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POLAND – legal system in transition

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Polish substantive and procedural law are undergoing very significant systemic transformations at present. This Report describes some elements of this transition relevant in the context of group and representative litigation. As far as it is workable, it follows the structure of the set questions. Its focus remains mainly on civil procedure, although administrative and criminal procedures are also mentioned when relevant.

While representative actions have quite a long tradition and their scope has recently been widened, no class action or other collective/group action mechanism exists in the Polish legal system. It is to be expected, however, that some form of a corrective redress mechanism will be introduced in the near future. Work on drafting the appropriate law has already commenced. This work is part of a much wider process of political, legal and social change, which entails a fundamental review of the manner in which law and regulation, and the respective roles of public regulators and individuals/businesses in enforcement of law, are approached. Poland has seen the introduction of principles of constitutional democracy including guarantees of access to justice and to courts on the one hand, and the unprecedented legalisation of social and economic life and the need for public regulation and public enforcement on the other.

By and large, the Polish record on legal enforcement—providing compensation, penalising and changing behaviour—has been relatively poor so far. While in the socialist system (until 1990 as far as amendments of many substantive and procedural

laws were concerned) compensation as well as market regulation were to be best ensured by state-controlled mechanisms placed outside of the realm of private law and private litigation, the role of the latter was very limited indeed. On the other hand, private litigation never fully lost its economic and social role. This mixture of policy considerations and social and market reality affecting law enforcement created a complex picture of a system where courts developed relatively consistent and sophisticated legal principles and indeed delivered compensation in some important cases involving for instance product liability law, but these decisions did not affect market or social relations to any significant extent. Unsurprisingly, these relations were not affected by the omnipresent public enforcement methods either. In the absence of a healthy market environment, relations between businesses and between businesses and consumers were far from the model which one observes in Western Europe. In the face of state ownership of most businesses and thus a very delicate position of enforcement authorities in taking action against them, the effectiveness of public enforcement was very unsatisfactory.

At present the importance of private litigation is growing together with the importance of private law in general. There is also an increasing realisation that the individualistic approach to access to courts and access to justice is no longer the only or indeed a satisfactory option. Representative actions are being brought more often, and a collective redress mechanism is being contemplated. Access to justice, and efficiency and effectiveness of the justice system are still unsatisfactory, both in delivering compensation to those who suffered grievances, in providing incentives and changing behaviour. While on the business side there remains lack of confidence in the justice system and insufficient realisation of the need to self-regulate and maintain strict standards of behaviour (for instance by drafting codes of conduct), on the consumer side the insufficient confidence in the justice system is also a serious problem. Access to justice and access to courts is still difficult because of costs, complexity and delays. On the other hand, public regulatory structure is only gradually gaining strength, with the greater number of public bodies and their increased investigative and other powers. The transition from the system where legal enforcement of both the private and public nature was ineffective is taking time.

Many aspects of the substantive civil law and procedure must be reconsidered before a collective redress mechanism is established in Poland. At the moment, Polish substantive and procedural law as well as legal culture present real challenges to an introduction and effective operation of such a scheme, and indeed they prevent wider use of representative actions, especially those brought in the name of consumers. The recent political events do not contribute to stability or consistency of the reform process, but the dissolving of the Parliament in September 2007 and the new general elections of October 2007 are unlikely to delay the process of drafting new legislation on collective actions. The civil law and civil procedure are under consideration by the Codification Commission – an academic body, independent of the government.

Following the theme of the Conference, the report focuses on mechanisms which aim at delivering compensation as opposed to purely regulatory measures. Regulatory bodies and their powers are however mentioned where their powers to provide injunctive relief are so significant that it is felt they could potentially in future be extended to include damages/compensation.

INTRODUCTION (referring to Question 1):

The Polish litigation system and litigation culture:

1. Socialist past and its impact:

Poland has experienced over 40 years of a socialist system between 1940s and 1980s, and the peculiar features of the system impacted on the shape of private law and its enforcement. The remnants of this system are gradually being eliminated from law, procedure and legal culture, but they need to be considered as still to some extent affecting the way that law is enforced in Poland. Traditionally, in socialist societies the emphasis was on state control, public regulation, and public legal enforcement. Private litigation was not normally encouraged – for political, ideological and social reasons.

This was problematic on two accounts. On the one hand, the institutional structure was weak, and public enforcement was ineffective. The incentives for businesses to strive for quality and safety were poor because of lack of competition. On the other hand, Poland retained much of its civil procedure rules from before the socialist system took hold of it. Private litigation was never truly stifled, and Polish courts dealt with a wide range of cases – also those concerning consumer claims (involving the quality and safety of products causing personal injuries or property damages). The problem with private enforcement was lack of cheap, good quality legal advice, the expense, complexity and length of court proceedings and a poor record on enforcement of court judgements.

The challenge the Polish legal system has taken on now is to combat any remaining features of the past regime. As yet, it cannot be said that the litigation system or litigation culture in Poland are similar to those of developed countries of Western Europe or the United States of America. There are some specific problems which need specific approaches – these are explored in the report.

2. Reforms of law and procedure – specific responses to specific problems:

The Polish legal system has undergone fundamental changes since 1990. It is crucial to provide some historical overview of the developments and the shape of the system at present. The reforms are still proceeding very dynamically and further changes are forthcoming. Those which are likely to be introduced in the near future have also been mentioned below.

Poland can now be placed in a group of civil law systems,¹ although this report demonstrates that some elements of transition from socialism to a fully-fledged civil law model still remain. Certain developments which can be observed in civil law countries of Western Europe have not been rooted in the Polish system yet. Poland has not fully caught up with the reforms introduced across the World in order to combat the perceived

¹ The report stems from the premise that belonging to a particular legal family implies certain general characteristics of a legal system – its substantive law, procedure, and legal culture.

‘crisis’ of civil litigation – caused on the one hand by the increased workload of courts and litigation rates, and on the other hand by the widely proclaimed inaccessibility and high costs of courts, civil litigation and legal advice. Throughout Europe and beyond, one can observe efforts to improve access to justice – to decrease the costs of litigation, simplify and de-formalise procedures, enable group or representative claims and facilitate access to legal advice on the one hand, and to widen the use of alternative dispute resolution methods on the other.² In order to make civil proceedings more efficient, changes in their organisation and especially transformations in the role of judges on the one hand and the parties on the other are being introduced throughout Europe.³

The Polish justice system is struggling with similar challenges, although it also faces very peculiar dilemmas characteristic of a system in transition. Thus, difficulties with accessing courts, lawyers, and legal advice (caused by high costs, an insufficient number of lawyers, and inadequate funding mechanisms), as well as formality, inefficiency and length of civil procedure gain an additional weight in Poland. Rapid political changes, democratisation, market transformation, and last but not least the accession to the European Union, radically transformed the law and its practice. In particular, laws which are closely linked with markets: such as competition law, consumer law, employment law or insurance law, are experiencing radical overhaul. The new laws, also those deriving from the European Union, are changing the entire legal system and legal culture. The emphasis on effective and efficient law enforcement entails on the one hand the creation of a new institutional framework of public enforcement bodies, and on the other hand the renewed focus on private enforcement. The Polish legal culture is experiencing unprecedented changes and challenges. Generally, the climate is shifting towards the one observed in other developed countries, but it is not yet conducive to a balanced, efficient and effective law enforcement model – a part of which would be some form of a collective action mechanism. A significant problem was noted by academic writers in the

² This process is accompanied by the increased legislative and regulatory penetration of European societies and the resulting greater powers of public regulators to shape behaviour – beyond the scope of this report.

³ The traditional approach to civil procedure in civil law systems – inquisitorial, written proceedings – is now being transformed towards a more parties-driven, oral, open and flexible approach. On the other hand, the civil litigation of England and Wales after the Woolf reforms became more judge-driven and less adversarial.

attitudes of the judiciary (lower levels of judiciary in particular): lack of confidence and flexibility in interpreting the plethora of new laws and even the old laws in the new reality. Another is the lack of confidence of ordinary citizens in the justice system. An effective and efficient justice system requires well-resourced courts, as well as good quality judges commanding public respect, and the situation is still not satisfactory in Poland. Group litigation, which entails greater judicial control of litigation including wide judicial discretion to make management decisions, may be problematic to conduct in these conditions.

The Code of Civil Procedure was adopted in 1964 when influences of socialism were particularly strong. Civil procedure had a clearly inquisitorial character, with the judges obliged to ‘seek the objective truth’, actively assisting the parties by instructing them about their substantive and procedural rights. In the new system, a more adversarial approach, the principle of ‘equality of arms’ between the parties and a less active (although more clearly defined – for the reasons of legal certainty and clarity) role of the court appeared. Such changes should of course be welcome in a legal system where civil liberties and human rights have not so far been appreciated sufficiently, but the legal culture is not yet ready for such changes. Although the parties were given more power to influence the proceedings, the reforms led to some very undesirable consequences. These, together with other elements of the Polish civil process, some quite typical of a civil law system and others reminiscent of the system in transition, may constitute an obstacle to introduction and an effective operation of a group litigation mechanism.

3. Reforms of civil procedure – assessment and the way ahead:

The country is in the process of introducing very significant amendments to the Code of Civil Procedure, new rules concerning costs of litigation and methods of funding it, and new rules on the organisation of legal profession (the website of the Ministry of Justice provides comprehensive information regarding the state of reforms and texts of draft legislation in the Polish language – <http://www.ms.gov.pl/ministerstwo/ministerstwo.shtml>). Legal training for judges and

other members of the legal profession (training concerning new legislation – especially the law of the European Union, new political and economic conditions, as well as computer literacy) is also taking place on a much wider scale.⁴ While these reforms are progressing with impressive speed and dynamism, it is obviously a much more complex effort to alter the elements of legal culture mentioned above.

The most significant amendment of the Code of Civil Procedure took place in 1996,⁵ when the provisions characteristic of a socialist system were removed and civil litigation gained features typical of a civil law model in a democratic society – greater independence and clearly specified duties of judges, the principle of equality of arms between the parties, and a generally more adversarial model of proceedings. However, the Act created some systemic and interpretative inconsistencies. It was obviously impossible to immediately create a well-balanced and comprehensive regulation of civil procedure which would fit the new reality. Thus, since then the Code is being amended quite frequently. The aim is to decrease the workload of courts and improve the efficiency of the justice system in general. Apart from changes in the nature and main features of civil proceedings and the judicial system (examined below), the improvements introduced so far include for instance: decreasing and simplification of the costs of litigation, greater use of mechanisms of alternative dispute resolution, computerisation of the judicial system (which unfortunately does not extend to all courts yet), introduction of court clerks (*referendarze sądowi*) and gradual extension of their responsibilities,⁶ and changes in the organisation, training and recruitment of the legal profession (opening up the recruitment process by taking away some control of the ‘corporations’ in 2005⁷). In

⁴ See for instance: ‘Efficient Court’ – guidelines prepared by the Polish Judge Association IUSTITIA (www.iustitia.pl).

⁵ Act of 1 March 1996, *Dziennik Ustaw (Journal of Laws)* No. 43, poz. 189.

⁶ Act of 21 August 1997 *on the amendment of the Acts: the law on the organisation of the ordinary courts, the Code of Civil Procedure, and other acts, Dziennik Ustaw (Journal of Laws)* No. 117, item 752.

