

# **The response of the Government of the Republic of Poland to the Report of the Commissioner for Human Rights of the Council of Europe following the visit to Poland from 9 to 12 February 2016**

## **Introduction**

The Government of the Republic of Poland would like to thank the Commissioner for Human Rights of the Council of Europe, Mr Nils Muižnieks (hereinafter referred to as the Commissioner), for paying a visit to Poland from 9 to 12 February 2016. A number of meetings with representatives of the Polish authorities, organised at the Commissioner's request, were intended to gain comprehensive knowledge about the situation in Poland. The great appreciation which Commissioner Muižnieks expressed about the organisation of his visit to Poland during the presentation of his quarterly activity Report and the 2015 annual Report at a meeting of the Committee of Ministers' Deputies on 25 May 2016, under item 4.1 of the agenda, is a reaffirmation that the Polish authorities loyally cooperate with the Commissioner, just as they do with other Council of Europe bodies.

The Government of the Republic of Poland supports the Commissioner's efforts and activities carried out pursuant to his mandate. The Commissioner's constructive dialogue with the national authorities has particular importance. The Government of the Republic of Poland looks upon the possibility of presenting this position on the Report from this year's periodic visit by the Commissioner in Poland as an element of this dialogue with the Commissioner. The position presented below expresses general observations and refers to the particular paragraphs of the Report according to the classification adopted in the document.

## **General comment**

The Commissioner's visit this year was presented as a periodic visit and took place for the first time since 2006, when the onetime Commissioner, Mr Thomas Hammarberg, held a number of meetings with the Polish authorities and NGOs. The conclusions and recommendations from the 2006 visit were later expressed in the form of a Memorandum to the Government of the Republic of Poland. The Commissioner suggests in para. 5 that he is referring to the substance of the 2007 Memorandum in his Report.

The Polish authorities carefully analysed the Memorandum and subsequently took comprehensive measures in order to implement the recommendations which was reflected in a Report on the implementation of the Memorandum drafted by the Polish authorities for the purpose of this year's visit by the Commissioner. Unfortunately, the Polish Government's Report on the implementation of recommendations made by the former Commissioner for Human Rights was completely ignored in the drafting of the present Report. This is a good illustration of the special approach of the present Commissioner to cooperation with the Polish Government whose extensive Report was not subjected to any, even the most critical, analysis.

Though the Commissioner did make a general observation about the progress made by the Polish authorities in implementing the Commissioner's earlier recommendations, the periodic visit in 2016 and the Report adopted following this visit focus on describing events that took place after 25 October 2015, when a parliamentary election was held in Poland.

This methodology of presenting actions undertaken by the national authorities creates the impression of a selective description of events and distorts their analysis. This makes it hard to perceive the Commissioner's activities as being unbiased and apolitical. As a result, the Report does not reflect the entire range of measures taken in order to raise the standard of human rights protection in Poland over all these years. It also fails to show the situation found by the present Government with regard to the observance of human rights.

It is easy to see the lack of symmetry and selectivity in the critical observations presented in the Commissioner's Report about the measures undertaken by the Government of the Republic of Poland, depending on whether they apply to the period preceding or following the last elections<sup>1</sup>.

In addition, despite the diversity of institutions that the Commissioner visited during his visit to Poland, and despite the wide exchanges of opinions that took place during the meetings and the additional explanatory materials that the Polish authorities sent to the Office of the Commissioner in connection with his visit, the Commissioner apparently based his Report on very selective information. At the same, one clearly feels a dismissive attitude to the merit-based arguments of the national authorities. Some diagnoses of the changes introduced in Poland, including the new system of the prosecution service, appear to be in many details the result of only a perfunctory reading of legal texts, giving the impression that they were based on journalistic texts.

A wider perspective in the description of legislative work on the Act on the Constitutional Tribunal was surely absent. Considering that during his February visit the Commissioner met with a large number of interlocutors and so had the opportunity to comprehensively learn about facts and also considering the extensive written material provided by the Polish authorities during and after the visit, the selective presentation of facts in this regard comes as a surprise.

Considering the time of the Commissioner's visit i.e. 9-12 February 2016, references made in the Report to developments that took place after the Commissioner's visit to Poland should raise concern. Such actions should not be indicated in a document like the periodic Report, which even the Commissioner himself admits, referring to his lack of mandate to comment more widely on the changes introduced by the Polish authorities since February 2016. The Government of the Republic of Poland wishes to underline that it had not been asked by the Commissioner to submit documents that would have explained the background and the essence of the changes that have been introduced nor had it been given an opportunity to present its position in order to address the Commissioner's possible questions or concerns, which would be required by the principle of fairness and hearing out all the interested actors. The Commissioner did not indicate the source from which he obtained information that allowed him to recreate the developments that took place in Poland after February 2016. Thus, his corresponding account must be considered one-sided and falling short on an in-depth analysis.

All this raises concern about the Commissioner's political involvement in internal political disputes, something that cannot be reconciled with the Commissioner's mandate.

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<sup>1</sup> Actually the only critical observation regarding measures taken by the previous Government is found in para. 120 and partially in para. 6.

The Commissioner's role is to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe, while also respecting the competences and functions exercised by the supervisory bodies of the Convention for the Protection of Human Rights and Fundamental Freedoms. In expressing in some places categorical criticism of the legal regulations of state policy, for instance in respect of criminal policy or sexual education, the Commissioner seems to go beyond the relevant legal instruments of the Council of Europe or the case law of the European Court of Human Rights (hereinafter ECHR, the Court), hence overstepping his mandate.

The Report contains opinions which are not based on documented facts or data that would substantiate the arguments put forward by the Commissioner. For example, the chapter of the Report dealing with reproductive health and women's rights contains statements that are very general or even lack certainty, i.e. expressions such as: "women are said to be confronted with indifference...", "judges reportedly sometimes consider...", "it is reported that some members of staff turn a blind eye to...". The Report also contains such expressions as "most representatives of the civil society", without indicating any public opinion surveys to prove this point. Given the number of civil society organisations in Poland<sup>2</sup>, it was not possible to collect information from such a number of entities that would warrant such far-reaching and general conclusions during the Commissioner's four-day visit in February, 2016.

The Commissioner devotes almost one-third of his Report to the issue of discrimination of women in Poland. In light of the available statistics prepared by reliable entities (EU agencies, the UN and the OECD), it is difficult to make the claim that the situation of women in Poland is worse than the situation of women in other European countries. On the contrary: when it comes to statistics on the situation of women in the labour market, the scale of violence against women or unfavourable developments when it comes to sexual life (infection with HIV and other sexually transmitted diseases, teenage pregnancies, the age of sexual initiation, etc.), Poland's situation in this regard is very good as compared with other countries of the Council of Europe. It should be underlined that the majority of critical comments about Poland are not based on available data documented by facts to which the detailed part of this position makes specific references.

The majority of statements made by the Commissioner in the fourth part of the Report are not corroborated by facts, but are based on commonplace opinions disseminated in documents prepared by different entities and their repetition resembles the mechanism of Chinese whispers. In the few cases where concrete data were quoted, they were presented at random and without a wider context. As regards methodology, such practice leaves much to be desired, while its presence in the Commissioner's Report disappoints, because it does not build his authority.

In the opinion of the Government of the Republic of Poland, the Report that follows a periodic visit, providing a basis for changes in the area of human rights protection, should be more precise in its wording and should present arguments based on verified facts. A more detailed Report and better documented facts would not have led to doubts about the

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<sup>2</sup> Based on National Court Register data, a total of 103,773 entities, of which 9,042 are public benefit organisations, are entered in the register of associations and other social and professional organisations, foundations and health care institutions (data as of 7 June, 2016).

correctness of the diagnosis made by the Commissioner and would have strengthened the dialogue he is conducting with the national authorities, which will be difficult to achieve on the basis of the presented Report.

At the same time, the Government wishes to justify the lengthiness of its position. It was, however, placed in a situation requiring presentation of a number of explanations and demonstration of data so as to enable a proper evaluation of the value of assessments presented in the Commissioner's Report.

#### **Comment to paragraph 5 of the Report:**

The claim that political polarisation in Poland appears to have increased since the 25 October 2015 parliamentary elections should be approached with scepticism. This assessment is more reflective of the assumption, on which the Report was based, that the years 2006-2015 appear to have been uninteresting for the Commissioner. In reality, however, the reaction of the previous Government to the crash of the TU-154 plane near Smolensk in 2010 was a turning point in this aspect. But since the Commissioner appears not to care for a symmetric treatment of the parties to political disputes taking place in Poland, he chose a turning point based on a criterion that was *de facto* political. He did not show an interest in, for one, the Police operations during independence marches in 2011-2014, which were scenes of violent clashes. Video footage of those events permitted to formulate claims that the Police had resorted to provocation to stir unrest<sup>3</sup>. Such video footage also led a court to sentence officers who in a particularly brutal way abused their powers vis-à-vis the demonstrators<sup>4</sup>. It is regrettable that the Commissioner did not show an interest in this and many other well-known cases of abuse, setting the diving line of his interest in a way that is difficult to explain differently than by specific political sympathies.

#### **Comment to paragraph 18 of the Report:**

It should be pointed out that the ratification of the revised European Social Charter entails that Poland becomes bound again by all the provisions of the 1961 Charter, which it ratified. Under Polish law, Poland may ratify an international agreement after it has approximated its domestic law to the requirements of such act. Hence, a possible ratification of the revised Charter will depend on the findings of the ongoing comprehensive analytical work into whether the domestic law conforms to the provisions of this treaty.

At the same time, it should be pointed out that Poland does not plan to accede to the Additional Protocol to the European Social Charter providing a collective complaints mechanism. In this context, it should be noted that the said instrument has been ratified so far by only 15 out of 43 States Parties to the Charter. Nonetheless, it should be stressed that Poland is monitoring, on an ongoing basis, the way the collective complaints mechanism is operating, so as to take all the relevant new circumstances into account in the country's position.

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<sup>3</sup> <https://www.youtube.com/watch?v=8G0SOYWeRQc>

<sup>4</sup> <https://www.youtube.com/watch?v=7G3cN6Bdn> 8. It should be noted that the Independence March that took place after the 2015 elections was completely peaceful, which additionally substantiates the argument that the clashes in 2011-2014 were politically inspired.

With regard to Protocol no. 12 to the European Convention on Human Rights, it should be pointed out that the findings of a recent analysis, based on the Court's case law in Polish cases and an analysis of the ECHR's case law on the grounds of Article 1 of Protocol no. 12 (performed by the Ministry of Foreign Affairs) justify a position that there is no absolute necessity to sign and ratify the aforementioned act by Poland. It should be underscored that the ban on discrimination provided for in Protocol no. 12 is potentially very wide and is defined in general terms, even in comparison to other provisions of the Convention. Its specific normative content still needs to be shaped by the ECHR's case law. A possible ratification by Poland of Protocol no. 12 apparently will not raise the existing level of protection under the Convention currently guaranteed in the territory covered by the Polish jurisdiction. It should be stressed that the right to equal treatment is extensively protected under Polish law, specifically under Article 32 of the Constitution, Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the provisions of the Act of 3 December 2010 on the implementation of certain legal provisions of the European Union regarding equal treatment.

As regards ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Government of Poland indicates that Polish law guarantees legally migrating workers and members of their families the majority of rights provided for under the Convention, while its ratification would entail the need to make further, in some cases deep legislative amendments. Poland does not conduct a worker immigration policy – its labour market, as a rule, is closed to foreigners (except for citizens of European Union Member States). On account of the limited scale of emigration and immigration, it does not seem essential to develop services that assist migrant workers, something that the Convention requires.

At present Poland is not planning to accede to the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities (hereinafter: UNCRPD). This decision was based on an analysis of the possibilities of applying the communications procedure with regard to the rights specified by the Convention. Rulings adopted so far and ways in which the Committee for the Rights of Persons with Disabilities conducted oversight of its decisions have also been analysed. The operation of the communications procedure and decisions issued within its remit are monitored by the Ministry of the Family, Labour and Social Policy in order to assess its development directions. An evaluation of the implementation by Poland of the UNCRPD, on the basis of its Report submitted in 2014, will be an important element of an assessment of the possibilities of acceding to the complaints protocol to the UNCRPD.

#### **Comment to paragraph 33 of the Report:**

The Government of the Republic of Poland takes the position that para. 33 of the document imprecisely stated that the Constitutional Tribunal rules on the conformity with the Constitution of a final decision by a court or a public administration which might infringe the constitutional freedom or rights of a person. It should be stated precisely that the gist of the power of the Constitutional Tribunal with respect to the institution of the constitutional complaint lies in examining, in a specific case, of conformity with the Constitution of statutes or another normative act, on the basis of which a court or a public administration finally ruled on the freedoms and rights or the obligations of the appellant, set out in the

Constitution (Article 79(1) of the Constitution). The importance of the above distinction stems from the fact that the present wording of para. 33 of the Report, *in principio*, may suggest that the Constitutional Tribunal is empowered to check, as an instance, the conformity of administrative rulings and decisions, whereas the specific competence that the Constitutional Tribunal has in this regard is limited to assessing the legal grounds of a court or administrative ruling, and not the ruling itself. It needs to be said that neither courts (nor, even more so, public administration bodies) have a competence to assess the constitutionality of statutory norms in the course of their application. A court may only apply to the Tribunal with a legal question as to the conformity of a normative act with the Constitution, ratified international agreements or a statute, if a ruling on a case pending before such court depends on the answer provided to such legal question (Article 193 of the Constitution). The above prerogative determines the existence of an additional, extraordinary legal remedy that is the complaint to the Constitutional Tribunal. The Constitutional Court ruling, in itself, does not quash a court or administrative ruling; it does however open the path to a possible re-opening of proceedings in a case that ended with a final ruling.

A precise take on the issue at hand could be significant for the assessment of the tone of the Report, which voices concerns that the current situation relating the Constitutional Tribunal could have serious consequences for human rights protection in Poland. It should be pointed out that the Constitutional Tribunal is not a body of the administration of justice, which includes the Supreme Court, common courts of law, military courts and administrative courts (Article 175(1) of the Constitution), which administer justice and provide legal protection to citizens, guarding human rights.

#### **General comment to paragraphs 34-42 of the Report:**

Paras. 34-42 contain a sequence of events, which lead to conclusions presented in paras. 43-44. Their incompleteness is noteworthy, as the choice of facts presented and omitted amounts to selectiveness and bias. The author of the Report exposed certain events, whilst completely failing to mention others, thereby presenting the situation existing in relation to the Constitutional Tribunal in a biased way and this, as a consequence, leads to just as biased conclusions.

By way of example just some facts, which had been omitted in the Report, are hereinafter mentioned.

#### **Comment to paragraph 34 of the Report:**

It is untrue that “the crisis regarding the [Constitutional] Tribunal unfolded shortly before [the Commissioner’s] visit to Poland” (9-12 February 2016). The works on the new act concerning the Constitutional Tribunal had been ongoing in an informal way by the current President of the Constitutional Tribunal and other judges chosen by him, who had also been present during the parliamentary works at the Sejm committee.

#### **Comment to paragraph 35 of the Report:**

The Commissioner did not present the real nature of the way the Act of 25 June 2015 on the Constitutional Tribunal instrumentalised the law. It allowed the outgoing Sejm to

elect five judges, whose mandate was to start after the new parliamentary elections. Such step would have been impossible on the basis of the prior Act and this was the political rationale for undertaking the legislative process.

It is also untrue that the President of the Republic of Poland “refused” to swear into office the five judges.

The Commissioner failed to mention in his Report the fact that the Sejm had passed resolutions declaring the election of the five Constitutional Tribunal judges null and void.

It is untrue that “the [Constitutional] Tribunal found the election of the two judges (...) to be unconstitutional”. The Constitutional Tribunal in Poland does not enjoy such competence, which it itself admitted by discontinuing proceedings regarding such claim.

**Comment to paragraph 42 of the Report:**

The Government of the Republic of Poland notes that the last sentence of para. 42 contains a statement to the effect that the Commissioner is concerned at the statement made by the Minister of Justice towards the President of the Constitutional Tribunal threatening disobedient judges with punitive measures, referring to constitutional judges operating outside the constitutional and legal framework. This statement is untrue. In his statement of 5 April 2016, addressed to the President of the Constitutional Tribunal (presumably this is the statement the Commissioner is referring to), the Prosecutor General who, in accordance to the law, is the Minister of Justice, clarified in detail his position with regard to the applicable legal provisions dealing with the organisation and the functioning of the Constitutional Tribunal. His statement was also intended to clarify the reasons why the Prosecutor General, as a mandatory participant of proceedings before the Constitutional Tribunal, may not participate in hearings set in violation of the applicable provisions of the Act on the Constitutional Tribunal. By stressing the lack of consent for the Tribunal’s proceedings in violation of the applicable legal order and the fact that by not attending the hearings of cases the Prosecutor General will not legitimise such actions, the said statement clarified that unauthorised operation by the Constitutional Tribunal may become the subject of a check on legal compliance.

The aforementioned position was not, in any way, a threat directed against any of the Constitutional Tribunal judges, and even more so it was not a threat of punitive measures. Considering that the task of the prosecutor’s office, the supreme body of which is the Prosecutor General, is to guard the rule of law (in addition to prosecuting offences), the comment referred to in the statement by the Prosecutor General is fully justified and it could be carried out, for instance, by making an assessment of the formal and legal grounds on which the Constitutional Tribunal operates and by presenting the Prosecutor General’s position in this regard to the public. It should be noted expressly that the Prosecutor General, in his statement to the President of the Constitutional Tribunal did not make any references to the Constitutional Tribunal’s adjudicating activity which is wholly independent.

**Comment to paragraph 43 of the Report:**

It also seems justified to argue against the point that was made in the context of the dispute about the formal and legal grounds on which the Constitutional Tribunal operates,

namely that there exist grounds to observe that there can be no real human rights protection without mechanisms guaranteeing the rule of law, in particular by ensuring checks and balances among the different state powers. Both the scope of powers of the Constitutional Tribunal which does not operate as one of the bodies of the administration of justice, but is a separate special body established specifically to check conformity of normative acts with the Constitution and the lack of any comments or doubts regarding the functioning of the Supreme Court, the common courts of law, military or administrative courts – mandate calling into question the validity of connecting the doubts about guarantees of human rights protection or the principle of checks and balances of authorities with the current issues relating to the functioning of the Constitutional Tribunal.

**Comment to paragraph 50 of the Report:**

In Poland there are a number of services whose tasks involve protecting the state and its citizens. They are: the Internal Security Agency, the Intelligence Agency, the Military Counterintelligence Service and the Military Intelligence Service. The special service that combats corruption in the public and business sphere, in particular in central and local government institutions is the Central Anti-Corruption Bureau.

