

Liability of public authorities

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Contents

- Public authorities' liability for damages..... 3
- The king can do wrong 6
- Liability of the State Treasury for injury caused by violation of EU law 8
- Liability of public authorities in the real estate development process 11
- Excessive length of proceedings and its consequences 14
- Authors 19
- About Wardyński & Partners 21

Public authorities' liability for damages

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The topic of liability for damages on the part of public authorities is not widely known. Many people are not aware of the extensive rights at their disposal connected with actions by bodies of public authority. Consequently, injured parties often fail to pursue redress of losses suffered in connection with public administration.

Damages liability of public authorities is not a new feature of Polish law. Its genesis may be found in the Constitution of 1921, which provided for joint and several liability of the State Treasury and the body responsible for the injury. Relevant regulations were also included in the Act on Liability of the State for Injuries Caused by State Officials of 15 October 1956, which was then almost entirely carried over into Art. 417–421 of the Civil Code of 23 April 1964. These provisions of the Civil Code, apart from the repealed Art. 418–420², remain in force in this area down to the present day.

The institution of the liability of the State Treasury is no longer merely an expression of good will on the part of the Polish Parliament. The rights of every Polish citizen are also shaped by international law and European Union law, including the wealth of case law from the EU courts. The right to damages for exercise of public authority is also enshrined in Art. 77(1) of the Polish Constitution of 1997.

Damages liability of entities of public authority is governed by the Civil Code and specific regulations.

Liability in damages of entities of public authority for unlawful acts or omissions

A public authority is liable for injury caused by an unlawful act or omission in exercise of

its authority (Civil Code Art. 417 §1), and for injury arising out of issuance of a normative act (Art. 417¹ §1) or a final ruling or final decision (Art. 417¹ §2), or in connection with failure to issue a ruling or decision (Art. 417¹ §3) or normative act (Art. 417¹ §4) if an obligation to issue them is provided by law.

Entities of public authority which bear liability are the State Treasury, territorial governmental units, and other legal persons exercising public authority pursuant to law. Liability of the State Treasury is tied to the activity of specific organisational units whose bodies represent the State Treasury in damages cases (*stationes fisci*). These entities include for example ministers, province governors, bodies of “aggregated” government administration such as province environmental inspectors and province construction inspectors, and bodies of “non-aggregated” government administration such as the heads of tax offices and customs offices. Liability of entities of public authority may also arise for example in connection with the functioning of such units as the Agricultural Property Agency or the Agency for Restructuring and Modernisation of Agriculture.

The State Treasury also bears liability for unlawful acts or omissions in performance of the duties of bailiffs, but this liability is joint and several with the bailiff, who is primarily

liable to make up any loss he has caused (Art. 23 of the Act on Court Bailiffs and Execution of 29 August 1997).

However, the State Treasury is not liable for injury caused by a notary in performance of notarial duties. Upon entry into force of the Notarial Law of 14 February 1991, liability in damages was shifted onto the notary, who is required to maintain civil liability insurance (Notarial Law Art. 19a and 49).

Generally, liability of entities of public authority may arise in just about any area of economic life, in relation to the activity of businesses, individuals and public administration. This is particularly relevant to commercial entities, because due to the range and extent of their business operations, erroneous actions by public authorities can generate huge losses for them or a number of other negative consequences. The effect can be a reduction in their business, the inability to fill orders from customers, loss of market share, loss of reputation, the need to cut their workforce, and in extreme cases even bankruptcy.

Particularly glaring instances of losses by companies can result from the functioning of tax authorities and customs authorities. This can be tied in particular to erroneous imposition of financial obligations on businesses, or seizure of the taxpayer's goods or facilities during proceedings. These authorities are also equipped with legal instruments enabling them to quickly execute their decisions (for example before their actions can be reviewed by the administrative court, where they are subsequently held to be in error). Such actions can greatly hinder ongoing business operations, preventing the taxpayer from complying with its contractual obligations and negatively impacting its liquidity, thus generating losses.

Often it is not until many years later that the actions of public authorities are determined to be wrongful, and assets regained after a long period may be damaged or worthless.

The negative consequences of a wrongful action by a public authority may be suffered by entities operating in the power industry, mining, fuels, aviation or transportation, or various types of manufacturers who rely on licences and permits for their operations. Any erroneous denial or removal of a licence or permit can cause a loss for an entity that has made investments but has lost the possibility of operating in a given area.