⁷ Act of 30 June 2005 *on the amendment of the law on barristers Dziennik Ustaw (Journal of Laws)* No. 163, item 1361. Similar changes took place in the organisation of the profession of legal advisors and notaries, with the amendments of the Act on Legal Advisors and the Act on Notaries. See the author’s blog for an explanation of the legislative reform in this area: <http://liabilitywatch.blogspot.com/>. Since the blog entry, however, the Constitutional Tribunal declared some provisions of the Act on Barristers unconstitutional: Wyrok Trybunału Konstytucyjnego z dnia 19 kwietnia 2006 r. (Judgement of the Constitutional Tribunal of 19 April 2006) (sygn. akt K 6/06). The Tribunal supported the provisions of the Act aiming at uniform criteria and methods of recruitment and training, but declared unconstitutional those

the spirit of improving access to justice, the opening-up of legal professions was aimed at increasing the number of barristers, solicitors and notaries, as well as other professionals able to give legal advice. Fundamental changes in civil procedure – mostly concerning the appeal and cassation procedures initially introduced by the Act of 1 March 1996, and an introduction of the new simplified procedure, took place in 2000.⁸ These changes decreased the level of complexity and formality of the appeal and cassation procedures.⁹

The Code of Civil Procedure is still seen by the judiciary and academics as overly formalistic, and civil procedure as very complex and inaccessible. The Codification Commission – the law reform body presided by Professor Radwański (a senior civil law professor) is considering further changes to the Code, including an introduction of some form of a group action. The developments taking place on the European Union level also increasingly affect the Polish legal system and legal culture.¹⁰

Recently, a period of political turmoil in Poland gave rise to renewed concerns over the direction of the reform of the justice system. On the one hand one sees genuine attempts to improve the efficiency of courts, relieve their workload, and improve access to justice, but on the other there are concerns about the increased influence of the government over the legal profession, judiciary in particular. In the light of the dissolving of the Parliament in September 2007 it is unclear what will become of the reforms which the ‘*Law and Justice*’-party-majority government introduced in the past two years. The government which took power in 2005 has introduced a range of new legislative and regulatory measures with the pronounced aims of strengthening of the executive, extending the rule of law and fighting corruption.¹¹ These laws limited the powers of self-governing bodies

provisions which enabled law graduates to become barristers without having to undergo bar training. It is to be expected that changes in the legislation regulating other legal professions will also be declared unconstitutional in the near future.

⁸ Act of 24 May 2000, *Dziennik Ustaw (Journal of Laws)* No. 48, poz. 554.

⁹ See below for the description.

¹⁰ Poland has been a Member State of the European Union since 2004. While even before joining the Union Polish laws were being gradually approximated with the laws of the latter (following the provisions of the Association Agreement), now European Union laws are a binding source of law in Poland.

¹¹ See the website of the Ministry of Justice for the government position on these issues. For the criticism of the government’s approach see for instance: *Stanowisko Zarządu IUSTITII na temat sytuacji w sądownictwie, które będzie przedstawione na najbliższej konferencji UIM w Trondheim* (Position of the

such as lawyers ‘corporations’ (explained below), and according to the majority of the judiciary limited the independence of judges. The Act of 29 June 2007¹² increased the control of the government (especially the Minister of Justice) over judges – by allowing for a judge to be moved to another court (even one in an entirely different part of the country) without his consent for a period of up to six months (new Article 77.1 of the Act on *the Law on the Organisation of Ordinary Courts*), or removed from office by a disciplinary court (if a prosecutor requests such action because of a suspected criminal offence, such as corruption) within 24 hours without the right to be present during the deliberations of the court (Article 80 of the Act). Such legislative changes are seen by the judiciary as an attack on their independence and impartiality. It is uncertain what indeed will become of this Act (it may well be brought before the Constitutional Tribunal).

The Polish Judges Association (IUSTITIA) expressed concerns over the perceived attacks on the judicial independence and impartiality, as well as the public (media) disapproval of some decisions of courts and conduct of judges by the members of the Government, including the Prime Minister.¹³ Other members of the legal profession also appear concerned about the perceived limitations of the powers of their self-governing associations and the increased presence of governmental controls over them.¹⁴ Whether these concerns are well-founded or not, one worries about the implications of the turmoil in the Polish political life on the legal and judicial reforms. The introduction and effective operation of a group litigation mechanism, similarly with other efforts aimed at improving access to justice, seem an even greater challenge at present.

4. Legislative framework of civil procedure:

Management of IUSTITIA concerning the the situation of the judiciary, to be presented at the upcoming Conference of UIM (International Association of Judges) in Trodheim) – www.iustitia.pl/content/view/291/74/

¹² *Dziennik Ustaw (Journal of Laws)* of 2007, no. 136; item 959.

<http://www.infor.pl/skany/spis.php?rodzaj=dzu&rok=2007&num=136&poz=959&str=1>

¹³ Ibid. IUSTITIA.

¹⁴ The representatives of the ‘corporations’ (self-governing associations) of various professions of public trust in Poland (such as lawyers, doctors, nurses, architects, pharmacists, engineers, psychologists, etc. expressed their concerns in the appeal to political parties of 12 September 2007 (<http://www.lex.com.pl/?cmd=artykul.625>).

Civil proceedings (including ordinary proceedings and a number of separate, specialised proceedings – see below), the structure of the court system, the costs and funding of litigation, and the organisation of the legal profession are regulated by the Code of Civil Procedure of 1964¹⁵ and a large number of other acts and regulations. Indeed, the current tendency has been to incorporate the provisions of as many of those acts as possible into the Code of Civil Procedure.

No provisions on group litigation exist in the Code of Civil Procedure. Nevertheless, the Code and other legislation establish various forms of formal or actual co-participation of a number of parties in civil proceedings, as well as forms of representative actions by specified institutions, organisations and persons. These are analysed below.

Apart from the Code of Civil Procedure, other legislative acts which are important in the context of this report are:

1. The Act of 2 April 1997 – *the Constitution of the Republic of Poland* (*Dziennik Ustaw* (*Journal of Laws*) No. 78, poz. 483); link to English version:

<http://www.senat.gov.pl/k5eng/dok/konstytu/konstytu.htm>

2. The Act of 1 August 1997 *on the Constitutional Tribunal* (*Dziennik Ustaw* (*Journal of Laws*) No. 102, poz. 643 with amendments); link to English version:

http://www.trybunal.gov.pl/eng/Legal_Basis/Act_Trib97.htm

3. The Act of 23 November 2002 *on the Supreme Court* (*Dziennik Ustaw* (*Journal of Laws*) No. 240, poz. 2052 with amendments); link to English version:

<http://www.sn.pl/english/sadnajw/index.html>

4. The Act of 27 July 2001 *the Law on the Organisation of Ordinary Courts* (*Prawo o Ustroju Sądów Powszechnych*) (*Dziennik Ustaw* (*Journal of Laws*) No. 98, poz. 1070 with amendments); available in Polish from: <http://www.infor.pl/dziennik-ustaw,rok,2001,nr,98.html>. Link to the description of the latest amendments:

http://www.monitorprawniczy.pl/index.php?mod=m_aktualnosci&cid=18&id=1407

¹⁵ *Dziennik Ustaw* (*Journal of Laws*) No. 43, item 296. The text the Code in Polish language: <http://bap-ppsp.lex.pl/serwis/kodeksy/akty/64.43.296.htm>.

5. The Act of 20 May 1985 *on Prosecutors* (published with amendments in *Dziennik Ustaw (Journal of Laws)* of 2002, No. 21, poz. 206 with later amendments); available in Polish from: http://www.ms.gov.pl/organizacja/ust_prok.pdf
6. The Act of 15 July 1987 *on the Ombudsman* (published with amendments in *Dziennik Ustaw (Journal of Laws)* of 2001, No. 14, poz. 147 with later amendments); link to English version:
<http://www.rpo.gov.pl/index.php?md=1372&s=3>
7. The Act of 6 July 1982 *on Solicitors* (published with amendments in *Dziennik Ustaw (Journal of Laws)* of 2002, No. 123, poz. 1059 with later amendments); link to Act with later amendments (in Polish):
<http://www.prawo.lex.pl/bap/prawnicy/Dz.U.2002.123.1059.html>
8. The Act of 26 May 1982 *the Law on Barristers* (published with amendments in *Dziennik Ustaw (Journal of Laws)* of 2002, No. 123, poz. 1058 with later amendments);
9. The Act of 5 July 2002 *on Legal Services of Foreign Lawyers in Poland* (*Dziennik Ustaw (Journal of Laws)* No. 126, poz. 1069 with amendments); link to Act with later amendments (in Polish):
<http://www.prawo.lex.pl/bap/student/Dz.U.2002.123.1058.html>
10. The Act of 17 June 2004 *on the complaint for breaching of the right of the parties in court proceedings to have their case considered with no undue delay* (*Dziennik Ustaw (Journal of Laws)* No. 179, poz. 1843); link to text in Polish:
<http://isip.sejm.gov.pl/servlet/Search?todo=file&id=WDU20041791843&type=2&name=D20041843.pdf>

Another crucial issue relevant for the report are costs and methods of funding of litigation. These are regulated by the Code of Civil Procedure, as amended by the *Act on Court Costs* of 28 July 2005.¹⁶ The principles governing remuneration of lawyers and tariffs for the cost-shifting purposes are contained in the regulations governing legal

¹⁶ (*Dziennik Ustaw (Journal of Laws)* of 2005, No. 167, poz. 1398 (http://ks.sejm.gov.pl/proc4/ustawy/2582_u.htm); amended again by the Acts of 12 May 2006 (*Dziennik Ustaw (Journal of Laws)* No. 126, poz. 876 (http://www.msp.money.pl/akty_prawne/ustawa;z dnia;12;maja,dziennik,ustaw,2006,126,876.html) and of 14 December 2006 (*Dziennik Ustaw (Journal of Laws)* no. 21, poz. 123) (<http://www.abc.com.pl/serwis/du/2007/0123.htm>).

professions mentioned above (the remuneration of lawyers, although subject to the normal principles of freedom of contract, is regulated for the purposes of costs-shifting and in the context of legal aid - lawyers nominated *ex officio*).

5. The conceptual and systemic framework of civil procedure:

With the change of political, economic and legal system, the general principles governing the functioning of the Polish legal order have been transformed and reinstated in a number of important legal instruments. For the purposes of this report the most important principle is the one concerning access to justice and access to courts. Article 45 of the Constitution (in the part concerning personal rights and freedoms) guarantees every Polish citizen the right to a just and open consideration of his case without undue delay by an independent, impartial court. Article 77 of the Constitution (in the part concerning the mechanisms for protection of rights and freedoms) provides that no legal act can limit the citizens' choice to have their rights and freedoms enforced by a court.

The representatives of the doctrine of law see the implementation of the right of access to justice and access to courts in some fundamental principles governing the civil process (equality of the parties – Article 7.2 of the Act *the Law on the Organisation of the Ordinary Courts*, openness of the proceedings – Article 7.1 of the Act *the Law of the Organisation of the Ordinary Courts* and Article 148 of the Code of Civil Procedure, and the principle of judicial impartiality and independence – Articles 48 – 50 of the Act *the Law of the Organisation of Ordinary Courts*) and some other legislative provisions governing the civil process. The existence of the rights of access to justice and access to courts needs to be seen, however, in the context of the structure of the Polish judicial system and the availability of alternatives to court-administered justice. According to Article 175 of the Constitution, justice is administered by the Supreme Court, ordinary courts, administrative courts and military courts. The Code of Civil Procedure and other legislative acts determine which courts and if indeed any courts are to consider a particular case. The principle of judicial administration of justice results in the assumption that ordinary courts are empowered to administer justice in particular cases – that is unless another mechanism (for instance administrative or military courts, or some

form of arbitration) has been prescribed by law. The latter cases are regulated in numerous legislative acts and analysing them here is not necessary. Some examples: in cases concerning trade unions of state enterprises¹⁷ and those concerning compensation of damages caused by geological and mining activities¹⁸ arbitration is the necessary prerequisite for commencing court litigation.

