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Participatory budgeting – case study of the city of Szczecin

Abstract

A growing awareness of civic participation resulted in the fact that, at the turn of the 20th and 21st century, local authorities of the world's countries decided to hand over some social tools to citizens. This article presents one of the most important participatory tools – participatory budgeting. A detailed analysis of the process was made on the example of the City of Szczecin, including the provisions of the Szczecin Participatory Budgeting Regulations, in force since 2019. The changes, which were introduced as a result of legal regulations of the legislator, made it necessary to update the rules of conducting this procedure in Szczecin. Three main elements on which participatory budgeting should be based are identified and, on this basis, the provisions of the Szczecin Participatory Budgeting Regulations are analysed. An attempt has been made to compare and identify significant differences between the usual way of conducting public consultations and the participatory budgeting process. The deliberations close with an assessment of the direction and manner of introducing changes in participatory budgeting in Szczecin.

Key words:

social participation, participatory budgeting, local government

Introduction

The phenomenon of participation is undoubtedly extremely complex, multidimensional and interdisciplinary. It cannot be comprehensively incorporated into the legal framework alone. Sociological, political, economic, legal, organisational and managerial elements intertwine in this phenomenon. The position that "today's citizens are guaranteed a wide range of forms of involvement in the exercise of public authority, not limiting them only to statutory institutions (i.e. referendums, elections or public consultations), as in practice their presence is much wider" should be shared.[1] Therefore, creating legal regulations is only one of the means (instruments) for implementing the idea of participation in practice.[2]

1 A. Kuriata, *Budżet partycypacyjny jako przejaw demokracji uczestniczącej w samorządzie lokalnym,* in: *Województwo – region – regionalizacja 15 lat po reformie terytorialnej i administracyjnej,* J. Korczak (ed.), Wrocław 2013, p. 33.

2 Cf. D. Wacinkiewicz, *Partycypacja mieszkańców miast w lokalnym życiu publicznym*, in: *Kierunki przekształceń struktury gospodarczej i społeczno-demograficznej miast)*, J. Słodczyk, E. Szafranek (eds.), Opole 2006, pp. 53ff. Cf. *Europejskie standardy uczestnictwa obywateli w życiu publicznym – wybrane zagadnienia,* in: *Prawa podmiotowe. Pojmowanie w naukach prawnych,* J. Ciapała, K. Flaga-Gieruszyńska (eds.), Szczecin 2006, pp. 97–104.

In my opinion, participatory budgeting should be considered an increasingly important participatory tool. As it is noted in the literature, "the idea of a participatory budgeting comes down to providing members of the local community with the right to co-determine the needs and directions of managing public space".[3] As regards the way participatory budgeting is defined, it should be noted that it is most often presented in functional terms, i.e. as a form of participation of the residents of a given local community in decisions on the allocation of a specific financial envelope or as a form of participation of the residents in designing local expenditure.[4]

The construction of participatory budgeting is based on three pillars: firstly, on citizens submitting projects to be implemented (from the funds of a given local government unit), secondly, on citizens' voting for selected projects and thirdly, on the implementation of the winning projects by the self-government.[5] In this way, the residents are involved in the decision-making process, which results in the indication of public tasks to be performed in a given financial year.[6] An element that needs special prominence in the case of participatory budgeting involves ensuring that residents have the right to make binding decisions on the creation of a certain part of the budget. It is precisely this element of power ("binding decisions") that is often pointed to as the element[7] specifying participatory budgeting in relation to classical public consultations. This enables the conclusion that the real opportunity given to residents to decide on spending public money on priority investments and projects brings many benefits – both for local authorities and residents.[8]

For the above reasons, out of a wide range of different types of participatory instruments, the very problem matter of participatory budgeting has been analysed in this study.[9] The basic aim of these analyses is to characterise and evaluate the way in which participatory budgeting in the Municipality of the City of Szczecin (hereinafter referred to as the City) is organised and implemented.

Participatory budgeting as a social participation tool

One of the most important instruments for creating space to try to involve citizens in the active implementation of tasks is participatory budgeting. It is a democratic procedure which

3 A. Błaszko, *Budżet obywatelski jst – zagadnienia finansowe,* System Informacji Prawnej LEX.

4 Cf. M. Augustyniak, R. Marchaj, *Komentarz do art. 5(a),* in: *Ustawa o finansach publicznych. Komentarz,* II edition, B. Dolnicki (ed.), Warsaw 2018, System Informacji Prawnej LEX., R., See also the literature mentioned therein including, in particular, D. Sześciło, *Uwarunkowania prawne budżetu partycypacyjnego w Polsce*, FK 2012/12, p. 15; M. Baraniecki, *O swoich pieniądzach decydujemy sami – planowanie partycypacyjne budżetu gminy*, in: *Partycypacja społeczna w samorządzie terytorialnym*, B. Dolnicki (ed.), Warsaw 2014, p. 574; W. Kębłowski, *Budżet partycypacyjny. Krótka instrukcja obsługi*, Warsaw 2013, p. 8.

5 Cf. A. Misiejko, *Budżet obywatelski jst – istota i zasady*, System Informacji Prawnej LEX.

6 Cf. M. Augustyniak, R. Marchaj, op. cit.

7 Such a position is exposed not only in literature, but also among practitioners of participatory budgeting. An example may be the view expressed on the website: budzetyobywatelskie.pl, according to which "as opposed to public consultations, in the case of participatory budgeting, decisions taken by residents are binding. There are many different models of such budgeting. In each of them the scope of direct influence of the residents is different. But the most important thing is to give the residents the opportunity to speak." Cf. http://budzetyobywatelskie.pl/.

8 A. Kuriata, op. cit., p. 34.

9 In this text, I will use the names "participatory budgeting" and "PB" interchangeably.

enables each resident of a given local community to participate in the disposal of a part of public funds allocated from the unit's budget to carry out tasks which are considered important by citizens.[10] This creates an opportunity for real participation in the spending of a specific financial amount and is reflected in creating a platform for discussion on the shape of the local community.

PB is characterised by certain basic principles, which must be taken into account in order to ensure that citizens have a real opportunity to participate in the process.[11] This is a form of public consultation which, in a particular way, allows residents to decide directly on the allocation of appropriate financial resources to what they choose by voting. One important fact that defines this power is the obligation to include selected projects in the commune budget and their subsequent implementation.[12] The executive bodies, if a project is not carried out, must take into account the political and public image consequences.[13] In addition, residents are informed about the acceptance or rejection of their proposal during the process. At each stage of participatory budgeting, residents have the opportunity to control and monitor the procedure. Another important element distinguishing participatory budgeting from the regular consultation procedure is the recurring nature of its subsequent editions. It is extremely important that a given participatory tool is permanently inscribed into the participatory activities in the commune and is repeated annually.

The literature takes the view that PB is a tool for citizens' checks over the authorities.[14] While this view is correct when assuming that participatory budgeting is a platform for integration and activation of residents, these checks may be important at the last stage of participatory budgeting, when implementing selected tasks. It may involve public pressure for more efficient execution of tasks and faster commissioning of certain investments.

Legal scholars and commentators acknowledge that the first idea to involve residents in resolving important issues for the local community was already conceived at the end of the fifteenth century, when referenda on budgetary matters were held in Swiss cantons. Citizens, in carrying out this form of direct democracy, were able to decide on financial matters.[15]

Nevertheless, the first official launch of a PB procedure took place in 1989 in the Brazilian city of Porto Alegre. An important difference between the original way of deciding on financial issues during referenda in Switzerland and the attempt to introduce the institution of participatory budgeting in Porto Alegre was the fact that during the referenda the residents decided on the approval of the authorities' financial proposals, and during the PB procedure it was the residents themselves who made proposals on how public funds should be used. This was the first step to directly involve the local community in spending public funds by submitting their task proposals. In the following years, interest in participatory budgeting in this city

10 A. Rytel-Warzocha, *Partycypacja społeczna w sprawach budżetowych. Model Porto Alegre jako pierwowzór rozwiązań europejskich,* p. 94; https://marszalek.com.pl/przegladprawakonstytucyjnego/ppk1/07.pdf (access: December 2019).

11 D. Rybińska, *Instytucja Budżetu Obywatelskiego jako narzędzia rozwoju samorządu lokalnego*, „Finanse i Prawo Finansowe", 1(17), p. 52.

12 More on this further in the article, especially on legislative changes.

13 D. Tykwińska-Rutkowska, P. Glejt, *Prawna regulacja budżetu obywatelskiego a jego praktyczna realizacja – czyli o uspołecznianiu wykonywania zadań publicznych na przykładzie przyjętych w trójmieście,* "Gdańskie Studia Prawnicze" 2015, vol. XXXIV, p. 322.

14 A. Kuriata, op. cit., p. 39.

15 A. Rytel-Warzocha, op. cit., p. 96.

constantly grew. In the first two years of the project, about one thousand people from Porto Alegre took part in it, whereas already in 1992 the number increased to eight thousand – until it reached a constant number of about 50 thousand people.[16]

Before the idea of PB became a permanent feature of civic participation in Poland, it had been introduced in other European countries. The institution of participatory budgeting appeared in France as early as in 2000. It operates at community and borough level and is an example of direct democracy close to the citizen. The participatory budgeting mechanism in this country is closely based on the activities of borough councils, which are the entity that enables this participatory tool to function properly. The inhabitants of local communities are free to propose tasks, which is a way for them to express their expectations and needs concerning the quality of public life. Nevertheless, it is stressed that the resources allocated to the budget are, as for a wealthy country like France, small. For example, in 2003, in La Roche-sur Yon (53 thousand residents), the participatory budgeting edition took place, for which a total of EUR 365 000 was allocated, which was 1.5% of the commune investment budget.[17]

The first city in Poland that decided to introduce the idea of participatory budgeting was Sopot. In 2011, the Sopot City Council, by way of a resolution, launched the whole procedure of participatory budgeting. Other Polish cities followed the example of Sopot, including Gorzów Wielkopolski, Wrocław, Łódź, Zielona Góra, Warsaw and Szczecin.

Until 2018, there had been no regulations in force that directly addressed participatory budgeting. The legal and material basis for the implementation and functioning of this institution was the disposition of Article 5a of the Act on Commune Local Government.[18] The Act provided for two modes of public consultation – the so-called "obligatory" and "optional". Until the amendment of the Act, participatory budgeting was an optional form of public consultation, yet of a binding nature.

Legal organization and functioning of the Szczecin Participatory Budgeting after legal changes of 2018

The greatest impulse to revise the existing rules of the Szczecin Participatory Budgeting (SPB) were the changes introduced by the legislator in the Act. Through amendments to the legislation, the legislator added paragraphs 3–7 to Article 5a, which included an attempt to regulate the institution of participatory budgeting. The substantiation of the project of changes reads as follows: "It is proposed to regulate the institution of participatory budgeting as one of the forms of consultation with the residents of the commune, district and province respectively. Within the framework of participatory budgeting, the residents would decide each year in a direct vote on a part of the budget expenditure of a given local government unit. The tasks selected under this budget would be included in the budget resolution. The decision making

16 Ibidem, pp. 97–98.

17 M. Augustyniak, *Partycypacja społeczna w samorządzie terytorialnym w Polsce i we Francji*, Warsaw 2017, pp. 374–377.

18 Article 5a of the Act of 8 March 1990 on Commune Local Government (Journal of Laws of 2019 item 506 as amended) – further referred to as the Act.

body of the local government unit, in the year of work on the draft budget resolution, will not be allowed to remove or significantly change the tasks selected under participatory budgeting [...]". In fact, it was a legal regulation of the institution that had functioned for many years on different levels of local government government units.

By introducing the above mentioned changes, the legislator decided to make a further split in public consultations. In addition to the previous division into mandatory and optional public consultations, a third type has been introduced – a specific form of consultations. Participatory budgeting has become the only regulated type of these consultations. Separating PB from other types of consolations was an obvious demonstration of how the idea of participation through participatory budgeting has developed at the level of local government in recent years.

In addition to the above mentioned reasons for introducing changes, the legislator indicated in which situations it is obligatory to carry out a participatory budgeting procedure. A commune which is a city with district rights is obliged to establish and carry out this process on an annual basis and additionally undertakes to spend for this purpose at least 0.5% of the commune expenses included in the last submitted budget execution report (Article 5a (5) of the Act).

This obligation applies only to a commune that is a city with district rights – other units that do not meet this criterion have retained the optionality of introducing this participation tool. In addition, the issue of the division of the financial envelope, which may include the whole commune and its part in the form of auxiliary units or groups of auxiliary units, is regulated.

In Article 5a(7), the legislator introduces requirements to be met by the citizens' draft budget. The catalogue of rules that an applicant must follow when designing an application for the budget is an open catalogue – it is the task of the Commune Council to define detailed criteria that must be met. First of all, the commune council must specify the formal requirements to which the submitted drafts must conform.[19] Additionally, the required number of signatures of residents supporting the project was introduced. The legislator specified that this number may not be greater than 0.1% of the population of the area covered by the participatory budgeting in which the project is submitted. It should be pointed out that the Supreme Audit Office, in its report on reviewing the functioning of participatory budgeting,[20] decided to indicate the de lege ferenda postulates to the Minister of the Interior and Administration, including, among others, the consideration of resignation from the required number of signatures of residents supporting the project. A resolution on participatory budgeting must obligatorily include rules for evaluating submitted projects as to their legality, technical feasibility, compliance with formal requirements, the procedure for appealing against the decision not to allow a project to be voted on and the rules for conducting the voting.

19 The amendment to the Commune Local Government Act of 2019 also introduced the term "universal design". The Commune Council may use this term, if possible.

20 The report is available at: https://www.nik.gov.pl/plik/id,21186,vp,23818.pdf.

Public consultation on the new SPB

In view of the legislative changes introduced, the President of the City decided to hold public consultations on the SPB regulations.[21] Three open meetings with residents were planned in three different parts of the City as well as one focused group interview with the invited representatives of different local communities.[22] Additionally, the residents could submit their comments and proposals for changes to the regulations in an electronic[23] and paper form by submitting a form at designated points in the City.

The City designed the initial assumptions in the form of a draft of new regulations and introduced a new division of the City. The idea behind the consultations and discussions on the new regulations was to meet the residents' expectations regarding the SPB. The City had 6 years of experience in carrying out the process and the legislative changes obliged the City to introduce certain modifications.

During the consultations, a total of 146 comments and opinions on the draft SPB Regulations were registered.[24] Most of the proposals were included in the new SPB regulations, which should be considered a success of the residents who decided to take part in the consultations.

New SPB rules

Following the conclusion of the above mentioned public consultations, the Council adopted the new SPB rules.[25] The first edition, during which the new rules were to apply, was SPB 2020. The new regulations meet the obligations imposed by the legislator in a very detailed way.

An important change, which has had influence on the stage of submitting applications and voting, was the indication of the definition of a City Resident. Until now, the person who could, e.g. vote within the SPB, was a resident who was registered for residence in the City. Now the legislator defines the resident as any natural person who is staying in the City with the intention of permanent residence without having to be registered at an address. In the course of individual stages of the SPB a resident is only obliged to make a relevant declaration of intent to reside on the territory of Szczecin. Any person who, in some way, feels attached to the City and, at the same time, expresses the will to settle permanently within its territory is considered a resident of the City under these regulations. This position is also emphasized by the judicature, including the Provincial Administrative Court in Opole, in its judgement of 17 April 2018,[26] which indicated that a resident is also an individual without full legal capacity,

21 Ordinance no. 33/19 of the President of the City of Szczecin of 24 January 2019 on social consultations of the regulations of conducting social consultations concerning the Szczecin Participatory Budgeting.

22 These were representatives of non-governmental organizations, Housing Estate Councils, SPB applicants from previous editions and representatives of the city.

23 By sending them at: regulaminsbo@um.szczecin.pl.

24 http://konsultuj.szczecin.pl/konsultacje/files/51860441995E458391D3D1BF64C91D0C/Raport_konsultacji_projektu_Regulaminu_SBO.pdf – Report on consultations held.

25 Resolution no. V/154/19 of the Szczecin City Council of 26 March 2019 on the introduction of the rules and mode of conducting the Szczecin Participatory Budgeting procedure (further referred to as the Regulations).

26 Judgement of the Provincial Administrative Court in Opole of 17 April 2018, II SA/Op 64/18, available in the website of the Central Base of Administrative Court Decisions www.orzeczenia.nsa.gov.pl further as "CBACD".

without Polish citizenship and deprived of public rights. This position was also shared by the Provincial Administrative Court in Łódź in its judgement of 7 July 2016.[27] Whereas the Provincial Administrative Court in Szczecin pointed out that a reservation, for the needs of conducting consultations associated with participatory budgeting, of a declaration about residing in a specific place under the pain of criminal liability for making false statements must be deemed wrong.[28]

Additionally, a novelty introduced to the SPB is the possibility to submit so-called non-investment projects. Introduction of this possibility is a kind of challenge for the City, while at the same time it allows the residents – apart from submitting projects such as building a park, renovating a pavement or a street – to submit proposals for football tournaments or even music concerts.

The regulations specify that the funds allocated for a given edition of the SPB may be used to finance a project belonging to the City's own tasks, which includes the implementation of a public task.[29] In addition, the subject of the project should be generally available and free of charge for the residents. By unambiguously continuing the policy of making tasks within the SPB accessible to the general public, the legislator decided to specify this definition precisely by delimiting the type of tasks.[30]

An investment submitted to the SPB may be implemented in the City. However, taking into consideration the residents' opinions, in view of the current property management policy, the residents are given the opportunity to submit investment proposals at locations not at the disposal of the City. There is a requirement to present a declaration of the owner of the real property about the willingness to lend the given area for investment for a period not shorter than the depreciation period of the planned expenditure on the area[31] and, at the moment of selecting such a task for implementation, the necessity to sign a real property lending agreement.

Direct indication by the legislator of the possibility to introduce such a territorial division of the commune, which would also include auxiliary units, was one of the reasons for the legislator to introduce a new division of the City. Currently, it is possible to submit projects of a city-wide and local nature – at the same time, dividing the City into 22 local areas.[32] The financial envelope allocated to the SPB is divided in the proportion of 30% of funds for projects in the whole city area and 70% of funds for projects in the local area.[33]

27 Judgement of the Provincial Administrative Court in Łódź of 7 October 2010, III SA/Łd 364/16, CBACD. Cf. Judgement of the Supreme Administrative Court of 26th July 2002, II SA/Wr III6/02, not published.

28 Judgement of the Provincial Administrative Court in Szczecin of 17 May 2018, II SA/Sz 317/17, Legalis.

29 § 4 of the SPB Regulations.

30 In the case of infrastructure projects, fulfilment of the condition of public availability "means making the results of the project available to all interested residents at least six hours a day from Monday to Friday (time interval 8–22) and at least ten hours a day on Saturday and Sunday (time interval 8–22)". On the other hand, in the case of non-infrastructural projects, "it means ensuring the possibility to benefit from the effects of the SPB investment on equal terms for all residents".

31 § 6(2) of the SPB Regulations.

32 City division with resources – https://sbo.szczecin.eu/sites/default/files/inline-files/SBO2019-pule_srodkow_obszarow_lokalnych.jpg.

33 §11(2) of the SPB Regulations – "The distribution of funds for projects in local areas will be made by means of an algorithm based on a percentage distribution depending on the number of inhabitants of a given local area in 70% and on the land area of a given local area calculated in km^2 in 30".

Submission of projects and their verification by the City units

Each resident of the City may submit an unlimited number of projects. Submission of task proposals to the SPB takes place on a specially dedicated ICT platform, which is adapted to the realities of the City and through a paper project form, the model of which is specified by the President in the SPB Launching Ordinance.[34]

One of the necessary elements of any project submitted to the SPB is attachment of a support list. The list must be signed by at least 10 people in order to comply with formal and statutory requirements. Every City resident may support an unlimited number of projects, except when the Project Leaders[35] or co-authors support their own proposal.

The relevant City units verify the projects in formal and factual terms. When checking projects for compliance with the generally applicable law, among other things, employees may call on Leaders to make certain changes to the project within 5 working days from the day following the call. Additionally, until the process of substantive verification of projects is completed, Leaders may decide to merge projects, e.g. similarly sounding or covering a similar project theme, into one project.

The criteria of both formal[36] and content-related[37] verification presented by the legislator indicate in a detailed and exhaustive manner the basis for the evaluation of the project by the City's units. The evaluation process is always problematic because it clashes with the views of the citizen, as the author of the idea, and the evaluator, as the future implementer of the idea.

The role of SPB Social Panels

The SPB Social Panels constitute an integral part of the whole process. They are a social factor and aim to verify the work done in the Office. The competences of the Panel have not been limited in the new regulations, so the most important changes will be presented.

First of all, the composition of the Panel has been changed.[38] The decision has been made to exclude Council representatives from the work of the Panel and, now, they can only perform advisory functions, without voting rights.

The Panel shall decide whether or not to admit a project to voting. The Regulations upheld the competences of the Panel to approve the final list of projects to be submitted to the residents for voting.

34 In the Ordinance, the President determines the date of commencement of a given edition of the SPB, the amount allocated, including the division of the city, and determines the composition of the Evaluation Team and the composition of the Appeal Panel.

35 § 2(1)(9) of the SPB Regulations – author of the SPB project.

36 § 15 of the SPB Regulations.

37 § 16 of the SPB Regulations.

38 The Panel consists of the residents of Szczecin, representatives of non-governmental organizations, housing estate councils and the Youth City Council.

A new entity which was established in fulfilment of the obligation imposed by the legislator[39] is the Appeal Panel[40] (further referred to as the AP). The legislator pointed out that the AP shall be composed of the most experienced social workers who have knowledge and have led their SPB projects to win the public vote. It is, in principle, the last instance to which a resident can appeal after a negative decision of the Panel.[41] The AP examines these appeals and has the competence to refer the project for reassessment by the city units, or to finally reject the project. The AP may request changes to a negatively verified project only once. After the project has been re-evaluated by the city units, if they agree with the opinion of the AP, the project is approved for voting. In the case of an unfavourable decision, the project is finally rejected.

Voting and selection of the winning projects

Voting within the SPB lasts for 14 calendar days. The order of projects on the voting lists shall be determined by a public draw. It takes fourteen days from the act of selecting the numbers and order of projects to the formal start of the selection procedure. This is a time for residents to effectively promote their proposal and convince other citizens to do so. During this period, public presentations of projects may take place, a marketing campaign may be conducted to encourage participation in the participatory budgeting process itself as well as voting for specific projects.

Voting is carried out by means of an ICT system and paper voting cards. Votes can be cast via the electronic system from any place at any time, while by means of paper cards – in places specially designated for this purpose by the City. The voting is a one-off act. A resident may cast a maximum of 5 votes – 2 for city-wide projects and 3 for local projects. However, a maximum of two votes may be cast per project.

Every resident of the City may take part in the vote, regardless of age. It is a solution which does not block anyone from the opportunity of participating in this particular form of social consultation. The Provincial Administrative Court in Gliwice[42] concluded that a commune is not authorised to limit the personal scope of persons entitled to participation in social consultations, and additionally such a solution includes a pedagogical aspect by which persons who in the future will have the right to active participation in local community life are given a chance to express their opinions.

The projects to be implemented are those which obtain the highest number of votes in a given territorial area of the city. The amounts not used in a given area constitute a reserve to be used in the implementation of projects in a given year of the SPB allocated beginning from the project with the highest deficit of funds for implementation until the reserve is exhausted. If several projects receive the same highest number of votes and the amount in the area makes it impossible to implement them all, then, by drawing lots at a meeting of the Opinion Panel, one project is selected for implementation.

39 Obligation pursuant to Article 5a(7)(3) of the Act.

40 The AP, according to the definition, *is* "a group of persons selected from among the authors of the winning SPB investments and persons being Panel members in previous SPB editions".

41 Pursuant to §20(2) of the Regulations, within 7 working days from the date of sending an e-mail with a notification of negative verification of the project.

42 Judgment of the Provincial Administrative Court in Gliwice of 8 March 2016, IV SA/GI 1129/15.

Conclusions

The initial attempt to carry out the SPB process, which was undoubtedly successful for the City, has gradually made the activities related to this participatory tool more professional.

The introduction of participatory budgeting in the City has undoubtedly strengthened communication between citizens and local government administration. The main objective of introducing the SPB was to directly involve the residents in the City's activities and to identify the most important needs of the local community. In addition, the aim of implementing this mechanism was to show the residents the efficiency of their actions – to indicate a tool on the basis of which they will decide which projects will be submitted to the SPB and which projects will be selected. A much greater involvement of the residents in the City's activities was achieved and the inhabitants of Szczecin were given a strong and effective tool to change the reality around them.

The three pillars on which the PB is based presented in the introduction are an ideal field for interpreting the changes that have taken place in the whole process in the City over the years. Firstly, the project submission process has undergone profound changes during the six years of the SPB functioning. Currently, there are strict verification criteria, both formal and substantive, on the basis of which the City checks the feasibility of a given idea. In addition to the employees who check a given task, there are SPB Social Panels. Their role is also extremely important – it shows the cooperation between the representatives of the administration and the community directly involved in the process.

The stage of voting for projects which have been positively verified by the City's units and Social Panels shows that the City meets the expectations of various social groups. The implementation of an ICT system is a step towards making participation in the process available to people who use the Internet.[43] Maintaining the paper form, on the other hand, enables participation in the SPB mainly for elderly people who do not want to use the ICT system.

The implementation of projects, which is one of the most exposed elements of the SPB, is at a good level.[44] It should be taken into account that various proposals are submitted to the SPB – from building a pavement or renovating a street, to simple investment purchases.[45] The ultitude and diversity of ideas leads to the fact that some investments need a certain amount of time to be implemented. However, the vast majority of investments have either already been accomplished or will soon be completed.

The changes that were introduced in 2019 have had a very positive impact on the operation of the SPB. In addition to legislative changes that have required the City to change its procedures for conducting the SPB, the experience of the previous editions and the decline in the interest in participatory budgeting have led to a desire for more discussion on the future and the direction of the changes the City wanted to take. The consultations that took place before the amendments to the regulations were made caused the residents to become more interested in the process and take an active part in public consultations by submitting

43 As the research shows, in Poland as much as 84% of the society has access to the Internet, https://www.wirtualnemedia.pl/artykul/84-procent-polakow-ma-dostep-do-internetu-najpopularniejsze-wyszukiwanie-informacji-i-poczta-elektroniczna.

44 The effects of the projects can be seen on the SPB website: https://sbo.szczecin.eu/realizacje-projektow.

45 Example: buying and setting up waste bins.

proposals for changes. Valuable comments and observations from all active residents have led to the new SPB regulations being discussed democratically and taking into account the majority of residents' comments.

In further SPB editions attention should be paid to the developing trend in shaping structures of tasks in participatory budgeting of other Polish cities. In Gdańsk[46] a category of the so-called green participatory budgeting was introduced. Pursuant to the legislator's assumptions funds for the green participatory budgeting will be allocated from the existing pool of the Gdańsk Participatory Budgeting. Residents will be able to submit proposals of tasks in five thematic areas.[47] Proposals of identifying categories of tasks provides an interesting perspective which results from residents' great interest in ecological projects. One may assume that the growing interest in the so-called "green" category will result in the future in creating separate participatory budgeting allocated only for such projects. In Lublin, the green participatory budgeting has been operating since 2017 and subsequent editions bring an increase in residents' interests in such projects. In Szczecin a proposal to create green participatory budgeting has emerged too.[48] Considering a change in the formula of proceeding with the SPB seem an interesting proposal, yet it needs to be remembered that the SPB Regulations are a relatively young legal act. Making changes in the regulations after a year of their functioning requires a consensus, both political and social. It seems optimal to adopt a solution that will allow conducting another SPB edition without legal changes and after carrying out broad evaluation of the edition – making changes in the rules. Participation in the City is still developing and maximum use of the participatory budgeting tool brings measurable benefits to each side of the process. Undoubtedly, future editions of the SPB or possible legislative changes with a view to full regulation of the participatory budgeting institution[49] will further improve the SPB and will be followed by further changes to the rules improving the whole process.

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Explication of evidentiary prohibitions on the ground of the criminal (Article 168a CCrP) and administrative procedure

Abstract

Prohibition of using evidence obtained contrary to the law is defined in the views of legal scholars and commentators and in the literature as the doctrine of the fruits of the poisonous tree. The aim of the paper is to discuss the subject matter of limiting the freedom of proof both on the ground of criminal procedure, especially through the lens of Article 168a CCrP,[1] and administrative procedure. The author stays convinced that the above-mentioned theory should be applied in both these types of procedures, primarily due to the constitutional right afforded to everyone to a public, fair and lawful examination of a given case by public and investigative authorities.

Key words:

evidence, prohibited act, principle of legality, trial, preparatory proceedings, administrative case

Introduction

The Constitution of the Republic of Poland establishes a few principles of which, as undeniably seems, the right of everyone to a public, fair and lawful examination of a given case by public and investigative authorities was instituted, as well as the possibility to have a given case heard by an independent and impartial court. Thus, the question whether there is a possibility to obtain evidence be means contrary to norms of law, even for the needs of the proceedings, both criminal or administrative, may seem rhetorical.

In practice it is no longer so evident.

The prohibition of using evidence obtained illegally is defined in the legal thought and literature as the fruit-of-the-poisonous-tree doctrine. Just like a poisonous tree cannot bear good fruits, an investigation tainted by illegal actions should not result in charging a man while an administrative case cannot be duly resolved.

The aim of the paper is to discuss the issues of evidentiary prohibitions in a criminal and administrative procedure and to establish whether it was substantiated for the legislator to prohibit the use of evidence obtained by means contrary to the law in both these procedures.

1 Act of 6 June 1997 The Code of Criminal Procedure, consolidated text, Dz. U. (Journal of Laws) of 2018 item 1987 as amended.

The theory of the fruit of the poisonous tree

The beginnings of the doctrine of the fruits of the poisonous tree need to be sought in the case law of the Supreme Court of the United States. In its 1920 judgment,[2] the court decided it inadmissible for government officials to use information obtained illegally as evidence in criminal proceedings. It was obtained by representatives of the Department of Justice (and staff of the US Marshals Service) by searching the premises and taking documents without an appropriate warrant, which, besides, constituted violation of the Fourth Amendment to the US Constitution.[3] The metaphor "fruit of the poisonous tree" itself which has entered into common us in the legal language also in European countries, was used in a 1939 judgement of the US Supreme Court.[4] It was in this ruling that the prohibition of basing the prosecution on evidence coming both directly and indirectly from activities or actions infringing the law was emphasized.

Evidence obtained on the basis of other evidence or directly illegal information ("indirectly illegal evidence") is figuratively called fruit of the poisonous tree, while evidence coming directly (primarily) from activities or actions that are contrary to the law ("directly illegal evidence") is the said poisonous tree.

The American criminal procedure excludes both the poisonous tree and its fruits, and thus also evidence most often discovered later, if obtained in a manner contrary to the law or on the basis of knowledge obtained from unlawful information.[5] The doctrine of the fruit of the poisonous tree is applied in federal and state courts.[6]

It needs to be noted that the above theory is an original solution of the American legal thought and practice, developed anyway on the ground of the exclusionary rule. According to it the court is obliged to exclude evidence obtained illegally from the proceedings. Moreover, the doctrine of the fruit of the poisonous tree applies primarily in criminal cases and concerns mostly public authorities or state bodies, since by assumption it is supposed to guarantee the citizen-individual who is a party in these proceedings a fair conduct of the trial, including obtaining legal evidence.

The aim and character of evidentiary prohibition in the Polish criminal procedure – Article 168a CCrP

The Polish law regulating a criminal trial[7] is one of the most frequently amended acts of law. From the date it was published until the end of November 2019 it was amended 154 times, where there has been no single year for over 20 years now that no amendment has been made.

2 Case *Silverthorne Lumber Co. Inc. v. United States*, 251 U.S. 385 (1920).

3 On the factual status and decisions in the discussed matter see more, in: P.M. Lech, *Owoce zatrutego drzewa w procesie karnym. Dowody zdobyte nielegalnie*, "Palestra" 2012, no. 3–4, pp. 36–37.

4 Case *Nardone. v. United States*, 308 U.S. 338 (1939).

5 *West's Encyclopedia of American Law*, 2nd Edition, Thomson & Gale 2005, Vol. 5, p. 9.

6 S. Potter, *The Road Map to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases,* in: "Columbia Law Review" 1983, Vol. 83, pp. 363ff.

7 Act of 6 June 1997 The Code of Criminal Procedure, consolidated text, Dz. U. (Journal of Laws) of 2018 item 1987 as amended.

