THE REFORM OF THE ADMINISTRATIVE JUDICIARY

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edited by Mateusz Pszczyński

Wydawnictwo Instytutu Wymiaru Sprawiedliwości **Warszawa 2024**

The publication was written within the framework of the international scientific project "Polish-Hungarian Research Platform" conducted by the Institute of Justice in Warsaw in 2022

REVIEWERS *dr hab. Ewa Pierzchała, prof. ucz.*
dr hab. Andrzej Szymański, prof. ucz.

PROOFREADING *Lingua Lab*

TYPESETTING AND COVER DESIGN *Tomasz Smołka*

ISBN 978-83-67149-36-5

WYDAWNICTWO INSTYTUTU WYMIARU SPRAWIEDLIWOŚCI
ul. Krakowskie Przedmieście 25, 00-071 Warszawa
SEKRETARIAT tel.: (22) 630 94 53, e-mail: wydawnictwo@iws.gov.pl

BOUND AND PRINTED BY *"Elpil", ul. Artyleryjska 11, 08-110 Siedlce*

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Preface

The role of the administrative judiciary is paramount in overseeing the external activities of public administration. Administrative courts that operate efficiently serve as the linchpin of a democratic state governed by the rule of law and ensure the harmonious functioning of the entire administrative law system. The articles featured in this collection explore the intricacies of the functioning of administrative courts within Hungary and Poland. Navigating the application of both national and EU laws that impose obligations on both the public administration and the administrative courts remains an enduring challenge amid the continuous social and economic transformations.

In the opening article Agata Kosieradzka-Federczyk analyses the problem of the subjective side of administrative court proceedings, placing it on a par with the subjective scope of public administration activities subject to judicial control. She argues that the circle of entities entitled to lodge a complaint to an administrative court must be expanded to include security institutions, which have so far been excluded from such privilege, including entities such as the Financial Ombudsman or the Patient Ombudsman. It also advocates granting the right to initiate legal proceedings to social actors acting in the public interest, conditional on the criterion of violation

of the rule of law by the administration, disregarding the required burden of proving their own legal interest in the case.

Kitti Pollák undertook an examination of the administrative court systems in Hungary and Poland as part of her research. Despite a common constitutional basis, the modern organisational framework differs significantly. It is noteworthy that Poland has an autonomous and independent administrative judiciary, which has no counterpart in Hungary, where administrative oversight is vested in the general judiciary. On the other hand, Pollak sees several Hungarian procedural mechanisms that are absent in the Polish judiciary. These include the right to adjudicate on the merits of contested administrative decisions. This comparative analysis of the models used in the administrative justice systems of the two countries is an important addition to the continuing discourse on the continuous improvement of administrative justice and the conduct of proceedings before such bodies.

Przemysław Ostojski focused on the assessment of the process of control of administrative actions undertaken by the Office of Competition and Consumer Protection (UOKiK (OCCP)), supervised by the Court of Competition and Consumer Protection within the common court system. The control carried out by this Court effectively safeguards the right of interested parties to demand a substantive resolution of their cases, even at this preliminary stage of court proceedings. He confirms that the Polish legal framework is in line with high European standards of judicial oversight of decisions on competition law. At the same time, he puts forward the thesis that entrusting the supervision of the OCCP to the jurisdiction of Polish administrative courts would not violate this standard. It would instead pave the way for exceptional efficiency in the jurisprudence of administrative courts, which is undoubtedly valuable. This transition would admittedly necessitate an extension of the powers of administrative courts to conduct evidentiary proceedings and grant exceptional competence to rule on the merits.

In the next article Gábor Hulkó questions the activism of the Court of Justice of the European Union (CJEU) with regard to the supremacy of European Union (EU) law over the legal order of its member states. He argues that the relationship between EU law

and the constitutions of the Member States should be precisely defined, entrusting this prerogative to the constitutional authority of each Member State. He acknowledges that such an approach may lead to differences in the measures adopted by individual Member States. Issues of a primarily political nature nevertheless cannot be allowed to be determined not by political bodies but by the interpretation of the law by European or national courts. The process of deliberative deliberation within the European Union is therefore crucial for the continued development of both the Union itself and its constituent states.

The final essay, by Mateusz Pszczyński, is devoted to the implementation of the principle of justice in the context of the functioning of on-line administrative courts during the SARS-CoV-2 pandemic. The extraordinary circumstances triggered by the pandemic forced the adoption of unconventional measures, including the adaptation of justice. Several of these measures should be considered for permanent inclusion, even if they remain optional, in the administrative justice framework. In particular, on-line hearings have proven their usefulness. Practical experience, however, has revealed a number of shortcomings, serving as a clear indicator of areas for improvement and elements that need to be preserved, particularly in the sphere of electronic administrative justice proceedings. Considering the control of public administration by the administrative court, the continuation of administrative proceedings in the traditional paper format hinders the establishment of an effective digital administrative court system. It is necessary to adapt legal solutions to the possibilities offered by new technologies in order to protect the integrity of the judicial process, instill confidence in the state and maintain justice in a democratic society respecting the rule of law.

The articles presented herein unequivocally demonstrate the continued vitality of legal discourse surrounding administrative justice, as it grapples with modern challenges stemming from persistent societal, economic and technological transformations. The authors, conducting their research in Hungary and Poland, assert crucial theses, imperatives and inquiries pertaining to the oversight of the judiciary in public administration. In this pursuit, they remain firmly

grounded in the rich tapestry of European legal culture, invoking fundamental principles that underpin it, including the rule of law, the principle of justice and the paradigm of a democratic state.

Mateusz Pszczyński

PROF. AGATA KOSIERADZKA-FEDERCZYK
Cardinal Stefan Wyszyński University in Warsaw | DOI: 10.32041/9788367149365/1

Chapter 1. Entities with the Standing to Bring Actions Before Administrative Courts

1.1. Introduction

From a historical perspective, a natural consequence of the development of the idea of the rule of law, the theoretical foundations of which were laid down by von Mohl, was the inclusion in the legal order of institutions designed to protect the rights of the individual in his or her relations with the state (public authority), with judicial control of administration at the forefront.[1] Since then, various resolutions have been adopted in European systems, entrusting this task to administrative courts set up specifically for this purpose. Depending on the model, administrative courts are independent bodies that have different relationships with the Executive and with the ordinary Judiciary; or else they are units with different kinds of separation among the ordinary courts.

A review of the resolutions applied in selected modern European countries with regard to the judicial control of administration shows the variety of solutions implemented, in terms of system, function and procedure. The legal, historical and political traditions of state attract attention. The essence for the solutions adopted in each state remains the adoption of an appropriate formula for the

[1] Z. Kmieciak, *O pojęciu rządów prawa*, "Państwo i Prawo" 2016, nr 9, p. 22.

protection of individual rights in relation to the activity of public administration.

The judiciary was seen to play a fundamental role in administrative matters within the wider concept of the state constituted and operating under the rule of law, and existing for the protection of public subjective rights. The courts were seen as an element by which the above concepts might be realised. The findings on this have been revised to some extent over recent decades and supplemented with new elements, *inter alia*, under the influence of experience with the implementation of the vision of the *administrative state* and good governance programmes.[2]

The issue of the role of administrative justice has been addressed by international institutions. Noteworthy is the Recommendation of the Committee of Ministers of the Council of Europe Rec(2004)20 of 15 December 2004 on judicial review of administrative acts, which represents the output of European legal thought.[3] With reference to the content of Article 6 of the European Court of Human Rights (ECHR),[4] the Recommendation's introduction points out that effective judicial review of administrative acts is initiated '*in the name of protecting the rights and interests of individuals*' and '*constitutes an essential component of the system of human rights protection*'. This part of the Recommendation further emphasises the need for a reasonable balance to be struck between the legitimate interests of all parties, the satisfaction of which is made possible by proceedings conducted without delay, and the effective exercise of public administration. It also adds that this legal instrument was motivated by a desire to strengthen the rule of law and human rights,

[2] Z. Kmieciak, *W poszukiwaniu modelu postępowania odpowiadającego naturze administracji publicznej*, "Państwo i Prawo" 2015, nr 11, p. 3.

[3] Z. Kmieciak, *Postępowanie administracyjne i sądowoadministracyjne a prawo europejskie*, Warszawa 2010, pp. 101 *et seq*., as well as J. Chlebny, *Standardy Rady Europy i Europejskiego Trybunału Praw Człowieka w procedurze administracyjnej i sądowoadministracyjnej*, [in:] *Postępowanie administracyjne w Europie*, Z. Kmieciak (red.), Warszawa 2010, pp. 34 *et seq*.

[4] The Convention for the Protection of Human Rights and Fundamental Freedoms, entry into force 3.09.1953.

as fundamental values of the legal systems in Member States of the Council of Europe.

Judicial review of administration, considered an essential condition for the protection of human rights and an integral part of the rule of law, is not questioned today. On the contrary, the special importance of the right to a court in case of a dispute between an individual and a public administration is emphasised, due to the specific nature of the administrative-legal relationship and the risk of unlawful discretion and the arbitrariness of decisions manifested by a public authority.[5]

It is also undisputed that the task of the courts checking on the administration is to protect both subjective rights and objective legal order. It is worth mentioning that the boundary between these two legal regimes is not always easy to set, or fully understood. In Zimmermann's view, the subjective and objective parts of the right of access to court are essential in the sense that preserving both aspects creates a full right to a court.[6]

The *locus standi*, the right to bring actions provides the basis for assuming who may be a complainant in a specific individual proceeding. It indicates the substantive qualification (entitlement) to seek legal protection of a specific subject in a specific administrative court case against another subject (a body of public administration).[7] The essence of the *locus standi* is the right to demand that a specific act or action of a body of public administration be reviewed by an administrative court. The aim is to bring the act into line with the law.

The place of the judiciary in administrative cases in the legal model of the state, including the basic tasks assigned to it, constitute a kind of reference point allowing for the identification of subjects entitled to seek protection in administrative cases in Poland. This corresponds with this article's fundamental aim. In the first place,

[5] E. Wójcicka, *Sądowa kontrola administracji publicznej w Europie*, Warszawa 2017, p. 23.

[6] J. Zimmermann, *Prawo do sądu w prawie administracyjnym*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2006, rok LXVIII, zeszyt 2, p. 312.

[7] W. Siedlecki, *Postępowanie cywilne. Zarys wykładu*, Warszawa 1977, p. 134.

such identification is made by the legislator, defining the subjects that hold the right of complaint, allowing proceedings before the court to be initiated. The clearly-defined tasks of the administrative court also make it possible to examine whether all subjects have obtained the protection of their subjective rights. In other words, it allows for the verification of whether the legislator has achieved appropriate and complete linkage between the *locus standi* and the protected goods.

1.2. The model of the administrative judiciary in Poland

In order to facilitate an understanding of the essence of the *locus standi*, it is worth outlining the basic assumptions of the model of the judicial review of activity by the administration under Polish law. This is first and foremost a continental model of special administrative judiciary[8] with the administrative courts being distinguished clearly from common and military courts. The separation concerns organisational and legal issues. From the very outset, i.e. from the inter-War period,[9] both the procedure before an administrative court and the organisation of those courts were regulated by separate acts.

From the early days of the administrative courts the fundamental difference from other courts constituting the administration of justice was indicated clearly. Jaworski pointed out that administrative courts are established to exercise scrutiny and supervision over the activities of state administration, even as other courts exercise the same function in respect of the activities of individuals. An important constituent element of the tasks of administrative courts is to ensure that private persons are involved in the relevant process,

[8] In the Anglo-Saxon tradition, the model of supervision and scrutiny of public administration being exercised by common courts is well established.

[9] After the end of the Second World War the authorities at the time did not decide to reactivate the administrative courts. This happened only under the Act of 31 January 1980 at the Supreme Administrative Court and at the amendment of the Code of Administrative Procedure Act.

even as other forms of justice see the state authority obtaining power to decide upon matters that are, as a rule, left to the discretion of private subjects.[10]

When account is taken of the criteria of possible forms of exercise of jurisdiction, i.e. the models of dual judicial-administrative jurisdiction or of verification-type jurisdiction, it may be seen that Poland currently has a mixed type, albeit features of the cassation model may predominate. Cassation procedure gives effect to objectives of the Constitution.[11] There is, nevertheless, an increasing discussion in doctrine regarding a move away from the cassation model in favour of judgments on merit. It seems that the legislator also sees advantages to substantive adjudication on the part of administrative courts, with this confirming one of the recent changes to the judicial-administrative procedure extending substantive rulings in certain cases. In the academic discussion, the basic argument against the possibility of substantive adjudication is the principle of the tripartite division of powers derived from Montesquieu. Administrative courts cannot substitute for the administration by ruling on administrative matters *ad merit* in judgments. This argument has, however, been challenged by Langrod, who pointed out (on the basis of a number of voices of representatives of the doctrine of law) that, while Montesquieu was concerned with the separation of authorities, he also addressed the matter of their interaction.[12] In this respect, it is possible to reconcile the activities of the administration itself, as well as reform the jurisprudence of the courts.

The direction of change in Polish law is in line with trends in various European countries, in which the cassation model also tends to have been abandoned. Austria is cited as an example of

[10] W.L. Jaworski, *Nauka prawa administracyjnego. Zagadnienia ogólne*, Warszawa 1924, p. 65.

[11] W. Piątek and A. Skoczylas point out that the introduction of the cassation model within the Polish administrative judiciary will only be possible following an amendment of the Constitution of the Republic of Poland. *Kasacyjny czy merytoryczny model orzekania – kwestia zmiany modelu sądowej kontroli decyzji administracyjnych*, "Państwo i Prawo" 2019, nr 1, pp. 29–35.

[12] J.S. Langrod, *Instytucje prawa administracyjnego. Zarys części ogólnej*, reprint, Warszawa 2003, pp. 322 *et seq*.

a state that has decided to change the model.[13] Its reform, carried out in 2012, came into force in 2014.[14] In the case of the Polish judiciary, this is of additional importance, as historically the first judicial-administrative procedure adopted after Poland regained independence post-1918 was modelled precisely on the Austrian experience.

The traditions of substantive adjudication are richer in those systems whose administrative judiciaries are located within the executive (as is the case in France). There is a wide range of reformatory adjudication in which administrative courts may rule on the merits, as a whole or in part, in many categories of cases (i.e. environmental cases, certain tax and financial contract cases, election cases, construction law and demolition orders, and audiovisual policy). Administrative courts in southern European countries, e.g. Croatia, Macedonia and Serbia, have been equipped with substantive powers of adjudication covering complaints about inaction by the public administration.[15]

Returning to the issue of subjective rights, it is necessary to move on to the criteria of the type and nature of rights that are subject to judicial protection (otherwise the criteria of the purpose of administrative justice). This is another issue, proposed by the doctrine, to describe administrative judiciary.[16] A distinction may be made here in which one model (with its roots in 19th-century Prussia and currently in force in Poland) boils down to the safeguarding of the legal order, while the alternative model takes the perspective of a criterion relating to types of protected rights and

[13] For more about Austrian administrative justice in Polish literature, see: A. Krawczyk, *Austria*, [in:] *Sądowa kontrola administracji publicznej*, E. Wójcicka (red.), Warszawa 2017, pp. 71–96.

[14] Verwaltungsgerichtsbarkeits-Novelle 2012, BGBl. no. 51/2012. For more on this topic, see A. Krawczyk, *Reforma sądownictwa administracyjnego w Austrii*, "Państwo i Prawo" 2013, nr 4, pp. 31 *et seq*.

[15] W. Piątek, A. Skoczylas, *op. cit.*, p. 28.

[16] For more about both models, see Z. Kmieciak, *Europejskie modele sądownictwa administracyjnego*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2006, nr 4–5 (7–8), pp. 9 *et seq*.

has an administrative judiciary derived from the need to protect (and often guarantee the exercise of) subjective rights.[17]

Where access to an administrative court is concerned, from the very moment this kind of institution came into existence in Poland, the basis of its procedural capacity has lain in legal interest, as derived from substantive administrative law. In the resolution as adopted currently, legal interest is, however, understood more broadly, in such a way as will be helpfully characterised in some detail below. When a case is accepted for consideration, the Polish administrative court examines the existence of a legal interest on the part of the complainant. This is a formal condition whose non-fulfilment precludes the continuation of proceedings.[18] It is crucially a judge who controls the administration, in so doing taking account of the criteria of the legality of such activities. The decision of the court ultimately represents a statement regarding the legality (or lack of legality) of the administrative action complained against, the outcome being a statement on inaction or protracted conduct of proceedings.

The competence of an administrative court extends to the possibility of application of legal measures provided for under the Act of 30 August 2002 on the Law on Proceedings before Administrative Courts,[19] with these serving to remedy violations of the law in relation to acts or actions of public-administration bodies (including silence), as issued or undertaken in proceedings conducted within the limits of the given case, to the extent that this is necessary for its final settlement.[20]

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[17] O. Bahr, the creator of the Austrian model of administrative justice, is indicated as the author. Currently, this model is implemented in Austria, Luxembourg, Italy and Greece. R. Suwaj, *Sądowa kontrola działań administracji publicznej jako przejaw judycjalizacji postępowania administracyjnego*, "Studia Prawnoustrojowe" 2009, nr 9, p. 204.

[18] When filing a complaint to the court, it is therefore unnecessary to demonstrate a violation of the applicant's legal interest. A.S. Duda, *Interes prawny w polskim prawie administracyjnym*, Warszawa 2008, p. 214.

[19] Official Journal of Laws RP of 2022, item 329, as amended (hereinafter referred to as: p.p.s.a.).

[20] L. Kaczmarski, *Pozycja procesowa prokuratora i Rzecznika Praw Obywatelskich w postępowaniu sądowoadministracyjnym*, " Studia Lubuskie" 2010, tom VI, p. 166.

Since the time the administrative judiciary was re-activated, an essential element has been the scope of the subject-matter of a review. As early as at the beginning of the 1980s when it had been in existence for just three years, the doctrine noted a tendency for the courts to strengthen and extend *de lege lata* control. This was welcomed as an expression of the entrenchment of the rule of law.[21] Also noticeable nowadays is the need for activity to be subject to administrative scrutiny in the broadest possible respect. This has gained the recognition of the legislator, which extended provision in the Administrative Court Procedure Act, by way of successive amendments. The need for change is also indicated by the Constitutional Tribunal, whose own rulings are indicative of a lack of complete control.

This article attempts to demonstrate that the subjective side of administrative court proceedings is at least as important as the scope of the administrative activity under the control of the administrative courts. Both elements interact with each other, creating protection for the individual in relation to administrative activity.

The current shape of the cognition of administrative courts in Poland has reflected many experiences. The first date back to the wartime period of the twentieth century, the time when an independent administrative judiciary was established. After the Second World War a political system seeing no need for judicial control over administration did not seek to re-activate the judiciary. This occurred rather only in connection with the changes in the political system beginning in the early 1980s. Since then, the scope of administrative supervision and scrutiny entrusted to the administrative courts has expanded steadily.

The jurisdiction of the courts has been defined by a general clause relating to cases of control over the activities of the public administration, as well as cases covered by special provisions.[22] Subsequent regulations specify types of case, as well as exceptions. The scope

[21] J. Świątkiewicz, *Zakres kontroli naczelnego sądu administracyjnego (w świetle orzecznictwa sądowego)*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1984, rok XLVI, zeszyt 1, p. 19.

[22] Article 1 p.p.s.a.

of issues includes rulings delivered in individual cases (administrative decisions, provisions issued in the course of administrative, enforcement-related and collateral proceedings; other individual rulings shaping the legal situation of an individual; and tax law interpretations). Other issues relate to local law issued on the authority of local government or local-government administration; acts of local-government authority (not only law); acts of supervision over the activities of local government; and inaction or protracted conduct of proceedings in individual cases, which are then subject to a complaint to court.

Among the exemptions are those described as belonging to the internal sphere of administration; for example as arising out of organisational superiority and subordination in relations between public-administration authorities; or arising from official subordination between superiors and subordinates. Disputes in matters of public procurement, competition law or labour and social-security law also generally fall under the jurisdiction of the ordinary courts.

1.3. Access to an administrative court and the Constitution of the Republic of Poland[23]

Individual-state administration relations under the previous socio-political system until 1989 led the authors of Poland's 1997 Constitution to pay particular attention to the creation of strong democratic foundations in which the rights of society would be adequately shaped and protected. It is therefore constitutional regulations that determine the fundamental solutions when it comes to the relationship between the individual and public administration. These introduce the principle of legality as the basis for the activities of the public administration, as well as that of judicial protection where constitutional freedoms and rights are in danger of being violated. Poland's administrative judiciary has therefore been given a constitutional basis, not standard in all European states. From

[23] Constitution of the Republic of Poland of 2 April 1997, Official Journal of Laws RP of 1997 No. 78, item 483, as amended.

the perspective of the Constitution, that judiciary is also treated as on an equal footing with the judiciary in civil or criminal matters; something that does not always resonate even in international documents.[24]

It is clear from the constitutional provisions in Poland that the administrative courts exercise justice by ensuring that activities of public administration are scrutinised. This extends to adjudication regarding the legality of resolutions passed by local government bodies, as well as their normative acts of an administrative nature.[25] Supervision is exercised in regard to compliance with the law.