Arbitration and other forms of alternative dispute resolution are increasingly popular alternatives to litigation. Act of 28 July 2005¹⁹ added Part Five on arbitration courts (Articles 1154 – 1217 – replacing Part Three (Articles 695 – 715)) to the Code of Civil Procedure. The jurisdiction of an arbitration court to consider a particular legal dispute is contingent upon an agreement between the two parties. The decision of the arbitration court (including settlement concluded by the parties approved by the arbitration court) can be referred for review and annulment to an ordinary court (Articles 1205 – 1211 of the Code of Civil Procedure).

Disputes between consumers and businesses resulting from contracts of sale of goods or provision of services can be considered by the special consumer arbitration courts. Their structure and procedure before them are analysed below.

The key systemic principle determining the shape of civil procedure is the one of open and oral proceedings (Article 45 of the Constitution and Article 7.1 of the *Law on the Organisation of Ordinary Courts*). The limitations of the openness principle, dictated by the procedural economy and the needs of particular types of proceedings, are however quite plentiful. Thus, while normally cases are considered during an open trial and parties submit evidence and other documents, recommendations, and conduct other procedural activities orally during the trial, some notices and documents must be submitted in writing – as established by the Code of Civil Procedure or ordered by the court in a

¹⁷ Act of 25 September 1981 *on trade unions of state enterprises* (*Dziennik Ustaw (Journal of Laws)* No. 24, poz. 123 with amendments.

¹⁸ Act of 4 February 1994 *the geological and mining law* (published with amendments in *Dziennik Ustaw (Journal of Laws)* No. 228, poz. 1947.

¹⁹ *Dziennik Ustaw (Journal of Laws)* No. 178, poz. 1478
<http://isip.sejm.gov.pl/servlet/Search?todo=file&id=WDU20051781478&type=1&name=D20051478L.pdf>

particular case. For instance, in injunctions proceedings as well as in simplified proceedings a greater number of activities must be conducted through submission of written statements or documents. The Code also provides for statements to be submitted on official forms. The recent tendency has been to simplify and de-formalise civil procedure – so on the one hand there is a greater emphasis on official forms and considering written documents, on the other hand it is emphasised that these official forms ought not be too complicated and that parties who did not fill them in or did it incorrectly ought not suffer very significant consequences.²⁰

6. Overview of civil procedure:

The Code of Civil Procedure provides for a number of types of proceedings before ordinary courts²¹ – distinguished on the basis of the amount in dispute and the subject matter of the dispute. The Code regulates civil procedure of an ordinary nature (here it describes the procedure to be followed in the first instance, including court-led mediation and settlement, gathering, presentation and assessment of evidence, appeal procedure, cassation procedure and certain other procedural mechanisms, such as a request to reconsider a case), and some separate procedures (*postępowania odrębne*) in specified areas: for instance 1. in marital cases, 2. in cases of parental relationships, 3. in labour relations and social security cases, 4. in business cases (here two important types of procedures are prescribed: for cases involving competition law, and cases concerning unfair contractual clauses), 5. in cases concerning regulation of energy, 6. in cases concerning regulation of telecommunications, 7. the injunction and notification procedures (*postępowanie nakazowe i upominawcze*), and 8. the new simplified procedure (explained below).

²⁰ See for instance the Judgement of the Constitutional Tribunal of 12 March 2000 (P 9/01, Dziennik Ustaw of 2002, No. 26, item 265, OTK-A 2002, No. 2, p. 14).

<http://isip.sejm.gov.pl/servlet/Search?todo=file&id=WDU20020260265&type=1&name=D20020265TK.pdf>

²¹ The Polish judicial system consists of a number of tiers of courts: ordinary, administrative, and military courts—see below.

6.1 The ordinary civil procedure:

The Polish civil procedure has three stages: the first two instances in which courts consider both the factual and the legal elements of the case, and the third one – cassation – focused on the legal aspects. The procedure is judge-driven, although the parties are responsible for the outcome of the case. The general rule is open, oral consideration of cases unless this is limited by an order of the court or by legislation. Normally, claims are brought in writing (in some types of proceedings official forms are used) and served with the court which has the authority to hear the case (see below for the explanation of the court structure). In this preliminary stage the presiding judge establishes important factual and legal issues and schedules the trial accordingly. The judge calls the parties, witnesses and experts, and orders the necessary documents to be submitted. The defendant may be requested to reply to the claim before the first trial day (the Code provides that this is necessary in cases concerning business affairs – one of the types of specialised proceedings established by the Code). In complex cases the judge may request that the defendant reply to the claim and that the parties submit other documents and statements before the trial day. If a party is represented by a lawyer, the judge may request a complete statement of claim before the trial day.

The trial is normally conducted in an open, oral manner. It commences with the parties presenting their statements before the judge, who can then ask further questions. The case may be concluded at this stage with a judgement or a settlement.²² Otherwise the next stage is examination of evidence. According to Article 6 of the Civil Code²³ the burden of proof of a fact is on a person who draws legal consequences from this fact. Further, Article 232 of the Code of Civil Procedure requires the parties to submit evidence to support their case (although it must be remembered that this obligation is not absolute – the failure to fulfil it does not entail any formal negative consequences for the party concerned). Evidence may include documents, statements from the parties, witness

²² The Act on Court Costs of 2005 (analysed below) contains a provision that a court would return three quarters of the court fee paid by a party if a settlement was concluded before a mediator during the first instance trial.

²³ Act of 1964 (*Dziennik Ustaw (Journal of Laws)* No. 16, item 93 with amendments.

statements, and experts' opinions (experts are appointed *ad hoc* by the presiding judge for the particular case from a list of court experts; the judge may also appoint an expert who is not on the list). The court decides the case after considering the evidence. If more than one judge is involved, a vote takes place. The judgement initially contains only the text of the decision (*sentencja*), but the court must provide a detailed explanation if a party demands it within one week from the day of pronouncing the judgement or if an appeal or cassation is brought. The explanation may contain a dissenting opinion of one of the judges. One of the striking features of the Polish legal system, similarly with some other continental legal systems, is the fact that not all the judgements are actually published. Further, names of the individual parties are not mentioned in the judgement.

An appeal against the judgement given in the first instance can be brought within two weeks from notification of the judgement and obtaining the explanation, by either party. The appeal can include new facts or evidence if their use during the first instance proceedings was impossible or unnecessary (the latter limitation is a result of the changes introduced in 2000 in order to make the appeal process less complex and quicker). An appeal is brought initially to the court which gave the first instance judgement. The court considering the case in the second instance decides the *meritum* of the case or, if it is concluded that the first instance proceedings were conducted unlawfully, it voids the first instance judgement completely and requests the court of first instance to consider the case again.

Cassations (brought initially to the court which gave the second instance judgement) are considered by the Supreme Court. A cassation has a more public-policy, law-shaping role. It is a mechanism through which the Supreme Court fulfils its responsibility of ensuring uniform application and interpretation of law. Hence, the Court may refuse to consider a cassation if no significant legal issue giving rise to uncertainty or discrepancies in jurisprudence arises (Article 393 of the Code of Civil Procedure). A cassation may be brought only after the two instances prescribed for civil proceedings have been exhausted, and there are more limitations prescribed by the Code of Civil Procedure (depending on the subject of the case and also the value of the case). Cassation

may be brought by one of the parties in the case, a person intervening in the case (see below), as well as a prosecutor, the Ombudsman, a regional consumer ombudsman, an Employment Relations Inspector, and a social organization (the latter - in cases concerning consumer protection). The Supreme Court considers possible breaches of substantive law in the judgement being the subject of cassation, or possible breaches of procedural rules if the latter could significantly affect the outcome of the case. If the Supreme Court accepts the cassation, it may give either a ‘cassatory’ judgement (these are much more common – the Court voids the judgement of the court of first or second instance and requests that it consider the case again) or a ‘reformatory’ judgement (these are rare – here the Court voids the judgement given by the court of second instance and decides the *meritum* of the case).

6.2 Separate procedures:

Certain separate procedures established by the Code are important in the context of this report. These are:

i. Simplified procedure:

It was introduced in 2000.²⁴ Łętowska suggested that facilitating access to justice for consumers was the primary motive for the creation of the ‘simplified procedure’ (2002: 597),²⁵ although the procedure is not solely reserved for consumer use. In fact, any case which falls under the jurisdiction of a district court can be processed using the simplified procedure as long as it involves either of the following:

- A contract law claim the subject of which does not exceed 10.000 PLN in value (Article 505.1 of the Code), or in cases of legal guarantees, commercial guarantees or non-compliance of a consumer product with a contract if the value of the subject of the contract does not exceed 10.000 PLN;

²⁴ *Dziennik Ustaw (Journal of Laws)* of 2000, No. 48, poz. 554.

²⁵ E. Łętowska (2002) *Prawo umów konsumenckich* 2 wydanie, C.H. Beck.

- A claim concerning payment of rent by a tenant irrespective of the amount.

However, cases which fall under the scope of the simplified procedure may also be moved to the ordinary procedure if they are considered complex or if they require special information or data (Article 505.7 of the Code of Civil Procedure).

The simplified procedure contains several elements which make it less formalistic and shorter than an ordinary procedure. For instance, the claim or the response to the claim is done using an official form. The claim cannot be amended after it has been brought. Normally the cases are considered by a single judge.

Initially, the weakness of the simplified procedure was the requirement that only one claim could be sought per proceedings (Article 505.3 para.1), and thus: on the one hand a legal guarantee claim could not be subject to the simplified procedure if it also involved a claim for compensation and on the other hand claims of multiple persons could not be processed (Łętowska: 2002: 598). At the moment Article 505.3 contains a provision which allows merging a number of claims in the same proceedings if they arise from the same contract or the same type of contracts. It is, however, still difficult to envisage joining a number of claimants in the same proceedings.

ii. Procedure in cases of unfair contractual clauses:

This procedure was introduced into the Civil Code by the Act of 2 March 2000,²⁶ giving effect to the provisions of the Unfair Contract Terms Directive. The court with the sole authority to consider these cases is the district court of Warsaw (referred to as the Court for the Protection of Competition and Consumers). Anyone who could potentially conclude a contract containing a suspected clause can bring a claim using this procedure. Claims can also be brought by a social organization the statutory aim of which is consumer protection, a district consumer ombudsman, or the Office for the Protection of Competition and Consumers. Further, a foreign organization registered in the Official

²⁶ *Dziennik Ustaw (Journal of Laws)* of 2000, No. 22, poz. 271.