The criminal procedure was subject to detailed remodelling in 2015/2016 due to the introduction and then "withdrawal" of the adversary nature of the criminal trial in place of the existing so-called relatively inquisitorial trial.[8] The amending act of 27 September 2013 on amending the act – The Code of Criminal Procedure and certain other acts,[9] with a very long vacatio legis, as the law entered into force on 1 July 2015, introduced a model of procedure based on the assumption that evidentiary procedure of preparatory proceedings is fundamentally supposed to prepare a basis for an indictment submitted by the prosecutor, as it is to be carried out for the prosecutor indeed, not for the court. In extraordinary circumstances – in so much as examining the evidence before a court is not possible – it will be used by the court as the basis for establishing facts of the case.[10]

In court proceedings the evidentiary initiative was given to the parties. The amended Article 167 CCrP sets it forth *expressis verbis*. Only in exceptional cases did it allow examining the evidence by the court who was in principle supposed to play the role of a passive arbitrator issuing a just ruling in the end, while the parties to the proceedings were to convince it to their reasons, among others by means of evidentiary motions. As a consequence, especially on the side of the accused, a broad possibility of bringing "private evidence" was created.[11] In order to prevent the certain arbitrary behaviour in participants to the proceedings' searching for evidence "by all means", the provision of Article 168a CCrP was introduced.[12]

It was the first general provision introduced to the Polish criminal procedure that regulated admissibility of use of evidence obtained unlawfully.[13]

As pointed out in the reasoning of the then draft amending act of 27 September 2013 "it is suggested that the possibility of introducing into the trail evidence that was obtained illegally be clearly restricted, save that it is suggested that the inadmissibility of its use be constituted only for the evidence that was obtained for the purpose of a criminal trial by means of a prohibited act (new draft Article 168a CCrP). It must exclude the possibility of installing wire-tapping at the request of the party to the trial or conducting a search".

It was in this assumption among others, next to a broader use of consensual modes, that the Codification Commission saw a departure from an inquisitorial nature of jurisdictional proceedings in favour of their contradictory nature, which in turn was to serve best respecting the right of the participants to the proceedings.

The evidentiary prohibition introduced pursuant to Article 168a should be construed as an institution protecting the evidentiary system from infringements of the law and from the requirement to accept that evidence in evidentiary proceedings due to the expansion of the

8 P. Kardas, *Mieszany, kontradyktoryjny czy inkwizycyjny proces karny? Rozważania o kierunku projektowanych zmian Kodeksu postępowania karnego*, in: *Czasopismo Prawa Karnego i Nauk Penalnych. Księga dedykowana dr Ewie Weigend*, S. Waltoś (ed.), Warsaw 2011, p. 181.

9 Dz. U. (Journal of Laws) of 2013 item 1247.

10 Statement of reasons for the draft act on amending the act – the Code of criminal procedure and certain other acts, the Sejm Paper no. 870, p. 4.

11 L. Mazowiecka, *Prokuratura w Polsce (1918–2014)*, Warsaw 2015, p. 173, see also A. Bojańczyk, *Dowód prywatny w postępowaniu karnym w perspektywie prawnoporównawczej*, Warsaw 2011, p. 21.

12 S. Pawelec, *Aktywność dowodowa obrońcy w zreformowanym procesie karnym*, in: *Prawo do obrony w postępowaniu penalnym,* M. Kolendowska-Matejczuk, K. Szwarc (eds.), Biuro Rzecznika Praw Obywatelskich, Warsaw 2014, p. 66.

13 W. Jasiński, *Zakaz przeprowadzenia i wykorzystania w procesie karnym dowodu uzyskanego do celów postępowania karnego za pomocą czynu zabronionego (art. 168a k.p.k.)*, in: *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach*, P. Wiliński (ed.), Warsaw 2015, pp. 360–361.

sphere of evidentiary activity of parties to the proceedings.[14] The established prohibition has a general, absolute but non-complete character.

Its absolute nature is expressed in the fact that a situation where an evidentiary prohibition could be waived has not been prescribed for.[15]

Its non-completeness results from the fact that the prohibition refers only to examining and using illegal evidence within the meaning of Article 1§ 1 of the Criminal Code[16] obtained for the purpose of criminal proceedings by means of a prohibited act. However, it is possible to use it through other means of evidence.[17] Referring *expressis verbis* to the unlawfulness of evidence in the meaning of Article 1 § 1 CC means exclusion of inadmissibility of given evidence if primarily it was obtained for a different purpose, e.g. in a divorce case, thus is a civil procedure, or even a prohibited act specified in the Act of 10 September 1999 Fiscal Criminal Code[18] or the Act of 20 may 1971 The Code of Minor Offences.[19] Therefore, the awareness and purposefulness of obtaining it is essential.

The discussed prohibition has a universal character since irrespective of the type of evidence that was to be introduced into the trial and of the person would like to introduce it, it will be impossible if it was obtained by means of a prohibited act for the needs of a given criminal case (the so-called directionality of prohibition).

The provision of Article 168a CCrP "survived" in an unchanged form for a mere ten months. The amending act of 11 March 2016 on amending the act – the Code of Criminal Procedure and certain other acts,[20] which in a way restored the model of a criminal procedure from before 1 July 2015 reemphasizing the superiority of substantive truth and the court's active role in its course, in the first version (The Sejm Paper no. 207) repealed Article 168a CCrP, and then reinstated it (The Sejm Paper no. 276), though restricting its scope quite significantly. It was because the legislator believed that the board scope of the evidentiary prohibition, regardless of the circumstances of obtaining it, disqualifies the evidence not so much pursuant to the legal and procedural criteria specified by evidentiary prohibitions, but according to substantive legal and criminal criteria concerning offensive action of participants to the proceedings and persons not participating in the process (or even only action prohibited under criminal law – Article 1 § 1 CC).[21]

As a consequence, the undertone of Article 168a CCrP was completely changed, emphasizing the general possibility of using "the fruit of the poisonous tree" except for exclusions directly specified therein.

The limitation of the evidentiary prohibition involved disqualification of evidence obtained only as a result manslaughter, wilful commission of a grievous bodily injury or deprivation of freedom, and in the case of a public official if in connection with the performance of his duties

14 A. Lach, *Dopuszczalność dowodów uzyskanych z naruszeniem prawa w postępowaniu karnym*, "Państwo i Prawo" 2014, no. 10, pp. 43–44.

15 Ibidem, p. 43.

16 Act of 6 June 1997 The Criminal Code, consolidated text, Dz. U. (Journal of Laws) of 2019 item 1950 as amended; hereinafter: CC, criminal code.

17 W. Jasiński, *Zakaz przeprowadzenia…*, p. 364.

18 Consolidated text Dz. U. (Journal of Laws) of 2018, item 1958 as amended.

19 Consolidated text Dz. U. (Journal of Laws) of 2019, item 821 as amended.

20 Dz. U. (Journal of Laws) of 2016 item 437.

21 R. Kmiecik, *Kontrowersyjne unormowania w znowelizowanym kodeksie postępowania karnego*, "Prokuratura i Prawo" 2015, no. 1–2, p. 17.

he obtained the evidence in violation of procedural law or by commission of a prohibited act referred to in Article 1 § 1 CC.

The consequences of establishing the prohibition

The addressees of the norm of Article 168a CCrP do not only comprise non-institutional parties (the accused or subsidiary prosecutor), but also investigative bodies and the public prosecutor.

In jurisdictional proceedings the court takes a decision to allow or dismiss the given evidence. Where an evidentiary motion was filed, even included in the indictment by the prosecutor and meeting the criteria of Article 168a CCrP, it should be dismissed pursuant to Article 170(1)(1) CCrP as inadmissible. If given evidence was already introduced to a pending criminal case and then it turns out that it was inadmissible in light of Article 168a CCrP, it should be eliminated since it cannot form the established facts in a given case.[22] Excluding it does not result in removing given information or document (or another form of evidence) from the case files, but only from the basis for a future ruling.[23] This is because it is a decision of a procedural body which, similar to others, is subject to assessment and verification of its validity e.g. in the course of appellate proceedings.[24]

It is worth looking in the discussed scope at the issues related to the constitutionality of the adopted regulations. The Court of Appeal in Wrocław in its judgment of 27 April 2017 (file no. II AKa 213/16) ruled that evidence obtained by officials with the infringement of the limits of provocation cannot be admitted in the case.[25] As a consequence, the evidence was obtained not only by means of a prohibited act, but also with the infringement of the provisions of the Constitution of the Republic of Poland as well as the European Charter of Human Rights. Giving reasons for its stance, the court stated that "evidence may be deemed inadmissible if it was obtained in violation of procedural law or my means of a prohibited act at the same time infringing the provisions of the Constitution of the Republic of Poland (e.g. Article 30, 47, 49 or 51). In such a situation the statutory limitation expressed in the phrase 'exclusively due to the fact that it was gained in violation of procedural law or by commission of a prohibited act' is not applicable since also norms of constitutional law were infringed here". This ruling, though issued after amending Article 168a CCrP, quite clearly favours the applicability of the fruit-of-the-poisonous-tree doctrine.

By a request of 6 May 2016, the Commissioner for Human Rights filed a motion at the Constitutional Tribunal for declaring the amendment of the provision of Article 168a CCrP as unconstitutional (file no. K 27/16). Due to the changes in the functioning of the Tribunal itself, universal criticism towards it caused by legal and constitutional doubts as to the correct

22 A. Lach, *Dopuszczalność…* pp. 50–51.

23 A. Seremet, *Prokuratura a kontradyktoryjny model postępowania sądowego. Wyzwania i możliwe zagrożenia*, "Prokuratura i Prawo" 2015, no. 1–2, pp. 171–172.

24 W. Jasiński, *Zakaz przeprowadzenia…*, p. 376.

25 By this ruling the court acquitted the defendants emphasizing that they had committed a prohibited act as a consequence of active provocation of a person working closely with the Central Anticorruption Bureau.

compositions of the Tribunal or even appointment of its judges,[26] the Commissioner for Human Rights withdrew his request in April 2018. Thus, in accordance with the principle of presumption of constitutionality, Article 168a CCrP needs to be seen as constitutional.

Evidence contrary to the law in administrative procedure

As pointed out in the introduction to these reflections, the Constitution, shaping a number of principles, laws and civil liberties, provided its addressees with procedural guarantees, including by means of Article 7 where it orders that organs of public authority should function on the basis of, and within the limits of, the law. The act of 14 June 1960 The Code of Administrative Procedure[27] is the basic and at the same time most comprehensive legal act regulating administrative procedure. Among fundamental principles, the act names the principle of legality (Article 6 CAP), the principle of public interest and just interest of citizens (Article 7 CAP) or the principle of deepening trust in the public authorities (Article 8 CAP). The listed principles legitimize the adoption of the regulation of Article 75(1) sentence 1 CAP according to which anything that may contribute to clarifying the matter and that is not in violation of the law may be admitted as evidence.

The sole act regulating the administrative procedure does not define the notion of evidence. With regard to the above-mentioned provision of Article 75(1) CAP, this term should be understood as all sources of true information that allows providing proof.[28] In particular, this provision lists evidence such as documents, witness testimony, expert opinions and inspections. However, this is not *numerus clausus* of evidence admissible in administrative procedure but only an open enumeration of means of proof identified by the statute.[29] Therefore, the so-called innominate evidence is admissible if it can contribute to discovering the objective truth and if it is not contrary to the law, e.g opinions of research centres, plans, maps, films, tapes.[30] Moreover, the open construct of the catalogue of evidence is in fact necessary and only in this way can the principle of the objective truth be carried out which any way imposes on the public authority the obligation of detailed explanation of the established facts of the case.

Evidence in administrative procedure though seems to be subject to one essential restriction. Namely, lawfulness is the limit of its admissibility. Regulations of detailed statutes might also be another limitation. In accordance with conflict-of-laws rules, they aim to eliminate contradictions of rules in the system of the law. In this case it would be *lex specialis derogat legi generali* and *lex posterior generali non derogat legi priori speciali*.[31]

On the basis of judicial decisions of the Supreme Administrative Court it needs to be concluded that admissibility of evidence from the point of view of its legality – *sensu largo* lawfulness – requires interpretation in the light of regulation in the provisions of substan-

26 See supplementary Commission Recommendations regarding the rule of law in Poland (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.

27 Consolidated text Dz. U. (Journal of Laws) of 2018 item 2096 as amended, hereinafter: CAP.

28 W. Dawidowicz, *Zarys procesu administracyjnego*, Warsaw 1989, pp. 109–110.

29 B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warsaw 2012, p. 160.

30 W. Siedlecki, *Postępowanie cywilne w zarysie*, Warsaw 1972, pp. 316, 351.

31 See resolution of the Supreme Administrative Court of 26 February, 2018 I OPS 5/16 (CBOSA).

tive law, taking into account the whole of this regulation outlining the hypothetical status of facts.[32] Nevertheless, evidence, apart from being contrary to substantive law, cannot be contrary to certain evidentiary restrictions under procedural law. A vivid example of such a situation would involve admitting or recognizing as proof testimony given by a person who under Article 82 CAP would be deprived of the capacity to act as a witness e.g. due to inability to perceive or communicate their observations. Deeming evidence as unlawful is done by an order of a public administration authority. This order cannot be challenged by way of a complaint (Article 77 § 2 CAP). However, the public administration authority is not bound by the content of the evidentiary order, which means than in the course of the proceedings an order may be squashed or amended *ex officio* or at the request of the party if the circumstances of the case dictate so.

It also needs to be taken into account that under Article 61 § 1 CAP administrative proceedings shall be initiated upon the demand of a party or *ex officio* and under Article 77 § 1 CAP even in the case of proceedings instituted upon the demand of the party, it is the public administration authority that is obliged to exhaustively collect and evaluate all evidence. Implementing the principle of substantive truth on the basis of the presented provisions under the code of administrative procedure makes it actually impossible to conduct evidentiary proceedings based on unlawful evidence. It would lead to erroneous establishment of facts.

In view of the above, the theory of fruit of the poisonous tree will be applicable in administrative procedure. It is because the evidentiary prohibition in construed in a different way than under criminal law. Article 75 § 1 CAP clearly states that anything that may contribute to clarifying the matter and that is not in violation of the law may be admitted as evidence in proceedings before public administration authorities. This reference is quite board but at the same time there are no grounds to narrow this regulation.

It is worth noting that for tax proceedings the legislator literally repeated the CAP provision addressing evidence. Article 180 § 1 of the act of 29 August 1997 The Tax Ordinance Act[33] provides that anything that may contribute to clarifying the matter and that is not in violation of the law may be admitted as evidence in tax proceedings. Another provision – Article 181 TO – specifies the definition of evidence in tax proceedings indicating that it may include tax books, declarations made by the party, witness testimony, expert opinions, materials and information gathered in inspections, tax information and other documents gathered in the course of the analytical activity of the National Revenue Administration, checks, tax inspection or taxes and duties inspection as well as material collected in the course of a criminal case or proceedings in cases of fiscal crimes or fiscal minor offences.

A similar situation occurs for entities who carry out an economic activity. Pursuant to Article 46(3) of the act of 6 March 2018 Entrepreneurs Law,[34] evidence which in the course of a review carried out by a reviewing authority was examined in violation of the statute or in violation of other regulations in terms of reviewing the undertaking's business activity,

32 See judgement of the Supreme Administrative Court of 7 March 2013, II OSK 2119/11 (Legalis) and Judgement of the Supreme Administrative Court of 26 July 2016, II GSK 299/15 (Legalis).

33 Consolidated text Dz. U. (Journal of Laws) of 2019 item 900 as amended, hereinafter TO.

34 Consolidated text Dz. U. (Journal of Laws) of 2019 item 1292 as amended: before the entry into force of this act, the act of 2 July 2004 on the freedom of economic activity (Dz. U. 2004 no. 173 item 1807) was applicable, whose Article 77(6) was identified with Article 46(3) of the current act.

which had significant impact on the result of the review cannot be evidence in administrative, tax, criminal or fiscal criminal procedure concerning the undertaking. In order for given evidence not to be admitted in the course of the review of carrying out a business activity another condition must be met apart from unlawfulness alone; namely such evidence must have essential impact on the result of the review.

Nevertheless, if one were to look closer at the presented types of administrative procedure it is clearly noticeable that anything may be used as evidence in these proceedings provided that it is not in violation of the law (in the case of limitation of the freedom to carry out a business activity such evidence must have an essential impact on the result of the review of the undertaking). This is turn leads to a conclusion that different to the criminal procedure, the fruit-of-the-poisonous-tree doctrine will apply to administrative proceedings.

In proceedings before administrative courts there no longer occurs a direct limitation of the restriction of evidence in violation of the law. Article 106 § 3–5 of the act of 30 August 2002 Law on proceedings before administrative courts[35] indicates that the court may, *ex officio* or upon the request of the party, examine supplementary evidence in the form of documents, if it is necessary to clarify essential doubts and will not cause excessive extension of the proceedings in the case; universally known facts will be taken into consideration by the court even without the parties invoking them, but what is of utmost importance, regulation of the act of 17 November 1964 the Code of Civil Procedure[36] is applied accordingly to evidentiary proceedings in proceedings before an administrative court. However, it needs to be emphasized that judicial and administrative proceedings in collecting and examining evidence have a markedly different character to the regulation of evidentiary proceedings in civil or criminal cases. This results primarily from the purpose for which the proceedings before administrative courts are being conducted. These courts, as a rule, examine complaints for administrative decisions which are final in the administrative course of the instance or for other rulings (Article 3 PBAC). Therefore, the aim of any evidentiary proceedings before administrative courts is not to establish facts of the administrative case, but to assess whether administration authorities established this factual status to be compliant with the rules applicable in administrative procedure.[37]

As indicated above, the regulation of the CCP is applied accordingly in proceedings before an administrative court. The code of civil procedure does not contain any regulation addressing the issue of admissibility of evidence or definition of this matter. Article 227 CCP prescribes only that facts that are relevant to the determination of a case are the subject-matter of evidence. However, it is worth noting that pursuant to Article 5 of the act of 23 April 1964 the Civil Code[38] one cannot exercise one's right in a manner contradictory to its social and economic purpose or the principles of community life. Thus, collecting evidence in proceedings and presenting it by the parties should not be done in violation of principles of community life.[39] Admissibility of "tainted" evidence is alone another issue. Then, due to the absence of regula-

35 Consolidated text Dz. U. (Journal of Laws) of 2019 item 2325 as amended, hereinafter PBAC.

36 Consolidated text Dz. U. (Journal of Laws) of 2019 item 1460 as amended, hereinafter CCP.

37 See judgement of the Supreme Administrative Court of 21 March 2014, II OSK 2589/12, judgment of the Voivodship Administrative Court in Poznań of 5 June 2014, II SA/Po 66/14, judgement of the Supreme Administrative Court of 3 December 2013, I OSK 3082/12.

38 Consolidated text Dz. U. (Journal of Laws) of 2019 item 1145 as amended.

39 See judgement of the Supreme Court of 22 April 2016, II CSK 478/15; judgment of the Administrative Court in Warsaw of 6 July 1999, I ACa 380/99.

tion concerning admissibility of this type of evidence there is no reason to disqualify it entirely, especially where a party to the proceedings does not deny its authenticity (e.g. a recording to which the party had not consented).[40] In such situations the court should carefully and diligently explain the reasons and circumstances of the emergence of such evidence.[41] This in turn leads to a conclusion that in the course of proceedings before administrative courts there is no formal prohibition to admit evidence which constitutes fruit of the poisonous tree, but the absence of its automatic disqualification does not relieve the court from careful examination of the legitimacy of its emergence and usefulness in hearing a given case, especially that Article 106 § 3 PBAC talks only about an extraordinary situation involving admissibility of supplementary evidence. It is because these courts only carry out judicial reviews public administration authorities in terms of legality of administrative cases conducted by these authorities.

Conclusions

The interpretation of Article 168a CCrP leads to a conclusion that the rule of the fruit of the poisonous tree is not applicable in the Polish criminal procedure. Besides, it has been the same since the very beginning of it being in force, i.e. 1 July 2015. In the author's opinion this results from the fact that the legislator used an expression of obtaining (before: examining and using) evidence "by commission" of a prohibited act. This expression indicated the directness of source of illegal evidence and cannot be interpreted in an expanding manner.[42] The evidentiary prohibition typified in Article 168a CCrP is indeed of direct nature. Therefore, it is possible to admit evidence obtained indirectly illegally, thus in connection with or as a result of a prohibited act.[43]

Each time, according to the rule of the free assessment of evidence, the court is obliged to take a decision about which evidence it deems admissible and on this evidence bases its establishment of facts of the matter pursuant to Article 410 CCrP.

The introduction of Article 168a CCrP alone constituted in fact the rule of general admissibility of tainted evidence. Its wording in the state of the law of 15 April 2016 provides for two exceptions to this rule.

The first one concerns public officials who obtained evidence in connection to conducting official tasks – a broader evidentiary prohibition.

The second one concerns non-institutional entities (who are not public officials) who obtained evidence as a result of manslaughter, wilful commission of a grievous bodily injury or deprivation of freedom – a narrower evidentiary prohibition.

The above reflections substantiate the belief that in the current model of a criminal case evidence obtained both indirectly and directly illegally (evidence as a fruit of the poisonous tree and from the tree itself) is admissible unless one of the two exceptions pointed to in Article 168a CCrP occur.

40 See judgement of the Supreme Court of 25 April 2003, IV CKN 94/01.

41 See judgment of the Voivodship Administrative Court in Szczecin of 9 October 2014, I ACa 432/14.

42 P. Kardas, *Podstawy i ograniczenia przeprowadzania oraz wykorzystywania w procesie karnym tzw. dowodów prywatnych*, "Palestra" 2015, no. 1–2, p. 9–10.

43 D. Świecki, *Czynności procesowe obrońcy i pełnomocnika w sprawach karnych*, Warsaw 2016, p. 190.

The aim of a criminal case is to discover the offender and to hold them liable, to combat crime *sensu largo* by general and specific prevention, including by apt application of measures prescribed for in criminal law, to protect the injured party and meet all identified circumstances within a reasonable time. With goals of a criminal case defined so in 2 § 1 CCrP it is difficult to admit evidence which was obtained contrary to the law as a tool for pursuing these goals. After all, actual established facts should be the basis of all decisions – the principle of substantive truth (Article 2 § 2 CCrP).

Therefore, a return to the solution applicable between 1 July 2015 and 14 April 2016 should be postulated for.

It is different in administrative proceedings. The CAP, the TO and the Entrepreneurs Law point to inadmissibility of evidence that is contrary to the law, which is a clear basis to conclude that on the ground of an administrative procedure the fruit-of-the-poisonous-tree doctrine is applicable, though excluding cases subject to review by an administrative court and with the possibility to admit supplementary evidence at this stage.

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Protection of the environment against electromagnetic fields – comments and amendments in the law[1]

Abstract

The aim of this paper is to demonstrate whether applicable regulations unambiguously specify the role of public administration authorities in terms of protection against electromagnetic radiation in the environment. The paper employs the method of interpretation of norms of applicable law within which normative material of the discussed issue is analysed and selected opinions of the legal thought and judicial decisions are referred to. The paper also refers to the assessment of electromagnetic radiation in the environment in the West Pomeranian Voivodship in 2018 made on the basis of research carried out according to the State Environmental Monitoring Programme for 2016–2020, which in turn is grounded in the regulation of Article 2(1)(2) of the act of Inspection of Environmental Protection. The measurements were made in accordance with a relevant regulation and did not show excess levels of electronic fields in the environment. However, it needs to be remembered that the dynamic development of the telecommunication industry will result in enhanced monitoring and checks of the levels of these fields especially in publically available places.

Key words:

electromagnetic radiation, Chief Inspector of Environmental Protection, measurements, monitoring, checks

Introduction

Protection of the environment against electromagnetic fields involves maintaining the levels of electromagnetic fields below or at least at the permissible levels and reducing the levels of

1 The idea of writing a paper with the above title came from a study written by the co-author of this paper, Joanna Chałupińska, titled "Ocena promieniowania elektromagnetycznego w środowisku w województwie zachodniopomorskim w 2018 roku" [Assessment of electromagnetic radiation in the environment in the West Pomeranian Voivodship in 2018] which is available at www.gios.gov.pl. This paper was expanded with the established line of judicial decisions and the view of legal scholars and commentators, as well as with issues concerning the reviewing activity of the Inspection of Environmental Protection. It was also supplemented with legislative changes occurring within this subject area.

electromagnetic fields at least to permissible levels where they are not complied with. Regulations addressing the subject-matter in question were included in the act Environmental Law[2], hereinafter: EL. Electromagnetic fields' levels have the character of immissions standards, which is why exceeding them as a result of the use of installations is not permitted.[3] Level indicators to protect the people against electromagnetic radiation are included in the relevant resolution.[4] An electromagnetic field means a type of a physical field, state of a physical space which has a characteristic involving the fact that the electric charge or another object of electric or magnetic properties inside it is impacted by a specific force.[5] There are two types of electromagnetic radiation in the environment: natural (Earth's geomagnetic field, cosmic rays) and artificial (introduced to the environment by man). Regulations of the law address artificial sources of electromagnetic fields such as: power facilities for generating and transmitting electricity (power plants, CHP plants, transformer stations, overhead power lines) as well as radiocommunication installations and facilities (cell towers, radio and TV broadcasting stations, radiolocation and radionavigation stations). The key legal act that indirectly addresses energy and electromagnetic efficiency, namely the Constitution of the Republic of Poland,[6] hereinafter: the Constitution needs to be pointed out here. It is because regulation of Article 5 points to "the obligation to ensure the possibilities for Poland's development pursuant to the principles of sustainable development, which (…) next to the issues related to the protection of health and life of users translates directly i.a. on ensuring possibly most effective use of energy"[7], including sources of electromagnetic radiation. There is no doubt that ensuring energy security is in the public interest. The issue whether legal instruments serving the investment development are carried out at the expense of the requirements of environmental protection stays problematic.[8]

The effects triggered by the impact of an electromagnetic field are not fully identified. The impact of electromagnetic radiation depends on the frequency, strength of intensity and distribution of an electromagnetic field as well as the period over which is affects an organism. The assessment of the impact of the factor of time of electromagnetic fields' influencing

2 Act of 27 April 2001 Environmental Law, Dz. U. (Journal of Laws) of 2019 item 1396 as amended.

3 *Prawo ochrony środowiska,* 3rd edition, M. Górski (ed.), Warsaw 2018, p. 354.

4 Regulation of the Minister of the Environment of 30 October 2003 on permissible levels of electromagnetic fields in the environment and ways of checking compliance with these levels (Dz. U. no. 192 item 1883) was repealed. On 1 January 2020 regulation of the Minister of Health of 17 December 2019 on permissible levels of electromagnetic fields in the environment entered into force (Dz. U. (Journal of Laws) of 2019 item 2448).

5 Encyklopedia Powszechna PWN, 3rd edition (as quoted in:) P. Korzeniowski, *Prawa i obowiązki przedsiębiorców w ochronie środowiska. Zarys encyklopedyczny*, Warsaw 2010, p. 198.

6 Constitution of the Republic of Poland of 2 April 1997 (Dz. U. (Journal of Laws) no. 78 item 483 as amended and corrected), hereinafter the Constitution.

7 D. Koc, *Wymogi wynikające z przepisów dotyczących efektywności energetycznej oraz certyfikacji energetycznej budynków w procesie inwestycyjnym*, in: *Energetyka i ochrona środowiska w procesie inwestycyjnym*, M. Cherka, F.M. Elżanowski, M. Swora, K.A. Wąsowski (eds.), Warsaw 2010, p. 25.

8 K. Sobieraj, *Obszary chronione wobec projektowanych regulacji w zakresie korytarzy przesyłowych*, in: *Problemy wdrażania systemu Natura 2000 w Polsce*, A. Kaźmierska-Patrzyczna, M.A. Król (eds.), Polskie Zrzeszenie Inżynierów i Techników Sanitarnych, Szczecin–Łódź–Poznań 2013, p. 662.

human health is one of the most difficult issues.[9] International research programmes play a very important role in the analysis. It is worth mentioning here the World Health Organization's programme "Electromagnetic field".[10] Guidelines of the International Commission on Non-Ionizing Radiation Protection do not include, however, detailed recommendations on the protection of the general public against electromagnetic fields. Member States may implement more rigorous standards concerning exposure to an electromagnetic field.[11]

A view (shaped to a great extent in the judicature of the Constitutional Tribunal) according to which a "healthy" environment is a constitutional value subject to which "the process of interpretation of the Constitution[12] must be ordered" is undeniable. However, one of the premises restricting the constitutional rights and freedoms (Article 31(3) of the Polish Constitution) involves public health. Regulation of Article 68(4) of the Constitution indirectly refers to a "healthy environment". The above provision incudes a State task which involves taking measures that prevent results of degradation of the environment which are negative to health. Nevertheless, one needs to remember that constitutional legal scholars and commentators express a view that the right to protection of health may be classified not only as a personal right, but also as a programme norm specifying the purposes of the state's policy.[13] It seems to be a universal approach to assume that if a planned undertaking lies within statutory limits of complying with environmental norms, then its impact should not bring about negative health effects.[14] For example, a judgement of the Voivodship Administrative Court of 23 May 2014 examined the problem of constructing a planned power line which may be the cause for exceeding, in publically available places, permissible levels of electromagnetic fields. It was concluded that in view of adopting statutory standards (as well as those resulting from implementing rules) of the impact of certain threats on the environment which outline limit values in this scope, the role of the authority is to examine whether the planned impact stays within the limits prescribed by the law or whether it exceeds them. An assessment of the above should be a dominant in the process of adjudicating whether in this specific case potential health effects were triggered.

9 Specialist literature features a number of studies which concern detailed research on the discussed subject matter, including: UK Health Protection Agency, Health Effects from Radiofrequency Electromagnetic Fields. Report of the independent Advisory Group on Non-Ionisinig, 2012 available at: https://www.gov.uk/government/publications/radiofrequency-electromagnetic-fields-health-effects (access: 14.01.2020), Media Release of the Cancer Council Australia of 17 May 2010 "World's largest mobile phone study fails to find brain cancer link" available at: https://www.cancer.org.au/content/pdf/News/MediaReleases/2010/17MAY2010_World%e2%80%99s_largest_mobile_phone_study_fails_to_find_brain_cancer_link.pdf (acess: 14.01.2020), M. Zmyślony, *Działanie stałych i sieciowych pól magnetycznych występujących w środowisku człowieka na układy biologiczne. Mechanizm rodnikowy*, Łódź 2000; K. Gryz, *Pola elektromagnetyczne w środowisku pracy*, Warsaw 2001.

10 S. Różycki, *Ochrona środowiska przed polami elektromagnetycznymi. Informator dla administracji samorządowej*, Generalna Dyrekcja Ochrony Środowiska 2011, p. 33.

11 Report from the Commission on the application of Council recommendation of 12 July 1999 (1999/519/EC) on the limitation of the exposure of the general public to electromagnetic fields (0 Hz to 300 GHz) – Second Implementation report 2002–2007. COM/2008/0532 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52008DC0532 (access: 12.01.2020).

12 Judgment of the Constitutional Tribunal of 13 May 2009, Kp 2/09, OTK ZU 2009, no. 5a item 66, LEX no. 493281.

13 A. Surówka, *Miejsce konstytucyjnego prawa do ochrony zdrowia w systemie praw i wolności człowieka i obywatela*, "Przegląd Prawa Konstytucyjnego" 2012, no. 3, pp. 123, 126.

14 Judgment of the VAC in Warsaw of 23 May 2014, file no. IV SA/Wa 249/14, LEX no. 1564499.

Many practical problems are brought by the issue of locating transmission facilities[15] for instance on the Natura 2020 areas. As a rule, if an operator which uses transmission facilities does not negatively affect the protected areas, then the legislator does not require any particular behaviours on the side of such an operator.[16] If transmission facilities are located on the Natura 2020 areas the content of the operator's obligation is determined by the environmental protection act.[17] With today's progress of civilization, intensive development of radiocommunication systems and an increasing number of radiation-generating devices, it is not possible to eliminate electromagnetic radiation from the environment. In consequence, it is crucial to weigh the interests of the entities under the law – on the one hand taking into account the need of technological investments, on the other noting the need of their impact of their operation on the environment.[18] Therefore, it is necessary to examine levels and monitor radiation emission norms so that they do not exceed permissible values.