Liability of entities of public authority may also be caused by refusal to issue an administrative decision or issuance of a decision not in compliance with the law. Such instances may occur for example in cases connected with the operations of real estate developers and construction companies. Refusal to issue a decision on construction conditions or a building permit, or issuance of defective decisions that are later challenged, can prevent development projects from being carried out or completed, and consequently lead to a loss of invested funds or anticipated profits. These issues are discussed in our article "Liability of public authorities in the real estate development process."

The violations mentioned above are just a few of the possible scenarios that can give rise to liability of bodies of public authority under the Civil Code.

Specific regulations in relation to the Civil Code

The grounds for liability of the State Treasury cited above are not exhaustive, as indicated in Civil Code Art. 421, which provides that Art. 417, 417¹ and 417² of the code do not apply if liability for injury caused in exercise

of public authority is governed by specific regulations.

Such specific regulations include the provisions of the Criminal Procedure Code governing liability for wrongful conviction or wrongful temporary arrest or detention (Criminal Procedure Code Art. 552–558). But it should be remembered that the issue of criminal liability may also be a consequence of suspicion of commission of an economic offence and can directly impact business operations. Wrongful actions by state authorities in such cases will have negative consequences not only for the individual involved in the criminal proceeding, but also for the enterprise the individual represents. The higher the position held by the individual, the greater is the damage to the reputation and the financial consequences for the firm.

Another basis for liability of the State Treasury for improper actions is the Excessive Length of Proceedings Act of 17 June 2004, regulating issues of liability for overlengthy proceedings. We discuss the liability of public entities under this act in the article “Excessive length of proceedings and its consequences.”

The State Treasury may also bear liability for damages based on bilateral investment treaties under which the Polish state has ensured foreign investors that their investments in the country will be protected. Claims by foreign investors under these treaties are pursued before international arbitral tribunals.

Liability of bodies of public authority for lawful actions

The instances discussed above of liability on the part of public authorities are tied to their actions in violation of regulations of law, and thus unlawful actions. But unlawfulness is not always a necessary condition for the liability of public authorities. In certain instances the state may be liable for lawful actions taken in the public interest.

These primarily involve expropriation issues, in connection with preparation of road development projects (Art. 12 ff. of the Act on Specific Rules for Preparation and Realisation of Public Road Projects of 10 April 2003) or zoning of property for public use (Art. 128 ff. of the Real Estate Administration Act of 21 August 1997). This same category includes for example losses arising from adoption of a zoning plan preventing or seriously limiting the use of all or part of a property (Art. 36 of the Zoning and Development Act of 27 March 2003).

Summary

Compared to other European solutions, the construction of damages liability of public authorities under Polish law provides broad possibilities to citizens. The various legal grounds, backed by established case law, gives injured parties strong instruments in the battle against acts and omissions of the authorities, and they are worth using.

The king can do wrong

Mikołaj Kubik, Agata Górska

It used to be accepted that the sovereign is infallible, and questioning the correctness of the sovereign's decisions was bound to end badly. Today, fortunately for the people, there are instruments for holding the authorities liable for their wrongful acts and omissions.

Poland's Civil Code of 1964, which recently marked 50 years in force, contained from the very beginning Art. 417, governing the liability of entities of public authority. This article has undergone numerous changes, however, and it no longer must be proved who exactly committed a violation of law. What does this mean for the injured party?

Under current law, the injured party does not have to indicate a specific person who is to blame for a violation that has caused negative consequences for the claimant. The construction of this provision indicates that the State Treasury, territorial governmental unit or legal person exercising public authority pursuant to law is responsible for such actions as for its own actions.

This rule is advantageous for the injured party, as it indicates that the liability of public authorities is not fault-based, and they cannot escape liability by proving they were not at fault. It is sufficient to show that the infringement was contrary to applicable law.

What are entities of public authority?

The catalogue of entities falling within the scope of public authority is quite extensive. Polish constitutional scholars take the view that it includes all entities of a state or local governmental nature equipped with the attribute of power, that is, the right to apply means of compulsion against citizens.

But the case law expands this category to include all entities performing public tasks. As the Supreme Court of Poland held in its judgment of 6 June 2014 (Case III CSK 211/13), "If performance of tasks in the area of public authority is assigned by agreement to a territorial governmental unit or other legal person, the performer of the tasks and the unit of territorial governmental assigning them or the State Treasury bears joint and several liability for injury."

The range of entities performing functions within the sphere of public authority has also been established in the case law of the Court of Justice of the European Union. The concept of entities acting as an "emanation of the state" was explained by the Court of Justice in *Foster* (C-188/89), defining it as "A body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond that which result from the normal rules applicable in relations between individuals."