**Comment to paragraphs 51-62 of the Report:**

The Polish Government points out that the Act of 15 January 2016 amending the Police Act and certain other acts<sup>5</sup> was enacted in order to adapt the Polish legal system to the Constitutional Tribunal's judgment of 30 July 2014, file no. K 23/11, with regard to the conduct of operational control by the uniformed services, special services and competent authorities, and collecting and processing telecommunications data by these entities. The Constitutional Tribunal stated that selected provisions of the Acts: on Police, on the Border Guard, on Fiscal Controls, on the Military Police and Military Law Enforcement Units, on the Internal Security Agency and the Foreign Intelligence Agency, on the Military Counterintelligence Service and the Military Intelligence Service, on the Central Anti-Corruption Bureau, and on the Customs Office are inconsistent with the Constitution, in particular because they:

- do not provide for independent review of sharing telecommunications data with services;
- do not provide for a guarantee of immediate destruction – before a commission and with a formal record – of those materials which contain information covered by ban on the use as evidence as to which the court did not abrogate professional secrecy or such abrogation was inadmissible;
- do not include regulations regarding destruction of data irrelevant for the conducted proceedings, in particular the data obtained by the special services.

The amendment of the regulations of 15 January 2016 fully implements the sentencing part of the Constitutional Tribunal judgement K 23/11 and, partly, demands resulting from its reasons. The scope of the amendments introduced by the aforementioned act consists of:

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<sup>5</sup> Journal of Laws, item 147.



- further specifying the reasons for collecting telecommunications, postal and internet data by the services,
- determining a close list of measures to conduct operational control,
- introducing rules for proceeding with materials of operational control which may include information covered by professional secrecy of professions of public trust,
- limiting the period of conducting operational control,
- introducing an obligation to immediately destroy unnecessary data,
- introducing a subsequent judicial review of the correctness of data collection.

It should be emphasized that the Act of 15 January 2016 introduced a number of new regulations concerning the method of obtaining data about individuals by state services, which led to improved control over this area of services' activities, and imposed a number of obligations that were not in force before.

The Act organises the issues regarding the type of data that can be shared with services by introducing a closed list including such types. So far, the regulations in this area were scattered in various legal acts. The services can obtain telecommunications, postal and Internet data, which do not constitute content, within the framework of the services provided by electronic means, and can process such data without the knowledge and consent of the person concerned. The amended Act contains a detailed procedure for sharing data with authorised services.

#### **Comment to paragraph 56 of the Report:**

The Constitutional Tribunal found that one of the requirements to be satisfied by laws authorising the services to obtain telecommunications data, is to create an independent control mechanism. The Constitutional Tribunal did not determine exactly how a procedure on accessing telecommunications data should look like, and in particular whether it should be necessary to obtain consent to share data in relation to each type of retained telecommunications data. Instead, as a prerequisite the Tribunal indicated that such body has to be independent of the government and have no direct or indirect authority over the officers who obtain data.

The amendment of the regulations raised the standards of proceeding with data by enhancing the possibility to exercise control and supervision over the process of sharing data with state services in several aspects. Prior to the entry into force of the regulation, these data were not subject to systematic control that would be exercised by an independent body.

Firstly, it should be noted that, without prejudice to the regulations on protection of classified information, the obligation to keep an electronic record of requests for data was imposed on the services' competent body. Until now, the services entitled to data collection were not obliged to keep such records.

The essence of the amendments made to the provisions consists in introducing judicial control over the collection of telecommunications, postal or Internet data by the services, which did not apply until now. Such control is performed by a regional court having jurisdiction over the registered office of the body of the authorised services with which the data was shared.

To this end, the competent body of the service must, subject to the provisions for the protection of classified information, provide the regional court every six months with a report containing:

- 1) the number of cases of obtaining data during the reporting period as well as the nature of such data;
- 2) legal qualification of acts whose occurrence was at the origin of the request for data, or information about obtaining the data in order to save human life or health, or support search or rescue activities.

The approved control method provides the court with the opportunity to get acquainted with materials supporting the request for data submitted by a given service. Within 30 days following the completion of the control, the services will be informed of its results by the court.

It should be emphasised that, in addition to establishing control over the telecommunications data (which follows directly from the Constitutional Tribunal judgment), control has also covered postal and Internet data. In this regard, the Act treats the judgment of the Constitutional Tribunal in a broader manner.

Additionally, in the light of adopted provisions, a new form of control has been introduced. The presidents of the regional courts are required to annually transmit to the Minister of Justice information about the telecommunications, postal and Internet data processing by all authorised entities, including a breakdown of the number of cases of sharing data for a given type of data, and the results of the performed judicial review of such sharing in the period until 31 March of the year following the year covered by the control. The Minister of Justice is, in turn, obliged to annually transmit to the Sejm and the Senate aggregate information on the processing of these data and the results of the controls performed, until 30 June of the year following the year covered by the control. Providing such information to the legislative is meant to introduce a mechanism of social control over the entire process of data collection.

The Constitutional Tribunal assumes that (...) the specificity of new technologies and assessment of risks related thereto justify entrusting specialised public authorities, such as police and national security services (cf. Article 103(2) of the Constitution) with adequate powers so that they will be able to prevent and detect crimes, prosecute perpetrators, and provide information about the threats to legally protected goods. A democratic state of law cannot ignore the growing importance of new technologies, and the scale of their use, in some cases in order to violate the law. This requires providing these services with appropriate authorisations, and creating financial and organisational conditions that will enable them to effectively fight against law infringements. The public authorities should have the legal and factual ability to detect committed crimes and activities directed against the state or its constitutional bodies. They should also be able to anticipate activities of persons infringing the law, not allowing the threats to occur. In the context of global crime, transnational terrorism and organised crime, it is also important to prevent threats whose occurrence can cause irreparable damage to legally protected goods.

In the opinion of the Constitutional Tribunal, the failure to provide the police or state protection agencies with the possibility of benefitting from technical advances, and even to provide them with such possibility but to the insufficient extent, may signify that the state is not fulfilling its constitutional role of safeguarding the independence and inviolability of the territory of the Republic of Poland, and of ensuring security to its citizens (Article 5 of the Constitution) or may violate the principle of effective operation by public institutions (introduction to the Constitution). It could sometimes lead to a breach of the obligations arising from international agreements, that Poland is bound by, which impose an obligation to cooperate in the fight against international crime and terrorism<sup>6</sup>.

For the sake of comparison, it should be pointed out that courts may order surveillance solely in cases concerning offences (including offences against human life and health and offences endangering state security and defence) that are enumerated in the respective acts that regulate the operation of the competent services. Taking the Police as an example, their exhaustive catalogue is provided for in Article 19(1) of the Police Act.

The applicable legal provisions specify two surveillance procedures, i.e. ordinary and special. An ordinary surveillance procedure, if other measures become ineffective or useless, is ordered by a court at the written application of a competent agency, following a written consent of the relevant prosecutor. Materials that justify the need to apply surveillance are attached to such application.

Special surveillance is instituted if two premises exist, i.e. if an urgent case has arisen and information may be lost or evidence of a committed offence could be covered up or destroyed. If such premises have occurred, a competent agency may order, following receipt of a written consent from the prosecutor, surveillance, and at the same time apply to a court of competent jurisdiction with a request to issue an order in such case. If the court does not issue consent within five days from the day the surveillance was ordered, the ordering authority stops the surveillance and destroys materials collected during such surveillance - before a commission and with a formal record.

The special procedure for instituting surveillance in urgent cases is an institution that is well-founded in the law and has been applied under the Police Act and other statutes since 1995. The use of this procedure is justified in situations when, for example, people's life or health are at risk and where the time needed to complete the flow of documents could cause irreversible harm, including the loss of evidence needed to institute criminal proceedings.

Instituting surveillance under the special procedure requires consent of the relevant prosecutor and is subject to *ex post* oversight by an independent court. In the event that a court questions the institution by a competent agency of surveillance, such operation is stopped by operation of law and the materials collected by the agency in the course of the surveillance are destroyed by a commission. Such mechanism prevents the possible collection of information and its illegal use in the future.

Executing the judgement of the Constitutional Tribunal, the Act specified the procedure to be applied to the handling of materials obtained during surveillance operations

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<sup>6</sup> Judgement of the Constitutional Tribunal of 30 July 2014, file no. K 23/11.

which contain or could contain information covered by criminal process ban on evidence, *i.e.* information relating to the performance of the profession of an advocate, legal advisor, mediator, journalist, or which concern the secrecy of confidential information or the secrecy of confession. Until now, no regulations have provided for any separate and specific rules of conduct in this regard.

In light of the adopted legal provisions, materials collected during a surveillance operation, which contain evidence that allows for instituting criminal proceedings or which is significant for ongoing criminal proceedings and which:

1. contains information covered by absolute ban on evidence<sup>7</sup> – is subject to immediate destruction before a commission and with a formal record, pursuant to an order issued by a competent agency;
2. may contain information that is subject to a conditional ban on evidence<sup>8</sup> or information which constitutes a secret connected with the performance of a profession or a so-called function of public trust<sup>9</sup> – it is handed over by the competent agency to the relevant prosecutor and finally a court decides whether such information may be used.

Only a court may decide on the manner of further handling such materials. A court issues a decision about the admissibility of using materials in criminal proceedings, if such decision is indispensable for the good of the administration of justice and when a circumstance may not be established on the basis of another piece of evidence. The court further orders the immediate destruction of materials whose use in criminal proceedings is inadmissible.

Materials that were not admitted by courts to be used in criminal proceedings shall be destroyed immediately. The procedure for destroying such materials, which is provided for in the statute, imposes an obligation on agencies to immediately execute a court order to destroy materials and to immediately destroy such materials that are not allowed in criminal proceedings - before a commission and with a formal record. No doubt the criminal process guarantees for protecting information obtained in connection with performing the above-mentioned professions are of fundamental significance, while it appears that the solutions adopted in the amendment dated 15 January 2016 have apparently strengthened these mechanisms. This is because the lawmaker entrusted to independent judiciary bodies the sole powers to decide about materials that could include such information. Oversight mechanisms in place for surveillance agencies have also been strengthened by requiring the agencies to immediately destroy materials containing information covered by absolute protection - before a commission and with a formal record.

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<sup>7</sup> Absolute ban on evidence applies to hearing a defence counsel or an advocate as a witness with respect to facts he or she has learned about when giving legal advice or when conducting a case, as well as to a priest with respect to facts he has learned about during confession.

<sup>8</sup> Conditional ban on evidence applies to hearing as a witness a mediator with respect to the facts he or she has learned about from a defendant or a victim when conducting a mediation, and a journalist with respect to journalistic secrecy – with the exception of information about the most serious categories of crimes or terrorist crimes.

<sup>9</sup> It applies to notaries, advocates (barristers), legal advisors, doctors and journalists.

### **Comment to paragraph 57 of the Report:**

Addressing the issue of the duration of surveillance operations, it needs to be pointed out that the regulation in Article 19(9) of the Police Act provides that in justified cases, when new circumstances arise during a surveillance operation that are significant for preventing or detecting an offence or finding the perpetrators and obtaining evidence of the offence, a regional court, at the written application of a competent agency, submitted after receiving a written consent of the authorised prosecutor, may also issue successive orders to extend a surveillance operation after the statutory time limits have expired for successive periods that may not exceed a total of 12 months.

Pursuant to the adopted amendment, *i.e.* the Act of 15 January 2016 amending the Police Act and certain other acts<sup>10</sup>, a surveillance operation may be ordered for a period not longer than 3 months, and then may be extended for another period not longer than three months, if it fulfils the premise that the reasons for such surveillance have not ceased (Article 19(8) of the Police Act). Hence, the total period of its duration may not exceed six months.

The Act provides for a different mechanism with respect to the Internal Security Agency, and the Military Counterintelligence Service, along the lines: maximum of 3 months plus maximum of 3 months plus maximum of 12 months, with a possible extension, upon court order, for another period of a maximum of 12 months.

It should be emphasised that the solutions in question introduce an upper limit to the duration of surveillance, something that did not exist in Polish law before, *i.e.* 18 months, provided that such operation should cease immediately after cessation of the causes for which it was instituted, but not later than upon the expiry of the period for which it was instituted (Article 19(13) of the Police Act). Prior to the Act's entry into force, the mechanism in place had not limited the maximum duration of surveillance, *i.e.* maximum of 3 months plus maximum of 3 months plus the period defined and approved by the court. The new provision thus reduces the possibility of using surveillance.

The allegation that the applicable legal provisions justify a disproportionately long-term application of surveillance is a wrong assumption, because the applicable model assumes that the court, in a flexible and adequate way, based on an assessment of the circumstances and information obtained in the case, will decide whether to extend surveillance, whilst observing the maximum duration of such one-time extension. The solution adopted by the lawmaker seems warranted and allows for taking a decision that is adequate for the course of proceedings in a case.

It should be kept in mind that the institution of extension of the duration of a surveillance operation to a maximum statutory period of its duration (Article 19(9) of the Police Act) is a special institution, qualified in relation to the normal procedure for extending a surveillance operation which at any one time may not exceed three months (Article 19(8) of the Police Act).

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<sup>10</sup> Journal of Laws, item 147.

The application of the qualified procedure is possible after statutory premises are fulfilled that are subject to an assessment by a court, and not by the respective agencies. The court assesses whether a particular situation fulfils jointly the premises of a justified case and the appearance of new circumstances important for preventing or detecting an offence or for finding perpetrators and obtaining evidence that an offence has been committed. This legal construction provides that a surveillance operation lasting the maximum time allowed represents a special situation and is an exception to the six-month period during which it may be conducted.

In addition, the institution of extending the duration of a surveillance operation, no matter whether it is applied under the ordinary or qualified procedure – to the same extent as the institution of a surveillance operation – is subject to oversight by a prosecutor whose written consent is necessary to submit an application by a competent Police body to the court in the above case.

The above construction of the legal provision, the oversight by a prosecutor established over it and entrusting exclusive competences to decide about application and extension of a surveillance operation to independent courts cannot harm the relation of trust between the state and its citizens, because it satisfies high standards of protection of individual rights.

Moreover, one should remember about the specific nature of the investigative process in the Polish legal order where operational and reconnaissance activities represent the basic element of this process. For these reasons one cannot compare a surveillance operation to procedural control, which on account of this specific nature, is relatively rarely carried out. It should also be noted that in the case of organised crime, where the disclosure of existing connections takes a long time, the statutory maximum duration of a surveillance operation is proportionate to the seriousness of the threats connected with such type of crime.

This solution replaced the regulation that the Constitutional Court found questionable in its judgement of 30 July 2014, file no. K 23/11 on the grounds that it did not contain a final time-limit for conducting a surveillance operation by competent state agencies.

#### **Comment to paragraphs 59 and 60 of the Report:**

The Government emphasizes that the services have not received new powers for collecting Internet data. Such powers existed previously, but only on the basis of Article 18 of the Act of 18 July 2002 on the provision of services supplied by electronic means (Journal of Laws of 2013, item 1422, and of 2015, item 1844). As a result of this, the provisions in force until 7 February 2016, as opposed to the current legal status, did not require possession of an authorisation to obtain such data, did not require their destruction in case they were found useless, did not provide for any form of external control, did not define precisely the objective of collecting them, and they did not require keeping records of the data obtained.

As regards regulations on telecommunication, postal and internet data (later referred to as the "TPI data"), it should be noted that the Act of 15 January 2016 lays down a new legal framework for competent state services to collect and process those data.

First of all, it puts in order the terminology used in the domain of data collection, introducing a collective term "internet data" for use in the amended laws on the surveillance services. Until now, this term has not been in use. The introduction of the term "internet data" allowed to define the group of metadata on internet communications collected by authorised services, set out in Article 18 (1-5) of the Act of 18 July 2002 on the provision of services by electronic means (2002 Act), effective as of 10 March 2003. Article 18(6) of 2002 Act states that: "6. The service provider makes the data referred to in paras. 1-5 available free of charge to state authorities authorised under separate laws, for the purposes of proceedings they conduct". Since 2003, this clause has provided an undisputed basis for the authorised services to collect data set out in this Act, which only as of 7 February 2016 started to be collectively defined as the "internet data." The provision in question organises the catalogue of data that can be collected by the police and other authorised services, and ensures that the process of collecting such data is subject to judicial oversight. Until now such oversight has not been required by law. The law limits the catalogue, with respect to both the TPI data that the services can have access to, and institutions authorised to use such data. The Act elevates the level of seriousness of cases in which the services can use relevant data. Furthermore, the Act of 15 January 2016 ensured judicial oversight of the use of TPI data.

The Government stresses the fact that the Act of 15 January 2016 establishes a catalogue of activities and procedures for collecting, processing, and destroying the TPI data. It also organises the powers of the services in this area.

The Act provides that:

a) As a rule, the TPI data may be collected by an authorised service only for the purposes of preventing or detecting a crime within the purview of such service (with the exception of the Police and the Military Police, which may also collect such data for the purposes of search and rescue operations, and the military and civil counterintelligence services, which may use such data for the purposes of performing counterintelligence and antiterrorist tasks specifically set out in the relevant laws, aimed at ensuring internal security or defence);

b) the TPI data may be collected by an authorised service only for conducting specific case, which stems from Article 18(6) of 2002 Act invoked earlier and from internal rules for conducting official proceedings in place at each service;

c) the TPI data may not include the content of telecommunication, postal or electronic messages (including logins and passwords and the addresses of visited websites). Its constraining character for the services should be noted here, because before the Act came into force no such rule was in place;

d) the TPI data may be made available by the service provider at the request of an authorised service, at the choice of the parties, by either traditional means (in hard copy), and only by mutual consent (i.e. after a relevant agreement has been made that establishes

rules and technical procedures for transferring the data) and when statutory requirements have been met (ensuring the identification of an officer obtaining the data, their type and the time of collection; protecting the data against unauthorised access), in a secure electronic form over a telecommunications network;

e) the TPI data that are relevant for criminal proceedings shall be transmitted by the authorised service to the competent prosecutor, and the TPI data not used for conducted criminal proceedings shall be immediately – before a commission and with formal record – destroyed. Prior to the amendment of the Act of 15 January 2016, the services were not obliged to comply with such rule; the procedure does not apply to data collected by the Internal Security Agency and the Military Counterintelligence Service which are essential to the country's security or defence;

f) the Act imposes an obligation on the services to record, as part of the service, all requests for TPI data submitted by the officers, in particular the scope of the TPI data obtained and the purpose of their collection. Until the entry into force of the Act such rule did not apply.