The issue of installing cell towers near residential areas in particular triggers a lot of controversy. Pursuant to Article 122a(1) EL, the operator of a radiocommunication installation or the user of a device emitting electromagnetic fields is obliged to measure the levels of these fields always directly after beginning to use the installation or device and each time the conditions of operation of this installation or device change as far as these changes may affect the level of emissions of fields from this installation or device. On 25 October 2019, by the act of 30 August 2019 on amending the act on supporting telecommunications services and networks and certain other acts,[19] hereinafter: the act of 30 August 2019, an amendment to the wording of Article 122a(2) EL was introduced. In the current status of the law, an operator of an installation or a user of a device emitting an electromagnetic field provides the voivodship inspector of environmental protection and the voivodship state health inspector with results of measurements of levels of electromagnetic fields in the environment in an electronic form within 30 days of making the measurements.

Monitoring intensity of electromagnetic fields

The system of monitoring radiation is supposed to provide information about electromagnetic radiation in order for relevant public administration authorities to take protective and preventive measures.[20] The only method of gaining knowledge in this scope involves control measurements of intensity of electromagnetic fields carried out by the bodies of the

15 One can assume pursusnt to Article 49(1) of the act of 23 April 1964 The Civil Code (Dz. U. (Journal of Laws) of 2019 item 1145 as amended) that transmission facilities involve equipment for supplying or discharging liquids, steam, gas, electricity and similar other facilities.

16 B. Rakoczy, *Dopuszczalność usytuowania urządzeń przesyłowych na obszarach Natura 2000 ze szczególnym uwzględnieniem problematyki służebności przesyłu*, in: *Problemy wdrażania systemu Natura 2000...,* p. 652.

17 Ibidem, p. 653.

18 D. Trzcińska, *Prawo planowania i zagospodarowania przestrzennego z pespektywy środowiska i jego ochrony*, Warsaw 2018, p. 397.

19 Act of 30 August 2019 on amending the act on supporting telecommunications services and networks and certain other acts (Dz. U. (Journal of Laws) of 2019 item 1815).

20 S. Rabiej, *Wielkoskalowe skażenia promieniotwórcze środowiska. Monitoring. Ochrona. Modele i Odniesienia*, Warsaw 2012, p. 59.

Inspection of Environmental Protection and the State Health Inspection or obtained from telecommunications companies and carried out by accredited research laboratories.

Assessment of the levels of electromagnetic fields and observation of changes is done under the State Environmental Monitoring. In accordance with the Act of 20 July 2018 on amending the act on the Inspection of Environmental Protection and certain other acts,[21] as of 1 January 2019 the Chief Inspector of Environmental Protection took over tasks pertaining to the implementation of the state environmental monitoring and laboratory activity, which before lay with the Voivodship Inspector of Environmental Protection. In view of the above, financing tasks of the State Environmental Monitoring starting in 2019, including research planned to be carried out under the Voivodship Monitoring of the Environment of the West Pomeranian Voivodship in 2019, lies with the Chief Inspectorate of Environmental Protection. Thus these measurements are carried out by the Central Research Laboratory, Szczecin Branch, at the Chief Inspectorate of Environmental Protection. According to the State Environmental Monitoring Programme of the West Pomeranian Voivodship for 2016–2020, the Chief Inspector of Environmental Protection analyses in detail information about installations emitting electromagnetic radiation. The data collected in this regard is gradually gathered in electromagnetic fields' databases, including in the JELMAG database, and is used to assess the levels of electromagnetic fields. On the basis of this data a register of excessive values of the impact of electromagnetic fields is also kept.

Information on monitoring electromagnetic fields is made available, among others, to the Governor's Office, the Maritime Office, the Border Guard, the Regional Inspectorate of Sea Fishing and at the request of natural persons and is published (this applies in particular to annual assessments of the state of the environment) on the IEP's website: www.gios.gov.pl (up until 31.12.2018 at: www.wios.szczecin.pl). Making the information about the environment and the state of the environment available is an expression of active implementation of the obligation to inform.[22] Assuming that as a rule practically any installation affects the environment, the right to access to the environment, to information about the state and protection of the environment, may constitute a tool of social review of the activity of public administration authorities taken up in the area of environmental protection.[23] Therefore, all available information on the monitoring of intensity of electromagnetic fields is publically announced, including the location of measurement points (address, coordinates), scope of measurements, measuring devices, measurement methods, results and measurement uncertainty, information about terrain on which exceeding permissible levels of electromagnetic fields in the environment were observed, with details of excessive values concerning terrain allocated for residential buildings and publically available places.

In order to ensure full information about the values of electromagnetic fields, the Chief Inspector of Environmental Protection uses i.a. available information submitted by installations' operators and users of field-emitting facilities. The research carried out by the Chief Inspectorate of Environmental Protection (since 2018 – Voivodship Inspectorates of Environ-

21 Dz. U. (Journal of Laws) of 2018 item 1479.

22 M. Czuba-Wąsowska, *Dostęp do informacji o stanie i ochronie środowiska – wybrane zagadnienia proceduralne*, in: *Energetyka i ochrona środowiska w procesie inwestycyjnym*…, p. 176.

23 Ibidem, p. 185.

mental Protection) under the State Environmental Monitoring, includes the range of electromagnetic radiation from 3 MHz to 3 GHz. A field with such frequencies is mainly generated by radio and TV stations and cell towers. They are electromagnetic radiation sources the number of which is dynamically growing. At the moment on the territory of the West Pomeranian Voivodship the number of radio permits issued by the Office of Electronic Communication has exceeded 10 thousand.[24]

Measurements of the intensity of electromagnetic fields in the environment were carried out according to the Regulation of the Minister of the Environment of 12 November 2007 on the scope and manner of conducting periodic measurements of levels of electromagnetic fields in the environment[25] in a three-year cycle, which means that investigations in the same points are repeated every three years. In 2018 measurements on the territory of the West Pomeranian Voivodship were done in 45 points in publically available places:

- 15 measurements in central districts or neighbourhoods of tows with a population of over 50 thousand,
- 15 measurements in other towns,
- 15 measurements in rural areas.

These points, according to the provisions of the above regulation, are located not closer than 100 m away from the projection of the antenna of radiocommunication, radiolocation and radionavigation installations on the surface of the terrain. The aim of the said measurement was to specify the values of intensity of electromagnetic radiation in the environment and possibly to identify areas on which the permissible values of intensity are exceeded. Measurements done in 2018 in the West Pomeranian Voivodship did not reveal excessive levels of permissible electromagnetic fields in the environment. However, one needs to remember that the dynamic development of the telecommunications industry leads to the increase of artificial sources of electromagnetic fields in the environment. Thus, this fact results in a slight increase in average levels of electromagnetic fields in the environment, especially in densely populated areas.

Checking the levels of electromagnetic fields

Pursuant to Article 2(1)(1)(b) of the act on the Inspection of Environmental Protection,[26] hereinafter IEP, the tasks of the Inspection of Environmental Protection include inspecting the entities that use the environment in the meaning of the EL in terms of compliance with decisions establishing the requirements for using the environment and complying with the scope, frequency and manner of conducting measures in the volume of emissions and its impact of the state of the environment. With regard to electromagnetic radiation coming from cell towers the legislator did not specify emission standards but only defined accepted values in the environment which means that it is not monitoring emission from these installations that

24 Data from the Office of Electronic Communication: https://www.uke.gov.pl (access: 23.10.2019).

25 Dz. U. (Journal of Laws) no. 221 item 1645.

26 Act of 20 July 1991 on the Inspection of Environmental Protection (Dz. U. (Journal of Laws) of 2019 item 1355 as amended).

is subject to this inspection (as it is not limited), but meeting the standards of the quality of the environment.

If the outcome of the inspection states irregularities, then a post-inspection ordinance is issued pursuant to Article 12(1)(1) IEP in order for them to be eliminated and to inform about action taken by the inspected entity in order to comply with the requirements of environmental protection.

Requests for conducting checks are brought by natural persons, institutions and public administration bodies. When implementing the provisions of Article 8a IEP, voivodship inspectors of environmental protection are obliged to provide regularly information, at the request of the bodies of local government units, on the state of the environment on the territory of the voivodship taking into account results of checks conducted on the territory of a commune or a poviat. This information may be used by these bodies to draw up Environmental Protection Programmes.

As a rule, the subject matter of a request for an inspection does not involve the way the electromagnetic field is emitted, but the applicant's concern about exceeding the limit values or about the impact of the emissions level on human health where these issues go beyond the scope of the subject-matter jurisdiction of the Inspection of Environmental Protection. The assessment of the impact of electromagnetic fields lies with the State Health Inspection, which implements public health tasks, in particular those associated with the protection of human health against detrimental impact of environmental harmful effects.[27] Whereas the inspection of the state of the environment involves checking whether levels of electromagnetic fields in publically available places do not exceed limit values. In 2018 the Voivodship Inspectorate of Environmental Protection in Szczecin, hereinafter: VIEP in Szczecin conducted checks of installations emitting electromagnetic fields – (cell towers and other facilities) both in the field and based on the so-called reports of self-monitoring measurements. The measured values were significantly above the limits (7 V/m). The inspection took into account results of provided measurements of the level of electromagnetic fields in the environment carried out in accordance with the appropriate methodology. Inspectors of the VIEP in Szczecin checked most of all whether:

- limit values for emissions were observed,
- examinations and measurements were carried out in a place and scope specified in statutes,
- taking samples and examinations were performed by an authorised laboratory according to the reference methodology,
- results did not raise reservations.

Stating above-norm levels of electromagnetic fields during the inspection constitutes a basis for requesting – under Article 16(1) IEP – at a competent authority for environmental protection that relevant action should be taken. In accordance with Article 362(1) EL an environmental protection authority may by way of a decision impose an obligation to limit the impact on the environment and related threats and to restore the environment to the proper state if the entity using the environment causes an adverse effect on the environment. Irrespective of the above, in accordance with Article 154(1) EL, "by way of a decision, the environmental

27 Act of 14 March 1985 on the State Health Inspection (Dz. U. (Journal of Laws) of 2019 item 59).

authority may lay down the requirements of environmental protection for the operation of an installation the emissions wherefrom do not require a permit, where this is justified by the need to protect the environment". The literal context (and in fact referring strictly to its wording) of the expression "requirements of environmental protection" may bring interpretational doubts for the bodies applying the law.

In turn, the undertakings' failure to meet the requirements imposed by regulations on electromagnetic field emissions results in specified sanctions:

- in accordance with Article 202 of the act Telecommunications Law[28], the President of the Office of Electronic Communication may impose on the undertaking an order to withhold the operation of telecommunications activity (by way of an immediately enforceable decision) if he concluded as a result of an inspection that the inspected entity violated obligations imposed on them in a way that causes a direct and grave threat to human life and health;
- pursuant to Article 364 EL where the activity conducted by the user of the environment causes a substantial deterioration of the state of the environment or poses danger to human life or health, the Voivodship Inspector for Environmental Protection shall issue a decision stopping this activity in the scope necessary to prevent the deterioration of the state of the environment;
- in the regulation of Article 338a the EL demonstrates that evading the obligation to measure electromagnetic fields in the environment referred to in Article 122a prescribes punishment by arrest or imprisonment or a fine.

However, the currently applicable regulation of the EL does not prescribe administrative monetary penalties where permissible levels of electromagnetic fields in the environment are exceeded. The EL provides for imposing administrative monetary fines for violating the conditions laid out in permits and decisions specifying the conditions for using the environment. Such permits or decisions are not issued to specify levels of electromagnetic fields. Installations producing electromagnetic fields that may have a negative effect on the environment must only be notified to the environmental authority (Article 152(1) EL). While performing inspection steps, the VIEP should then request at the competent environmental protection authority that the notification together with the report on the measurements be made available.

The 2019 report of the Supreme Audit Office, hereinafter SAO, on "action of public administration authorities in the scope of protection against electromagnetic radiation coming from cellular telecommunications devices" addressed the formal and legal difficulty based on imprecision of meaning expressed in the absence of clarity as to specific tasks and competences attributed to the bodies of the Inspection of Environmental Protection and the State Health Inspection. In view of the above it was concluded that there is a need to assign powers in terms of reviewing compliance with permissible levels of electromagnetic fields to one specialised body that has access to data on basic parameters of cell towers and spatial distribution of intensity of electromagnetic fields in the cell towers' surroundings. "Competence dispersion" does not serve the enforcement of obligations concerning the broadly understood environmental protection, including also protection against the impact of electromagnetic fields.

28 Act of 16 July 2004 Telecommunications Law (Dz. U. (Journal of Laws) of 2019 item 2460 as amended).

In the post-inspection address it was also recommended that the bodies of the Inspection of Environmental Protection should among others "perform control measurements by means of equipment adequate to the state of development of transmission techniques in cellular telecommunication and name the analysis method that allows an optimal choice of measurement points focused on places most threatened by above-norm levels of electromagnetic fields".[29]

One of further post-inspection recommendations involved observing the legal requirement of measuring field levels in places most exposed to the impact of high intensity radiation, that is in windows and on balconies and terraces situated high. It needs to pointed out here that measurements may be made only where it is possible to enter the premises with the consent of the property owner. Therefore, interference in the right to privacy must be necessary and proportional. Article 31(3) of the Constitution of the Republic of Poland is a regulation that allows settlement of doubts in the discussed scope. It orders that the principle of proportionality of limitations should be observed and prohibits infringement of the essence of freedoms and rights. Sentence two of the regulation of Article 31(3), according to the Constitutional Tribunal, should be understood as an "inviolable core" of each freedom and each right. This inviolability consists in the fact that even limitations compliant with all constitutional norms must not infringe a certain sphere of rights of a man and a citizen guaranteed by the Constitution.[30] In view of the above, in the Authors' opinion, only a limitation of inviolability of privacy dictated by recognized highest values of intensity of electromagnetic radiation near a place of residence, which can pose a threat to health or life, would be substantiated.

Legislative amendments

A response to SAO's post-inspection conclusions involves a regulation of the Minster of Health on permissible values of electromagnetic field levels in the environment,[31] the aim of which is to specify maximum limit values of levels of electromagnetic fields in the environment at the threshold that is safe to citizens. The act of 30 August 2019 includes statutory authorisation under which this resolution shall be issued by a minister competent for matters of health in cooperation with a minister competent for matters of digitalisation. In the previously applicable state of the law this regulation rested with the minister competent for environmental matters. The amendments, as we read in the reasoning to the draft, "result mainly from the fact that issues of protection of health (that is specifying permissible levels of electromagnetic fields in the environment) involve tasks of a minister competent for matters of health and also from the fact that Council Recommendation 1999/519/EC of 12 July 1999 on the limitation of exposure of the general public to electromagnetic fields was issued on the basis of Article 152(1) of the Treaty establishing the European Community which speaks of complementing national policies, in order to improve public health, prevent human illness and diseases, and obviate sources of danger to human health".[32] The content of the resolution

29 https://www.nik.gov.pl/aktulanosci/kontroli -nie-ma-promienie-harcuja.html (access: 19.11.2019).

30 Judgment of the Constitutional Tribunal of 30 October 2001, file no. K 33/00, OTK ZU, no. 7 item 217, LEX no. 49538.

31 Dz. U. (Journal of Laws) of 2019 item 2448.

32 https://www.sejm.gov.pl (access: 20.11.2019).

prescribes that apart from the State Environmental Monitoring introduced by the Inspection of Environmental Protection, an Information System on Installations Generating Electromagnetic Radiation (SI2PEM) which will ensure full access to information about emissions of electromagnetic radiation in the environment will be launched in 2020. Thanks to this programme it will be possible to check the level of an electromagnetic field in any place in the entire country. It will be possible to check the distribution of the magnetic field with the accuracy of a few meters.

The act of 30 August of 2019 prescribes enhanced access to modern telecommunications services. The assumptions adopted in it were included in the "2020 Strategy for Sustainable Development (with the 2030 perspective)"[33] and in the recommendation of the European Commission Communication: "Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society".[34] Harmonizing regulations on permissible levels of electromagnetic fields is necessary for the development of fifth generation (5G) telecommunications network.[35] The new network is to be quicker and more reliable compared to the currently operating mobile networks.

At the stage of the Legal Commission a draft resolution of the Minister of Climate on the manner of inspecting the observance of permissible levels of electromagnetic fields in the environment is examined.

Conclusions

Mobile technologies touch almost all spheres of our lives. The development of digital and internet infrastructure seems inevitable. At the moment pinpointing potential sources of this impact gains increasing importance especially in places at risk of radiation. For now, the issue of assessment of the impact of modern technology on human life stays problematic. The complexity of this problem requires interdisciplinary consultations with experts equipped with specialist scholarly knowledge necessary in the process of law-making. In view of the above, people's awareness of the need for competent administration authorities to conduct due checks in terms of observing permissible levels of electromagnetic radiation is constantly growing. The authors are of the opinion that an especially important aspect that lies with the legislator involves "careful" formulation of tasks and competences for relevant environmental protection bodies in order to avoid doubts as to activity undertaken by them in terms of protection against electromagnetic fields. One cannot forget the intensified educational activity and knowledge addressing potential threats to health posed by devices generating these fields. State of law as at 2 January 2020.

33 About the "Europe 2020" Strategy, in: E. Mazur-Wierzbicka, *Ochrona środowiska a integracja europejska. Doświadczenia polskie*, Warsaw 2012, p. 174.

34 https://www.gov.pl/web/5g (27.11.2019).

35 *Pole elektromagnetyczne a człowiek. O fizyce, biologii, medycynie, normach i sieci 5G*, Ł. Lamża (ed.), Ministerstwo Cyfryzacji, Instytutu Łączności Państwowego Instytutu Badawczego, 2019.

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The profession of medical practitioners vs aesthetic medicine and dermatology treatment practice

Abstract

The objective of the article is to reflect of the absence of separation of aesthetic medicine procedures from the total regulations applicable to exercising the profession of medical practitioners. Doubts may arise as to whether a medical practitioner performing procedures not directly focused on the achievement of a therapeutic goal, provides health services within the meaning of the Act of medical activity.[1] It is also worth thinking about whether in the legal system of health protection there truly is no consistent differentiation between procedures directed at achieving a therapeutic goal and those not directed at this goal. Hence, one may ask whether the well-established ethical principles of the profession of medical and dental practitioners provide for a possibility to provide services other than therapeutic ones. Moreover, it is worth noting that in order to provide services within a given field crucial in the profession of a medical or dental practitioner, doctors should acquire theoretical and practical skills developed over years.

Key words:

aesthetic medicine, medical practices, ethical principles, health care services, medical ethics

Introduction

The 21st century is the time when the youth cult thrives. Currently, appearance plays a crucial role in interhuman relations and is a frequent marker of one's professional, social and financial position. That is because the effects of aesthetic medicine procedures most often comprise changes in appearance, i.e. correcting or improving it. Many people decide to undergo an aesthetic medicine treatment to feel comfortable in their bodies or to correct some beauty defects. The most popular procedures are beauty and dermatology treatments, plastic surgeries, plastic gynecology treatments, and the broadly understood aesthetic dental medicine – prosthetics. An extensive array of aesthetic medicine surgeries allows many to take advantage of its achievements at any age. Nonetheless, the specificity of various aesthetic medicine procedures requires a holistic approach to all activities by experienced and adequately trained medical staff, taking account of the needs of the skin and bodily or beauty defects of the patient. In today's reality, aesthetic medicine procedures are being more commonly introduced in dental

1 Act on medical activity of 15 April 2011, Dz. U. (Journal of Laws) of 2011 no. 112 item 654.

or other individual medical practices. However, they are often unsuited to the performance of the above specified services, which would be directly focused on achieving a therapeutic goal.

The aim of medical activities

Without a doubt, attention should be paid to the fact that the goal of medical activities[2] in medical practice has recently changed its course. The aim becomes more and more often different from the one long-established by the legal and ethical principles of the medical profession. Nowadays, it may occasionally fail to fall within the regulatory framework of health care activities or medical competencies. It sometimes goes beyond the generally adopted ethical principles. It surpasses disease treatment, lifesaving and health care services provision. Instead, it focuses on addressing expectations related to patients' appearance and their dreams about an ideal look. It may occur that it even surpasses the medical field in which a given medical practitioner specializes and should practice according to the acquired qualifications. It is caused by patients' ever greater interest in such services.

It is common knowledge that there are no normative acts (prescriptive instruments) which would regulate powers necessary to perform aesthetic medicine procedures in the currently binding legal status. Upon graduation, medical or dental practitioners who start to provide aesthetic medicine services hold qualifications allowing them, only, to break down the continuity of the skin. Another important issue is the fact that the nursing profession, which is a part of medical staff, also holds such powers. However, any such procedure may not be treated as performed legally if conducted by a medical professional, should the operator not have other specific skills. Moreover, if the medical community performs aesthetic medicine treatments without a health care goal, this does not constitute provision of medical services. Therefore, to have an opportunity to perform the above described services, the professional group of medical practitioners should deepen their medical knowledge in the field of aesthetic medicine at targeted postgraduate programs and be equipped with skills and many years of practical experience, which would reduce the risk of potential postoperative complications.

Differences between the terms "aesthetic medicine" and "health care service"

To permit a reasonable understanding of the substance of the subject matter, two terms should be defined: "aesthetic medicine" and "health care service" provided by a medical practitioner. The term "aesthetic medicine" has no single commonly binding definition in

2 "The goal of medical activities is assumed to involve the goal to eliminate any health issues" – a deeper insight into the topic: M. Boratyńska, *Indywidualne preferencje pacjenta a celowość leczenia*, in: *System Prawa Medycznego. Regulacja prawna czynności medycznych,* E. Zielińska (ed.), Vol. II, part 2, Warsaw 2019, p. 841; More on the subject: M. Boratyńska, P. Konieczniak, *Zasady Prawa Medycznego. Podstawy i przesłanki legalności czynności medycznych, in: System Prawa Medycznego…,* p. 97.

the legal thought and, as already mentioned, there are no concrete legal regulations pertaining to it. The term aesthetics derives from the Greek word *aisthesis* which means a sensation or love of beauty. In medicine, it may be defined as an action aimed at supporting beauty preservation, preventing loss of beautiful appearance, or slowing down individual aging processes. Aesthetic medicine is a field which focuses on appearance, image and aesthetics and, according to various literary sources, it originated in France where the term *la médecine de l'amélioration*, i.e. ameliorating medicine, was coined.[3] As early as in the ancient times, people started to carry out procedures aimed at appearance changing. One example is ancient China, where young girls' feet used to be deformed to make them smaller.[4] Attempts to remove natural flaws or flaws resulting from accidents were undertaken in the 18th century B.C. in ancient Egypt, too.[5] Poland, in turn, witnessed the arrival of aesthetic medicine in the early 1990s.

In turn, the term "health care service" appears in many legal acts relating to the pursuit of the activities of medical and dental practitioners. Among others, it may be found in the Act on the profession of medical and dental practitioners[6] and in the Act on health care services financed with public funds.[7] What is more, it is applied in the Act on patient rights and patient ombudsman and in the Act on medical activity. In all of the above specified acts, a "health care service" is defined and understood as an activity aimed at health saving, maintenance, recovery, or improvement of one's health and other medical activities resulting from the treatment process, or separate provisions regulating the principles of their performance.[8] All of the above listed elements point to a therapeutic goal, which includes prevention, diagnostics, medical rehabilitation, and the issuance of medical statements and opinions.[9] It is also called a medical treatment, directed at remediation of a health problem of a patient, focused on protecting patient's life or health, and performed in accordance with one's medical knowledge and by a qualified personnel.[10]

As already mentioned, this medical field has not been legally regulated as a medical specialization – aesthetic medicine continues to be an area of medicine, nothing more. It is situated somewhere between dermatology and plastic surgery. When analyzing the above quoted definition of a health care service, we shall highlight that activities aimed at health preservation mainly focus on carrying out preventive actions which are to prevent the formation of various diseases. Protecting or saving one's health involves the use of methods which are to stop or decelerate disease processes affecting one's body. Next, recovery encompasses ensuring that the patient is safe and has good conditions to regain health. Finally, health improvement may boil down to a state in which the patient has not

3 D. Folschied., J.J. Wunenburger, *La médecine de l'amélioration*, in: D. Folschied, B. Feuillet-Le Mintier., J.F. Mattei, *Philosophie, éthique et droit de la médecine*, Paris 1997, pp. 221–232.

4 R. Kubiak, *Czynności kosmetyczne (estetyczne),* in: *System Prawa Medycznego…*, p. 779.

5 R. Kubiak, *Prawo Medyczne*, Warsaw 2010, p. 635.

6 The Act on the profession of medical and dental practitioners of 5 December 1996, Dz. U. (Journal of Laws) of 1997 no. 28 item 152.

7 The Act of 27 June 2004 on health care services financed with public funds, Dz. U. (Journal of Laws) of 2004 no. 210 item 2135.

8 The Act on medical activity, consolidated text Dz. U. (Journal of Laws of 2018) item 2190 as amended.

9 R. Kubiak, *Prawo Medyczne*, op. cit, p. 19.

10 Ibidem.

been before.[11] Therefore one needs to conclude that medical or dental practitioners carrying out a procedure without a justified medical reason are not providing health care services. Professional activities carried out by a doctor ought to be performed in accordance with recommendations of medical knowledge, as determined in Article 4 of the Act on the profession of medical and dental practitioners. Similarly, Article 57(1) sentence one of the Code of Medical Ethics indicates that "Medical practitioners may not use methods found by science to be harmful, worthless or not scientifically verified".[12] This is why aesthetic medicine procedures should be performed if need to by medical practitioners who have completed post-graduate studies the field of which should cover dermatology, surgery as well as broadly understood cosmetology.

Another key issue in the provision of health care services is the taking of patient's medical history and making sure that the patient (client, consumer) who is the object of a given cosmetic procedure has not overlooked anything while reporting his health status. An aesthetic procedure, as any medical procedure involves interference with the human body. It carries a risk of potential complications, which can influence the overall health condition. One of the risks include necrosis or embolism following an injection of a substance into a blood vessel. In worst case scenarios, a procedure may lead to an anaphylactic shock.[13] The risk attendant to the performance of the profession of medical or dental practitioners means all types of danger patients are exposed to due to their involvement with a diagnostic, treatment or even disease prevention processes.[14] Risk assessment encompasses not only the type of performed medical activity, but also the general health condition of a patient, the conditions surrounding a given medical activity and, finally, the experience and competence of a medical or dental practitioner.

Ethical principles governing the medical profession

Two fundamental principles of doctors' morality, *primum non nocere* (first, do no harm) and, *salus aegroti suprema lex esto* (the health of the patient should be the supreme law), should be applied simultaneously, for the former indicates the intention of one's professional actions and the latter determines the limitations resultant from their implementation.[15] Any interference in a human body entails some risk. Aesthetic medicine procedures may also have negative consequences whenever an intervention in a human body fails. The question is whether a doctor has the right to undertake risky non-medicinal actions and what principles should be followed? The answer to the above question is the so-called proportionality rule described by T. Brzeziński, which assumes that "every medical activity must be justified by an underlying goal which is to be attained and should not be a greater risk for the patient than the risk we wish to remove therewith".[16]

11 M. Boratyńska, P. Konieczniak, *Zasady Prawa Medycznego…,* pp. 94–95.
12 *Kodeks Etyki Lekarskiej*, Warsaw 2004, p. 27.
13 A. Markowicz, *Powikłania po zabiegach estetycznych*, "Aesthetic Business", 2019, no. 5, Poznań 2019, pp. 104–105.
14 T. Brzeziński, *Etyka Lekarska*, Warsaw 2011, p. 131.
15 M. Boratyńska, P. Konieczniak, *Zasady Prawa Medycznego…,* p. 41.
16 T. Brzeziński, op. cit., p. 131.

Article 2(2) of the Medical Ethics Code provides that "the vocation of every doctor is to protect human life and health, prevent diseases, treat the sick, and relieve human suffering. What is more, a doctor may not use medical knowledge and skills in actions contrary to this vocation".[17] Therefore, one may ask whether, in accordance with the Medical Ethics Code, a doctor having a duty to provide the above listed health care services is also empowered to perform other actions, such as cosmetic activities, within the limit of breaking the continuity of human tissue. Are the procedures the aim of which is solely to improve one's physical appearance of a therapeutic or medicinal nature? Are they justified in the performance of a medical profession from the ethical point of view?

In literature, it is frequently emphasized that cosmetic or beauty treatments may be either conducted for medical purposes or, due to a common need to have a different, better, prettier look, oriented at aesthetics or image improvement. Many a time, it appears that cosmetic or aesthetic procedures are deemed to have a medical goal, for instance in cases when they are related to one's mental condition resultant from congenital defects, accidents, diseases, or consequences of treatment. Such situations may often result in developing neuroses or personality disturbances. In such cases, the legislator included cosmetic, aesthetic procedures as part of the guaranteed services of inpatient health care, which comprise, among others, the procedures of plastic surgery,[18] which is a medical specialty. It is essential that any medical activity should be carried out by a competent and qualified person due to the requirement of adequate knowledge and experience in a given medical procedure. Additionally, any such procedure ought to be performed upon informed consent of the patient or other authorised persons.

According to source literature, when analyzing the above quoted Article 2(2) of the Code, disease prevention is medical activity involving popularizing preventive actions targeted at patient hygiene, following a healthy diet, promoting physical activity, and counteracting smoking, alcohol abuse or use of drugs. It boils down to medical practitioners' directing patients to conduct healthy and suitable lifestyles.[19] Treating patients is a holistic process that starts with a diagnosis and ends with a therapeutic or rehabilitation process. Alleviating one's suffering or providing relief refer to both physical and mental human suffering that may be diminished by the application of treatment methods or pharmaceuticals that are capable of soothing pain, or by showing empathy and compassion for another man.

Ethics has always been associated with morality and it discusses human lives captured in individual and social norms. It is related to human action created by the man himself. At the same time, it affects other people's actions, oftentimes becoming results or consequences for some others. Moral norms, however, determine what is good and bad, and why, in a given professional or social environment.[20] Every human being takes his actions into his own hands according to his own conscience; he should reflect, though, on the moral values which ought to accompany his daily professional duties. Such a reflection constitutes an effort because it makes one realize that he serves some purpose. Generally, etiquette focuses

17 *Kodeks Etyki Lekarskiej*, op. cit.
18 R. Kubiak, *Prawo Medyczne*, op. cit., p. 638.
19 K. Linke, *Komentarz do art. 1-5 Kodeksu Etyki Lekarskiej*, "Medyczna Wokanda" 2015, no. 7, p. 16.
20 K. Wojtyła, *Elementarz etyczny*, Lublin 1983, pp. 19–21.

on honor and dignity and every ethical decision made by a doctor that should concentrate on protecting a patient's health is also a moral decision which ought to be closely associated with moral values.[21]

Substantiation of the objective of undertaken medical activities

Unfortunately, nowadays, activities undertaken by physicians oftentimes go beyond the above specified ethical principles and are performed for aesthetic purposes in the absence of medical grounds. They are performed by doctors of various specializations and also non-specialist physicians. They do not have sufficient knowledge of dermatology or surgery, or experience. To classify aesthetic medicine procedures as therapeutic actions, one would need to undertake them for therapeutic or medicinal purposes, which consists in a thesis that they should be aimed at lifesaving, health-protection or at alleviation of physical or mental pain.[22] Therefore, here we can pose another question: do non-therapeutic actions, which cover aesthetic medicine procedures, fall within the category of redundancy? As Maria Boratyńska notes, „redundancy means inexplicability of undertaken actions, which signifies absence of health-care needs in a patient of a given clinical status".[23] The said redundancy may frequently be affected by the patient's will expressed by an individual need to alter one's appearance or to enhance one's beauty, not necessarily being in accordance with the therapeutic goal. Nonetheless, no indications to perform a procedure in such cases from a clearly medical point of view – i.e. to save or protect life – disqualifies it in a clearly medical category. Such measures presume that there is a certain subjective appraisal.

The extremely crucial aspect of implementing doctors' actions is the suitability of the performance of any procedures involving human body interventions and the risks they carry. Oftentimes, non-medical procedures concerning beauty enhancement are done because the patient insists on or talks the doctor into it. It requires one to take account of the situation, social and other, of the patient who does not feel well or comfortable in his own body. A patient insisting on the performance of a procedure is tantamount to the patient's informed consent to the breaking of bodily continuity due to, among other things, her wish to have a better, prettier look. In such a case the medical practitioner should take into consideration the patient's needs. It should be a doctor with adequate qualifications, knowledge and experience. Nonetheless, it is unjustified to interfere with a human body without any therapeutic goal by a person without adequate education. If an activity has no medical justification it is at the same time illegal and entails liability.

