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E-TRIALS IN POLISH COURTS

How Has the COVID-19 Pandemic Affected
the Work of Polish Courts?

Krzysztof Jarzmus, Marcin Szwed
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TRIALS IN POLISH COURTS

Remote court proceedings gradually become a more frequent phenomenon, depending on the level of technological advancement of a given country. The recent rapid development of e-courts is a consequence of efforts made to reduce direct interpersonal contacts to address the risks associated with COVID-19. The possibility of conducting remote trials has caused quite a stir in the legal community – both among practitioners and academics, but also among litigants. The prospect has also attracted considerable interest from the general public and commentators. “E-trials” have great potential to improve judicial proceedings and facilitate individuals’ access to courts, especially in view of current extraordinary pandemic circumstances. However, in consequence, the digitisation of Polish courts, which has been delayed for years, is now being carried out rapidly in extremely difficult conditions. For this reason, the Helsinki Foundation for Human Rights has decided to carry out an in-depth analysis of the practices of Polish courts related to the remote trials and hearings, the findings of which are presented below.

Survey methodology

The conclusions presented below are based on responses to survey forms sent as public information requests to:

- all courts of appeal (11),
- all regional courts (45),
- selected district courts in Łódź and Warsaw (9).

The questions sent to the courts concerned:

- the number of cases heard remotely;
- the number of remote hearings and trials;
- the number of remote pre-trial detention hearings;
- the tools that the courts use to conduct remote hearings and trials (platforms, programmes, the number of appropriately equipped courtrooms);
- the issue of whether remote hearings or trials are open to the public;
- possible complaints and technical problems relating to conducting remote hearings or trials;
- the education and training of judges and court personnel which ensures that remote hearings or trials are properly conducted.

The Foundation received replies from all (65) surveyed courts. The replies concerned the **period between 31 March 2020 and the date of a given court's reply – the vast majority of the courts responded in December 2020**. Below we present the key conclusions drawn from the analysis of the data provided to the Foundation along with a breakdown of the major identified problems. To gain a full understanding of the issues presented, readers of this document should also refer to the accompanying table, which contains the complete data on which the analysis is based.

The number of remote hearings conducted

- There was a significant difference in the number of remote trials conducted by individual courts during the surveyed period.

For example, the District Court for Warsaw's Śródmieście borough remotely heard 69 cases¹, the District Court for Warsaw's Żoliborz borough conducted 15 cases², and the District Court for Warsaw's Praga Południe borough heard no remote case whatsoever³. Such significant variation occurs, therefore, between courts not only of the same level but also those operating in the same city (the District Court for the capital city of Warsaw⁴ in Warsaw remotely heard 431 cases but due to its unique jurisdiction, it was excluded from the above comparison). Similar differences exist between hierarchically equal courts at the appeal and regional levels. For example, the Regional Court in Ostrołęka⁵ remotely heard only two cases, the Regional Court in Radom⁶ 22 cases and the Regional Court in Przemyśl⁷ remotely heard 39 cases, as compared to 669 cases processed remotely by the Regional Court in Słupsk⁸, 836 (764 by the end of 2020) cases dealt with remotely by the Regional Court in Krosno⁹ or 1830 cases conducted remotely by the Regional Court in Katowice¹⁰. Likewise, there is a notable disproportion between the figures indicated by the courts of appeal, such as the Court of Appeal in Lublin¹¹ or the Court of Appeal in Łódź¹², which remotely heard one and six (four by the end of 2020) cases, respectively, and those given by the Court of Appeal in Warsaw¹³ or the Court of Appeal in Szczecin¹⁴, which remotely dealt with 242 and 63 cases, respectively.

1 Response dated 21 December 2020.
2 Response dated 17 December 2020.
3 Response dated 17 December 2020.
4 Response dated 20 January 2021.
5 Response dated 5 December 2020.
6 Response dated 16 December 2020.
7 Response dated 22 December 2020.
8 Response dated 21 December 2020.
9 Response dated 29 January 2021.
10 Response dated 21 December 2020.
11 Response dated 5 February 2021 – data for the period ending on 21 December 2020.
12 Response dated 8 February 2021.
13 Response dated 21 January 2021 – data for the period ending on 17 December 2020.
14 Response dated 4 January 2021.