Journal of the European Communities and empowered to bring claims in cases of unfair contractual clauses can bring a claim as long as its official aims justify taking such action in Poland in order to prevent infringements of the interests of consumers resident in the Member State where the organization is based. There are a number of unusual features to this procedure and the effect of decisions given by the court. First of all, it is impossible for a trader suspected of using an unfair clause to dispose of the litigation by accepting the claim. Settlements are also not allowed. The wider, social impact of this procedure is also reflected in the fact that the judgement containing the clause which was declared unfair is published in the Judicial and Economic Monitor (*Monitor Sądowy i Gospodarczy*), and the clause with some additional information is inserted into the Register of Unfair Contractual Clauses (kept by the President of the Office for the Protection of Competition and Consumers) and since this moment it is effective *erga omnes*. The Supreme Court confirmed this effect of the clauses inserted into the Register in the judgement of 13 July 2006. The Register was established by the Council of Ministers Regulation of 19 July 2000.²⁷ It includes information about the parties, the participation of a prosecutor or a social organization in the case, apart from the text of the clause. More detailed information about this participation of representative bodies is provided below, but it is useful to mention here that the majority of claims are brought by the following: the President of the Office for the Protection of Competition and Consumers (a significant majority), the Consumers Federation in Warsaw, regional consumer ombudsmen, and only in a minority of cases - individuals.

The two procedures described above have so far worked relatively efficiently. The Register of Unfair Contractual Clauses is growing every week (in July 2007 it contained 1208 clauses).

7. Structure of the court system:

The structure and organisation of the court system are regulated by the *Act on the Law of the Organisation of the Ordinary Courts*. Similarly with the French court structure, there

²⁷ *Dziennik Ustaw (Journal of Laws)* No. 62, poz. 723.

are several tiers of courts depending on the subject matter of the case. Ordinary courts consider cases which are not within the jurisdiction of administrative or military courts or of the Supreme Court (Article 1.2 of the Act).

Ordinary courts have been structured into three instances: there are 299 district courts (*sądy powiatowe*), 41 regional courts (*sądy okręgowe*) and 10 appellate courts (*sądy apelacyjne*).

Ordinary courts are organised into specialised departments – dealing with civil, criminal, and depending on the needs also labour relations, family and custody, business, and social security insurance cases. Additional court departments (*sądy grodzkie*) may be established in district courts, mainly for civil cases considered in simplified proceedings. The Regional Court of Warsaw also has a specialised department for considering cases involving competition and consumer protection – ‘the court for the protection of competition and consumers’ (*Sąd Ochrony Konkurencji i Konsumentów*).

District courts consider all cases with the exception of those expressly reserved for the regional courts (Article 16 of the Code of Civil Procedure). The latter cases are, among others, proceedings where a non-pecuniary benefit is sought together with the pecuniary one, intellectual property and patent rights cases, and almost all cases where pecuniary benefit is sought the value of which exceeds 75,000 PLN (Polish Zloty) and in business cases (according to Article 479.1 of the Code these are cases resulting from civil relations between business people in the course of their business activity) - 100,000 PLN (Article 17 of the Code). Further, district courts may transfer to the regional courts every case in which a legal issue giving rise to significant doubts appears, although a justification must be given and the regional courts may always refuse the transfer if they conclude that no doubts arose (Article 18 of the Code). Appellate courts consider appeals from judgements of regional courts.

The Supreme Court (*Sąd Najwyższy*) is the highest court in Poland for civil, military and criminal matters. It consists of a number of chambers: Civil Chamber, Criminal Chamber,

Labour, Social Security and Public Affairs Chamber, and Military Chamber. Its tasks include: overseeing administration of justice through considering cassations and other submissions prescribed by law and thus ensuring adequate and consistent application of law by ordinary and military courts, and deciding on legal issues submitted to it (Article 1.1 of the *Act on the Supreme Court*) (for instance, if divergences in application of a particular legal provision appear in the jurisprudence of ordinary courts, military courts or the Supreme Court itself, the President of the Court, the Chief Prosecutor (Minister of Justice), the Ombudsman, or the Insurance Ombudsman may call for the Supreme Court to take a decision clarifying the matter and thus to adopt a binding ‘legal principle’ – Article 60 of the Act).

Administrative courts, with the Supreme Administrative Court as the highest instance, control decisions of the administrative authorities.

Military matters are considered by military courts.

Compliance of legislation with the Constitution is examined by the Constitutional Tribunal.

An alternative to ordinary court proceedings are the consumer arbitration courts established in 1991, organised by the offices of the Trade Inspection (according to Article 37 of the Act of 15 December 2000 *on Trade Inspection* and the Regulation of the Minister of Justice of 25 September 2001 *on establishment of the rules of organisation and operation of permanent consumer arbitration courts*).²⁸ Disputes between consumers and businesses resulting from contracts of sale of goods or services can be considered by these courts, although their decision may also be reviewed and annulled by an ordinary court. The proceedings before the arbitration courts are cheap, quick, informal, better

²⁸ *Dziennik Ustaw (Journal of Laws)* of 2001, No. 4, item 25. The Minister’s Regulation *on the establishment of the rules of organisation and operation of permanent consumer arbitration courts* (*Dziennik Ustaw (Journal of Laws)* No. 113, poz. 1214). can be viewed (in Polish) on the website of the Consumers’ Federation: <http://www.federacja-konsumentow.org.pl/pagePrint.php?page=37> Before these legislative provisions the courts were operating on the basis of the provisions of the Code of Civil Procedure.

suitable to the needs of consumers, and have been commended by the Consumers' Federation for their efficiency. However, the jurisdiction of an arbitration court is conditional upon both parties' consent. The Consumers' Federation pointed out that traders tend not to agree for the case to be considered by an arbitration court hoping that the consumers will not bring the matter before an ordinary court.²⁹ The latter, according to the Federation, still does not provide consumers with a satisfactory redress. Court proceedings (even the new simplified procedure) are long, complex and expensive, and a very specific legal culture which was described above does not always deliver the results consumers expect.

8. Structure of the legal profession:

The Polish legal profession in fact consists of several different professions: judges (these are career judges, formally nominated by the President of Poland), prosecutors (*prokurator* - career prosecutors; their general role is to safeguard the protection of the rule of law), barristers (*adwokat*), legal advisors (*radca prawny* resembling the English solicitors, empowered to represent physical persons and businesses in civil litigation except family and custody cases), and notaries (*notariusz*). The duties of the members of legal profession (as well as the rules governing their remuneration) are regulated by legislation: the Act on barristers, the Act on legal advisors, the Act on notaries, the Act on prosecutors, as well as internal rules of professional ethics established by the professional associations. The legal advisors, barristers and notaries are members of 'corporations' – independent, self-governing organisations with a distinct legal personality. Corporations are self-governing bodies of the 'professions of public trust'. Their autonomy is guaranteed in the Constitution (Article 17.1) (see above for the description of the recent legislative limitations of this autonomy with regard to training and recruitment).

²⁹ <http://www.federacja-konsumentow.org.pl/pagePrint.php?page=41>

Question 2. Formal rules for representative or non-representative group litigation (for each litigation mechanism identified above, please provide a general description of the process contemplated by the formal rules):

Please include both statutory rules and rules adopted by the judiciary, and include both private law and public law mechanisms (e.g. partie civile). Describe briefly the policy debate and political context for the consideration and adoption of different forms of group litigation, including if relevant the decision to adopt a non-representative form of group litigation and/or a limited form of representative litigation, as alternative(s) to a broadly available representative litigation procedures, along the US model. For each litigation mechanism, please describe what types of claims the mechanism pertains to (for example, all multi-party claims or only some specific type of claims, such as antitrust, consumer protection, investor/shareholder protection, environmental, etc.) and when the rules were adopted. If there have been important amendments to the governing statutes or rules since their adoption, please identify these, describe them briefly and if possible describe why amendments were adopted. Please attach copies of the statutory provisions and/or rules, and an English translation, if possible.

No US-style class action or a traditional group litigation mechanism exists in Poland. However, the political climate is changing towards an increased recognition of the need to introduce procedural mechanisms enabling greater access to justice, acknowledging the fact that individual pursuit of justice is not always the best solution for claimants as well as for the justice system as a whole (see the answer to Question 1 for a more detailed elaboration of policy developments). Such mechanisms are at present being considered by the Codification Commission, although definite proposals have been put forward so far. It is unlikely that an US-style class action mechanism will be adopted, but during the Codification Commission meeting in January 2007 it appeared that introduction of some type of a group litigation mechanism is likely (such view was voiced by the judiciary, academics and the representatives of the Ministry of Justice present at the meeting).

Representative actions, on the other hand, have had quite a long tradition in the Polish civil process, and are now being developed further.

Representative actions:

The most significant powers of initiating litigation and joining litigation at a later stage in the name of citizens have been entrusted by the Code of Civil Procedure to prosecutors and ‘social organizations’ (the Code describes the latter in generic terms and a further description is provided by the Regulation of the Minister of Justice of 10 November 2000.³⁰ These powers existed even during the socialist era, although they have not been used often. They have now been extended onto further institutions and organizations (see below).

The prosecutors and the social organizations can take an active part in litigation (including bringing claims as well as joining litigation at any stage, making appeals and bringing cassation proceedings) and be passive participants by making representations and presenting views and opinions. Prosecutors and social organizations bringing claims in the name of specified persons are referred to as ‘formal’ parties to litigation (as opposed to ‘material’, ‘substantive’ parties – which are persons in whose name litigation was brought).

1. Prosecutors:

According to the Code of Civil Procedure and the *Act on Prosecutors* of 2 June 1985, the role of prosecutors is to safeguard the rule of law and oversee prosecution of crimes. Prosecutors may bring claims in civil, administrative and criminal cases; they may also make recommendations and take part in civil cases, and in litigation arising out of employment relations and social insurance (Article 3.1 of the *Act on Prosecutors*). The *Act on Prosecutors* allows them to use these powers if they feel that their action is required by the need to safeguard the rule of law, social interests, public property or the citizens’ rights (Article 3.1). Article 42 of the Act refers to further legislation for the details on the role of prosecutors in civil, administrative and other types of litigation. One

³⁰ Regulation *on establishment of a register of social organizations empowered to act before courts in the name of or on behalf of citizens (w sprawie określenia wykazu organizacji społecznych uprawnionych do działania przed sądem w imieniu lub na rzecz obywateli)* (*Dziennik Ustaw (Journal of Laws)* No. 100, poz. 1080).

of these acts is the Code of Civil Procedure. The general note on the role of prosecutors in civil litigation is contained in Article 7 of the Code³¹ which stipulates:

“**[competences of prosecutors]** A prosecutor may require that litigation in any case be commenced, and may take part in litigation already proceeding, if according to his judgement such action is justified by the need to safeguard the rule of law, rights of citizens or a social interest. In non-pecuniary family law cases the prosecutor may bring claims only in the circumstances prescribed by law.”³²

Article 3.1.2 of the *Act on Prosecutors* adds protection of property as another reason for the prosecutor’s participation in civil proceedings.

Prosecutors may bring any civil claim or join civil litigation in the name of a diffuse group of people, a group of specified people or a single person. This power is particularly suitable for assisting those members of society (not necessarily Polish citizens) who cannot for some reason bring claims to protect their rights.

Title II of Book I (Articles 55 – 6) of the Code of Civil Procedure regulates the role of prosecutors in civil litigation in detail. It transpires from these provisions that prosecutors may bring claims in the name of specified persons (Article 55), but may also bring claims without specifying any particular person (Article 57).