It is therefore the constitutional provision that administrative courts scrutinise the activities of public administration that determines the manner in which administrative courts dispense justice. It is precisely with a view to public administration being kept in check, although not replaced, as it pursues matters within its jurisdiction.[26] Finally, an explanation is offered as to the dominant cassation model, with a prior amendment of the Constitution of the Republic of Poland involved in the attempt to change that.

From the perspective of the Constitution of the Republic of Poland, the determination of the subjective scope of the right to a court hearing first comes down to a decoding of what is meant by the word 'everyone', which the constitutional legislator used in wording Article 45(1).

The subjective scope of the constitutional right to a court hearing has indubitably been defined in a general manner. The notion of 'everyone' in this case corresponds to every natural person (whether a citizen of the Republic of Poland or a foreigner), every legal person, and organisations without legal personality. That interpretation is confirmed by the Constitutional Tribunal, whose judgments include the statement that:

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[24] E. Wójcicka, *op. cit*., p. 23.

[25] Article 184 Polish 1997 Constitution.

[26] R. Hauser, *Konstytucyjny model polskiego sądownictwa administracyjnego*, [in:] *Polski model sądownictwa administracyjnego*, J. Stelmasiak, J. Niczyporuk, S. Fundowicz (red.), Lublin 2003, p. 145.

> *'every citizen of the Republic of Poland and every broad subject in the Republic of Poland should have the opportunity to assert his or her rights before an independent court. Indeed, the right to a court hearing is a guarantee of legal order and observance of the law by all.'*

In view of the above, the right to a court hearing may be regarded as one enjoyed by every natural person, every legal person and every organisational unit lacking legal personality.

As subjective scope is considered, account needs to be taken, not only of Article 45 of the Constitution, but also of Article 77(2) thereof, whereby '*a law may not close off a judicial path for anyone to pursue infringed freedoms or rights*'. It is accepted in the literature that the prohibition on closure of judicial paths supplements the right to a court,[27] and is in the nature of a guarantee where the said right is concerned.[28] The judicial path cannot be closed to 'anyone'. This means that the right (guarantee) expressed therein is framed as a human right, i.e. it is not reserved for Polish citizens alone. Such an approach corresponds to the general approach to individual rights adopted in the Constitution; the right to a court hearing is also understood in a similar way in the ECHR (Articles 6(1) and 13), as well as in the case law of the Strasbourg bodies.[29] Article 77(2) of the Constitution resembles Article 45(1) therein in delimiting the personal scope of the right to a court in a broad manner.

While the Constitution provides for unambiguous prohibition of the closure of the judicial path for the protection of rights and freedoms, it also allow for their limitation. This arises out of an assumption that the freedoms and rights involved are not of an absolute nature, and may therefore be subject to lawful and reasonable limitations. Indeed, the expression 'prohibition of the closure of the judicial path' used in the constitutional provision means that it is

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[27] M. Florczak-Wątor, *Komentarz do art. 77*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, P. Tuleja (red.), wyd. II, LEX/el. 2021.

[28] L. Garlicki, K. Wojtyczek, *Komentarz do art. 77*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki, M. Zubik (red.), tom II, wyd. II, LEX/el. 2016.

[29] L. Garlicki, K. Wojtyczek, *op. cit.*

the exclusion, and not the restriction, of the judicial path that is prohibited. At the same time, the 'judicial path' is understood in a broad manner, with the prohibition of its closure thus needing to be understood as a prohibition to exclude access to any kind of court.

1.4. Characteristics of access to an administrative court

The legal framework for access to an administrative court as provided for in Polish law is largely determined by constitutional regulations. These are a product of the aforementioned principles of the right to a court hearing, and prohibition on the closing-off of the judicial route (even as a restriction may be permitted). When creating in-depth regulations, the legislator is obliged to move within the above boundaries.

The cited regulations refer to rights and freedoms, which, as noted in the literature, concern private entities entering into relations with public administration.

From the point of view of the protection of individual freedoms and rights, the fundamental issue is the possibility of verifying whether particular forms of action (and inaction) of public authorities are grounded in the provisions of the law, of are the implementation of the latter; and at the same time whether (as they implement the dispositions of particular legal norms) it is constitutional values and principles that public authorities are implementing. For this reason it is possible to discern the increased importance of control over acts of public administration as a formal legal guarantee of public authorities acting in a manner appropriate to the rule of law as they pursue relations with individuals and associations.[30]

[30] The protection of subjective rights ensured within the framework of the rule of law is indubitably one of the basic arguments for the separation of administrative justice. Suwaj points to the complexity of the issue and adds other arguments. These include the implementation of the constitutional principle of the rule of law, and the equal procedural position of the parties (an individual and a public-administration authority) through the formula of the adversarial nature of proceedings. The subjecting of decisions taken in the context of supervision over local self-government to judicial review makes it possible to protect local

Access to an administrative court is based on the principle of complaint as the fundament of the procedure conditioning the initiation of proceedings. There are therefore no court proceedings if a complaint has not been filed by an entitled party. This is also the element that distinguishes proceedings of this kind from administrative proceedings, which may be initiated both on application and *ex officio*. The law sets out in detail the rules for initiation.

Given the standing to complain being based on the category of individual legal interest, Polish law has no collective form of complaint, with neither joint complaint nor collective complaint being admissible. This means that, if a complaint is brought by group of people, a standing to complain is required in respect of each person separately, with this therefore denoting, *inter alia*, a need to demonstrate their own actual and individual legal interest.

By linking the principle of actionability to the obligation that there be a specific interest, judicial review has not been shaped on the basis of *actio popularis*. Indeed, should supervision and scrutiny over public administration be framed by reference to *actio popularis*, not linked to any interest of the person and as non-time-limited, a violation of the principle of legal certainty may arise. Literature thus points to this being the main value that needs to be respected by the law. The right to bear the qualification 'certain' is intended to foster the need for security as a basic human need. The principle of legal certainty therefore derives from a broad set of principles that protect citizens' trust in the state, such as the predictability of the law, confidence in the law and the credibility of the order established by law.

1.5. Entities entitled to lodge a complaint

The Law on Proceedings before Administrative Courts in Polish proceedings make it possible to distinguish three categories of entity:

1) parties in a dispute, denoting that the administrative court proceedings are adversarial, with a complaint potentially

authority within the framework of decentralised administration. For more, see: R. Suwaj, *op. cit*., pp. 199–200.

lodged by an addressee of a decision, e.g. a party to the proceedings;
2) entities with the rights of a party;
3) participants in proceedings.

The implementation of the constitutional principle of the right to court is determined as procedural institutions construct the right. Among the institutions, the first to be mentioned is the legitimacy of the right to a court hearing.[31] The doctrine of procedural law calls procedural legitimacy the right to appear as a party in a particular trial. It follows from the principle of the adversarial nature of any court proceedings that one party has active legitimacy, demanding the commencement of proceedings, and thus designating the other party to the process, which is passively legitimate. Administrative court proceedings differ from criminal and civil proceedings in that the passive legitimate party is always the administrative authority, which results from the content of Article 32 of the Administrative Court Procedure Act (offering a clear definition of the parties to proceedings).

Polish law offers a succinct definition of entities that may effectively bring a complaint before a court. The essence of the right to complain is to demand that a particular act (or silence) on the part of public administration should be reviewed by an administrative court to ensure this is brought into conformity with the law. It has been noted by the doctrine that the legislator's assumption was to construct the notion of complaint legitimacy of a universal character, in relation to all acts and actions for which a complaint may be admissible.[32] Taking into account the *locus standi*, the categories of subject to be distinguished are:

[31] B. Adamiak, J. Borkowski, *Instytucje procesowe wyznaczające prawa do sądu*, [in:] *Państwo prawa, administracja, sądownictwo, prace dedykowane Prof. J. Łętowskiemu w 60. rocznicę urodzin*, Warszawa 1999, p. 307. The authors also mention, from among the other procedural institutions, secondly, the prerequisites for the admissibility of the right to court, and thirdly the formal requirements regarding complaints to the court.

[32] T. Woś, *Komentarz do art. 50 p.p.s.a.*, [in:] *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, T. Woś (red.), wyd. VI, 2016.

1) anyone with a legal interest in it;
2) the Public Prosecutor;
3) Poland's Ombudsman, Ombudsman for Children, Ombudsman for Small and Medium-Sized Enterprises;
4) a social organisation, within the scope of its statutory activity in matters concerning the legal interests of others, if it took part in the administrative proceedings;
5) any other entity to which law grants the right to lodge a complaint.

The above enumeration led to a division of legitimacy into the material-legal and the formal-legal.[33] The category of entity described in the first point, possessing material-legal legitimacy, is the broadest and at the same time the most basic category from the perspective of the model of supervision over public administration by the court that is applicable in Poland. It is described by reference to the possession of a specific characteristic, i.e. a legal interest.

The second category that has formal-legal legitimacy as regards the lodging of complaints are institutional entities which have been granted the relevant right where a case is concerned with the interests of other persons. This reflects a need to ensure that the objective legal order be protected. The procedural legitimacy of the entities involved is linked to the functions they have been established to perform. The right to bring a complaint has been granted to certain of them, i.e. the Public Prosecutor, the Ombudsman,[34] the Children's Ombudsman[35] and the Ombudsman for Small and Medium-sized Enterprises. In turn, such legitimacy is not granted to: the Ombudsman for Patients' Rights, the Financial Ombudsman, the Consumer Ombudsman and others. The granting of a *locus standi* to precisely these entities may be explained as the legislator's intention that their activities should be reinforced.

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[33] In literature e.g. W. Federczyk, *Sądownictwo administracyjne*, [in:] *Postępowanie administracyjne*, W. Federczyk, M. Klimaszewski, B. Majchrzak (red.), wyd. 4, Warszawa 2015, p. 298.

[34] Ombudsman (Commissioner for Citizens' Rights) in Polish: Rzecznik Praw Obywatelskich, RPO.

[35] Children's Ombudsman, in Polish: Rzecznik Praw Dziecka, RPD.

The participation of social organisations in legal proceedings is a contribution of citizens to the functioning of the state based around civil society, in accordance with the principle of subsidiarity. This is also widely acceptable and reflects the possibility of realising principles set out in the 1997 Constitution. This refers in particular to the principle of a democratic state ruled by law, as well as the pursuit and implementation of principles of social justice (Article 2). That may be seen in conjunction with Article 12 of the Constitution, which establishes the freedom to form and operate associations, civic movements, other voluntary associations and foundations.[36]

In establishing that a social organisation has standing to lodge a complaint, there must be verification of the administrative procedure file with a view to it being determined whether the organisation participated in proceedings. Such participation is understood as formal admission to participate in proceedings, and that takes place by virtue of a provision from an authority of public administration. It is not required for an organisation to have been taking part actively, as borne out by the submission of opinions or the requesting of evidence in the said proceedings.

The last category of entities is actually an open category, the identification of which requires the analysis of particular legal instruments. Under the Polish doctrine there have been various views concerning the relationship between the entities listed in point 1 (as having a legal interest) and those in point 5. The most accurate view may be thought to be that of Kiełkowski, for whom an adopted regulation determines the direction of deviations from the basic regulation, linking the possession of legal standing with a substantive legal interest.[37]

The Polish doctrine proposes the following qualification of entities entitled to bring a complaint in relation to legal interest. Tarno divides the said entities into: 1) subjects who file a complaint in

[36] K. Kułak-Krzysiak, M. Podleśny, *Organizacje społeczne w postępowaniu sądowym*, [in:] *Internacjonalizacja administracji publicznej*, Z. Czarnik, J. Posłuszny, L. Żukowski (red.), LEX 2015.

[37] T. Kiełkowski, *Strona i uczestnicy w postępowaniu patentowym*, "Przegląd Prawa Handlowego" 2005, nr 8, p. 40.

order to protect their own legal interest, 2) subjects who file a complaint in someone else's case with a view to the objective legal order being protected.[38] In turn, Adamiak distinguishes four categories of legitimacy to lodge a complaint, which she differentiates in line with the type of protected interest. A distinction is thus drawn between legitimacy:

1) to lodge a complaint based on the protection of a legal (individual) interest;
2) based on the protection of a public interest;
3) based on the protection of a social interest;
4) to lodge a complaint, the construction of which is not based on the protection of any of the individual, public or social interests derived from the law.[39]

Regardless of the type of interest, a court's judgment focuses in on determination of the legality of an act or omission of a public--administration body that has been complained about.

The adopted solution entailing the enumeration of categories of entities possessing a *locus standi* should be qualified as a closed list. Disregarded here are the possible difficulties of interpretation that may arise at the stage of application of the law, i.e. the determining of the existence of a right of action in a specific case. Such a reflection is prompted by the view of the doctrine and case law that the provisions defining the right of action should be interpreted strictly,[40] to the extent that all doubts as to whether a given entity has a right of action should be interpreted *in favorem* of the lack of such a right.[41]

It is rightly emphasised that this category does not and cannot include public administration entities involved in taking a decision in a given case. The public authority that issued the decision at first

[38] J.P. Tarno, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Warszawa 2006, p. 133; W. Chróścielewski, *Strony i uczestnicy postępowania administracyjnego*, "Państwo i Prawo" 2004, nr 9, p. 33.

[39] B. Adamiak, J. Borkowski, *Postępowanie administracyjne i sądowoadministracyjne*, Warszawa 2003, p. 424.

[40] More: NSA judgment of 30.8.2011, II OSK 523/11, Legalis.

[41] M. Jagielska, A. Wiktorowska, P. Wajda, *Komentarz do art. 50* [in:] *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, R. Hauser, M. Wierzbowski (red.), wyd. 7, Warszawa 2021, el./Legalis.

instance will not be able to file a complaint against the decision made by the body at second instance, even if it does not agree with the content. Similarly, the administrative authority that issued an opinion in a case will be unable to file a complaint to the administrative court if it disagrees with the content of a final decision. It is unacceptable that the same public administration should at one time occupy the position of an authority, but at other times a party to the proceedings, depending on the stage of settlement of the matter. The procedural functions of public authority conducting a proceedings and party to those proceedings cannot be combined into one. Administrative court proceedings cannot be used to settle disputes on a variety of legal views between administrative authorities pursuing proceedings in different instances, meaning initiation solely at the initiative of an entity outside the system of public administration, whose activities are to be subject to scrutiny by the administrative court.

The structure of administrative court proceedings has been shaped as a dispute conducted before an independent court by two entities: the complainant, i.e. the entity requesting legal protection, and the public-administration authority, whose action or omission gave rise to the claimed request for legal protection.[42]

The *locus standi* is complemented by the obligation to exhaust the remedies available at the stage of the administrative procedure.

According to the data contained in the annual report of Poland's Supreme Administrative Court (*Naczelny Sąd Administracyjny*), in 2021 the largest number of complaints passing to the provincial administrative court (66,359) was filed by natural persons. Legal persons were behind 18,901 complaints; social organisations 1379; the Public Prosecutor 1259; the Ombudsman 21; and other entities 343.[43] Last year, Public Prosecutors filed 35 cassation complaints, while the Ombudsman filed 4.[44] The Chamber also received requests

[42] A. Górska, *Zdolność sądowa i legitymacja skargowa w postępowaniu sądowo-administracyjnym. Glosa do postanowienia Naczelnego Sądu Administracyjnego z 22.08.2019 r. I OSK 1611/19*, "Przegląd Prawa Publicznego" 2021, nr 1, p. 100.

[43] *Informacja o działalności Sądów Administracyjnych w 2021 roku*, Naczelny Sąd Administracyjny, Warszawa, marzec 2022, p. 13.

[44] *Informacja o działalności Sądów Administracyjnych w 2021 roku*, *op. cit.*, pp. 33 and 101.

to resolve legal issues, of which one application each originated with the Children's Ombudsman, the Public Prosecutor-General, and the Ombudsman.

1.5.1. A PERSON WHO HAS A LEGAL INTEREST

In Polish law the effective initiation of judicial review is linked to the possession of a legal interest. the latter issue occupies a great deal of space in the literature on administrative law.[45] The concept of legal interest is an important normative concept used by the legislator to define the relationship between an individual and the public administration. This means that the subject who is able to link the interest he or she represents to an entitlement or obligation arising from the law has a right of action. These are primarily provisions of substantive law, but also of procedural and systemic law. At the same time, the complainant may only do this in 'his/her own administrative case'. This leads to the conclusion that, as mentioned above, a complaint to an administrative court constitutes no *actio popularisi* and requires the existence of substantive legitimacy on the part of the entity exercising these rights.

On procedural ground it even constitutes a link between the sphere of application of administrative procedural law and substantive law.

The category of legal interest that the applicant must manifest was taken over into the current regulation post, the 1990 Act on the Supreme Administrative Court. It was used because there was a significant expansion of the administrative court's cognition at that time. The concept of a party to administrative proceedings had previously been used and the courts were essentially concerned with reviewing decisions made in administrative proceedings. This meant that a complaint could only be brought by a person who was a party to the administrative proceedings. In the inter-War period parties to such proceedings and before the administrative court were equated.

[45] The monograph by A.S. Duda, *op. cit.*, is one many examples.

In the 1990s, after the re-establishment of local government with autonomy in Poland, the administrative courts reviewed the acts of the government administration undertaken in relation to those of local authorities. As the acts in question are made beyond administrative proceedings, the concept of parties used prior to that were rendered insufficient, just as it was necessary to ensure that legitimacy of complaint was conferred upon the local-government administration.

Regardless of the issue of the *locus standi* being extended, there are differences in the scope within which a legal interest might be established *vis-à-vis* administrative proceedings and proceedings before an administrative court. While in the former, the interest has to be derived primarily from the provisions of substantive law, but in the latter it may also be based on procedural or constitutional law.

For its part, relevant case law points to administrative court proceedings not representing a continuation of two-instance administrative proceedings. The procedural legitimacy of a party in administrative court proceedings is not the same as that of a party to administrative proceedings. This means that the existence of a party's *locus standi* in administrative court proceedings is not determined by the allegation of infringement of an interest, but by an interest in bringing proceedings, the essence of which is a request for the competent administrative court to assess the compatibility of the contested act or decision with the objective legal situation. There must, however, be a link between the sphere of the applicant's individual rights and obligations and the contested act or action.[46] Legal interest may also be referred to as an individual's right to a particular procedure aimed at issuing a decision, situated between a subjective right and a factual interest.[47]

The concept of 'legal interest' has a rich and, unusually, a relatively uniform jurisprudence. Even in older rulings it was already being pointed out that the criterion of 'legal interest', on which the right of action is based, means that the act, action or inaction of an administrative body must concern the legal interest of the applicant;

[46] The NSA judgment of 17.03.2015, II OSK 1955/13, LEX no. 1665729.
[47] B. Dauter, *Metodyka pracy sędziego sądu administracyjnego*, LEX/el. 2018.

somebody's own interest must be involved, being individual and resulting from a specific provision of law of general applicability.[48] It is accepted in case law that having a legal interest is tantamount to indicating a provision of law that entitles a given subject to make a specific demand with respect to a body of public administration.[49] Dauter notes that the case law of the Supreme Administrative Court concerning the interpretation of the notion of legal interest introduces no excessive restrictions, aiming to provide legal protection to the widest possible group of persons interested in resolving an administrative case, which fulfils the constitutional principles of a democratic state under the law, and the right to a court hearing.[50]

Parties to proceedings on development conditions, for example, may not only be applicants, but may also be owners or managers of real estate directly adjacent, or in close proximity to, property on which a given investment is planned. The attribute of being party in the case of these entities must, however, be assessed each time from the perspective of their having a legal interest. The mere fact of being the owner or manager of neighbouring real estate does not determine that such an entity automatically becomes a party to such proceedings. The legal interest of such persons is determined by reference to the extent of the impact of a given development on neighbouring properties and the degree of its nuisance posed to those properties, with the burden of proving such an interest placed with the entity making claim to it.

Equally only the applicant shall be a party to proceedings for access to public information initiated on request. Since the obligation to provide public information arises in connection with the requests of particular persons, who in this way exercise their constitutional right to information, only those in question acquire the attribute of a party to the said proceedings. Likewise, the right to lodge a complaint against inaction on the part of an authority in making public information available may be vested solely in the person who made the request for access at an earlier time. This is

[48] NSA judgment of 3.6.1996, II SA 74/96, ONSA 1997 no. 2, item 89.
[49] NSA judgment of 22.2.1984, I SA 1748/83, CBOSA.
[50] B. Dauter, *op. cit*.

because only this person has a legal interest in initiating judicial review, and therefore in combating the authority's failure to act.