- Penitentiary divisions of regional courts are by far the most willing to hear cases remotely. An extreme example of this trend was the Penitentiary Division of the Regional Court in Świdnica which remotely dealt with 1075 cases, whereas all divisions of the Court's remotely heard a total of 1090 cases¹⁵. High numbers of remotely conducted cases were also reported by other penitentiary divisions of regional courts – e.g. that of the Regional Court in Bydgoszcz (2247 cases, including 1995 by the end of 2020)¹⁶ or the Penitentiary Division of the Regional Court in Gorzów Wielkopolski (968 cases)¹⁷.
- Significantly less frequently, cases are remotely heard by civil, commercial, and labour and social insurance divisions. To use aforementioned examples, the Civil Division of the Regional Court in Bydgoszcz remotely dealt with 30 cases, while the Labour and Social Insurance Division and the Commercial Division of the Regional Court in Gorzów Wielkopolski remotely heard 15 and 116 cases, respectively.
- As a rule, criminal divisions very rarely process cases remotely – for example, the Court of Appeal in Warsaw remotely dealt with 113 civil cases and 128 commercial cases, but remotely conducted only one criminal case.
- Only two surveyed courts – the District Court for the capital city of Warsaw and the District Court for Warsaw's Praga Północ borough¹⁸ – each remotely conducted a single pre-trial detention hearing, which must be assessed as a positive trend. Already during the legislative process, the HFHR raised serious objections to the laws allowing the pre-trial detention of an individual who has not been physically brought before a court¹⁹.

Technical arrangements enabling the courts to conduct remote hearings or trials

- The long-postponed digitisation of the Polish courts and the absence of relevant legislation, resulted, among other things, in the chaotic and inconsistent implementation of emergency measures by the courts in the face of the COVID-19 pandemic. This problem has manifested itself in several areas such as the receipt of letters and documents²⁰ and the technical aspects of the remote hearing of cases.
- There were considerable variations between courts in terms of the software used to conduct remote hearings and trials. According to the received responses,

15 Response dated 22 December 2020.

16 Response dated 10 February 2021.

17 Response dated 4 January 2021.

18 Response dated 18 February 2021.

19 <https://www.hfhr.pl/zdalne-posiedzenia-w-przedmiocie-zastosowania-tymczasowego-aresztowania-sprzecznosc-z-konwencja-zastrzezenia-hfpc-do-ustawy-o-doplatkach-do-opercentwania-kredytow-bankowych/> (accessed on: 17.02.2021); see also *Medvedyev and Others v. France*, no. 3394/03, 29 March 2010.

20 The Foundation's reports discussing this matter are available at: <https://www.hfhr.pl/wp-content/uploads/2020/04/Dostep-do-sadu-w-dobie-pandemii2-FIN.pdf>; <https://www.hfhr.pl/wp-content/uploads/2020/04/Dost%C4%99p-do-s%C4%85du-w-dobie-pandemii-16-04.pdf> (accessed on: 3 February 2021).

the choice of software was determined by practical considerations. To a large extent, the software was freely selected, which is evidenced by the fact that in courts where more than one platform was used, the choice of a platform depended solely on the preferences of a given judge (it was indicated, for example, that some judges prefer using the MS Teams platform).

- At the end of 2020, more and more courts started using the Jitsi Meet application, which is currently used by 33 regional courts and almost all courts of appeal (only the Court of Appeal in Wrocław²¹ indicated the proprietary software/platforms vc.wroclaw.sa.gov.pl, konferencje.wroclaw.sa.gov.pl and e-konf.wroclaw.sa.gov.pl). The second most popular platform is Avaya Scopia, which is used by six courts of appeal and 33 regional courts. The courts also use the MS Teams platform (two courts of appeal and 11 regional courts), Cisco Webex (nine regional courts), Skype (three regional courts) and Zoom (Regional Court in Legnica)²².

Public access to remote trials

- An analysis of data on public access to remote trials leads to the conclusion that also in this area no coherent and coordinated action has been taken.
- An interested person most commonly receives an “e-trial” link or is simply allowed to appear in person in the courtroom. Some courts ensure both remote and physical access to trials.
- An intermediate solution, which comprises of the audience watching the live feed of a remote hearing in another courtroom, is used by the Supreme Court²³, the Court of Appeal in Warsaw, the Court of Appeal in Katowice²⁴ and the District Court for Warsaw’s Wola borough²⁵.
- Notably, many of the surveyed courts pointed out that nobody was interested in observing remote trials. Many courts merely noted the existence of a such possibility without providing any further details or statistical data, which prevented a more detailed examination of the arrangements used by these courts.
- Most concerningly, as many as **12 regional courts** and **two of the surveyed district courts** reported that members of the public were unable to participate in the remotely conducted trials²⁶. By failing to take any steps to ensure effective public access to proceedings, these courts seem to completely disregard the

21 Response dated 29 January 2021.

22 Response dated 22 February 2021.

23 See § 4 of Order No. 130/2020 of the First President of the Supreme Court of 12 November 2020 on the manner of conducting public hearings or trials before the Supreme Court during the state of pandemic emergency or the state of pandemic announced due to COVID-19, http://www.sn.pl/informacjepraktyczne/SiteAssets/SitePages/Organizacja_w_SN_SARS_CoV_21_v1/Zarz_PP_SN_130_2020_Covid.pdf (accessed on: 2 March 2021).