Grounds for liability

There are three main conditions for liability of entities of public authority, which must all be met in order to rely on Civil Code Art. 417. They are injury, an unlawful act or omission in exercise of public authority, and

a causal connection between the act or omission and the injury.

In describing the first of these conditions—injury—it should be pointed out that this term is not defined in the context of Civil Code Art. 417. Thus the broad notion of injury used in Civil Code Art. 361 §2 should be adopted, comprising two constituent elements: *damnum emergens*, i.e. the actual loss determined by the reduced value of assets or increased value of liabilities of the injured party, and *lucrum cessans*, i.e. lost benefit, the inability to achieve potential gains in the future. It should be pointed out, however, that this interpretation applies to injury caused after entry into force of the current Constitution (of 1997). This interpretation was established by the judgment of the Constitutional Tribunal of 23 September 2003 (Case K 20/02). There the tribunal held that certain limitations on the liability of public authorities for existing or potential injury are unconstitutional—thus depriving the public authorities of the possibility of limiting the scope of their liability in damages.

The second condition for liability of entities of public authority is an unlawful act or omission. Unlawfulness arises in terms of public law, not in the sphere of civil relations. The act or omission must occur in connection with the exercise of public authority, or else it cannot be said that there is liability arising in the sphere of public power. “Unlawful” here is not regarded as identical to the notion of “contrary to law,” but is a broader concept. Unlike with the stricter notion of being contrary to law, the injured party need not demonstrate that the act or omission is contrary to positive law, i.e. reduced to the form of various acts of law, but may also show that the act or omission is inconsistent with principles of social coexistence. These principles

are much more flexible and give the injured party greater latitude in pursuing claims. Moreover, civil law commentators locate the source of this interpretation in the Constitution itself, which provides in Art. 2 that the Republic of Poland shall implement “principles of social justice.”

The last condition for liability is a causal connection between the other two conditions.

First the court will examine whether there was actually an act (or omission) causing a detriment to the plaintiff. The next step is to determine whether an injury actually occurred. Only after that is the causal connection examined in legal terms. The tort nature of the liability of entities of public authority is apparent in that there is an obligation on the part of the plaintiff, as the person with a legal interest in resolving the case, e.g. by obtaining damages, to prove that all of the conditions for liability are fulfilled. There is an exception for cases involving protection of personal interests (e.g. defamation), where there is a presumption under the code that a violation of personal interests was made unlawfully.

In the context of the conditions for liability of public authorities, it is essential to mention the prerequisite of a preliminary finding (*prejudykat*), that is, a determination in an appropriate proceeding of the unlawfulness of the action of the public authority. Obtaining a preliminary finding is not required when pursuing redress of injury under Civil Code Art. 417, but it is required when Art. 417¹ §§ 1, 2 and 3 are applicable. Thus this applies to a situation where the injury arose as a result of issuance of a normative act, a legally final judicial ruling, or a final administrative decision, or failure to issue a ruling or decision which is required by law to be issued. The condition of obtaining a preliminary finding was introduced into the Civil Code in

2004 when Art. 160 of the Administrative Procedure Code was repealed.

Consequently, liability in damages of the State Treasury and territorial governmental units is regulated quite broadly in the Civil Code. This, in combination with European legislation, provides injured parties the possibility of

effectively seeking redress of injury. However, demonstrating this liability and proving the conditions requires the injured party to take the initiative of coming forward with evidence to support the claim.



Liability of the State Treasury for injury caused by violation of EU law

Agnieszka Kraińska

It is theoretically possible to pursue damages from the State Treasury for injury caused by violation of EU law, such as non-implementation of directives. But procedural difficulties discourage most litigants from taking this path.

Art. 4(3) of the Treaty on European Union requires the member states and the EU to assist each other in carrying out their treaty obligations in “sincere cooperation.” The member states also promise to take all necessary means to perform their obligations under EU law, and thus to ensure the effectiveness of EU law in their territory. TEU Art. 19(1) in turn require the member states to “provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.” The Court of Justice of the European Union has stressed in its rulings numerous times that the principle of effective legal protection is a fundamental right protected by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, recognised by the member states through their common constitutional tradition.

The state’s liability for injury caused to individuals as a result of violation of rights vested

in them by EU law or national law constitutes an element of effective legal protection.