As a rule it is up to the authority pursuing administrative proceedings to determine the parties thereto. Indeed, this gives rise to one of the first actions the authority takes in such a case: the authority that determines the persons who have a legal interest, and an erroneous determination as to a party gives rise to a legal defect in the entire proceedings.

There are few exceptions to this basic rule. In some cases, it is the legislator who determines the parties to proceedings. In accordance with the Wastes Act, the parties to proceedings that concern collection permits will not be the owners of real estate adjacent to the installation or property on which such activity will be carried out.[51] These persons will consequently be unable to file a complaint to the administrative court.

Analogously, at the stage of actual proceedings before an administrative court, the existence of the right of action is subject to examination by that court. The *locus standi* is determined in the course of preliminary proceedings, with the lack of same representing an obstacle to the case being examined.

It is decisive for *locus standi* that a legal interest in bringing proceedings in a given case should be demonstrated. This means that the possession of other categories of interest, as not otherwise established in law by the legislator, shall not be protected in proceedings before an administrative court. A factual interest is therefore not protected, where this is taken to denote a situation in which a given subject is interested in the resolution of an administrative case, but does not find support in the provisions of generally applicable substantive law.

In a decision of December 2021 the court stated that action solely in the public interest cannot justify the existence of standing to bring said action. In the particular case that set the precedent, the complainant (an individual person) filed a complaint against a decision of Poland's Minister of Culture, National Heritage and

[51] For more, see Article 170(2) of the Act of 14 December 2012 on Wastes, Official Journal of Laws RP of 2022, item 699.

Sport, by which the authority ruled that a tenement house be deleted from the Register of Monuments. The complainant was not a party to the proceedings and, in filing a complaint, indicated rather that he was a specialist in the field of monuments, and had been involved in their restoration for years. In proceeding to reject that complaint, the court indicated that, while civic concern for the protection of monuments constituted a commendable action, what the applicant had actually done could not be construed as related to the protection of his own legal interest. In the view of the court, these were rather actions specifically taken in the public interest.[52]

In another decision, the administrative court stated that a person who participated in a competition for the post of Director of a school has no standing to challenge an order appointing another person to that post. The impugned order could be deemed to concern only the rights of the person actually elected to the post of Director, to whom the said order was addressed, and whose legal situation was the subject of regulation. The applicant in the case therefore had nothing more than a factual interest (albeit one which may have been infringed), not a legal interest. Indeed, there is no legal provision conferring any right on a candidate for the post of school Director, or indeed imposing on that person any obligation, in relation to the appointment of another person designated individually to the said post of Director.[53]

The above legal framework and examples from case law indicate a rather narrow interpretation of the complaint capacity to initiate a review of public-administration actions before an administrative court. The reason is undoubtedly that the right to complain is based on the category of legal interest. A look at the solutions arrived at in other countries shows that more liberal approaches may be entertained. In the legal system of England and Wales, one of the conditions for bringing a complaint is the demonstration of 'sufficient interest'. Acts against a public law are classified as acts against the public interest. They are deemed to infringe the right of the public to be governed in accordance with the law. An act against

[52] WSA Judgment in Warsaw of 10.12.2021, VII SA/Wa 2053/21.
[53] WSA judgment in Warsaw of 22.12.2022, II SA/Wa 2026/20.

public law is therefore defined by public interest and the right to complain in reference to that law's violation is then described in terms of its being the complainant's interest in the case.[54] The existence of a complaint *locus standi* is determined by analysing the structure of a given act. The approach dubbed close to the citizen emphasises that the analysis should begin from the assumption that it would be a serious loophole in a case were interest groups or citizens in no position to stop an illegal action on the part of an authority.[55] Under the 'restrictive' approach, more attention is paid to the demonstration of a sufficient interest in a case.[56]

1.5.2. THE PUBLIC PROSECUTOR

The participation of the Public Prosecutor in proceedings before an administrative court constitutes one aspect by which practical effect is given to the rule of law. An authority, when initiating proceedings before an administrative court, acts on behalf of the legal order as understood objectively.

The systemic basis for the Public Prosecutor's participation in administrative court proceedings is provided by Poland's Act on the Public Prosecutor's Office,[57] from which it follows that the said Public Prosecutor performs his or her duties by, *inter alia*, challenging unlawful administrative decisions before the court and participating in court proceedings relating to the legality of such decisions. In this respect the Public Prosecutor's legitimacy to file a complaint to the administrative court knows no subject matter

[54] A. Budnik, *Anglia i Walia*, [in:] *Sądowa kontrola administracji publicznej*, E. Wójcicka (red.), Warszawa 2017, pp. 51–52.

[55] Lord Diplock in R v. IRC *ex parte* National Federation for the Self Employed 1982 AC 617: '*It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped*'.

[56] A. Budnik, *op. cit.*, pp 54–55.

[57] Article 3 § 1 item 7 of the Act of 28 January 2016, Official Journal of Laws RP of 2019, item 740.

limitation when it comes to the Public Prosecutor's right to file, as long as the complaint involved is filed in a case falling under administrative court procedure.

The Public Prosecutor's legitimacy to bring a complaint to an administrative court is not limited to substantive grounds. The Public Prosecutor brings a complaint in a case concerning the interests of other persons and the only basis for his complaint's legitimacy is the protection of the objective legal order. There is therefore no obligation that a violation of the legal interest of a specific individual or of a social interest should be demonstrated. Only after a complaint has been examined on its merits may the court conclude that there has been no violation of the rule of law, and therefore dismiss the complaint. A possible basis for rejecting the Public Prosecutor's complaint would arise were there to be no invoking of a violation of the law by the authority, but rather, for example, reference to expediency or economy of action.

The Public Prosecutor makes his or her own assessment in deciding to participate in administrative court proceedings. This is then his or her own decision, which the administrative court is in no position to change.[58] Pursuant to the wording of Article 8 p.p.s.a. (the law on proceedings before administrative courts), the Public Prosecutor is allowed to participate in pending proceedings and exercise other procedural rights listed in this provision if, in his or her own assessment, the protection of the rule of law so requires.[59]

Neither the Public Prosecutor nor Poland's Ombudsman (Commissioner for Citizens' Rights) act in a case in their own interest, but rather in the general interest *vis-à-vis* the protection of the rule of law or human and civil rights. The doctrine here emphasises that the Public Prosecutor's activity is to exercise control of legality, so that participation in administrative court proceedings may be dictated by two types of consideration. Firstly, it may be a means of verifying the lawfulness of proceedings before an administrative authority,

[58] In the light of Article 8 p.p.s.a.

[59] For more, see J. Świątkiewicz, *Rzecznik Praw Obywatelskich a sądownictwo administracyjne po reformie*, Biuro Rzecznika Praw Obywatelskich, Warszawa 2004, p. 11.

and the act or action taken therein. Secondly, it may be aimed at protecting the rule of law in judicial proceedings.[60]

1.5.3. THE OMBUDSMAN AND CHILDREN'S OMBUDSMAN

The Ombudsman (Commissioner for Citizen's Rights, *RPO*) upholds the freedoms and rights of the human being and citizen as set out in the 1997 Constitution of the Republic of Poland and other normative acts, including as regards pursuit of the principle of equal treatment. At the same time, the Constitution lays down the scope of cases in which the *RPO* may take action while also serving as the basis upon which specific legal remedies are granted to the Ombudsman. The literature also holds that the participation of the Ombudsman (and Public Prosecutor) in administrative court proceedings is important, given the specific tasks and duties assigned to these posts in the Polish state operating under the rule of law.[61]

Jurisprudence and doctrine accept the principle of subsidiarity of the intervention of the Ombudsman. Under this principle the Ombudsman shall take action when a person whose rights have been violated has now exhausted all other available legal remedies. If the Ombudsman sees no serious shortcomings in an continuing inquiry, there is no intervention until such time as that inquiry ends.[62] Neither does the Ombudsman take any action that would replace the exercise of the rights by citizens, nor does the holder of the post act in the capacity of legal representative, nor supplier of detailed legal advice on the way a case may be initiated and conducted (given that there is no legal provision to impose or grant such an obligation).

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[60] J.P. Tarno, *Komentarz do art. 8*, [in:] *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, wyd. V, Warszawa 2011.

[61] L. Kaczmarski, *op. cit.*, p. 189.

[62] W. Taras, *Rzecznik Praw Obywatelskich w postępowaniu administracyjnym*, "Państwo i Prawo" 1991, nr 1, pp. 44–45.

The procedural position in administrative court proceedings is the same whether the Ombudsman or the Ombudsman for Children is involved. Those two authorities enjoy the same powers as the Public Prosecutor. Crucially, they perform tasks different from those of the Public Prosecutor, such that pointing to nothing more than a violation of law in a complaint will not suffice, where there is no appended indication regarding some violation of civil/citizen's (or children's) rights and freedoms.

The Ombudsman's activity extends to cases of the violation of human rights and freedoms regulated in Chapter II of Poland's 1997 Constitution. The Ombudsman should engage in activity regarding the protection of constitutionally guaranteed freedoms and rights of the human being and citizen. This means that the Ombudsman lodges a complaint to the provincial administrative court in a case that concerns the interests of citizens, deriving a right to complain from the requirement that the legal order be protected.

The complaint legitimacy of the Ombudsman for Children is enshrined in the Act on the Children's Ombudsman,[63] by virtue of which the Ombudsman safeguards the rights of the child as defined in Poland's 1997 Constitution, the Convention on the Rights of the Child[64] and other legal provisions, with respect for the responsibility, rights and duties of parents. The Ombudsman for Children, in exercising his or her powers, shall be guided by the welfare of the child and shall take account of the fact that the natural environment for a child's development is the family.[65]

[63] Article 1 paragraphs 2 and 3 of the Act of 6 January 2000.

[64] Adopted by the General Assembly of the United Nations on 20 November 1989, Official Journal of Laws RP of 1991 No. 120, item 526, as amended.

[65] H. Knysiak-Sudyka, [in:] *Skarga i skarga kasacyjna w postępowaniu sądowoadministracyjnym. Komentarz. Orzecznictwo*, wyd. V, Warszawa 2021, LEX/el. 2021, Article 50.

1.5.4. THE OMBUDSMAN FOR SMALL AND MEDIUM-SIZED ENTERPRISES (SMES)

The Ombudsman for SMEs is a relatively young institution under Polish law, having been established as part of Poland's 'Business Constitution' in 2018,[66] this being a package of laws regulating anew the domestic economic market. In particular, this Ombudsman acts in the name of implementation of the principles of freedom of economic activity, of deepened trust in public authorities on the part of entrepreneurs, of impartiality and equal treatment, and of sustainable development and the principle of fair competition, as well as respect for good customs and practices and the legitimate interests of entrepreneurs. Tasks focus on the defence of the rights of micro-entrepreneurs and small and medium-sized entrepreneurs engaging in business activity in Poland, as well as taking care to ensure proper standards in relations between entrepreneurs and public authorities, in particular in the area of activities pursued by state authorities.

In this case, complaint legitimacy was acquired with the reform of business regulations taking place in March 2018. This included application to the administrative courts for legal protection aimed at clarifying legal provisions whose application has led to discrepancies in the case law of administrative courts. In individual cases, this Ombudsman may request the initiation of administrative proceedings, file complaints and complain to the administrative court, as well as participate in these proceedings, with rights equal to those of a Public Prosecutor. The Ombudsman will act either *ex officio* or on request. No data is available on the filing of complaints with the court, in the case of the SME Ombudsman. The relevant Annual Report, however, shows the extent to which, in 2021, this Ombudsman was involved in 201 administrative and judicial administrative cases concerning entrepreneurs.[67]

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[66] Act of 6 March 2018 on the SME Ombudsman, Official Journal of Laws RP of 2018, item 648.

[67] *The report on the activity of the SME Ombudsman covering the period from 1 January 2021 to 31 December 2021*, Warsaw, March 2022, p. 15, available at:

1.5.5. SOCIAL ORGANISATION

The Law on Proceedings before Administrative Courts does not define the term 'social organisation', nor does it refer to the way it is understood in other laws. In fact, there is no single, uniform definition of this notion in the Polish legal system and its content is reproduced in the doctrine as common features of certain structures perceived as social organisations are sought.[68]

It is assumed in the doctrine that social organisations for the purposes of the Law on Proceedings before Administrative Courts are all permanent associations of natural and legal persons, established to fulfil specific, socially important purposes, having a permanent organisational bond, and not being part of public administration authority, either governmental or local or regional governmental.[69] This concept is understood broadly, and also therefore includes foundations.[70]

The legal situation in proceedings before an administrative court is complex, more so indeed than with the categories of entity referred to above. This is a reflection of the legal status in force, but also the understanding of the concept of 'legal interest' adopted in doctrine and jurisprudence. Even at this stage it is worth mentioning that the standing to complain enjoyed by an environmental organisation (as a type of social organisation) differs, as will be discussed below.

A social organisation may file a complaint initiating administrative court proceedings in two types of case, i.e. when:

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https://rzecznikmsp.gov.pl/ritilob/2022/05/Sprawozdanie-Rzecznika_2021.pdf (accessed on: 25.08.2022 and 6.09.2022).

[68] M. Lasiński, *Organizacja społeczna w postępowaniu administracyjnym*, "Nowe Prawo" 1987, nr 10, pp. 39 *et seq*.

[69] M. Romańska, *Komentarz do art. 25*, [in:] *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, T. Woś (red.), wyd. VI, LEX/el. 2016

[70] Initially, the jurisprudence remained divergent as regards the recognition of the foundation as a social organization. A foundation in Polish law is a legally separated property estate, which as a legal person is established by the so-called foundation deed. It is a declaration of will of a natural person, expressed in the form of a notarial deed. These doubts were finally resolved by the judgement of a panel of 7 judges dated 12 December 2005, II OPS 4/05, ONSA and WSA 2006, no. 2, item 37.

1) it has a legal interest in doing so;
2) the case concerns the legal interests of other persons, but the social organisation has in this case participated in administrative proceedings.

The former involves situations in which a social organisation has been party to administrative proceedings, which is to say that its legal interest has actually been affected directly thereby (as when a tax decision is challenged), with this denoting a right to complain as based on having a legal interest.

In the latter, the entitlement of a social organisation to bring a complaint is derived from the fact that it has acquired the status of a subject with the rights of a party in the administrative proceedings as conducted previously.[71] A social organisation may participate in administrative proceedings, in a case concerning the legal interest of another entity. The rules of access of a social organisation to administrative proceedings are regulated in detail by the Code of Administrative Procedure. Access is based on two conditions being met, i.e. justification *vis-à-vis* of statutory objectives and support by the public interest. The administrative authority conducting proceedings confirms the fulfilment of these conditions by admitting the organisation to them. The consequence of admission is that the organisation in society is granted the status of entity with the rights of a party, which is equivalent to receiving the same rights as a party to the proceedings. These rights include filing a complaint to the administrative court.[72] It is also worthy of note that a refusal to admit a social organisation to the proceedings is subject to a complaint to the administrative authority and, in the event

[71] A. Skoczylas, *Podmioty legitymowane do złożenia wniosku o rozstrzygnięcie sporu kompetencyjnego lub sporu o właściwość w rozumieniu art. 4 p.p.s.a.*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2007, nr 2, pp. 9 *et seq*.

[72] There is also a different view in jurisprudence, according to which the mere fact of the participation of a social organization in administrative procedure is insufficient to conclude that it has standing to bring an action (for more, see the NSA judgment of 10.4.2008, II OSK 374/07, Legalis; NSA judgment of 7.5.2019, II OSK 1584/17, Legalis). The justification for this position is that the court is not bound by assessment of the fulfilment of the prerequisites for the participation of a social organization made by the public administration body at the stage of administrative proceedings. It is difficult not to share this view.

of a subsequent decision unfavourable for the social organisation, a complaint to the administrative court.

The prerequisite for the participation of a social organisation in administrative court proceedings in cases of other persons is the need to protect the social interest which, at the stage of proceedings before an administrative authority, is done to support the granting of the status of a social organisation as a party, and, moreover, the compliance of the subject matter of the proceedings with the statutory objectives of that organisation.

The onus is on the organisation in society to demonstrate that both conditions are met in any case in which it decides to bring an action. It is the court's task to examine to what extent they have been met, which will only allow the social organisation to have *locus standi*.

An organisation may participate in proceedings if two conditions are met: the administrative court case concerns the legal interest of other persons and the scope of the statutory activities of the social organisation, and the subject of the case must be acts taken in the course of the administrative procedure. The statutory activity must have a defined subject matter, not merely representing the legal interests of others. This is to say that the activity must have a precisely defined scope, including the subject matter of the administrative court case in question. What is decisive to the assessment of a request to participate in a judicial administrative case is the demonstration, not only that the case concerns its statutory activity, but also that there is a circumstance whereby a social interest in favour of such participation exists. The purpose included in the statute of a social organisation that may justify its being admitted to participate in court proceedings may be, not only the defence of individual interests and rights of members, but also, for example, the promotion of a certain activity or ideas, the protection of material and immaterial values, and the prevention of unfavourable social or economic phenomena. An organisation in society may act to the benefit of one of the parties, strengthening its position in the proceedings, or it may not bind its procedural activities to the interests of any of the parties, aiming only to comply with the requirements of social interest.

It is accepted in jurisprudence that the participation of social organisations in administrative court proceedings should be understood broadly. It cannot be limited to the control of administrative proceedings. An interpretation allowing the possibility for social organisations to be admitted as participants in any judicial administrative proceedings, regardless of their subject matter, is supported, not only by a literal interpretation, but also by a functional and pro-constitutional interpretation. Indeed, the participation of a social organisation essentially ensures social control over the activities of the judicature, allowing a case to be explained from additional perspectives. It may therefore have a positive impact on the implementation of the right to a court hearing (under Article 45(1) of the 1997 Constitution), as well as on the improvement of executive activities, the assurance of which constitutes a constitutional value (see the Preamble to the Constitution). At the same time, the ensuring of a legal possibility for social organisations to apply for admission to participate in proceedings represents an expression or embodiment of the concept of civil society, allowing interest groups interested in a case to have their say.[73]

Wider powers regarding the filing of a complaint to an administrative court under Polish law have been granted to environmental organisations, as a sub-category among social organisations in general. In doctrine this is said to be one of the best illustrations of the impact of EU law on procedural provisions in all Member States.[74] The sources of law for judicial authorities in environmental cases at international level, however, are to be found ultimately in Article 9 section 2 of the Aarhus Convention of the UN-ECE. If the case concerns a public participation procedure within the meaning of Directive 2003/35,[75] then the organisation is entitled to complain against the decision, even if it has not participated in that procedure.

[73] NSA provision I OSK 2800/17 from 18.01.2018, LEX no. 2427285.

[74] Z.H. Stawińska, *The right to file a complaint by environmental organizations in administrative court proceedings as an example of the Europeanisation of national legal systems*, "Studia Administracyjne" 2020, nr 12, p. 80.

[75] Consolidated text: Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment

Polish law secures this entitlement where there is a meeting of the conditions that:

(1) this is an environmental organisation (as must be established by virtue of the content of its statutes); and
(2) it was established at least one year before the administrative proceedings were initiated.

This last condition was introduced in order to avoid a practice whereby environmental organisations were created solely to complain against decisions made in proceedings.[76]

This particular entitlement applies to proceedings in respect of new developments. Under Polish law these may be conducted across more than one stage, wherein each said stage ends with the issuance of an administrative decision. At the final stage, a decision in respect of the new development to be invested in is issued. If one of the decisions issued in this process is preceded by an environmental impact assessment, then an environmental organisation will be able to challenge the decision to invest. The law does not require the organisation in question to participate in the proceedings ending with the issuance of the permit allowing the development to proceed. In the complaint, however, it is necessary for there to be an indication as to the extent to which the permit referred to is inconsistent with the environmental decision, as well as substantiation of the allegations made.

This is the latest extension of the complaint rights of environmental organisations arising out of a need for Polish domestic law to be aligned with EU law. This took place in 2021 and once again exemplifies the influence of EU law on the procedural solutions applied in the Member States.

The amendment extending the right to complaint to environmental organisations did not remove all doubts concerning the

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and amending them with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

[76] The broad legal standing may sometimes lead to abuses of public law. Legal regulations should therefore include norms that make it more difficult to act illegally. For more, see A. Barczak, *Udział organizacji ekologicznych w ochronie środowiska a granice realizacji przez nie prawa do udziału w postępowaniu wymagającym udziału społeczeństwa*, "Studia Prawnicze KUL" 2020, nr 3(83), p. 44.

initiation of judicial review of public administration actions in the sphere of environmental protection. It concerned only proceedings in individual cases (e.g. a permit relation to the construction of a specific facility). Planning documents remained beyond the ambit of the amendment, and in Polish law that group denotes both policies and plans, and programmes in the field of environmental protection. Local spatial (physical) development plans also fall into this category. Constructing legal standing on the basis of universal conditions means that, in order for the possession of legal standing to complain about documents to be demonstrated, a legal interest is necessary, with this understood in the same way as when individual acts are complained about, i.e. with a necessity for it to be individual, up-to-date, arising out of applicable legal provisions, and so on. Under the relevant regulations, environmental organisations wishing to file a complaint against a local development plan successfully must demonstrate a violation of their legal interest, doing so by indicating the legal provision from which they are deriving their right or obligation. While for the owner of a property covered by a plan this is not difficult, the link will be the protection of property for an environmental organisation raising an allegation of, for example, insufficient protection of greenery in the area covered by a given plan, given that finding such a link proves challenging. The allegation cited may be treated in terms of social interest, which (as already explained) is not covered by judicial protection in the Polish system and is therefore insufficient when it comes to the obtainment of standing to bring an action.