Persons in whose name prosecutors bring claims must be notified by the court of the prosecutor’s actions and may join the claim at any stage. If the person joins the claim, he/she becomes a joint party in the case (the concept used here is ‘co-participation in disputes’ – *współuczestnictwo w sporze* – explained in more detail below). The type of co-participation applied here is ‘uniform co-participation’ (*współuczestnictwo jednolite*) – According to Article 73 of the Code of Civil Procedure it is a situation where the type of legal dispute or a legal provision require that all the co-participants in the case are concerned with the decision in its entirety, not a particular part of it (the key feature of this ‘uniform co-participation’ is that, whilst ordinary actions of a co-participant who is

³¹ Amended by the Act of 1990, *Dziennik Ustaw (Journal of Laws)* No. 55, poz. 318.

³² All translations of the Code of Civil Procedure have been done by the author of this report.

active in the proceedings are binding on those co-participants who are not active, the consent of all co-participants is required before a settlement can be reached, as well as before withdrawing or accepting the claim). Whereas the judgement following the proceedings conducted with the participation of the prosecutor is binding (*res judicata*) on the parties in the case, whenever a pecuniary interest is involved an interested person who did not take part in the proceedings is not prevented from bringing a claim to secure such a pecuniary interest (Article 58 of the Code).

The Code of Administrative Procedure also gives the prosecutors powers to take part in administrative proceedings, and to commence and take part in court proceedings concerning review of an administrative decision (Articles 182 and 183 of the Code of Administrative Procedure, and Article 3.1.6 of the Act on Prosecutors). These are not analysed here.

2. Social organizations:

The Code of Civil Procedure gives social organizations the power to bring claims or to join already proceeding litigation in order to protect citizens' rights. These powers may be exercised under certain conditions only by social organizations meeting specific requirements. There is, however, no specific authorisation procedure and indeed no authorisation or certification requirement. The requirements established in the Code concern the subject of the proceedings and the nature of the organization.

Article 8 of the Code³³ stipulates:

“**[Competences of social bodies]** Social organizations the statutory aims³⁴ of which do not include economic activity may in cases prescribed by law in order to protect citizens' rights bring proceedings or join proceedings already taking place.”

³³ Amended by the Act of 2004 (*Dziennik Ustaw (Journal of Laws)* of 2004, no. 172, poz. 1804.

³⁴ These are understood as aims included in the official statement which is a legal basis of the activity of the organization, as well as any legislation which regulates the structure and operation of the organization.

The Code devotes Title III of Book I (*The Process*) to these social organizations.³⁵

Article 61³⁶:

[the position of social organizations in the proceedings]

1. In alimony and consumer claims social organizations the statutory aims of which do not include economic activity may bring claims on behalf of citizens.
2. In cases mentioned in paragraph 1 such organizations can join the proceedings at any stage.
3. Social organizations which according to their statutory aims deal with environment protection, consumer protection or protection of industrial property rights may in cases in these areas, subject to the claimant's consent, join the proceedings at any stage.
4. Social organizations which according to their statutory tasks deal with ensuring equality and preventing direct and indirect discrimination in rights and obligations of citizens may in these cases bring claims on their behalf, subject to the citizens' consent, and join the proceedings at any stage, subject to the claimant's consent.

Article 62:

[application of other provisions] The provisions of the Code concerning the role of prosecutors shall be applied to social organizations bringing claims on behalf of citizens as well as taking part in proceedings in order to protect citizens.

According to Articles 472 and 476.1 – 3 of the Code of Civil Procedure, social organizations can also bring claims in cases resulting from employment relations and social security insurance.

The powers of the social organizations are not as wide as the powers of the prosecutors, but this is a result of the fact that the general role of prosecutors is an overarching protection of the rule of law without emphasis on any particular public or social interests. The Minister of Justice issued a Regulation of 10 November 2000.³⁷ The Regulation provides for general criteria which organizations bringing claims on behalf of the citizens should meet. It describes organizations able to bring claims in specified areas: for

³⁵ The title was amended (it existed in the Civil Code also during socialism) by the Act of 1990 (*Dziennik Ustaw (Journal of Laws)* of 1990, No. 55, Poz. 318), and by some further legislation.

³⁶ Amended by the Act of 2 July 2004 (*Dziennik Ustaw (Journal of Laws)* of 2004, No. 172, poz. 1804.

³⁷ Regulation on *establishment of a register of social organizations empowered to act before courts in the name of or on behalf of citizens*, although the Regulation does not provide any register, and in fact does not even mention the Minister's power to establish such a register.

instance in matters of alimony, in matters of environmental protection, consumer protection, in the area of patents, employment relations and social security. Paragraph 3 provides that social organizations empowered to **bring claims and join litigation** in the matters of consumer protection are: consumer associations, human rights organizations, scientific or technical organizations, trade unions and associations of motorists. Paragraph 4 specifies that organizations which are able to **join litigation, subject to the claimant's consent** (note the difference in language between these two), in the area of environment protection are: organizations dealing with the protection of environment, human rights organizations, organizations dealing with protection of family and its members, scientific or technical organizations, trade unions, farmer associations, consumer associations, young persons associations, sports associations.

3. National Employment Relations Inspectorate:

The amendment of the Code in 1996 (*Dziennik Ustaw (Journal of Laws)* No. 24, poz. 110) introduced the competence of Employment Relations Inspectors to bring claims and join litigation (subject to the claimant's consent) at any stage in cases concerning determination of the existence of an employment relationship (new Title IIIa 'National Employment Relations Inspectorate') (Articles 63¹ and 63²). In such cases the Code refers to the provisions concerning the role of the prosecutors. The procedure to be followed is the 'separate' procedure in employment relations and social security cases (Division III of Title VII (Separate Proceedings) of Book I (Process) of Part One (Litigation) of the Code. Article 462 of the Civil Code (in the part devoted to the proceedings in employment relations and social security cases). It is important to note that the employee's consent is only necessary if the Inspector joins litigation, and no such consent is needed for bringing a claim in the name of the employee (confirmed by the Supreme Court's decision of 29 December 1998).³⁸

4. Regional (town) consumer ombudsmen:

³⁸ Sygn. Act I PKN 494/98, OSNP 2000/4/149.

The amendment of the Code in 1998³⁹ provided regional or town consumer ombudsmen with the power to bring claims and join litigation (subject to the claimant's consent) in cases concerning protection of the interests of consumers (Articles 63³ and 63⁴). Consumer ombudsmen are civil servants appointed by regional authorities (Article 35.1 of the Act on the Protection of Competition and Consumers of 15 December 2000).⁴⁰ Again, provisions regulating the proceedings with the participation of the prosecutor apply.

Other relevant procedural mechanisms:

The Code of Civil Procedure provides for a possibility of a number of parties being involved in civil litigation on the same (claimant or defendant) side.

Co-participation:

Co-participation in civil procedure was mentioned above with regard to representative proceedings (relationship between the representative body and the represented person/persons). Generally, however, co-participation is regulated by Articles 72 – 74 of the Code. It is possible in two types of cases:

- If the subject matter of the case are rights or duties common to all parties or based on the same legal or factual basis ('material co-participation'); or
- If the subject matter of the case are claims or enforceable legal obligations (here the emphasis is not on mere substantive rights and duties but on legal claims or legal obligations which can be enforced against specified persons through litigation) of the same kind, based on identical legal or factual basis, as long as the same court has the authority to consider each separate claim or obligation or all of them together ('formal co-participation') (Article 72).

³⁹ *Dziennik Ustaw (Journal of Laws)* No. 106, item 668.

⁴⁰ The text with amendments was published in: *Dziennik Ustaw (Journal of Laws)* of 2003, No. 86, item 804.

Each party co-participating in litigation is acting in her own name (Article 73) (the court invites each party separately to attend the trial – Article 74), although if a legal provision or the nature of the subject matter indicate that the decision in its entirety would concern all parties an ordinary activity undertaken by one party binds the others. Even in such cases, however, the consent of all parties is required for settlement, accepting or withdrawing the claim.

Material (main, key) or subsidiary intervention (*interwencja główna i uboczna*):

The Code prescribes for ‘material’ (*główna*) intervention in civil proceedings, where a person claims a thing or a right which is the subject of litigation between two parties, and subsidiary (*uboczna*) intervention, where a person has an interest in the case being decided in favour of one of the parties of litigation. Essentially, the material intervention involves a new lawsuit where the parties in the litigation already taking place are co-participating as defendants in an action taken by the third party (Article 75 of the Code of Civil Procedure). A subsidiary intervenient joins one of the parties in the existing litigation (Article 76 of the Code). Although the intervenient can perform various procedural activities, like present statements, he or she is not a party (although in some cases the intervenient may become a party).

Public enforcement:

A number of public bodies have also been entrusted with the responsibilities to protect consumers through various enforcement mechanisms. Although this goes beyond the scope of this report, it is useful to mention a number of these bodies here. As mentioned above, public enforcement limited to injunctions is not the focus of this report. However, the bodies and procedures mentioned below could potentially be equipped with further powers in future – thus it is useful to introduce them here.

1. Trade Inspection:

Trade Inspection is an administrative body protecting the interests of consumers and the economic interests of the state (Article 1.1 of the Act on Trade Inspection). It consists of

the General Inspector and regional inspectors. It monitors the market for possible illegal or unscrupulous activities, organizes the activity of the consumer arbitration courts, provides legal advice and mediation services to consumers. Its superior organ is the Office for the Protection of Competition and Consumers.

2. Office for the Protection of Competition and Consumers:

The Office for the Protection of Competition and Consumers was established by the Act *on the protection of competition and consumers* of 15 December 2000, now replaced by the Act *on the protection of competition and consumers* of 16 February 2007.⁴¹ According to the Act, the Head of the Office for the Protection of Competition and Consumers conducts investigations and takes decisions in cases where there is a suspicion of an infringement of a collective interest of consumers (this power is the result of the implementation of the European Community Directive on Injunctions for the Protection of Consumers' Interests⁴²). The Office is an administrative body, and the Head of the Office is a "central institution of government administration" with the responsibility for the protection of competition and consumers, nominated by the Prime Minister. The proceedings before the Head are not civil proceedings, and indeed the Head does not have the power to bring civil proceedings on behalf of consumers.

The purpose of the proceedings is to secure collective interests of consumers, and the Act *on the protection of competition and consumers* is very clear that collective interests are not a sum of individual interests. The proceedings also do not lead to any damages awards. However, by virtue of the new Act of 2007, the Head of the Office for the Protection of Competition and Consumers may impose financial penalties on traders who infringe collective interests of consumers (in the old Act only breaches of competition law were punishable by fines). Before the introduction of the new Act, the proceedings could be commenced by the Head of his/her own initiative or following a request by the Ombudsman, the insurance ombudsman, a consumer ombudsman or a consumer

⁴¹ Dziennik Ustaw (Journal of Laws) No. 50, item 331. Can be found (in Polish) on the following website: <http://www.infor.pl/dziennik-ustaw,rok,2007,nr,50.html>

⁴² Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ L 166, 11. 06.1998, pp. 51 – 55).

organization. The Head was however bound by these requests – they had to be pursued exactly according to the claims contained in them. The new Act abandoned the requests system (in practice it appeared that the majority of the proceedings commenced with a request were concluded by the Head’s declaration of lack of any infringements). As of April 2007, proceedings before the Head of the Office for the Protection of Competition and Consumers may only be started by the Head of his own initiative. On the other hand, however, the Act gave consumers the power to make complaints to the Head which may lead to an investigation and proceedings. The decisions of the Head declaring an infringement and imposing a fine may be appealed to the Court for the Protection of Competition and Consumers.