Grounds for liability

The key rulings by the Court of Justice for determining the rules of member states’ liability for violation of EU law are C-6/90 and C-9/90 *Francoovich* and *Bonifaci*, C-46/93 *Brasserie du Pêcheur*, and C-48/93 *Factortame*.

In these judgments, the Court of Justice held that a member state is liable if:

- The rule of law infringed is intended to confer rights on individuals
- The breach is sufficiently serious
- There is damage, and
- There is a direct causal link between the breach of the member state’s obligation and the damage sustained by the injured party.

The state is regarded as a whole, regardless of whether the violation causing the injury can

be attributed to the legislative, judicial, or executive authorities. The member state's liability is not conditioned on a previous judgment by the CJEU confirming the violation.

Serious violation

The notion of a sufficiently serious breach has been explained in the CJEU case law to mean a manifest and grave disregard of the limits on the exercise of the member state's discretion. In examining a breach, the degree of the clarity and precision of the violated norm should be considered, as well as the range of discretion left to the national authorities by the norm in question, the intentional or unintentional nature of the breach and the injury, the justified or unjustified nature of any error in applying the law, and whether the behaviour of any EU institution could have contributed to the failure to act or issuance or maintaining in force of regulations or national practice inconsistent with EU law.

It should be regarded as a serious breach when the violation has continued despite issuance of a judgment or preliminary ruling or the existence of established case law of the Court of Justice in the given area, demonstrating the unlawful nature of the behaviour by the member state. Failure to make timely transposition of a directive constitutes a serious breach of EU law.

Procedural autonomy

Damages are pursued in accordance with the national procedure, before the courts of the member state. Under the principle of equivalence, the conditions for reparation of loss laid down by the national law of the member state must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.

The national procedures may provide for a limitations period on pursuit of the claim, rules for determining the causal connection, mitigation of damages and valuation of the extent of the damages. But the rule is that the damages must cover both actual loss and lost benefits.

Polish procedure

Art. 417 of the Civil Code provides for the liability of the State Treasury for injury caused by an unlawful act or omission in exercise of public authority. Under Art. 417¹, the injury may be caused by issuance of a normative act, a final judgment or a final decision, or by failure to issue a normative act, judgment or decision. Art. 417¹ also provides that if the injury is caused by failure to issue a normative act which is required by law to be issued, the unlawfulness of failure to issue the act will be determined by the court hearing the case seeking damages.

But with respect to issuance of a normative act, final ruling or final decision, or failure to issue a ruling or decision, Art. 417¹ requires, as a prerequisite to filing an action for damages, an earlier proceeding (*prejudykat*) finding the normative act, final ruling or final decision to be unlawful, or finding that there is an obligation to issue a ruling or decision.

In light of the rules discussed above for a member state's liability for violation of EU law, the principle of effectiveness of legal protection and the CJEU's holding that there is no obligation to obtain an earlier judgment from the CJEU confirming the violation of treaty obligations by the member state, the requirement in Poland to obtain a prior finding (*prejudykat*) constitutes an impermissible limitation on pursuing damages for a normative act inconsistent with EU law. Consequently, the requirement to obtain a prior finding of inconsistency of a normative act

with EU law should be bypassed, and the violation of EU law should be determined by the court hearing the case seeking damages (as is the case for failure to issue a normative act).

With respect to the possibility of setting aside a final ruling or final decision, and in the case of injury caused by failure to issue a ruling or decision, the proceedings for issuance of a preliminary ruling must be laid down in the same manner with respect to objections connected with violation of national law and objections related to violation of EU law (under the principles of equivalence and effectiveness of EU law).

With respect to the causal connection, Civil Code Art. 361 indicates that liability extends to the ordinary consequences of an act or omission causing the injury, and includes both immediate losses suffered by the injured party and lost benefits.

Two judgments from the Supreme Court

In a resolution by a seven-judge panel of 19 May 2009 (Case III CZP 139/08), the Supreme Court of Poland held that Civil Code Art. 417 constituted the legal basis for the state's liability in damages for violation of Community law (including for failure to implement a directive by the applicable deadline) from the time of Poland's accession to the European Union (1 May 2004), and thus prior to entry into force of Art. 417¹ §4.

In the judgment of 19 June 2013 (Case I CSK 392/12), the Supreme Court conducted an extensive analysis of the rules for liability of the State Treasury in the case of legislative inaction involving EU law. The court stressed there that the violated obligation to issue a legal act must arise from specific regulations of law and must be specific in terms of timing and content. The court pointed out that the

right to seek damages is held only by persons whose legal situation would have been shaped advantageously by the provisions of the unissued normative act. It must also be found that the financial detriment would not have occurred if not for the legislative inaction, leading to a finding that the detriment is a normal consequence of such inaction. The Supreme Court held that the conditions for liability in damages under Polish law for legislative inaction are not less favourable than those arising under EU law concerning the liability in damages of member states to individuals for violation of EU law.