The concept adopted in Polish law of the standing to complain at the disposal of environmental organisations (or more widely of social organisations) in respect of planning documents (having the form of local laws or other resolutions) needs to be verified in the context of the requirements of the aforementioned Aarhus Convention, under which national rules may define the requirements to be met by NGOs if they are to qualify for legal standing, even as broad access to justice is required. *The Aarhus Convention: An Implementation Guide* draws attention to the fact that, even criteria such as having a sufficient interest or a right that may be impaired may be

incompatible with the Convention if understood too narrowly in the case law of the reviewing bodies.[77]

1.5.6. OTHER ENTITIES

The last category of entities with *locus standi* is extremely diverse. Even the doctrine has made no attempt to classify it. Neither is there any need to undertake classification in the context of the present study. The only thing held in common here is indubitably that the basis for standing derives from specific legal provision. Several legal bases may be given as examples, though, as a side note, these will offer a good perspective as to the issue covered by the cognition of an administrative court in Poland.

1) Cases concerning a local referendum. The initiator of a local referendum enjoys the right to complain. He or she may complain against decisions of the authorities *vis-à-vis* the rejection of an application regarding the holding of a local referendum.
2) In matters of supervision over local government. The right to complain here is vested in appropriate supervisory bodies, which, under the 1997 Constitution, are: the President of the Council of Ministers, a Voivode, Provincial Governor (in matters other than financial) and a Regional Chamber of Accounts (solely in financial matters). The complaint here shall relate to a resolution or order issues by tiers of government at local level (*gmina*), county (*powiat*) level, or provincial level.
3) In matters of the supervision of professional corporations, in which regard bodies exercising supervision have the right to complain, e.g.:

[77] *United Nations Economic Commission for Europe, The Aarhus Convention: an implementation guide*, Second edition, 2014, p. 194; https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive _eng.pdf (accessed on: 30.08.2022).

- the Minister competent in matters of agriculture may appeal to the administrative court against a final resolution of the bodies governing the veterinary profession, as adopted in matters ascertaining the right to practice that profession, depriving or suspending the said right in line with an inability to engage in it, or ascertaining the loss of the said right;
- the Minister responsible for construction, planning and spatial development and housing has the right to challenge resolutions of bodies of the Polish National Chambers of Architects and Civil Engineers.

4) Where matters relate to the professional ethics of professional corporations, there is legitimacy vested in bodies whose remits include the said ethics, e.g. national and district ombudsmen of professional liability, who are entitled to file complaints regarding professional liability among members of the chambers of architects and construction engineers.
5) In matters concerning press law, an editor-in-chief enjoys the right to lodge a complaint against a refusal to provide information to the press issued by entrepreneurs and entities not falling within the public-finance sector and not operating for profit.
6) In cases relating to industrial property law, the President of the Patent Office, the Public Prosecutor General of the Republic of Poland and the Ombudsman all enjoy rights to lodge a complaint against a final decision of the Patent Office which terminates proceedings in a case and is tantamount to gross infringement of the law.

1.6. Conclusions and postulates *de lege ferenda*

In Polish law the legitimacy of complaint giving title to the initiation of a review of public administration activity via administrative court proceedings is based on a person's own legal interest, or is as granted by the legislator to a closed group of entities. Participation in administrative court proceedings is based on complaint standing. The

scope of jurisdiction of the administrative courts, which includes challenge to the activity of public administration being mounted in various legal forms, results in the derivation of a legal interest requiring complex processes of interpretation of legal provisions. It would seem to be relatively simple to demonstrate a legal interest where complaints are against administrative decisions or individual tax interpretations. In this case, a clear limitation to the provisions of substantive acts is possible, assuming that legal interest will derive from a public subjective right, understood as an individual having specific rights granted by legal provision, or obligations imposed, with exercise possible by virtue of an administrative decision. The numerous items of case law on the interpretation of legal interest will undoubtedly facilitate the determination of such interest in particular cases.

Despite well-established jurisprudence and a rich literature, even in this respect, the determination of right of action may cause difficulties, as confirmed currently by court rulings in cases on the implementation of provisions set out in the Decree municipalising real estate in the city of Warsaw after the Second World War. In fact, it was not until this year that the Supreme Administrative Court ruled that only legal successors, heirs of owners, are entitled to demand the return of real estate. In contrast, for many years, legal interest was also conferred upon purchasers of claims. In the face of that, Poland's Supreme Administrative Court stressed that the legal interest constituting the basis for the right of action must arise out of a substantive administrative law norm, and also have a dimension involving direct connection of the legal situation of the applicant with such a norm.[78]

The postulate *de lege ferenda* concerns the conferring of the *legal standing* upon those public administration authorities tasked with upholding the interests of specific groups. The solution currently in force *inter alia* grants legitimacy to Poland's Commissioner for Citizen's Rights, or Ombudsman (*RPO*), and to the Children's Ombudsman and Ombudsman for Small and Medium-sized Enterprises,

[78] Judgments of the Supreme Administrative Court of 29.08.2022, in cases I OSK 2030/20, I OSK 2875/20 and I OSK 707/20.

even as no such legitimacy is granted to the Patients' Ombudsman, the Financial Ombudsman and others. Extension of the right to complain to these entities would strengthen supervision and scrutiny over administrative activities in areas corresponding with the tasks of the ombudsmen, whose duty is by definition to protect the rights of a certain category of subject.

De lege ferenda postulates also relate to the manner of shaping complaint legitimacy in plans and programmes subject to the cognition of an administrative court. Within the current legal framework, complaint legitimacy has been based on the same, by type, criterion of legal interest. It is already evident from the content of the present article that the way in which this criterion is interpreted in relation to organisations in society poses a challenge which, as case law makes clear, is very difficult to meet, or in softer terms, is challenging. It is therefore necessary for there to be a re-think of the role the legislator seeks to assign to social organisations, in relation to the activity of administration pursued in shaping the situations of the individual by virtue of acts of local law. Among possible solutions, two may be highlighted. Firstly, the role of such a social organisation is to ensure the exercise of societal supervision and scrutiny over the activities of the administration, in particular its compliance with the law. For this reason, legitimacy of complaint would be based on the criterion of violation of the rule of law by the administration, but without the need for a social organisation to demonstrate its own legal interest in a given case.

Secondly, the participation of an organisation in the law-making procedure, and the latter's investigation and examination before an administrative court, would represent opportunities for account to be taken of society's interest, a notion under Polish administrative law with a separate existence from that of public and individual interest.

Notwithstanding proposed amendments, the scope of the right of complaint in Polish law may be deemed to be shaped broadly, in such a manner as to secure broad control by the courts over activity in public administration.

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GÁBOR HULKÓ, ASSOCIATE PROFESSOR
Széchenyi István University | DOI: 10.32041/9788367149365/2

Chapter 2. The Activism of the Court of Justice of the European Union and the Possibilities of Administrative Adjudication

2.1. Introduction

The Court of Justice of the European Union (henceforth: CJEU) ensures that European Union (henceforth: EU) law is interpreted and applied the same in all EU Member States. Ensuring countries and EU institutions abide by EU law. A case may be referred to the CJEU[1] under different procedures in the Treaties[2] (henceforth: Trea-

[1] Competences of the Court of Justice of the European Union, https://www.europarl.europa.eu/factsheets/en/sheet/12/competences-of-the-court-of-justice-of-the-european-union (accessed on: 15.09.2022).

[2] Treaties currently in force, https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html (accessed on: 15.09.2022). If referring to a particular Treaty, it will be highlighted explicitly.

ties): infringement proceedings,[3] actions for annulment,[4] actions for failure to act,[5] actions for damages[6] and preliminary rulings.[7]

A request for a preliminary ruling may be made to the CJEU if a question concerning the interpretation of the Treaties and the validity and interpretation of acts of the EU institutions, bodies, offices or agencies arises in proceedings before a national court or tribunal to rule on the underlying case. If such a question arises before a court in a Member State and that court considers it necessary to rule on this preliminary question to give judgment, it may ask the CJEU to rule on it.

The CJEU has interpretative powers concerning EU rules. Although the EU strictly speaking has no constitution, the Treaties may be considered a quasi-constitution that lays down the main principles on which the Union operates and the values and objectives it seeks to achieve. The CJEU has exclusive competence to interpret the Treaties and performs a quasi-constitutional court

[3] The Commission may typically open infringement proceedings against a Member State if it considers that it has failed to fulfill an obligation under the Treaties. Before a case is referred to the CJEU, the Commission delivers a reasoned opinion on the case after giving the Member State concerned the opportunity to submit its observations. If the Member State concerned fails to comply with the opinion within the time limit set by the Commission, the Commission may refer the matter to the CJEU.

[4] In the annulment procedure the CJEU reviews the legality of binding rules of EU bodies. If the CJEU finds that the action is well-founded, it will declare the contested act null and void.

[5] An action for failure to act may also be brought against EU bodies if one of them fails to act in breach of the Treaties. To initiate proceedings Member States and other institutions of the Union may bring an action before the CJEU to have the infringement established.

[6] Actions for damages mean sanctioning EU institutions: any person or company that has had their interests harmed as a result of the action or inaction of the EU or its staff may take action against them through the CJEU.

[7] The General Court has the jurisdiction to give preliminary rulings (Article 267 TFEU) in the areas laid down by the Statute (Article 256(3) TFEU). Since no provisions have been introduced into the Statute in that regard, however, the Court of Justice currently has sole jurisdiction to give preliminary rulings. Competences of the Court of Justice of the European Union, https://www.europarl.europa.eu/factsheets/en/sheet/12/competences-of-the-court-of-justice-of-the-european-union (accessed on: 15.09.2022).

function within the EU. The Treaties, however, are not complex legal texts; they only set out primary objectives without laying down specific and detailed rules in many cases. Their provisions must consequently be given certain status by legislation or by interpretation of the law by the CJEU.

If the interpretation of the law by the CJEU is considered too broad,, it may be described as judicial activism. This has both beneficial and detrimental effects. On the positive side, an expansive interpretation has often contributed to the development of EU law. It has encouraged the EU legislator to codify the interpretation of the CJEU utilising legislation, for example, in the field of social rights or internal market regulation. The detrimental consequence of judicial activism is that it may impose obligations on the Member States and extend the scope of EU law to powers that the Member States have not transferred.

No judicial activism explicitly entails the invalidation or inapplicability of a national rule. In proceedings before the CJEU national law is considered a fact and it is in light of this that the CJEU interprets EU law. The inapplicability of a given national rule, however, may only be declared by the national court, considering the CJEU judgment in the national court proceedings relating to the case in question. To sum it up: the CJEU has no power to invalidate a national rule in any procedure and has no legislative function, but through its decision-making procedure decisions and legal interpretations may influence the rules of interpretation or even the legal system in the Member States.

The fundamental problem, and a primary hypothesis of this study, with judicial activism is that, in practice, it almost always falls to the national legislator to amend the problematic national sources of national law. This is not a systemic solution, however, and cannot be considered a general or satisfactory practice from a long-term point of view, including its *ex-post* effect. The judicial activism of the CJEU could also lead to the coexistence of two parallel interpretations of the law in individual cases with the similar factual situation: one in which the authorities act only within the framework of the interpretation of the national law and another where a different legal

interpretation is established based on judicial interpretation of the CJEU, in the case of a preliminary ruling.

Judicial activism also opens up several broader problems and issues. One of these is the fundamental question of the relationship between EU law and Member State constitutions, which is yet to be satisfactorily resolved. The different Member States have different judicial and academic approaches to this matter. It is not for the courts or national public authorities to decide this relationship, but the member states' courts and public authorities are confronted with this problem. The relationship between EU and national legal orders and constitutions is also a question of substance, as there may be issues of principle and socio-political issues, such as the concept of the traditional family, the rights of minorities, the role of historical tradition in legal systems, child protection, etc., which may have different approaches within each Member State, resulting in different application practices and judiciary interpretations. If the EU as an international entity wishes to take a stand on value issues, it would be unfortunate if the CJEU were used to do so instead of political discussion and debate. The relationship between national constitutions and community law is at the heart of the relationship between national legal systems and EU law and defines the boundaries of judicial activism. To this matter, we now turn.

2.2. Constitutional order and community law

The CJEU's position is that the primacy of EU law is absolute and unconditional. This means that any source of EU law at any level takes precedence over national regulation, regardless of the date it came into force. The CJEU also has exclusive jurisdiction to examine the validity of EU law and national courts cannot apply national law rather than to EU law in national proceedings before them. To support this concept the CJEU has gone a long way, backing up its position in several judgments, such as: C-26/62 *van Gend*

& *Loos v. Netherlands Inland Revenue Administration* (1963);[8] C-6/64 *Flaminio Costa v. E.N.E.L.* (1964);[9] C-11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970);[10] C-106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* (1978);[11] and C-224/97 *Erich Ciola v. Land Vorarlberg* (1999).[12] In general, the principle of primacy of EU law means that EU law takes precedence over national law and that national law that is in conflict with EU law cannot be applied and that the application of EU law cannot be made conditional on its compatibility with national law.

The principle of direct effect is closely linked to the principle of the primacy of EU law. The principle of primacy of EU law, however, impacts the national legal system, as it prevents the creation of legislation in the national legal system that runs contrary to EU law. If it does, it cannot be applied. Direct effect means that an EU legal norm becomes a direct source of law for national courts. This direct effect is necessary to enable an individual to enforce a right based on an individual EU right, even if that right does not exist in the national legal system. The direct effect is conditional: it requires that the EU legal norm in question (1) be sufficiently circumscribed and clear, (2) contain a specific individual entitlement (this may take the form of a prohibition against a Member State), (3) not be

[8] Judgment of the Court of 5 February 1963. NV Algemene Transport – en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0026 (accessed on: 15.09.2022).

[9] Judgment of the Court of 15 July 1964. Flaminio Costa v. E.N.E.L., https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006 (accessed on: 15.09.2022).

[10] Judgment of the Court of 17 December 1970. Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61970CJ0011 (accessed on: 15.09.2022).

[11] Judgment of the Court of 9 March 1978. Amministrazione delle Finanze dello Stato v. Simmenthal SpA, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61977CJ0106 (accessed on: 15.09.2022).

[12] Judgment of the Court (Second Chamber) of 29 April 1999. Erich Ciola v. Land Vorarlberg, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61997CJ0224 (accessed on: 15.09.2022).

subject to conditions and that no further measures are required for its implementation. This was the ruling of the CJEU in *van Gend & Loos v. Netherlands Inland Revenue Administration* (1963), in which it examined whether a provision of a fundamental Treaty (Article 12), which was a primary EU norm (EEC Treaty), provided for a prohibition on the imposition of customs duties, had a direct effect. The reply of the CJEU was affirmative because the above conditions were fulfilled.

Where an EU legal rule that has no direct effect is invoked in an individual enforcement action, the primacy of EU law merely requires an EU-compliant interpretation of the national law where possible, but it does not preclude its application. Where an EU provision with direct effect is at stake, however, the principle of primacy of EU law is more strongly applied. The national court cannot use the national law if it cannot be interpreted in a way that is compatible with the EU law with direct effect.

In many cases the direct effect is *de facto* necessary for the primacy of EU law to prevail in an individual enforcement action. At the same time, the principle of the primacy of EU law also applies in proceedings that are not brought in the context of individual enforcement, such as in infringement proceedings or state aid proceedings. In such cases, the principle of the primacy of EU law applies independently of its direct effect. The principle of the primacy of EU law was developed by the case law of the CJEU and is not enshrined in the Treaties.

Declaration 17 of the Lisbon Treaty, however, contains this principle,[13] regarding the case law of the CJEU and the annexed opinion of the Council Legal Service, according to which the code exists and its application has been elaborated by the case law of the Court of Justice. The Declaration does not guide the scope or potential limits of the principle of primacy. While the case law of the CJEU

[13] Declaration 17 annexed to the Lisbon Treaty recalls that '*in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law*'. J. Cloos, *The Debate on the Primacy of EU Law*, https://www.tepsa.eu/the-debate-about-the-primacy-of-eu-law/ (accessed on: 15.09.2022).

supports the broadest possible interpretation, several national constitutional courts question the supremacy of EU law over national constitutions. It is unclear whether all EU legal norms precede all national legislation. Deciding on the delimitation of competencies between the EU and the Member States is a particular problem area, the so-called competence problem, that remains unresolved.

This arises in the interpretation of Article 19 TEU,[14] under which the CJEU '*shall … give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions*'. On this basis, the CJEU also assumes exclusive competence to interpret the principle of conferral of powers, as laid down in Article 5(2) TEU:[15]

> '*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*'.

The position of the CJEU does not mean, however, that the word of this court will be the final decision on a given jurisdictional issue and that national (constitutional) courts will accept it unconditionally, as is the practice of some Member States' constitutional courts.

The CJEU has held that the validity of EU law does not derive from the delegation of powers by the Member States but exists *sui generis* as a new and special body of international law. According to this view, the primacy of EU law is absolute, extending to all EU legal rules, primary and secondary, and prevailing over all the laws of the Member States, including their constitutions. The applicability of an EU legal rule is also a matter for the CJEU alone. Although the status of EU law enjoys a special status in all Member States, not all

[14] Consolidated version of the Treaty on European Union, Title III – Provisions on the Institutions, Article 19, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016M019 (accessed on: 15.09.2022).

[15] Consolidated version of the Treaty on European Union, Title I: Common Provisions, Article 5 (ex Article 5 TEC), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008M005:EN:HTML (accessed on: 15.09.2022).

of the Member States share the view of the CJEU that the primacy of EU law is unconditional and cannot be limited in any way.

Given the informative value of examining Member State approaches that contradict, or partially contradict, the CJEU's position, from the point of view of the research subject and the assessment of the situation, this study will focus on such Member State approaches. There is also the social phenomenon by which the approach of the regime-changing, ex-socialist EU Member States is much more pronounced towards the primacy of EU law. This study, therefore, examines this phenomenon through these two filters and provides examples and case studies of judicial and national approaches to the subject.

2.2.1. CASE STUDY OF POLAND

In Poland the Constitution[16] establishes the relationship between international and domestic law, and EU law is treated as international law. As a general rule ratified international legal agreements stand lower in the hierarchy of sources of law and must comply with the law. Exceptions are international treaties ratified by law or by prior consent expressed in a national referendum, which takes precedence in the event of a conflict with the law. Where it follows from a treaty establishing an international organisation ratified by the Republic of Poland, the law established and applied by the international organisation, directly applicable and in the event of a conflict, shall prevail. Based on the Constitutional Court's practice, it is established that EU legal norms cannot override constitutional rules.

The Constitution has no specific provision on the relationship with EU law, which is dealt with under international treaties. In its remarks on Article 8, which identifies the Polish Constitution as the apex of the hierarchy of legal sources, the commentary on the Constitution broaches the problem that the principle of the primacy

[16] The Constitution of the Republic of Poland, https://www.senat.gov.pl/en/about-the-senate/konstytucja/ (accessed on: 15.09.2022).

of the Polish Constitution conflicts with the principle of primacy of Community law, which requires Community law to take precedence over all the national law of the EU Member States, including the Constitution. According to the commentary, the problem of this conflict becomes relevant when a dispute between a community law rule and a constitutional rule cannot be resolved by interpretation. In this respect the Polish Constitutional Court assumes that:

> *'In the Polish legal system such a contradiction cannot be resolved by recognising the primacy of the Community norm over the constitutional norm. The interpretation of the law cannot lead to the loss or withdrawal of the binding force of the constitutional norm and the 'substitution' of the constitutional provision in question for the Community norm.'*

In such a situation it would fall to the Polish legislator to decide whether to amend the constitution, propose an amendment to Community law or ultimately withdraw from the European Union. This decision must be taken by the sovereign, the Polish nation, or a public authority representing the nation under the constitution. The Constitution's standards on individual rights and freedoms set a minimum and uncrossable threshold, which cannot be lowered or called into question by the introduction of Community rules. In this respect the Constitution fulfils its role as a guarantor of protection of rights and freedoms clearly defined, which applies to all legal entities acting within its scope. The *European law-friendly* interpretation is limited in this respect, as both the commentary and the Polish Constitutional Court have pointed out. Resolving this conflict must in no way lead to results incompatible with the precise wording of constitutional norms and the minimum guarantee of functions provided by the Constitution. The Constitutional Court therefore does not recognise the possibility that the binding force of a constitutional rule may be called into question merely by the incorporation of a contradictory Community rule into the European legal order.