Question 3:

For each litigation mechanism identified above, please provide a general description of the process contemplated by the formal rules. *In most legal systems, there are significant differences between “the law on the books” and “the law in practice.” For this item, we are interested in “the law on the books”; later we will ask about actual practice, and about specific issues, such as standing, appointment of legal counsel, and who is bound by outcomes of the litigation.*

Please see the response to Question 2. The persons and organizations which the Code empowers to bring claims are described there. It is also mentioned that the process following their actions is regulated by the same provisions (all refer back to the prosecutor’s role in taking action). For the overview of civil procedure – see the answer to Question 1.

Question 4:

In representative litigation, who may come forward to represent groups of claimants, in what circumstances? Must class members all come forward individually (“opt in”) to join the litigation, in some or all circumstances? What interests and organizations have availed themselves of the procedure? What roles have public justice officials and private lawyers played in prosecuting cases? What are the

barriers to individuals and groups using the representative mechanism (e.g. funding problems, difficulty communicating with potential class/group members, lack of independence of officially-appointed representatives, judicial attitudes)? Are there features of your country's civil litigation system that either facilitate or deter representative litigation?

The first part of this question was already addressed above. The role of social organisations, public prosecutors and other public bodies was explored there. It was also clarified that the proceedings brought by the representative bodies and organisations are based on an 'opt-in' mechanism. Further, no material decision in the proceedings can be made without the consent of all the represented persons.

The brief analysis of the Polish legal system, civil procedure and litigation culture above indicated that certain specific features of this system may constitute obstacles to access to representative or group proceedings. Some of these were actually noted by the representatives of organisations which take such actions, and they are also likely to constitute obstacles in the introduction and an effective operation of a collective redress mechanism, were one to be introduced in Poland in the near future.

Here is a more detailed assessment of the possible barriers to the use of representative actions (some of them were mentioned above):

- **Lack of sufficient judicial flexibility and judicial control of litigation (these are key requisites of many group litigation mechanisms), and difficulties in coping with the new political, economic and legal reality:**

This phenomenon was already briefly described in the answer to Question 1. On the one hand, civil procedure is more adversarial now than it was during the socialist period. Parties have the main responsibility for the result of the process, and according to the 'principle of truth' they are obliged to provide complete and truthful statements of facts of the case and to present evidence (Article 3 of the Code). On the other hand, the powers and obligations of judges are described with greater precision: they may provide the

necessary advice to parties who are not represented by a lawyer (Article 5)⁴³; they ought to prevent delays in litigation and aim at concluding the case during the first trial day as long as this is possible without detriment to the case (Article 6); they should aim at concluding each case with a settlement – either before the judge or before an arbitrator (Article 10). Thus, while the civil procedure model adopted in Poland is now largely adversarial, it is the judge who is in charge of managing the progress of litigation: he or she establishes time limits for certain procedural activities of the parties and determines the dates of the trial. Before the trial the judge establishes the main factual and legal issues which the parties wish to focus on, and prepares the trial accordingly. The court may also decide to join a number of cases in order to consider them together (Article 219 of the Code),⁴⁴ to separate a single claim into a number of cases (Article 218), or decide to consider only certain aspects or only preliminary issues of the claim (Article 220).

In Polish court practice, however, the role of the judge is often seen as being one of a passive observer in a purely adversarial procedure. This appears to be the result of the dissatisfaction with the role of courts and judges advocated during the Socialist époque. At that time, the court was encouraged to actively seek the “objective truth” (Łętowska 2002: 594).⁴⁵ The problems with judicial practice were indicated above. At present, judges were observed to sometimes avoid taking initiative in the course of the proceedings, to steer clear from encouraging settlement between parties, or from simplifying, shortening proceedings. The impression of some scholars is also that in even the simplest of matters the judges refuse to take a decision based upon their own common sense, experience and opinion, and refer to experts for their views. Such a dismissive approach was observed in cases involving consumers as well as in other types of cases

⁴³ Very often such advice concerns the possibility of claiming legal aid, which in Poland consists in an application for a court fee waiver and for appointment of a lawyer *ex officio* (K. Piasecki (ed.) (2006: 87) *Kodeks Postępowania Cywilnego. Komentarz do artykułów 1 – 505.14. Tom I (The Code of Civil Procedure. Commentary to articles 1 – 505.14. Volume I)* Warszawa: Wydawnictwo C.H. Beck).

⁴⁴ The court may also do so in order to determine whether the cases are linked or should have been subject to a single claim.

⁴⁵ E. Łętowska (2002) *Prawo Umów Konsumenckich. 2 wydanie (The law of consumer contracts. Second edition)* Warszawa: Beck.

(Łętowska 2002: 594, 597)⁴⁶ In some way relieved of their duty to actively lead the proceedings, the judges are not willing to risk taking initiative in making many vital decisions during the proceedings – even the simplest and most obvious facts often require confirmation by experts. This leads to increased costs and length of civil proceedings (Łętowska 2002: 593). In the light of the very clearly visible problem with disproportionate length of civil procedure, high costs of litigation and the insufficient availability of legal aid, of which below, this is an unfortunate result indeed. The judges often exhibit a defensive attitude, where they try and protect themselves from any suggestions of partiality and undue involvement or influence on the case. This approach makes judicial case management and case control, so crucial in managing group litigation, very difficult. While there is no doubt that with the strengthening of the democratic structures and deepening of the judicial independence and impartiality (especially as it is perceived in society) this approach is likely to change, the transformation is presently delayed by the legislative and regulatory activities, to some extent limiting judicial independence and subjecting the judges to greater control by the executive (described above).

While Western European civil law systems are also moving towards a more adversarial system, they do it in the face of an entirely different legal culture – one where the position of a judge in litigation is relatively stronger – both as regards his/her own confidence and knowledge dealing with the law, and the social recognition of the judges' authority. The position of judges in Polish civil procedure is problematic indeed – they are having to come to terms with the plethora of new legislation and new political and economic reality, and lack of public trust and confidence in their decisions. An inherent in the Polish legal culture distrust of judiciary (undoubtedly the reminder of the previous époque where judges were often seen as the arm of the socialist state and where their role was to educate society) is an obstacle to increasing the role of judges in managing litigation. Judges themselves seem wary of suggestions that they would need to take greater control over the proceedings – they wish to avoid public criticism which they feel

⁴⁶ The statement based upon the observation of the reality of court proceedings by Łętowska. Ewa Łętowska is one of the most prominent Polish legal scholars and judges. She was the first Ombudsman in Poland and is now a Constitutional Tribunal judge.

would follow their greater flexibility, creativity and control. They fear that taking independent or creative decisions may earn them criticism of lack of impartiality (the latter was very clear from opinions of judges presented during the meeting of the Polish Codification Commission in Warsaw in January 2007). These issues are related to aspects of legal culture and cannot quite be influenced by legislative and short-term political activities.

- **No principle of precedent – a court judgement is formally only binding upon parties of a particular case in which it was given (there is a need to consider introducing a wider effect of judgements – this has already been done with regards to the effect of judgements in cases of unfair contractual clauses).**
- **The model of civil procedure is not conducive to group litigation – the role of the judge is limited: the proceedings are the responsibility of the parties and the judge is only an outside arbiter.**
- **Other elements** of the civil justice system which were noted by academics and policy papers are: high costs of litigation and a relative inflexibility and lack of dynamism with regard to developing new methods of litigation funding (the legal aid system is still in quite an archaic stage, insurance or third party funding is rarely used, and contingency fees are prohibited), the existence of the loser pays principle (which remains in operation even with regard to parties in receipt of legal aid), and the difficulty in accessing good legal advice (this as regards the costs as well as the relatively low numbers of lawyers – see above for recent reforms aimed at increasing the number of people entitled to give legal advice). Below is an assessment of these issues. Particular emphasis is on the length of proceedings and the costs of litigation. Because of the structure of the questions set out below, the topic of litigation funding is explored in the responses to Questions 12 -14.

Length of proceedings:

Overall, what is striking about the Polish court procedure is its length, often disproportionate to the degree of complexity of the issues involved, let alone the value of the case.⁴⁷ Article 6 of the Code of Civil Procedure entrusts some of the responsibility for a swift conclusion of litigation to the judge, and there are also a number of penalties which the Code prescribes for parties delaying proceedings – the most crucial being Article 103.2 (the judge may make a costs order against the party who unreasonably delayed submitting evidence, irrespective of the outcome of the case).⁴⁸ The Parliament recognised the problem of delays and recently passed the Act enabling parties to claim compensation for damages caused by such delays. The Act of 17 June 2004⁴⁹ gives parties, persons making a subsidiary intervention in civil litigation (see above), and any other participants in civil proceedings the power to make a complaint if his/her right to have the case with no undue delay was infringed by an action or omission by a court (Article 1.1 of the Act). This is possible if the court considering the complaint establishes that the proceedings took longer than it was necessary for the determination of all the factual and legal issues which are crucial for deciding the case (considering the speediness and correctness of the activities of the court, taking into account the nature of the case, the level of its factual and legal complexity, or the conduct of the parties, especially the party making the complaint – Article 2). The court which considers the complaint is the superior court to the one considering the case (the complaint must be brought while the proceedings in the case are taking place). If the complaint is allowed, the court declares ‘procedural delay’ (*przewlekłość postępowania*): it may prompt the court considering the case to undertake certain activities in a specified time period, and may also award compensation up to 10,000 PLN (around £1810). The court considering the case pays such compensation out of its own resources. Irrespective of this award, the

⁴⁷ The World Bank Report on *Contract Enforcement and Judicial Systems in Central and Eastern Europe* of 2005 (<http://siteresources.worldbank.org/INTECA/Resources/CEJSPoland.pdf>) notes a backlog of cases clogging the Polish judicial system, only partly helped by the improvements in the work of courts – greater computerisation and relieving judges of some of the administrative work (*referendarze sądowi* – court assistants – were given a greater role). This backlog may be one of the reasons for the delays.

⁴⁸ This is an exception from the general ‘loser pays’ rule.

⁴⁹ The Act on the complaint for breaching the right of the parties in court proceedings to have their case considered with no undue delay (adopted after the judgement of the European Court of Human Rights in the case against Poland based on Article 13 of the European Convention of Human Rights: *Kudła v Poland*).

party whose complaint was allowed may in separate proceedings seek compensation of damages caused by the confirmed delay from the State. A party who did not bring a complaint during the proceedings can no longer rely on the Act, but may seek compensation of damages caused by delay of proceedings already concluded following Article 417.1 of the Civil Code. The situation is not satisfactory even after the introduction of the Act, the Helsinki Committee concluded in its Report.⁵⁰ Just how significant the problem is can be seen from the statistics provided in the Report: only in the first six months of the operation of the Act, 366 complaints were lodged with the Supreme Administrative Court, and in the first six months of 2005, 2652 complaints overall were lodged.⁵¹ The Report notes that complaints are not always successful – one of the main reasons being that courts, in the spirit of the principle of non-retroactivity of the law, refuse to consider the period before the introduction of the Act as relevant time for the alleged delay.⁵² Another problem is the low amount of compensation, and the fact that courts often refuse to award any compensation even if they declare procedural delay.⁵³

Costs of litigation:

The main costs of litigation in Poland are court costs and the costs of legal representation. The court costs were regulated by the Act of 13 June 1967,⁵⁴ which was now repealed by the Act on Court Costs in Civil Cases. The costs of legal representation – the fees of barristers and solicitors - were regulated by the Regulation of the Minister of Justice of 12 December 1997 on the payment for the services of barristers and the services of legal advisors, now replaced by the Regulation of the Minister of Justice of 28 September 2002 *on the payment for the services of barristers* and the Regulation of the Minister of Justice of 28 September 2002 *on the payment for the services of legal advisors*.⁵⁵

⁵⁰ International Helsinki Foundation Report 2006, Human Rights in the OSCE Region. Polish part prepared by Krzyszto Wilamowski of Helsinki Foundation for Human Rights.