As the legal basis in the reflection on superfluity (redundancy) or legitimacy of performing medical activities, we must quote the regulation of Article 4 of the Act on the profession of medical and dental practitioners, which provides that "A doctor shall perform his profession in accordance with indications of the current medical knowledge, using available methods and means of prevention, diagnosis and treatment of diseases, following the principles of pro-

21 M. Boratyńska, *Indywidualne preferencje pacjenta...,* p. 841.
22 R. Kubiak, *Czynności kosmetyczne…*, p. 791.
23 M. Boratyńska, *Indywidualne preferencje pacjenta…,* p. 825.

fessional ethics and with due diligence".[24] This duty is reflected in the patient's right stipulated in Article 6(1) and (8) of the Act on the Rights of the Patient and the Patients Ombudsman,[25] hence the performance of an activity that is redundant and preconditioned by a lack of medical justification is incompatible with adopted legal and ethical principles typical of the profession of medical and dental practitioners. Therefore, in the case of taking up therapeutic methods and actions not based on scientific evidence and, as such, infringement of patient's rights to health care services corresponding to the current medical knowledge, the patient has the right to file a claim against the doctor at any time.

Prior to the performance of any medical service, an informed consent must be obtained from a patient or another entity authorized to grant it. Obtaining the informed consent of a patient before the provision of medical services constitutes an assurance of the legal capacity of the patient and is one of his most vital rights.[26] Such a consent should be preceded by the provision of information regarding the aim, need, and method of the procedure, as well as potential complications. As is clear from, among others, Article 31(1) of the Act on the Profession of Medical and Dental Practitioners, the content of which is as follows: "A doctor shall inform the patient or his statutory representative in an intelligible manner about his health condition, diagnosis, suggested and practicable diagnostic and treatment methods, foreseeable consequences of their application or renunciation, treatment outcomes and prognosis".[27] Such information should be communicated in a detailed and reliable fashion and shall account for all aspects that might affect the decision made by the patient.[28] The informed consent of the patient is one of the basic conditions of the legitimacy of medical procedures and the provision of any medical service.

In the examination of the field of aesthetic medicine, it must be concluded that to a large extent the patients of medical or dental practitioners providing aesthetic services are healthy individuals unaffected by medical conditions, who wish either to improve their looks or to withhold the natural aging processes. Therefore, persons enjoying such services should not be referred to as patients. A more appropriate term here would be consumers or clients, for aesthetic medicine procedures are non-curative, non-therapeutic, non-health-oriented procedures. The "patient", within the wording of the Act on the Rights of the Patient and the Patients Ombudsman is "a person who requests the provision of health care services or using health care services provided by an entity which provides such services or a person pursuing a medical profession".[29] Given the above definition, saying that "someone is a patient" has been correlated with the provision of a health care service or with awaiting its provision.[30]

24 Act of 5 December 1996, Dz. U. (Journal of Laws) of 1997 no. 28 item 152.
25 The Act of 6 November 2008 on Patient's Rights and the Patients Ombudsman, Dz. U. (Journal of Laws) of 2009 no. 52 item 417.
26 R. Kędziora, *Odpowiedzialność karna lekarza w związku z wykonywaniem czynności medycznych*, Warsaw 2009, p. 73.
27 Act of 5 December 1996, Dz. U. (Journal of Laws) of 1997 no. 28 item 152, 114.
28 T. Brzeziński, op. cit., p. 105.
29 Act of 6 November 2008 on Patient's Rights… and the Patients Ombudsman, item 417.
30 P. Konieczniak, *Prawa pacjenta*, in: *System Prawa Medycznego…,* p. 341.

Conclusion

The therapeutic goal always focuses on solving health issues, both physical and mental. Health issues relate to good health and sickness, whereas a medical goal is understood as an intention to "serve good health" or "fight disease".[31] Every decision made by a physician and involving interference in human body is a moral decision, while a medical or dental professional should be able to see what is most important when taking a decision: the facts or values. It is this valuation that requires one to take a position on what is more important: the patient's wishes or medical reasons? Undeniably, the needs of a person turning for help to a medical professional are very important. A physician should provide help to any person in needs. However, the aim of his medical activities should be directed utterly at the patient's good and safety. Comprehensive knowledge of general medicine, dermatology, surgery and broadly understood cosmetology is necessary in order to perform any type of aesthetic medicine procedures. A person who does not have those should not undertake to perform such procedures. Not only is it unethical from the point of view of pursuing a medical or dental profession, but also dangerous to the patient and at the same time to the person performing these procedures, given the risk of criminal, civil or professional liability.

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Weapons licence – administrative and legal analysis

Abstract

Access to weapons has always raised controversy. Different legal systems regulate this issue differently. In some countries the right to possess weapons results directly from the constitutional right to defence. In others, for various reasons, it is close to impossible to obtain a weapons licence necessary from the point of view of legality. It is not an easy task for the legislator to make the regulations not to be too liberal or too restrictive. This publication aims to present existing solutions of the Polish legislator in the substantive scope and to establish the comprehensiveness of the said regulations and the possibility to improve them. The study employs a number of research methods: doctrinal, comparative, historical and analytical method.

Key words:

weapons, weapons licence, administrative discretion

Introduction

The basic legal act in Poland addressing issuing weapons licences is the Act of 21 May 1999 on weapons and ammunition.[1] This act regulates the premises for issuing weapons licences in Poland. The said act grants the power to decide about issuing permits to voivodship police commissioners territorially competent for the place of residence of the applicant. A number of disputes have arisen in the course of exercising this power. These disputes concern primarily the validity of being guided by administrative discretion by the authority issuing weapons licences, and also different interpretation of the law by these authorities. In view of the disputes referred to above, an analysis of the scope of discretion in decision-making granted to a public authority has been carried out. This analysis primarily aims to see whether a competent Police authority employs administrative discretion when issuing a gun licence, and if so, what is its scope.

1 Consolidated text, Dz. U. (Journal of Laws) of 2019 item 284.

Historical and contemporary approach to weapons

First regulations on access to firearms in Poland date back to 1919. This is when the Chief of State issued a decree about acquiring and possessing arms and ammunition.[2] In this act the legislator regulated the scope of competence of the Minister of the Interior and bodies authorized by it to issue arms licences. The discussed legal act also specifies sanctions for illegal possession of military or hunting weapons. Possession of such weapons without a necessary permit was punishable by a fine of up to 5,000 Polish marks and imprisonment for up to 5 years.

The next essential regulation was the so-called "Small Criminal Code", i.e. a decree of 13 June 1946 on particularly dangerous offences in the period of restoration of the country.[3] It radicalised sanctions for illegal possession of weapons. Pursuant to Article 4 of the said act, manufacturing, collecting or storing weapons and ammunition without a necessary permit was punishable by no less than 5 years of imprisonment, life imprisonment or the death penalty.[4] According to the author, the authorities of the Polish People's Republic feared armed civilians. Such a state of affairs was maintained until the end of this regime.

At the moment, the basic legal act which comprehensively regulates the issue of possession of weapons and ammunition in the Polish legal order is the act of 21 May 1999 on weapons and ammunition (hereinafter referred to as WAA).[5] In light of its regulation, weapons are no longer a tool threatening public authority, nevertheless access to them is still strictly regulated. The WAA, employing the term "weapons" points to the need to understand this term as firearms, including combat firearms, hunting, sporting guns, gas pistols, alarm guns or signal guns.[6] As rightly pointed out, At the outset of the reflections a comment needs to be made that until the entry into force of the act of 11 May 1999 on weapons and ammunition there had been no definition as to the content of the concept of "firearms". Due to research interests of forensics it is this field of study that has become a natural environment where the notion of firearms has developed sufficiently precisely for the needs of criminal law. The said act first introduces the legal definition of firearms, specifying constitutional features that allow classification of a given entity as a designate of the name "firearms".[7] By using the term "including" in the legal definition in this act, the legislator created an open catalogue of types of weapons enumerated in it. Moreover, the WAA in Article 4(1) defines the notion of devices and tools the use of which may threaten life and health and they include melee weapons, crossbows, truncheons or items intended to incapacitate by means of electricity.[8] These definitions are often criticised in the literature. An essential challenge frequently quoted is incoherence between understanding the notion of weapons in the literature and the perception developed in forensics. It is because the current form of the statutory definition does not overlap with any definitions developed by the forensic science. The previous definition of firearms included elements from the definition

2 Decree of the Chief of State of 25 January 1919 on acquiring and possessing weapons and ammunition, Dz. Pr. P. P. (Journal of Laws of the Polish State) of 1919 item 123.
3 Article 4 of the decree of 13 June 1946.
4 Ibidem.
5 Act of 21 May 1999 on weapons and ammunition, consolidated text, Dz. U. (Journal of Laws) 2019, item 284.
6 Article 4(1) WAA.
7 R. Rejmaniak, *Pojęcie broni palnej,* "Prokuratura Krajowa" 2018, no. 4, p. 79.
8 Article 4(1)(4).

of forensic weapons, developed by the legal thought and was as follows: "A firearm is a device which is dangerous to life or health, which, as a result of the action of compressed gases, created by the combustion of the propellant, is capable of shooting a bullet or a substance from the gun barrel or a component replacing the gun barrel, and thus of hitting targets at a distance".[9]

Premises for granting a weapons licence

In the light of the current wording of the WAA a weapons licence is treated in the category of a privilege which is afforded to few. As pointed out by B. Kurzępa "it needs to be highlighted that contrary to the basic law of the United States of America, the right to possess firearms does not in our country form part of absolute citizens' rights guaranteed in the Polish Constitution".[10]

As the Voivodship Administrative Court in Warsaw concluded in its judgement of 21 September 2017: "Such an assumption corresponds with the views expressed in the decisions of the Supreme Administrative Court, in the light of which the conditions for obtaining a weapons licence should be examined restrictively, while the possibility of not giving consent to their possession should be seen as a preventive measure, aiming to ensure broadly understood security. Possession and use of weapons is regulated and is a type of a privilege rather than a personal right, therefore a person holding such a licence is required to have qualified features of character and behaviour that does not raise doubts from the point of view of a legal order".[11]

The legislator included the premises for granting a weapons licence in Article 10 WAA. A competent Police authority (the Voivodship Police Commander competent territorially, hereinafter: VPC) issues a weapons licence if the applicant does not pose a threat to himself, public order and security and presents a valid reason for having a gun. The conjunction "and" which separates the premises is essential here, that is proving that one does not present a threat to public order or security, and also giving the reason for wishing to possess a gun. However, practice points to the need to prove the existence of the reason for such a desire. The applicant's not being a threat to oneself, to the public order and security is subject to a doctor's assessment. In compliance with the WAA, the doctor deciding in the case must be certified to conduct medical examinations focused on gun possession and is also required to have additional qualifications allowing them to conduct such examinations. A register of doctors authorised to conduct said examinations is kept by a territorially competent VPC. The applicant is also obliged to obtain a psychological certification from a psychologist, who, similar to the doctor, is obliged to have special qualifications and to be entered in the register of authorized psychologists. This register is also kept by a territorially competent VPC. Requirements for the physical and psychological condition of the applicant are included in Articles 15a-15l WAA. The specific nature of assessments focused on the possibility to own a gun as compared to other assessments is evidenced by the case examined before the Warsaw Voivodship Administrative Court (hereinafter: VAC) in 2015. The case in question concerned a man who

9 L. Stępka, V. Kwiatkowska-Wójcikiewicz, *Istota broni palnej*, in: *Broń. Problematyka prawna i kryminalistyczna,* L. Stępka, V. Kwiatkowska-Wójcikiewicz (eds.), Toruń 2013, p. 42.

10 B. Kurzępa, *Ustawa o broni i amunicji. Komentarz,* Warsaw 2010, p. 3.

11 Judgment of the VAC of 21 September 2017, II SA/Wa 753/17. Accessed via the Central Base of Judicial Decisions of Administrative Courts available, hereinafter CBOSA, on 08.02.2020.

was subjected to regular restrictive medical examinations due to the fact that he managed a driving school. Examples of tests the man had done include eye tests, which are much less tolerant of vison impairments compared to exams focused on the possibility to issue a gun permit. In his case the applicant quoted having driving instructor's qualifications for all types of driving licences as a proof of his excellent health condition. Yet he did not obtain a weapons licence. Apart from the different nature of the exams, the VPC referred to information he had about the applicant's family being protected under the Blue Card procedure. The reason for this protection was the applicant's use of psychological violence in the form of threats, insults and humiliation. Therefore, the VPC did not deem the doctor's certificate reliable and exercised his right to appeal. As concluded in the judgement in the discussed case: "(…) in accordance with the wording of §8(1) of the regulation of the Minister of Health of 7 September 2000 on medical and psychological examinations for persons applying for or holding a weapons licence (Dz. U. (Journal of Laws) no. 79 item 898 as amended), a medical certificate or a psychological certificate can be appealed against in writing and the right to this appeal is granted to the applicant and the competent Police authority (section 2), and the competent Police authority may file it within 45 days from receipt of the certificate".[12]

The second premise of article 10 WAA necessary to grant a weapons licence involves presenting a valid reason for wishing to own a gun. It needs to be noted that the mere pointing out the reason is not sufficient. It is also indispensable to objectively deem such a premise to be valid. Unfortunately, this is subject to a subjective assessment of the VPC. In most purposes under the statute, documented membership in an association constitutes such a reason. Such an association must correspond in its nature to the purpose of the licence applied for.

A Regulation of the Minister of Health on the list of medical conditions and disorders of psychological functioning excluding the possibility of issuing weapons licences and weapons registration of 23 December 2005[13] is WAA's implementing act. This act enumerates 13 main diseases and disorders excluding the possibility of issuing weapons licences. This regulation includes schizophrenia, personality disorders, mental handicap or sexual preference disorders out of which sadomasochism and paedophilia were named.

Moreover, it needs to be noted that in accordance to the WAA, the VPC, in the course of administrative proceedings to issue a weapons licence or to revoke it in certain situations, exercises the competence of administrative discretion, which will be analysed in detail in the further part of this study.

Administrative discretion

Administrative discretion as a legal institution has been a constant subject of dispute. The basic problem involves the mere establishment of what this institution is and how it should be interpreted. The above was looked closely at by M. Zimmerman, who pointed out that the contem-

12 Judgment of the VAC in Warsaw of 12 November 2015, II SA/Wa 1243/15. Accessed via CBOSA on 13.11.2019.

13 Regulation of the Minister of Health of 23 December 2005 on the list of medical conditions and disorders of psychological functioning excluding the possibility of issuing weapons licences and weapons registration, Dz. U. (Journal of Laws) 2006, no. 2, item 14.

porary perception of administrative discretion has been significantly affected by the changes in the state and the administration in the 18th and 20th centuries. Administrative discretion is not a novum in the Polish legal system, yet despite this it is still a significantly controversial issue.[14]

As pointed out in A. Habuda's publication "the term 'free discretion' is no longer used". It has been superseded (or perhaps better: it has evolved) by the term administrative discretion. It needs to be signalled here that the latter corresponds better to the principle of a strict relationship between administration and the law expressed in the Polish Constitution and ordinary rules of law. It needs to be highlighted that "free" discretion is not identical to "unrestricted" discretion. The signalled doubts, however, determined the gradual departure from this term and replacing it with other terms, such as administrative discretion, discretionary competence or authority's discretionary prerogatives."[15]

In the author's opinion, these naming evolutions may have affected the perception of this term. The historical form mentioned by A. Habuda is fatal. It is because according to the Dictionary of the Polish Language edited by W. Doroszewski, freedom means "possibility to act and behave without having to be forced or constrained". In this case, the capability of being guided by administrative discretion would mean that the authority may act without restrictions, and thus it would not be obliged to act lawfully. This would be contrary to Article 6 of the act of 14 June 1960 – the Code of Administrative Procedure,[16] which recognises as one of the basic principles the fact that public administration authorities must act on the basis of provisions of law.[17] It is in the course of administrative procedure, such as applying for a weapons licence, that the public administration authority (territorially competent VPC) is guided by administrative discretion. It needs to be concluded that administrative discretion must be a legally granted power of the authority in order to be compliant with the CAP regulations.

Since the term free discretion was superseded by the newer administrative discretion, the legal scholars and commentators have tried to define it a number of times. Those most widely known definitions assume that "administrative discretion:

- is a construct where the law does not associate legal effects with the occurrence of a given situation; these effects and the very fact whether they should occur are determined by the administrative authority (J. Starościak);
- is a construct where the legal norm in its provision grants a certain competence to the authority, though whether it exercises it in a given case is left to its discretion (E. Smotkunowicz);
- is a construct which prevents the authority in a given situation from choosing between various solutions (E. Ochendowski), decisions (Z. Leoński);
- occurs where we are dealing with both the choice of legal consequences and where it only involves the interpretation of vague terms used by the legislator (A. Wiktorowska, M. Wierzbowski)".[18]

14 Cf. M. Zimmermann, *Pojęcie administracji publicznej a "swobodne uznanie",* Poznań 1959, pp. 84–85.

15 *Prawo administracyjne – pojęcia, instytucje, zasady w teorii i orzecznictwie,* M. Stahl (ed.), Warsaw 2000, p. 68, accessed via A. Habuda, *Granice uznania administracyjnego,* Opole 2004.

16 Consolidated text, Dz. U. (Journal of Laws) 2018, item 2096, as amended.

17 Article 6 of the Code of Administrative Procedure of 14 June 1960.

18 Z. Duniewska et al., in: *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie,* Warsaw 2002, p. 69.

Views on discretion in administrative procedure will be divided depending on the point of view. From the position of a citizen pursuing a decision the issuance of which entails discretion, the authority's ruling may subjectively seem inequitable to the applicant. Despite meeting all prescribed requirements necessary to obtain a positive decision, the authority may refuse it. An ostensible inequality of citizens before the law in created in this situation, which in consequence involves multiplicity of appeals to such a decision, which in great majority of cases leads to upholding the decision by a higher instance authority or an administrative court.

Administrative discretion and a weapons licence

Referring to administrative proceedings for issuing a weapons licence, it needs to be pointed out that the WAA in various provisions orders the competent authority to be guided by administrative discretion. Other provisions do not grant the VPC such a competence. Article 17 WAA may serve as an example here. The legislator enumerated 6 situations in this provision where the VPC may refuse issuing a weapons licence and two in which the VPC is obliged to refuse the issuance of a positive decision.

Most regulations of the WAA which grant the power to exercise administrative discretion are not controversial since they concern the applicant's violation of formal requirements, e.g. the obligation to inform about a change in the place of permanent residence or violation of the requirements for carrying a gun. However, there are situations where, in the opinion of many, the VPC should not be granted the right of administrative discretion. The most frequently named example involves proceedings to issue a weapons licence for the purpose of personal protection. In Poland almost the least weapons licences are issued this category.

Table 1. Number of weapons licences issued in Poland in 2018

Number of persons to whom a weapons licence was issued in Poland in 2018	
Purpose for which the weapons licence was issued	**Number of persons to whom a weapons licence was issued**
Personal protection	121
Protection of persons and property	0
Hunting	4,296
Sports	5,172
Historical reenactment	3
Collection	6,522
Souvenir	16
Educational	162
Other	10

Source: author's own compilation on the basis of data of the General Police Headquarters published on its website.

TThe above data shows that among all weapons licences issued in Poland in 2018, permissions for the purpose of personal protection account for approximately 0.47%. It should also be noted that even a licence for the purpose of historical reenactment enjoys an even lower number of licences issued, yet this category does not have a significant impact of the citizen's sense of security, it does not infringe the right to defence either.

The reasons for such a low percentage of positive decisions for the purposes of personal protection need to be sought in the interpretation of the WAA regulations by Police authorities. In accordance with the WAA regulations, an important premise justifying the issuance of a weapons licence for this purpose is the existence of a permanent, real and extraordinary threat to life, health or property.

One police officer was given the opportunity to find about the problematic nature in proving such a reason, who kept being refused such a decision. By appealing against negative rulings, he found himself in the Supreme Administrative Court. Refusals were justified by the lack of express cases which would evidence the existence of a permanent, real and extraordinary threat to life or health of this officer and his relatives. According to the Supreme Administrative Court (hereinafter: SAC): "The appeals body in the reasoning to the challenged decision on the one hand acknowledges that the nature of official duties of I. P. may indicate that he is under a real and extraordinary threat of attack, in reality there have never been incidents in which his life or health or the life or health of his family were indeed threatened (…). It may be concluded from this statement of this authority that the appellant could have the chance of obtaining the permit (…) if an incident had occurred in which his life or health or the life or health of his family were indeed threatened. One cannot agree with this view even for humanitarian reasons, since it moves the boundaries of the threat to life and health too high, and besides, Article 10(3)(1) WAA does not require such sacrifices in order to speak about the existence of a permanent, real and extraordinary threat to life as an express reason for issuing a weapons licence. (…) this does not mean, however, that in order for these requirements to be met an incident has to have occurred in which the applicant's life or health (…) or the life or health of his family were truly threatened".[19] This position of the administrative court indicates that a threat to life or health does not have to be supported by previous cases, thus it may be associated e.g. with the profession – of a Police officer in this case. It is then a threat of a potential nature. However, administrative courts in rulings on analogical cases depart significantly from this stand. The SAC itself denied this statement when examining the case of a jeweller who was refused a weapons licence for the purpose of personal protection despite the circumstances indicating a threat to his health and life as well as property. As it was concluded in the reasoning to the judgement: "Given the content of Article 10(1)(1) and (3)(1) of the act on weapons and ammunition, one needs to agree with the position of the authorities stating that in order to approve the application in the case in question it is necessary to demonstrate, as an important reason for having a gun for personal protection, a permanent, real and extraordinary threat to life, health and property. The party's sense of threat itself is not sufficient here. It was rightly established in this matter that criminal proceedings in the case of addressing to the party on 16 January 2014 punishable threats at a petrol station and in the case of breaking into the basement cannot constitute such circumstances (…). The threats demonstrated above cannot be considered as

19 Judgment of the SAC of 18 November 2016, II OSK 349/15. Accessed via CBOSA on 13.11.2019.

permanent as they do not feature permanence. (…) Whereas the circumstances cited by the party associated with carrying out economic activity consisting in buying and selling precious metals (…) do not justify granting the right to possess firearms".[20] a similar decision was taken by the Warsaw VAC on 29 May 2019. The case involved an officer of the Internal Security Agency who was refused a weapons licence for the purpose of personal protection. As pointed out by the SAC: "In this state of facts the Court decided that Police authorities of both instances, issuing contrary administrative decisions, established correctly that the Petitioner did not demonstrate that he is the state of continuous, real and extraordinary threat to his life or health, thus rightly concluding that the mere fact of his service in the Internal Security Agency may only constitute a potential threat which in no way justifies the issuance of a firearms licence for the purpose of personal protection".[21] One can conclude from this reasoning that it is easy to specify what this threat identified by the act is, yet the problem lies with indicating when it will occur. To sum up, for the majority of licences, for example for sporting or collector's purposes, the procedure comes down to proving no criminal record and an important reason for the wish to obtain such an administrative decision. Most often, membership in an association of the type corresponding to the purpose of the licence applied for is recognized as such a reason. The procedure then requires obtaining a positive opinion from a doctor and a psychologist, passing a state exam on knowledge of weapons, paying a stamp duty and demonstrating adequate conditions for storing the weapon at the place of residence, i.e. a safe permanently fixed to the building's structural elements – a wall or floor. On can therefore come to a conclusion that in terms of the institution of a weapons licence there are two completely separate points of view of the VPC. In principle, weapons licences in the sports, hunting, collection and souvenir category are not denied. Only formal requirements need to be met there. Licences for the purpose of personal protection are treated extremely differently in the Polish legal system, both at the law-making stage and during implementation of this law. The chances for obtaining such a licence are minimal. In the author's opinion, this happens because the statutory regulation itself concerning weapons licences for the purposes of personal protection points to vague premises, which combined with reluctance of the competent authority to issue such a decision results in such a low number of weapons licences held in this category. In author's opinion, if a potential threat is considered an important premise necessary for obtaining a weapons licence for the purpose of personal protection, it should be sufficient to plausibly demonstrate the existence of such a threat. Lack of clarity of this premise combined with administrative discretion of the authority issuing the licence results in marginal percentage of positive decisions for the purpose of personal protection.

Statistical analysis of the number of weapons licence issued in selected areas of the Republic of Poland

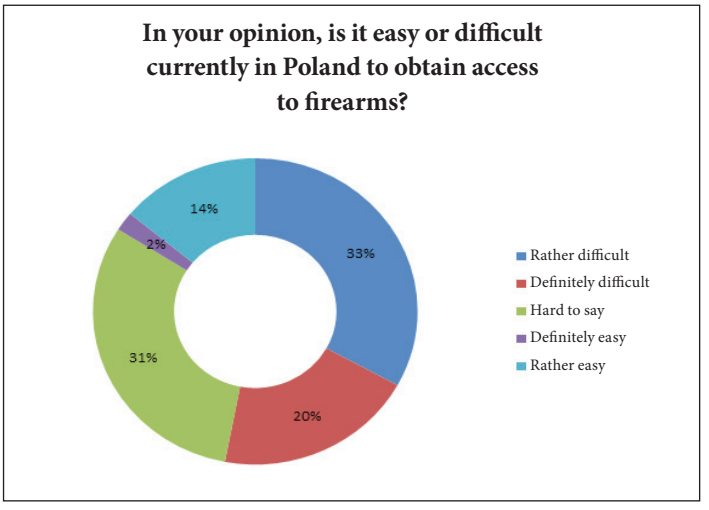
First one needs to ask public opinion whether they believe that under currently applicable laws it is difficult to obtain a weapons licence. The Poles were asked about their opinion on the level

20 Judgment of the SAC of 26 October 2017, II OSK 307/16. Accessed via CBOSA on 13.11.2019

21 Judgment of the VAC in Warsaw of 29 May 2019, II Sa/Wa 397/19. Accessed via CBOSA on 08.02.2020.

of complexity of the administrative procedure for obtaining a weapons licence in a survey by the Public Opinion Research Center (hereinafter: CBOS). The research population included 948 Poles and was held between 5-12 October 2017.

Chart 1: Opinion on access to weapons in Poland
In your opinion, is it easy or difficult currently in Poland to obtain access to firearms?
- Rather difficult;
- Definitely difficult;
- Hard to say;
- Definitely easy;
- Rather easy.



Source: author's own compilation on the basis of CBOS's study "Poles on access to weapons".

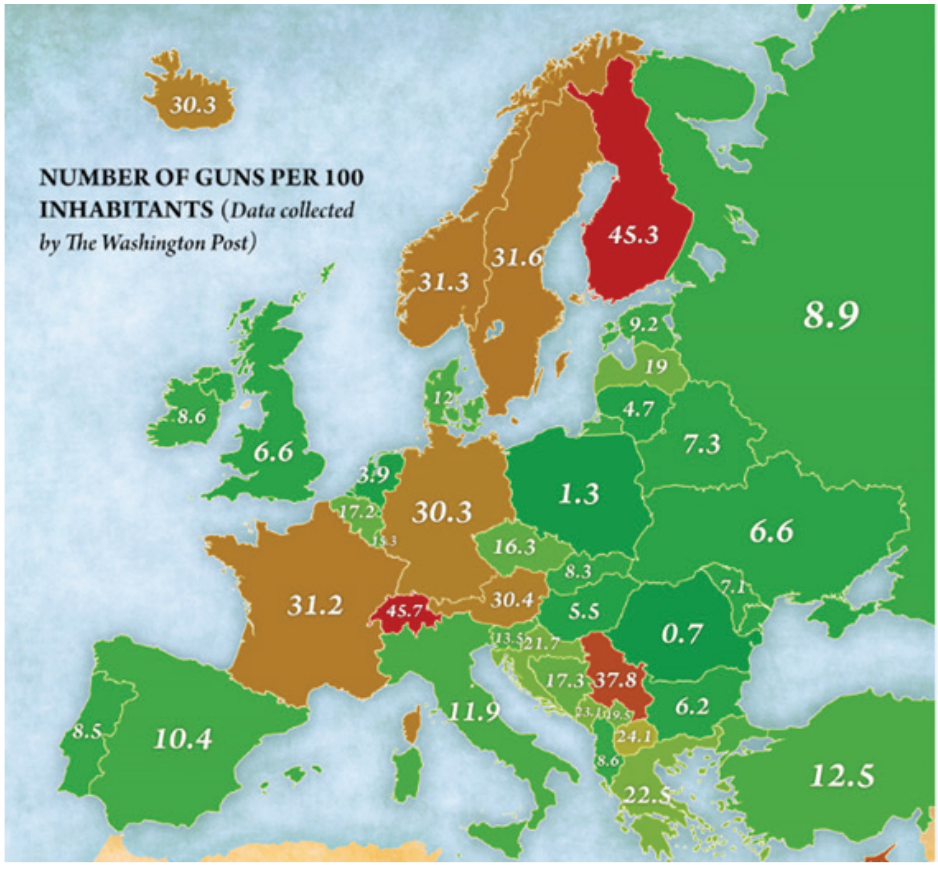
More than half of the respondents, as many as 53%, believe that it is rather difficult or definitely difficult to obtain access to firearms in Poland. 16% of respondents believe it is rather easy or definitely easy. Almost every third respondent stated that it was difficult to say. It needs to be concluded form the above that it the public opinion it is not easy to obtain access to weapons in Poland.

The author of the communication on the study, A. Głowacki, believes that "the sense of safety and security of Poles has for a long time now been at a high level. When we last asked and studied this issue, this April (2017), 89% of respondents believed that Poland is a safe place to live and 95% assessed the safety of their neighbourhood well".[22]

Polish regulation of access to weapons results in one of the lowest numbers of guns per citizen yet Polish people assess their safety and the safety of their relatives well.

22 Komunikat z badań *Polacy o dostępie do broni,* CBOS, file no. 5613, communication no. 137/2017, author: A. Głowacki. Accessed via CBOS.pl on 15.11.2019.

Map 1. Number of guns per 100 inhabitants in individual countries of Europe



Source: J. Marian, Number of guns per capita in Europe, https://jakubmarian.com/number-of-guns-per-capita-in-europe/ (access: 13.11.2019).

It is a fact that it is Romania, not Poland, that features the lowest rate in Europe of guns held, amounting to a mere 0.7. For Poland this rate is only 1.3 guns per 100 inhabitants. The most guns in the hands of civilians calculated per 100 inhabitants can be found in Switzerland. Almost half of the population there (45.7%) own firearms. It is over 35 times more than in Poland. As pointed out at legalna-bron.pl: "In Switzerland the army is based on conscripting all men between 20 and 30. The recruits attend a number of training courses and may hold their own weapons in their own homes according to applicable regulations. Even after their compulsory military service is finished the soldiers do not have to part with their weapons and the rest of the equipment. The state also supports shooting sports which is strongly promoted and sponsored. Each person aged 18 and above may purchase weapons for use in recreational and sporting shooting as well as hunting. It is worth noting that despite universal possession of weapons the number of crimes involving their use are very low."[23]

23 http://legalna-bron.pl/pozwolenie-na-bron/posiadanie-legalnej-broni-w-wybranych-krajach-europy/ (access: 15.11.2019).

The statistics on the possession of weapons in various countries differ not only due to the attitude of public authorities. People's interest in weapons and the resulting desire to have them affects it to the largest extent. The social contexts are affected by the tradition of shooting and the current level of crime, in particular with the use of firearms.

At the local level the situation of weapons licences issued is similar to the nation-wide one. On the basis of his own research, the author assessed the possibility of obtaining a positive decision from the VPC in the West Pomeranian Voivodship.

Table 2. Number of filed applications for a weapons licence in the West Pomeranian Voivodship

Number of filed applications for a weapons licence		
Purpose for owning weapons	2016	01.01.2017–28.02.2017
Personal protection	4	2
Hunting	304	28
Sports	259	28
Collection	120	23

Source: author's own compilation on the basis of author's own research by means of public information.

Table 3. Number of weapons licences issued in the West Pomeranian Voivodship

Number of weapons licences issued		
Purpose for owning weapons	2016	01.01.2017–30.06.2017
Personal protection	0	0
Hunting	295	120
Sports	251	96
Collection	111	64

Source: author's own compilation on the basis of author's own research by means of public information.

The above data on the West Pomeranian Voivodship proves absence of a significant disproportion between the number of filed applications for a weapons licence and the number of actually issued licences. One needs to take into account the fact that the lack of a positive decision in this case is not always determined by the lack of willingness of the issuing authority. Formal shortcomings in the application which the applicant did not complete despite the authority's request may also be a reason. A potential reason may also involve the death of the applicant in view of which the administrative proceedings become obsolete, which in turn results in a decision non being issued.