Another relevant provision of the Constitution from the point of view of EU law is Article 90 on the delegation of powers of public

authorities, which states that the Republic of Poland may, based on an international agreement, delegate the management of public authorities in some issues to an international organisation or international body. A law expressing consent to the ratification of an international treaty of this type is adopted by a two-thirds majority of the *Sejm* in the presence of at least half the complement of deputies provided for by law and by a two-thirds majority of the Senate in the presence of at least half the complement of senators provided for by law. A national referendum may also obtain consent to ratification under Article 125 of the Constitution. Article 90, although it does not specifically refer to EU law and always speaks of international law, was explicitly inserted in the Polish Constitution when Poland joined the European Union.

According to the Polish Constitutional Court, Community law, whether primary or secondary, is in no position to override national law. The principle of the supremacy of the Constitution is unquestionable. It is one of the highest principles of law, and the supremacy of Community law is guaranteed only within the framework of the Constitution of the Republic of Poland. The binding force of Community law in the Republic of Poland derives directly from the Constitution, which determines the procedure and scope of the delegation of powers. The autonomy of Community law is therefore not absolute; its power derives from its decision, taken in the manner and to the extent required by the sovereign constitution and to which the Republic of Poland is a party, as laid down in the Accession Treaty.

The Polish Constitutional Court has consistently upheld the primacy of the Polish Constitution. Article 4 of the Polish Constitution describes the principle of sovereignty, stating that in the Republic of Poland the supreme power is vested in the nation and that the nation exercises power through its representatives or directly. Article 5 enshrines the independence of the State and states that the Republic of Poland shall safeguard the sovereignty and inviolability of its territory; ensure human and civil liberties and rights and the security of its citizens; protect national heritage; and ensure environmental protection based on the principle of sustainable development. The Polish Constitutional Court, in its decisions on the primacy of EU

law and in its recent decision TK- K 3/21,[17] explicitly refers to the sovereignty of the Republic of Poland, in the sense that if the Constitutional Court were to accept the interpretation of the Court of Justice of the European Union, its sovereignty would be at risk.

On 7 October 2021 the Polish Constitutional Court upheld the petition of the Prime Minister and, in its decision, provided the following principal reasons for its opinion:

1) In Article 87(1) of the Polish Constitution, it states that the system of legal sources in the Republic of Poland is hierarchical. International treaties such as the TEU,[18] the ratification of which was made possible by law, are in this hierarchy below the Constitution, given that the Constitution is at the top of the Polish legal hierarchy. The TEU, like all other international treaties, must therefore comply with the Constitution.
2) It highlights the cases[19] in which it has already examined the constitutionality of international treaties and primary sources of EU law.
3) It stresses that it does not interpret EU law in its constitutional review and respects the competence of the CJEU in this respect. The examination by the Constitutional Court is limited to determining the content of the rules and their compatibility with the Polish Constitution.
4) It pointed out that the Constitutional Court had not asked the CJEU for a preliminary ruling on the matter, as it felt it was pointless and unnecessary to refer to the question of the compatibility of the TEU rules with the Polish Constitution to the CJEU. The CJEU retains exclusive competence to interpret EU law, but the Polish Constitutional Court has

[17] Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union, https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej (accessed on: 15.09.2022).

[18] Consolidated version of the Treaty on European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT (accessed on: 15.09.2022).

[19] Cases nos.: K 18/04 (/s/k-1804), K 32/09 (/s/k-3209), SK 45/09 (/s/sk-4509), P7/20 (/s/p-7-20), P37/05 (/s/p-3705), U 2/20 (/s/u-2-20).

the final say in determining whether specific rules, including EU law, are compatible with the Polish Constitution.

5) It expressed doubts regarding the independence of the CJEU, citing the Forum's decision of 30 September 2021.
6) It pointed out the essence of the Prime Minister's motion, which concerns the relationship between the Treaties and the principle of the primacy of the Polish Constitution, i.e. essentially Polish sovereignty. The constitutional problem presented by the petitioner effectively stretches the constitutional limits of the ever-closer unity between the peoples of Europe. It is closely linked to the loyal implementation of the obligations imposed by the Treaties, as provided for in Article 4(3) TEU, in the so-called new phase of European integration.
7) It stressed as a critical point of the Prime Minister's motion that, although the nature of the competencies conferred on the Union means that no Member State exercises its sovereignty in the absolute sense (within the limits of the delegated powers), the Union, as the recipient of these competences, must respect the national identities and constitutional identities of the Member States and the framework provided by the principles of proportionality and subsidiarity under Articles 4(2) and 5(1) TEU.
8) It referred to the decision of the Polish Constitutional Court of 11 May 2005 (K 18/04),[20] in which the Constitutional Court stated that the transfer of powers of the Member States to such an extent as to prevent the Republic of Poland from functioning as a sovereign and democratic state crosses the border of integration (i.e. close unity). In its decision, the Constitutional Court stressed that this approach is essentially in line with the Federal Constitutional Court of Germany and

[20] Judgment of the Polish Constitutional Tribunal concerning the constitutionality of Poland's accession to the European Union, http://www.proyectos.cchs.csic.es/euroconstitution/library/documents/Polish%20Constitutional%20Tribunal_Judgment%20Polands%20accession%20to%20the%20EU.pdf (accessed on: 15.09.2022).

the Kingdom of Denmark Supreme Court. This Constitutional Court decision was also the starting point for the present decision.

9) It held that the first two sentences of Article 1 TEU were compatible with the Polish Constitution insofar as:
   - the bodies of the European Union operate within the framework of delegated powers;
   - the new, ever closer union (Article 1 TEU, second turn) does not deprive the Polish Constitution of its primacy, i.e. it remains the binding and applicable norm in the territory of the Republic of Poland;
   - the Republic of Poland retains the character of a sovereign and democratic state.
10) It pointed out that the TEU contains precise delegated powers, which do not include the organisation and structure of the judiciary, and that there is no doubt that the Member States, as sovereign parties to the Treaties, have not empowered the EU bodies to presume powers and to derive new powers from existing powers.
11) It stressed that, in line with the case law of the Constitutional Court and Article 91 of the Polish Constitution, EU law is directly applicable and takes precedence over the statutory law.
12) It stressed that agreeing to allow any international organisation, including the European Union and its bodies, to make rules that go beyond the delegated powers and which pre-empt not only the laws but also the Polish Constitution would mean a loss of Poland's sovereignty. The Constitutional Court has firmly stated that no state body of the Republic of Poland accepts such a situation.
13) It stressed that its conclusions in the decision were in line with Article 9 of the Constitution, which states that the Republic of Poland complies with the international law to which it is subject. The subject of *compliance* in the present case is the law binding the Republic of Poland. This binding law, in this case, may only be the law that the European Union and its institutions establish within the competencies conferred on

the Union by the Treaties and which is determined by the obligation to respect the constitutional identity and essential functions of the State (within the limits of subsidiarity and proportionality). Rules established outside these limits are not binding international law norms for the Republic of Poland under Article 9 of the Polish Constitution.

14) It emphasised that the compliance of European integration with national constitutions is also a democratic legitimacy of the functioning of the EU bodies, as confirmed by the Constitutional Court in its 2005 decision. The democratic legitimacy of the EU bodies in the Republic of Poland to establish the norms in force exists only to the extent that the Polish sovereign (nation) has consented to this. It should be recalled that Polish citizens, like citizens of other Member States, generally do not influence the appointment of the executive bodies of the European Union and judges of the CJEU.
15) It stressed that the judgments of the CJEU are not sources of EU law in the light of the Treaties and that theories on their legal significance are divided. In the Constitutional Court's view, CJEU judgments are hybrid in nature, part continental in character and part Anglo-Saxon in character, are addressed to and enforceable by the courts and, as such, are subject to constitutional review.
16) It stressed that the treaty provisions, which, according to the CJEU's interpretation, were the subject of the present constitutional review, specifically concern the Polish judicial system, an area that does not fall within the ambit of the delegated competencies under Article 90(1) of the Polish Constitution. The Polish judiciary is part of the Polish constitutional identity, as the Constitutional Court has indicated in previous decisions.
17) It stressed that Article 1 TEU, from which the CJEU derives its powers to decide on the Polish court system, is an obligation for member states, which is not equivalent to transferring (even destructive) powers to EU bodies, in particular the CJEU. The contractual obligation of the Member States cannot be equated with the powers of EU bodies and institutions.

The CJEU is creating new competencies by divesting itself of the power to decide on the Polish judicial system.

18) It stressed that Article 2 TEU, which contains the EU's fundamental values, should not be a source for creating additional competencies. According to the Constitutional Court, Article 2 TEU has a purely axiological meaning; these values do not function as a legal principle. The administration of justice in the Member States does not belong to the Member States' common constitutional identity since each member state's methods of appointing judges are very different. The rule of law does not determine the appointment method of judges but demands their independence and impartiality. Independence is not, however, inextricably linked to the method of the appointment of judge and may not be tested *a priori* and equally against all judges. The independence of a judge is linked to the specific case over which the judge presides. The Polish Constitution, like previous constitutions, provides a framework for legal guarantees of judicial independence. The CJEU's interpretative guidelines cannot replace these constitutional norms.

19) It stated that in its view the conclusions of the Polish Constitutional Court and the conclusions of the CJEU should be the same as regards the interpretation of Article 2 TEU and the second indent of Article 19(1) TEU. The Polish Constitution also sets a much higher level of guarantees and standards regarding the independence and impartiality of the judiciary than the relevant European law. In this respect, the Constitutional Court considers a basis for mutual and sincere co-operation between the EU and Poland.

20) It recalled that in jurisprudence, referring to the case law of the Constitutional Court, the thesis is sometimes put forward that in the event of an irreconcilable conflict between EU law and the Polish Constitution, the following scenarios are possible:
    (i) changing the Constitution,
    (ii) changing European legislation, or
    (iii) leaving the EU.

These scenarios and claims are only acceptable in academic rhetoric, primarily because irresolvable conflict rarely, if ever, occurs outside legal theory. Any attempts to resolve any conflicts of norms would require sincere mutual dialogue, an obligation derived from the principle of loyalty and a characteristic of European legal culture.

21) It stressed that the Polish Constitutional Court has a unique and privileged role in the system of supreme organs of public power. The Constitutional Court, as the guardian of the Constitution, the legal act which underpins the Polish normative system, maintains legal certainty and is thus also the depository of the sovereignty of the Polish State, at least in the normative dimension.

The CJEU is of the well-founded opinion that its jurisprudence not only evolves but also contributes to the legal order of the EU and, consequently, of the EU Member States, including the Republic of Poland. Since all EU law (as a whole) is hierarchically subordinated to the Polish Constitution and, as such subject to constitutional review, it must be concluded that not are only the normative acts defined in the case law of the CJEU but also the jurisprudence itself, as part of the EU normative order, but they are also subject to the highest legal act in the Polish hierarchy of legal sources, the Polish Constitution, and to constitutional review. As a rule, the Constitutional Court refrains from exercising these constitutional powers in the spirit of sincere co-operation, dialogue, mutual respect and mutual support. At the same time, to the extent that the progressive jurisprudence of the CJEU constitutes an encroachment on the exclusive competence of Polish state bodies, it undermines the Constitution as the highest legal act of the Polish legal system and calls into question the universality of the Constitutional Court's judgments, The Constitutional Court does not exclude the possibility that it will exercise the said powers and will directly assess the conformity of CJEU judgments with the Polish Constitution if necessary removing them from the Polish legal system.

2.2.2. CASE STUDY OF ROMANIA

Under Article 11(2) of the Constitution of Romania,[21] international conventions ratified by the Parliament become part of domestic law. As a general rule, Article 11(3) of the Constitution provides that international conventions contrary to it may be ratified only after a constitutional amendment. Therefore, in a conflict between international conventions and Romania's internal law, supremacy is given to the constitutional norm. The conflict between domestic law and international law is regulated only in specific cases. Article 20 of the Constitution provides for the interpretation of the constitutionally guaranteed human rights and freedoms by the conventions on human rights. It precedes international conventions that guarantee human rights and are more favourable than domestic law, ratified by Romania, over *internal laws*. Article 148(2) and (3) of the Constitution provides that EU law shall prevail over internal laws. The Constitutional Court in its Decision 390 of 2021[22] ruled:

> *'the (Romanian) Constitution does not give EU law priority over the Romanian Constitution, so that a national court does not have the power to examine the conformity of a provision of national law, found to be constitutional..., with the provisions of EU law'.*

The practice of the Constitutional Court makes a clear distinction between rules at the constitutional level and rules below the constitution in cases of conflict between international and domestic law. In the case of a conflict between EU law and internal law, both primary and secondary sources of EU law must prevail over internal law, according to the provision of Article 148 of the Constitution, which in its specific wording refers to the *binding* sources of EU law, so that secondary law in direct effect is also considered binding. In

[21] The Constitution of Romania, https://www.presidency.ro/en/the-constitution-of-romania (accessed on: 15.09.2022).

[22] Decision No. 390 of 8 June 2021, https://www.ccr.ro/wp-content/uploads/2021/07/Decizie_390_2021_EN.pdf (accessed on: 15.09.2022).

the light of the above, the text of the Constitution distinguishes between national laws and constitutional norms in the case of a conflict between international law and domestic law, in the broad sense, i.e. including constitutional sources of law, by placing international law norms between the Constitution and the origins of law under the Constitution. This distinction applies to international human rights conventions and EU law. The Constitutional Court further holds that, although the national court is entitled to examine the primacy of EU sources of law over internal law in its specific application of the law, the concept of internal law may only be understood to refer to sub-constitutional rules. Indeed, Article 11(3) of the Constitution grants this source of law primacy over all other sources of law: EU sources of law cannot have priority over the Constitution.

In this sense, according to the Constitutional Court, a Romanian national judge cannot even examine the primacy of EU sources of law over an internal norm whose previous constitutionality examination in the light of Article 148 of the Constitution has resulted in a finding that the norm is constitutional.

The Romanian legal system thus recognises the primacy of EU sources of law over national law. Still, it limits this to internal laws by placing Community sources of law under the Constitution. The Constitutional Court reserves the right to declare internal laws that conflict with EU sources of the law unconstitutional, but it does so under strict conditions. Neither does the Constitutional Court recognise the primacy of EU sources of law over the Constitution, even in contrast to the practice of the CJEU in this respect.

2.2.3. CASE STUDY OF THE CZECH REPUBLIC

The Czech Republic's relationship with the EU is framed by Articles 10a and 10b of the Constitution.[23] These provisions allow the Czech Republic to transfer certain powers of its authorities to an international organisation or institution utilising an international treaty.

[23] Ústavní zákon č. 1/1993 Sb., https://www.epi.sk/zzcr/1993-1 (accessed on: 15.09.2022).

The ratification of such an international treaty requires the consent of Parliament unless a constitutional decree provides that ratification requires a referendum.[24] In such cases, Parliament shall give its approval by a qualified majority. The Government shall also be obliged to inform Parliament regularly and in advance of matters relating to its obligations as a member of an international organisation or institution. Parliament's lower and upper houses shall give their prior opinions on such issues.[25] The text of the Constitution, however, makes no explicit reference to EU acts and their direct binding force, their primacy of application, or their place in the legal order. Concerning EU law, the Czech legal order does not distinguish between primary and secondary law. It interprets the obligation to apply EU law as a general obligation deriving from Article 1(2) of the Constitution, according to which the Czech Republic shall comply with its obligations under international law.

In joining the EU a sovereign state transfers to an international institution some of its powers in the areas of legislation, law enforcement, central banking, etc. It does not, however, relinquish sovereignty, which is a conceptual characteristic of an independent state. According to the Constitutional Court, shared sovereignty, the transfer of powers, is voluntary, under control and with the participation of the State, which does not mean that sovereignty is weakened or lost. Such a transfer of powers is conditional, as the state reserves the right to withdraw it: it only lasts as long as the EU complies with and respects the Czech core constitution, which states that no changes to the fundamental elements of the democratic rule of law are allowed. The transfer of some of the powers of national authorities is only permitted to the extent that the EU authorities exercise these powers in a manner compatible with preserving the sovereignty of the Czech Republic.

The Euro-amendment of the Czech constitution[26] was introduced in the context of EU accession, which introduced several

[24] Article 10a(1) and (2) of the Constitution.

[25] Article 10b(1) and (2) of the Constitution.

[26] Senát a 'euronovela' Ústavy, https://www.senat.cz/doc2html/1315089911/index.html (accessed on: 15.09.2022) and Ústavní zákon č 395/2001 Sb. kterým

changes in the relationship between the Czech Republic and the EU. This constitutional amendment introduced several changes; its significance in the EU context is that it provides an integration mandate to transfer specific competencies of the Czech Republic's institutions to international institutions or organisations. The text of the Constitution, however, makes no explicit reference to EU acts and their direct binding force, their primacy of application or their place in the legal order. Concerning EU law, the Czech legal order does not distinguish between primary and secondary law. It interprets the obligation to apply EU law as a general obligation deriving from Article 1(2) of the Constitution, according to which the Czech Republic shall comply with its obligations under international law. According to the explanatory memorandum of the Euro-amendment paving the way for EU accession,[27] by joining the EU, a sovereign state transfers to an international institution some of its powers in the areas of legislation, law enforcement, central banking, etc. It does not, however, relinquish sovereignty, a conceptual characteristic of an independent state. On the contrary, it strengthens its sovereignty by exercising it in certain areas jointly with other states through a particular intergovernmental body. Accession to the European Union will therefore not result in the loss of sovereignty of the Czech state but only in a different exercise of sovereign powers.

Generally speaking, judicial and constitutional practice recognises the primacy of EU law, but this does not fully apply to constitutional rules. If EU membership entails a particular limitation of the powers of national authorities (in favour of EU authorities), however, one manifestation of this limitation is necessarily a restriction of the freedom of Member States to determine the national legal effects of Community law. In other words, the transfer of specific competencies to the EU also entails the loss of the Czech Republic's freedom to determine the national legal effects of Community law

se mění ústavní zákon České národní rady č. 1/1993 Sb., Ústava České republiky, https://www.zakonyprolidi.cz/cs/2001-395 (accessed on: 15.09.2022).

[27] Sněmovní tisk 884/0 Vládní návrh Ústavy České republiky – EU, https://www.psp.cz/sqw/text/tiskt.sqw?O=3&CT=884&CT1=0 (accessed on: 15.09.2022).

which derive directly from Community law in the areas where this transfer has taken place. Article 10a of the Constitution is therefore, in fact, a two-way street: it provides the normative basis for the delegation of powers but at the same time opens up the national legal order to the operation of Community law, including its effects within the legal order of the Czech Republic.

In examining the practice of the judiciary, and above all, the practice of the Constitutional Court, it may be said that, while defending Czech constitutionalism, it also seeks to interpret the law in a euro-conformist way and proposes to resolve the conflict between EU and Czech law primarily through international co-operation or possible constitutional amendments, rather than through judicial decisions. The Constitutional Court's jurisprudence therefore seeks to preserve the balance between EU and Czech law, noting that although accession to the *acquis communautaire* has meant a change in the legal norms under the Constitution, such a change in the lower level legislation has repercussions on the constitutional principles and thus on the constitutional order itself.

Suppose EU law derives its existence and supremacy from the national constitutional order. In that case, it may be limited by state sovereignty when powers are transferred, even if the principle of primacy is enshrined in the Treaty.[28] The Czech Constitutional Court's practice is in line with this finding.[29] According to the Constitutional Court, shared (joint) sovereignty, the transfer of powers is voluntary, under the control of, and with the participation of the State, does not imply a weakening or loss of sovereignty. Such a transfer of powers is conditional, as the State reserves the right to withdraw it: it only lasts as long as the EU complies with and respects the Czech core constitution, which states that no changes to the fundamental elements of the democratic rule of law are allowed.[30] These elements include, in particular, the limitation of the discretionary powers of

[28] A. Posch, *Community Law and Austrian Constitutional Law*, "ICL-Journal" 2008, Vol. 2, No. 4, p. 280.

[29] See ÚS 50/04 ze dne 8.3.2006, http://nalus.usoud.cz/Search/GetText.aspx?sz=pl-50-04 (accessed on: 15.09.2022).