⁵¹ Ibid. at 304.

⁵² Ibid. at 305.

⁵³ Ibid.

⁵⁴ *Ustawa o kosztach sądowych w sprawach cywilnych* (as amended), Dziennik Ustaw (Journal of Laws) 2002, Nr 9, Item 88; amendments: 2003.01.28, Dziennik Ustaw 2002, Nr 233, Item 1955; 2003.04.01, Dziennik Ustaw 2003, Nr 45, Item 391.

⁵⁵ Dziennik Ustaw (Journal of Laws) No. 163, item 1348 and 1349.

The court costs have undergone a very serious transformation. The reform was long overdue, as the previous Act 1967 contained provisions which were not suited to the new, democratic, free market reality of the new Poland after the end of socialism. According to the provisions of the 1967 Act, the court costs included court fees and reimbursement of expenses.⁵⁶ The court fees included the fee referred to as an ‘inscription’ (or ‘registration’ – *wpis*) and the “*opłata kancelaryjna*” (official/administrative fee). The latter was payable for documents issued on the basis of the files of the case. The “expenses” included in particular: the costs of travel and other costs of judges having to perform activities outside the court, remuneration of witnesses, experts, translators, curators established for the particular case and other persons or institutions, the costs of phone calls, the costs of accommodating persons and animals, the costs of announcements, the costs of accommodation of arrested persons, etc.⁵⁷ The amount of the ‘inscription’ normally depended upon the value of the subject of the case, and most ‘inscriptions’ were fixed, or their upper and lower limits were fixed, by legislation. Both the fixed ‘inscription’ and the “*opłata kancelaryjna*” were established by a Decree of the Minister of Justice. The fixed ‘inscriptions’ were regulated by the Decree of 17 December 1996 *on the rate of ‘inscriptions’ in civil cases*.⁵⁸ Generally, in civil and commercial cases the ‘inscription’ (a whole sum) amounted to:

⁵⁶ Article 2 of the Act.

⁵⁷ Article 4 of the Act.

⁵⁸ *Rozporządzenie Ministra Sprawiedliwości w sprawie określenia wysokości wpisów w sprawach cywilnych* Dziennik Ustaw Nr 154, Item 753.

Value of the case	Inscription
Up to 10.000 PLN	8%, but no less than 30PLN
10.000 to 50.000 PLN	on the first 10.000PLN – 800PLN, then 7% of the rest
50.000 to 100.000 PLN	on the first 50.000 PLN – 3,600 PLN, then 6% of the rest
Above 100,000 PLN	on the first 100,000 PLN – 6,600 PLN, then 5% of the rest but not more than 100,000PLN ⁵⁹

The Act of 28 July 2005⁶⁰ (in force since 1 March 2006) *o kosztach sądowych w sprawach cywilnych* (on court fees in civil cases) changed the manner in which the fees are charged, reduced the fees, reduced the number of cases in which parties would be partly or totally exempted from having to pay the fees, and transferred some crucial powers regarding costs from the judges to *referendarze sądowi* (court clerks). The reforms are aimed at increasing the effectiveness and speed of civil proceedings, and improving access to justice.⁶¹ For reasons of simplifying the law regarding costs, the Act regulates many matters which have so far been regulated by a number of legal instruments – including Acts of Parliament and administrative acts.⁶²

Immediately after its introduction, the Act caused some controversy and it was amended in May and December 2006 (especially with regard to court fee waiver for social organizations in representative proceedings – the original Act seems to have missed this).

As already mentioned, the Act simplified the legislative basis for regulating court costs, and decreased the costs, at least in some cases. Instead of the two parts of the fee

⁵⁹ Chapter 1 paragraph 1 of the Directive.

⁶⁰ *Dziennik Ustaw (Journal of Laws)* of 1 September 2005, no. 167, item 1398.

⁶¹ Uzasadnienie projektu ustawy o kosztach sądowych w sprawach cywilnych (Explanatory Note to the draft act on court fees in civil cases) found at the website of the Polish Ministry of Justice – http://www.ms.gov.pl/kkpc/koszty1_uzas.rtf at page 1.

⁶² http://www.ms.gov.pl/kkpc/koszty1_uzas.rtf at pages 1 and 2.

(registration and administrative fee), there is now one single court fee. This can be a set amount established by the Act for certain cases (for instance – in cases of appeals against the decision of the Head of the Office for the Protection of Competition and Consumers it is 1000 PLN, or in simplified proceedings there is a tariff depending on the value of the case). In other cases the fee is established as a percentage of the value of the claim – here a significant change to the old law can be seen – it is a constant 5%.

The Act exempts certain persons and organisations from the duty to pay court fees and expenses. The most fundamental exemption is the one related to legal aid – granted at the discretion of the court subject to a means and merits test (described below). The Act also provides for certain exemptions which are not subject to the courts' discretion. Some depend on the subject of the claim (for instance an appeal from the court's decision to refuse legal aid). Others are given to particular persons or institutions: prosecutors, the Ombudsman, consumer ombudsmen and trade inspectors. Following the amendment of the Act in December 2006, the court may exempt social organizations from having to pay court costs (the requirement for them not to aim to achieve profit, present in the provisions of the Code of Civil Procedure, has also been inserted here) in a number of specified cases – for instance cases involving consumer or environment protection.

The general principle governing the barristers and solicitors' fees in Poland is freedom of contract, although any such arrangements between the lawyers and the clients are effective only between them (Stępień 2005).⁶³ For costs shifting purposes the lawyers' fees are established by courts and by statute. A number of legal instruments regulated the remuneration of barristers and solicitors since 1990s. They were regulated by the

⁶³ H. Stępień (2005) *Honorarium adwokata i radcy prawnego w polskim systemie prawnym* (barristers and solicitors' fees in the Polish legal system) <http://www.oirp.waw.pl/temidium/wynagrodzenie1.htm> (from 'Temidium' - the newsletter of the District Chamber of Legal Advisers in Warsaw). Also – Chapter Two, Paragraph 2.1 of the Decree of the Minister of Justice of 28 September 2002 *w sprawie opłat za czynności adwokackie oraz ponoszenia przez Skarb Państwa kosztów nieopłaconej pomocy prawnej udzielonej z urzędu* (on the remuneration of barristers' services and on the payment by the State Treasury of the costs of unpaid legal assistance nominated *ex officio*) (Dziennik Ustaw (Journal of Laws) of 2002 no 163 item 134; and Chapter Two, Paragraph 2.1 of the Decree of the Minister of Justice of 28 September 2002 *w sprawie opłat za czynności radców prawnych oraz ponoszenia przez Skarb Państwa kosztów pomocy prawnej udzielonej przez radcę prawnego ustanowionego z urzędu* (on the remuneration of solicitors' services and on the payment by the State Treasury of the costs of legal assistance given by a solicitor nominated *ex officio*) (Dziennik Ustaw (Journal of Laws) of 2002, no 163, item 163).

Regulations of the Minister of Justice of 12 December 1997.⁶⁴ The Regulations determined the remuneration for the services of barristers and legal advisors before courts and other justice authorities for costs shifting purposes, minimum rates of remuneration, and the conditions under which the State covered the remuneration of a barrister or a legal advisor nominated *ex officio* (Poland has a ‘Judicare’ legal aid model).

At present, lawyers’ fees are regulated by the Regulations of the Minister of Justice of 28 September 2002.⁶⁵ The Regulations are uniformly structured and, similarly with the Regulations of 1997 they deal with three main issues: the remuneration for the services of barristers and solicitors (*opłaty* – fees), minimum rates for these services (*stawki minimalne* – minimum rates), and the manner in which the State Treasury pays for legal assistance given by barristers and solicitors nominated *ex officio*. The general principle is that the fee established by the court for the particular case (for cost-shifting purposes) should not be higher than the minimum rate, irrespective of any agreement between the lawyers and the clients (Chapter 2 paragraph 2.1 of both Decrees).⁶⁶ However, the Decrees introduce exceptions to this principle: the court may establish a fee higher than the minimum rate (although not higher than six times the minimum rate) if the complexity of the case and the barrister or solicitor’s amount of work justify this (Chapter Two paragraph 2.2 of both Decrees). Further, in exceptional cases, where the financial or family position of the client or the type of case justifies this, the lawyer may agree to a fee which is lower than the minimum rate or even waive the fee entirely (Chapter Two paragraph 3.2 of both Decrees). In such cases, the court may confirm such agreed lower or waived fee for cost-shifting purposes (Chapter Two paragraph 3.3 of both Decrees).

⁶⁴ *W sprawie opłat za czynności adwokackie oraz ponoszenia przez Skarb Państwa kosztów nieopłaconej pomocy prawnej udzielonej z urzędu* (on the remuneration of barristers’ services and on the payment by the State Treasury of the costs of unpaid legal assistance nominated *ex officio*) and a similar regulation concerning the remuneration of legal advisors

⁶⁵ *W sprawie opłat za czynności adwokackie oraz ponoszenia przez Skarb Państwa kosztów nieopłaconej pomocy prawnej udzielonej z urzędu* (on the remuneration of barristers’ services and on the payment by the State Treasury of the costs of unpaid legal assistance nominated *ex officio*); and *w sprawie opłat za czynności radców prawnych oraz ponoszenia przez Skarb Państwa kosztów pomocy prawnej udzielonej przez radcę prawnego ustanowionego z urzędu* (on the remuneration of solicitors’ services and on the payment by the State Treasury of the costs of legal assistance given by a solicitor nominated *ex officio*).

⁶⁶ Chapter Two paragraph 3 of both Decrees specifies that, when deciding upon the fee in an agreement between the lawyer and the client, the type and complexity of the case and the amount of work the lawyer is expected to perform should be considered.

In fact, the minimum rates have general application – the Decrees establish them for particular types of cases and sometimes also classify them into depending upon the value of the case (Chapter Two paragraph 4.1 of both Decrees). Even if the rates for a particular case are not established by the Decrees, Chapter Two paragraph 5 of both Decrees indicates that the rates prescribed for cases of the greatest similarity to the one in question should be used.

As mentioned above, the fees agreed between the lawyers and the clients are not regulated and are only subject to the laws of the market. Unfortunately, barristers and solicitors have recently experienced pressures from clients (including large companies) demanding that minimum or even lower fees be agreed and threatening to use the services of their competitors otherwise (Stępień 2005). Stępień stressed that such pressures breached the law (they normally have no relation to the financial or family position of the client), infringed the principle of equality of bargaining power between the parties to a civil contract, breached the principles of professional ethics and induced the lawyers to use unfair competition practices (ibid.). He also pointed out that ‘corporations’ of solicitors and barristers made attempts to combat these practices, although he did not specify what these attempts entailed.

A short note concerning the costs rules and the principles of cost assessment in Poland:

The Polish civil procedure follows the ‘loser pays’ rule (Article 98 of the Code of Civil Procedure), which applies even in cases where the party was in receipt of legal aid (Article 108 of the Act on Court Costs, Article 121 of the Code of Civil Procedure). There are exemptions from this rule which are subject to the discretion of the court (Articles 100 – 104 and 106 of the Code of Civil Procedure⁶⁷).