It is therefore unquestionable that the current legislation has not granted new powers to the services, while at the same time it significantly tightened the rules for obtaining and processing Internet data. In addition, the provisions in force for obtaining Internet data do not apply to correspondence sent electronically, because such information can be obtained with the court's consent only under operational control.

#### **Comment to paragraph 60 of the Report:**

From the perspective of interfering in individuals' privacy, it should be emphasized that the data collected do not interfere in the sphere of civil liberties as far as operational and reconnaissance activities, in particular operational control, because they do not include access to the content of the correspondence. Therefore, it seems that the conditions of their availability do not have to be subject to the same requirements as an order for operational control.

It should be noted that the category of "serious crimes" is not known to the Polish legal order. Significant in this regard is a reference to the division of prohibited actions into offences and misdemeanours, adopted in the Polish law. The legislator based this distinction on, among others, the assessment of social harmfulness of given categories of actions, which in turn translates into distinct degrees of severity of penalties for offences and misdemeanours. It can therefore be presumed that, by introducing this distinction, the legislator separated prohibited acts in those serious (offences) and those of second category (misdemeanours).

This concept can also be applied to the catalogue of offences in connection with which it is possible to conduct operational control, but a simple transfer of these solutions to data collection can result in an effective inability to prosecute perpetrators of certain crimes, to which admittedly lower penalties apply, but whose specificity makes it impossible to apply different methods, e.g. some forms of stalking. What is more, the authorisation to collect data cannot be limited to the category of prosecuting perpetrators, since such data are necessary for the implementation of certain activities with respect to saving human life or



health, or supporting search and rescue activities (in this case, location data are of key importance).

The said Act establishes an exhaustive catalogue of serious offences with respect to which the Internal Security Agency may use surveillance if such offences undermine the state's economic foundations. In this regard, the Act refers to specific provisions of the Criminal Code and the Criminal Fiscal Code. Moreover, the Act defines more precisely regulations that allow the Military Police and the Border Guard to use surveillance. Prior to that, the relevant provisions had been imprecise, and lacked a catalogue of specific offences whose detection and prosecution allowed these services to conduct surveillance.

The Government would like to emphasize that the Act of 15 January 2016 amending the Police Act and certain other acts significantly raises the level of protection of civil rights. It achieves this by introducing, in line with the reasons for Constitutional Tribunal judgement K 23/11, a number of legal solutions that limit the freedom to act by the Police and counterintelligence forces. One such solution is a strictly defined catalogue of surveillance measures, i.e. technical measures that allow for covertly obtaining the content of communications between individuals. Before the Act of 15 January 2016 entered into force this catalogue was open, unlimited, and was defined as the use of technical means making it possible to covertly obtain and record information and evidence, especially the content of telephone conversations and other information communicated via telecommunication networks.

#### **Comment to paragraph 61 of the Report:**

The Government notes that the provisions of the Act of 15 January 2016 did not introduce the possibility of concluding contracts (agreements) with operators based in Poland granting access to telecommunications data to the authorities. Such a possibility has existed for many years and is designed, on the one hand, to reduce costs for businesses, and on the other hand to ensure the effectiveness of law enforcement. At the same time it should be emphasized that an officer performing activities of obtaining telecommunications data in an automated manner (using the telecommunications system), must have an appropriate, written authorisation of the Border Guard Commander in Chief or a Commander of a Border Guard unit. Data collection is done electronically, on separate computer stations, by interfaces using the www protocol made available by specific operators. Authorised officers are identified by the operators' systems on the basis of individual certificates. Data collection from telecommunications operators also takes place via written inquiries sent by post to the telecommunications operator.

#### **Comment to paragraph 64 of the Report:**

The Act of 15 January 2016 amending the Police Act and certain other acts executes the sentencing part of the judgement file no. K 23/11. The intension of the lawmaker in the course of the legislative work on the draft law<sup>11</sup> was also to maintain the principle of proportionality between protecting civil rights and liberties and ensuring effective and quick

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11 Draft law on the Police and certain other acts (Sejm paper no. 154) was submitted by MPs – the Government was represented during parliamentary work on the bill by Mr Mariusz Kamiński, Minister – Member of the Council of Ministers, Coordinator of Special Services .

actions by security and public order agencies. No doubt the adopted solutions impose significant restrictions on agencies authorised to apply surveillance in relation to the previously applicable legal provisions.

Referring to the proposal to review the laws applicable to the operational and reconnaissance activities in order to guarantee full protection of human rights, it should be noted that there are cases pending before the Constitutional Tribunal concerning the examination of the constitutionality of the existing regulations on the use of operational control and data collection by authorized state services, file no. K 32/15 and K 9/16. It is therefore reasonable to refrain from taking initiatives until the abovementioned cases are adjudicated by the Constitutional Tribunal.

Notwithstanding the foregoing, it must be observed that the issue of amendments to the legislation introduced into the Polish legal order by the Act of 15 January 2016 amending the Police Act and certain other acts (Journal of Laws, item 147) was a subject of discussion during the visit of the Venice Commission's members to Poland on 28-29 April 2016. According to the information provided by the Ministry of Foreign Affairs, a plenary session on the above issue is planned for 10-11 June, with the participation of representatives of the Polish side.

#### **Comment to paragraph 65 of the Report:**

In conclusion, the postulate of the Commissioner for Human Rights of the Council of Europe that the Polish authorities should ensure that the law be precise and clear as to the offences, activities and people subjected to surveillance, and that it sets out strict limits on its duration, as well as rules on the disclosure and destruction of surveillance data by services has been fully implemented in the present Polish legal system.

In addition, the postulate that rigorous procedures should be in place to order the examination, use, storage and control of the data obtained is also reflected in the present Polish legal system, as shown in detail above.

#### **Comment to paragraph 66 of the Report:**

The Government assure that the recommendations of the Commissioner for Human Rights of the Council of Europe to take into account the observations expressed in the Commissioner's Issue Paper on the Rule of Law on the Internet<sup>12</sup> and the Commissioner's Issue Paper on Democratic and Effective Oversight of National Security Services<sup>13</sup>, as well as the most recent guidelines in the field of security published by the European Union Agency for Fundamental Rights and the Venice Commission will be taken into account when possible consideration is given to amending the acts on the services responsible for internal order and national security.

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<sup>12</sup> Issue Paper, "The Issue Paper on the Rule of Law on the Internet and in the wider digital world", 2014.

<sup>13</sup> Issue Paper, "Democratic and Effective Oversight of national security services", 2015.

**Comment to paragraph 76 of the Report:**

The Government of the Republic of Poland argues that, as transpires from the information presented to the Commissioner, this year will see the entry into force of additional legislative amendments, including amendments of court procedures whose one of the objectives will be to streamline, implement further IT solutions and accelerate proceedings. In addition, the Ministry of Justice conducts an ongoing analysis of the possible solutions (procedural and systemic) which, if implemented, could further accelerate the examination of cases by domestic courts.

**Comment to paragraph 77 of the Report:**

Referring to the comment made about the execution of the pilot judgment in the case *Rutkowski and others v. Poland*, including the effectiveness of the domestic remedy in the form of a complaint against excessive length of judicial proceedings, it needs to be pointed out that the execution of this ruling in respect of general measures i.e. the amendment of the Act of 17 June 2004 on complaint against the violation of a party's right to have his or her case heard in pre-trial proceedings conducted or overseen by a prosecutor and in judicial proceedings without unjustified delay (Journal of Laws of 2004, no. 179, item 1843 as amended) is now at the stage of consultations of the draft law prepared by the Ministry of Justice. The draft law accounts for solutions whose aim is to eliminate the identified dysfunctions in the application of the domestic remedy, in particular the matter of fragmentation of proceedings and of the lack of adequate just compensation in connection with finding excessive length of proceedings. Intense work is now ongoing to address the numerous and detailed comments presented by entities that participate in these consultations. The leadership of the Ministry treats as a priority Poland's commitment to properly and possibly soon execute the pilot judgement.

**Comment to paragraph 84 of the Report:**

Referring to the comment regarding the application of non-custodial preventive measures in domestic criminal proceedings, it should be noted that the application of such preventive measures in criminal proceedings in relation to pre-trial detention remains at a good level. In particular, in 2015, non-custodial preventive measures (bail, police supervision, and ban on leaving the country, suspension in activities, refraining from specific activity or driving specific vehicles) were applied in a total of 30 725 cases. During this time a total of 8 619 people were in pre-trial detention. This allows for arguing that the application of non-custodial preventive measures significantly outnumbered cases of pre-trial detention.

**Comment to paragraph 85 of the Report:**

The Government notes that the ECHR recognises that the presumption of obstruction of the proper course of proceedings for reasons of severe punishment to which the accused (suspected) person is liable under Article 258(2) of the Code of Criminal Procedure is not, in itself, contrary to Article 5(3) of the Convention. The Court in its judgements noted that the weight of the charges brought against an individual cannot justify long periods of pre-trial detention (see ECHR judgement of 24 March 2015 in the case *Stettner v. Poland*, application no. 38510/06). The Court, like the Supreme Court (see the Supreme Court resolution of 19 January 2012, file no. I KZP 18/11), ruled that a reference to

a special premise under Article 258(2) of the Code of Criminal Procedure has to take into account also the general requirements set out in Article 249(1) of the Code of Criminal Procedure. The justifiability of pre-trial detention must be evaluated through the angle of circumstances of the case and the length of the preventive measure. If a court invokes this premise as the grounds for pre-trial detention, it has to provide an exhaustive justification that does not include stereotypical procedural formulas. At the same time it should be noted that the severity of the punishment as an independent basis for the application of pre-trial detention is not a new institution and it exists in other countries as well (Austria, Denmark, and the Netherlands).

#### **Comment to paragraph 92 of the Report:**

The Government notes that the changes made to the Polish criminal procedure are intended to restore the courts' more active role during trial and are aimed at ensuring conformity of factual findings in terms of substantial truth. The changes resulted in a return to the procedural model in which the principle of substantial truth plays an overriding role. The reform carried out does not constitute a complete reversal of changes introduced in July 2015; it only restores the mixed procedural model (adversarial and inquisitorial) that had been in place previously. Arguments in favour of restoring the adversarial procedural model in which substantial truth plays the overriding role, as a procedural principle that allows for finding the truth, is strongly based in axiology.

The restored model of procedure is thus nothing new for bodies that apply the law i.e. courts and prosecutors. It is evident that stability is a pillar of the created law, but the lawmaker should take into account all matters that are subject to an assessment on their merits. The amendments introduced by the Act of 27 September 2013 amending the Act – Code of Criminal Procedure should be well known to judges and prosecutors, not least because of the long period of *vacatio legis*.

The provision of Article 168a of the Code of Criminal Procedure, which was mentioned in the Commissioner's Report, introduced a wide scope of prohibition of evidence, irrespective of the circumstances in which such evidence was obtained. In introducing these amendments in this respect the case law of the ECHR was also used. The Court's case law does not conclude that indirectly illegal evidence may not be used despite identifying its illegal source of origin. At this point reference should be made to at least the case of *Schenk v. Switzerland*, which concluded that even though Article 6 of the Convention protects the right to a fair trial, it nevertheless does not regulate any rules on the admissibility of evidence, leaving this task to individual countries. In providing grounds for this case, the Court pointed out that the use of evidence by a court in the form of a tape recording which came from an illegal source does not violate the right to a fair trial, because under the domestic (Swiss) law, the manner in which such tape was recorded or how it was obtained is irrelevant from the point of view of its admissibility in criminal proceedings (see application no. 10862/84 and ECHR judgement of 12 July 1988, publ. HUDOC). A similar position can be found in the case of *Khan v. the United Kingdom*, in which the Court ruled that the use during a trial of recordings of conversation of the accused, despite infringing the right to privacy did not violate Article 6(1) of the Convention, whereas the decision to allow wiretapping issued retroactively did (see application no. 35394/97 and judgement of 12 May 2000, publ. HUDOC).

The concept of “the fruit of a poisoned tree” are ambivalently treated in European countries. In Switzerland, advocates of this doctrine point to the possibility of using indirectly illegal evidence, in the neighbouring France it is applied sporadically, while in Germany this concept was voted down.

The currently applicable solutions in the Polish criminal procedure do not provide the grounds to embrace the argument that they would constitute the grounds for violating the elementary Convention principle, namely that of a fair trial.

#### **Comment to paragraph 93 of the Report:**

Summing up the above remarks, one should express doubts as to the conclusions and recommendations included in para. 93 of the Report to the effect that the new legal solutions *per se* represent a threat to human rights in the context of the criminal procedure, including the right to a fair trial, presumption of innocence and the right to defence. Provisions of procedural laws and substantive criminal law are firmly anchored in the latter principles, which cannot be violated also under the revised system of the prosecution service.

#### **Comment to paragraph 94 of the Report:**

The assessment of the new system of the prosecution service contained in the Report seems on many detailed counts to have relied, for the purposes of identifying concerns, only on a superficial analysis of the legal texts and critical remarks provided to the Commissioner which had been prepared by people and circles critical towards the new regulations, including those voiced as early as during legislative work.

#### **Comment to paragraph 97 of the Report:**

The establishment of special prosecutor’s sections to conduct proceedings into so-called serious crimes is intended to centralise units with highly specialised prosecutors. A similar assumption, excluding any suspicions about partisanship, gave rise to a prosecutor’s unit established for the purpose to institute proceedings against judges and prosecutors who have committed an offence. The purpose of these changes was to effectively prosecute the most serious crimes by the best prosecutors.

The establishment of an Internal Department at the National Public Prosecution Office, equipped with powers to prosecute the most serious crimes committed by judges and prosecutors, despite the very few such cases, cannot lead to the charge of producing the “chilling effect” on the community of judges and prosecutors. The chilling effect stands for an effect of avoiding legal decisions or proceedings that might incur consequences. If that is the way the term used in the Report should be understood, it would mean that the establishment of this Department could produce a positive effect of refraining from actions that might constitute serious crime, and not from due performance of judicial or prosecutorial duties and observing the law also outside the service. The organisational decision manifests a trend towards protecting judges and prosecutors against insufficiently examined charges being addressed to them, in proceedings distributed across the country, and towards reinforcing the principle that proceedings against such persons (protected by

formal immunity) may be carried out only by prosecutors, in other words not by other authorities competent for acts in criminal proceedings.

**Comment to paragraph 98 of the Report:**

The Report is right to point out that the Polish Constitution does not address basic questions relating to the system of the prosecution service and the status of prosecutors, including its supreme authority (the Prosecutor General). Effective until 4 June 2016, the Act of 20 June 1985 on Prosecution Service (Journal of Laws of 2011, no. 270, item 1599 as amended), in other words: the legal act passed under a different political system, separated the prosecution from the executive, effectively depriving the government of any influence on its functioning, as a result of numerous amendments, including the major one introduced in 2009. It established the independence of the Prosecutor General, as the supreme prosecution authority, from the executive, leaving the government with weak oversight powers and the Sejm with a complex procedure for recalling the Prosecutor General from office. At the expense of the Prosecutor General's executive powers, it provided for prosecutors' independence in proceedings they conduct. However, the system of the prosecution service was adopted by an ordinary parliamentary majority with no intention of it being regulated by the Constitution, which naturally gives each subsequent parliamentary majority a relatively free hand to regulate the system and rules of the prosecution service.

Effective as of 4 March 2016, the new Law of 28 January 2016 on Prosecution Service substantially changed not only the system of prosecution, but also introduced significant changes to its operating model. Experiences of nearly six years of the prosecution service after the 2009 amendments showed that despite the hierarchical structure they left prosecutors with ample leeway, verging on freedom, in the pursuit of their duties relating to proceedings they conduct. Such state of affairs met with criticism not only from the then political opposition but also the executive and the legislature, which initiated and introduced the changes. Also the prosecutors' community called for revising the prosecution system and the rules of its functioning, introduced in 2009. The model of the prosecution service as linked with the government cannot be questioned on the basis of Rome Charter provisions and the Council of Europe's Recommendation Rec(2000)19 of 6 October 2000 on the Role of Prosecution in the Criminal Justice System. The system introduced by the Law of 28 January 2016 on Prosecution Service does not make the prosecution services part of governmental authorities nor does it make them subordinate to the Council of Ministers. The office of the Prosecutor General, filled by the Minister of Justice appointed in the political and parliamentary procedure, is only a liaison between the executive and the prosecution, which has a material influence on its functioning. However, the Prosecutor General in his function has not been made subordinate to the head of government and retained a considerable degree of autonomy. Other senior positions responsible for the prosecution's operation are filled by persons from the professional prosecutor services; despite the Prime Minister's influence on their appointment, such persons guarantee proper understanding of not only the prosecution's role but also proper rules for its functioning. The public prosecution therefore has not been made part of or subordinate to the government administration neither on the central nor local levels.

### **Comment to paragraph 99 of the Report:**

The Government points out, as the Commissioner has rightly noted, that a plurality of models for the organisation of prosecution services exists in Europe<sup>14</sup>. Poland has now returned to a systemic solution of a personal union in the person of the Minister of Justice – Prosecutor General. The new law was introduced in order to improve the effectiveness of the prosecution service's activities in fighting crime, and the proposed solutions are intended to implement these assumptions.

The prosecution service is an institution, which by its nature, is hierarchically subordinated and no legal regulations can undermine this. This specific hierarchical subordination creates certain relations between the Prosecutor General as the superior and the prosecutors as the entities subordinated to his authority. In this shape of official relations, the Prosecutor General as the superior and at the same time someone who takes the full responsibility for the proper functioning of this institution, must have powers to implement his statutory duties. To this end, the Prosecutor General issues orders, guidelines and instructions. One should refute claims that the prosecutor's independence is being limited, at least on the basis of an analysis of changes on the issuance of instructions to subordinated prosecutors. The changes that have been introduced restored transparency to issuance of instructions (issued in writing, giving the possibility of appealing against the superior's decision). Such solutions exist in Austria where the Minister of Justice (who manages the prosecution service) can issue direct instructions to prosecutors, also as regards the substance of their activities.

Provisions of the Law of 28 January 2016 on Prosecution Service allow of some limitations on prosecutors' independence but they do that in a manner in line with Recommendation Rec(2000)19 and the Venice Commission's recommendations (transparency of instructions and orders from prosecutors' superiors in individual cases or of a change or reversal of a prosecutor's decision by an obligation for them to be made in writing and attached to the case file, their grounds, option for a prosecutor to decline to take part in a case should he disagree with an instruction about an act of legal procedure). That way of proceeding governed by Article 7 and 8 of the Law on Prosecution Service does not pose a threat to prosecutors' independence and protects the interest of justice.