[30] Article 9(2) of the Constitution.

the State, the principle of the protection of fundamental rights, the principle of legal certainty and non-retroactivity, the prohibition of discrimination, etc. The delegation of part of the powers of national authorities is only allowed to the extent that the European Union authorities exercise these powers in a manner compatible with the preservation of the State sovereignty of the Czech Republic in such a way that the substance and form of the rule of law of the Czech Republic are not compromised. If one of the conditions for the exercise of the delegation of powers is not fulfilled, i.e. if changes in the European Union endanger the sovereignty of the Czech Republic or the fundamental principles of the democratic rule of law, the national bodies of the Czech Republic may insist that they take back these powers be taken back.[31]

Several decisions of the Constitutional Court have dealt with the implications of EU law in the Czech Republic and the relationship between EU law and the Czech constitutional order has been analysed. In this context, three main decisions have been distinguished: firstly, ÚS 50/04 (*Cukerné kvóty III. 'Potud, pokud'*);[32] secondly, ÚS 19/08 (*Lisabonská smlouva*);[33] thirdly, ÚS 5/12 (*Slovenské důchody XVII*).[34]

In the case of *Cukerné kvóty III* the Constitutional Court addressed the issue of the primacy of EU law for the first time, which essentially followed the reasoning of the German *Solange* decision, i.e. it recognised primacy, but not in absolute terms. According to the Czech Constitutional Court's reasoning:

> *'the Constitutional Court itself is not competent to examine questions relating to the validity of Community law rules. Such questions fall within the exclusive competence of the*

[31] ÚS 50/04, http://nalus.usoud.cz/Search/GetText.aspx?sz=pl-50-04 (accessed on: 15.09.2022).
[32] ÚS 50/04 http://nalus.usoud.cz/Search/GetText.aspx?sz=pl-50-04 (accessed on: 15.09.2022).
[33] ÚS 19/08, http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-19-08_1 (accessed on: 15.09.2022).
[34] ÚS 5/12, http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-5-12_1 (accessed on: 15.09.2022).

CJEU. In terms of the practice of the CJEU, "the rules of Community law take precedence over the legislation of the Member States. According to the case law of the CJEU, where Community law is the only rule, that law prevails and cannot be overruled by the criteria of reference laid down by national law, including those applied at the constitutional level." In addition, however, the Czech Constitutional Court cannot overlook several decisions of national courts which have never fully adhere to the doctrine of the absolute primacy of Community law, even over the Constitution and have thus granted a margin of appreciation in the interpretation of principles such as the democratic rule of law and the protection of fundamental rights and freedoms.

However, according to the Constitutional Court, the transfer of part of the Member States' powers to the EU is a conditional transfer since the original holder of sovereignty, and the powers deriving from it remains the Czech Republic, whose sovereignty is still conferred by Article 1(1) of the Constitution. According to this article, the Czech Republic is a sovereign, unitary and democratic State governed by the rule of law, based on respect for human and civil rights and freedoms … In other words, the delegation of some of the powers of the national authorities may continue as long as the EU authorities exercise these powers in a manner compatible with the preservation of the foundations of the State sovereignty of the Czech Republic and in a manner that does not undermine the essence of the substantive rule of law. If one of the conditions for the implementation of the delegation of powers is not met, i.e. if the EU measures jeopardise the essence of the Czech Republic's State sovereignty or the fundamental elements of the democratic rule of law, it should be insisted that the national authorities of the Czech Republic resume the exercise of these powers…'

In the case of *Lisabonská smlouva* the Constitutional Court ruled that '*following the ratification of an international treaty, the*

Constitutional Court must show considerable restraint' and seek to interpret EU law in a euro-compliant way:

> '*However, this principle cannot be a kind of implicit euro rule in the constitution. In the event of a clear contradiction between the domestic constitution and European law that cannot be resolved by reasonable interpretation, the constitutional order of the Czech Republic, in particular its essential centre of gravity (i.e. the core constitution*[35]*), must prevail.*'

In the case of *Slovenské důchody XVII* it is stated that:

> '*the accession of the Czech Republic to the European Communities and the European Union has brought about a fundamental change in the Czech legal order, as the Czech Republic has incorporated the whole of European law into its national law. There is, therefore, no doubt that there has been a change in the legal environment of the legal norms under the Constitution, which must necessarily have an impact on the assessment of the existing legal order as a whole, including the constitutional principles and fundamental principles, provided, however, that the factors affecting the national legal environment are not in themselves contrary to the democratic rule of law and that the interpretation of those factors cannot lead to a threat to the democratic rule of law.*'

At the same time, however:

> '*if the national methodology for the interpretation of constitutional law does not allow for an interpretation of the provision in question that conforms with European law, the constitutionalist must amend the Constitution. However, this power may only be exercised by the Constitutional*

[35] Article 9(2) of the Constitution.

Authority while preserving the essential elements of the democratic rule of law (core constitution, Article 9(2) of the Constitution), from which it may not derogate, and the power to amend these elements may not be transferred, even by international treaty, under Article 10a of the Constitution.'

According to this decision:

'the Constitutional Court remains the supreme defender of Czech constitutionalism, even against possible excesses of the EU institutions and European law, which also provides a clear answer to the question of the sovereignty of the Czech Republic; if the Constitutional Court is the supreme interpreter of the constitutional provisions of the Czech Republic, which has the highest legal binding force in the territory of the Czech Republic, then it is clear that Article 1(1) of the Constitution[36] *cannot be violated. If the European institutions were to interpret or develop EU law in such a way as to jeopardise the foundations of substantive constitutionality and the fundamental elements of the democratic rule of law, which the Constitution of the Czech Republic regards as inviolable, such acts would not be binding in the Czech Republic. Accordingly, the Czech Constitutional Court intends to review, as a matter of ultima ratio, whether the acts of the European institutions remain within the limits of the powers conferred on them.'*

The basic principle of the relationship between EU law and Czech law may be derived from the status of national sovereignty, i.e. that the Czech Constitution determines the relationship between EU law and Czech law. In the light of the examination of the case law, and in particular the practice of the Constitutional Court, it may be said that, while defending the Czech constitutionality, it also seeks a euro-conformist interpretation of the law and proposes to

[36] The Czech Republic is a sovereign, unitary and democratic state based on the rule of law and respect for human and civil rights and freedoms.

resolve the conflict between EU and Czech law primarily through international co-operation or possible constitutional amendments, rather than through judicial decisions.

2.2.4. THE SLOVAK REPUBLIC

The relationship between Slovak and EU law is based on Articles 7(1) and (2) of the Constitution.[37] These provide that the Slovak Republic may freely decide to enter into an association with other states. Entry into or exit from a State Union with other states must be provided for by constitutional law, which must be confirmed by referendum. The Slovak Republic may also transfer the exercise of some of its rights to the European Communities and the European Union utilising an international treaty ratified and proclaimed as provided for by law or based on such a treaty. Binding acts of the European Communities and the European Union shall take precedence over the laws of the Slovak Republic. Legally binding acts requiring implementation shall be adopted employing a law or a government decree under Article 120(2) of the Constitution.[38] Regulations are generally binding legal acts with direct effect in all Member States and, therefore, binding on all citizens. The regulations take precedence over national law and need not be transposed into the Member States' legal systems. They are published in the Official Journal and become binding on the day of their publication; a) directives, which are not binding in general and are imperative, regarding the result to be achieved, only on the EU Member State to which they are addressed; b) decisions, which are legally binding acts issued by the competent authority but are binding only on the specific legal entities to which they are addressed. These may be addressed to individual States, individual

[37] Ústava Slovenskej Republiky č. 460/1992 Zb., https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/ (accessed on: 15.09.2022).

[38] By law, the Commission is empowered by Government to adopt regulations for the implementation of the European Association Agreement between the European Communities and their Member States, on the one hand, and the Slovak Republic, on the other, and of the international treaties referred to in Article 7(2).

bodies or specific persons; and c) recommendations and opinions which are not legally binding.[39]

All EU action is based on the founding treaties, binding agreements between EU countries that set out the EU's objectives, the rules governing the EU institutions and decision-making, and the EU's relationships with Member States. The founding treaties are the starting point for EU law, the primary law. The body of law based on the principles and objectives in the Treaties constitutes the EU's secondary legislation. This includes directives, regulations, decisions, recommendations, and opinions.[40] Slovak legislation considers primary law as international treaties in the classical sense, albeit of particular importance. By contrast, EU secondary legislation is *sui generis*, the consequence of accession to the EU and the transfer of specific competencies from the Member States to the EU, and therefore has a special legal status. Slovak legislation considers primary legislation as international treaties in the classical sense, although of primary importance. In contrast, the EU is a *sui generis* secondary legislation, which is the consequence of accession to the EU and the transfer of specific competencies of the Member States to the EU, and therefore has a special legal status.

The Slovak legislation does not regulate the relationship between the Constitution and EU law. It contains an explicit provision only about Slovak regular law. At the top of the Slovak hierarchy of norms is the Constitution, with which all other legislation must comply.[41] In this form the following sources of law may be distinguished:

a) the Constitution and constitutional laws: constitutional laws being at the top of the hierarchy of normative legal acts and expressing the fundamental social values from which the whole legal system derives. They form the legal basis for all legislation. Laws and other legislation are based on them and must comply with them;

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[39] *Právny poriadok SR*, https://www.onlinezakony.sk/10/pravny-poriadok-sr/ (accessed on: 15.09.2022).

[40] *Primary and secondary legislation*, https://ec.europa.eu/info/law/law-making-process/types-eu-law_hu (accessed on: 15.09.2022).

[41] *Ibidem*.

b) international treaties, which take precedence over laws, and legally binding acts of the European Communities and the European Union (see above);
c) laws, international treaties having the force of law: international treaties whose ratification requires a law have the same force as the law giving effect to them.[42]

Overall, judicial (and constitutional) practice recognises the primacy of EU law, but this is not the case with constitutional rules. The Constitutional Court acknowledges two types of procedure for the assessment of legislation concerning EU law:

a) assessing whether Slovak legislation (laws) is compatible with European law, i.e., assessing the conformity of Slovak legislation with EU law; and
b) assessing whether Slovak legislation based on EU law conforms with the Slovak Constitution, i.e., assessing the constitutional conformity of Slovak legislation dependent on EU law.[43]

On the question of state sovereignty, it is recognised that if EU law derives its existence and supremacy from the national constitutional order, it may also be limited by the principle of state sovereignty when powers are transferred. Accordingly, the delegation of powers by national authorities is permissible only to the extent that the authorities of the European Union exercise those powers in a manner compatible with the State sovereignty of the Slovak Republic. Under state sovereignty, if EU law derives its existence and supremacy from the national constitutional order, it may be limited by state sovereignty when powers are transferred, even if the principle of primacy is enshrined in the Treaty.[44]

Article 7(2) of the Constitution allows the Slovak Republic to transfer the exercise of some of its rights to the European Communities or the European Union. In the specific case of Slovakia, this occurred with its accession to the EU, which resulted in the

[42] *Ibidem*.
[43] I. Macejková, *Právo Európskej únie v rozhodovacej činnosti Ústavného súdu Slovenskej republiky*, https://www.ustavnysud.sk/documents/10182/0/Presentation-Ms_Macejkova.pdf/c4af38fe-b1d4-4fd2-957c-35f28a321717 (accessed on: 15.09.2022).
[44] A. Posch, *op. cit.*, p. 280.

transfer of powers of the Slovak national authorities, exercised by the European Communities/European Union authorities under primary law of the European Union, in such a way that Slovakia *lent* these powers to the EU. In the case of such delegated powers, the powers of all competent national authorities are limited, whether they are normative or specific decision-making powers. The delegation of some of these powers, however, is not absolute. Still, as the original holder of sovereignty and the exercise of the resulting powers, the conditional delegation remains the Slovak Republic.[45]

The delegation of some of the powers of national authorities is allowed only to the extent that the authorities of the European Union exercise these powers in a manner compatible with the State sovereignty of the Slovak Republic, in such a way that the substance and the essence of the rules of laws of the Slovak Republic remain unaffected. If one of the conditions for the exercise of the delegation of powers is not fulfilled, i.e. if changes in the European Union endanger the sovereignty of the Slovak Republic or the fundamental principles of the democratic rule of law, the Slovak Republic may insist that it withdraw these powers, with the Slovak Constitutional Court having jurisdiction to decide on the constitutionality of this issue (i.e. the constitutionality of the withdrawal of powers).[46]

The Slovak aspects of EU law are dealt with in several Constitutional Court decisions, but the conflict between the Constitution and EU law is analysed in none of them. In this respect, the most notable decision is PL. ÚS 3/09,[47] in which the Constitutional Court confirmed the principle of the primacy of EU law over *regular* law, noting that this principle also applies to procedures on the compatibility of legislation initiated by a group of members of the Parliament or other authorised bodies entitled to do so. In the Constitutional Court's view, the general court cannot, in principle, initiate constitutional proceedings under Article 125(1) of the

[45] I. Macejková, *op. cit*.

[46] *Ibidem*.

[47] PL. ÚS 3/09-378, https://www.ustavnysud.sk/ussr-intranet-portlet/docDownload/4ffd5bc7-7d78-42c5-aa1d-5cae02ca0395/Rozhodnutie%2520-%2520Rozhodnutie%2520PL.%2520%25C3%259AS%25203_09.pdf+&cd=4&hl=de&ct=clnk&gl=sk (accessed on: 15.09.2022).

Constitution on the compatibility of a provision of national law with an international treaty by which the Slovak Republic has transferred the exercise of some of its powers to the European Union since it (the court) applies the provisions of EU law in its jurisdiction.

2.3. Considerations

Law itself is neutral; it is a set of rules of conduct. The direction of its social impact is determined by the social values behind them and enshrined in the law; simplified as the need for justice in law. This context has been known since the emergence of written law, from Cicero through Radbruch to the present day. The need for justice in law and its moral implications is a complex issue, but it cannot be denied that it is necessary to give its direction and vector in all cases. This direction is determined by the changing values of society over the ages. If the law loses this value content or has a value load that is not specific to a given community, it loses its social acceptance. While it is true that the values of law are not only determined by the underlying social fabric, but that the legal norm may also change the values of a society, the bottom line is: without social values, the law is just an empty set of rules.

As far as social values are concerned, although this approach is disputed by some philosophical trends, social values have a hierarchy of importance. Our everyday experience of life shows that, in terms of social utility, not all values and skills are equal: one may be an extremely clever thief, but we know that stealing the wealth of others is socially harmful and unsustainable. These social values determine the direction of the mechanism of action of the legal norm, or more simply: the purpose of the law; what it regulates, and for what purpose.

In terms of the CJEU's judicial activism, this is relevant to where the boundary lies between what we might call common European values and what we might call values that are specific to the individual Member States. As judicial interpretation often uses legal reasoning to bridge legal gaps by examining the purpose of a given legal norm, it essentially projects the social value underlying the legal norm onto

a specific case. Since these social values are most often reflected in the law itself, typically in the constitutional provisions of the Member States, the phenomenon of judicial activism is also based on the relationship between EU and national law, or to be more precise, the relationship between EU law and Member States´ constitutions (as embodiments of given states' core social values).

For this reason, it is therefore essential above all to establish the relationship between the primacy and subsidiarity of EU and national constitutions. A simple, unambiguous definition of this system of relationships is yet to be established. On the one hand, there is the approach of the CJEU, which takes EU law as a primary, *sui generis* phenomenon. On the other hand, this approach is not entirely accepted by some national courts and constitutional courts. Whether this relationship may be resolved by interpretation of the law and judicial action alone is questionable. Still, it would be highly desirable for the long-term functioning of the EU to find a reassuring and stable solution to this relationship. Given the nature of the day-to-day operation of the law, it is up to the administrative authorities and the administrative courts to deal with this conflict. Since the proper functioning of these bodies requires transparency and the predictability of the law, a set of rules is needed to make this clear in the long term.

There are two possible ways to approach this problem. The first is based on a hierarchical arrangement of legal norms, whereby some laws are superior to others. The other approach may be found in an analysis of the EU's functions, which rests on the dividing line between community and national policies.

The norm hierarchy approach is rather old. It is based on the idea that, like the hierarchy of Member States' legal systems, the sources of EU law should be placed *expressis verbis* in the hierarchy of norms of the Member State concerned. As the CJEU's approach, and consequently the EU's, is well understood: i.e. these entities would have no fundamental objection to the supremacy of EU law in the hierarchy of norms; this would require a Member State law or a constitutional amendment. Similarly, at the Member State level, the place of CJEU decisions of principle, with quasi-normative effect, in the decisions of national and sub-national courts should be uniform.

While this solution may seem simple, in practice it raises more questions than it answers. The first and most important question is: at which level should EU law fit into the Member States' legal systems? More specifically, since EU norms generally pre-date the ordinary laws of the Member States, the question is: do they pre-date the constitutional provisions of each Member State? If so, is this valid only for EU primary or secondary law? These are all issues that could fundamentally affect the sovereignty and functioning as the state of each Member State; the proper course of action in deciding on this matter, i.e. on the significant restriction of state sovereignty, would be a political decision at the highest level, even a referendum.

Even in such a system, the conflict of legal norms at different levels, usually resolved at the Member State level by Constitutional Courts, or the equivalent decision-making institution, cannot be avoided. In the case of a dispute with an EU dimension, the question arises: who would decide? A special body set up for this purpose? the CJEU? or the court of the Member State concerned? In the case of the hierarchy of norms, these are all subsidiary questions that would need to be answered.

The approach through common policies is not based on the hierarchy of norms, but on the transfer of sovereignty from the Member States. The EU's operation is based on the will of each Member State. Within this frame, three principles determine the way and in what areas the EU may act:

a) conferral: the EU only has that authority conferred upon it by the EU treaties, which all member countries have ratified;
b) proportionality: EU action cannot exceed what is necessary to achieve the objectives of the treaties; and
c) subsidiarity: in areas where either the EU or national governments may act the EU may intervene only if it might act more effectively.[48]

It is also within the framework of these principles that the EU's legislative powers are regulated, which, above all, cover Community

[48] *Areas of EU action*, https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law/areas-eu-action_en (accessed on: 15.09.2022).

policies. Given that EU law with direct effect essentially prevails over the ordinary laws of the Member States, it is essentially irrelevant whether it is primary or secondary EU law. For this reason, it is not the place of each norm in the hierarchy of norms that is important, but the sectors they affect, the areas they regulate.

In terms of common policies, the will of the Member States is subordinate, so the policies are essentially the real driving force of the EU. From this point of view, what is important is not the place of origin of the norm in question, but the area in which it applies and the interest it serves. The interests declared in EU legal sources and, through them, EU objectives and values are therefore reflected in these common policies, which may provide the dividing lines between the interests and policies of the Member States. A legal dispute, also valid for CJEU cases, does not arise in a vacuum but is, at its core, a dispute of interests. In some cases, such conflicts of interest are not of paramount importance. In others, they are rooted in public aims and social values, which could be interpreted differently at Member State and EU levels.

To resolve such a conflict, a particular order of precedence may be established based on the cases presented, which may be followed by national courts in interpreting the law, but which may be challenged without a solid legal basis. Taking all this into account and beginning with the fact that the EU is an international organisation based on the free sovereign will of the individual Member States, the following basic principles of legal interpretation may be drawn in connection with the resolution of the conflict between EU and Member State law:

1) Core values and sovereignty declared by the Member States' constitution should be unaffected and require primacy before EU law in any case, except for exclusive EU competencies [customs union; competition rules for the single market; monetary policy for the Eurozone countries; trade and international agreements (under certain circumstances); marine plants and animals regulated by the common fisheries policy]. The countries examined to show that in all cases, there is a core of member-state constitutions that addresses the most fundamental issues of the functioning of the state and society.

The designation of this core constitution should be a matter for the Member States, given that it is the Member States that are best aware of the specific national characteristics of each country.

2) In the case of shared competencies, such as economic, social and territorial cohesion; agriculture; environment; consumer protection; trans-European networks, EU rules should have primacy even before the constitutional rules, but not before core values (see above). Member States' constitutional protection should consistently focus on protecting social values. Other constitutional rules need not necessarily have priority *per se*, but their relationship to fundamental constitutional values should always be examined.
3) In the case of other policies, such as public health; industry; culture and education; training, national rules shall have primacy under the condition that they do not contradict the principal aims of EU integration. In other public policies, Member State primacy is the general rule but must always consider the general commitments of EU membership.

Overall, however, it may be said that a satisfactory and long-term solution to the issue at hand requires precise clarification of the relationship between EU law and the constitutions of the Member States, which above all concerns the area of political decision-making, and cannot be replaced by the interpretation of the law by the courts, either at the pan-European or at the Member State level. In this respect, a solution could be envisaged which would leave it to the Member State's constitutional authority to settle this relationship, which would give rise to differences in the approaches of the individual Member States, but also to diverse opinions. The ultimate question is, in the end, how to achieve a long-term goal of European integration in accordance with a diverse attitude and plurality of opinions that has always been the hallmark of European tradition and development.