Interestingly, the Supreme Court pointed out in the judgment of 19 June 2013 that EU law does not condition the member state's liability for damages on a prior finding by the CJEU of violation of EU law. As the court held, "Ruling on whether there was a violation of EU law—in whatever form (legislative action, issuance of a decision or ruling, or legislative inaction or non-issuance of a decision or ruling)—is up to the court of the member state where the statement of claim for damages was filed."

This passage from the judgment demonstrates that the requirement to obtain a preliminary finding before filing a claim for damages, as specified in Civil Code Art. 417¹, should in the opinion of the Supreme Court be ignored with respect to all forms of violation of EU law by the member state.

Summary

The state's liability for injury resulting from violation of EU law arises directly out of EU law. Within the bounds of their procedural autonomy, the member states must ensure realisation of this right. The Polish procedure concerning the State Treasury's tort liability does not impose more severe requirements than those arising out of EU law with respect

to pursuing damages for a legislative failure to act. However, with respect to pursuing damages in the event of inconsistency of a normative act with EU law, the requirement to obtain a preliminary finding (*prejudykat*) is stricter than required by EU law, and is consequently contrary to EU law.

In the procedure for pursuing damages from a member state for violation of EU law, the

principle of the effectiveness of EU law and the principle of equivalence must be observed. If these principles would be violated in the process of pursuing damages, the national court should refuse to apply the national regulations that are inconsistent with EU law.



Liability of public authorities in the real estate development process

Leszek Zatyka

The real estate development business relies on decisions issued by administrative authorities for architectural and construction matters. The development process follows a number of successive phases, and only after positive completion of one phase can the process move on to the next phase.

If there is no zoning plan in force for a given site, commencement of the construction process requires a decision on construction conditions to be issued by the commune authorities, as well as a building permit issued by the head of the county (*starosta*). If there is a zoning plan in force, a building permit will suffice. But obtaining a building permit may require the investor to first obtain a number of other permits, approvals and opinions from other authorities. Completion of construction and commencement of occupancy of the building in turn requires notification of completion of construction or obtaining an occupancy permit.

The role of the architectural and construction administration and construction supervision inspectors is to oversee the construction pro-

cess and ensure that the process is conducted in compliance with legal regulations. Administrative authorities have legal instruments at their disposal enabling them to fulfil these tasks, such as the possibility of issuing an order to halt construction work, cure irregularities in the structure, or dismantle the structure.

Carrying out the construction process obviously requires the investor to make significant financial outlays, conclude a number of agreements, and incur obligations. The costs include acquisition of the site, geodetic and architectural services, construction materials and equipment, labour and security. Before beginning a project, the investor will prepare a business plan including the timeframe for the project, the costs, the projected profit,

and the sources of financing. The business plan is also the basis for raising financing, for example in the form of a bank loan.

Defective functioning of the architectural and construction administration and improper exercise of the instruments at its disposal can directly impact the development process, interrupting or even ending construction against the investor's will—causing the investor to suffer a loss.

Wrongful acts or omissions by public authorities in the development process may involve overlengthy conduct of administrative proceedings, unjustified refusal to issue a decision on construction conditions or a building permit, or issuance of defective decisions which are subsequently vacated, potentially even leading to an order to tear down the building.

Errors by architectural and construction administrative authorities are not isolated incidents, as demonstrated by the findings of a report by the Supreme Audit Office of 9 March 2016 from its audit of issuance of building permits and occupancy permits for multifamily residential construction and related infrastructure ([available at the website of the Supreme Audit Office](#)). The report found a number of violations in the actions of administrative bodies, such as errors in conducting procedures, reaching differing results in similar cases, and difficulties in interpreting provisions of construction law.

The injury to the investor can take various forms, depending on the phase at which the injury occurs, the current market conditions, and the factual and financial situation in which the investor ultimately finds itself. Under the case law from the courts, injury is understood to mean the difference between the actual asset position of the injured party

and what its asset position would have been if the event causing the injury had not occurred. Under Civil Code Art. 361, injury may include both immediate losses (*damnum emergens*) and the benefits which the investor failed to obtain (*lucrum cessans*).