### **Comment to paragraph 101 of the Report:**

The new system of prosecution enhances the individual sense of prosecutors' responsibility for the quality and efficiency of the conducted criminal proceedings, while the discretionary procedure for appointing prosecutors to management functions at prosecution organisational units and for removing them from such functions introduces a responsibility for negligent performance and a possibility of a quick response in the event of careless performance of duties and filling up management functions. Provisions of the act in force

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<sup>14</sup> Among the European Union countries, in 13 of them the prosecution services are independent from the Minister of Justice; in 4 of them there is at least a partial subordination taking a form of financial dependence or of a possibility to influence the filling of the Prosecutor General's position; and in 9 of them exists a strict subordination of the Prosecutor General to the Minister of Justice (France, Austria, Germany, Malta, Denmark, Estonia, the Netherlands, Portugal, Romania).

until 4 March 2016 did not guarantee such instruments of rapid response, which resulted in serious impediments to sensible management of the prosecution service.

The role of positions by the Prosecutor General in units subordinated to him cannot raise any reservations. The managing of the prosecution service and assuming full responsibility is part and parcel of the duty to properly shape the staff. The changes that have been implemented in this regard are intended to cause that people who are substantially prepared to take on their tasks, have the right professional experience and are of untarnished reputation will be employed by the prosecution's office or will fill in managerial posts.

Such powers vested in the Prosecutor General do not seem problematic as the procedure for his interference in an individual case will be recorded in the case file. Restraint on the part of the Prosecutor General is foreseeable in this respect. By having specific powers to shape the management services at prosecution organisational units, the Prosecutor General will have a considerable influence on their functioning and, as the Minister of Justice, will bear political responsibility for improper use of oversight instruments at his disposal.

At the same time, it should be noted that the Prosecutor General (and the whole prosecution service) will be controlled by the legislature. A democratic way of expressing disapproval of what the Prosecutor General does will no doubt be the possibility of recalling him or her by the parliamentary majority.

#### **Comment to paragraph 102 of the Report:**

The Prosecutor General's powers to communicate information to the media pertaining to pending prosecutorial proceedings do not mean that such information may as a rule violate ECHR's case law in the context of Article 6(2) of the Convention. What it must not contain is only detailed information about persons covered by the proceedings or an appraisal of their guilt, which might violate the principle of the presumption of innocence. What is more, these powers open the prosecution service to the access to information through the media, as well as reducing media pressure on eliciting often unauthorised information through not necessarily legal channels. The issue resolved by the Court in *Mirosław Garlicki v. Poland* emerged in connection with an event when there was no procedure regulating the way the prosecution communicates information about the proceedings it conducts, which now does not seem possible with the new legal solutions.

#### **Comment to paragraphs 115 and 124 of the Report:**

It should be emphasized that the media draft laws, even though submitted by MPs, were put to extensive public consultations. On 17 May of this year, the Polish Sejm hosted a public hearing which could be attended by all interested parties. Moreover, the Sejm has received a number of written remarks, which will be taken into account during the work of parliamentary committees and subcommittees.

Media draft laws were also discussed with the Council of Europe representatives who met on 17 May of this year with the Government Plenipotentiary for Public Service Media Reform, and the chair of the Sejm's Culture and Media Committee. During the talks, the



Council of Europe representatives familiarized themselves with the Polish position, and offered their remarks. The parties agreed about the good intentions of the draft laws' authors, and the need to introduce certain corrections into them at the stage of parliamentary work.

**Comment to paragraphs 116 and 125 of the Report:**

Defamation is defined in the Polish Criminal Code in Article 212. The basic type of this offence (Article 212(1)) can be subject only to a non-custodial penalty, i.e. fine or restriction of liberty, while the qualified type (Article 212(2)), where the attribute on which the legislator makes stricter liability dependent involves committing the offence using means of mass communication, is subject to either: non-custodial penalties (fine or restriction of liberty) and up to one year of imprisonment. Addressing the problem of the penalisation of defamation it must be said that—although all those remarks about the potentially chilling effect of penalising defamation on the freedom of speech and means of mass communication are not without substantive reasons—keeping the basic and qualified type of offence under analysis in the normative system still rests on strong axiological grounds reflected in the constitutional law. It must be further noted that the analysed rules of substantive criminal law were examined for conformity with the Constitution by the Constitutional Tribunal in two rulings: judgment of 30 October 2006 (case of ref. no. P 10/06) and of 12 May 2008 (case of ref. no. SK 43/05). In the two rulings, the Tribunal confirmed the conformity of the contested criminal rules with the basic law. Despite the rich case law of the ECHR as regards Article 212 of the Polish Criminal Code, the aforementioned provisions were never found incompatible with the Court's standards.

The freedom of speech guaranteed in Article 54(1) of the Constitution of the Republic of Poland does not enjoy the presumed priority of protection against other freedoms and rights, including priority over the right to protection of the dignity and good name and private and family life. There are no grounds to assume that the protection of personal rights under civil law is an equally effective way of protecting dignity and good name as is the criminalisation of defamation provided for in Article 212 of the Criminal Code.

Turning to a detailed analysis of the issue of penalising defamation, it is worth noting that this offence may be committed only intentionally, and the illegality of the act under Article 212(2) is excluded when the accusation made public is true and relates to the conduct of a person holding a public office or serves the purpose of defending a socially legitimate interest (Article 213(2)). The perpetrator, to be held criminally liable, must be aware of the untruthfulness of a public accusation or at least anticipate a high probability that the raised accusation is not true but should make such accusation public using means of mass communication. It must be noted that most legal orders provide for penal protection of honour and good name. To single out public defamation, including defamation made through means of mass communication, constituting a qualified type of the offence of defamation, which therefore is subject to a more severe sanction, is a frequent solution. It is of course justified by the fact that defamation committed in this manner proves more burdensome for the injured party, and its consequences incomparably more difficult to remedy.

#### **Comment to paragraph 117 of the Report:**

In special cases of infringement of dignity, the legislation of long-established democracies (e.g. Germany, Switzerland, Norway) provide for far stricter sanctions than those defined in the Polish criminal law. Stricter criminal liability for the qualified type of defamation stems from the reach of channels of mass communication and the retrievability of stored information long afterwards. The harm inflicted on an individual defamed in the press, on the radio or on TV is usually hard to remedy, and in some circumstances hardly remediable at all (especially if privacy has been invaded), whereas the aftermath in the form of humiliation or loss of public trust is often irreparable.

The exceedingly positive role of the press and other mass media in a democratic state and society is on the other hand accompanied by far-reaching risks of breaching freedoms and subjective rights and other constitutional values. In today's world, it has become necessary to recognise the growing threat to the honour, good name and privacy of individuals coming from press publications, particularly those produced out of interests remote from the journalistic mission, with a view to seeking financial gain from the suffering and misfortune of others or to exposing intimate details of people's private lives.

#### **Comment to paragraph 118 of the Report:**

As regards the punishability of the offence of defamation, one should point out the results of a query which the Ministry of Justice ran in common courts of law last year in order to examine the practice of common courts in adjudicating the punishment of deprivation of liberty for an offence under Article 212(2) of the Criminal Code in the years 2010-2015 and the statistical data on final sentences for acts under Article 212(2) of the Criminal Code and under Article 216(2) of the Criminal Code. It transpires from the statistical data collected by the Ministry of Justice that in year 2015, 123 individuals were sentenced for offences under Article 212(2) of the Criminal Code (defamation through mass media), of whom: one was sentenced to a prison term with conditional suspension of the execution of this punishment, 15 were sentenced to punishment by restriction of liberty, of whom 5 had their punishment suspended, 106 were subject to a fine, of whom 16 had their punishment suspended conditionally. In eight cases, punishment was not administered. Proceedings regarding another 14 were conditionally discontinued.

In 2015, 23 individuals were sentenced for offences under 216 (2) of the Criminal Code (insult through mass media): two were sentenced to imprisonment with conditional suspension of the execution of this punishment, two were subject to restriction of liberty, of whom one had his punishment conditionally suspended, 19 were subject to a fine, in five cases with conditional suspension of its execution. In eight cases, punishment was not administered. Proceedings regarding another 5 individuals were conditionally discontinued.

It transpires from the above list that courts did not sentence anyone to imprisonment without a conditional suspension of the execution of their sentences. Moreover, such sentences are adjudicated very rarely. Out of the total number of persons sentenced for an offence under Article 212(2) of the Criminal Code, only 0.8 percent (one person) was sentenced to imprisonment and for an offence under Article 216(2) of the Criminal Code – 8.7 percent (2 persons) in 2015.

At the same time, during the period under review from January 2010 until July 2015 only one out of 17 cases ended in a prison sentence for a journalist. This happened when his actions did not serve the protection of the public interest and he did not act with due diligence required of a journalist. During the same period, six cases ended in prison sentences for private individuals who posted on web sites and portals critical comments on the activities of different public entities and whose activities, it appears, were taken in order to protect the public interest. In other cases, private individuals were sentenced to imprisonment for flagrantly violating freedom of speech and the rights of other persons (posting naked pictures of the plaintiffs with offensive comments, films showing plaintiffs' intimate life, etc.).

The query results and the case law of the Supreme Court in cases falling under Article 212(2) of the Criminal Code concerning journalists and persons engaged in public debate (see Supreme Court rulings in cases: III KK 243/06, III KK 52/09, V KK 178/13, which ended in judgements of acquittal) allow for concluding that the practice of common courts in the period under review heads in a direction that conforms with the standards set by the Court in judgements finding a violation of Article 10 of the Convention, and in the majority of cases, these standards are being applied – the courts, as a rule, do not sentence persons to prison terms, in particular in cases against journalists, with the exception of cases involving the most extreme forms of statements.

The data presented in the Report of the Commissioner for Human Rights of the Council of Europe on persons convicted under Article 212(2) of the Criminal Code with a suspended sentence of deprivation of liberty show that courts impose adequate sentences for offences under Article 212(2) of the Criminal Code, ones that cannot be deemed grossly harsh or disproportionate. The Government can by all means conceive of situations when defamation committed over means of mass communication so severely damages legal interest, which is someone's good name, that it may require a court to give a suspended sentence of deprivation of liberty, especially so if such conduct has happened before. It should be stressed that Article 212 of the Criminal Code protects human honour, popularly known as respect, regard, recognition, and value of an individual as perceived by others (a human's social importance). When ruling in specific cases concerning violations of such legal interests, courts are independent and follow the principles set out in Chapter 6 of the Criminal Code, but they also have at their disposal a wide array of means of punishment and an option to mitigate a penalty or refrain from imposing a penalty, so that it is adequate to the degree of fault and the circumstances of an incident. It must be stressed that in accordance with a rule laid down in Article 58(1) of the Criminal Code, if a statute provides for a possibility of a choice of form of penalties, and a crime is punishable by up to five years of deprivation of liberty, the court imposes imprisonment only if other penalty or measure cannot fulfil the goals of punishment. This provision explicitly establishes the preference for non-custodial penalties, giving the court a choice in selecting the type of punishment and clearly pointing to the preferred choice, i.e. in the first place considering the advisability of imposing a fine or a restriction of liberty.

The directive laying down the preference for non-custodial penalties over absolute imprisonment for petty crime is a manifestation of the constitutional principle of proportionality. The directive under Article 58(1) of the Criminal Code entails the court's obligation to provide detailed grounds for choosing absolute imprisonment as the necessary

sanction imposed on the perpetrator and to provide reasons for rejecting the possibility of applying non-custodial penalties. The categorical wording of Article 58(1) of the Criminal Code ("the court decrees") settles the special nature of absolute imprisonment for offences optionally punishable by non-custodial penalties.

#### **Comment to paragraphs 122 and 123 of the Report:**

It should be recalled that during the talks with the Council of Europe representatives, it was often stressed that the so-called "Small Media Law" was of temporary character, and would only remain in force until 30 June of this year. It should be clarified that the national media draft law which is now subject to parliamentary work, rules out any possibility for the government administration to interfere with the functioning of public service media.

The Broadcasting Act of 29 December 1992 (Journal of Laws of 2015, item 1531, as amended) sets the legal framework for the Minister of State Treasury to exercise ownership supervision over public radio and television broadcasting companies, and defines the status of such companies. According to these provisions, public radio and television broadcasting organisations operate only in the form of single-proprietor companies of the State Treasury, which are governed (subject to Articles 27-30 of the Broadcasting Act) by provisions of the Code of Commercial Companies (to the exclusion of Article 312 and 402 of the Code of Commercial Companies). During general assemblies, the State Treasury is represented by the minister competent for State Treasury affairs. The minister competent for State Treasury affairs has the right to appoint and dismiss management and supervisory board members of public radio and television broadcasting companies. Moreover, the companies in question have programme boards<sup>15</sup>, which are appointed by the National Broadcasting Council and evaluate the level and quality of current programming and the programme schedule. Therefore, after the Broadcasting Act was amended on 8 January 2016, the ownership supervision over public radio and television broadcasting companies can be said to be similar to the model applicable to companies that are especially important from the point of view of the national economy, as referred to in Article 1a of the Commercialization and Privatisation Act of 30 August 1996 (Journal of Laws of 2015, item 747, as amended).

Notice should also be taken of a certain dysfunction of the previous procedure to appoint members of public radio and television broadcasting bodies, whereby the minister competent for State Treasury affairs, whilst exercising ownership supervision over these companies, had practically no say about who would be chosen member of management and supervisory boards (only one member of a supervisory board composed of 5 or 7 people). Such an arrangement makes it difficult to perform ownership supervision over a company that is governed solely by the Code of Commercial Companies. It should be noted that except for the "mission sphere," which manifests itself in the editorial independence (programme autonomy) of public service media, public radio and television broadcasting organisations function as commercial law companies.

In this context, specific regulations that were in force prior to 8 January of this year had given rise to situations which made it difficult or even impossible for public radio and television broadcasting companies to operate. With the number of supervisory board

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<sup>15</sup>The programme boards comprise of 15 members, with 10 members representing political parties and 5 appointed among persons having experience and achievements in the sphere of culture and the media.

members in the public radio and television broadcasting company being fixed (Article 28(1) and (1a) of the Broadcasting Act in its previous reading), whenever an office mandate of a National Broadcasting Council-appointed member of the supervisory board expired in a company, such company would lack its obligatory body until the competition to fill the vacancy was concluded. The accompanying state of legal uncertainty would have continued for a relatively long period of time, as competition participants were selected by collegial bodies of universities. This prevented the company concerned from functioning properly, as many actions could only be taken with the approval or opinion of the supervisory board.

It is also worth noting that the Polish Constitution itself provided no justification for the described dysfunctional dichotomy of ownership supervision which existed between the minister competent for State Treasury affairs and the National Broadcasting Council prior to the amendment of the Broadcasting Act. According to the doctrine: "From the point of view of constitutional provisions, the National Broadcasting Council is a state organ of law protection, which should only exercise oversight over whether radio and television broadcasters respect the freedom of expression, the right to information, and the public interest in radio and television broadcasting. It is only within this scope that the National Broadcasting Council's substantive competence is defined in Article 213 (1) of the Polish Constitution. In the light of basic linguistic interpretation of constitutional provisions (...) these regulations give rise to no executive, governing powers on the part of the Council vis-à-vis radio and television broadcasters"<sup>16</sup>.

#### **Comment to paragraph 124 of the Report:**

The public service media reform aims to establish a system of national media whose pillars will be institutions with stable sources of financing that will not take the form of joint stock companies. The competition conditions in this sector are set to improve thanks to the introduction of the public service media reform, and the transfer of powers to determine the composition of the bodies of public radio and television broadcasting organisations to an entity that is not the electronic media market regulator. The introduced changes will not only help rationalize and lower the costs of managing public radio and television broadcasting organisations, but they will also make such organisations more independent financially and politically. This in turn will restore their professional and ethical standards which are instrumental if the public mission set forth in the national media draft law is to be accomplished.

It should be emphasized that the draft laws have no bearing whatsoever on the powers of the National Broadcasting Council. Its competences only change as far as the management and supervision of the way the public mission is performed by public service media are concerned. These matters are not regulated in the Polish Constitution in any way. What also needs to be underscored is that the National Broadcasting Council will retain its competences *vis-à-vis* public service broadcasters, similar to the competences it has today with respect to all private broadcasters, *i.e.* to assess whether their actions comply with law, in particular the Broadcasting Act.

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<sup>16</sup>Wąsowski K.A. (2004). Legal status of the National Broadcasting Council - an attempt to characterize. Thesis no. 4. Quarterly of Public Law, 2004/1/223.

### **Comment to paragraph 125 of the Report:**

As the Constitutional Tribunal remarked in the reasons for judgement case of ref. no. P 10/06, the need to protect honour and good name and private and family life stems directly from the Constitution and emanates from a paramount constitutional value – human dignity. In the Constitutional Tribunal's view, the connection between such values as good name, honour, and the protection of private life and human dignity justifies making the violations of such values subject to sanctions under criminal law. Recognising this conflict of constitutional values and subjective rights that safeguard them (respect for one's honour and good image, private life and the freedom of speech in a democratic state and society based on the freedom of the individual and the plurality of views), a view must be taken that the penal protection of honour and good name under the definition of crimes under Article 212 takes the form of necessary protection that is simultaneously proportionate from the point of view of the degree of legal interference in the individual rights and liberties (criminal liability provided for defamation is on a level envisaged for unintentional offences with a low abstract social harmfulness of the deed).

Also the Supreme Court has repeatedly addressed the issue of journalistic publications in the context of the offence under Article 212 of the Criminal Code. It pointed out that "the requirement of special care formulated in Article 12(1)(1) of the media law must be understood as a guidance recommendation which points to the rules for assessing journalistic conduct by courts. This requirement posits a need to each time build a model with particularly stringent criteria that form a benchmark to be compared with the contested journalistic acting on the collected information. The requirement of special care involves the obligation to exercise exceptional care in collecting and using press materials" (decision of the Supreme Court of 17 October 2002, IV KKN 634/99, OSNKW 2003, no. 3-4, item 33), and: "the journalist right to criticism cannot turn into insults and slanders against public officials. Each state authority may be subject to journalistic assessment, and the public has the right to be informed about any possible irregularities. That does not exempt journalists from making their publications neutral in character, especially when they concern facts" (decision of the Supreme Court of 10 December 2003, V KK 195/03, OSNKW 2004, no. 3, item 25). In the light of the Supreme Court's extensive case law on the subject there are no indications that provisions of Article 212 of the Criminal Code lead to constraining media freedom, which directly follows from Section 3.2.1, para. 125 of the Report.