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The Constitution of the Republic of Poland, https://www.senat.gov.pl/en/about-the-senate/konstytucja/.
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ÚS 19/08, http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-19-08_1.
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Ústavní zákon č. 1/1993 Sb., https://www.epi.sk/zzcr/1993-1.
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DR. KITTI POLLÁK, ASSISTANT PROFESSOR
National University of Public Service | DOI: 10.32041/9788367149365/3

Chapter 3. Comparative Analysis of the Hungarian and Polish Administrative Court Procedural Rules Regarding the Acceleration of the Receipt of Final Decisions

3.1. Introduction

One of the objectives of this paper is a comprehensive analysis of one the latest current question of administrative judiciary, the acceleration of the receipt of final decisions in administrative court proceedings, a key question in the codification period of the new Hungarian Act No. I of 2017 the Code of Administrative Court Procedure (henceforth: the Hungarian Code). Before examining this this paper first makes a comparative analysis of the Hungarian and Polish constitutional administrative judiciaries, analysing the most relevant fundamental provisions such as the rule-of-law clause, the tasks of the courts regarding administrative decisions, the right to good administration, the right to fair trial and the right to legal remedy. Pointing out the most important historical changes, the paper goes on to explain the organisational differences between the court systems deciding in administrative cases. While in Poland there is an independent, two-level administrative court system, in Hungary ordinary courts decide on administrative cases. Despite of the organisational differences, both Hungary and Poland have a detailed administrative court procedure act, the Hungarian Code and the Polish Act of 30 August 2002 on Law on proceedings before administrative courts (henceforth: the Polish Code). After

describing the structures of the Codes, the the acceleration of the receipt of final decisions in administrative lawsuits is analysed in detail: first the tools which may be found both in the Hungarian and in the Polish Code, and secondly the new elements of the Hungarian Code which help to realise the above goal, but these institutions and rules cannot be found or differently determined in the Polish Code, so similar rules might be considered for the Hungarian Code.

3.2. Constitutional background of administrative justice

In Hungary the constitution is called the Fundamental Law, which came into force on 1 January 2012.[1] The Fundamental Law is the foundation of the Hungarian legal system.[2] Regarding the constitutional background to the administrative judiciary,[3] we shall first note the rule-of-law clause as it stated in Article B) paragraph 1 of the Fundamental Law of Hungary: '*Hungary shall be an independent, democratic rule-of-law State*'. The Hungarian Constitutional Court,[4] which began operating in 1990, derived the most basic requirements regarding the operation of public administration from the principle of the rule of law.[5] The Hungarian Constitutional Court, considered a principle element of a constitutional state under the

[1] Final and miscellaneous provisions 1. of the Fundamental Law. Translation of the Fundamental Law of Hungary may be found on-line in the following link: https://njt.hu/jogszabaly/en/2011-4301-02-00 (accessed on: 15.12.2022).

[2] Article R) of the Fundamental Law of Hungary.

[3] See in detail: A. Patyi, A. Téglási, *The constitutional basis of Hungarian public administration*, [in:] *Hungarian public administration and administrative law*, A. Patyi, A. Rixer, G. Koi (eds.), Passau 2014, pp. 203–218; A. Patyi, *A közigazgatási-közhatalmi eljárásokkal szembeni legfontosabb alkotmányos követelések*, [in:] *A közigazgatási eljárásjog alapjai és alapelvei*, A. Patyi, Zs.A. Varga (eds.), Budapest 2019, pp. 11–53.

[4] See: L. Csink, B. Schanda, *The Constitutional Court*, [in:] *The Basic (Fundamental) Law of Hungary: A Commentary of the New Hungarian Constitution*, Zs.A. Varga, A. Patyi, B. Schanda (eds.), Dublin 2015, pp. 185–197.

[5] K. Pollák, *The Rule of Law and Administrative Justice in Hungary*, "Nispacee: Occasional Papers" 2019, pp. 1–10.

rule of law, the subordination of public administration to the law: the essential requirement of the legality of the activities of public administrations is that the administrative bodies shall operate within the framework of the laws, respecting the procedural rules defined by the law and the authorisation to restrict rights must be defined precisely by law.[6] The Hungarian Constitutional Court considers that control regarding the subordination of the public administration to law must be ensured by courts through decision-making on the legality of administrative decisions.[7] Article 25 paragraph (2) of the Fundamental Law of Hungary nevertheless states that '*[c]ourts shall decide on* […] *the lawfulness of administrative decisions, the conflict of local government decrees with any other law and their annulment, the establishment of omission by a local government of its obligation based on an Act to legislate* […]'. In accordance with the previously-cited provision the courts have the power to examine in the administrative cases whether the administrative bodies exercised their competence in the decision-making procedure within the legal framework and whether the provisions of the law have been respected during the application of the law by the administrative

[6] Decision 56/1991 (XI. 8) of the Hungarian Constitutional Court. Meanwhile the Fundamental Law of Hungary states that: '*[t]he decisions of the Constitutional Court made prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions*' (Final and miscellaneous provisions 5. of the Fundamental Law). Regarding the rule-of-law clause of the Hungarian Constitutional Court, however, expressed that Article B paragraph (1) of the Fundamental Law and Article 2 paragraph (1) of the previous Constitution are identical in terms of content, and no statement contrary to the previous position of the Constitutional Court may be derived from the interpretation of the Fundamental Law (Decision 32/2013 (XI. 22) of the Hungarian Constitutional Court, Justification [70]). The arguments, legal principles developed in the Constitutional Court's previous decisions referred to the rule-of-law clause may therefore still be cited. Even a plus, Decision 56/1991 (XI. 8) of the Hungarian Constitutional Court is expressly confirmed after the enactment of the Fundamental Law in the Decision 5/2013 (II. 21) of the Hungarian Constitutional Court, Justification [36].

[7] Decision 24/2015 (VII. 7) of the Hungarian Constitutional Court, Justification [19], [20]; Decision 30/2017 (XI. 14) of the Hungarian Constitutional Court, Justification [85]; Decision 14/2018 (IX. 27) of the Hungarian Constitutional Court, Justification [24].

authorities in their proceedings.[8] Another important article of the Fundamental Law of Hungary will be underlined in this regard: the Constitutional Court shall, on the basis of a constitutional complaint, review the conformity with the Fundamental Law of any judicial decision.[9] When the Constitutional Court finds unconstitutional the judicial decision, it may annul it and in very rare cases even the administrative decision may be annulled.[10]

Regarding constitutional rights, the right to good administration, the right to a fair trial and the right to legal remedy are the most important elements of the constitutional background of administrative judiciary.

The right to good administration was initially envisaged in two documents that had no binding effect in the European Union. These documents were: the Charter of Fundamental Rights of the European Union declared in 2000 and the European Code of Good Administrative Behaviour.[11] The Charter of Fundamental Rights of the European Union from 2009 is a legally binding European Union document, as Article 6 of the Treaty on European Union states '*1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007,*

[8] Decision 272/B/2006 of the Hungarian Constitutional Court.

[9] Article 24 paragraph (2) d) of the Fundamental Law of Hungary. F. Gárdos-Orosz, *The Hungarian constitutional court in transition: from actio popularis to constitutional complaint*, "Acta Juridica" 2012, Vol. 53, No. 4, pp. 302–315; F. Gárdos-Orosz, *The constitutional environment of the introduction of the constitutional complaint to the Hungarian constitutional system*, "Diritto pubblico comparato ed europeo" 2019, Vol. 39, No. 2, pp. 1525–1539; P. Paczolay, *The constitutional complaint in Hungary and the exhaustion of domestic remedies*, [in:] *Intersecting Views on National and International Human Rights Protection: Liber Amicorum Guido Raimondi*, R. Chenal, I.A. Motoc, L.-A. Sicilianos, R. Spano (eds.), Tilburg 2019, pp. 687–694.

[10] See for exemple: Decision 3002/2021 (I. 14) of the Hungarian Constitutional Court.

[11] See: *Egy európai alkotmány felé: a nizzai Alapvető Jogok Chartája és a Konvent: konferencia előadások*, J. Frivaldszky (ed.), Budapest 2003; M. Batalli, A. Fejzullahu, *Principles of Good Administration under the European Code of Good Administrative Behaviour*, "Pécs Journal of International and European Law" 2018, No. I, pp. 26–35.

which shall have the same legal value as the Treaties'. Likewise, to Article 41 of the Charter of Fundamental Rights of the European Union,[12] the Fundamental Law of Hungary articulates, for the first time, *expressis verbis*, the right to good administration as follows: '*[e]veryone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by Act.*'[13] The Fundamental Law of Hungary also states the right to fair trial as follows: '*[e]veryone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.*'[14] From the above paragraphs of the Fundamental Law of Hungary we should emphasise that the Fundamental Law mentions the requirement of a decision within a reasonable time and several other requirements as the part of the principle of procedural fairness. The two aspects of the principle of procedural fairness may also be understood in connection with each other. The duty to justify decisions, for example, may be found as an obligation regarding administrative procedures and judicial proceedings.[15]

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[12] R. Bousta, *Who Said There is a 'Right to Good Administration'? A Critical Analysis of Article 41 of the Charter of Fundamental Rights of the European Union*, "European Public Law" 2013, Vol. 19, No. 3, pp. 481–488.

[13] Article XXIV paragraph (1) of the Fundamental Law of Hungary.

[14] Article XXVIII paragraph (1) of the Fundamental Law of Hungary.

[15] See: N. Balogh-Békesi, K. Pollák, *The realisation of constitutional principles, the right to good administration and the right to legal remedy, in Hungary*, "Bratislava Law Review" 2018, No. 1, pp. 46–56; A. Patyi, *A tisztességes eljáráshoz és ügyintézéshez való jog. Az eljárási alapjogok és az eljárási alkotmányosság főbb kérdései*, [in:] *Alapjogok: Az emberi jogok alkotmányos védelme Magyarországon*, S. Bódi, G. Schweitzer (eds.), Budapest 2021, pp. 155–170; N. Balogh-Békesi, *A tisztességes ügyintézéshez és a tisztességes tárgyaláshoz való jog*, [in:] E. Balogh, *Az Alaptörvény érvényesülése a bírói gyakorlatban 3.: Alkotmányjogi panasz: az alapjog-érvényesítés gyakorlata: tanulmánykötet*, Budapest 2019, pp. 468–503; N. Chronowski, *Mikor megfelelő az ügyintézés? Uniós és magyar alapjogvédelmi megfontolások*, "Magyar Jog" 2014, No. 3, pp. 137–145; N. Chronowski, *A megfelelő ügyintézéshez, tisztességes közigazgatási eljáráshoz való jog az Európai Unióban és Magyarországon*, [in:] *A közigazgatás és az emberek*, F. Csefkó (ed.), Jövő Közigazgatásáért Alapítvány, Pécs 2013, pp. 85–102; G. Kecső, *A tisztességes*

Through the requirement of effective judicial protection against public administrative decisions, the right to fair proceedings is closely related to the right to legal remedy,[16] which is expressed in the Fundamental Law of Hungary as follows: '*[e]veryone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests.*'[17] Ensuring the right to a legal remedy means that the law guarantees the person affected by the administrative case that the reviewing of his/her case will be adjudicated by another organ or an administrative body different from the administrative authority acting in first-instance.[18] The essential element of all legal remedies is the possibility to restore justice, so legal remedy includes conceptually and substantially the redressability of the infringement.[19] The right to legal remedy requires the real possibility of an effective legal remedy.[20]

The Republic of Poland's current Constitution was adopted on 2 April 1997 (amended in 2009).[21] Like the Hungarian Fundamental Law, the Polish Constitution states in Article 2 that: '*[t]he Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice*'. Article 184 of the Polish Constitution

hatósági eljáráshoz való jog, [in:] *Alapjogi kommentár az alkotmánybírósági gyakorlat alapján*, L. Csink (ed.), Budapest 2021, pp. 288–303; A. Patyi, A. Téglási, *The effective judicial control over the functioning of the public administration in Hungary*, [in:] *Hungarian public administration and administrative law*, A. Patyi, A. Rixer, G. Koi (eds.), Passau 2014, pp. 201–218.

[16] N. Balogh-Békesi, *Jogorvoslathoz való jog és tisztességesség az esetjog tükrében*, [in:] *Ünnepi tanulmányok a 80 éves Máthé Gábor tiszteletére: Labor est etiam ipse voluptas*, Z. Peres, G. Bathó (eds.), Budapest 2021, pp. 59–70.

[17] Article XXVIII paragraphe (7) of the Fundamental Law of Hungary.

[18] Decision 5/1992 (I. 30) of the Hungarian Constitutional Court, Decision 35/2013 (XI. 22) of the Hungarian Constitutional Court, Decision 10/201 (V. 5) of the Hungarian Constitutional Court.

[19] Decision 23/1998 (VI. 9) of the Hungarian Constitutional Court, Decision 3064/2014 (III. 26) of the Hungarian Constitutional Court.

[20] Decision 6/2013 (XII. 5) of the Hungarian Constitutional Court.

[21] The Polish Constitution may be found in English on-line in the following link: https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm (accessed on: 15.12.2022).

is comparable to Article 25 paragraph (2) of the Fundamental Law of Hungary when it states that:

> *'[t]he Supreme Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration. Such control shall also extend to judgments on the conformity to the statute of resolutions of organs of local government and normative acts of regional organs of government administration.'*

Regarding the above provisions, we may constate very comparable constitutional rules regarding the basis of the administrative judiciary in Poland and Hungary, but in Poland, based on the Article 79 of the Polish Constitution:

> *'[i]n accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution'.*

In accordance with the Polish Constitution and unlike the Hungarian, plaintiffs may not directly challenge the acts administrative authorities and administrative judgments before the Polish Constitutional Court. The Polish Constitutional Court reviews the conformity to the Constitution of a normative act on which the court or the administrative authority makes its decision, and which has infringed the plaintiff's constitutional rights or freedoms.[22]

[22] See: B. Szmulik, *The parties empowered to lodge constitutional complaint in Poland and in selected European countries – legal – comparative study*, "Polish Political Science Yearbook" 2005, Vol. XXXIII, pp. 31–44; L. Jamróz, *The right to constitutional complaint in Poland*, [in:] *Locus Standi across legal cultures*,

Chapter II of the Polish Constitution also specifies institutional guarantees for the protection of rights and freedoms. These include, as well as the above right to submit a constitutional complaint to the Constitutional Tribunal (Article 79), the right to a fair trial (Article 45), the right to appeal against judgments and decisions made at first instance (Article 78), the guarantee of at least two-stage court proceedings (Article 176). It shall be noted that the former Polish Constitution of 1952 contained no guarantees for the protection of rights and freedoms such as the right to a fair trial. After the amendment of 1989 the Constitutional Tribunal assumed the right to access to a court from the principle of the rule of law. In Article 45 paragraph (1) the Polish Constitution currently states that '*[e]veryone shall have the right to a fair and public hearing of his or her case, without undue delay, before a competent, impartial and independent court*'. The Constitutional Court has indicated in its jurisprudence that the right to a fair trial enshrined in this provision comprises the following:

a) the right of access to a court;
b) the right to proper court proceedings which comply with the requirements of a fair and public hearing;
c) the right to a court ruling; and
d) the right to have cases examined by a court with an adequate organisational structure and position.

In recent case law, the Constitutional Court has also emphasised the right to the effective enforcement of a final court ruling.[23]

A. Budnik (ed.), Białystok 2015, pp. 142–156; Seminar co-funded by the 'Justice' programme of the European Union Seminar organised by the Federal Administrative Court of Germany and ACA-Europe: *Functions of and Access to Supreme Administrative Courts*, Berlin, 13 May 2019, to be found at the following link: https://www.aca-europe.eu/seminars/2019_Berlin/Poland.pdf 8 p 31; L. Csink, J. Fröhlich, *Mire lehet alkotmányjogi panaszt alapítani? A jogvédelem alapjául szolgáló Alaptörvény-ellenesség és az Alaptörvényben biztosított jog fogalma*, [in:] *Normativitás és empíria: A rendes bíróságok és az alkotmánybíróság kapcsolata az alapjog-érvényesítésben, 2012–2016*, F. Gárdos-Orosz (ed.), Magyarország 2020, pp. 31–57.

[23] Explained in detail: S. Biernat, M. Kawczyńska, *The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context*, [in:] *National Constitutions in European and Global Governance:*

The right to legal remedy, i.e. the right to appeal against administrative decisions is a constitutional right guaranteed, by the Polish Constitution too, as by the Hungarian Constitution, as follows: '*[e]ach party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute.*'[24] The detailed regulation of the realisation of this fundamental right is specified in procedural acts as in the Code of Administrative Procedure.[25]

The main difference, however, concerns the constitutional background of administrative judiciary regarding the right to good administration. As in Hungary, the Fundamental Law, *expressis verbis*, states this constitutional right, while this right is not included in the Polish Constitution. In Article 7 of the Polish Constitution provides that public authority bodies operate on the basis and within the limits of the law. Such an approach is notwithstanding interpreted rather as a principle (of legalism) and not a subjective right, which significantly limits the possibility of reference to Article 7 by individuals.[26] Even though the right to good administration is unacknowledged expressly in the Polish Constitution, it may be derived from fundamental values such as the right to good administration as part of common good.[27] Regarding administrative proceedings the Polish Code of Administrative Procedure of 1960 in Articles 6–16 under the title General Principles contains legal norms which are key elements of the realisation of the principle of good administration. The lack of an expressive statement of the right to good administration in the Polish Constitution probably contributes to the fact that

Democracy, Rights, the Rule of Law National Reports, A. Albi, S. Bardutzky (eds.), Hague 2019, p. 760.

[24] Article 78 of the Polish Constitution.

[25] P. Ura, *The Constitutional Right to Appeal Against an Administrative Decision*, "Przegląd Prawa Konstytucyjnego" 2021, Vol. 6, No. 64, pp. 529–542.

[26] A. Kastelik-Smaza, *The application of the Charter of Fundamental Rights of the EU in Poland*, "Acta Universitatis Carolinae – Iuridica" 2018, pp. 101–112.

[27] M. Zdyb, *The Right to Good Administration. Axiological Aspects of good administration*, "Studia Iuridica Lublinensia" 2019, Vol. XXVIII, No. 2, pp. 107–133.

one of the most cited provisions by the Polish courts is Article 41 of the Charter of Fundamental Rights of the European Union.[28]

It should nonetheless be noted that the constitutional background of administrative judiciary is regulated very similarly in Poland and in Hungary regarding the rule-of-law clause, the tasks of courts regarding the reviewing of administrative decisions, the right to seek legal remedy and the right to fair trial. The major differences concern the novel provision of the Fundamental Law of Hungary: the *expressis verbis* declaration of the right to good administration and of the constitutional possibility of complaint. These Hungarian norms may be considered by Polish legislators too.

After a comparative overview of the constitutional bases of administrative justice, this paper will focus on the relevant questions of the regulation of administrative court proceedings, but before of this question we would like to draw attention to the organisational differences of the court systems adjudicating on administrative matters in the two countries examined.

3.3. The organisation of the court system deciding in administrative cases

Several models of regrouping regarding the organisational structure of the court system which review administrative decisions are to be found both in international legal literature and in Hungarian literature.[29] This question has recently been one of the most discussed topics in Hungarian law. To understand the current structure of the court system that reviews administrative decisions, we shall

[28] A. Kastelik-Smaza, *op. cit.*, p. 101.

[29] In Hungary we also found several scientific resources concerning the different models of the judicial review of administrative decisions. Four models predominate: the French, the German, the Anglo-Saxon and the mixed model. In: J. Martonyi, *Államigazgatási határozatok bírói felülvizsgálata*, Budapest 1960; F. Toldi, *A közigazgatási határozatok bírói felülvizsgálata*, Budapest 1988, pp. 18–19; L. Trócsányi, *A közigazgatási bíráskodás főbb rendszerei és szervezeti keretei*, "Magyar Közigazgatás" 1991, Vol. 5, No. 41, pp. 408–425; L. Trócsányi, *Milyen közigazgatási bíráskodást?*, Budapest 1992, pp. 44–82.

first take an overview, without entering to detail, of the historical background of administrative judiciary.

From a historical point of view,[30] the first organisational forum for the judicial review of the administrative decisions in Hungary was the Royal Financial Court,[31] which was incorporated in the Hungarian Royal Administration Court in 1886.[32] Until 1949 this Court was a single-instance independent court, separate from the ordinary court system, which adjudicated on both general administrative and financial cases.[33] After the Second World War, the Hungarian administrative remedy system changed significantly. For some years there was an almost complete absence of the regulation of judicial review over administrative decisions. In 1957 the judicial review procedures in minor cases were briefly regulated.[34] In 1981 a Decree of the Council of Ministers listed the cases against which a judicial review procedure may be initiated.[35] The first significant change after decades of basically non-regulation of administrative judiciary was in 1989 with Act No. XXXI of 1989 modified the Article 50 paragraph 2 of the Constitution of 1949, as follows: '*[t]he court shall review the legality of administrative decisions*'. The Parliament adopted Act No. XXVI of 1991 on the extensions of judicial review of administrative decisions. This Act established a system of two levels of review of the administrative decisions in official court proceedings within the ordinary judicial system. Several changes occurred over the next decades, from which we would only point out the last important ones: from 1 January 2013 until 1 March 2020 Administrative and Labour Courts decided in most of the

[30] See in detail the evaluation of administrative judiciary in Hungary: A. Patyi, *A magyar közigazgatási bíráskodás elmélete és története*, Budapest 2019.