The injury may include additional costs incurred by the investor connected with the need to interrupt the project (such as the costs of securing the building site, costs of failure to comply with obligations to subcontractors or suppliers of construction materials, or costs connected with redressing the loss to buyers of units for failure to make timely delivery of the structure for occupancy), as well as the reduced profit from the project compared to the hypothetical profit that the investor would have achieved if the administrative authorities had acted properly and the project could be commercialised earlier. The injury may also include additional costs the investor had to incur in order to service its financing.

The amount of the investor's injury is also inextricably tied to the changing market situation and property prices. An injury will arise if property prices were higher at the time when the sale hypothetically could have been made than at the time when the delayed project could actually be sold. The difference in price will be an element of the loss.

Depending on the nature of the unlawful actions by the administrative authorities, claims for damages by the investor in a construction project may be based on Civil Code Art. 417, or Art. 417¹ §2 or §3.

The liability of the public authority in the instances described above is based more specifically on Art. 417¹ §2 or §3 of the Civil Code because of issuance of a defective **final** administrative decision or failure to issue the

decision. But this requires obtaining a preliminary finding (*prejudykat*) in a separate proceeding holding that the final decision was issued in violation of law or the decision was not issued when there was a legal obligation to issue it. Such a preliminary finding could be a judgment of the administrative court issued under Art. 145 or 145a of the Law on Procedure before the Administrative Courts, or for example a decision under Art. 156 of the Administrative Procedure Code confirming the invalidity of another administrative decision which is the grounds for the liability of the public authority. A ruling by the administrative court finding delay in the administrative proceeding could also serve as a preliminary finding.

If the investor obtains in the relevant proceeding, for example, a ruling setting aside an erroneous order to halt construction, the investor may seek redress of the loss caused by the actual stoppage on the construction site. But it should be borne in mind that merely obtaining a preliminary finding does not automatically result in a finding of liability on the part of the public authority. It is also necessary to prove the other conditions for liability, such as injury and a causal connection between the injury and the wrongful act or omission of the public authority.

The case law from the Supreme Court of Poland indicates, however, that Civil Code Art. 417 can be the basis for liability only with respect to **non-final** administrative decisions. In the event of pursuing redress of injury

under this procedure, it is necessary to demonstrate all of the conditions for liability, that is, also to prove that the act or omission by the public authority was unlawful.

Judicial proceedings seeking damages for wrongful actions by public administrative authorities during the real estate development process are quite complicated, as the plaintiff must prove a number of hypothetical circumstances that would have existed if the authorities had acted properly. The plaintiff must demonstrate that it had sufficient funds to carry out the project, it was highly likely to have to completed construction on schedule, and it would have found buyers willing to pay the expected price. The proceedings require participation by court-appointed experts in various specialisations, such as valuation of real estate, architecture, urban planning, construction, accounting, and corporate finance.

Despite the difficulties presented by pursuing claims for damages related to construction projects, such actions can not only enable the investor to recoup its losses, but can also serve as a valuable lesson for the public administration. The threat of heavy damages can encourage administrative bodies to implement remedial measures within their own organisations to eliminate improprieties in the future.

Excessive length of proceedings and its consequences

Barbara Majewska

The liability of public authorities for unlawful acts or omissions also extends to delay in the functioning of the courts, infringing the individual's right to have his case heard without undue delay. A finding of excessive length of proceedings enables a party to pursue redress of the resulting loss through the courts.

The liability of the State Treasury and territorial governmental units arises not only under Art. 417 and following of the Civil Code (as we discussed in the article "The king can do wrong"), but also under a number of other acts. One of them is the Excessive Length of Proceedings Act of 17 June 2004 (full title the Act on the Complaint for Breach of the Right to Have a Case Examined in an Investigation Conducted or Supervised by a Prosecutor and in Judicial Proceedings without Undue Delay, originally entitled the Act on the Complaint for Breach of the Right to Have a Case Examined in Judicial Proceedings without Undue Delay).

A party's right to consideration of a case without undue delay is guaranteed by acts of international law as well as Art. 45(1) of the Polish Constitution ("Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.") However, until 2004 Polish law did not provide a legal means to counter delay in judicial proceedings. Then the Excessive Length of Proceedings Act introduced appropriate statutory solutions, thus expanding the liability of public authorities in this respect.