24 Response dated 21 December 2020.

25 Response dated 21 December 2020.

26 District Court for Warsaw’s Mokotów borough, District Court for Łódź’s Widzew, Regional Court in Jelenia Góra, Regional Court in Białystok, Regional Court in Bielsko-Biała, Regional Court in Świdnica, Regional Court in Olsztyn, Regional Court in Opole, Regional Court in Gorzów Wielkopolski, Regional Court in Zamość, Regional Court in Poznań, Regional Court in Piotrków Trybunalski, Regional Court in Konin, Regional Court in Legnica.

requirement of public proceedings arising from the general rules of law (the Regional Court in Konin²⁷ went as far as to point out in its reply that remote trials had been closed to the public due to the absence of relevant legislative arrangements). This phenomenon should be regarded as particularly dangerous, as the principle that courts proceedings are publicly accessible, which originates from the Constitution of the Republic of Poland, constitutes an additional guarantee of the impartiality of the court.²⁸

- Some courts, such as the Regional Court in Gdańsk²⁹, has taken note of the applicable rules of civil and criminal procedure, but leave the decision concerning the physical presence of an audience during a trial conducted over a video link dependent on the decision of the judge rapporteur, due to the risks associated with the COVID-19 pandemic.
- In the case of two courts, contradictory information was provided by the court's divisions. In the case of the Regional Court in Kraków³⁰, the civil divisions of the court replied that members of the public may take part in remote trials, while the Labour and Social Insurance Division declared that it was impossible. A similar disjuncture occurred in the information provided by divisions of the Regional Court in Radom.

Complaints and technical problems related to the conduct of remote hearings or trials

- The replies show that complaints related to the use of remote hearings or trials by the court were extremely rare.
- Only four of the surveyed courts (three regional courts and one district court) received such complaints. However, it is worth noting a complaint lodged with the Regional Court in Rzeszów³¹, which held a hearing during which no simultaneous connection could be made with two different prisons. Therefore, the accused held in a prison in Rzeszów was brought to court while the other accused attended the hearing over a video link from a prison in Lublin. This resulted in an allegation of unequal treatment of the accused, which led to the cancellation of the remote trial. The District Court for Łódź's Śródmieście borough³² recorded two complaints questioning the legitimacy of the remote form of the trial.
- Technical problems preventing the conduct of a trial occurred much more frequently – the regional courts indicated a total of 59 such cases, the courts of appeal – nine, while the surveyed district courts reported one case of technical

27 Response dated 21 December 2020.

28 P. Tuleja in: P. Czarny, M. Florczak-Wątor, B. Naleziński, P. Radziejewicz, P. Tuleja, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, Commentary to Article 45.

29 Response dated 16 February 2021.

30 Response dated 22 December 2020.

31 Response dated 21 December 2020.

32 Response dated 16 December 2020.

problems. The above figure is relatively small compared to the overall number of remote court hearings and trials. However, it should be noted that some courts, such as for example the Regional Court in Rzeszów, reported frequent technical problems but did not indicate the exact number of adjourned or suspended hearings or trials. At this point, it is worth referring to an observation made by the Regional Court in Rzeszów which noted that technical problems preventing the conduct of penitentiary hearings often occurred on the part of penitentiary facilities. This observation seems to be corroborated by the answers received from other courts. On the other hand, the Regional Court in Wrocław³³ (which, by 11 December 2020, remotely conducted 3,243 penitentiary hearings) informed that penitentiary hearings, conducted over an online video link between the court and the prison, are generally free from any technical problems. Moreover, one should once again note the differences that exist between the courts also in this area.

- Many of the surveyed regional courts (22) declared that there was no need to interrupt or postpone a trial. However, in some regional courts such interruptions and postponements were not uncommon (e.g. the Regional Court in Gdańsk reported several such cases; the Regional Court in Koszalin declared that they were occurring “very often”³⁴; the Regional Court in Elbląg reported 10 instances of an interrupted and postponed hearing³⁵; and the Regional Court in Lublin informed about 18 interrupted or postponed hearings, eight of which were trial sittings³⁶).