The reasons for not issuing licences in the case of the West Pomeranian Voivodship are not known, since, as the author managed to establish, the VPC in Szczecin does not record statistics on the premises for refusals to issue weapons licences or their withdrawals.

A significant conclusion concerns the lack of weapons licences issued for the purpose of personal protection. Thus it confirmed the conclusions of the CBOS's statistical data which

showed the Poles' sense of safety and security. This, as can be seen, results in a low number of applications for such a decision. A thesis that the problematic nature of substantiating the reason for the wish to have such a licence affects such a low number of positive decisions issued, and in the case of the voivodship in question even the lack of such decisions proved true. It is indeed a true assumption according to which the VPC only in exceptional cases does not issue a weapons licence in such categories as sports or collection, since the Police authority does not have the competence of administrative discretion in these proceedings.

It is also important to demonstrate the number of withdrawn weapons licences.

Table 4. Number of withdrawn weapons licences in the West Pomeranian Voivodship

Number of withdrawn weapons licences		
Purpose for owning weapons	2016	01.01.2017–30.06.2017
Personal protection	107	29
Hunting	100	43
Sports	13	0
Collection	0	0

Source: author's own compilation on the basis of author's own research by means of public information.

The above data shows that the number of withdrawn decisions allowing possession of weapons is relatively high. For example, for merely 300 weapons licences issued for hunting purposes 100 of previously issued licences were withdrawn in 2016. The majority of withdrawn licences is in the category of personal protection, which is also to the detriment of a citizen wishing to possess a weapon for personal safety.

Conclusions

According to universally available statistics referred to in the part "Statistical analysis of the number of weapons licences issued in selected areas of the Republic of Poland" Poland features one of the lowest rates of guns owned by civilians calculated per 100 inhabitants. In the author's opinion the reason for such a state of affairs is the fact that the Polish legislator fears the possible increase in crime. On account of this concern the right to possess a weapon was subject to strict regulation. Moreover, the competence of administrative discretion is considered unfavourable by people applying for weapons possession. This legal institution may potentially result in violations. In view of the above, the circle of persons interested in weapons and defence opposes the possibility of administrative discretion in the course of such proceedings.

Despite understanding the fact that according to some a more universal weapons ownership may bring about negative effects, the author agrees with the claim that administrative discretion when issuing a weapons licence is unnecessary. Resigning from this institution would entail equality in the application of the law felt by the applicants. This would also entail equality in the attitude of authorities issuing licences throughout the country, removing dis-

crepancies and it would streamline the procedure. The absence of administrative discretion, thus binding the authority with a statutory assumption, would result in popularizing shooting in Poland. In turn, an increase in an interest in shooting would contribute to an increase in the level of public safety and security as well as to strengthening Poland's position with regard to other countries of Europe in terms of armament of civilians.

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List of attachments

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Auxiliary units of communes in rural areas – a few words on the functioning and financing of villages

Abstract

The aim of this article is to bring closer the issues related to the functioning of villages – auxiliary units of a commune characteristic for rural areas. The study indicates the legal basis for the functioning of these units, starting with the Constitution, through statutory acts, ending up with acts creating their legal position, that is statutes. The status of individual village authorities and the basic principles of their financing have also been discussed, often referring to the reality of the Gryfino commune. In addition, the opinion of legal scholars and commentators as well as the jurisprudence on the above issues has been taken into account.

Key words:

auxiliary unit of a commune, village fund, local government

Introduction

The subject matter concerning auxiliary units of a commune is an interesting and very extensive subject of research as well as disputes in legal scholarly circles. Creating auxiliary units undoubtedly facilitates the development of the idea of self-governance and other constitutional principles. The following study, based on a legal thought-related and analytical research method, presents the institution of a village as an auxiliary unit of rural areas in the most complementary manner.

In the first part of the study, an attempt has been made to bring closer the legal regulations relating to the issues of auxiliary units of a commune. Further, the subject matter of statutory issues of villages is examined and the authorities of these units are discussed. At the end of these reflections focus is given to the analysis of village financing solutions within the village fund.

General substantive issues

While undertaking the analysis of issues relating to local government units, even auxiliary ones, it is impossible not to mention, even very generally, the regulations contained in the

Constitution of the Republic of Poland.[1] It is the constitutional norms that are the basis of the entire legal system and they determine the position of other norms and acts in the hierarchical system of the sources of law. One should begin here with constitutional principles the implementation of which should be a priority in the process of creating and applying the law. With constitutional values, one cannot confine oneself to indicating specific articles because a constitutional norm, having the nature of a legal principle, is not limited to a legal provision but, on the contrary, may logically or instrumentally derive from several norms or provisions. As regards the local government, the focus should be on three basic principles, i.e. the principle of subsidiarity, the principle of decentralisation and the principle of self-governance. In this case, the preamble and Articles 15 and 16 of the Polish Constitution will be crucial.

As I. Maruszewska points out, the three principles of self-governance, decentralization and subsidiarity currently form the structure of local government activity in Poland. Self-governance is a principle that allows social groups to make sovereign decisions about social life and its problems. The principle of decentralisation assigns to local governments the maximum number of issues not related to the general population of the country. The principle of subsidiarity, on the other hand, states that the state helps to solve problems and issues that local communities cannot cope with.[2]

The remaining assumptions and values concerning local government were mostly regulated in Chapter VII of the Constitution of the Republic of Poland, entitled simply: Local Government, i.e. in Articles 163–172. Naturally, none of these provisions referring to local government units apply directly to auxiliary units. Nevertheless, Article 164(2) of the Constitution of the Republic of Poland provides for a possibility of creating other regional and/or local government units by way of a statute. Thus, it would be necessary to move from constitutional regulations to the level of statutory regulations.

Therefore, a statute is the decisive act determining, to a significant extent, the situation of local government auxiliary units. The legislator has created the possibility of creating auxiliary units only for commune local government, whereas there are no regulations in the district or province which could assume the possibility of creating auxiliary division units. The creation and structure of auxiliary units is currently regulated by the Act on Commune Local Government.[3] Article 5(1) and (2) of this Act gives a commune, and specifically the commune council, the competence to establish auxiliary units by way of a resolution, whereas the commune or its council does not have to use them. Therefore, it is important to underline the optionality of setting up auxiliary units. Obviously, the social factor must be taken into account, thus the establishment of an auxiliary unit can be effected on the initiative of the residents themselves or following consultations with them. The right conclusions are drawn by B. Dolnicki, who claims that the Act does not determine the legal nature of the consultations and the legal effects they will have on the commune authorities.[4] In addition, he emphasises that

1 Constitution of the Republic of Poland of 2 April 1997 (Dz. U. (Journal of Laws) of 1997 no. 78 item 483 as amended), hereinafter: the Constitution of the Republic of Poland.

2 I. Maruszewska, *Znaczenie funkcji sołtysa we współczesnej Polsce*, "Civitas Hominibus. Rocznik Filozoficzno-społeczny" 2018, no. 18, p. 191.

3 Act of 8 March 1990 on Commune Local Government (consolidated text: Dz. U. (Journal of Laws) of 2019, item 506 as amended), hereinafter ACLG.

4 B. Dolnicki, *Samorząd Terytorialny*, 7th edition, Warsaw 2019, p. 82.

the view of Z. Leoński should be agreed with, according to whom consultations are a form of seeking the residents' opinion.[5] The results of this opinion are not binding – unlike a referendum – for the commune authorities, although this opinion should be taken into account by the council and commune authorities if it is to be a form of local democracy. On the other hand, where the activity of the council (another authority) is conditional on consultation, the absence of such consultation would render the act null and void.[6]

Within views of legal scholars and commentators, the most frequently presented position is that a local referendum can sometimes act as a consultation. The above thesis seems to be confirmed by Article 4a(4) ACLG, which states that consultations with residents shall not be held in the case of a local referendum on the establishment, merger, division and abolition of a commune and the establishment of the boundaries of a commune. The decisions of the Supreme Administrative Court (further referred to as the SAC) are also of significant importance in this case. This is confirmed by the decision of 21 June 2016, pursuant to which, in the procedure of creating, merging, dividing, abolishing or establishing new commune boundaries, the legislator provided for alternative forms of expression of the their inhabitants – consultations or referendum.[7] Nevertheless, there are some important differences here; namely, consultations are only supposed to provide an opinion, whereas this is quite different for a local referendum, which is, in principle, binding for the authorities conducting it. In support of this thesis, another judgement of the SAC can also be quoted, according to which, as a consequence, a referendum question is inadmissible and thus leads to illegal decisions if it results in obtaining only the opinion of the local community (opinion-giving referendum) instead of an explicit obligation for the authorities of a specific local government unit to take a specific decision which remains within their competence. The judgement of the Provincial Administrative Court in Białystok shall also be mentioned here, pursuant to which the Local Referendum Act does not provide for any local opinion-giving referenda in the Polish legal system, but only binding ones.[8]

In the provision of Article 5.4 ACLG, the legislator explicitly states that the principles of creation, merger, division and abolition of an auxiliary unit are set out in the commune statute. It is the commune council pursuant to Article 18(2)(1) ACLG that has the exclusive competence to adopt the commune statute. *Ergo* in the case of creating or modifying auxiliary units, the freedom of regulation is left with the commune. Other issues related to auxiliary units are regulated in Articles 35–37b and 48 ACLG and will be discussed in detail later in the study. Here, it can only be pointed out that they concern respectively the statute of the auxiliary unit, the legal position of its authorities as well as the management and use of the commune assets. In addition, it can be mentioned that this position is also determined by such acts as the already mentioned village statute and, as far as financing is concerned, the Village Fund Act[9], which will also be discussed further in this work.

Bearing this in mind, there are two points worth noting. First of all, the provisions concerning the legal position of a commune auxiliary unit can be found in various acts, starting

5 Z. Leoński, *Samorząd terytorialny w RP*, Warsaw 1998, p. 71.
6 B. Dolnicki, *Samorząd…*, pp. 8ff.
7 Judgement of the Supreme Administrative Court of 21 June 2016, case file no. II OSK 1236/16, LEX no. 2097518.
8 Judgement of the Supreme Administrative Court of 2 February 2016, II OSK 2851/15, not published.
9 Act of 21 February 2014 on the Village Fund (Dz. U. (Journal of Laws) of 2014 item 301).

with the Constitution of the Republic of Poland, through statutory acts and ending with local laws, such as the statutes of the commune and its auxiliary unit respectively, which will have the greatest impact on the final position of that unit. Secondly, in the process of establishing a village, the following stages can be distinguished:

1. The commune council defines the rules for creating, changing, merging and abolishing auxiliary units in the commune statute.
2. Establishment by the commune council of an appropriate auxiliary unit by way of a resolution, whereas the optionality of such a resolution should be noted here as well as the previous obligation to consult.
3. Providing an auxiliary unit with a statute by the commune council.

The statute of a village and its status

The statute is a legal act that most completely determines the actual position of the village, while at the same time indicating its tasks or the way it operates. The general guidelines that these statutes should contain are set out in Article 35 ACLG. Being aware of the difficulties that discussing these elements in isolation from a specific actual state of affairs may cause as well as in order to enable an in-depth analysis of the discussed issues, the author decided to refer directly to the Statute of the Gardno Village.[10]

The aforementioned Article 35 ACLG refers only to regulations of fundamental importance, which should be included in the statute of a village. This catalogue is open, as evidenced by both the general competence of the commune decision making body to actually create, determine the organisation or the rules of operation of the village and the phrase "in particular" used in section 3 of this article. The individual elements of the statute are illustrated by the following table with a reference to the reality.

Table 1. Example regulations included in the Statutes of the Gardno Village

Obligatory statute elements	Example proposal of solutions in the Gardno Village
1. Name	Gardno village (§ 1)
2. Area	The area of operation is Gardno (§ 2)
3. Principles and procedures for selecting the authorities	Secret, equal, direct, general and majority elections, by entering the name of the candidate for whom the vote is cast on the ballot paper. (§ 29 and 30)

10 The Statute of the Gardno Village, constituting Appendix no. 9 to Resolution no. XXI/294/04 of the Gryfino Town Council of 29 April 2004, source material of the website: https://bip.gryfino.pl/chapter_56087.asp (access: 19.11.2019).

4. Organisation and tasks	The village assembly is the legislative body which is made up of permanent residents of the village with voting rights and rights to be elected. The village administrator is the executive body, whose activities are supported by the village council. (§ 9. and 12.) § 7. The tasks of the village council include all matters important for its residents, in particular (open catalogue): 1) participation of residents in the consideration of matters important to the functioning of the village, 2) management and proper use of commune property, provided that it has been transferred to the village, 3) organising self-help for residents and joint work for the benefit of the place of residence, especially in the field of social assistance, maintenance of order, promotion of sports, culture and education.
5. The scope of tasks delegated to the unit by the commune and the manner of their implementation.	§ 8. The tasks specified in § 7 are carried out by the village by through 1) giving an opinion on matters falling within the scope of activity of the village, 2) participation in organizing and carrying out public consultations on draft resolutions of the Town Council in matters of fundamental importance to the residents of the village, 3) filing motions to the commune authorities for consideration of matters the settlement of which is beyond the capacity of the residents of the village, 4) cooperation with council members in the organization of meetings with the residents and submitting applications to them concerning the village.
6. Scope and forms of control and supervision	§ 37. 1. Supervision over the activities of the village is exercised by the Town Council and the Mayor, reviewing the financial management at least once a year, provided that part of the commune property and budgetary funds have been transferred to the village. 2. The Town Council shall evaluate the functioning of the village at least once in its term of office. 3. Reviewing the current activities of the village on the basis of the criterion of legality, purposefulness, reliability and efficient management is exercised by the Mayor. § 38. The supervisory and review authorities shall have the right to request the necessary information and explanations concerning the functioning of the village.
7. Possibility of setting up a subordinate unit	None

Source: author's own compilation on the basis of the Statute of the Gardno Village, constituting Appendix no. 9 to Resolution no. XXI/294/04 of the Gryfino Town Council of 29 April 2004, https://bip.gryfino.pl/chapter_56087.asp (access: 19.11.2019).

In addition, it should be emphasized that each statute should be sufficiently different from others, be a separate, individual and named act. Such a statute will be an act of local law, which, in turn, is considered to be a common act of law. They contain norms of both a general nature (they indicate the addressee by indicating its characteristics and not by naming it) and an abstract nature (they concern behaviour that is generally repetitive under the circumstances and are not "consumed" by a one-off behaviour). Moreover, one can also point out such features as the fact that these acts are in force in the area of activity of the relevant local government unit, they regulate matters of public nature and local range or the fact that their addressees are not only the inhabitants of the local government community, but also individuals temporarily staying in the area of the local government unit and entities conducting their activity there.[11] Therefore, the statute should also specify such issues as in particular: who has the voting right and the right to be elected, when the election takes place, how and on what dates the residents will be notified about the place and date of the elections, who convenes the election meeting and announces the elections as well as the issue of the election turnout or the rules of the returning committee.[12]

It should be noted that such a model of solutions provided by the legislator arouses some controversy as to how to treat the village. B. Dolnicki presents them in a comprehensive manner, claiming that the ACLG has not defined the status of the auxiliary unit in a clear and explicit manner. The legal scholars and commentators and the established line of judicial decisions distinguish two methods of determining the legal nature of an auxiliary unit: negative and positive. The negative method is based on the claim that an auxiliary unit – unlike a commune – is not a communal legal person, does not constitute a territorially separate local government association and does not have a corporate nature. Moreover, there are no legal grounds for treating the village as a social organisation, in particular the one referred to in Article 64 of the Code of Civil Procedure. The Supreme Administrative Court, in a judgement of 6 March 1992, excluded the local government and, thus, all the authorities of that government, including the authorities of auxiliary units, from the concept of a local government organisation. The supporters of the positive method treat the village, city district, housing estate only as an auxiliary (internal) unit of territorial division. The position of the Supreme Court treating an auxiliary unit as a local government auxiliary authority of the commune also does not deserve to be accepted. Since, no auxiliary unit is an auxiliary commune authority.[13]

Similar controversies may arise with regard to the recognition of ability of auxiliary units to act as legal entities within the scope of using the property transferred to them. Pursuant to Article 48(1) ACLG, the auxiliary unit has the competence to manage and use the commune property and to dispose of the income from that source to the extent specified in the statute. The statute also determines the scope of activities to be carried out by an auxiliary unit on its own, within the scope of its property. In this respect, it should be noted that legal scholars and commentators expressed a view that both the management, use of commune property

11 Cf. M. Stych, *Wybrane zagadnienia prawne statutu gminy jako aktu prawa miejscowego o charakterze ustrojowym.*, "Ius et Administratio" 2014, no. 4, pp. 2–3.

12 Cf. A. Gołębiowska, P.B. Zientarski, *Podstawy prawne działania gminnych jednostek pomocniczych*, in: Sołectwo – studium prawnoustrojowe, A. Gołębiowska, P.B. Zientarski (eds.), Warsaw 2017, pp. 9–10.

13 B. Dolnicki, *Samorząd*…, pp. 147–148.

and disposal of the income from this source must be determined in the statute. Failure to determine these activities and their scope makes it *de facto* impossible for an auxiliary unit of a commune to exercise the rights granted to it under the provisions of Article 48(1), sentence 1 ACLG.[14]

It is doubtful whether the above-mentioned regulation allows one to conclude that auxiliary units have legal personality or legal capacity in relation to the communal property transferred to them. As rightly noted, what the legislator has defined as the use of communal property and the disposal of the income it generates does not constitute a disposition. This is the transfer of the management of the components of this property to the authorities of the auxiliary units to the extent specified in this provision.[15] The decision of the Provincial Administrative Court in Łódź of 23 July 2015 can be considered conclusive as regards this doubt. Pursuant to thereto: it should be pointed out that both the legal writings and judicial decisions establish the view that an auxiliary unit is not another local government unit, but is a part of a larger structure which is the commune. As the name suggests, such entities are of an auxiliary nature, perform tasks entrusted to them and operate within the ability of the commune to act as legal entity. The auxiliary units themselves do not have legal personality and are not authorised to act independently in legal transactions. Therefore, they cannot be an independent holder of rights and obligations in the sphere of substantive administrative law. The lack of legal regulations in the ACLG granting the villages, city districts and housing estates the right to participate in administrative proceedings on the principles set in the Act of 14 June 1960 – Code of Administrative Procedure[16] for social organizations also excludes the possibility of granting these auxiliary units of a commune with the position of an entity with the rights of a party in administrative proceedings.[17] Independently – on their behalf and in their own interest, the auxiliary units cannot effectively initiate any administrative procedure and cannot participate in the procedure as a party to that proceedings.[18]

The essence of the ability to act as legal entity is aptly described by E. Hadrowicz, according to whom the notion of the ability to act as a legal entity in the Polish legal system is closely connected with having the attribute of legal personality (i.e. normative qualification as a legal person) or legal capacity (i.e. normative qualification as the so-called legal person without corporate status) in the sphere of legal relations. In this context, it should be emphasised that the basic attribute of a commune (as a legal person) is its subjective separation from the state (understood in a narrow sense), both in the private (civil law) and public law sphere. This is because granting legal personality to a basic local government unit creates the possibility for it to act in legal relations on its own behalf and at its own risk. This means that it may have its

14 M. Augustyniak, *Status prawny jednostki pomocniczej gminy w sferze prawa prywatnego,* "Administracja: Teoria, Dydaktyka, Praktyka" 2008, no. 3(12), pp. 72–108.

15 Cf. A. Agopszowicz, in: A. Agopszowicz, Z. Gilowska (eds), *Ustawa o samorządzie gminnym. Komentarz,* A. Agopszowicz, Z. Gilowska (eds), Warsaw 1999, p. 324.

16 Consolidated text Dz. U. (Journal of Laws) of 2018 item 2096 as amended.

17 Judgement of the Supreme Administrative Court of 29 April 2003, case file no. IV SA 2841/2001

18 Judgement of the Provincial Administrative Court in Łódź of 23 July 2015, case file no. II SA/Łd 519/15, LEX no. 1757739 (compare judgements: Supreme Administrative Court of 26 May 1992, case file no. SA/Wr 1248/91, not published; Supreme Administrative Court of 20 September 2001, case file no. SA 1539/2000, not published; judgement of the Provincial Administrative Court in Białystok of 9 November 2006, case file no. II SA/Bk 414/2006, not published).

own rights and obligations. It acquires them or disposes of them on its own behalf. It also has assets separate from other legal entities (i.e. legal persons, legal persons without corporate status or natural persons). Like other legal entities, the commune is also liable with all its assets for non-performance or improper performance of its obligations. According to the position expressed by the author, the village, in the current legal status, does not have the ability to act as a separate legal entity from the commune, which means that its activities are carried out within the limits set out in the statute within the legal personality of the commune. The village is granted powers within the framework of managing the commune property, taken out of the competence of the commune administrator and granted by a resolution of the commune council. *Ergo* the commune delegates its competences, while, at the same time, depleting the possibility of its own authorities to operate in this area.[19]

Village authorities

The basic issues concerning the authorities in the village council were resolved by the legislator in the aforementioned Article 36 ACLG, while, in the remaining scope, the freedom of regulation was left with the commune authorities. Taking into account the subject under consideration, it is necessary to point out the dualism of village authorities, as the legislator has distinguished two authorities of this auxiliary unit: the legislative one – being the village assembly and the executive one – the village administrator.

The village assembly is usually understood as a gathering of all the inhabitants of a given village, which is additionally characterized by the permanence of residence of the members of the assembly within the territory of the village. In addition, the residents must, as a rule, have voting rights.[20] In the legal writings the village assembly is assigned the presumption of jurisdiction. This means that this authority is competent in all matters not reserved for the village administrator and the village council. In order to determine the characteristics of the village assembly, a detailed analysis is required of the provisions of substantive law which attribute specific competences to the village administrator.[21] Therefore, it cannot be assumed that only those activities which are enumerated in the statutes will be included in the competences of the village assembly, such a catalogue will rather be open and, therefore, it will usually be preceded by the phrase "in particular".

In the literature the most important competences of the village assembly include matters that concern the village and influence its organization and structure, i.e.: election of the village administrator and the village council as well as dismissal of these authorities, examination of annual reports on the work of the village administrator and the village council, determination of the objectives of spending the budget funds at the disposal of the village, submission of ap-

19 E. Hadrowicz, *Implikacje prawne wokół statusu sołectwa w kontekście podmiotowości prawnej gminy. Dylematy i wyzwania.* in: *Sołectwo...,* pp. 49ff.

20 The statutes regulate the notion of the village assembly in a different manner; the above definition was developed referring to the Statute of the Gardno Village, constituting Appendix 9 to Resolution no. XXI/294/04 of the Gryfino Town Council of 29 April 2004, https://bip.gryfino.pl/chapter_56087.asp (access: 19.11.2019).

21 Cf. Z. Niewiadomski, W. Grzelak, *Ustawa o samorządzie terytorialnym z komentarzem*, Warsaw 1990, p. 38 after: B. Dolnicki, *Samorząd…*, pp. 150–151.

plications and comments on the statute of the village, decisions on undertaking social actions or managing the entrusted communal property.[22]

The village administrator, as an auxiliary unit of local government at the commune level, is an authority that has one of the longest traditions in Polish history. From the very beginning of its existence, it has played a significant role in the life of rural communities, being a local leader and an institution connecting citizens with the authorities.[23] It is the executive, management and representative authority of a rural auxiliary unit. Its most important tasks include: convening and proposing the agenda of the village assembly and the village council meetings as well as presiding over these meetings, implementing resolutions of the village assembly, participating, pursuant to the principles specified in the provisions of the statue, in the sessions of the town council as well as in the meetings of and training for village administrators, submitting annual reports on its own and the village council's activities to the village assembly. Moreover, the village administrator may also be responsible for performing tasks resulting from the resolutions of the commune councils (e.g. collection of local fees and taxes) or other legal regulations (e.g. authorisation to serve various documents and to issue administrative decisions).[24]

However, the position of the village council may raise doubts. The legislator merely mentioned that it supports the activities of the village administrator, without specifying the nature of the authority. The legal thought is currently dominated by the view on two fundamental issues in this subject matter. First of all, it is pointed out that the village council is obligatory in the village. This can be seen from the wording of the phrase 'shall assist' instead of 'may assist' in paragraph 1 of Article 36 ACLG. Secondly, it is treated only as an advisory and opinion-giving body, although the village council cannot be denied the actual function of initiating the village administrator's or village assembly's activities. The above seems to be confirmed by the judicial decisions of the Supreme Administrative Court, where, in its decision of 20 May 1991, it states that, pursuant to Article 36(1), sentence two of the Act of 8 March 1990 on Local Government[25], the village council is not an authority of an auxiliary unit of the commune with the power to act independently, in particular, it does not pass resolutions on the use of legal means available to the village as a possible party in administrative proceedings nor does it have the power to organise the implementation of such a resolution and to represent the village outside. The village council does not have the right to lodge a complaint with the Supreme Administrative Court.[26]

The review and supervision of the activities of the village should also be mentioned and, thus, the following issues shall be pointed out. First of all, the competent authorities exercising review shall involve: the executive authority of the commune (commune administrator, town or city mayor), with respect to the financial management of the village and the manner of commune property management as well as the commune council, which may also review the

22 Cf. A. Gołębiowska, P.B. Zientarski, *Podstawy prawne działania gminnych jednostek pomocniczych*, in: *Sołectwo – studium prawnoustrojowe*, A. Gołębiowska, P.B. Zientarski (eds.), Warsaw 2017, p. 12.

23 Cf. I. Maruszewska, *Znaczenie funkcji sołtysa we współczesnej Polsce*, "Rocznik Filozoficzno-Społeczny Civitas Hominibus" 2013, no. 18, p. 191.

24 Cf. A. Gołębiowska, P.B. Zientarski, *Podstawy prawne działania gminnych jednostek pomocniczych*…, pp. 12–13.

25 Dz. U. (Journal of Laws) no. 16, item 95, as amended).

26 Decision of the Supreme Administrative Court (to 2003.12.31) in Wrocław of 20 May 1991 SA/Wr 381/91, "Wspólnota" 1991, no. 29, p. 9.

activities of auxiliary units with the help of a committee, including a specific review committee (Article 18a ACLG). Secondly, the review criteria shall include: legality, reliability, cost efficiency and expediency. Thirdly, the most important powers of the reviewing authorities shall include: the right to inspect all documents related to the activities of the village authorities, the possibility to observe the course of certain activities, the right to demand oral and written explanations from the village administrator, the right of free access to the premises intended for the activities of the village authorities and the possibility to carry out an inspection of the assets held by the village. And finally, fourthly, the supervision measures may include: examination of reports on the socio-economic and financial activities of the village, inspection of the village authorities, repealing resolutions of the village assembly, the right of direct insight into the activities of the village authorities (inspection), suspension of the execution of the resolution of the village assembly, requesting necessary information, data and explanations concerning the functioning of the village and the right of direct insight into the course of individual matters dealt with by the village authorities (vetting).[27]

Village fund

The village fund (hereinafter referred to as the fund) was introduced into the Polish legal order by the Act on the Village Fund (hereinafter AVF) in 2009.[28] Currently, the legal basis for its operation is the act of the same name, i.e. the Act on the Village Fund. Due to formal limitations, the circumstances related to the enactment of this act, as well as the history of shaping this institution will be omitted. Even though according to some legal scholars and commentators these changes were only of editorial nature, they cannot be denied a significant impact on the formation of the finances of the village, especially as regards carrying out joint projects by villages or the possibility of changing projects during the financial year.[29]

Given the legislation in force, it is difficult to answer the question as to what a social fund explicitly is. The legislator does not formulate a legal definition of this concept. Reference should, therefore, be made to definitions provided by legal scholars and commentators.[30] On this basis, it can be pointed out that the village fund is the resources, or colloquially speaking money, which are to be used to carry out undertakings ensuring improvement of the living conditions of the commune inhabitants. It should also be stressed here that the village fund is not a separate budget of an auxiliary unit, but separate resources from the commune budget and remains a part of it at all times. Also, Article 2(5) AVF should be quoted, pursuant to which the fund is not a special purpose fund within the meaning of the Public Finance Act.[31]

27 Cf. A. Gołębiowska, P.B. Zientarski, *Podstawy prawne działania gminnych jednostek pomocniczych*…, pp. 14–15.

28 The Act on Village Fund of 20 February 2009 (Dz. U. (Journal of Laws) of 2009 no. 52 item 420, as amended), which became effective as of 1 April 2009.

29 See also K. Hennig, W. Biesiacki, M. Pintara, *Funkcjonowanie Funduszu Sołeckiego w latach 2010–2017. Analiza prawno-statystyczna i postulaty de lege ferenda, Opinie i analizy* 2018, no. 38, pp. 5–9.

30 Cf. *Fundusz sołecki w pytaniach i odpowiedziach,* Stowarzyszenie Liderów Lokalnych Grup Obywatelskich, K. Batko-Tołuć (ed.), source material of the website: https://siecobywatelska.pl/fundusz-solecki-w-pytaniach-i-odpowiedziach/ (1.12.22019).

31 Act of 27 August 2009 on Public Finance (consolidated text: Dz. U. (Journal of Laws) of 2019 item 869, as amended).

The decision on which specific tasks the financial resources from the fund will be allocated is made directly by the inhabitants of the village participating in the village assembly. On the other hand, the implementation of the village fund as well as the entire budget is the responsibility of the executive authority of the commune. The decision to separate the fund is taken by the commune council in the form of a resolution, but a resolution giving consent to separate the fund also applies to subsequent financial years following the year in which it was adopted, while a resolution not giving such consent is valid for one financial year only. This can be read in line with the idea of self-governance as a general directive, pursuant to which separation of the fund will be a rule, whereas its non-separation – an exception from the rule. Furthermore, a resolution adopted after 31 March of the year preceding the financial year to which it relates shall be absolutely null and void.

Another issue that needs to be raised is the amount of this fund. Each village has a specific amount of money assigned calculated according to the formula contained in Article 2 AVF:

$$\mathbf{F = \left(2 + \frac{L_m}{100}\right) \times K_b}$$

Where individual symbols have the following meaning:
F – the amount of the resources allocated to the relevant village, but not more than 10 times K_b
Lm – the number of residents of the village as at 30 June of the year preceding the financial year, determined on the basis of the permanent residents' dataset kept by the commune referred to in Article 44a(1)(1)(a) of the Act of 10 April 1974 on the Population Register and Identity Cards (Dz. U. (Journal of Laws) of 2006 no. 139 item 993, as amended),
K_b – base amount – calculated as the quotient of the current income of a given commune, as referred to in the public finance regulations, obtained for the year preceding the financial year by two years and the number of inhabitants living in the area of a given commune, as at 31 December of the year preceding the financial year by two years, determined by the President of Statistics Poland.

The amount of resources allocated to individual villages depends on the number of inhabitants of the village and the income of the commune. It should be stressed that the commune council may increase the amount of the fund by way of a resolution, however, as regards the amount exceeding the resources calculated according to the statutory formula, no reimbursement of the part of the expenditure for this purpose is due. These reimbursements amount to 40, 30 and 20% of expenditures respectively and depend on the income of the commune. It can, therefore, be concluded that separation of the fund brings benefits not only to the village but also to the commune. On this issue one should also agree with I. Maruszewska. According to this author's reflections, "the communes which have carried out their tasks using the resources from the village fund are granted a return of a part of the incurred expenses, so it is an attractive form of carrying out investments by communes. (…) However, the biggest beneficiary of the changes that are taking place thanks to the resources from the village fund is ourselves as a local community. Thanks to the implemented projects, the village and its image is changing, for example, for city dwellers, who eagerly use agritourism, which is an attractive way to have a cheap holiday and, at the same time, sustains the traditions and culture of the

region. The great efforts of the countryside to create a civil society are visible and the next generations are also involved."

Another thing worth noticing is the procedure for the creation of the village fund, specified in Article 5 AVF. Its first stage will be the submission by the village administrator, by 30 September of the year preceding the financial year, of a motion adopted by the village assembly to the commune administrator (town or city mayor), which, the same time, is a *sine qua non* condition for the allocation of resources from the fund in a given financial year. The commune administrator may accept the motion or reject it for formal reasons within 7 days. In such a case, the village administrator may, within 7 days from the date of receiving the information about the rejection of the motion, uphold the motion that does not meet the conditions, referring it to the commune council through the commune administrator and also the village assembly may re-adopt the motion. Then, the commune council finally considers the motion within 30 days of its receipt.