The impetus to adopt the act was the case law from the European Court of Human Rights,

particularly the judgment in *Kudła v Poland* (26 October 2000, Application 30210/96). There the ECtHR held that there is an obligation to provide for means in national law to prevent or properly respond to violation of the right to consideration of a case within a reasonable time. In the court's view, the individual's right to have his case decided in a reasonable time will not be effective until there is a possibility provided for filing a complaint against excessive length of proceedings first with the national authorities. The act was passed in order to implement these guidelines and realise the constitutional right to have cases heard without undue delay.

Amendment of act

Soon after the act entered into force in 2004, doubts began to arise whether the act as adopted and applied would meet the requirements and criteria laid down by the ECtHR. It was pointed out that in many instances the national courts refused to award compensation for losses arising out of delay in judicial proceedings, or awarded modest compensation, barely 20% of the maximum that could be awarded to a complainant (initially PLN 10,000). The doubts connected with application of the act were reflected in numerous cases from Poland decided by the

ECtHR. According to the ECtHR, in many instances the Polish courts examining excessive length of proceedings failed to follow the standards from the ECtHR case law. Another objection to the act in its original form was that it was limited to judicial proceedings and enforcement proceedings.

The problems with applying the act of 17 June 2004, and consequently the numerous complaints filed with the ECtHR, led to changes in the act. The goal of the amendment was to increase the effectiveness of the act as a means of combating delay in proceedings and ensure that there was a real procedure in place for combating delay in preparatory proceedings, judicial proceedings, and enforcement proceedings.

Scope of liability of public authorities

The Excessive Length of Proceedings Act in its current form governs the rules and procedure for filing and consideration of complaints by parties whose right to have their case heard without undue delay has been infringed as a result of action or inaction by the court or by the prosecutor conducting or supervising preparatory proceedings. The act also applies as relevant when as a result of action or inaction by the court or a court bailiff there has been an infringement of the party's right to have an execution proceeding or other case involving enforcement of a judicial ruling conducted and completed without undue delay.

Following the amendment, the act applies to all judicial proceedings, and thus the full range of civil proceedings (e.g. cases involving civil law, commercial law, family law, labour law, social insurance, land and mortgage registers, the National Court Register and the pledge register), criminal proceedings (including those in the military justice system, fiscal penal cases and proceedings involving petty

offences), execution proceedings conducted by a court bailiff, and administrative court proceedings, as well as delay in preparatory proceedings at the initial stage of a criminal case.

What is excessive length and how to combat it

Under Art. 2(1) of the act, excessive length of proceedings occurs when there is an infringement of the party's right to consideration of a case without undue delay. This will be the case when the proceeding lasts longer than necessary to clarify the factual and legal circumstances that are relevant to resolution of the case, or longer than necessary to conclude an execution case or other case involving enforcement of a judicial ruling.

It is accepted in the case law that excessive length occurs when the proceeding is long-lasting, conducted at great prolixity, lasting longer than necessary to clarify the relevant factual and legal issues, causally connected with the action or inaction of the court (Kraków Court of Appeal order of 22 March 2007, Case II S 1/07, Legalis No. 86067). According to the Supreme Court, "Undue delay may be caused by either inaction or action of the court. It is necessary when hearing a complaint for excessive length of proceedings to consider not only the timeliness of the actions taken, but also their correctness. There may be excessive length both when the court does not take any action, and when it does take actions but they are not correct and thus lead to delay in consideration of the case" (Supreme Court order of 11 February 2014, Case WSP 9/13, Lex No. 1430407).

To determine whether proceedings are over-lengthy, the criteria set forth in Art. 2(2) of the act are helpful. These include:

- The timeliness and correctness of the actions taken by the court with the aim of issuing a resolution on the merits of the case, reflecting the nature of the case and the degree of factual and legal complexity
- The importance to the complainant of obtaining a resolution of the issues raised in the complaint
- The behaviour of the parties, particularly the party complaining that the proceedings are overlengthy.

These criteria should be interpreted through the prism of the case law of the European Court of Human Rights, under which the excessive length of the proceedings should be evaluated in light of the overall length of the proceedings, regardless of how many judicial instances the case has been through and regardless of which court the case is pending before at the time the national court issues its ruling on overlengthiness. Limiting the evaluation of the court hearing the complaint against excessive length to the duration of the case at just one judicial instance does not meet the requirements and standards imposed by the ECtHR (e.g. ECtHR judgment in *Majemski v Poland*, Application 52690/99, 11 October 2005).

A complaint for excessive length of a civil proceeding may be filed by any party, and thus by the plaintiff, the defendant, an intervenor, or a respondent, meaning any person interested in a matter heard in a non-adversarial proceeding. The complaint should be filed with the court before which the principal proceeding which is allegedly overlengthy is pending. As a rule, the jurisdiction to rule on the complaint is vested with the court superior to the court where the overlengthy proceeding is being heard.