⁶⁷ The court may decide to award the costs following different rules if only part of the claim was allowed, if the defendant accepted the claim immediately, or in other special circumstances. If a prosecutor took part in litigation a party cannot to be awarded the costs from the state treasury.

Cost assessment is done by the court in the decision concluding litigation (Article 108.1 of the Code of Civil Procedure). It can also be delegated by the court to the court clerk. Article 98 of the Code of Civil Procedure clearly sets out that only reasonably incurred costs, those necessary for proceeding with litigation, will be awarded. Article 109 reiterates this rule for the purposes of costs assessment.

Question 5:

In non-representative group litigation, who may initiate group litigation, and in what circumstances? *In what types of cases have parties/lawyers attempted to use the group litigation process? What role have judges played in conferring group litigation status on cases? What are the barriers to parties/lawyers using the group litigation mechanism (e.g. funding problems, difficulty determining whether group litigation would be efficient & effective, judicial attitudes)? Are there features of your country's civil litigation system that either facilitate or deter group litigation (presence or absence of contingency/speculative fee system, limits on lawyer advertising, etc.)?*

No group litigation procedure exists Poland, as explained above.

As regards potential facilitation/deterrence of group litigation, neither the speculative fee system nor lawyer advertising are permissible in Poland. However, the environment is changing and debates on the possible introduction of such mechanisms have begun. Further, one can see the introduction of speculative fees and some evidence of lawyer advertising in practice, in spite of the prohibitions. The barriers to effective access to justice and an efficient functioning of a representative actions mechanism were presented above.

Question 6:

How many lawsuits have proceeded in each litigation form over the past 5 years? *If representative or group litigation requires judicial approval, please indicate the number of representative or group actions that have been attempted and the number in which*

approval was granted. Please indicate the source of any numbers you provide. If no “hard” numbers are available, please provide estimates.

As far as the representative litigation is concerned, some data is available from various representative bodies and from other sources.

For instance in cases of unfair contractual clauses – it was already mentioned that out of over 1200 unfair contractual clauses registered in Poland so far, the majority of claims are brought by the following: the President of the Office for the Protection of Competition and Consumers (a significant majority), the Consumers Federation in Warsaw, regional consumer ombudsmen, and only in a minority of cases - individuals.

The participation of prosecutors in civil cases: statistical information provided by the General Statistical Office (Główny Urząd Statystyczny) includes all civil cases in which prosecutors took part. The following table includes data provided by the Office in the Concise Statistical Yearbook of Poland

In 2006 (from the 2007 Concise Statistical Yearbook of Poland (http://www.stat.gov.pl/cps/rde/xbcr/gus/PUBL_concise_statistical_yearbook_of_poland_2007.pdf):

District prosecutors: 60,9 thousand incoming cases, 59,4 thousand concluded cases

Regional prosecutors: 13,5 thousand incoming cases, 13,2 thousand concluded cases

Appeal prosecutors: 0,2 thousand incoming cases, 0,2 thousand concluded cases

No data on this issue exists in earlier yearbooks.

The data of Consumers Federation:

The Consumers Federation is an independent, non-governmental organisation the aim of which it is to protect consumers in Poland. It has been a ‘public benefit organisation’ since 1 June 2004.

The following data is available on the website of the Federation (www.federacja-konsumentow.org.pl):

In 2006 the Federation brought claims in 181 cases and took part in litigation before ordinary courts in 415 cases. It also took part in 725 cases before consumer arbitration courts.

In 2005 the Federation brought claims in 243 cases and took part in litigation before ordinary courts in 470 cases. It took part in 701 cases before consumer arbitration courts.

In 2004 the Federation brought claims in 218 cases and took part in litigation before ordinary courts in 457 cases. It took part in 698 cases before consumer arbitration courts.

In 2003 the Federation brought claims in 210 cases and took part in litigation before ordinary courts in 560 cases. It took part in 864 cases before consumer arbitration courts.

Association of Polish Consumers (Stowarzyszenie Konsumentów Polskich): still awaiting data.

Question 7:

In representative litigation, must possible class members be informed of the initiation of the litigation and, if so, how? *Do courts have oversight authority for the notification process? Please provide any information you have about the types of notification used, their scale, and costs. If parties are required to opt-in, what has been the experience with regard to that? What are the barriers to participation in representative suits? How are class members kept informed of developments, and to what extent can they exercise control over decisions, or take part in the process if they wish?*

Prosecutors and social organizations bringing claims in the name of specified persons are referred to as ‘formal’ parties to litigation (as opposed to ‘material’, ‘substantive’ parties – which are persons in whose name litigation was brought). In such cases, the court must

notify the person in whose name the litigation was brought and send him/her a copy of the claim in order to enable him/her to become claimant in the case (this according to Article 129.2 of the internal rules of procedure of ordinary courts – introduced in the Regulation of the Minister of Justice of 19 November 1987).

Question 8:

In non-representative group litigation, must the named parties be informed that the litigation is proceeding in group form? Can parties/lawyers whose cases are similar to others that are proceeding in group litigation form exclude themselves from the group litigation and proceed independently, and if so how? Are group members kept informed of developments, and to what extent can they exercise control over decisions?

Not applicable.

Question 9:

In group litigation, are there special case management procedures (e.g. case pleadings, scheduling, development of evidence, motion practice, test cases, preliminary issues)? Are there features of your country's civil litigation system that either facilitate or hinder the development of cases that proceed in representative or non-representative group form?

Not applicable.

Question 10:

In group litigation, what proportion of cases is resolved through party/attorney negotiation and settlement, and what proportion is resolved through judicial or jury decision? If cases are settled, who participates in negotiating settlements? Does the court or do other public officials have responsibility for assuring fairness of any negotiated outcomes, and if so what procedures exist to address the fairness issue? What has the experience of oversight been? Have there been controversies over the fairness or

reasonableness of settlements? If cases are tried, how is evidence presented on behalf of the class or grouped claimants?

Not applicable.

Question 11:

What remedies are available in representative and non-representative group litigation? When group litigation is resolved with the payment of monetary damages, how are damages allocated among claimants? Do judges exercise oversight of fairness or process of allocation? Please provide data on outcomes of representative and non-representative group litigation over the past five years. Please indicate the source of any outcome data you provide. If no “hard” data are available, please describe the diversity or range of outcomes to the best of your ability.

No specific damages are prescribed by representative proceedings – the damages depend on the subject of the litigation.

Question 12:

Who funds group litigation: the state, legal services organizations, NGOs, private lawyers, or the claimants themselves? Is funding perceived to be a problem, and if so, is the problem perceived as too much funding or too little? What problems have those who wish to proceed in representative or non-representative group litigation encountered in obtaining funding?

Although no group litigation mechanism exists in Poland, a short elaboration of the methods of funding litigation seems necessary in the context of the report.

The main form of funding litigation for impecunious parties is legal aid. Other funding mechanisms are now starting to develop. Insurance becomes more widespread, and although speculative funding arrangements are prohibited, they have been known to be occurring between lawyers and clients in practice.

The legal aid system in Poland is based on the ‘Judicare model’ – waiver of court costs and appointment of a lawyer *ex officio*. The main principles are set out in the Act on Court Costs of 2005 and in the Code of Civil Procedure as amended by the latter Act. It is provided that any physical or legal person may submit an application to the court considering the case for a waiver of court costs and for a nomination of a lawyer. The application for a costs waiver is to be submitted before or during the proceedings. The court considers the application taking into account a means test and a merits test. The means test is established in relatively wide terms – the party must document that he or she cannot fund the litigation without significant financial detriment to himself/herself and his/her family (Article 102.1 of the Act). The merits test is also formulated in wide terms – the court is to refuse waiver if the claim or defence is clearly unsubstantiated (Article 109.2 of the Act). If the court approved the application, the party can then request that a lawyer be appointed to assist the case. The Polish civil procedure does not always require the presence of a lawyer, thus the court will only then appoint a lawyer if it considers such appointment necessary. If a lawyer (barrister or a legal advisor) is to be appointed, the court refers its request to the regional barristers or legal advisors’ council to nominate the lawyer.

Although Polish court statistics are comprehensive indeed, no formal reviews on legal aid were carried out so far (HFHR 2003: 38). In fact, lack of transparency regarding determination of legal aid budgets is striking in Poland. According to Terzieva, no distinct budget line for legal aid existed in 2002 (this both in the overall court budget and the budget of the Bar) (2002: 4). This is true until today. The legal aid funds are lumped together with costs of courts and public prosecutors’ proceedings (ibid.). While it is clear from the Report of the Helsinki Foundation (2003) that state expenditure on legal aid has kept increasing, especially recently in the light of the increase in the lawyers’ fees, it is indeed remarkable that there has been no interest in knowing how much money exactly is being spent and how.

Question 13:

Costs and benefits. *How are attorneys in group litigation paid? Please indicate whether there are special rules for paying attorneys in representative and non-representative group litigation that do not pertain in ordinary civil litigation. Do courts have responsibility for determining or approving fees in these cases? How do the private costs of group litigation compare to the costs of ordinary civil litigation, or any other available methods for resolving such situations? Do attorneys make more, the same, or less, in proportion to their time, effort and risk, by comparison to ordinary civil litigation? How do costs compare with the outcomes achieved? Please provide any quantitative data available on litigation costs over the past five years, and any available data comparing costs to outcomes Please indicate the source of any cost and outcome data you provide. If no “hard” data are available, please describe the range of costs to the best of your ability, and share your perceptions of the relationship between costs and outcomes.*

The rules on costs and funding of litigation in Poland were described above.

Question 14:

Is the burden that group litigation places on the court more, the same, or less, than in comparable non-representative, non-group litigation? What is the average time to dispose of a group case, and how does this compare to comparable non-representative non-group litigation? *Please provide any quantitative data available on court costs and time to disposition over the past five years. Please indicate the source of any data you provide. If no “hard” data are available, please describe the range of outcomes to the best of your ability.*

Not applicable.

Question 15:

What are the current debates in your jurisdiction over the application of collective litigation rules and their consequences? *How intense are the debates, how pressing is*

any need for reform? Have there been important evolutionary steps or trends? What major developments might follow?

The Report already mentioned that the Polish legal system remains in the phase of transition, both as regards the substantive law and procedures. Also the discussions in the Codification Commission concerning introduction of a group litigation mechanism was mentioned.

Question 16:

Overall, how would you evaluate the mechanism(s) success in achieving major changes in behavior, activities or policy, relative to the costs incurred by public and private actors?

In assessing the representative proceedings in Poland one finds a much greater participation of public bodies (prosecutors or ombudsmen) than social organisations in such litigation. It is difficult to determine the reasons for this, although in my conversations with the President of the Consumers' Federation I was told that the Federation often lacks resources to bring or take part in civil litigation. Another problem indicated by the Federation is their concern over those on whose behalf they would bring claims – the 'loser pays' principle still applies to them.

Because of the peculiar shape of the Polish civil procedure – the remaining problems with delays, costs and complexity, and the specific legal culture, it is indeed doubtful whether such private litigation can always achieve the desired deterrent effect. The views of the Consumers' Federation with regard to the activity of the arbitration consumer courts (mentioned above) indicate that litigation is the preferred option for traders because of their hope that its length and costs will discourage consumers from proceeding.

It appears that a more effective method of changing behaviour, at least in the context of consumer disputes, is at present public enforcement.