Summing up, the formal requirements of such a motion should also be presented. Firstly, the motion should include an indication of the undertakings to be carried out in the area of the village within the resources specified for the village with an estimate of their costs and a justification. Secondly, the resources of the fund are allocated to the implementation of undertakings which are, at the same time, the commune's own tasks, serve to improve the living conditions of the inhabitants and are consistent with the commune's development strategy. In addition, the legislator also provided for the possibility of using these resources to cover the expenditures related to actions intended to remedy the effects of a natural disaster. An exemplary statement of expenditures from the village fund for the aforementioned Gryfino commune is illustrated in the table below.

Table 2. Planned expenditures from the village fund for individual tasks in the financial year 2020 for all villages in the Gryfino commune

Category of public issues	**Specific public issue**	**Expense intended for**	**Planned amount of expenses for 2020 (in PLN)**
Transport and connections	Public commune roads	Purchase of renovation services	53,022.25
Transport and connections	Public commune roads	Investment expenses of budgetary units	30,996.98
Services	Cemeteries	Purchase of renovation services	18,864.57
Public administration	Promotion of local government units	Various fees and contributions	500.00
Public administration	Promotion of local government units	Purchase of other services	1,000.00
Public security and fire protection	Voluntary fire brigades	Purchase of materials and equipment	12,400.00

Communal services and environmental protection	Cleaning of towns and villages	Purchase of materials and equipment	9,200.00
Communal services and environmental protection	Maintaining greenery in towns and communes	Purchase of materials and equipment	22,643.75
Communal services and environmental protection	Lighting of streets, squares and roads	Purchase of other services	6,000
Communal services and environmental protection	Lighting of streets, squares and roads	Investment expenses of budgetary units	15,000.00
Culture and heritage protection	Culture centres, community centres and clubs	Purchase of materials and equipment	32,218.68
Culture and heritage protection	Culture centres, community centres and clubs	Purchase of renovation services	9,000.00
Culture and heritage protection	Culture centres, community centres and clubs	Purchase of other services	3,500.00
Culture and heritage protection	Culture centres, community centres and clubs	Investment expenses of budgetary units	61,256.38
Culture and heritage protection	Other activity	Remunerations not falling under employment contracts	15,500.00
Culture and heritage protection	Other activity	Purchase of materials and equipment	36,382.91
Culture and heritage protection	Other activity	Purchase of other services	162,738.86
Physical culture	Sport facilities	Purchase of materials and equipment	11,985.00
Physical culture	Sport facilities	Purchase of other services	168,581.20
Physical culture	Sport facilities	Investment expenses of budgetary units	40,324.33
In total			**711,114.91**

Source: author's own compilation based on the data included in the project of the Gryfino Commune budget for the year 2020, https://bip.gryfino.pl/UMGryfino/files/D59C92B4D2A445358E10CF0EB7C12231/uchwala_projekt_budzet_2020.pdf (access: 26.11.2019).

Conclusions

Summarizing the whole range of issues and institutions presented in the study, it can be unequivocally stated that the issue of functioning of auxiliary units of a commune, especially of villages, is very complicated and relatively broadly defined. As a result, it causes numerous interpretation problems, which is reflected in the practice of applying certain solutions. This is also evidenced by the judicial decisions cited in the study.

Moreover, it should be noted that the status of auxiliary units of a commune is very important from the point of view of local government functioning. It affects not only the scope and quality of the tasks performed, but also facilitates the implementation of important social issues. The tasks which are carried out by villages are only those own tasks of the commune which have been delegated to them by the local authorities, i.e. the commune councils. Thus, the scope of the competences of villages is limited in this manner. It should also be emphasised that the actions taken by villages are subject to review.

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Issues of administrative powers in the processes of executing administrative law

Abstract

The subject of the study involves selected topics of administrative powers in the field of executing administrative law. The aim of the research is to determine the range of administrative powers in the processes of administrative law execution and to compare it with the scope of discretionary powers of administration in the administrative law application processes, to juxtapose legal bases of both types of authority, of sources of administration's legitimacy in both spheres and of causes for differentiation of legal bases of both spheres of administration's activity. The provisions of administrative law regulating this issue are analysed and the research is conducted using the method of interpretation of norms of applicable law.

The set of discretionary powers of administration in the external sphere of law execution and the internal sphere of processes of administrative law application and execution boils down to the implementation of statutory blanket rules setting aims and tasks, including determining or specifying the volume of public tasks, selection of methods and legal forms of action, deciding on the legitimacy, time, place and scope of action or non-action, establishing internal procedures for planned action, determining legal means ensuring internal steerage in the processes of performing public functions, objectives and tasks.

It is wider than the scope of discretion in the processes of its application thus making administration the mouth of the legislator. It is qualified to create the legal basis for its activities and to freely execute the statutory norm, being restricted in this regard only by the aims and axiology of a statute and the principles of rationality.

Key words:

administrative powers, execution of administrative law, application of administrative law, discretion, internal sphere of administration

Introduction

The authority assigned to public administration, which is one of the types of state authority, is a sort of interpersonal relation regulated by provisions of the law, occurring within the state and the structure of society organised on its territory, on the basis of which administrative entities, executing laws and by virtue of them, exercise tasks and powers, have the ability to implement their own will in certain social relations, even against the will and objection of the addressees, and ultimately using physical coercive measures to ensure the execution of

laws (i.e. corresponds to valid legal norms set by the state) and implementation of the system of values recognised in a given society and expressed in laws, and thus serves the common good, and the exercise of authority has specific legal consequences related to, among others, establishing, abolishing and changing interpersonal relations or legal relations, disposing of and distributing resources, goods and values.[1]

The issue of administrative authority can be analysed from the point of view of various criteria. It is a matter of selection of the objective and the method used to achieve it.[2] By and large, a profound reflection can focus on the analysis of areas of public administration activity.[3] This approach makes it possible to indicate different types of tasks[4], and thereby the scopes of presence of public administration authority in the life of society and the individual. However, a simple analysis of administration's activity will not say much about the essence of the competences that administration has in these areas.

Specific, individual activities of administration may become subject of an analysis so as to determine the legal forms of administration through which they are activated in individual spheres of their activities. This view will, in turn, provide insight into the legal nature of the activity and will allow one to establish on a certain scale the range of government authority-related powers that the administration has at its disposal in a given situation. This approach, however, has weaknesses in that it does not allow the perception of the whole phenomenon of administrative authority. Administration is equipped with power in the sphere embraced by administrative and legal regulation, even when it uses non-government authority-related forms of action. The essence of its authority lies in the fact that it can cooperate on a voluntary basis with an individual, social group, community or society, at the same time having the possibility to settle a specific matter unilaterally, by using the government authority-related powers by which it unilaterally makes a specific decision. The simple prospect of using authority allows these relations to be considered government authority-related. The phenomenon of authority also is based on the fact that it also indirectly affects the sphere of life in which its legal interference is excluded.

As a consequence of that, when characterising individual relatively homogeneous sets of government authority-related powers, this cannot be done under on command of the typology of administrative tasks, or by limiting the arrangements as to the range of the government authority–related powers of administration using a specific form of activity identified in legal provisions. This is an argument for formulating the concept of administrative powers on

1 See P. Winczorek, *Władza polityczna*, in: J. Kowalski, W. Lamentowicz, P. Winczorek, *Teoria państwa i prawa*, Warsaw 1981, pp. 222–227.

2 W. Hoffmann-Riem, *Methoden einer anwendungsorientierten Verwaltungswissenschaft*, in: *Methoden der Verwaltungswissenschaft*, E. Schmidt-Assmann, W. Hoffmann-Riem (ed.), Baden-Baden 2004, p. 19. On the subject of the method and research methods in the theory of administration see J. Łukasiewicz, *Zarys nauki administracji*, Warsaw 2007, p. 73; Z. Hajduk, *Ogólna metodologia nauk*, Lublin 2005, pp. 84–85.

3 However, these issues were not the subject of wider interest of Polish scholarly circles (apart from a certain exception: M. Kulesza, H. Izdebski, *Administracja publiczna. Zagadnienia ogólne*, Warsaw 1999, pp. 85ff.) and sometimes this interest was fragmentary, e.g. L. Zacharko, *Prywatyzacja zadań publicznych. Studium administracyjnoprawne*, Katowice 2000, pp. 13ff.; M. Tabernacka, *Zakres wykonywania zadań publicznych przez organy samorządów zawodowych*, Wrocław 2007, pp. 80–129; J. Blicharz, *Udział polskich organizacji pozarządowych w wykonywaniu administracji publicznej*, Wrocław 2005, pp. 31–40.

4 I indicated one of the proposals on the typology of public tasks in the monograph *Pluralizm administracji publicznej*, Warsaw 2019, pp. 41ff.

the basis of the concept of steerage[5], which has been engrafted in the particular field of legal doctrines by law theorists[6], including the views of legal scholars and commentators of administrative law.[7] I assume that the essence of authority (administrative powers) of public administration is grounded in its activity or impact on an individual or social and economic system (specific parts in the form of communities, social and professional groups, interest groups, etc.), aimed at making, by means of its own actions or actions of other entities, planned and thus conscious changes in the external world or in the behaviour of the recipients of the impact or actions aimed at causing the intended changes within the administrative structure (apparatus). Impact is a broader concept than settlement and may also include non-government authority-related, bilateral actions, or factual (e.g. information) actions, if they result in achieving changes theretofore planned by the public administration.

The concept of authority understood through the lens of steerage allows one to capture its essence, which should be considered not only in unilateral decision-making, but also in influencing in a different manner the directions, shape and content of the individual's behaviour (specified social groups or the entire society) in spheres include in the interest of the administration. A similar view has been present for long in the Polish legal writings that all administrative activities bear an element of state authority. "(...) The element of authority characterises the entire activity of the state administration"[8], and the essence of authority is that it is an expression of the will of the state, unilateral (even if the individual has the right to be heard), and this will expressed primarily by an administrative act is presumed to be correct.[9] It faced criticism from Tadeusz Kuta, who disagreed with the thesis about the government authority-related nature of the entire activity of the administration and limited the sphere of administration's powers to cases of using the government authority-related form of activity by the administration.[10]

Approaches to administrative powers

The source of administrative powers includes the provisions of the Constitution and ordinary laws which grant administrative organs and entities competences and obligations in the field of: application and execution of administrative law.

5 E. Knosala, *Prawne układy sterowania w administracji publicznej,* Katowice 1998, p. 13.

6 H. Rot, *System prawa – model cybernetyczny,* Państwo i Prawo 1965, no. 1; J. Wróblewski, *Prawo a cybernetyka (zarys problemów),* Państwo i Prawo 1968, no. 12; F. Studnicki, *Cybernetyka a prawo,* Warsaw 1969.

7 K. Sobczak, *Koordynacja gospodarcza. Studium administracyjnoprawne*, Warsaw 1971, p. 7. According to E. Knosala steerage is a relation between at least two optional objects (elements, schemes, systems), which is grounded in the fact that the desired changes in one of these (steered) objects are caused by the action of the other (steering) one. The state's influence on individuals under its authority, which is to cause them to choose from among various possible behaviours deemed desirable by the state, is also a case of steerage (*Prawne układy sterowania...*, p. 14.).

8 J. Starościak, *Prawne formy działania administracji*, Warsaw 1957, pp. 29, 167–168.

9 Idem, *System prawa administracyjnego*, Vol. III, T. Rabska, J. Łętowski (eds.), Warsaw 1977, p. 61. The assumption of presumption of validity as an attribute of public authority was criticised by W. Dawidowicz, who emphasized at the same time the obligation to perform the functions of a state administration organ. See W. Dawidowicz, *Nauka prawa administracyjnego*, Warsaw 1965, p. 256.

10 T. Kuta, *Pojęcie działań nie władczych w administracji na przykładzie administracji rolnictwa*, Wrocław 1963, p. 6.

Administrative powers may be defined in a narrow and broad sense. The criterion for identifying both approaches comprises the concepts of application and execution of the law. In the theory of law, the concept of the application of law is referred to the activities of a state organ which boils down to using the competence granted to it by a specific competence norm.[11] On the basis of the study of administrative law, this concept is associated with the administration's performance of classic regulatory and order-related functions and shaping the administrative law in the authority – citizen relations based on the *subsumptio iuris* method, regarding constitutional and statutory rights, freedoms and obligations of the individual, and their legal guarantees.[12] By contrast, the exercise of law, or more precisely a statute, is composed of activities of diverse nature, which share the fact that they involve the state organ applying competence norms generally outlined by aspiring to create the stateof affairs postulated by the act being implemented.[13] Therefore, execution is a wider concept, as it involves the use of competence provisions aimed at achieving the objectives of the statute outside the organ-citizen relations system based on the *subsumptio iuris* method.[14]

Administrative powers in the narrow sense should be referred to the processes of applying substantive administrative law[15] and the discretion granted to the administration with regard to settling individual administrative cases. In this sense, there is a reference to the external sphere of the application of the law which concludes with solving an administrative case of an entity situated outside the administration by an administrative act.[16]

By contrast, administrative powers in a broad sense include:

- constitutional and functional authority,
- authority to legislate and
- administrative authority in other processes of executing administrative law in the external and internal sphere, including specification of the volume of public tasks, selection of methods and legal forms of action, deciding on the time, place and scope of activity or non-activity, application of law in the internal sphere.[17]

The constitutional and functional authority and the authority to legislate are left outside the scope of this paper, which due to their size and importance should be the subject of separate studies.

11 Z. Ziembiński, *Teoria prawa*, Warsaw–Poznań 1978, p. 130. Cf. K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa*, Warsaw 1969, p. 285.

12 T. Kuta, *Funkcje współczesnej administracji i sposoby ich realizacji*, Wrocław 1992, p. 43.

13 Z. Ziembiński, *Teoria prawa*, p. 133.

14 On the differences between the application and execution of law and the methods used in both processes: "the inductive method of substantiation of administrative resolutions" and "the deductive method of substantiation of administrative resolutions" see. A. Wasilewski, *O metodzie konkretyzacji rozstrzygnięć administracyjnych*, "Acta Universitatis Wratislaviensis", Prawo CXLIII, 1985, p. 339.

15 More on the concept of applying the law J. Wróblewski, *Sądowe stosowanie praw*, Warsaw 1972, pp. 7-9; L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Cracow 2004, p. 15.

16 M. Jaśkowska, *Uznanie administracyjne a inne formy władzy dyskrecjonalnej administracji publicznej*, in: *System prawa administracyjnego*, Vol. 1, *Instytucje prawa administracyjnego*, R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), Warsaw 2010, p. 264.

17 More on the application of law in the internal sphere under the so-called steering model see W. Dawidowicz, *O stosowaniu prawa przez organy administracji państwowej*, "Zeszyty Naukowe Wydziału Prawa i Administracji Uniwersytetu Gdańskiego – Prawo" 1981, Vol. 9, p. 74.

Administrative powers in the processes of executing administrative law

The implementation of a statute is ensured by:

- including various competence and task-related provisions in the statute being implemented and specifying the forms of activity, and reserving administration's possible discretion in exercising explicitly granted powers,
- blanket coverage of a specific sphere of issues by the provisions of the act with the simultaneous absence of further statutory regulation and reserving administration's capacity for independent activity in this regard.

In the first situation, the statute defines the spheres that should be subject to performance by the administration, organs responsible for implementation, competence provisions, provisions specifying the form of action and the scope of discretion left at the implementation of these provisions of the statute. The range of discretion may be clearly defined in the statute. Examples include actions undertaken within the constitutional and functional authority, the authority to legislate or to apply administrative law in the internal sphere.

In the second case, the provisions of a statute create a certain framework for the administration's lawful operation, restricting it only by basic constitutional principles, the content of the act being implemented and considerations of rationality. In these areas administration operates within the law, with theoretically wider discretion. The discretion of administration is ensured by legal norms, which are often limited to indicating the aim or aims that are to be achieved. These are norms which contain final programmes. Their execution is usually secured with a description of the basic (only) public tasks that must be performed for the final programme to be accomplished.[18] The act also contains provisions which determine the competence of particular organs. Procedural issues related to a given task or a composition of public tasks may but need not to be regulated in the statute. Statutes may also indicate the forms of administrative activities in these cases. The absence of decisions in this respect entitles the administration to take non-government authority-related action where the external sphere is involved. With regard to the internal sphere, administration, in turn, is entitled to take any action that is not forbidden by the explicit provision of a statute.

By these means, a framework of administration's activity is established within which it may take action leading to the implementation of the final programme. Every action will be considered lawful in these cases. T. Kuta calls it "administration's organisational discretion", because in its performance administrative organs are bound only by the purpose, and they are left with freedom as to the order, type of action undertaken, time of is implementation, etc.[19]

The set of administration's discretionary competences in the external sphere of law execution and the internal sphere regarding processes of administrative law application and execution includes the implementation of statutory blanket rules that set objectives[20] (possibly also tasks), which involves the administration making discretional decisions on:

18 See more on this subject: W. Hoffmann-Riem, *Tendenzen in der Verwaltungsrechtsentwicklung,* "Die oeffentliche Verwaltung", 1997, p. 434 and the literature cited there.

19 T. Kuta, *Pojęcie działań niewładczych w administracji na przykładzie administracji rolnictwa*, Wrocław 1963, pp. 52–56; idem, *Aspekty prawne działań administracji publicznej w organizowaniu usług,* Wrocław 1969, pp. 70ff.; idem, *Funkcje współczesnej administracji i sposoby ich realizacji,* Wrocław 1992, p. 23.

20 CF. Idem, *Funkcje współczesnej administracji…*, p. 45.

- determining (in the absence of statutory regulation) or specifying (in the case of marginal regulation) the volume of public tasks,
- selection of methods and legal forms of action,
- deciding on the legitimacy, time, place and scope of action or non-action, unless an obligation to act at a specific time, place or by applying specific axiological principles results explicitly or implicitly from the content of the statute,
- establishing internal procedures for scheduled activities,
- determining legal measures to ensure internal steerage in the processes of performing public functions, objectives and tasks (save for measures expressly prohibited by statutes).

Limiting the statutory regulation to indicate the objectives of the statute and the organs responsible for their implementation will require administrative organs to determine – in the complete absence of statutory regulation – or to specify – in the case of marginal regulation – the volume of public tasks. The case of the absence of specification of public tasks in the statute is an absolute extreme, which should be considered only in purely theoretical categories as legally admissible, although in principle absent in the legal system. In such cases, a statute would have to indicate the organs responsible for achieving public objectives, not public tasks. Establishing the volume of public tasks lies with the statutes. The legislator can delegate its function to the administrative system to a small extent, an example of which is Article 7(1) of the Act of 8 March 1990 on commune self-government.[21] Building constitutional systems based on the principle of legalism and the rule of law implicates grounding each action of public administration organs on the basis of or within the limits of the law (e.g. Article 7 of the Constitution of the Republic of Poland). This creates the need to make the law more flexible be means of a system of general clauses, vague notions, presumptions of jurisdiction, allowing the administration to take a lawful action in cases not specified in detail in the given law. The canon of Article 7 of the Constitution of the Republic of Poland legitimises the award of a certain scope of independence of public administration in specifying its tasks within the framework of constitutional objectives and values. An example includes the principle of presumption of the commune's competences, which grants the commune discretional administrative powers in the performance of tasks that have not been expressly laid down in the applicable law. There is no possibility of granting the administration competences in defining administrative tasks in the classic administrative organ-citizen relation (*subsumptio iuris* model). A larger field of activity in the sphere of creating new administrative tasks by the administration exists with regard to tasks which Tadeusz Kuta defines as government authority-related and organisational tasks. Their essence is that they are a necessary intermediate link in the implementation of the general objectives defined in the Constitution of the Republic of Poland and ordinary laws, and sometimes also in governmental programmes.[22] In his opinion organisational activities should be handled by a different measure of the rule of law than classic, government authority-related activities in external relations. There is no doubt that the administration's choice of detailed tasks, which in fact constitutes the choice of measures to achieve the general objective, should take into consideration the element of rationality, fundamental constitutional values and should be within the limits of the law.

21 Dz. U. (Journal of Laws) of 2019, item 912 as amended, consolidated text.

22 T. Kuta, *Funkcje współczesnej administracji*..., p. 22.

Exercising the executive function takes places by the organ responsible for implementing the act (and in the case of deconcentrating the implementation of the act among several organs – by the organ responsible for a specific part of the implementation of the act) taking an appropriate action by virtue of which it determines the directions, time, principles, methods and legal forms of implementation of a specific task by its administrative structures. The organ which passes such an act may act on under statutory authorisation or task-competence provisions. In the first case, the provision of the act clearly indicates at least the material scope of the authorisation and the legal form of administration`s activity. The basic legal form of implementation of the act is an implementing rule or provision of acts of domestic law, or, possibly, provision of rules of domestic law. The administration cannot replace this legal form with another form of action. Non-obligatory regulations are also rare. The case is similar with local laws, although the administration has wider discretional administrative powers with regard to them.

The sphere of executing administrative law in the scope of forms of activity comes within fragmentary statutory regulation. An example involves the power to issue implementing rules and other implementing provisions. In the unregulated scope the administration has the discretion to select legal forms of action serving the performance of objectives and tasks entrusted in it. The competence-task provisions are the legal basis for their issuance. The administration here uses forms of internal regulations and non-government authority-related actions, also addressed to external entities.

A statute may reserve the administration's discretion to decide on the legitimacy, time, place and scope of action or non-action. By making such decisions, the administration is bound with the purpose of the statutory regulation, its axiological system and the general axiological system which arise from the Constitution. In most cases, financial decisions will be pivotal with reference to decisions on the time of action or non-action. These types of problems are decided upon in financial plans that determine the sequence in which administrative tasks will be implemented. Leaving such a wide range of discretion can also be highly independent of the financial aspect. The necessity for action or non-action may be determined by the nature of the subject of administrative law regulation which results from the urgency and unpredictability of the appearance of the regulated phenomenon, its nature, intensity of danger, the type of goods that may be threatened by this phenomenon. An example here includes local administration organs passing order regulations.

The organs also have equally broad discretion in their internal sphere. The execution of law in this sphere is associated with taking acts in law and factual action. It is rare for both categories of action to be isolated. They usually form a series of actions sharing a common objective. Therefore, despite the focus of attention on legal means of implementing statutes, one cannot omit the factual acts that may constitute links connecting a series of factual and legal actions into one whole aimed at implementing the act.

Legal measures play a pivotal role in securing internal steerage during processes of implementing laws. The process of implementing a statute is coordinated to a significant degree by provisions specifying the tasks and competences of particular organs. This sphere is precisely formalised to a high degree. It is supplemented by coordination through hierarchy, i.e. the right to use steering and government authority-related measures. Their extensive deformalisation

is an attribute of internal steering measures. The competence provisions which determine the reporting in service (within the office) or hierarchical reporting (as part of multi-level hierarchical structures) are the basis for undertaking this type of action. However, there are no procedures for taking such legal measures in the statutes. The provisions specifying the procedure and grounds for refusing to carry out an instruction by an official or employee are an exception. The absence of regulation constitutes a scope for action in this regard without establishing specific procedural rules (i.e. based on customary procedures, established orally ad hoc) or shaping these procedures unconstrainedly on the ground of internal regulations.

Two types of factors affect the content of internal procedures created from the ground up by the administration: legal and non-legal. A legal factor will involve e.g. the organisational structure of the office or organisation within which the task will be performed. General procedural institutions regulated by the Code of Administrative Procedure also affect the shape of procedures. As an example of a non-legal factor the competences of specific clerks of a given office can be indicated. Low competences will affect the formalisation of procedures to ensure protection of competent officials against the mistakes of incompetent officials and create the possibility of easy holding individual persons responsible in the future.

Launching the process of implementing an statute requires undertaking a number of planning and programming tasks, i.e. preparatory actions preceding the processes of proper implementation of an statute, including: prior arrangement of the internal organisation and its adaptation to the government authority-related process, including the organisation of human and material resources dedicated to implementing processes including recruitment of new officials, shifting previously employed officials from certain tasks to new ones, training them if necessary, acquiring material assets necessary to implement a statute, adjusting existing resources for possibly new tasks, etc. The next stage involves assigning specific tasks, time of their implementation and issuing general internal management acts determining specific types of actions and individual resolutions in the process of performing, issuing service-related instructions specifying how to handle an individual matter. Next, the process of implementing a statute requires ongoing supervision of the implementation processes, interfering in it as part of supervisory activities in order to verify the performance of general acts and service-related instructions, which are an internal form of applying administrative law. The implementation of a statute also involves a systematic analysis of the performance of assumed plans, their evaluation according to the experience gained in the course of taking measures and changes in external conditions taken into account in the planning processes.

Conclusions

Administration's discretion is commonly identified with the external sphere of the application of administrative law which concludes with solving an administrative case of an entity situated outside the administration by an administrative act.[23] Administrative powers extends to the entire process of applying the law and is undoubtedly wide, as it embraces discretionary powers present at the stage of interpretation of legal regulations, authority at the stage of establishing the facts and the thought process of recognising certain facts as proven[24], discretionary powers at the stage of subsumption[25], and above all discretionary powers at the last stage of the process of applying administrative law, which comes down to establishing the legal consequences of a fact recognised as proven on the basis of the applicable provision of law. Administrative powers will appear at this stage if the legal norm does not determine legal consequences unequivocally, leaving the organ with the possibility to select them from among the options indicated in the provision of law. The scope of discretionary powers in this case is considered to be the widest and the discretion of administration is often identified with this type of authority.

At the same time the discretion of administration with reference to execution of administrative law is inadmissibly omitted. The scope of administrative discretion in the processes of implementing administrative law is obviously wider than administration's discretion in the processes of application of administrative law. The extent of discretion in of the application or execution of law is illustrated by a summary of its legal basis. In the first case, the source of discretion always lies in a precise legal regulation which determines the potential possibilities of administration's behaviour. This discretion is thus restricted. In the case of implementation of administrative law, administrative discretion may be a consequence of absence of a comprehensive statutory regulation. It does occur that it is limited only to covering a particular administrative case with the material scope of the statute. Other issues related to the implementation of this blanket rule are then outside the statutory regulation. Administration then becomes the mouth of the legislator and has the competence to create the legal basis for its operation, to select legal forms of action, and to set in motion factual activities aimed at implementing the statutory norm. In this regard, administration is fully capable of independent action restricted only by the objectives and axiology of the statute and the principles of rationality.

The impact of the sphere of administrative law execution on the process of its application, including the impact of the discretionary powers in the sphere of administrative law execution on the scope of discretion in its application is an undoubted problem that has not been taken up in the study.

23 M. Jaśkowska, *Uznanie administracyjne...*, p. 264.
24 K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa*, Warsaw 1969, p. 294.
25 Ibidem, p. 295.

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Transferring real estate by means of a tender by local government units and the State Treasury

Abstract

The Act of 21 August 1997 on real estate management specifies two modes in which real estate which is property of the State Treasury or of a local government unit can be transferred or given in perpetual usufruct – a tender and non-tender mode. The real estate resources are the basic assets element of the above-mentioned entities. They may be used for the purposes of development and organised investment activity, in particular for the construction of residential housing as well as implementing other public purposes.

A tender procedure has been specified in the Polish law. A tender is the most optimal way to commit public property. The objective of this instrument consists in transactions involving public real estate according to universally applicable rules. It is a way which gives the greatest guarantee of security in terms of transferring immovable property assets.

Key words:

tender, real estate, transfer, State Treasury, local government unit

Introduction

The Act of 21 August 1997 on real estate management specifies the following cases allowing transfer of real estate assets which are property of local government units or the State Treasury – a tender and non-tender mode. The above also needs to be applied to the State Treasury or a local government unit transferring the right to perpetual usufruct.[1]

The aim of this paper is to present detailed procedures of the implementation of tenders for public real estate in Poland. The research method employed in this study involves an analysis of legal acts and judicial decisions. A tender is a solution giving the greatest guarantee of security in terms of transferring public property, though not flawless.

As a rule the tender mode is applied.[2] Non-tender transfer is an exception from the former. The option to apply the said mode occurs only in situations specifically identified in the statute. It is not possible to extend the interpretation of the regulation included in Article 28(1)

1 Dz. U. (Journal of Laws) of 1997 no. 115 item 741, hereinafter referred to as REMA.

2 M.J. Nowak, Z. Tokarzewska-Żarna, *Gospodarka nieruchomościami w gminie. Kluczowe problemy prawne*, Warsaw 2017, p. 7.

REMA. This is because the regulation in question allows transferring property in a non-tender way only in cases specified in the act on real estate management, as referred to in Article 37(2)(1–18) of the said act. Moreover, one needs to note that applying the non-tender mode is admissible also where the subject of sale involves immovable property designated for residential housing or immovable property designated for public purposes other than those listed. However, it is essential that the latter should be carried out by the entity for whom these will be statutory objectives. Moreover, incomes of these entities should be fully designated for carrying out statutory activity. Analysing the issues of non-tender transfer one cannot forget real estate developed on the basis of a construction permit. Nevertheless, the above concerns a situation where the sale of real estate is requested by the entity who is its lessee or user on the basis of a contract executed for the period of minimum ten years. Opting for a non-tender mode of transfer lies in the above-mentioned case with the voivode, with the minister for construction by way of an ordinance, or with substantively competent commune council, poviat council or voivodship assembly by way of a relevant resolution.

All issues relating to a sale through must be reflected in the notice. These are requirements for both the sale of an ownership right and the sale of perpetual usufruct. The above is grounded in Article 28(2) REMA.

The elements the notice in question must comprise include: identification of the real estate for sale, specifying the starting price which is the consequence of the value established earlier by an asset valuer in the form of a valuation report. Moreover, the notice must not omit the issue of the tendering security (5 to 20 percent of the starting price) and bid increments (minimum 1 percent of the starting price). One needs to note the requirement of informing potential parties interested in taking part in the tender on the manner and conditions for paying the price after their offer has been successful. It is also necessary for the notice to include information about the real estate's purpose, e.g. in the local land use plan or in the decision on development terms and conditions, if such a decision has been issued. If, however, the subject of transfer involves a right to perpetual usufruct then it becomes necessary to specify the period for which this right is to be established. In the context of the said right (i.e. perpetual usufruct), it is also necessary to specify the type of development and time periods for real estate development. One cannot omit the perpetual usufructary's obligation to maintain buildings and devices in due condition in the course of the usufruct.

It is inadmissible to specify previously not stipulated requirements after making the tender notice public.

Each tender should result in a conclusion of a contract in the form of a notarial deed. A report is drawn up for each tender, which is the basis for formulating the said contract. The requirements discussed above must be reflected in the notice as well as in the contract.

Tender mode

In order to introduce public property into trading it is necessary to place it on the list of real estate designated for transfer, usufruct, lease, lease with the right to collect fruits or lending for use. The above aims to observe the principle of transparency since the list and the notice

are its reflection. This involves transparency in trading in public property, specifically real estate which is property of the State Treasury or of local government units. One of tasks of the said list consists in creating opportunities for stakeholders to take efforts to acquire rights to an item included in the list. This means a possibility of putting forward a relevant claim to listed real estate before it is sold. What is more, the above entails the authorised entities' exercising their right of pre-emption.[3]

The regulation of Article 35(1) REMA stipulates how to publically announce information about the list which should be posted for 21 days at the premises of the competent office. Additionally, it needs to be published on the office's websites. It needs to be noted that a poviat administrator carrying out a public administration task passes the list onto the voivode in order for it to be published. This also applies to immovable property which is the property of the State Treasury. This occurs as the above-mentioned official performs public administration tasks. In turn, it is the Voivode's task to publish the list in the Public Information Bulletin for 21 days. Moreover, he should make the information public by announcing it in local press with a reach covering at least a poviat. It entails a poviat relevant due to the location of the property in question. The list refers to property transferred both in a tender and non-tender manner. It needs to be noted that until the property is placed on the real estate list it does not function in transactions. It is because it is the owner who decides about designating the real estate for trading and about the form of this trading.[4]

Pursuant to the regulation of Article 35(1b) REMA the obligation to be placed on the discussed list does not apply to real estate designated for lease, lease with the rights to collect fruits or lending for use for a time period of up to 3 months. The above is subject to change if the contract is to be extended to a period exceeding 3 months. In such a case being placed on the list becomes obligatory regardless of whether it refers to new contracts concerning the same item concluded between the same entities or a change in the contract resulting in extending the time period to exceed three months. Information specified in Article 35(2)(1-4) REMA must be obligatorily provided in all lists. The said regulation stipulates that these include: a land and mortgage register, signifying real estate according to the cadastre, size of the real estate, real estate's description, information on the real estate's purpose and its development. It is necessary to specify whether the immovable property is designated for transfer or for perpetual usufruct, or whether it is designated to be leased or leased with the right to collect fruits, to be given in usufruct or to be lent for use.

