible to complete the work on the regulation by 7 August 2020.¹³ Furthermore, the explanatory memorandum reads “... a mere postponement of the entry into force of this statutory instrument is not sufficient to address all the issues at stake. If the courts were to print the instructions in each case where the law requires it, this would involve a considerable input of labour and significant material costs; all those resources would need to be allocated even though the instructions may fail to match the actual procedural situation of the parties concerned. Notably, Article 15zzs of the Act of 2 March 2020 on special arrangements for the prophylaxis, prevention and combating of COVID-19, other infectious diseases and the ensuing emergencies (Journal of Laws, items 374 and 567) has had an extensive impact on the conduct of millions of court proceedings, which the courts should flexibly take into account when instructing the parties taking part in procedural steps about the significance and consequences of such steps. This impact may persist for months, if not years. However, it can certainly be predicted that as a result of the COVID-19 pandemic, expenditures of the state budget will increase significantly. It would thus be unreasonable to take any further actions that could contribute to a further increase in such expenditures. Due to the significant volume of the instructions, the cost of their official translation could also be significant. Having dozens of types of instructions translated into several foreign languages will certainly generate significant costs for the State Treasury, which, in the current crisis caused by the COVID-19 pandemic, are arguably unreasonable and unjustified.”¹⁴ At the same time, it was emphasised in the explanatory memorandum to the proposal of the Repealing Act that “... the Ministry of Justice is going to carry on working in this area with the view of publishing those of the model instructions required by the Code that are used in the most common procedural situations on the Ministry's website. This will enable the Minister of Justice to respond quickly to the actual needs of the courts and legislative changes without having to amend the regulation every time such a change takes place.”¹⁵

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 47.

¹⁵ *Ibid.*

9. In the opinion of the HFHR, the repeal of the amendment to Article 5 CCP puts off the prospect of executing ECtHR judgments in the cases of *Parol v. Poland* and *Adamkowski v. Poland*. Once again, the responsibility to instruct the parties to the proceedings governed by the CCP is placed on the courts, which have not received any preparation or assistance in this respect. The HFHR further argues that it is incomprehensible why it would be quicker to change the wording of model instructions on the website of the Ministry of Justice rather than in the relevant regulation. Notably, the rank of instructions laid down in a regulation is different from that of instructions based on a model to be published on the Ministry of Justice's website. It should also be pointed out that whenever a court wishes to use the instructions available on the Ministry's website, it will still have them printed out and then hand them over to the parties to the proceedings. Also, the explanatory memorandum to the proposal of the Repealing Act does not focus, in any way whatsoever, on the guarantees that the instructions could be provided for the parties but includes an extensive discussion on the organisational and technical difficulties in their preparation. Moreover, it must be noted that instructions existing in a purely online form (not printed by a court from the Ministry of Justice's website) may be unavailable to persons who do not have internet access or are unable to use the Internet efficiently.

10. At the same time, the Foundation's opinion would like to make it clear that repealing the amendment to Article 5 CCP through a law introducing interest relief for business operators affected by consequences of the COVID-19 pandemic who have taken out bank credit and a simplified procedure for the ratification of arrangements with creditors in connection with the emergence of COVID-19 is arguably a questionable step from the perspective of principles of good legislation. The rapid adoption of the Repealing Act also prevented a meaningful discussion about the changes. Notably, the Repealing Act had nothing to do with the CCP and the repeal of Article 5 CCP had nothing to do with the SARS-CoV-2 coronavirus pandemic, which was also pointed out in an opinion by the Senate Legislative Office.¹⁶

11. It should also be noted that on 22 July 2020 the HFHR submitted an access to public information request to the Ministry of Justice asking about the progress made in the drafting of the instructions referred to in the explanatory memorandum to the Repealing Act and the date

¹⁶ Opinion of the Senate Legislative Office on the Act on the interest relief available for business operators who have taken out bank credit to ameliorate the consequences of the COVID-19 pandemic, Sejm Paper No. 142, p. 28, <https://www.senat.gov.pl/download/gfx/senat/pl/senatekspertyzy/5539/plik/142o.pdf>.

when these instructions will be published on the website of the Ministry of Justice.¹⁷ The reply of the Ministry of Justice of 3 August 2020 shows that despite the repeal of the amendment to Article 5 CCP by the Repealing Act “... *there is still a need for a comprehensive legal framework for instructions to be given to the parties of and participants in civil proceedings, including those used in international circulation. According to the current plans for work in this area, only those instructions which are most widely used in civil proceedings will be presented and made available on the website of the Ministry of Justice. Such a defined set of forms will be processed linguistically and then, to the extent necessary, translated into the languages most commonly used in international circulation.*”¹⁸ At the same time, the Ministry of Justice stressed that “... *the Institute of Justice is to be actively engaged in the described work and will be responsible for both compiling the set of instructions and developing them linguistically. Despite the priority given to the instructions project, the pace and timing of the completion of work are currently not foreseeable. It should be estimated that, given the need to carry out case file research and process results of such research, this will take several months. The project's momentum largely depends on the intensity of other urgent research work simultaneously assigned to the Institute.*”¹⁹

12. In summary, the HFHR believes that the Repealing Act effectively abolished the idea of any further development of the instructions, even though, as the Ministry of Justice's response given to the Ombudsman's letter seems to suggest, works on the instructions were at an advanced stage. Furthermore, the development of instructions was cancelled by a law that was in no way related to the Code of Civil Procedure. At the same time, the placement of instructions on the website of the Ministry of Justice does not remedy in any way the issues related to the ineffective procedure of instructing parties to civil proceedings. Given the above, the HFHR respectfully argues that such a measure is insufficient for concluding that the judgments in the cases of *Parol v. Poland* and *Adamkowski v. Poland* will be properly enforced.

III. Recommendations

13. With the above in mind, the HFHR respectfully presents the following recommendations:
- 1) The Minister of Justice should adopt a regulation with harmonized model of instructions taking into account necessity of providing parties to proceedings with

¹⁷ HFHR's public information request of 22 July 2020, ref. 762/2020/PSP/AK.

¹⁸ Response of the Ministry of Justice of 3 August 2020, ref. DLPC-V.082.3.2020.

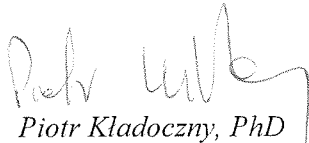
¹⁹ *Ibid.*

all necessary information, including duty to submit all legal pleadings in required number of copies, and in an understandable manner.

- 2) The Committee should request the Polish Government to provide regular information on the stage of works on the regulation of the Minister of Justice on the harmonized model of instructions to parties in civil proceedings and assess compatibility of scope and manner of instructions with standards of Article 6 § 1 of the Convention.

14. The Helsinki Foundation for Human Rights wishes to express its willingness to further assist the Committee of Ministers of the Council of Europe in the monitoring of the proper execution of the judgments of the European Court of Human Rights in the cases of *Adamkowski v. Poland* and *Parol v. Poland*.

On behalf of Helsinki Foundation for Human Rights,



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