It must be noted here that abuse of the freedom of speech and writing by a defence counsel in the performance of his duties, which constitutes insult or defamation, prosecuted by public indictment, of a party, its attorney or defence counsel, guardian, witness, expert or interpreter, is subject to prosecution by disciplinary action only (Article 8(2) of the Act of 26 May 1982 – Law on the Bar, unified text: Journal of Laws of 2015, item 615, as amended). Analogous resolution with respect to legal advisers is to be found in Article 11(2) of the Act of 6 July 1982 on legal advisers (unified text: Journal of Laws of 2014, item 637, as amended).

From the point of axiological assumptions of the Polish legal system and considering the aforementioned conflict of constitutional values, the solution adopted by the Polish legislator, which involves the criminalisation of defamation while at the same time

maintaining a relatively mild criminal penalty, seems an optimal measure that guarantees a necessary balance between the conflicting constitutional values.

**Comment to paragraph 129 of the Report:**

The opinion expressed in chapter four about the impact of traditional gender role beliefs was supported by no evidence, and it reflects ideological thinking rather than describing a real problem.

**Comment to paragraph 130 of the Report:**

The Concluding Observations referred to in footnote 86, which allegedly point to the existence of deep-rooted stereotypes concerning gender roles, and the negative impact such stereotypes purportedly have on the situation of women in Poland, contain actually no reference to any statistics; all the Committee does is express its view without drawing on any specific data.

The Polish Government attaches great importance to measures aimed at eliminating any negative stereotypes *vis-à-vis* all groups protected by law by providing support and patronage to high-quality projects implemented by NGOs.

In the Polish educational system, teachers have discretion in choosing curricula and teaching methods and teaching materials (textbooks) which follows from the autonomy of schools and the professional autonomy of teachers.

The Minister of National Education authorises the use of textbooks only in schools. The grounds for allowing a textbook (prepared by an independent publisher) to be used by a school are at least two positive substantial and teaching opinions about the textbook and a positive opinion about its correct language. Opinions about textbooks are prepared by experts who can only be persons with master's degree higher education, experience and accomplishments in academic or teaching work and who are recommended by a higher school, research institutes or the Polish Academy of Sciences (PAN) and the Polish Academy of Abilities (PAU) scientific institutions. The experts designated by the Minister of National Education assess the textbook's conformity with the core curriculum and the substantial, teaching, upbringing and linguistic correctness and whether the textbook accounts for the current state of scientific knowledge. A textbook that has been admitted for use by schools must contain content that is consistent with the law, particularly with the Constitution and the international agreements ratified by Poland. Educational materials and exercise materials are not subject to this procedure.

The phrase used in the Report suggests that the presence of stereotypes related to sex and concerning the roles and duties of women and men in the family and the society is also possible in educational materials admitted for school use by the Minister of National Education.

**Comment to paragraph 131 of the Report:**

The Report referred to in footnote 88, which is meant to show that the perception of gender roles in Poland adversely affects action against trafficking in human beings, does not

contain any data that would suggest that such a link exists either. The Group of Experts only quotes observations made by “several NGOs,” without giving any details.

**Comment to paragraph 132 of the Report:**

Regard should also be had to opinions presented by other groups of non-governmental organisations who act for the protection of human rights and the family, namely that values defined as traditional, such as, the family and marriage, have grounds in the Polish constitutional system and that their nature is not oppressive and they do not create a space for a patriarchal society and they do not serve to limit the presence of women to the dimension of domestic chores. Both the system of protection of rights in Poland and the practice of social life are aimed at ensuring that both men and women have conditions that serve their comprehensive development. The good conditions for social and professional advancement of women in Poland are illustrated by The Economist’s “Glass-ceiling index”, in which Poland holds the fourth place with an evaluation expressed in points that is far above the OECD’s average.

**Comment to paragraph 134 of the Report:**

The General Comment referred to in footnote 90, which states the prohibition of discrimination on the grounds of sex, is of general character and does not relate to any specific situation in Poland. Also, the content of the Comment does not imply that it is directly concerned with the conditions in Poland. The same holds true for the reference to the ECtHR judgement in footnote 91.

**Comment to paragraph 135 of the Report:**

In line with the currently applicable regulations, the minister competent for education and upbringing, in defining the core curriculum for pre-school and general education, by way of an ordinance, identifies the mandatory objectives and teaching contents, including skills that a pupil should acquire upon completion of a specific educational level and the upbringing tasks of the school, reflected in pre-school and school curricula respectively.

Pursuant to the Ordinance of the Minister of National Education of 27 August 2012 (concerning core curriculum for pre-school and general education in different types of schools) all types of schools have to counteract all types of discrimination. The school or institution principal is responsible for the implementation of the core curriculum and exercises pedagogical supervision over the teaching staff he or she employs.

The core curriculum in schools and institutions in the education system is implemented continuously throughout the school year. The requirements and their form are adjusted to fit the age of the pupils at different educational levels, their cognitive needs and possibilities.

Educational classes are to form a consistent whole with the school’s upbringing and prophylactic activities. They are supplemented by: an upbringing programme and a prophylactic programme.



Schools are mandated to develop a school upbringing programme which covers all upbringing content and activities addressed to pupils and implemented by teachers. A school upbringing programme is developed on the basis of a diagnosis of the upbringing problems existing in such school.

The upbringing and prophylactic programmes are the schools' internal documents adopted by the parents' board in consultation with the pedagogical board, pursuant to Article 54(2) of the Educational System Act of 7 September 1991. Such programmes should create a coherent whole. Their objective is to develop and deepen the upbringing and prophylactic content included in the core curriculum, accounting for the specificity of the school (the level of education, the pupils' environment, the parents' environment, the pupils' development needs, etc.) It also concerns the school's upbringing activity aimed at preventing all forms of discrimination.

The school's upbringing and prophylactic programmes are adopted by the parents' board in consultation with the pedagogical board. Such solution serves the interests of a systemic approach to problems of children and young people and of consistency in upbringing activities applied at home and at school.

As part of pedagogical supervision exercised in the form of evaluation, the fulfilment of state requirements set out in Ordinance of the Minister of Education of 6 August 2015 on Requirements for Schools and Institutions<sup>17</sup> by schools and institutions is examined. One of the requirements to be fulfilled by pre-schools, schools and educational institutions is the implementation of anti-discriminatory activities addressed to whole communities of pre-schools, schools or institutions.

In the opinion of the Government of the Republic of Poland, the aforementioned systematic and continuous activities carried out in order to prevent any discrimination at schools ensure a systemic approach to the problems of children and young people and a consistent line of upbringing activities applied at home and at school in this regard and do not warrant undertaking any additional measures in the system of education.

#### **Comment to paragraph 137 of the Report:**

Government Plenipotentiary for Equal Treatment, acting pursuant to the Act of 3 December 2010 on implementation of certain legal provisions of the European Union regarding equal treatment (Journal of Laws no. 254, item 1700, as amended) and Government Plenipotentiary for Civil Society, appointed pursuant to Council of Ministers Ordinance of 8 January 2016 on Government Plenipotentiary for Civil Society (Journal of Laws, item 37) – these are two separate functions (positions) created pursuant to distinct legal grounds, even though exercised by one person at present.

#### **Comment to paragraph 138 of the Report:**

Regarding the criticism about the absence of a coordination mechanism to ensure gender mainstreaming at all levels, it should be recalled that, among others, the appointment of coordinators for equal treatment at the Prime Minister's Office, ministries

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<sup>17</sup> Journal of Laws, item 1214.

and central offices, while in Voivodship Offices – plenipotentiaries of Voivodes for equal treatment, serves the purpose of coordinating government administration activities. Coordinators and plenipotentiaries were appointed as part of the implementation of the National Programme of Actions for Equal Treatments in 2013-2016, by decisions of the heads of the respective offices. Their activities involve, among others, the promotion of the equal treatment principle, cooperation with NGOs and systematic monitoring of compliance with the equal treatment principle. Such activities are performed in cooperation with the Government Plenipotentiary for Equal Treatment.

**Comment to paragraph 140 of the Report:**

As to giving a proper rank to issues of gender equality, it should be underlined that the Government Plenipotentiary for Civil Society and Equal Treatment, even though he is responsible for implementing the government policy on equal treatment, including combatting discrimination, in particular on the grounds of sex, race, nationality, ethnic origin, religion, belief, outlook, age, disability or sexual orientation, devotes a particular attention in his work to equal treatment on the grounds of sex. The greatest number of tasks set out in the National Programme of Actions for Equal Treatment in 2013-2016, which is the main instrument of government policy on equal treatment, aim at ensuring gender equality.

It should be underscored that measures implemented by the Polish authorities in this regard have been systematically improving the rights of women and the equality of women and men. The Polish Government regards NGOs acting for equality of rights of women and men as its important ally.

**Comment to paragraph 143 of the Report:**

The Commissioner challenges the results of an FRA survey, which shows that violence against women is not a major problem in Poland compared with other EU countries. However, he fails to present any alternative data which would indicate the real – in his view – scale of the phenomenon. He limits himself to quoting the FRA's recommendation that collected data be treated with caution, and goes on to cite "some NGOs" (without giving their names) that challenge FRA data.

One should also note the fact that similar surveys concerning such sensitive issues as experience of violence against women inflicted by a partner (present or former) have been conducted in Poland for years now. One of the first such surveys after 1990 concerning the situation of women and their sexual life by an outstanding specialist in the field Professor Starowicz was conducted over 25 years ago. Neither the research methodology nor the subject matter of the survey is cultural taboos in Poland and there is no justification to perceive its outcome as the result of solely a low level of awareness of Polish women as to what constitutes sexual violence.

**Comment to paragraph 145 of the Report:**

Pursuant to the Act on Preventing Domestic Violence of 29 July 2005, amended in 2010, interdisciplinary teams consist of representatives of social assistance units, commune (*gmina*) committees for solving alcohol-related problems, police, educational staff, healthcare staff, NGOs, and court-appointed custodians.

### **Comment to paragraph 146 of the Report:**

The Polish Government points out that the Police does not have a separate structure for the prevention of domestic violence, but in every *powiat*, metropolitan, district and *voivodship* Police headquarters and National Police Headquarters there are police officers responsible for the coordination of activities in this area. In addition, in accordance with § 4.2 of Guidelines no. 2 of the National Police Chief of 7 December 2011 *on police officers' mode of conduct during the execution of the "Blue Card" procedure* (Official Journal of the National Police Headquarters no. 10, item 77), working groups that work with families affected by violence include a community policeman. In the event of suspected domestic violence against a child, a police officer from the organisational unit for minors and pathologies should also take part in the working group's activities. It should be noted that police officers who coordinate activities in the field of prevention of domestic violence, community policemen and policemen from organisational units for minors and pathologies improve their skills in this area by participating in training courses organised by the Police or other entities, including local governments or non-governmental organisations. However, this does not mean that they are so competent that they do not need further training. In many organisational Police units, police officers who undertake activities in the area of prevention of domestic violence are also involved in supervising activities. Also duty officers in *powiat*, metropolitan, district Police headquarters and Police stations, as well as police officers from patrol-intervention units take part in training in the field of preventing domestic violence, organised by police schools or as part of local development. In addition to the theoretical knowledge, these training courses are aimed at acquiring and reinforcing specific skills. Therefore, they use case studies and simulations. At this point it should be stressed that, especially during training courses addressed to police officers from patrol-intervention units, it is not possible to accurately reproduce interventions related to domestic violence, given that every intervention is different, and that during the simulation the police officers experience other emotions than those that appear during the intervention.

### **General comment and comment to paragraph 149 of the Report:**

The Commissioner quotes no sources (not even as vague as "some NGOs") to substantiate claims about the bad treatment of the victims of domestic violence, including on account of sex.

The Government of the Republic of Poland would like to submit comments regarding drafting. Using phrases, such as: "women are said to be confronted with indifference...", "judges reportedly sometimes consider...", "it is reported that some members of staff turn a blind eye to..." necessarily raises doubts. The Report should be based on facts, not on unchecked opinions or arguments which are not substantially confirmed.

Wording used in para. 149 of the Report, such as „In some case, woman are said to be confronted with indifference, stigmatisation, or incredulity on the part of the Police (...)", having in mind the preceding sentence may give impression that, in the context of tens of thousands of cases of domestic violence each year and nearly 100 000 police officers employed, the number of women treated unprofessionally is significant, which does not

correspond to the reality. It seems that the Commissioner has not proved this thesis sufficiently.

**Comment to paragraph 151 of the Report:**

The Government of the Republic of Poland notes that statements included in this paragraph are not precise, because restraining orders are applied in Poland not only as a punitive measure issued by courts or as a probationary measure also issued by courts when administering a punitive measure connected with subjecting a sentenced person to probation, but it is also applied as a preventive measure by prosecutors and courts as early as at the stage of pre-trial proceedings conducted by law enforcement agencies – the police and prosecution service (Article 275(2) of the Code of Criminal Procedure).

**Comment to paragraph 153 of the Report:**

The Polish Government cannot agree with the statement that the “Blue Card” procedure is too cumbersome to be effective. According to the Government, these are particular interdisciplinary teams that, through excessive bureaucracy, make it too onerous. The reason for this is often insufficient competence of the members of interdisciplinary teams. Therefore, one must agree with the Commissioner that it is necessary to raise the competences of those working in the field of domestic violence prevention by increasing the number of training courses, including for entire interdisciplinary teams.

**Comment to paragraph 154 of the Report:**

It is surprising to note how the Commissioner referred to the issue of the Blue Card being used in divorce proceedings, saying that it was just another example of negatively stereotyping women’s roles, which had to be dealt with by educating the public about domestic violence as a human rights violation.

**Comment to paragraph 160 of the Report:**

It is incorrect to say that sexual harassment is prohibited only in the field of labour relations.

The English-language version of the Ombudsman’s Report quoted in footnote 99, which is used to justify the need to extend the protection against mobbing beyond labour relations, does not set out any numerical data which would show the alleged scale of mobbing outside the workplace. It is to be regretted that the Commissioner fails to address the size and forms of the phenomenon. It would seem that in a situation where the most credible publicly available data, i.e. the FRA’s Report, clearly show that sexual harassment in Poland is a relatively minor problem compared with other EU member states (one of Europe’s lowest ratios of sexual harassment victims – see Violence against women: an EU-wide survey. FRA 2014, [http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14_en.pdf), accessed on 4 June 2016), a stronger case should be made when pointing out a lack of regulations concerning this particular subject matter to the Polish authorities.

As concerns the statement that outside the family sphere, the law only prohibits sexual harassment in the field of labour relations, it should be recalled that Article 6 of the Act of 3 December 2010 on implementation of certain legal provisions of the European Union regarding equal treatment (Journal of Laws no. 254, item 1700, as amended) prohibits unequal treatment (including sexual harassment) of natural persons on grounds of, among others, sex in access to and conditions of, using social security, services, including housing services, goods and the acquisition of rights or energy, if they are offered to the public.

In Poland the possibility of asserting rights by victims of sexual harassment is also provided by the Criminal Code. Sexual harassment is not defined in Polish criminal law. However, if such act was committed with elements of an offence it comes within the provision of Articles 197-199 of the Criminal Code and of Articles 202 and 203 of the Criminal Code.

#### **Comment to paragraph 163 of the Report:**

Regarding the Commissioner's recommendation to establish, among others, special structures within the Police to carry out tasks relating to domestic violence, in the opinion of the Government of the Republic of Poland there is no such a need, since, as indicated above, in every *poviat*, metropolitan, district and *voivodship* headquarters of the Police there are people who coordinate the area of domestic violence prevention. Creating separate structures specialised in actions for prevention of domestic violence would be contrary to the principle of effectiveness. The solution recommended by the Commissioner would mean creating such unit in every *poviat*, metropolitan, district and *voivodship* Police headquarters, which means that at least in 343 organisational units of the Police, 10 police officers should be assigned only to interventions related to domestic violence (assuming that only one patrol intervenes in connection with domestic violence, and in practice, particularly in cities and towns, there are days when several interventions in connection with domestic violence take place at the same time, and some others when there are no such interventions at all). In addition, these structures should also include police officers who would take part in meetings of interdisciplinary teams/working groups, and who would systematically pay visits in order to check the security status of a person as to which there is a suspicion that they are affected by domestic violence (at least 1 for each community and a few in towns). It should be emphasized that the Police organisational units competent to conduct pre-trial proceedings include separate departments / teams that specialize in handling cases against life and health (that is, among other things, those relating to abuse, injuries).

Despite the absence of specific Police structures established to deal solely with this issue, in the opinion of the Government of the Republic of Poland, the rights of victims of domestic violence are properly secured, and police officers who perform tasks in this area are properly prepared to secure them. Therefore, at present it is not planned to establish special Police units to perform tasks only in the area of preventing domestic violence.

In view of the fact that raising police officers' competences in this area is a very important aspect in fighting against violence against women and domestic violence, training courses are provided in local Police units in the framework of specialist training courses (organised by police schools) and local professional training. In 2015-2016, the Ministry of Family, Labour and Social Policy organized national training for interdisciplinary teams with a

view to enhancing cooperation among representatives of the institutions concerned, and increasing the effectiveness of aid to people who fall victim to domestic violence.

To sum up, one has to agree with the thesis and recommendation regarding the need for further training courses for police officers in the area of prevention of domestic violence and violence against women. However, the recommendation to set up specialised Police units dealing solely with domestic violence and violence seems pointless.

The Polish Police, as a public administration body, acts on the basis of and within the law. It is therefore obliged to comply with all applicable laws with regard to the protection of human rights and prevention of discrimination. As indicated in the Report, Poland has ratified a number of legal instruments in this area, such as: the Council of Europe Convention on Action against Trafficking in Human Beings, the UN Convention on the Rights of Persons with Disabilities, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, which entered into force on 1 August 2015.

There is also a variety of domestic laws applicable in this respect, such as the Act on Preventing Domestic Violence, the Act on the Ombudsman, or the Act on the Ombudsman for Children. Violation of the provisions in question involves disciplinary and criminal liability of the police officers.

The Polish Police tries to ensure a thorough professional preparation of officers in the area indicated above. The issue of human rights is one of the points covered by the basic vocational training, obligatory for all police officers admitted to the service. In addition, anti-discrimination issues occupy an important place in the offer of specialist courses prepared by the Polish Police College (*Wyższa Szkoła Policji*) in Szczytno and the European Police College (CEPOL). These courses help significantly increase the knowledge and skills of police officers and employees in protecting human rights and preventing discrimination.