Courtrooms equipped with facilities enabling remote hearings or trials

- Significant differences can also be observed among courts of the same level in terms of the number of courtrooms equipped with facilities enabling remote hearings or trials. For example, the District Court for Warsaw’s Żoliborz borough has 24 such courtrooms, whereas the District Court for Warsaw’s Wola borough has only one such courtroom. Even greater disparities can be noted for regional courts: on the one hand, the Regional Court in Warsaw³⁷ and the Regional Court in Poznań³⁸ has 107 and 58 appropriately fitted courtrooms, respectively, while, on the other hand, only two such rooms are located at the Regional Court in Płock³⁹ and three – at the Regional Court in Warsaw’s Praga borough⁴⁰.
- However, the problem of the insufficient number of adequately equipped courtrooms is to some extent mitigated by the possibility of running programmes

33 Response dated 18 December 2020, amended on 11 January 2021.

34 Response dated 27 January 2021.

35 Response dated 4 February 2021.

36 Response dated 21 December 2020.

37 Response dated 18 December 2020.

38 Response dated 29 December 2020.

39 Response dated 21 December 2020.

40 Response dated 8 January 2021.

such as Avaya Scopia, Jitsi Meet or MS Teams on any computer. However, the use of stand-alone videoconferencing platforms gives rise to another problem related to the recording of a given “e-trial”. According to the information provided by courts, civil trials are usually recorded with the use of the e-transcript (*e-protokół*) system. This means that even if it is possible to remotely conduct a hearing, for example, via a portable computer running the MS Teams platform, in a situation where the judge is not in a courtroom equipped with facilities enabling the recording of the course of the hearing, the proceedings will not be recorded. Consequently, this may lead to a situation where two similar cases will be conducted based on the same procedural rules but only one will be recorded.

Training in the organisation and conduct of remote hearings or trials for judges and court personnel

- Also in this area, no coordinated action has been taken. The judges and court personnel who had already received training in this area were usually instructed on an ad hoc basis by the staff of courts’ IT departments.
- As many as 29 regional courts and four courts of appeal have not conducted any appropriate training whatsoever. Notably, the Regional Court in Sieradz⁴¹ indicated that despite the notification of the need for appropriate training for judges and recording clerks sent to the Ministry of Justice by the President of the Court of Appeal in Łódź no such training had been provided.
- A noteworthy solution was introduced in the District Court for Warsaw’s Praga Północ borough, where a special team was established to provide training to court personnel on how to handle remote hearings and trials.

Summary

The analysis of the data obtained by the Foundation based on its public information requests indicates a lack of a uniform approach to remote hearings or trials. This leads to substantial differences between courts in many areas. In the view of the HFHR, such serious differences not only may threaten individuals’ right to a court, which stems from the Constitution of the Republic of Poland⁴² and international agreements ratified by Poland⁴³ but also are detrimental to the fundamental coherence in the functioning of the justice system. Particularly worrying are the cases involving a failure to guarantee public access to proceedings, as well as those of technical obstacles. The latter frequently appear in some courts but are virtually non-existent in others, which may be explained by different levels of the availability of appropriate facilities and digital competences of judges and court personnel. Such difficulties may be solved if the digitisation of court proceedings

41 Response dated 18 December 2021.

42 Constitution of the Republic of Poland, Dz.U. No. 78, item 483.

43 See e.g. European Convention on Human Rights as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, Dz.U. No. 61, item 284, art. 6.

is combined with regular training for the court professionals – unfortunately, as shown above, no coherent, synchronised action has been taken in this area. In consequence, in many of the surveyed courts, appropriate training was not provided or was limited to the provision of the how-to type of instructions.

“Digitisation” of judicial proceedings must not be purely legislative but rather should be combined with practical activities (including the provision of appropriate equipment and training). Still, even the legislative aspect of digitisation is marred with shortcomings, which demonstrates the need for the implementation of detailed rules governing the conduct of remote trials or hearings, instead of merely introducing rules that allow the remote conduct of proceedings. Otherwise, it will not be possible to fully exploit the potential of “e-trials” as an extremely useful tool of the justice system.

New Technologies — New Justice is a joint project of the Helsinki Foundation for Human Rights and Clifford Chance.

In today's world, new technologies are present in virtually all spheres of life – and they are also becoming increasingly important for the modern justice system. The project seeks to examine the actual presence of new technologies in the justice system of Poland and around the world, as well as to identify the main risks associated with modern legal technologies and the most promising solutions to these risks. The advancing digitalisation of the justice system and the digital modernisation of the legal system is an inevitable consequence of the need to ensure that the legal system keeps up with the times. That is why the Helsinki Foundation for Human Rights and Clifford Chance work to identify solutions for improving the justice system to ensure that the rights and freedoms of individuals are not only respected but also exercised more easily.