It becomes necessary to indicate such elements as the price of the immovable property or the amount of the first charge in the case of perpetual usufruct or percentage rates of annual fees. Moreover, it is necessary to specify the time frame for the development. It is obligatory to name the period in order for authorized entities to exercise their right of pre-emption pursuant to Article 34(2)(1) and (2) REMA.

Failure to comply with the above will constitute invalidity of the act in law i.e. a contract concluded in violation of the said obligation.[5] It needs to be pointed out that a change in the purpose should result in a re-announcement of the list and in making it publically available.[6]

3 J. Siegień, *Ustawa o gospodarce nieruchomościami. Komentarz*, Jaktorów 1999, p. 78.
4 Ibidem.
5 Judgment of the Supreme Court of 11 May 2005, III CK 564/04.
6 Judgment of the Voivodship Administrative Court in Białstok of 26 October 2006, II SA/Bk 491/06.

Causing violation of regulations concerning pre-emption rights results in general liability. The above applies both to the State Treasury and local government units. The liability referred to above is liability for damages. This means that the entity whose pre-emption right has been violated is entitled to claim compensation under terms and conditions set forth above. The above can be also sought by an entity who conducted administrative proceedings to establish the validity of acquisition of immovable property for a local government unit or the State Treasury. Transferring real estate disregarding the pre-emption right of former owners or their heirs when acquiring the real estate leads to invalidity of a contract of transferring such reals estate.[7] Liability under Article 36 REMA is of an exclusive nature and does not allow questioning the validity of a contract concluded in disregard to the pre-emption right or questioning the act in law under Article 59 of the Civil Code.[8] Such an approach serves the security in trading in real estate property and also narrows down the circle of entities authorized to exercise the pre-emption right. This refers, however, to certain entitled persons. The entity whose right has been violated should specify the basis for its claim. Moreover, they must specify the amount of the damage. It needs to be noted that in the situation in question one can pursue compensation regarding losses or lost benefits.[9]

Tender and non-tender mode. Basic rule and exceptions

The main rule for transferring real estate by local government units or the State Treasure is to do it by means of a tender.[10] Failure to comply with it should result in invalidity of the contract.

Preparing a report on the tender, which is a basis for drawing up a contract, will give the specified entity an acquisition claim regarding the real estate in question.[11] Public entities are not obliged under the provisions of the law to transfer public immovable property. Their relevant bodies decide whether to do so and for what price. There is also no regulation that would grant anybody a property transfer claim.[12] There are, nevertheless, ways to withdraw from the tender-mode of the transfer. The said situations are stipulated in regulations. It needs to be noted what these cases must not be interpreted as extending the regulation as they are exceptions from the rule.[13] Therefore, the tender is the main mode. Non-tender disposition of immovable real estate is an exception from the rule prescribed in regulations.[14] This concerns in particular Article 37(2) REMA which includes a list of possibilities of transfer excluding the tender mode. At the moment the article in question comprises twenty situations. A few of them can be mentioned, e.g. transferring to entities that perform charity, care or cultural activities, for purposes not related to gainful activity. However, should the sale to such an entity

7 Judgment of the Supreme Court of 20 January 1998, I CKN 368/97, OSNC 1998/9, item 143.
8 Judgment of the Supreme Court of 25 March 2004, II CK 268/03.
9 G. Bieniek, *Komentarz do ustawy o gospodarce nieruchomościami. Vol. I (działy I i II ustawy)*, Warsaw–Zielona Góra 1998, p. 170.
10 Judgment of the Supreme Administrative Court of 11 May 2011, I OSK 203/11.
11 Judgment of the Supreme Administrative Court of 22 March 2011, I OSK 2110/10.
12 Judgment of the Supreme Administrative Court of 23 February 2011. I OSK 1729/10.
13 Judgment of the Supreme Administrative Court of 21 March 2007, I OSK 1998/06.
14 Judgment of the Voivodship Administrative Court in Wrocław of 8 July 2009, III SA/Wr 86/09.

be planned for gainful purposes then the tender mode becomes obligatory. Another frequent case involves transferring real estate in order to expand adjoining property. This should entail improvement of development of the parcel for which the transfer is done. However, it is essential that the transferred item cannot be used as self-contained property as the tender mode would need to be applied then.

The non-tender mode should not be used to burden the buyer with costs of preparing the property for transfer as it concerns contract elements within the competence of the transferor's organ.[15]

The real estate management act specifies rules for organizing tenders for the sale of immovable property. Pursuant to Article 38 of the said act they are carried out by competent authorities. The term competent authorities encompasses poviat administrators, presidents of towns with poviat rights or executive bodies of local government units with territorial jurisdiction. In the context of the above one must remember the minister competent for matters of construction, land use planning and housing as he is competent to announce, organize and conduct tenders in cases stipulated in Article 57(1) REMA and for real estate included in the list referred to in Article 60(2)(1) REMA.[16]

Initiating the procedure to transfer real estate by means of a tender results in the establishment of a civil law relationship between specified entities: the competent authority, i.e. the tender's organizer, and its participants.[17] a tender notice should include the following: information included in the content of the list, time and place of the tender. Information should also be provided on the tender's terms and conditions and, should the need for subsequent tenders arise, information about dates of previous tenders.[18]

The discussed tender notice which is a reflection of the principle of transparency should be placed on the notice board of a relevant office. Such information also needs to be publically announced by means usually adopted in a given community and on the said office's website. Non-application of transfer through tender after the notice has been made public is admissible only for important reasons. The above means that it is not admissible to do so without having a reason to cancel the tender. A decision to cancel a tender entails the competent authority's exercise of the right resulting from the act in question. An administrative court shall not review the issue of refusal to repeat the tender procedure as a result of a complaint.[19]

Only the activity concerning the conduct of the tendering procedure is challengeable. It is not admissible here to bring a case before an administrative court. Cancellation of a tender is not challengeable.[20]

Where the tender ends unsuccessfully the competent organ should conduct a second tender. This should take place after 30 days have passed, but no later than 6 months after closing the previous one.

The regulations do not stipulate an obligation to conduct the second tender. The competent authority then faces a decision whether to organize a subsequent tender or to withdraw

15 Judgment of the Voivodship Administrative Court in Wrocław of 11 June 2014, II SA/Wr 242/14.
16 E. Bończyk-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz*, Warsaw 2018, p. 356.
17 Resolution of the Supreme Court of 2 August 1994, III CZP 96/94, OSNC 1995/1, item 11.
18 S. Kalus, *Ustawa o gospodarce nieruchomościami. Komentarz*, Warsaw 2012, p. 345.
19 Order of the Supreme Administrative Court of 22 February 2010, I OSK 207/10.
20 Order of the Voivodship Administrative Court in Łódź of 7 December 2007, II SA/Łd976/07.

from the idea of sale a through tender. Withdrawing from a transfer by means of a tender does not close the way to the non-tender mode. However, if a decision about a second tender is taken then the starting price may be lowered maximally to 50% of the starting price from the first tender. The above does not mean that the price in question cannot be increased or left at the current level. If the second tender too ends unsuccessfully then the competent authority again faces the choice – whether to conduct another tender (on terms applicable in the second one) or to attempt to transfer the real estate by means of negotiated procedure. The above shows that it is impossible to conduct negotiated procedure after the first "unsuccessful tender". Legal protection in a situation where an entity conducts negotiations in violation to good customs involves the possibility to pursue claims for compensation under Article 72(2) of the Civil Code. [21]

It is an extremely important issue that in the negotiated procedure the price is established in the amount not lesser than 40% of the value of the real estate. Where subsequent tenders are organized there is no need to draw up a list of real estate. It needs to be noted that the valuation report drawn up by an asset valuer remains valid for 12 months. However, it is possible for a relevant asset valuer to "update" the document in question. The above may take place after the said period has passed. Failure to observe the rules set forth in the statute in question, thus violation of procedures, results in invalidity of such an agreement concluded in disregard to the procedures.[22] Reports on tenders and negotiated procedures are the basis for the parties to claim conclusion of contracts.[23]

The act on real estate management empowers the competent authority to choose between four forms of tender. When the aim of the tender is to achieve the highest possible price then an oral tender should be chosen. A written tender should be opted for if its objective is to get the most favourable offer.[24]

The above mentioned procedures may be open or restricted. The former occurs when the terms and conditions set out in the tendering procedure may be satisfied only by a certain number of entities. The regulation in question applies to entities who may be participants to the procedure.

The regulation of Article 40(3) REMA provides the competent authority with an opportunity to choose between a restricted or open procedure. The organizer referred to above also has considerable discretion in terms of establishing terms and conditions of the tendering procedure.[25] Nevertheless, the said entity should exercise its relevant rights in moderation and with caution as it may result in a situation where no one or only one person will be able to meet the incorrectly established requirements. Such a situation may lead to a conclusion that one is dealing with a tender ending unsuccessfully. This occurs e.g. where no entity paid the tendering security or where in the course of the tendering procedure no-one offered a price for bid increments. The above concerns an oral tender. For written tenders, the reason to state that the tendering procedure ended unsuccessfully includes a situation e.g. where the tender committee concluded that all of the offers fail to meet the procedure's requirements. It needs

21 Judgment of the Voivodship Administrative Court in Wrocław, III SA /Wr 519/07.
22 Judgment of the Supreme Court of 11 May 2005, III CK 562/04.
23 Resolution of the Supreme Court of 2 August 1994, III CZP 96/94, OSNCP 1995/1, item 11.
24 A. Prusaczyk, *Ustawa o gospodarce nieruchomściami. Komentarz*, Warsaw 2017, p. 196.
25 G. Bieniek, *Ustawa o gospodarce nieruchomościami. Komentarz*, Warsaw 2005, p. 224.

to be noted that it is not possible to recognize a tender as closed unsuccessfully if the buyer has been established in its course yet no final contact has been signed e.g. in the form of a notarial deed. Any participant has the right to appeal against the result of the tender. The time period to do so is set to 7 days. In the course of an analysis of the appeal in question the competent authority informs about possible irregularities.[26] Acknowledging the complaint will entail either a repetition of the tender or a decision to annul it. However, where the real estate in question is transferred before the appeal is examined, only the court will become competent to solve the analysed issue. An administrative court will become competent when all avenues prescribed for in Article 40(5) REMA have been explored. In such a case the above mentioned authority for legal protection will mainly focus on allegations concerning failure to comply with regulations on the mode of conducting the tender. The said authority may not undertake to substantively assess the legitimacy of rulings of the tender committee as regards submitted offers.[27] One needs to point to the fact that a voivode's decision resulting in a cancellation has the character of a civil law statement on avoidance of legal effects of the tendering procedure. The above also refers to relevant declarations of local government units about cancelling the tender.[28]

If a tender participant unsatisfied with the decision about cancelling the tender, after an ineffective appeal, files a complaint with the court, then this court is obliged to assess independently the validity of the organization of the tender. The above will also apply to specifying legal effects which are consequences of the above-mentioned assessment. Questioning the result of the tender should proceed according to regulations included in Article 40(4) REMA. The district court, in the course of procedure concerning the establishment of a land and mortgage register and an entry of an ownership right does not conduct an inspection and does not specify whether the tender was organized correctly. Moreover, it does not analyse its course or rights taken by a participant other than the real estate owner.[29]

Obligations following the tender

The successful tenderer should conclude a contract with the transferor in the form of a notarial deed. In view of the above, the competent authority is obliged to notify the said tenderer within 21 days from the decision taken in the tendering procedure about the place and time of executing the contract. The said time period resulting from the notice should not be shorter than 7 days from the date of serving the notice on the buyer. Analysing the above one question needs to noted. It the entity who is the buyer fails to sign the contract without a justification then it must expect a sanction of losing the tendering security paid before to the tender's organizer. The requirement here involves informing, duly and in advance, about its place and time in the notification, which must include information about this right. The above also means that the real estate buyer may request that the organizer should make a declaration of intent

26 Order of the Supreme Administrative Court of 7 June 2011, I OSK 891/11.
27 Resolution of the Supreme Court of 25 April 1996, III CZP 36/96, OSNC 1996/9, item 115.
28 Order of the Supreme Court of 30 October 1990, I CZ 265/90, OSNCP 1991/10–12, item 132.
29 Resolution of the Supreme Court of 13 January 1995, III CZP 172/94, OSNC 1995/4, item 65.

necessary to conclude the contract in question. When adjudicating this claim it should be established whether or not there are premises for the tender's organizer's withdrawing from the conclusion of the contract.[30]

Article 41(2) REMA specifies only one requirement for losing the tendering security. It involves unaccounted for absence at the place and time of signing the contract. In such a situation the transferor, without a confirmation that his account has been credited with payment, despite the fact that the buyer produces a document confirming the money transfer, should establish a different time in order to perform the obligation in question.[31] A reason justifying the byer's withdrawal from placing a signature under the contract may include defects in the course of tendering activities. Noticed defects of the object of the transfer, both physical and legal, may also be a reason. Following the closure of the tendering procedure a mutual obligation arises between the organizer and the person established as the buyer, the aim of which is to execute a contract. Regulations concerning general provisions in the question of contractual obligations need to be applied to the above. Moreover, they need to be combined with regulations on the effects of failure to carry out contractual obligations. The above gives a basis to conclude whether the buyer has the right to withdraw from signing the contract if he notices defects in the tendering procedure. He does not have to first execute a contract in the form of a notarial deed and then withdraw from it or avoid legal effects of a submitted declaration of intent.[32] If then the entity called the buyer of the subject-matter of the tender became entitled to withdraw from the contract or to avoid legal effects of a submitted declaration of intent on account of facts known to them before the signing of the contract, then they may withdraw from executing the contract. In such a case the competent authority will not exercise the right to keep the tendering security.

Based on Article 42 REMA the currently applicable Resolution of the Council of Ministers of 14 September 2004 on the manner and mode for holding tenders and negotiated procedures for the transfer of real estate was passed.[33] The said act establishes rules for organizing tenders. Moreover, the regulation specifies the issue of conducting negotiated procedures which may be held after a second tender ends unsuccessfully. It also establishes rules concerning the tendering security and notices which reflect the principle of transparency. The said act does not avoid such significant issues as the tender committee, the tender report and questioning tender activities. It also points to regulations on the terms and conditions for organizing a restricted tender or on conducting negotiated procedures.

It needs to be highlighted that if the organizer fails to observe the time periods specified in Article 39 REMA and does not organize subsequent tenders or negotiated procedures, they will be obliged to hold the tender again which should be deemed as first. The implementing rule in question specifies in detail who can participate in a tender. It will include entities who paid the tendering security into the account of the organizer in due time, i.e. no later than three days before the tender. Moreover, the regulation specifies issues related to the amount of the tendering security in question, i.e. from 5% to 20% of the starting price. The choice here lies with the competent authority. The question of the date for the payment of the tendering

30 E. Bończyk-Kucharczyk, *Ustawa o gospodarce…,* p. 367.
31 Judgment of the Supreme Court of 11 February 2009, V CSK 326/08.
32 Judgment of the Supreme Court of 19 March 2003, I CKN 148/01.
33 Dz. U. (Journal of Laws) of 2014 item 1490.

security is also reflected in the discussed act, i.e. it should be specified in a way which makes it possible for the tender committee to affirm, no later than 3 days before the tender, that the tendering security was indeed paid in. Whereas when it comes to returning the tendering security it is done no later than three days after the tender ends. The term ending should be understood as i.a. cancelling, closing, annulling but also ending unsuccessfully. The tendering security form the best offer will be calculated into the bid amount. Thus, the buyer is obliged to pay the purchasing price less the discussed tendering security before the date of singing the notarial deed.

In line with the discussed regulation, the tender's organizer should publically announce the tender notice no later than 30 days before the established date of the tender. Whereas where immovable property whose starting price is higher that the equivalent of EUR 100,000 is concerned, no later than 2 months before the established date of the tender. Whereas if the starting price in question is higher that EUR 10,000 then a notice excerpt is published in press with a reach no smaller than the poviat. This means a periodical issued at least once a week – at least 30 days before the established date of the tender. This concerns a poviat relevant for the location of the real estate in question. However, if, in line with § 6(5) of the said regulation, the starting price of the real estate to be transferred exceeds EUR 100,000 then the notice excerpt is publically announced at least 2 months before the established date of the tender in daily press with a nation-wide reach. Where the starting price is above EUR 10 million, the notice is announced at least twice. However, it needs to be pointed out that the first notice excerpt is publically announced no later than 2 months before the established date of the tender. The second one at least 30 days before the relevant date.[34] The tender report is a very important document reflecting all activity carried out in the course of the tendering procedure. This document is prepared in three copies – one is given to the successful tenderer and the other two to the organizer. It is this document that evidences i.a. bid increments proposed by individual tender participants in its course. It is signed at the end by all members of the committee and by the buyer. A great role in these activities is played by the tender committee who, among other things, analyse the documents produced by tenderers such as confirmation of payment of the security, IDs. This document is submitted to a notary's office in order for a contract in the form of a notarial deed to be drawn up. The choice of the notary is left to the buyer's discretion. The prevailing view in the judicial decisions of the Supreme Court involves an opinion that notifying the tenderer about his offer being successful results in the creation of a civil law obligation relationship between the organizer and the tenderer, which in turn results in an obligation to make a declaration, in a prescribed legal form, about concluding a contract which is the object of the tender.[35] In accordance with the discussed regulation, questioning tendering activities by a participant is done through the tender's organizer. However, in the event of failure to observe the time specified for appeal referred to earlier or if a complaint is treated as unfounded then information about the outcome of the tendering procedure is made publically available by the organizer by posting it at the premises of a competent authority for 7 days (§ 12(1) of the discussed regulation).

34 S. Źróbek, R. Źróbek, J. Kuryj, *Gospodarka nieruchomościami z komentarzem do wybranych procedur,* Katowice 2011, p. 133.

35 Judgment of the Supreme Court of 19 March 2003, I CKN 148/01.

Conclusion

The rules for local government units and the State Treasury managing immovable property are regulated by the Real Estate Management Act.

The resource of real estate belonging to the said entities is the main element of public assets. Employing it is mostly supposed to serve public purposes. This concerns primarily provision of public services. However, in the context of the above one cannot avoid undertaking investment activity or other activity focused on stimulating local development.

The sale of real estate owned by the State Treasury or local government units or giving it in perpetual usufruct may be done in a non-tender way. However, transfer of real estate by means of a tender is the rule.

The tender is the main tool used for an efficient operation of trading in public real estate. It is the most optimal way to manage public property, though not flawless. A tender, as one of the ways to execute a contract, is multilateral. Exclusion proceedings are another essential feature that cannot be omitted. The entity which is in a strict relationship with the subject-matter of the tender is primarily focused on achieving best possible benefits by selecting the best offer and removing others.[36] The course of the tendering procedure has been strictly specified in the Polish law. The aim of this paper was to present detailed procedures of holding tenders for public real estate in Poland. The research method employed in the study involved an analysis of legal acts and the established line of judicial decisions.

The research presented in the paper is based on an analysis of the Polish law in terms of trading in public real estate. The act on real estate management is of fundamental importance in this matter. A discussion of basic elements of tendering activities, institutions such as the tendering security, the starting price, lowering the starting price, forms of tenders or notices proved that regulations in terms of trading in public real estate give a considerable dose of security in terms of managing public property. The tendering security, an element characteristic to a tender, serves to secure the organizer – by specifying the assets assessment in order to select potential buyers. The said entity accepts the tendering security before the emergence of the legal relationship which is to emerge as a result of the tendering procedure, thus securing the performance of potential obligations of a future counterparty. Transfer by means of a tender is based on a mechanism fundamental to free market economy – competition. In places where there is no competition this manner of concluding a contract cannot actually operate properly. A tender, being a restriction of freedom of contract, makes it impossible for public entities to freely and thoughtlessly select counterparties, thus protecting public property against irrational disposal. In the real estate management act the tender is the rule and the non-tender mode is exception from this rule.

Thanks to the analysis a conclusion can be made which confirms the statement referred to above that a tender is a method which gives the greatest guarantee of security in terms of transferring public property.

36 G. Bieniek, S. Rudnicki*; Nieruchomości. Problematyka prawna*, Warsaw 2011, p. 658.

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Unlawful provisions of a contract (abusive clauses) – forms of review and the system of eliminating them from economic trading

Abstract

As a rule, legal transactions are governed under the principle of the freedom of contract, though this does not mean that each provision included in a contract will be lawful, especially if a consumer is one of the parties to the contractual relationship. The legislator, whose aim is to equate the positions of the undertaking and the consumer, introduces a number of regulations addressing the inclusion of abusive clauses in a contract/standard contract. The paper discusses the definition of unlawful provisions correlated with forms of reviewing them with reference to amendments introduced in this scope.

Key words:

consumer, abusive clauses, abstract review, incidental review

Introduction

Unlawful contractual provisions, in other words abusive clauses, the need to regulate which under Polish law resulted from the obligation to implement Council Directive 93/13/EEC[1] of 5 April 1993 on unfair terms in consumer contracts,[2] are regulated by Articles 385^1–385^3 of the Act of 23 April 1964 The Civil Code[3] (hereinafter CC). As rightly noted in the judicature, these regulations are "the core of the system of consumer protection against undertakings' using their stronger contractual position associated with the possibility of unilateral shaping the contents of provisions binding the parties, in order to reserve clauses unfavourable to the consumer (abusive clauses)".[4] It needs

1 See more in: I. Szczepańska-Kulik, *Nowy model abstrakcyjnej kontroli wzorców umów,* "Edukacja Prawnicza", 2017, no. 2.

2 See more in: K. Skubisz-Kępa, *Komentarz do art. 385^1 KC*, in: *Kodeks cywilny. Komentarz,* M. Habdas, M. Fras (eds.), Warsaw 2018, LEX, point 1.

3 Consolidated text, Dz. U. (Journal of Laws) of 2019, item 1145.

4 See Resolution of the seven judges of the Supreme Court of 20.06.2018, III CZP 29/17, http://www.sn.pl.

to be highlighted that these regulations introduce an instrument of enhanced[5] "review of the content of provisions imposed by an undertaking with regard to respecting consumer interests".[6]

It needs to be highlighted already here that the discussed regulations refer only to relationships occurring between consumers and undertakings which are referred to as B2C (business-to-consumer). These regulations, however, are not ignored in commercial transactions (B2B, business-to-business), as they directly affect them.

The fundamental purpose of this study it to analyse and assess the changes in the system of review of provisions of standard contracts executed with consumers by entrusting it to the President of the Office of Competition and Consumer Protection (hereinafter the Office), maintaining substantive review over its decisions by the Court of Competition and Consumer Protection.

Consumer as a party to a contractual relationship

It is worth beginning reflections on the subject-matter of abusive clauses and forms of their review by presenting the legal specificity of the position of the consumer in relation to the undertaking.

In legal trading the consumer is seen as a weaker party to the contractual relationship.[7] This position is particularly justified under Article 76 of the Constitution of the Republic of Poland[8] and the established line of decisions of the Constitutional Tribunal,[9] and should not raise great doubts. Despite that, it is worth recalling arguments supporting it. It is known that in order for a natural person to be attributed the status of a consumer they must perform a legal act with an undertaking, but this activity must not be directly related to his business or professional activity (Article 22^1 CC). With reference to the said definition the following model is construed: a non-professional entity – consumer, executes a contract (or performs another legal acts) with a professional entity – an undertaking. Already at this level of analysis, when defining the parties, a clear disproportion can be seen – only one of the entities

5 Enhanced in terms of general principles specified in Article 58 § 2, Article 353^1 and 388 CC.

6 See resolution of the seven judges of the Supreme Court of 20.06.2018, III CZP 29/17, http://www.sn.pl.

7 Cf. A. Grzesiek, *Niedozwolone klauzule w umowach o imprezę turystyczną we wspólnotowym i polskim prawie ochrony konsumenta*, Cracow 2008, pp. 26–28. The author presents a definition of a consumer against European law taking into account his weaker position in the relationship with an undertaking.

8 Pursuant to the said article, public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices and the scope of such protection shall be specified by statute. See Article 76 of the Constitution of the Republic of Poland of 2 April 1997 (Dz. U. (Journal o Laws) no 78 item 483).

9 As noticed by the Constitutional Tribunal, "the legislator considered it certain that the consumer is a weaker party to a legal relationship and thus requires protection, that is certain rights which would lead at least to relative equation of the position of counterparties. Consumer's rights correspond to certain obligations from the other side – seller or service-provider. Whereas jointly the rights of one and the obligations of the other party are to compensate the consumer his incomplete possibility to exercise the principle of autonomy of will of the parties to the contract" and further – "protective obligations resting on public authorities cover the need to ensure minimum statutory guarantees to all entities, who (…) take a weaker position in relation to professional participants of the market game". See judgment of the Constitutional Tribunal of 02.12.2008, K 37/07, OTK-A 2008/10/172, Dz. U. (Journal of Laws) 2008/219/1408, LEX no. 465366.

listed in Article 22[1] CC should be attributed the name of a professional entity; naturally, the undertaking. Therefore, one cannot place the equals sing between the undertaking and the consumer looking through the prism of a legal act which may bind the parties in the future. This results from the fact that in a majority of cases the consumer does not have, or even does not have the opportunity to gain such professional knowledge on a given product or service that the undertaking has. Consumer's position to a large extent depends on the behaviour of the undertaking. Information passed to him by e.g. a salesperson will have great impact on his decisions. Continuing the reflections – the fact that the consumer does not have the same specialist knowledge in terms of the good or service as the undertaking does is not the only premise that advocates considering the consumer a weaker party. At the moment of executing a contract with an undertaking, most often this contract has already been drawn up and the only thing that individualises it is the parties' data; this then means incorporation of a standard contract. It is the professional entity that creates the legal relationship. On the ground of the above comments the legitimacy of consumer protection seems natural. However, it is worth noting as in E. Łętkowska, that this protection should not be seen as the authority's protectionist favouring the consumer, but as actions for compensating his lack of knowledge and awareness caused by the mass scale of production and trading in general. Measures and instruments serving to protect the consumer, concludes E. Łętkowska, do not aim to "give" the consumer something extra, but to restore equality of opportunity, hence consumer protection means "an instrument of fighting for a truly free market – for all its participants, active and passive".[10] K. Zaradkiewicz has a similar view on this matter indicating, that the legislator's introducing various forms of consumer protection and calling him "a weaker party" does not aim to favour him in relations with a professional entity but to execute the principle of equality of the parties in real terms.[11]

Premises for abusiveness

In order to protect consumers as weaker parties in the relations with undertakings, the legislator has introduced a security measure for consumer interests – an institution that allows considering some of contract provisions occurring in consumer transactions as unlawful.

Under Article 385[1] § 1 CC unlawful clauses need to be understood as such provisions of a contract which have not been agreed individually and at the same time set forth his rights in contrary to good practice, grossly violating consumer's interests. At the same time, it must be noted that this does not apply to all contractual provisions – it does not refer to provisions shaping the parties' main performances.[12] The legislator clarified here that it involves mainly the price or remuneration, as long as these provisions were expressed in the contract in a way

10 See E. Łętowska, *Prawo umów konsumenckich*, Warsaw 1999, p. 19.

11 K. Zaradkiewicz, *Rozważania ogólnosystemowe. Wolność "słabszego" do samookreślenia gospodarczego w świetle art. 76 Konstytucji RP*, in: *Ochrona strony słabszej stosunku prawnego*, M. Boratyńska (ed.), Warsaw 2016, LEX.

12 It needs to be expressly highlighted that where a given provision meets all premises of abusiveness but was individually agreed with the consumer then it cannot be called unlawful. See more in: M. Michońska, *Pacjent jako konsument świadczeń zdrowotnych. Klauzule niedozwolone w umowach o świadczenie usług medycznych*, in: *Prawa konsumenta w teorii i praktyce*, M. Fras, (ed.), Warsaw 2018, point V.

that does not raise doubt. It needs to be flagged up that the regulation of Article 385[1] CC does not only refer to individual contracts but also to standard contracts referred to in Article 384 CC.[13]

In order to move on to discussing forms of reviewing unlawful clauses positive premises that must be met in order for a given provision to be called abusive must be analysed. Following Article 385[1] CC's regulations in order all features of abusiveness of contractual provisions will be discussed.

Firstly, one needs to respond to the question of the statutory phrase that "a provision has not been agreed individually with the consumer". Article 385[1] § 3 CC addresses it saying that provisions which are not agreed individually are those on which the consumer had no actual influence. Then, how should "actual influence" be understood? The Court of Appeal in Białystok among others addressed this expressing a view that the mere fact of the consumer being aware of the content of the provision and, what is more, understanding its meaning does not necessarily prejudge that it has been individually agreed with him.[14] The court's position is well-worth approving as the very fact of being aware of something does not equate with having actual influence on a given state of affairs. Legal scholars and commentators express a view according to which it is impossible to conclude that the consumer had actual influence on a given provision if he only had the possibility to choose between a few solutions offered by the undertaking. Actual influence can thus be talked about e.g. where the consumer himself suggested a given provision of a contract and it was accepted by the undertaking.[15] Article 384 CC is worth mentioning here which talks about standard contracts. Should in a given individual contract provisions of a standard contract be included it needs to be considered by default that the consumer did not have influence on such provisions.[16]

Secondly, another premise of abusiveness involves "setting forth consumer's rights and obligations in a way that is contrary to good practice". It is difficult to find a legal definition of "good practice", yet based on a firm stand of legal scholars and commentators and the established line of judicial decisions it needs to be concluded that provisions contrary to good practice will be those that mislead the consumer or those that set forth consumer's position with violation of the principle of freedom of contract.[17] The Supreme Court in one of its judgments also stated that it is contrary to good practice to formulate contractual provisions in such a way that gives the professional entity freedom to set the extent of parties' obligations during the duration of the legal relationship or to exchange the product named in the contract with a similar product though in essence different to the one specified in the contract.[18]

The last of the determinants of abusiveness involves "violating consumer's interests". Any provision that causes an unfounded and unfavourable to consumer disproportion between his rights and obligations and the rights and obligations of the undertaking constitutes a gross

13 W. Popiołek, *Komentarz do art. 385[1] KC,* in: *Kodeks cywilny. Komentarz,* K. Pietrzykowski (ed.), Vol. I, Warsaw 2018, p. 1293.

14 Judgment of the Court of Appeal in Białystok of 8 August 2019, I ACa 79/19, LEX no. 2726793.

15 K. Skubisz-Kępa, *Komentarz*..., point 5.

16 See judgment of the District Court for Warszawa-Śródmieście in Warsaw of 29 April 2016, VIC 1713/15, LEX no. 2045180.

17 J. Mojak, *Dobre obyczaje w polskim prawie kontraktowym – wybrane zagadnienia,* "Studia Iuridica Lublinensia" 2016, no. 2, p. 172.

18 Judgment of the Supreme Court of 27 February 2019, II CSK 19/18, LEX no. 2626330.

violation of the interests of the weaker party to the relationship.[19]

Considering a given contractual provision as abusive, pursuant to Article 385^1 § 2 CC, results in the fact that parties are not bound by such a provision under the law *ex tunc*. However, a contract is binding on the parties in the remaining scope. The Supreme Court pointed to two possibilities of solutions in the case of occurrence of abusive clauses in a contract. One of them is deciding that after excluding abusive clauses the contract is binding on the parties in the remaining scope. The other one involves deciding about the contract's nullity or declaring a contract null and void due to the lack of possibility to execute it by the parties as a result of exclusion of abusive clauses.[20]

Moving on to forms of reviewing abusive clauses it is worth mentioning the catalogue of abusive clauses included in Article 385^3 CC. The article in question constitutes a set of 23 sample provisions that need to be considered unlawful.[21] The catalogue of abusive clauses is related to the regulations expressed in Article 385^1 CC; thus one needs to agree with the position of the Supreme Court which says that where a given provision is identical to one named in the catalogue it constitutes at the same time violation of provisions expressed in Article 385^1 CC. The mere fact that a given provision of a contract or a standard contract is similar to the one included in the catalogue does not deem the provision abusive. According to the Supreme Court, this catalogue should provide support where there are doubts as to the fact whether a given provision should be considered unlawful or not.[22] Clauses included in Article 385^3 CC are referred to by legal scholars and commentators as the so-called grey clauses; the purpose of this institution is to create a potential possibility to maintain provisions convergent with the catalogue, though in practice it is quite unlikely.[23]

Placing definitions of clauses in regulations and creating a sample catalogue alone does not provide consumers with full protection. This is why two forms of reviewing abusive clauses have been introduced into the Polish legal order.

Forms of reviewing abusive clauses

The Polish legal system distinguishes between incidental and abstract reviews of abusive clauses.