#### **Comment to paragraph 164 of the Report:**

In accordance with Article 6(4)(1) of the Act on Preventing Domestic Violence, government administration tasks carried out by the counties (*poviats*) include setting up and running specialist support centres for the victims of domestic violence. Such facilities are financed on a regular basis. Funds for that purpose are part of the Provincial Governors' (*Voivodes*) budgets, while their amount is set in Annex 2 to the National Programme for Preventing Domestic Violence. It should therefore be concluded that the specialist support centres for the victims of domestic violence do not face the problem of having to seek funding each year.

Many Polish organisations (*e.g.* Caritas) organise shelters for women – victims of violence with the involvement of central and local government funds.

#### **Comment to paragraph 166 of the Report:**

Polish Government supports in many different ways campaigns implemented in this regard by NGOs, by becoming patrons of such campaigns and by supporting such activities

financially. As part of a mechanism available to the Minister of Justice, approximately PLN 20 million was allocated to organisations helping injured persons, including women – victims of violence.

**Comment to paragraph 167 of the Report:**

The Commissioner points to the fact that women are insufficiently represented in professions which are considered to be prestigious, citing the impact of negative stereotypes as one of the reasons. Unfortunately, he does not go on to compare numerical data from Poland with data on other Council of Europe countries. This means that the Commissioner's comments shed no light on Poland's place relative to other Council of Europe countries, nor on whether there is a significant correlation between the number of women in prominent positions, and the social perception of the role of women. No such information is to be found in the English-language version of the Ombudsman's Report referred to in footnote 102, in which the Ombudsman calls for introducing quotas in management and supervisory boards. Meanwhile, statistics show that Poland performs relatively well in terms of women's standing in social and economic life, relative to Council of Europe countries:

– According to OECD data, the gender wage gap in Poland is among the smallest in the OECD and stands at 10.6 %, compared with the average of 15.46 %. The gap in Poland is thus smaller than in Germany, the UK, France, Sweden, and the Netherlands (source: <https://www.oecd.org/gender/data/genderwagegap.htm>, accessed on 3 June 2016);

– Also, Poland is the OECD country with the second-highest share of women investors (<https://www.oecd.org/gender/data/shareofwomeninventors.htm>, accessed on 3 June 2016);

– At 37.8%, the percentage of women in management positions in Poland is high and exceeds the corresponding figures for Germany, the Netherlands, Sweden, Norway or Italy (according to the Women in Business and Management Gaining Momentum Global Report, ILO 2015, <https://sustainabledevelopment.un.org/content/documents/1770ILO%20Report%202015.pdf>, accessed on 4 June 2016);

– In terms of the share of women parliamentarians, the ratio for Poland is 27.4 %, which is only slightly behind the OECD average of 28.58 %, and more than in the case of France, the Czech Republic or Slovakia (<https://www.oecd.org/gender/data/female-share-of-seats-in-national-parliaments.htm>, accessed on 3 June 2016).

Therefore, the allegations levelled by the Commissioner with respect to the discrimination of women on the Polish labour market and in Polish public life should be considered far off the mark. The Commissioner's reasoning on the connection between negative stereotypes about gender roles, which are allegedly nurtured in Poland, and the discrimination against women should be deemed to be even more unfounded, and prompted by ideological considerations.

The Polish Government takes the stand that the most important role in promoting the participation of women in public life should be played by organisations that advance

their professional, social and political standing. The gist of the matter is not so much the mechanical inclusion of women in different spheres of public life and the decision-making process, but rather their appropriate preparation. It should also not be forgotten that the participation of women in such processes should first of all be the result of their conscious decisions.

**Comment to paragraph 170 of the Report:**

Concerning the statement that the existing programmes to combat discrimination do not have a special focus on discrimination against women, it should be recalled that the greatest number of tasks in the National Programme for Equal Treatment for 2013-2016, which is the main instrument of government policy on equal treatment, are aimed at eliminating discrimination on the grounds of sex.

**Comment to paragraph 172 of the Report:**

As regards the equality of women and men on the labour market, the Report points to the disproportions in the employment of women and men, the relatively low share of women in the circles of economic decision-makers, the pay gap, the low percentage of men involved in household tasks and care, and the insufficient number of child care facilities.

The Polish Government is aware of the problems and negative phenomena affecting women which are listed in the Report. That is why it has taken a number of actions to address these issues. In particular, the Government is focused on promoting solutions that will make it easier to reconcile career and family, supporting families financially, promoting active fatherhood, promoting entrepreneurship and economic independence of women, and expanding care infrastructure for children under the age of 3.

**Comment to paragraph 174 and subsequent of the Report:**

The Commissioner concludes that the limited access to sexual reproductive health services is the result of discrimination against women. He only quotes the Open letter by representatives of selected UN agencies (footnote 107) to that effect, without providing any evidence to support this claim.

It should be added that no document referred to in para. 174 contains a reference to the meaning of the term "sexual rights." Unlike the notion of sexual health whose definition exists, reference to sexual rights is unwarranted on the basis the referenced documents. In addition, the term "reproductive rights" was not clearly defined in the international instruments that Poland is bound by and it is not part of the catalogue of human rights.

The Polish Government calls upon the institutions of the Council of Europe to respect the applicable international law in this regard and not to introduce notions to the language of documents which have not been sufficiently well defined.

Poland supports promoting and protecting human rights with respect to all women and their sexual and reproductive health and reproductive rights, in line with the Programme of Action of the International Conference on Population and Development



(ICPD), and the Beijing Platform for Action (as well as documents summing up their implementation meetings).

#### **Comments to paragraph 175 of the Report:**

Writing about the destructive effect of inadequate sexuality education, the Commissioner does not quote any data to suggest a substandard quality of classes in family life education on the one hand and the negative influence of the Polish sexuality education model on pupils' behaviour on the other. On the contrary, data on Polish teenagers show a far better picture compared with the countries which follow the sexuality education model proposed by the Commissioner:

– Far lower rate of sexual initiation among 15-year-olds, at 15% for girls and 19% for boys (Germany: 20% and 24%; Sweden: 31% and 32%; the UK: 26% and 32% → Currie C. et al. (eds.), *Social Determinants of Health and Well-being among Young People. Health Behaviour in School-aged Children (HBSC) Study: International Report from the 2009/2010 Survey*, Copenhagen, WHO Regional Office for Europe, 2012 (Health Policy for Children and Adolescents), no. 6, p. 174.

– Poland has one of the lowest incidences of typical venereal diseases: syphilis, gonorrhoea and chlamydiosis: 0.0094% compared with 0.2223% in Sweden or 0.1416% in the United Kingdom → Demographic Yearbook 2002, United Nations Statistics Division, 2002. Centers for Disease Control and Prevention. WHO Regional Office for Europe.

The grounds for exempting pupils from "family life education" classes have been presented in the comments to para. 191 of the Report.

Teachers who conduct "family life education" classes in different types of schools are mandated to transmit full and reliable knowledge adjusted to the pupils' development levels. Such classes are conducted by teachers who are qualified to teach "family life education" classes.

The issue of qualifications required of teachers are set out in the provisions of the Act of 26 January 1982 - The Teacher's Card<sup>18</sup> and in the Ordinance of the Minister of National Education of 12 March 2009 regarding specific qualifications required of teachers and determination of schools and circumstances in which teachers without higher education or completed teacher training college can be employed<sup>19</sup>.

Pursuant to the provisions of paras. 2 through 4 of the aforementioned Ordinance, qualifications for conducting family life education classes in elementary, lower secondary and upper secondary schools are held by persons who have completed:

- 1) Master's degree studies majoring in a subject that is consistent with the taught subject or conducted classes and has completed pedagogical training, or

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<sup>18</sup> Journal of Laws of 2014, item 191 as amended.

<sup>19</sup> Journal of Laws of 2015, item 1264.

- 2) Master's degree studies majoring in a field whose scope was defined in the standard of teaching for this major of studies in the basic and major field content group of the taught subject or conducted classes and who have completed pedagogical training, or,
- 3) Master's degree studies majoring in a field different from the one mentioned in points 1 and 2 and, in addition, who have completed post-graduate studies in the taught subject or conducted classes and have completed pedagogical training.

In addition, qualifications for conducting family life education classes in elementary and lower secondary schools are held by persons who have completed:

- 1) a three-year bachelor's degree majoring in a subject that is consistent with the taught subject or conducted classes and who have completed pedagogical training, or
- 2) a three-year bachelor's degree majoring in a field whose scope was defined in the standard of teaching for this major of studies in the basic and major field content group of the taught subject or conducted classes and have completed pedagogical training, or
- 3) a three-year bachelor's degree majoring in a field different than the one mentioned in points 1 and 2 and, in addition, have completed post-graduate studies in the taught subject or a course qualifying such person to teach the subject or to conduct classes and who have completed pedagogical training.

Qualifications for teaching "family life education" classes in elementary schools are also held by a person who has completed:

- 1) a teacher training college in the specialty that corresponds to the taught subject or conducted class, or
- 2) a teacher training college in a major other than the one referred to in point 1 and who has also completed a course qualifying such person to teach the subject or conduct a class.

"Family life education" classes may not be conducted by persons who do not have the aforementioned qualifications. The school principal is responsible for the proper organisation of educational classes and for assigning duties to teachers in accordance with their qualifications.

#### **Comment to paragraph 177 of the Report:**

According to the paragraph, access to contraception in Poland is hindered by the "conscientious objection clause" invoked by some doctors who refuse to prescribe – and some pharmacists who refuse to deliver, contraceptives.

It should be strongly emphasized that in Poland it is the medical doctor who (under certain conditions) has the right to refrain from performing healthcare services that go against his or her conscience<sup>20</sup>. Nurses and midwives may refuse to follow the doctor's instruction or perform another healthcare service that is against their conscience or runs

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<sup>20</sup> In accordance with Article 39 of the Law on the Doctor and Dentist Professions of 5 December 1996 (Journal of Laws of 2015, item 464, as amended).

counter to their qualifications (under certain conditions)<sup>21</sup> as well. However, pharmacists have no such right. While calls were made to enable pharmacists to invoke the “conscientious objection clause”, this has not led to amending the applicable law.

The provision of Article 96(5) of the Act of 6 September 2001 - Pharmaceutical Law (Journal of Laws of 2008 r. no. 45, item 271, as amended) clearly provides that a pharmacist and pharmaceutical technician may refuse to deliver a medical product, if:

1. its delivery may endanger the patient’s life or health;
2. there is a justified suspicion that the medical product could be used for non-medical purposes;
3. there is a justified suspicion about the authenticity of the prescription or demand;
4. there is a necessity to change the composition of the prescription drug, in the prescription which the pharmacist or pharmaceutical technical has no authorisation to do and has no possibility to communicate with a person who is authorised to issue prescriptions;
5. at least six days have elapsed since day the medical product was prepared – in the case of a prescription drug prepared on the basis of a prescription or pharmaceutical label;
6. a person who presented the prescription for realisation is under 13 years of age;
7. there is a justified suspicion about the age of the person for whom the prescription was issued.

Referring to the “conscientious objection clause” invoked by a doctor or a dentist, it should be noted that Article 39 of the Act of 5 December 1996 on the Profession of Doctor and Dentist (Journal of Laws of 2015, item 464) clearly provides that a doctor may refrain from performing health services contrary to his or her conscience, but he or she is obligated to inform about real possibilities of obtaining such service from another doctor or a medical entity and justify and note down this fact in the medical documentation. A doctor who performs his or her profession on the basis of an employment contract or as part of a service is also obligated to inform in writing his superior in advance. By this token, women are not deprived of medical care in the event a doctor invokes the “conscientious objection clause”, because the doctor is bound by his duty to inform the patient about real possibilities of obtaining this service from another doctor.

Cases of refusal to issue referral for prenatal testing or to issue a decision about admissibility of abortion or a refusal to perform abortion have ended in some court cases. In one such case concerning a refusal to refer a woman for prenatal testing when there was a suspicion that the foetus is suffering from the Turner disease (the spouses had one child born with this defect), the Supreme Court addressed directly the issue of the “conscientious objection clause”. In its ruling of 12 June 2008, III CSK 16/08, OSNC 2009, no. 3, item 48, the Supreme Court concluded that the right to carry out prenatal tests arises from the right of a pregnant woman to be informed about the condition of the foetus, its possible ailments and defects and the possibilities of treating them during the foetal period. If a doctor, for any reasons, including his or her outlook, does not want to issue a referral for such tests, when

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<sup>21</sup> In accordance with Article 12 of the Law on the Nurse and Midwife Professions of 15 July 2011(Journal of Laws of 2014, item 1438, as amended).

the patient has the right to such tests, he or she should act in accordance with Article 39 of the Act on Profession of Doctor, i.e. inform about real possibilities of obtaining such referral from another doctor or in another health care institution and justify and note down such fact in the medical documentation.

It should be noted that in 2010, Article 31 that provides for the possibility of lodging a statutory objection by a patient or his or her legal representative against a medical opinion or decision, if such opinion or decision affects the rights or obligations of the patient arising from the provisions of law was introduced in the Act of 6 November 2008 on the Rights of Patient and the Ombudsman of Patient Rights (Journal of Laws of 2016, item 186).

#### **Comment to paragraph 178 of the Report:**

The Commissioner notes the fact that the lack of reimbursement of some contraceptives represents an obstacle in access to reproductive health. He quotes the Barometer of the International Planned Parenthood Federation (footnote 108), which briefly states that the lack of reimbursement of some newer contraception methods creates a barrier to reproductive health. This brief note fails to provide any information on the costs of using such medicines, their relation to average income, etc. It only mentions that the monthly cost of standard contraceptive pills is around EUR 3 (which generally is not a serious barrier in Polish conditions). It must be further stressed that the International Planned Parenthood Federation can hardly be called an impartial source of information in the light of its active involvement in promoting access to contraception and abortion, and its role in facilitating direct access to such services.

#### **Access to contraceptives for minors:**

It should be pointed out that under the Act on Family Planning, Foetus Protection, and the Conditions for Abortion of 7 January 1993, central and local government administration bodies are obligated, within their competences laid down in specific provisions, to ensure that citizens have free access to the methods and means of informed reproduction. Pursuant to the Law on Publicly Funded Healthcare Services of 27 August 2004, and the Minister of Health's Ordinance on Healthcare Services Guaranteed under Outpatient Specialist Care of 6 November 2013 (Journal of Laws of 2016, item 357), women are ensured a healthcare that covers specialist gynaecological and obstetric services – these comprise two kinds of services: obstetric and gynaecological counselling, and gynaecological counselling for girls. The counselling includes in particular reproductive healthcare.

In accordance with the Act on the Family and Guardianship Code of 25 February 1964 (Journal of Laws of 2015, item 2082, as amended), a child under the age of 18 is under the parents' authority or guardianship. One should bear in mind that a person under 13 years of age or a person fully incapacitated is not able to control their actions and take conscious decisions. Should such persons have access to contraceptives, this does not mean that they would be able to make a full assessment of the healthcare method being offered to them, or the impact of contraceptives on their health today and in the future. This would not mean either that such persons appreciated all aspects of the course of treatment suggested to them. The same, albeit to a lesser extent, holds true for persons who have a restricted capacity to perform acts in law (including minors aged 13 – 18). Article 97(2) of the

aforementioned Family and Guardianship Code stipulates that matters of importance for the child – and these include treatment – should be decided by the parents together, and where they disagree, by the guardianship court.

The discussed regulations are correlated with provisions on the patient's consent to health services. Under the Act on the Doctor and Dentist Professions of 5 December 1996 (Journal of Laws of 2015, item 464, as amended), the doctor may proceed with an examination or perform other health services, subject to exceptions provided for in the law, after the patient has given his or her consent. For minor patients it is necessary for their statutory representatives to agree, and in the absence of such representatives or where contacting them is impossible, it is up to the guardianship court to give consent. If a minor needs to be examined, his or her actual guardian may give consent to such examination. When a patient has turned 16, it is also necessary to obtain his or her permission.

However, in a situation where a minor who has turned 16, an incapacitated person, or a mentally ill or mentally handicapped person, who nonetheless has sufficient awareness, objects to medical activities, it is also the guardianship court which must give its consent, apart from such person's statutory representative or actual guardian, or where they gave no permission.

In the light of the outlined provisions, there is a direct link between the age limit for the patient's independent consent to health services, and regulations on the parents' exercise of parental authority, and the minor patient's safety and health. The relevant provisions are applicable to all services performed for the minor, including gynaecological and urological ones.

In addition, with regards to the issue of drug prescription, it should be noted that the doctor may prescribe drugs, foodstuffs intended for particular nutritional purposes, which are passed as fit for trading in the Republic of Poland in accordance with separate provisions, as well as medical devices, accessories to medical devices, medical devices for in vitro fertilization diagnostics, accessories to medical devices for in vitro fertilization diagnostics, and active implantable medical devices within the meaning of the Medical Devices Act of 20 May 2010 (Journal of Laws no 107, item 679, as amended).

When exercising the said right, doctors are guided by the supreme professional duty, state-of-the-art medical knowledge, the available means and methods of preventing, diagnosing, and treating diseases, the principles of professional ethics, and due diligence. It should be underscored that medical prescriptions are written out on medical grounds, and there is no question of accepting patients' requests for "on demand" prescriptions, no matter what medicinal product is expected of the doctor by the patient.

#### Lack of reimbursement of modern contraceptives

At present, the following are registered and available in the Republic of Poland: contraceptive medicinal products and medical devices, as well as medicines and medical devices used during pregnancy and necessary to ensure foetal care, and medical care for pregnant women.

In 2003, the Polish Gynaecological Association issued its contraception guidelines which stated that the following methods of fertility control are available in the Republic of Poland:

- methods of periodic sexual abstinence (natural methods),
- spermicides,
- condoms,
- intrauterine devices, including with intrauterine progestogen release,
- one or two-ingredient hormonal substances in the form of tablets for oral use, transdermal patches or injections.

The following medical criteria are applied to assess contraceptive methods:

- effectiveness,
- reversibility,
- safety,
- acceptance, tolerance,
- non-contraceptive benefits.

In accordance with Article 37(1) of the Act on the Reimbursement of Medicines, Foodstuffs Intended for Particular Nutritional Purposes, and Medical Devices of 12 May 2011 (Journal of Laws of 2015, item 345, as amended), the Minister of Health issues an announcement with a list of medicines that are reimbursed under a final administrative decision. Such announcements are made once every two months.

According to the announcements from 2015, the reimbursement scheme included the following medicines with contraceptive effect:

- Levomine,
- Microgynon 21,
- Rigevidon,
- Stediril 30.

In addition, the aforementioned reimbursement scheme covered medicines which contain active hormonal ingredients and can have a contraceptive effect:

- Cyprodiol,
- OC-35,
- Syndi-35,
- Diane-35,
- Cyprest.