In formal terms, the complaint must meet the requirements for a pleading, according to the regulations governing the type of proceeding which is allegedly overlengthy. The complaint must also contain a demand for a finding of excessive length of the proceeding in the case and allegations of the circumstances justifying the demand. The complaint may also include a demand for issuance of an instruction to the court hearing the case to take relevant actions within an indicated time, as well as a demand for award of a monetary amount of PLN 2,000–20,000. After the complaint is forwarded to the proper court together with the case file, the State Treasury is notified of the proceeding through service of a copy of the complaint on the president of the court whose actions or inaction is allegedly causing the excessive length of the proceeding.

The court hearing the complaint is required to issue a ruling within two months after filing. If the complaint is upheld, the court, applying the criteria discussed above, will find that the proceeding in question is being conducted with undue delay. Moreover, at the request of the complainant or at its own initiative, the court may also instruct the court hearing the case on the merits to take appropriate actions. Upon request of the complainant, the court will order the State Treasury to pay the complainant a sum of money between PLN 2,000 and 20,000 (regarded as a distinct form of compensation for violation of the party's right to have the case decided in a reasonable time, awarded under specific rules). If a monetary award is made, the payment is made by the court conducting the case where the delay occurred, out of the court's own funds.

Art. 14 of the act permits another complaint against delay in the same case to be filed when 12 months have passed since issuance

of the first ruling on this issue. Introduction of this period which must pass between decision of one complaint for excessive length of proceedings and the filing of a new complaint in the same case is intended to prevent delaying the case through filing of repeated complaints for excessive length (this provision does not apply to situations where the complaint has been rejected). A shorter, six-month period for refiling of a complaint is provided for preparatory proceedings in which temporary arrest has been ordered, and in execution cases or other cases involving enforcement of a judicial ruling.

What about injury

It should be stressed, however, that the act does not cover the issue of redress of any injury caused as a result of undue delay in judicial proceedings. The sum of money which may be awarded in the proceeding pursuant to the complaint for excessive length of the proceedings is not designed to compensate for the injury resulting from the delay, but only to compensate for the violation of the party's right to have the case heard without undue delay, regardless of any actual injury to the party.

Under Art. 15(1) of the Excessive Length of Proceedings Act, a party whose complaint is upheld may file a separate case seeking redress of injury resulting from the excessive length of the proceedings, against the State Treasury or jointly and severally against the State Treasury and the bailiff in question, pursuant to Civil Code Art. 417¹ §3. A necessary prerequisite for exercising this possibility is obtaining an order upholding the complaint for excessive length of the judicial proceedings, which will be binding on this issue for the court in the civil proceeding seeking damages for the delay. A party who has suffered an injury from delay in proceedings may thus

pursue a separate case seeking redress of the injury caused by the delay in the proceedings. However, a necessary condition for holding the State Treasury liable is proof of an adequate causal connection between the delay and the injury suffered by the plaintiff.

It should be pointed out that under Art. 16 of the Excessive Length of Proceedings Act, failure to file a complaint for excessive length of proceedings does not deprive the party of the possibility of seeking redress for injury resulting from overlengthy action by the court. Then the demand for redress of the injury will be based on Civil Code Art. 417 §1, which provides the general rule for liability of public authorities for an unlawful act or omission. Such a demand can be asserted only after the proceeding on the merits of the case has been completed with legal finality. In that case, however, it will be necessary to prove first the excessive length of the proceedings, secondly the injury, and thirdly a causal connection between the two.

An imperfect law

Although the principle of liability of public authorities for delay in conducting proceedings set forth in the Excessive Length of Proceedings Act of 17 June 2004 should not raise any doubts, the solutions adopted in this respect are far from perfect and do not adequately protect the rights of complainants.

The current law requires further amendment, at least arising out of the necessity to carry out the ruling of the European Court of Human Rights in *Rutkowski v Poland* (Applications 72287/10, 13927/11 and 46187/11, judgment of 7 July 2015), issued in the pilot judgment procedure.

Despite the numerous weaknesses of the act as an instrument for combating delay in proceedings, use of the means provided in the

act should impose some discipline on the courts and encourage them to act efficiently and decide cases without undue delay, and is necessary in order to obtain a preliminary

finding opening the way to seeking damages for delay in proceedings covered by the act pursuant to Art. 417¹ §3 of the Civil Code.



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