Reviewing abusive clauses of incidental/specific nature does not refer directly to a standard contract but to a given specific legal relationship. This is a matter of establishing a contractual obligation between the consumer and the undertaking. The Court of Appeal in Warsaw presented the core of incidental review of abusive clauses clearly in its judgement stating that the essence of a specific review of provisions of a contract in terms of abusiveness involves protection of a specific consumer. The court examines then the provision of a given contract, where-

19 See judgment of the Court of Appeal in Warsaw of 1 July 2019, V ACa 492/18, LEX no. 2706990.

20 More in judgement of the Supreme Court of 29 October 2019, IV CSK 309/18, LEX no. 2732285.

21 W. Madej, *Klauzule abuzywne w polskim prawie cywilnym*, "Kortowski Przegląd Prawniczy" 2017, no. 2, p. 37.

22 Judgment of the Supreme Court of 12 February 2013, V Ca 3013/12, LEX no. 1994342.

23 G. Karaszewski, *Komentarz do art. 385^3 KC.* in: *Kodeks cywilny. Komentarz.,* J. Ciszewski, P. Nazaruk (eds.), Warsaw 2019, LEX, point 1.

as if the contract includes provisions of a standard contract, then it is also subject to review.[24] Therefore, a conclusion needs to be made that incidental review may cover only such provisions of a contract which were not individually agreed with the consumer, or those which the undertaking imposed on the consumer, maintaining, naturally, the remaining premises under Article 385[1] CC. Only the consumer and undertaking bound by a specific contractual relationship may be parties to court proceedings in the course of which incidental review is carried out. Therefore, a ruling on the abusiveness of given provisions is binding *inter pares*.[25] As for the subject-matter of incidental review, as mentioned earlier, it covers provisions of a contract which were not individually agreed with the consumer. If a specific contract was drafted by means of a standard contract, then the provisions of this standard contract also become subject to review. Certain doubts arise in terms of reviewing the standard contract itself during incidental review. What where a consumer claims abusiveness of only one provision of a standard contract incorporated to the contract, the court decides about this abusiveness and then the consumer brings another action to court concerning abusiveness of the entire contract due to bad incorporation of the standard contract? M. Bednarek asks a legitimate question here – how should the court respond to this and how does it refer to Article 321 of the act of 17 November 1964 The Code of Civil Procedure[26] (hereinafter CCP)? It is well-founded to express approval for the view presented by M. Bednarek in reference to the above – where the contract binding the parties was incorporated from a standard contract, the court should examine *ex officio* the correctness of such incorporation.[27]

With regard to incidental review, it needs to be emphasised that it is carried out in each proceeding if the party (consumer) puts forward an allegation of including an unlawful clause in a given contract. Continuing reflections in this regard it needs to be stated that court proceedings may involve incidental review even if it was the undertaking, not the consumer, who was the claimant.[28] It is indeed possible that an undertaking should bring an action against a consumer and in the course of the proceedings the consumer puts forward a plea of including an unlawful clause in the contract binding the parties. The court will then review the contract. It needs to be highlighted here that the judgment in the case will not set forth a new legal situation for the parties; therefore, it will have a declarative character.[29] This results from the fact that an unlawful clause is invalid from the very beginning and the court's tasks involves examining only whether a given provision does or does not bear features of abusiveness. Therefore, it is not the court's competence to put provisions the court deems appropriate in place of abusive provisions.[30] This would entail violation of the freedom of con-

24 Judgment of the Court of Appeal in Warsaw of 13 March 2017, VI ACa 1866/15, LEX no. 2423350.

25 M. Bednarek, *Sądowa kontrola w obrocie konsumenckim,* in: *Prawo zobowiązań – część ogólna*. E. Łętkowska (ed.), Vol. 5, Warsaw 2013, pp. 792–795.

26 Consolidated text, Dz. U. (Journal of Laws) of 2019, item 1460 as amended.

27 K. Zagrobelny, *Związanie wzorcem, konsument. Komentarz do art. 385[1] KC*, in: *Kodeks cywilny. Komentarz,* E. Gniewek, P. Machnikowski (eds.), Warsaw 2017, p. 695.

28 Judgment of the Regional Court in Wrocław of 20 March 2014, II Ca 1501/13, LEX no. 1994277.

29 K. Zagrobelny, op cit.

30 Cf. M. Romanowski, *Życie umowy konsumenckiej po uznaniu jej postanowienia za nieuczciwe*, in: *Życie umowy konsumenckiej po uznaniu jej postanowienia za nieuczciwe na tle orzecznictwa Trybunału Sprawiedliwości UE,* M. Romanowski (ed.), Warsaw 2017, pp. 7–9. The author points out possible decisions in the event of deeming a given contractual provision unlawful.

tract, a view supported by the European Court of Justice (hereinafter ECJ).[31] [32] The Supreme Court expressed its opinion on the above in the same way, pointing out that when assessing abusiveness of a given provision the court does not consider how a given provision should be amended and whether such a change should take place at all.[33]

Naturally, when evaluating the provisions, the court takes into account the moment the contract was executed.[34] What occurred after the contract had been signed should not be taken into account when assessing abusiveness.[35] When assessing the provisions of the contract the court should examine not only the contract itself but also connected contracts, which results directly from Article 385^2 CC.

Summing up the reflections on incidental review of abusive clauses one needs to agree with B. Wyżykowski who states that in order to decide about abusiveness of provisions of a given contract a specific legal relationship needs to be assessed and not the mere fact of deeming a similar provision in the past unlawful.[36]

In turn, abstract review of abusive clauses, contrary to incidental review, does not refer to a specific legal relationship but to reviewing the standard contract (definition of a standard contract – Article 354 CC).[37] For this form of review it does not matter whether a given standard contract was incorporated to an individual contractual relationship or not.[38] In this form of review the standard contract is treated as an independent entity.[39] Initially (until 17 April 2016) the issue of abstract review had been regulated by the provisions of the CCC (479^{36}–479^{45}). Abstract review then had a court and administrative form, it was performed by the Regional Court in Warsaw – the Court for Competition and Consumer Protection (hereinafter: the Court).[40] It was the Court that decided about abusiveness of a given standard contract.[41] Before the amendment the review had been performed in two dimensions – primary and secondary. An entity authorised under no longer applicable Articles 479^{36}–479^{44} had to file a complaint with the Court. On considering a given standard contract contrary to applicable law the court issued a judgment prohibiting the use of this provision in a standard contract. Secondary review, on the other hand, consisted in the President of the Office of Competition and Consumer Protection examining in adminis-

31 Judgement of the Tribunal (fifth chamber) of 7 November 2019 in joint cases from C-349/18 to C-351/18;

32 It is worth noting that the mere introduction into the Polish order of regulations on abusive clauses in a way restricts the freedom of contract. See more in: P. Machnikowski, *Swoboda umów według art. 353^1 KC. Konstrukcja prawna,* Warsaw 2005, point II.

33 Decision of the Supreme Court of 28 May 2014, I CSK 607/13, LEX no. 1622296.

34 M. Grochowski, *Niedozwolone postanowienia w umowach konsumenckich: podstawa kontroli i jej granice w czasie*, "Monitor Prawniczy" 2019, no. 3, point II.

35 Judgment of the Court of Appeal in Białystok of 19 June 2019, I ACa 250/19, LEX no. 2716967.

36 B. Wyżykowski, *Abstrakcyjna kontrola postanowień wzorców umów*, "Przegląd Prawa Handlowego" 2013, no. 10, pp. 30–40.

37 M. Sieradzka, *Zakres niedozwolonych klauzul abuzywnych w umowach o kredyt konsumencki – określanie przesłanek zmiany stopy oprocentowania.* Glosa do wyroku SOKiK z 27 lutego 2015, XVII AmC 3477/13, 2015, LEX.

38 M.P. Ziemiak, *Postanowienia niedozwolone na tle umów ubezpieczenia*, Warsaw 2017, p. 292.

39 See A. Mlostoń-Olszewska, *Możliwość orzekania o uznaniu za niedozwolone postanowień wzorca umowy sprzedaży z bezwzględnie obowiązującymi przepisami prawa – argumenty za i przeciw*, in: *Prawo konsumenckie w praktyce*, M. Czarnecka, T. Skoczny (eds.), Warsaw 2016, pp. 6ff. The author reflects there on seeing the standard contract as a separate entity. One needs to agree with the author's belief that "a standard contract is an act in law".

40 I. Szczepańska-Kulik, *Wzorce umów i niedozwolone postanowienia umowne w deweloperskiej praktyce rynkowej*, "Monitor Prawniczy" 2016, no. 16.

41 Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna. 13th edition*, Warsaw 2018, p. 175.

trative proceedings whether given standard contracts are identical to those included in the register of unlawful clauses.[42]

The substantive and legal basis in the case of abstract review was and is the same as in the case of incidental review[43] (Articles 385^1 and 385^3 CC), though today other regulations form part of this basis, which will be discussed in further parts.

The then form of review is problematic if only in the question of a great number of complaints filed with the Court, and thus a prolonged time of waiting. Moreover, the manner of interpreting judgments issued by the Court also caused problems – whether a given judgment is only binding on the parties or whether it is also binding *erga omnes*. Initially, a view was supported that a judgment in an abusiveness case was binding non only on the entity with regard to which it was issued but also on all professional entities (undertakings).[44] This position was backed up by the fact that the register of clauses is open and thus everyone can read it.[45] With time, though, a different position was shaped, in accordance with which any consumer may refer to such a judgment, though only with regard to the undertaking for whom such a judgment was passed.[46] In the reasoning alone for the draft project on amending the act on competition and consumer protection it was pointed out, that amending the form of abstract review is necessary due to the need to "eliminate doubts about effects of the court ruling in the case of declaring a standard contract unlawful".[47]

In order to overcome these inconveniences the so-called consumer amendment was introduced on 17 April 2016, whereby the aspects of reviewing standard contracts are no longer specified by the CCP, but by the act of 16 February 2007 on competition and consumer protection[48] (hereinafter the Act). The current Article 32a of the said Act speaks about the prohibition of application in standard contracts executed with consumers of provisions referred to in Article 385^1 § 1 CC.

Administrative review of standard contract provisions carried out by the President of the Office of Competition and Consumer Protection

In line with Article 23b of the Act the authority that may carry abstract review and issue a relevant decision in this regard is the President of the Office of Competition and Consumer

42 K. Lehmann, *Eliminowanie postanowień niedozwolonych z wykonywanych umów o charakterze ciągłym w obrocie konsumenckim*, in: *Prawo konsumenckie*..., pp. 45–47.

43 P. Mikłaszewicz, *Abstrakcyjna kontrola postanowień nieuzgodnionych indywidualnie. Komentarz do art. 3851 KC,* in: *Kodeks cywilny. Komentarz*, K. Osajda (ed.), Vol. IIIa, Warsaw 2017, p. 266.

44 In its judgement of 20 June 2006 (III SK 7/06) the Supreme Court supported a position that "it is forbidden to employ in legal transactions provisions of standard contracts listed in the register as unlawful by all and against all counterparties occurring in legal relationships of a given type.", LEX no. 278545.

45 See K. Kaczmarska, *Postanowienia niedozwolone – przeczytaj zanim podpiszesz umowę*, Warsaw 2011, p. 26 – this study prepared by the Office of Competition and Consumer Protection shows that "on entering a decision in the register the ruling is effective also for persons who did not participate in the proceedings. Anybody now can invoke the unlawful nature of the clause".

46 Judgment of the Supreme Court of 20 September 2013, II CSK 708/12, LEX no. 1385871.

47 Reasoning for the draft act of 5 August 2015 on amending the act on competition and consumer protection and certain other acts, LEX.

48 Dz. U. (Journal of Laws) of 2019 item 369 as amended.

Protection. The proceedings themselves in terms of abstract review are proceedings instituted *ex officio*, which is directly specified in Article 49 (1) of the Act but the proceedings themselves will be discussed still in further parts.

Classifying provisions of a given standard contract as abusive is done by way of a decision. The content of the decision is specified in detail in Article 23b of the Act. In the discussed Article the legislator pointed to elements which are obligatory for the President of the Office to point to and those that are optional. These optional elements aim to remove the effects of the occurrence in legal transactions of a given standard contract whose provisions have abusive nature. What is more and what has been pointed out in Article 23b of the Act it needs to be remembered that a decision on declaring a standard contract abusive is an administrative decision, thus it must include elements which are specified in the act of 14 June 1960 The Code of Administrative Procedure[49] (hereinafter CAP).[50]

The President of the Office may in the decision among others oblige the undertaking to inform consumers who have executed contracts drawn up on the basis of a standard contract that a given provision of this standard contract has been defined as abusive. Moreover, the decision may specify an obligation for the undertaking to submit, in a specified manner and in a specified form, a single statement or multiple statements referring to the abusiveness of a provision of a given standard contract. Additionally, the legislator gave the authority the power to order in the decision to have its content published in a specified way, along with information about its validity – the cost of the publication to be borne by the undertaking. Naturally, when selecting measures the President of the Office should bear in mind the legitimacy of its application in order for it to be proportional to the violations.[51] And what is more, when assessing a given standard contract the authority should also take into account whether or not the undertaking employs a given standard contract in legal transactions.[52]

As a result of the conducted proceedings the President of the Office may issue three types of decisions. Namely, he may issue a decision on discontinuing the proceedings under Article 105 § 1 CAP in connection with Article 83 of the Act. The legislator does not prescribe in the Act for a possibility to issue a decision which would specify that a given provision of the standard contract is not abusive; the only thing the reviewing authority may do is discontinue the proceedings.[53] However, the President of the Office's discontinuing the proceedings does not exclude the possibility of the consumer invoking the abusiveness of the provision in the course of incidental review.[54] He may also issue a decision declaring a given provision abusive and impose a prohibition of applying it. He may also issue a decision about abusiveness and the prohibition of applying a given provision

49 Dz. U. (Journal of Laws) of 2018 item 2096 as amended.

50 A. Wiercińska-Krużewska, M. Prętki, *Decyzje w prawach o uznanie wzorca umowy za niedozwolone,* in: *Ustawa o ochronie konkurencji i konsumentów. Komentarz,* A. Stawicki, E. Stawicki (eds.), Warsaw 2016, pp. 602–603.

51 K. Araczewska, Ł. Wroński, *Wybrane zagadnienia „konsumenckiej" nowelizacji ustawy o ochronie konkurencji i konsumentów,* in: *Ochrona Klienta na rynku usług finansowych w świetle aktualnych problemów i regulacji prawnych,* E. Rutkowska-Tomaszewska (ed.), Warsaw 2017, p. 80.

52 A. Wiercińska-Krużewska, M. Prętki, *Decyzje w prawach o uznanie…*, pp. 602–603.

53 See more in K. Araczewska, Ł. Wroński, *Wybrane zagadnienia…,* pp. 79–82.

54 See Reasoning for the draft act of 5 August 2015 on amending the act on competition and consumer protection and certain other acts, LEX.

along with obliging the undertaking to meet certain requirements referred to in Article 23b and 23c of the Act.[55]

In terms of obligatory elements of the decision expressed in the Act – it must be a decision on the abusiveness of a given provision of a standard contract along with pointing to its content and an expression of the prohibition of applying the abusive provision in relations with consumers.

On top of what has been described above, the authority may impose a fine on the undertaking for violating Article 23b of the Act. Such a power is expressed in Article 106(1)(3) of the Act, according to which the President of the Office may impose upon an undertaking a fine of 10% of the turnover generated in the financial year preceding the year in which the fine is imposed for violating (even if unintentionally) among others Article 23b of the Act. Before the consumer amendment the Court had not been able to impose a fine for applying abusive provisions.[56] And thus in one decision the President of the Office imposed a fine upon an undertaking for applying the following provision in a standard contract – "The Parties represent that the provisions of this contract were individually agreed with the Buyer (which shall be understood as accepting them without comments or changing it by way of negotiations of both parties,(…)". The authority justified its opinion demonstrating that theoretically this wording implies individual agreement of the contract provisions with the consumer, while in fact it is the undertaking's unilateral provision introduced into the standard contract. If an undertaking already at the stage of drawing up the standard contract, which nota bene is to be implemented in an unspecified number of individual contracts, represents that the provisions of the contract have been individually agreed with the buyer it is clear that this provision raises doubts as to the possibility for the consumer to influence the provisions included in the contract.[57]

Irrespective of the above, the legislator conferred upon the President of the Office in Article 99d of the Act the power to make the decision immediately enforceable in whole or in part where consumers' important interest requires so.

An undertaking may oblige itself before a decision referred to in Article 23b is issued to take certain measures or to forbear from doing so, the aim of which is to cease the violation of the prohibition to apply unlawful clauses or to remove the effects of violation thereof. In such a situation the authority may impose on the professional entity in the decision an obligation to perform such tasks with the requirement to submit reports on their performance at a specified time. Should the President of the Office employ the possibilities under Article 23c(1-3) the authority shall not issue a decision pursuant to Article 23b of the Act. Should the undertaking fail to perform tasks it was obliged to perform, the President of the Office may overrule the decision issued on this basis and impose on the undertaking a fine referred to in Article 106 of the Act. Regulations of Article 23c are in no way binding on the authority. Even if the undertaking undertakes to carry out the specified measures the President of the Office may not exercise the right expressed in the discussed regulation. In one of his decisions the President of the Office refused to exercise the right under Article 23c of the Act pointing out

55 A. Wiercińska-Krużewska, M. Prętki, *Decyzje w prawach o uznanie…*, p. 604.
56 M.P. Ziemiak, *Postanowienia niedozwolone…*, p. 308.
57 Decision of the Office no. RPZ 5/2019, http://uokik.gov.pl/decyzje/.

that the measures undertaken by the undertaking are not sufficient to talk about the cessation of violation of Article 23a.[58] It is worth pointing out that the decision in question addressed an inclusion of an abusive provision in the rules and regulations of an online shop, which is why it needs to be stressed that rules and regulations should also be considered a standard contract.[59]

It was flagged up in the introduction to the discussion of abstract review that a lot of problems were caused by the fact that it was not clear ultimately who the judgment given by the Court was to be applied to. At the moment this problem is solved by Article 23d of the Act, which clearly specifies for whom the decision issued as a result of abstract review is effective. Therefore, in compliance with the legal basis, a (final) decision issued by the President of the Office in relation to the performance of an abstract review of a given provision of a standard contract, is binding not only on the undertaking for whom it was issued, but it is also effective with regard to all consumers who executed a contract with a given undertaking on the basis of the standard contract specified in the decision. The literature calls such a state of affairs a unilateral extended effect of a final decision.[60] This regulation will be applicable not only to decisions issued on the basis of Article 23b but also on the basis of Article 23c of the Act. Even though the performance of abstract review is detached from any specific legal relation, it is due to the above-mentioned regulation that it has a direct effect on an individual consumer. They may then invoke the decision of the President of the Office with regard to an undertaking (only a final decision will be material for individual consumer interests).

As a rule, proceedings for abstract review are instituted *ex officio*, but for some entities the legislator has introduced the right to notify the President of the Office of violations of the prohibition referred to in Article 23a of the Act. The right to submit such notification was specified in Article 99a of the Act. In subsection 1 of the said regulation the legislator included a closed catalogue of entities who may submit such notification. Under the regulation in question a consumer among others may submit notification of the infringement of the prohibition of applying abusive clauses. Before the introduction of the consumer amendment the legislator had not specified that the notification could be submitted by a person enjoying the status of a consumer.[61]

In Article 99a(2) the legislator also listed obligatory elements that such notification mush have, such as the undertaking against which the notification is submitted or pointing out the clause in the standard agreement that may be considered abusive.[62]

In Article 99b(1) of the Act the legislator represented that everyone against whom proceedings have been instituted for declaring a given provision of the contract abusive is a party to the proceedings. When performing an interpretation in connection with the definition of a consumer (Article 22^1 CC) and an undertaking (Article 43^1 CC and Article 4(1) of the Act) and having regard to the content of Article 23a of the Act, it needs to be recognized that the

58 Decision of the Office no. RŁO 3/2019, http://uokik.gov.pl/decyzje/.

59 A. Mlostoń-Olszewska, *Możliwość orzekania o uznaniu…*, p. 6.

60 A. Wiercińska-Krużewska, M. Prętki, *Decyzje w prawach o uznanie…*, p. 623.

61 See more in: E. Wójtowicz, *Stosowanie przepisów o klauzulach abuzywnych do przedsiębiorców przy umowach ubezpieczenia*, in: *Prawo konsumenckie w Polsce oraz innych państwach UE. Zagadnienia wybrane,* B. Gnela (ed.), Warsaw 2019, point 4.

62 J. Szczygieł, *Ochrona konsumenta przed niedozwolonymi postanowieniami umownymi we wzorcach umów kompleksowych na rynku energetycznym*, Warsaw 2019, LEX.

notion of a party to proceedings in terms of abstract review should be understood as referring solely to an undertaking.[63]

A decision of the President of the Office may be appealed against at the Court which is regulated in detail in Article 81 of the Act.

At the end it is worth mentioning the institution of the register of unlawful clauses. Prior to 17 April 2016 a final judgment of the Court had been referred to the President of the Office, who then placed a provision which the Court had declared abusive in the register of unlawful clauses (Article 479[45] CCP).[64] On entering the provision deemed abusive in the register of clauses it gains broader material legitimacy and at the same time enhanced gravity of the matter ruled on, and thus no one can invoke before the Court abusiveness of the same provision with regard to the same undertaking.[65] What is essential, the register of abusive clauses is maintained on the basis of judicial decisions taking into account actions in terms of abusiveness of a given provision. The then principles for entering abusive provisions in the register made it completely incomprehensible and the clauses were often duplicated.[66] What is more, the register did not contain any reasoning or context for recognizing a given provision as abusive, thus an analysis of the register was rather difficult.[67]

At present the register of unlawful clauses is maintained only for proceedings instituted before the entry into force of the consumer amendment and for which the old legal basis is applicable. This register in accordance with the amendments introduced by the act of 5 August 2015 on amending the act on competition and consumer protection and certain other acts[68] will function for 10 years from the date of the amendment, that is until 17 April 2026.[69]

At the moment, pursuant to Article 31b of the Act, decisions of the President of the Office are published on the website of the Office of Competition and Consumer Protection, not including business secrets or any other types of information protected under the law along with information about the decision being legally binding.

Conclusion

Introducing changes in terms of reviewing abusive clauses has a certainly positive character. Firstly, abstract review has actual significance for the protection of consumer rights, it allows elimination from legal transactions of provisions of standard contracts before they become an

63 Reasoning for the draft act of 5 August 2015 on amending the act on competition and consumer protection and certain other acts, LEX.

64 A. Cempura, A. Kasolik, *Metodyka sporządzania umów gospodarczych*, Warsaw 2014, p. 79.

65 T. Przemysław, *Komentarz do art. 479[45] KPC,* in: *Kodeks postępowania cywilnego. Komentarz aktualizowany. Vol. I. Art. 1-729,* A. Jakubecki (ed.), LEX 2019.

66 See more on defectiveness of the register of unlawful clauses in: M. Romanowski, *W sprawie charakteru i skutków abstrakcyjnej kontroli niedozwolonych postanowień wzorców umownych stosowanych przez przedsiębiorcę,* "Studia Prawa Prywatnego" 2010, no. 3. § 1.

67 M. Błachucki, *Publikacja decyzji wydawanych przez Prezesa UOKiK. Komentarz do art. 31b*, in: *Ustawa o ochronie konkurencji i konsumentów. Komentarz,* A. Stawicki, E. Stawicki (eds.), Warsaw 2016, LEX.

68 Dz. U. (Journal of Laws) of 2015 item 1634.

69 M. Sieradzka*, Postanowienia umowne przewidujące możliwość zmiany powierzchni lokalu po zakończeniu inwestycji – dozwolona praktyka na rynku deweloperskim czy niedozwolona klauzula abuzywna,* in: *Ochrona konsumenta na rynku usług*, M. Jagielska, E. Sługocka-Krupa, K. Podgórski (eds.), Warsaw 2016, p. 234.

element of a specific contractual relationship. There are no doubts that transforming the form of abstract review from judicial and administrative into administrative greatly facilitated the process of eliminating abusive clauses. These proceedings are much shorter and publishing an entire decision about abusiveness allows for learning the context of placing a given provision in the standard contract and for learning the arguments for a given provision to be specified as unlawful. What is also approval-worthy is the fact that even if the President of the Office does not see an abusive provision in a given standard contract and as a result discontinues the proceedings, the consumer is not barred from pursuing his claims in judicial proceedings. To sum up, the consumer amendment of 17 April 2016 has a real impact on consumer protection, actually influences the scope of protection of their rights at the same time guarding the principle of contractual equality.

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REVIEW

Of the monograph by A. Barczak, A. Ogonowska, "Działalność uchwałodawcza rady gminy w zakresie ochrony środowiska. Wzory uchwał z komentarzem" [Resolution-making activity of a commune council in terms of environmental protection. Sample resolutions with commentary], C.H. Beck, Warsaw 2019

Adequacy of the title and subtitles to the publication's content

In my opinion, both the work's title and its individual subtitles correspond to its content. Commune tasks in term of environmental protection are presented from the perspective of the resolution making activity of its constitutive and review body – the commune council. The work also has a pragmatic value as it includes practical examples of sample resolutions on matters discussed in theory. The work presents both acts of local law given by the commune and the manner of performance of tasks resulting from the provisions in special statutes dealing with environmental protection law. Special focus is given to principles of constructing commune council resolutions and to the commune resolution-making procedure.

Text composition

The work is divided into two parts. The first part addresses general issues including a discussion of the subject matter of local law provisions given by communes with emphasis on resolutions, their classification, principles of constructing resolutions and the procedure of providing them. The second part refers specifically to commune council resolutions in terms of environmental protection. In my opinion, one more introductory chapter in the second part of the study could have been added in which the Authors could expand the introduction

to the subject matter of tasks of a commune (or perhaps even broader, of local government units) as regards environmental protection or their classification. These specific issues are them discussed in each chapters included in part two.

These two parts comprise 9 chapters in total, where each next chapter develops and supplements thought expressed earlier. Chapter one – Commune council resolutions – notion, types, review and supervision – is aptly opened by the Authors by demonstrating the notion of a resolution and its types, by differentiating between act of local law from acts of internal management. The explicit second part of chapter one concerns review carried out by administrative courts and the Constitutional Tribunal over the resolution-making activity of communes and the supervision carried out by the President of the Council of Ministers, a voivode as well as regional chambers of audit. The Authors do not omit the important issue of review measures. Chapter two – Classification of commune council resolutions in terms of environmental protection. The chapter opens with introductory issues concerning the notion of the environment and its protection and a general characteristic of commune council resolutions in terms of environmental protection. Chapter three – Principles of constructing commune council resolutions – concerns the legislative technique of constructing resolutions, whereas chapter four – Commune resolution-giving procedure – concerns i.e. the procedure of preparing draft resolutions, giving opinions on them, participation of the society in commune resolution-giving activity and strategic assessments of environmental impact.

The second part of the study comprises five chapters referring to the following, respectively: chapter five – Commune council resolutions concerning the quality of the environment and emissions law; chapter six addressing waste management; chapter seven – Commune council resolutions concerning waste management; chapter eight – commune council resolutions concerning nature conservation and protection of animals; chapter nine – Commune council resolutions in terms on land-use planning.

In my opinion the study is of appropriate volume, the relationship between the breadths of individual chapters seems correct. Chapters four and nine are slightly lengthier, but their volume is substantively justified. The Authors have selected illustrative material correctly using examples of decisions of administrative courts. The study does not contain repetitions.

Language accuracy

The work does not cause reservations in linguistic terms. It is written in a clear and communicative language. Minor editorial errors will be certainly eliminated at the editing stage (i.a. erroneous numbering of chapter three and four or providing both the initial and the full name in note 24 in chapter five ("P. Korzeniowski")). It would be advisable to streamline the position of the initial before or after the cited surname in notes throughout the study.

Substantive quality

The reviewed work carries a significant scientific value. It is a study of the subject-matter of commune council's performance of environmental protection tasks approached from the side of resolution-making activity. The reflections illustrate sample resolutions with appropriate commentary. The juxtaposition of theoretical and practical problems is the work's quality as it presents the manner in which the analysed institutions operate. This procedure has a positive impact on expanding the monograph's circle of readers.

Legitimacy of the research

The purpose of the reviewed study is to analyse commune law-giving tasks which were expressed in self-government systemic regulations and legal acts included in the block of environmental laws. An analysis of the above-mentioned acts indicates that social relations which are attributed a legal value present complicatedness and complexity of problems. Commune, being a local lawmaker, encounters ever-greater difficulties in expressing its will by way of environmental legal norms. The degree of complicatedness of environmental regulation causes great interpretational obstacles by erroneous reading of laws frequently adopted by communes. Such a situation produces numerous complaints for acts of local law concerning environmental regulations adopted by communes. Therefore, the choice of the subject-matter should be regarded excellent and the examples of sample resolutions are unquestionably helpful in the practice of application of the law.

Methodology

The method of the legal doctrine applied by the Authors is the basic methodology. The Authors analyse: legal acts indispensible in this scope, basic available literature (including monographs, text books, but also commentaries to statutes) as well as a broad scope of decisions of administrative courts and rulings of public administration authorities, especially voivodes' supervisory decisions. It needs to be highlighted that each chapter closes with a conclusion.

Correctness of formulated findings, presentation method

While presenting their own views the Authors maintained due respect for other researchers' assertions. The Authors' views deserve to be agreed with. For instance, they rightly note that calling an act of a commune council a resolution does not prejudge that one is dealing with an act of local law. This is thy they distinguish two categories of resolutions: those that are acts of local law and those that are acts of internal management.

The regulation of the substantive environmental law is the criterion classifying resolutions in the second part of the study, and thus chapter five addresses commune council resolutions in terms of the quality of the environment and emissions law, chapter six – waste management, chapter seven – water management, chapter eight – nature conservation and protection of animals, chapter nine – land use planning. The work is in accordance with the state of law as at 5 June 2019.

Validity of publication

In light of the comments presented above the validity of publishing the reviewed monograph should not raise doubt.

Circle of potential readers

The book is dedicated primarily to all employees of commune bodies who prepare draft environmental resolution in the day-to-day operation of the offices, but it will also be an excellent educational position for students of the following courses: law, administration or environmental protection. It can be also safely recommended to practitioners who wish to advance their knowledge in the discussed field.

Examples of competion literature

Studies addressing a theoretical basis of local government tasks in terms of environmental protection are authored by one of its co-authors – A. Barczak, *Zadania samorządu terytorialnego w zakresie ochrony środowiska* [*Local government tasks in terms of environmental protection*], Warsaw 2006 or A. Barczak, Ewa Kowalewska, *Zadania samorządu terytorialnego w ochronie środowiska, Aspekty materialne i finansowe* [*Local government tasks in environmental protection. Substantive and financial aspects*], Wolters Kluwer 2015. A monograph by M. Górski must also be mentioned – *Ochrona środowiska jako zadanie administracji publicznej* [*Environmental protection as a public administration tasks*], Łódź 1992, where the entire theoretical and legal fundaments maintain their up-to-date status.

This issue was also given a significant amount of reflection in the following scholarly works, e.g. Janina Ciechanowicz, *Kompetencje samorządu terytorialnego w zakresie ochrony i kształtowania środowiska* [*Local government powers in terms of protection and shaping of the environment*], *RPEiS* 1991, *No.* LIII(2), or by the same author, *Zadania i kompetencje gminy w zakresie ochrony środowiska – Kierunki zmian* [*Commune tasks and powers in terms of environmental protection – directions of change*], "Gdańskie Studia Prawnicze" 2015, Vol. XXXIV.

The reviewed monographs clearly stands out due to its practical value, which makes it an interesting positon that deserves to be recommended on the publishing market. Those interested in the subject matter will be able to reach more broadly for further scholarly reflections in this regards.

Final assessment

The book is the first such comprehensive study of the issues of commune law-making activity in terms of environmental protection. Gradually, for almost thirty years, the legislator has been entrusting local government with further environmental tasks.

The Authors took into account the most recent regulations addressing i.a. emissions law and waste management. The publication takes into account the resolution-making activity in terms of: land-use planning; quality of the environment and emissions law; waste management; water management; nature conservation and protection of animals.

These detailed issues are preceded by more general issues concerning the legal nature of commune council resolutions, their classification, principles of reviewing them and the commune resolution-making procedure. Apart from its scholarly values, the study's practical character is its immense value.

Due to the convention adopted by the Authors, part one which in essence is a theoretical and legal introduction to the issues of commune resolution-making activity is supplemented in part two by a discussion of legal basis for environmental protection, and then by a sample draft resolution together with a commentary. This approach makes the presented monograph stand out on the publishing market.