All of these medicines were included in the limit group “Hormonal drugs to be taken orally, containing cyproterone, ethinyl estradiol, levonorgestrel or medroxyprogesterone.” The medicines were available at the 30% level of patients’ co-payment, in all registered recommendations as at the date the decision was issued. They were available for patients in the price range PLN 2.47 to PLN 23.47.

In 2015, over one million packets of these medicinal products were given out. Their amount of reimbursement was close to PLN 9 million. Given different recommendations for the use of these reimbursed medicinal products, and the fact that there are no clear contraceptive recommendations for some of the drugs, it is difficult to specify the amount of medicine and the value of reimbursement assigned to contraceptive use, and such calculations are likely to be erroneous. Therefore, no such estimates are made.

At the same time it should be noted that alongside reimbursed products, the Polish market offers plenty of hormonal contraceptives, such as tablets for oral use of different composition and hormone content, and non-reimbursed transdermal systems. Consequently, their prices vary between different retailers.

Moreover, under the Minister of Health's Ordinance on Healthcare Services Guaranteed under Outpatient Specialist Care of 6 November 2013, the National Health Service also finances the insertion and removal of contraceptive intrauterine devices (except for the cost of the device itself, which is covered by the patient).

Prescription-free methods include spermicides in the form of vaginal globules, and condoms, with the latter being the basic contraceptive method used by men.

#### **Comment to paragraph 179 of the Report:**

The Commissioner notes the reprehensible lack of women's universal access to a legal and safe abortion. It should be observed that according to the generally recognised UN documents on abortion, e.g. the Programme of Action of the United Nations International Conference on Population and Development, Cairo, 1994, abortion should be perceived as the *ultima ratio* and it does not represent a method of family planning.

It should be noted that Polish law in this regard has its sources in the Constitution and is conditioned by a widely shared care of the Polish society for the respect for life.

The Government of the Republic of Poland believes that the citizens' legislative initiative is an expression of an effectively working civil society. It is debatable whether such initiative may be exercised by a group of people whose number is 100 000. Every domestic order is empowered to shape this level in a sovereign way. However, it should be noted that every citizens' initiative regarding legislative regulations will be subject to parliamentary assessment, which will include a check on its conformity with the applicable law. The present legal situation in respect of the criminalisation of abortion is not a sensation on a European scale and has been developed in conformity with the principles of a democratic state ruled by law. At the same time it should be observed that every sanction relating to criminal behaviour should also fulfil the role of deterrence.

#### **Comment to paragraph 182 of the Report:**

Addressing the criticism of the "conscientious objection clause", it should be noted that it obviously ignores the significance attributed to the possibility of expressing "conscientious objection" to acts that are against an individual's deepest beliefs both by the Polish Constitution and other acts of international law. The following acts should be invoked in this respect:

- Article 18 of the UN Universal Declaration of Human Rights
- Article 18(1) the ICCPR
- Article 9 of the European Convention on Human Rights - most recent case law of the ECHR explicitly allows the possibility of inferring a right to conscientious objection from Article 9(1) of the ECHR (see judgements of 7 July 2011, *Bayatyan v. Armenia*, application No 23459/03 and of 10 January 2012 on *Bukharatyan v. Armenia*, application No 37819/03 - with respect to military service)
- Resolution No. 1763 of the Parliamentary Assembly of the Council of Europe of 7 October 2010 on the right to conscientious objection in lawful medical care, which naturally follows up on the position adopted by the Parliamentary Assembly of the Council of Europe in the 1960s, and expressed in Resolution No. 337 of 1967 on the right of conscientious objection, and in Recommendation No. 478 of 1967 on the right of conscientious objection.

The paragraph discusses the possibility of invoking the so-called “conscientious objection clause” by an entire hospital.

In this context it should be noted that the Act on Family Planning, Foetus Protection, and the Conditions for Abortion of 7 January 1993 gives individuals covered by social insurance, and individuals who are eligible for free-of-charge healthcare under different provisions, the right to a free abortion at healthcare facilities. A list of guaranteed services related to abortion is specified in annex 1 to the Minister of Health’s Ordinance of 22 November 2013 on Guaranteed Hospital Treatment Services (Journal of Laws, item 1520, as amended).

Consequently, it should be noted that by providing guaranteed healthcare services, the service providers fulfil contractual obligations arising from the relevant contract with the National Health Fund (NHF). The obligatory terms of contracts with service providers are set out in the general terms and conditions of healthcare service contracts (GTC), attached to the Minister of Health’s Ordinance on the General Terms and Conditions of Healthcare Service Contracts of 8 September 2015 (Journal of Laws, item 1400).

§ 3 of the GTC obligates the service provider to carry out the contract in accordance with the terms of service provision set out in the statute and its implementing provisions (in particular, regulations on guaranteed services), general terms and conditions, and specific terms and conditions of contract laid down by the NHF President. Also, the service provider is obliged to provide services with due diligence, and to comply with patients’ rights arising from the applicable law. It should be also pointed out that pursuant to § 9(1) of the GTC, the service provider renders services throughout the term of the contract, in line with a contractual schedule of work, and a material and financial plan attached thereto.

By signing a contract to provide healthcare services, the service provider undertakes to render all services that the relevant implementing regulations of the statute describe as guaranteed, according to the scope and type of services specified in the contract.

The NHF is not concerned with how the service provider fulfils the contract. In the event that services cannot be rendered, and this could not be predicted beforehand, the



service provider must take immediate action to maintain the continuity of service provision (refer the patient to another service provider that performs a specific service), while notifying a regional NHF office of such a situation and the actions taken.

It should be also underlined that in accordance with § 8 of the GTC, the service provider should ensure a comprehensive service, including the required laboratory tests and medical imaging, and medical procedures accompanying the provision of these services. As a result, in the event that a doctor who pursues his or her profession on the basis of employment or service relationship informs the service provider about the possibility to refuse to provide a service in the circumstances specified by the provision in question, *i.e.* invoking the “conscientious objection clause”, the service provider must ensure the different possibility to render the service. Healthcare facilities should organize their health services in a way that ensures, on the one hand, that doctors can practice their profession in agreement with their conscience, and, on the other hand, that female patients have unhindered access to the health services they are entitled to.

Non-performance of services represents a breach of contract, which can entail a contractual penalty for the service provider under § 29 and sub. of the GTC, or even a termination of the contract pursuant to § 36 of the GTC.

Thus, as a rule, all healthcare facilities (hospitals) which concluded a contract with the NHF are under the obligation to render the services provided for therein, comprehensively and in accordance with the applicable law. The invocation of the “conscientious objection clause” should not infringe upon this obligation.

Notice should also be taken of the fact that conscience is an individual category, which means that it is only individuals who can invoke the “conscientious objection clause”. It is the right to a free (*i.e.* free of any pressure) self-determination in the matters of belief, a condition that is not met by a collective refusal. Therefore, a hospital may not declare that it will not carry out abortions even though it performs gynaecological and obstetric services. Such a declaration would presuppose some kind of “collective conscience” of all the doctors employed at a given facility, a proposition that runs counter to the very nature of the “conscientious objection clause”. It is worth referring to a position paper no. 4/2013 of 12 November 2013 on the “conscientious objection clause” issued by the Bioethics Committee of the Presidium of the Polish Academy of Sciences. The Committee pointed out that “legal and deontological regulations pertaining to the “conscientious objection clause” do not define the concept of conscience, and do not specify what kind of beliefs held by a member of the medical profession this institution protects. What is beyond doubt, however, is that conscience is characteristic of a specific person. Institutions and organisations do not have it. It is therefore only a natural person who can refuse to perform a health service for reasons of conscience. The invocation of these regulations by healthcare facilities within the meaning of the Healthcare Activities Act of 15 April 2011 should be considered as an abuse that goes against the purpose of the regulation.”

Such wording of the aforementioned provisions is supposed to ensure the realization of patients’ right to healthcare services arising from Article 68(1) and (2) of the Polish Constitution, and information right pursuant to the Law on Patients’ Rights and the Commissioner for Patients’ Rights of 6 November 2008.

#### **Comment to paragraph 184 of the Report:**

It would seem that the decision concerning Italy by the European Committee of Social Rights discussed at length in this paragraph should only be treated as a commentary, since it stands in no direct relation to the Republic of Poland, or the applicable national legislation.

#### **Comment to paragraph 185 of the Report:**

Claims about the material influence of the “conscientious objection clause” and the criminalisation of abortion on restricting access to reproductive health, in para. 185 and subsequent, should be considered as not substantiated by any evidence. The English summary of the Ombudsman’s Report cited in footnote 114, supposed to point to the weakness of the existing procedure for appealing against refusal to perform abortion, is also short on evidence – all it mentions are signals coming from some NGOs, unspecified by name.

This paragraph of the Report states that the right to lodge an objection against a medical opinion or decision – pursuant to provisions of the Act of 6 November 2008 on Patient’s Rights and on the Commissioner for Patients’ Rights (Journal of Laws of 2016, item 186) – does not constitute an effective mechanism for protecting women’s reproductive rights.

It should be said at the outset that provisions under review have been introduced into the Polish legal system in order to implement the judgement of the ECHR in the *Tysic v. Poland* case; they also implement the judgement in the *R.R. v. Poland* case, as it must be pointed out that when the circumstances that gave rise to the latter application against Poland and the ensuing judgment by the Court took place, the provisions of the Act of 6 November 2008 on Patient’s Rights and on the Commissioner for Patients’ Rights were not in force.

This Act recognises a patient’s right to object to a medical opinion or decision if it affects her rights or obligations under law. This right is an effective legal remedy for women who have been denied an abortion (in the circumstances set out in the Act of 7 January 1993 on Family Planning, Foetus Protection, and the Conditions for Abortion), referral for prenatal testing, and in the event when prenatal testing has not been carried out despite the referral.

Under the above Act, any objection to an opinion or decision issued by a doctor or a dentist may be lodged with the Medical Board for the Commissioner for Patients’ Rights, when such medical opinion or decision affects the patient’s rights or obligations under law. The time limit for lodging the objection is 30 days from the date the opinion or decision was issued by a doctor who examined a patient. The objection must be substantiated, including by indicating a legal provision that gives basis to rights or obligations affected by the contested medical decision or opinion. Acting on the medical records and, where necessary, after examining the patient, the Medical Board promptly issues its decision, not later than within 30 days from the date the objection was lodged.

It must be noted here that the discussed right to lodge an objection to a medical opinion or decision is of a general nature, *i.e.* it has not been limited only to the refusal to permit an abortion under circumstances defined in the Act of 7 January 1993 on Family

Planning, Foetus Protection, and the Conditions for Abortion. Making this rule general was an intentional policy intended to protect all patients in the event when a medical opinion or decision affects a patient's rights or obligations under law (and when no other appeal procedure exists to pursue those rights). It does not in any way imply that pregnant patients have limited access to this procedure or that its wording does not respond to the circumstances set out in the quoted Act of 7 January 1993 on Family Planning, Foetus Protection, and the Conditions for Abortion.

A case which happened in 2013 is a positive example here. On 30 July 2013, the Commissioner for Patients' Rights received a letter from a patient objecting to a medical opinion which found the inadmissibility of termination of pregnancy under the aforementioned Act of 1993. The objection satisfied the formal requirements set out in Article 31 of the Act on Patient's Rights and on the Commissioner for Patients' Rights. A three-person Medical Board was convened very quickly, on 1 August 2013. The Medical Board met at the office of the Commissioner for Patients' Rights, on 7 August 2013. The patient was informed of her right to be present at the meeting, which she did not exercise. The Medical Board unanimously upheld the medical opinion contested by the patient, reaffirming the inadmissibility of termination of pregnancy. The Board's decision was communicated to the patient.

The above example clearly indicates that the objection procedure does fulfil the requirement for a legally regulated and effective remedy against a medical opinion unsatisfactory to a patient, also with respect to meeting the admissibility criteria for a legal abortion.

Objections examined by the Medical Board afterwards only confirm that those provisions work in practice and guarantee an effective remedy as regards the exercise of rights whose violation forms the subject of the objection.

In 2014, the Office of the Commissioner for Patients' Rights received a total of 34 objections. Two of them pertained to the admissibility criteria for an abortion under Article 4a(1)(1) of the Act of 7 January 1993 on Family Planning, Foetus Protection, and the Conditions for Abortion.

In 2015, the Office of the Commissioner for Patients' Rights received 36 objections to a medical opinion or decision. One of the objections involved an appeal against a medical decision issued by the Interdisciplinary Team for Foetal Abnormalities within the Institute of Mother and Child in Warsaw, which found no medical indications for an abortion.

Besides the aforementioned right to lodge an objection, it must be noted that pursuant to provisions of the Act of 6 November 2008 on Patient's Rights and on the Commissioner for Patients' Rights, the Commissioner for Patients' Rights has been granted the following authority to ensure the protection of patients' rights:

- 1) conducting proceedings with respect to practices that infringe on patients' collective rights;
- 2) conducting proceedings under Articles 50-53 of the Act;
- 3) pursuance of duties defined in Article 55 of the Act in civil matters;

- 4) developing draft legal acts relating to the protection of patients' rights and submitting them to the Government;
- 5) requesting relevant authorities to take a legislative initiative or to issue or amend legal acts on the protection of patients' rights;
- 6) developing and publishing papers and educational programmes that raise the awareness of the protection of patients' rights;
- 7) collaborating with public authorities in order to ensure that patients' rights are respected, in particular with the minister competent for health;
- 8) providing relevant public authorities, organisations, institutions and boards of medical profession associations with appraisals and conclusions meant to ensure effective protection of patients' rights;
- 9) collaborating with non-governmental, social and trade organisations whose statutory goals include the protection of patients' rights;
- 10) analysing patients' complaints to determine threats and areas for improvement in the healthcare system;
- 11) carrying out other tasks set out in laws or ordered by the Prime Minister.

It must be also noted that the Office of the Commissioner for Patients' Rights keeps a free countrywide helpline to facilitate contact with all the interested individuals. The helpline is a tool of the Commissioner's information and education activities. Such channel makes it possible for Office staff to provide faster and more effective help, in particular to provide necessary information on patients' rights and take appropriate measures to resolve the signalled problems.

In 2014, the Commissioner for Patients' Rights conducted 49 investigations involving pregnant women to establish whether patients' rights had been breached.

It must at the same time be remarked that according to the Commissioner for Patients' Rights data, female patients prefer to exercise their rights in an unofficial manner. Hence they far more often report a problem through the Commissioner's helpline or during a visit to the Commissioner's Office rather than use their right to file an objection. The choice of a form of appeal rests with the patient and depends on a variety of reasons; it cannot be equated with the inefficiency of the remedy under discussion. For example, in 2012 the Commissioner for Patients' Rights received 63,913 submissions about possible violations of patients' rights. This number, which includes written and telephone submissions and visits to the Commissioner's Office, undoubtedly speaks of the trust the Commissioner for Patients' Rights has among the patients.

#### **Comment to paragraph 186 of the Report:**

The Commissioner writes that there is a lack of oversight mechanisms to guarantee the availability of prenatal testing, relying only on the Communication submitted to the Committee of Ministers of the Council of Europe by FEDERA, a Polish NGO which is part of the International Planned Parenthood Federation (footnote 115).

The paragraph in question states that the female patient's right to be heard by the Medical Board which examines her objection is not guaranteed, but as a matter of fact this right has been guaranteed by provisions of the Ordinance of the Minister of Health of 10

March 2010 on the Medical Board for the Commissioner for Patients' Rights. According to Article 4 of the above ordinance, a patient or his statutory representative may attend a Medical Board meeting, except for the discussion and voting part, and to give information and make statements in the case.

The paragraph in question also brings up the issue of a lack of efficient oversight and monitoring mechanisms to guarantee that prenatal testing is available and accessible in practice. As the paragraph has been inserted in the Report part devoted to the objection to a medical opinion or decision, it should be assumed that the Commissioner's intention has been to draw attention to *e.g.* refusal to refer women for such testing as the subject of the objection.

At this point it must be noted that in accordance with Article 25 of the Act of 6 November 2008 on Patient's Rights and on the Commissioner for Patients' Rights, medical records contain a description of the patient's health or healthcare services provided to him or her. Such description of the patient's health should include indications for prenatal testing. It must be noted that access to the programme of prenatal testing is regulated by the Ordinance of the Minister of Health of 6 November 2013 on guaranteed medical services under health programmes. The programme of prenatal testing is featured in the appendix to the aforementioned Ordinance in the list of guaranteed medical services under preventive health programmes and conditions for their implementation. The programme defines the scope of procedures carried out under guaranteed services, eligibility criteria for the service recipient and eligibility criteria for the service provider. As far as eligibility criteria for the service recipient are concerned, a pregnant woman must meet at least one of the following criteria:

- 1) over 35 years of age;
- 2) chromosome aberrations in the foetus or child in the previous pregnancy;
- 3) confirmed structural chromosome aberrations in the pregnant woman or the child's father;
- 4) confirmed considerably higher risk of giving birth to a child with a monogenetic or multifactorial disease;
- 5) confirmed abnormal result of ultrasonography or biochemical tests during the pregnancy which indicate an increased risk of a chromosome aberration.

Performing the tests in question within a specified time frame is conditioned on a possibly early diagnosis of a possible abnormality in the foetus or its illness and taking an adequate medical intervention.

It must be remembered that prenatal testing is most of all preventive and diagnostic, and that it allows confirming or excluding foetal defect or illness; its performance should not be equated only with ascertaining the admissibility of abortion. It is wrong to assume that the only purpose behind such testing is each and every time to perform a legal abortion on the basis of its results. Modern medicine offers a possibility of treating some malformations already during the pregnancy, while others can be treated after the child is born. Refusal to refer a patient for prenatal testing amounts to a serious breach of patient rights. Early diagnosis of malformations helps to better prepare for a child who, because of its health conditions, will require special care. This subject is of extreme importance not only to the

doctor, who can plan an efficient treatment, but also to the child's parents. Besides, diagnosing a high probability of a severe and irreversible foetal disability or an untreatable disease that threatens its life only provides the woman with knowledge about its health.

On account of the above, as regards referring for and performing such tests, a doctor may not invoke the "conscientious objection clause" and refuse to perform them, even if he or she may expect that the woman might decide to have an abortion as a result. This constitutes a clear restriction on the patient's right to information; a diagnostic test alone cannot be equated with an abortion.

Provisions of Article 4a(2) of the Act of 7 January 1993 on Family Planning, Foetus Protection, and the Conditions for Abortion (Journal of Laws no. 17, item 78, as amended) define the time limit until which abortion is permitted, laying down that in cases specified in Article 4a(1)(2) abortion is permitted until the foetus is capable of surviving outside the pregnant woman's body, whereas in cases specified in (3), abortion is permitted until the end of the first 12 weeks of pregnancy.

The lack of referral for prenatal testing within a period allowing results of such testing to be received before the elapse of the time limit mentioned above deprives the patient of the right to information about her health and, consequently, the right to take an informed decision about the pregnancy, including its termination, when the condition has been fulfilled under Article 4a(1)(2) of the Act of 7 January 1993 on Family Planning, Foetus Protection, and the Conditions for Abortion.

In its judgement of 13 October 2005 (case no. IV CK 161/05), the Supreme Court stated that "recognising the controversies caused in the international case law and doctrine by claims brought by giving birth to a disabled child who would not have been born if the doctors had provided the parents with information enabling them to have a legal abortion taking into account the fact that the aforementioned Act of 7 January 1993 on Family Planning, Foetus Protection, and the Conditions for Abortion gives the parents a right to conscious family planning and gives the woman the right to terminate the pregnancy in a situation set out in Article 4a(1)(2), *i.e.* for the so-called genetical reasons, such rights must be deemed to be subjective rights of the parents the violations of which entails liability for damages. When prenatal testing or other medical indications point to a high probability of a severe and irreversible foetal disability, the parents have the right to take an informed decision on a question whether they want and can take a burden of giving birth to a disabled child on themselves and their family. In such circumstances they may decide to terminate the pregnancy. A doctor's action or abandonment of action that leads to the refusal to refer a patient for relevant prenatal testing or a genetic clinic when there is a high risk that the foetus has a genetic defect, failure to provide the parents with full information about such risk and about the ways, procedures and dates by which such defect can be found constitutes a breach of the doctor's duties and the patient's rights, as well as the parents' right to family planning and taking an informed decision to have a child with a genetic defect or to terminate the pregnancy, in accordance with provisions of the aforementioned Act. Preventing the parents from exercising those rights which leads to giving birth of a disabled child against their will entails the responsible entity's liability to pay adequate compensation under Article 448 of the Law of 23 April 1964 – the Civil Code (Journal of Laws No 16, item 93, as amended), hereinafter referred to as the CC, for the personal injury suffered as a

result of violation of their rights. The violation of the aforementioned subjective rights also justifies compensation claims under Article 444(1) in conjunction with Article 361(1) and 2 of the CC which involve not only financial loss of the costs of pregnancy and labour or the mother's opportunity loss after giving birth to a disabled child, but also the loss arising from the necessity to incur increased costs of living related to a disabled child. It must be stressed that the parents' loss does not involve the very fact of giving birth to a child with a genetic defect as under no circumstances can the birth of a human being be deemed a loss, also within the meaning of the civil law. Their loss consists in a financial loss defined in Article 444 in conjunction with Article 361(2) of the CC out of the obligation to incur additional costs of a disabled child's upbringing and education, the costs they did not expect, did not agree to bear, and would not have had to bear if their right to family planning and taking a decision to terminate the pregnancy had not been breached. There is a causal link between the parents' financial loss construed in that way [Article 361(1) of the CC] and the above-mentioned doctors' negligence that deprives the parents of the possibility to decide on an abortion and that is what the doctors are liable for."

In the judgement quoted above, the Supreme Court also ruled that "determining adequate damages is justified in the event of a causal link within the meaning of Article 361(1) of CC between the loss and the actions of the party liable to damages. Such link exists when the doctor's negligence as regards the assessment of the risk of a genetic defect in the foetus, giving information about such risk and the necessity to perform relevant prenatal testing within specified time, referring for such testing or to a relevant specialist, prevented the woman from having an abortion under Article 4a(1)(2) of the Act of 7 January 1993 on Family Planning, Foetus Protection, and the Conditions for Abortion".

Addressing the issue of the availability of prenatal testing it should be noted that the programme of prenatal testing (carried out pursuant to abovementioned Ordinance of the Minister of Health of 6 November 2013 on guaranteed medical services under health programmes) provides for the following procedures: ultrasound examination of the foetus per the standards of the Ultrasound Section of Polish Gynaecological Society; biochemical tests (serum markers: PAPP-A – A-Pregnancy Associated Plasma Protein, 3-hCG – free human chorionic gonadotropin (beta subunit), AFP – Alpha-fetoprotein, Estriol – free estriol), computer assessment of risk of foetal disease; geneticist's advice; invasive testing when required by medical indications: collecting material for genetic testing by amniocentesis or biopsy of amniotic fluid or percutaneous umbilical cord blood sampling and genetic testing of foetal material.

The 2015 data on the services in question are presented below.

**Table 1. Programme of prenatal testing in 2015 (by provinces)**

Item	Name of provincial office of National Health Fund	Value of contracted services (PLN)	Value of performed services (PLN)	Number of service providers
1	DOLNOŚLĄSKI	3,643,560	3,597,864	6
2	KUJAWSKO-POMORSKI	4,225,289	4,214,189	5
3	LUBELSKI	1,069,394	1,068,962	3
4	LUBUSKI	2,157,311	1,457,190	5

5	ŁÓDZKI	3,489,512	3,383,879	11
6	MAŁOPOLSKI	3,903,388	3,788,133	6
7	MAZOWIECKI	5,849,435	5,725,982	8
8	OPOLSKI	1,479,755	1,490,748	2
9	PODKARPACKI	1,622,760	1,374,170	2
10	PODLASKI	1,344,015	1,343,696	2
11	POMORSKI	2,551,101	2,582,121	5
12	ŚLĄSKI	13,726,883	13,346,143	31
13	ŚWIĘTOKRZYSKI	1,392,080	1,392,080	2
14	WARMIŃSKO-MAZURSKI	1,299,564	1,299,501	2
15	WIELKOPOLSKI	4,636,772	4,588,102	10
16	ZACHODNIOPOMORSKI	1,969,058	1,969,039	2
	<b>Total</b>	<b>54,359,877</b>	<b>52,621,799</b>	<b>102</b>

Source: National Health Fund Head Office

**Table 2. Programme of prenatal testing in 2015 (by age groups)**

Item	Name of provincial office of National Health Fund	Number of patients		
		2015		
		under 35	35 and over	Total
1	DOLNOŚLĄSKI	2,378	3,628	6,006
2	KUJAWSKO-POMORSKI	3,859	2,148	6,007
3	LUBELSKI	399	1,437	1,836
4	LUBUSKI	2,517	1,012	3,529
5	ŁÓDZKI	1,893	3,239	5,132
6	MAŁOPOLSKI	2,643	3,292	5,935
7	MAZOWIECKI	2,478	4,858	7,336
8	OPOLSKI	1,173	983	2,156
9	PODKARPACKI	1,308	1,673	2,981
10	PODLASKI	713	1,343	2,056
11	POMORSKI	1,609	2,627	4,236
12	ŚLĄSKI	18819	7,468	26,287
13	ŚWIĘTOKRZYSKI	1,107	1,112	2219
14	WARMIŃSKO-MAZURSKI	1,069	1,411	2,480
15	WIELKOPOLSKI	6,188	3,148	9,336
16	ZACHODNIOPOMORSKI	920	2,243	3,163
	<b>Total</b>	<b>49,073</b>	<b>41,622</b>	<b>90,695</b>

Source: National Health Fund Head Office

**Table 1. Programme of prenatal testing in 2015 (by procedures)**

Name of product	Number of delivered products
AMNIOCENTESIS	5,889
BIOCHEMICAL TESTS- AFP	5,571



BIOCHEMICAL TESTS - BETA-HCG	59,800
BIOCHEMICAL TESTS - ESTRIOL	1,078
BIOCHEMICAL TESTS - PAP P-A	59,733
GENETIC TESTS INVOLVING MOLECULAR AND BIOCHEMICAL ASSESSMENT OF FOETAL MATERIAL	5,643
ULTRASOUND EXAMINATION I TRIMESTER	62,081
ULTRASOUND EXAMINATION II TRIMESTER	54,049
BIOPSY OF AMNIOTIC FLUID	375
PERCUTANEOUS UMBILICAL CORD BLOOD SAMPLING	105

*Source: National Health Fund Head Office*

Finally, addressing the reservations in para. 185 and 186 of the Report about the functioning and efficiency of the procedure for lodging an objection against a medical opinion or decision, it must be noted that a draft law is being drafted to amend the relevant laws in force, i.e. draft law amending the Act on Patient's Rights and on the Commissioner for Patients' Rights and some other acts.

**Comment to paragraph 187 of the Report:**

The claim of the "chilling effect" of the criminalisation of abortion is not supported by any evidence, and it only refers to the line of reasoning expressed by the ECHR in the *Tysi c v. Poland* judgement (footnote 116), failing to take into account the current legislation and practice in this area.

**Comment to paragraph 189 of the Report:**

It must be noted that the draft law referred to in the paragraph is a civic draft law. In accordance with the Constitution of the Republic of Poland, the right to introduce legislation belongs to the Government, deputies, Senate, President of the Republic of Poland and a group of at least 100,000 citizens having the right to vote in general elections.

The Ministry of Health currently does not work on any draft law to amend the Act of 7 January 1993 on Family Planning, Foetus Protection, and the Conditions for Abortion that would ban abortion.

One cannot make an accusation against legally functioning organisations in Poland for trying to make use of the right, to which they are entitled, to prepare under conditions strictly defined by law a legislative initiative in accordance with the system of values professed by this group of citizens. Rather, it should be perceived as a manifestation of the activity of developed civil society institutions.

The Commissioner's concern at a citizens' initiative in this regard contradicts the criticism of an alleged restriction of public debate expressed in para. 124 and sub. paragraphs of the Report.

### **Comment to paragraph 190 of the Report:**

Addressing the recommended right of women, including adolescent girls, to receive information about sexual and reproductive health, it should be noted that Polish laws<sup>22</sup> obligate the doctor to provide the patient or his statutory representative with accessible information about his or her health, diagnosis, proposed and possible diagnostic and therapeutic methods, foreseeable effects of their application or non-application, treatment results and prognosis. Such medical obligation also applies to minor patients over 16 years of age.

If the patient is under 16 years of age, the doctor provides the information to his or her relatives. Within the meaning of Article 3(1)(2) of the Law of 6 November 2008 on Patient's Rights and on the Commissioner for Patients' Rights, a relatives includes a relative or a relative by affinity up to the second degree in the direct line, a statutory representative, or a person indicated by the patient. The doctor provides a patient under the age of 16 with the information in the scope and form needed for correct diagnostic and therapeutic process and hears his or her opinion.

The patient's rights to receive such information are established by provisions of the Act of 6 November 2008 on Patient's Rights and on the Commissioner for Patients' Rights. As is the case with the doctor's obligation, the right to information also applies to a minor who is under the age of 16. A minor patient under the age of 16 has the right to be provided with the information in the scope and form needed for correct diagnostic and therapeutic process.

The legal provisions in question regulate rights and obligations in the area of access to health information, hence they also apply to information about intimate health, including reproductive health.

### **Comments to paragraph 191 of the Report:**

In line with the applicable legal provisions, the organisation of classes on "family life education" which include contents concerning knowledge about human sexual life, the rules of conscious and responsible parenthood, the value of the family, life in pre-natal phase and methods and means of conscious procreation, is the duty of the school.

In addition, the content concerning caring for one's body, the structure and function of male and female sex organs, the stage of human development (including life in the pre-natal phase) and changes occurring in bodies during puberty are present in the core curriculum of the following mandatory educational classes: "natural science" (grades 4-6 of elementary school) and "biology" (lower secondary school and upper secondary school - extended curriculum).

In the opinion of the Government of the Republic of Poland, access to information, education and counselling in sexual and reproductive health is every citizens' right, not a duty.

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<sup>22</sup> Act of 5 December 1996 on the Medical and Dentist Profession (Journal of Laws of 2015, item 454, as amended).

Participation in “family life education” classes is thus a way of implementing this right and, as such, cannot be made absolutely mandatory (i.e. not giving the option of not attending such classes).

For this very reason, having regard also for the rights of parents to bring up their children according to their beliefs<sup>23</sup>, the legislative provisions on the method of school teaching and the scope of the content concerning knowledge about sexual life of humans, on the rules for conscious and responsible parenthood, about the value of the family, life in the pre-natal phase and the methods and means of conscious reproduction contain solutions that allow for resignation by the pupil’s parents or by the pupil who is of age himself or herself from attending “family life education” classes.

In the opinion of the Government of the Republic of Poland, the applicable legal provisions ensure that all citizens in Poland have equal right “(...) to non-discriminatory information, based on facts about sexual and reproductive life, while respecting their dignity and autonomy (...)” and that there are no grounds justifying the need to undertake additional activities in this regard.

**Comment to paragraph 192 of the Report:**

Addressing the recommended removal of barriers in access to contraception for all women throughout Poland, one should go back to data quoted above in the comment on para. 178. They illustrate access to methods and measures for conscious reproduction.

**Comment to paragraph 193 of the Report:**

Addressing the recommended decriminalisation of abortion, it should be noted that no amendments are planned to provisions of the Act of 7 January 1993 on Family Planning, Foetus Protection, and the Conditions for Abortion that regulate this matter.

**Comment to paragraph 194 of the Report:**

Conscientious objection clause

According to Article 39 of the Act of 5 December 1996 on the Medical and Dentist Profession (Journal of Laws of 2015, item 454, as amended), doctors may refuse to provide medical services that are against their conscience, subject to Article 30 thereof, but with the obligation to indicate realistic options for receiving such services from another doctor or medical institution and to justify and duly note the decision in medical records. A doctor performing his or her duties under employment relationship or as part of service is furthermore obliged to notify his superior in writing beforehand. Article 30 of the Act of 5 December 1996 on the Medical and Dentist Profession, invoked above, states that doctors have the duty to provide medical assistance in each case when a delay in its administration can carry a risk of death, grievous bodily harm or serious health disorder, and in other urgent cases.

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<sup>23</sup> Guaranteed under Article 48(1) of the Constitution of the Republic of Poland.

The mentioned provisions in their existing form partially expired pursuant to the Constitutional Tribunal's judgement of 7 October 2015, case no. K 12/14 promulgated on 16 October 2015 in the Polish Journal of Laws under item 1633. The following provisions lost their binding force by virtue of this judgment as from that date:

- 1) Article 39, the first sentence in conjunction with the Act of 5 December 1996 on the Medical and Dentist Profession (Journal of Laws of 2015, item 464, as amended) in the extent to which they imposed an obligation on doctors to provide medical services that are against their conscience in "other urgent cases";
- 2) Article 39, the first sentence of the Act of 5 December 1996 on the Medical and Dentist Profession in the extent to which they imposed an obligation on doctors refusing to provide medical services that are against their conscience to indicate realistic options for receiving such services from another doctor or medical institution.

For the above reasons, efforts should be taken to work out a universal mechanism that would establish general procedures for all cases in which doctors refuse to provide medical services that are against their conscience. What is essential here is the need to secure doctors' right to refuse to provide such services on the one hand, while on the other ensuring that patients will receive services they are entitled to (and ensuring the exercise of the patient's right to information).

Addressing the recommended full observance of judgements of the ECHR that pertain to reproductive health (*i.e.* judgments in cases: *Tysiąc v. Poland*, *R.R. v. Poland*, and *P. and S. v. Poland*) it should be noted that Poland has submitted reports on measures taken to implement all those judgements. Furthermore, as has been mentioned above, the implementation of the above-mentioned judgements was facilitated by the statutory definition of the patient's right to lodge an objection against a medical opinion or decision, in the Act of 6 November 2008 on Patient's Rights and on the Commissioner for Patients' Rights. Arguably, the mechanism established with this respect should be deemed efficient; however, responding to the voices from civil society and numerous discussions held on this subject within the inter-ministerial Committee for Matters of the European Court of Human Rights (which hosted representatives of non-governmental organisations, the Commissioner for Patients' Rights, and the Ombudsman), a draft law has been prepared which provides for considerable changes in the objection procedure. Proposed provisions of the act amending the Act on Patient's Rights and on the Commissioner for Patients' Rights and some other laws incorporate findings and conclusions reached in the course of those discussions.

The proposed changes are as follows:

- 1) to simplify the objection procedure against a medical opinion or decision, by abandoning the requirement that the patient's objection must be substantiated with an indication of a legal provision that gives basis to rights or obligations affected by the contested medical decision or opinion (the change took into account proposals by the Committee for Matters of the European Court of Human Rights, which argued that the legislator had laid down too demanding a requirement for persons willing to exercise their right of objection, a requirement which involved invoking a legal provision that gives basis to the

patient's rights and obligations under pain of the objection's being returned without examination);

- 2) to specify more precisely that the patient has the right to objection also in the event when a medical opinion or decision has been refused and when a referral for diagnostic testing has been refused, if they are indispensable to have such opinion or decision issued (to make such objection more effective, any refusal should be noted in the patient's medical records, hence a statutory obligation has been proposed to make relevant entries to that effect);
- 3) to shorten to 10 days the time limit for the Medical Board to issue its decision in response to the patient's objection to a medical opinion or decision;
- 4) to incorporate in the Act a provision that enables the patient or the patient's statutory representative to attend a Medical Board meeting, except for the discussion and voting part, and to give information and make statements in the case (now this provision arises under the Ordinance of the Minister of Health of 10 March 2010 on the Medical Board at the Commissioner for Patients' Rights; Journal of Laws no 41, item 244);
- 5) to introduce a regulation allowing the patient to appoint a representative before the Medical Board;
- 6) to introduce an option to lodge objection in electronic form through the Electronic Platform of Public Administration Services (ePUAP), in order to simplify the objection procedure and make it easier for interested patients to exercise this right;
- 7) to unequivocally define the status of a decision issued by the Medical Board (it has been proposed that such decision should replace the contested opinion or decision).

The Government is expected to adopt the draft law in question in the third quarter of 2016.

#### **Comment to paragraphs 195 and 196 of the Report:**

Finally, urging the Polish authorities in para. 196 to decriminalise abortion in the name of protecting women's health, the Commissioner once again only cites the Concluding observations of the UN Human Rights Committee (footnote 119), which are not supported by statistical data on the influence of the criminalisation of abortion on women's health; the said observations are rather a manifestation of the Committee members' beliefs than a thorough analysis of the issue under discussion.

As has been mentioned above, no work is currently underway to amend the provisions of the Act of 7 January 1993 on Family Planning, Foetus Protection, and the Conditions for Abortion.

It should be noted that on the basis of the Constitution of the Republic of Poland and the values that are widely shared by the Polish society there is no justification for an interpretation of the right to abortion as a right to which women are, so to say, naturally entitled. It is difficult to conclude that such interpretation of the right to abortion exists in the international obligations assumed by Poland.