[31] I. Stipta, *Adalékok a pénzügyi közigazgatási bíróság működésének történetéhez (1884–1885)*, "Acta Juridica et Politica" 1999, Tomus LVII, Fasciculus 9, Szeged.

[32] A. Csizmadia, *A magyar közigazgatás fejlődése a XVIII. századtól a Tanácsrendszer létrejöttéig*, Budapest 1976, pp. 239–242; J. Martonyi, *A közigazgatási bíráskodás bevezetése, szervezete és hatékonysága Magyarországon (1867–1949)*, "Acta Universitas Szegediensis de Attila József Nominate, Acta Jurudica et Politicqa" 1990, Tomus XX, Fasciculus 2.

[33] Act No. II of 1949 abolished the Hungarian Royal Administration Court.

[34] Act No. IV of 1957 on the General Rules of State Administration Procedures.

[35] Decree No. 63/1981 (XII. 5) of the Council of Ministers.

administrative court cases in first instance. These separate administrative courts shared the same organisational background as the labour courts.[36] The Administrative and Labour Courts were not legal entities and had the same status as the former Labour Courts, which were aligned with the status of District Courts. There were, and remain, more than a 100 District Courts, but there were only 20 separate Administrative and Labour Courts within the judicial structure of Hungary, located on the seat of Regional Courts.[37]

Over the last couple years regarding the organisation of the administrative court system numerous significant questions arose, the first concerning the necessity of an independent administrative court. While several scholars, including Toldi Ferenc,[38] Trócsányi László,[39] Patyi András,[40] and others supported the idea of the creation of the independent administrative court system, some experts, including Kilényi Géza,[41] Petrik Ferenc[42] and others, considered this a secondary question and they believed that it was unnecessary to bring it to fruition. Secondly, if there are independent administrative courts, separate from the ordinary court system, another question

[36] The reasons for this were unconvincing. See: H. Küpper, *Magyarország átalakuló közigazgatási bíráskodása*, "MTA Law Working Papers" 2014, No. 59, pp. 13–15.

[37] See more in detail: A. Patyi, *Rifts and deficits: lessons of the historical model of Hungary's administrative justice*, "Institutiones Administrationis: Journal of Administrative Sciences" 2021, No. 1, pp. 60–72; Zs.A. Varga, *Administrative Procedure and Judicial Review in Hungary*, [in:] *Judicial Review of Administration in Europe: Procedural Fairness and Propriety*, della C. Giacinto, A. Mads (eds.), Oxford 2021; P. Darák, *Administrative justice in Hungary*, [in:] *Hungarian public administration and administrative law*, A. Patyi, A. Rixer, G. Koi (eds.), Passau 2014, pp. 219–229; A. Patyi, *Administrative justice in Hungary*, [in:] *The Transformation of the Hungarian Legal System 2010–2013*, P. Smuk (ed.), Budapest 2013, pp. 145–154.

[38] F. Toldi, *op. cit*., p. 137.

[39] L. Trócsányi, *A közigazgatási bíráskodás hatásköri és szervezeti kérdései*, "Magyar Jog" 1993, No. 9, pp. 543–548.

[40] A. Patyi, *Szervezet és hatáskör alapkérdései közigazgatási bíráskodásunk hatályos rendszerében*, "Jogtudományi Közlöny" 2002, No. 3, pp. 127.

[41] G. Kilényi, *A közigazgatási bíráskodás néhány kérdése*, "Magyar Közigazgatás" 1991, No. 4, pp. 296–303.

[42] F. Petrik, *A közigazgatási bíráskodás aktuális kérdései*, "Bírák Lapja" 1993, No. 2, p. 81.

relates to the responsibility of these administrative courts: whether they need to be organised on a national, regional or local level.[43]

In December 2018 the Parliament adopted Act No. CXXX of 2018 on administrative courts. This law regulated in detail the organisation of a system of administrative courts, the administration of administrative courts and the specific rules regarding the legal status of administrative judges. The organisation of administrative justice would be on two levels: a Higher Administrative Court and eight regional administrative courts.[44] The Parliament has also adopted Act No. CXXXI of 2018 on enacting Act No. CXXX of 2018 on Administrative Courts, which initially might have entered into force on 1 January 2019 and certain transitional rules related to the establishment of administrative courts. This act contained the most important rules regarding the president of the Higher Administrative Court and the transfer of judges from ordinary courts to the administrative courts. The Seventh Amendment of the Fundamental Law[45] even stated that these Courts are both the ordinary courts and the administrative courts. Administrative courts shall decide on administrative disputes and other matters specified in an Act. The supreme judicial organ of the administrative courts is the Higher Administrative Court which shall ensure the uniformity of the application of the law. These constitutional rules were cancelled by the Eighth Amendment of the Fundamental Law of Hungary.[46] The above Acts were also harshly criticised by many, including the Commissioner for Human Rights of the Council of Europe[47] and the Venice Commission too[48] the opposition parties turned to the Constitutional Court.[49] Finally, in the draft law T/6295 on the

[43] For example: K.F. Rozsnyai, *Közigazgatási bíráskodás Prokrusztész-ágyban*, Budapest 2010, pp. 225–229.

[44] K. Sperka, *Quo vadis közigazgatási bíráskodás?*, "Acta Humana" 2019, No. 1, pp. 134–137.

[45] Adopted: 20 June 2018, promulgated 29 June 2018.

[46] Adopted: 10 December 2019, promulgated 12 December 2019.

[47] See: https://rm.coe.int/report-on-the-visit-to-hungary-from-4-to-8-february-2019-by-dunja-mija/1680942fod pp 26–30 (accessed on: 15.12.2022).

[48] See: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e (accessed on: 15.12.2022).

[49] Decision 22/2019 (VII. 5) of the Constitutional Court of Hungary.

postponement of the enactment of the Act on Public Administrative Courts, submitted on 30 May 2019, the Government proposed postponing the establishment of the independent administrative court system for an indefinite period. Act No. LXI of 2019 on the postponement of the Act on Administrative Courts was enacted by the Parliament on 2 July 2019.[50] As a result, it now seems likely that in the following years the independent administrative court system, effecting spite of its benefits, will not come to fruition.

The current Hungarian judicial system[51] was formed as follows on 1 March 2022: there are 113 District Courts located in the major cities of Hungary and proceed in most of the civil and criminal cases in first instance, but administrative cases cannot be heard in these courts.

The next level is the Regional Court (19 in the counties and 1 in Budapest) which decides in first instance in several cases specified in acts and in second instance as reviewing appeals against the decisions of the District Courts. Only eight Regional Courts have an administrative department and decide on most of the administrative cases in first instance.

The following level is the Regional Court of Appeal. There are only 5 in Hungary: in Budapest, Debrecen, Győr, Pécs and Szeged. In regard of administrative cases appeals against the decisions of the eight Regional Courts that have an administrative department are determined by the Budapest Regional Court of Appeal.

In the last instance, we find the Curia of Hungary, highest general ordinary court. This reviews the final court's decisions in civil, penal and in administrative cases if these are challenged through an extraordinary remedy. The Curia also has material (first instance) jurisdiction regarding several administrative cases such as in procedures for reviewing the conflict of a local government decree with other laws, procedures due to the failure of a local government to

[50] See: E. Várnay, M. Varju, *Whither Administrative Justice in Hungary? European Requirements and the Setting Up of a Separate Administrative Judiciary*, "European Public Law" 2019, Vol. 25, No. 3, pp. 283–304.

[51] See: Act No. CLXI of 2011 on the Organization and Administration of Courts.

fulfil its obligation to legislate, etc.[52] The Curia also guarantees the uniform application of law.[53]

From the above explanation we deduce that in Hungary ordinary courts decide on administrative cases: in first instance mostly the eight regional courts that have an administrative chamber, in second instance cases are determined by the Budapest Regional Court of Appeal, and review procedures are adjudicated by the Curia of Hungary, which also acts as a first instance forum in a limited scope of cases.[54]

In Poland an independent system of administrative courts exists.[55] Without going into detail of the historical overview of the Polish administrative judiciary, the judicial control on administrative activities recommenced with the amendment of the Act on the Code of Administrative Procedure with the Supreme Administrative Court. This Act restored basically administrative jurisdiction in Poland and the enactment of that law is the beginning of a new stage in the Polish administrative judiciary.[56] Pursuant to this Act, the Supreme Administrative Court assumed responsibility for jurisdiction in cases involving complaints against administrative decisions and the inaction of administrative bodies.[57] The Supreme Administrative Court that sits in Warsaw, began its operations on 1 September 1980 and since 1981 it has also had regional branches. It remained a one-instance court. Major changes were introduced only in 1990 and 1995. In 1990, according to the amended Article 196 paragraph 1 of the Code of Administrative Procedure, the decision of the state administrative body might be appealed to an administrative court on the grounds of its illegality. As a result, the ambit of

[52] Article 7 of the the Hungarian Code.

[53] Article 25 paragraph (3) of the Fundamental Law of Hungary.

[54] Article 12 paragraph (3) of the Hungarian Code.

[55] An overview is also given in the Polish Supreme Administrative Court's homepage: https://www.nsa.gov.pl/en.php (accessed on: 15.12.2022).

[56] See for more detail: J. Turłukowski, *Administrative Justice in Poland*, "BRICS Law Journal" 2016, Vol. 3, No. 2, pp. 124–152.

[57] Seminar co-funded by the 'Justice' programme of the European Union Seminar organised by the Federal Administrative Court of Germany and ACA-Europe: *Functions of and Access to Supreme Administrative Courts*, Berlin, 13 May 2019.

administrative control has clearly changed, challenging the legality of every administrative decision before the administrative courts. We see the similarity in this regard with Hungary.

The next important step in this reform was the adoption on 11 May 1995 of the comprehensive Act on the Supreme Administrative Court regulating the organisation of the Supreme Administrative Court, its jurisdiction and its scope, as well as court proceedings. At the same time, the rules regarding judicial control of administrative proceedings were repealed from the Polish Code of Administrative Procedure. The adoption of the Constitution of the Republic of Poland in 1997 brought significant changes in the Polish administrative court system. The administrative judiciary, as we had already seen, has a great deal of constitutional power in Poland.[58] The Constitution states that the judicial power is a separate power, and that it shall be independent of other branches of power.[59] The Constitution stipulates the dual nature of the judicial authority, as it is composed of courts and tribunals.[60] The Constitution lists the Constitutional Tribunal and the Tribunal of State, while the courts are the Supreme Court, common courts and administrative courts including the Supreme Administrative Court, and military courts.[61] The Constitution also states that court proceedings shall have at least two stages.[62] This constitutional duty was to introduce a system of two administrative instances within five years of its coming into force. On that basis the following acts were adopted and came into force on 1 January 2004: the Act on the System of Administrative Courts and the Act on Proceedings before Administrative Courts.[63] These Acts, together with the rules implementing

[58] J. Turłukowski, *op. cit.*, p. 125.

[59] Article 173 of the Polish Constitution.

[60] J. Olszanowski, *Model of Supervision over Administrative Courts in Poland*, "Bratislava Law Review" 2020, Vol. 4, No. 2, p. 176.

[61] Article 175 paragraph 1 of the Polish Constitution.

[62] Article 176 of the Polish Constitution.

[63] These Acts are to be found in English as an unofficial translation by the Supreme Administrative Court in Poland: *Administrative Justice in Poland. Legislative Acts*, Inowrocław 2019. See: https://rm.coe.int/poland-reponse-questionnaire-annexe-2-administrative-justice-in-poland/168093193f (accessed on: 15.12.2022).

their regulation, may be considered as the fundamental elements of the reform of administrative judiciary after 1990 in Poland. Since 1 January 2004 the new two-instance administrative court structure has been as follows: the administrative courts are voivodship administrative courts (*wojewódzki sąd administracyjny*) and the Supreme Administrative Court (*Naczelny Sąd Administracyjny*).[64] At the present time there are sixteen voivodship administrative courts,[65] which review the legality of administrative decisions, ascertaining the legality of the activities of the public administration in first instance.[66] Appeals (cassation appeal and interlocutory appeal)[67] against decisions of the voivodship administrative courts are decided by the Supreme Administrative Court.[68] The Supreme Administrative Court is divided into three chambers: the Financial Chamber, the Commercial Chamber and the General Administrative Chamber.[69] The Supreme Administrative Court supervises the work of the voivodship administrative courts. In addition to its decision-making power, the Supreme Administrative Court also accepts resolutions addressing legal issues.[70] The Supreme Administrative Court may adopt two types of resolution: a) resolutions aiming to explain and clarify legal provisions, the use of which caused a divergence in the case law of administrative courts; and b) resolutions including decisions on legal issues raising serious doubts in a particular administrative court case.[71] In Polish literature[72] the first resolutions are abstract resolutions and the second are concrete resolutions. Resolutions have an important role in the unification of Polish judicial practice, and similar tools are also to be found

[64] Article 2 of the Act on the System of Administrative Courts.
[65] See Regulation by the President of the Republic of Poland – Coll 2003 no. 72 item 652.
[66] Articles 13–14 of the Polish Code.
[67] See: Article 173 and suivants regarding cassation appeal and Article 194 and suvaints regarding interlocutory appeal of the Polish Code.
[68] See Article 15 1 of the Polish Code.
[69] See Article 39 of Act on the System of Administrative Courts.
[70] See Articles 264–269 of the Polish Code.
[71] See Article 15 paragraphs 2–3 of the Polish Code.
[72] J. Turłukowski, *op. cit.*, p. 139.

in Hungary.[73] The Supreme Administrative Court also has other important competences such as resolving jurisdictional disputes between local government authorities and between self-government appellate boards, unless a separate statute provides otherwise, and resolving disputes regarding competence between local government authorities and government administration agencies.[74]

In view of the above, it may be deduced that one of the most significant differences between the realisation of administrative judiciary in Hungary and in Poland concerns the organisation of courts which decide in administrative cases: while in Hungary ordinary courts review the legality of administrative decisions, in Poland there is an independent administrative court system. The organisation of administrative courts, however, is only one, maybe not even the most important,[75] question which cannot curb the creation of administrative justice. Other key conditions for the satisfactory operation of the judicial review of administrative decisions is the quality and the form of codification of the administrative court procedures. The next part of the paper therefore focuses on these questions.

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[73] See: motion for preliminary ruling and uniformity complaints and unification procedures in the Hungarian Act CLXI of 2011 on the organisation and administration of courts; A. Patyi, *A jogegységipanasz-eljárások gyakorlatának néhány alapkérdése*, [in:] *Jó kormányzás és büntetőjog: Ünnepi tanulmányok Kis Norbert egyetemi tanár 50. születésnapjára*, A. Koltay, B. Gellér (eds.), Budapest 2022, pp. 511–525.

[74] See: M. Wiącek, *Legal Position of Administrative Courts in Poland: Commercial and Financial Cases Perspective*, "International Community Law Review" 2021, Vol. 23 No. 5, pp. 526–539; J. Olszanowski, *op. cit*., pp. 173–188; D. Kryska, *Organisation of Czech and Polish Administrative Judiciary*, "International and Comparative Law Review" 2012, Vol. 12, No. 1, pp. 81–102.

[75] A. Patyi, *Közigazgatási Bíráskodás de constitutione ferenda*, [in:] J. Fröhlich, A.Zs. Vargha, *Közérdekvédelem. A közigazgatási bíráskodás múltja és jövője*, Budapest 2011, pp. 33–55; K.F. Rozsnyai, *A step towards the dualistic model of administrative justice*, [in:] *Liber Amicorum László Trócsányi: Tanulmánykötet Trócsányi László 65 születésnapja alkalmából – Studies commemorating the 65th birthday of László Trócsányi: Mélanges offert à László Trócsányi pour ses 65 ans*, P. Kruzslicz, M. Sulyok, A. Szalai (eds.), Szeged 2021, pp. 157–165.

3.4. Latest codification regarding administrative court proceedings in Hungary and in Poland

One of the most important codifications in Hungary in recent years is the adoption of Act No. I of the 2017 Code of Administrative Court Procedure (the Hungarian Code here),[76] which contains the rules of the procedures of judicial review of administrative decisions.[77] Until the enactment of this Act on 1 January 2018 judicial review procedures of administrative decisions was mostly regulated in the Code of Civil Procedure. The current regulation regarding the rules applicable in administrative court cases is complex, as most of the provisions are to be found in the Hungarian Code, while Article 6 of the Hungarian Code states that the provisions of the new Act No. CXXX of 2016 on the Code of Civil Procedure are applied to an administrative court action if it is expressly referred to it in the Hungarian Code, which mentions the Code of Civil Procedure in several cases such as language use, the service of documents, time limits, court vacation, failures and excuses for them, access to documents, making copies and data processing, etc.[78] The complexity of the rules applicable in administrative court proceedings is even more complicated: not only the Hungarian Code, but in cases when it directly refers to it, the Code of Civil Procedure, shall be applied, but in several cases specific rules are determined in different acts such as in election cases.[79]

The structure of the Hungarian Code is logical, following the order of the administrative court procedure. There are six parts to the Hungarian Code: Part I outlines general provisions and defines the first the scope of the act, the responsibilities of the court and the

[76] See the reforms: I. Hoffman, *Application of Administrative Law in the Time of Reforms in the Light of the Scope of Judicial Review in Hungary*, "Studia Iuridica Lublinensia" 2020, Vol. 29, No. 3, pp. 101–116.

[77] The Code of Administrative Court Procedure was first accepted on 6 December 2016 and abolished by the Decision 1/2017 (I 17) of the Hungarian Constitutional Court because one part of the Act was deemed unconstitutional by Parliament.

[78] Article 36 of the Hungarian Code.

[79] Article 228 paragraph 2 of Act No. XXXVI of 2013 on election procedure.

obligations of the parties and the definition of the basic notions used in the Code, such as administrative dispute, administrative act. It also describes the courts that adjudicate in administrative cases and names the types of case which the court is obliged to proceed in the first instance. It also regulates the material jurisdiction and regional jurisdiction; names the parties and the interested persons in the court proceedings and outlines the rules regarding the representation of the parties. Part II precisely regulates the procedure of the first instance and defines provisions regarding the different types of the statement of the claim and the joinder of claim, forwarding the statement of claim, the measures based on the statement of claim, the preparatory arrangements for the court action, the hearing, the taking of evidence, etc. Part III defines the different types of court decisions (judgments concerning the merits of the action, an order in any other question arising in the course of the action), defines the limits of the court's power of decision and the legal effects of the court's decision. Part IV enumerates the possibilities of legal remedy (appeal, review and retrial) which may be used against the judgement of the courts. This part also describes the rules of the procedure to follow in respect of a constitutional complaint. Part V explains the different rules of the special administrative court actions and other administrative court procedures, such as the simplified procedure, the action for failure to act, the procedures for reviewing the conflict of local government decrees with other laws and to procedures due to the failure of a local government to fulfil its obligation based on an act, etc. Part VI concerns the final provisions.[80]

In Poland the Act of 30 August 2002 on the Law on Proceedings before Administrative Courts (the Polish Code here) regulates the administrative court proceedings as the Hungarian Code according to a very similar structure. The Polish Act also refers to the

[80] See: *A közigazgatási eljárás szabályai – Kommentár a gyakorlat számára*, F. Petrik (ed.), 4. kiadás, Budapest 2021; *Kommentár a közigazgatási perrendtartáshoz: Kommentár a közigazgatási perrendtartásról szóló 2017 évi I. törvényhez*, G. Barabás, K.F. Rozsnyai, A.G. Kovács (eds.), Budapest 2018; K.F. Rozsnyai, *Current Tendencies of Judicial Review as Reflected in the New Hungarian Code of Administrative Court Procedure*, "Central European Public Administration Review (CEPAR)" 2019, Vol. 17, No. 1, pp. 7–23.

application of the Code of Civil Procedure, but significantly fewer cases than the Hungarian Code. The Polish Act has eleven parts. Part I outlines the preliminary provisions and contains rules regarding general provisions, jurisdiction of voivodship administrative courts and of the Supreme Administrative Court, composition of the court and disqualification of judges. Part II defines the parties in administrative cases. Part III focuses on the rules of proceedings before the voivodship administrative courts. Part IV contains rules regarding appellate measures. Part V concerns the costs of the proceedings. Part VI explains the special rules regarding the resolutions of the Supreme Administrative Court. Part VII regulates the re-opening of the proceedings. Part VII A is a motion for the declaration of a legally binding judicial decision unlawful. Part VIII enumerates rules regarding the execution of court decisions. Part IX regulates the proceedings in relation to lost or damaged files. Part X deals with provisions relating to foreign relations. Part XI is the final provision.

The above structure demonstrates that the Polish Act is more detailed than the Hungarian Code and contains provisions which in Hungary are regulated in different Acts, such as questions related to costs,[81] and the execution of court decisions.[82]

The legality of public administration clearly cannot be ensured only by administrative courts or courts adjudicating in administrative cases, but also through the codification of the administrative procedure law.[83] We therefore found it important that from 1 January 2018, when the Hungarian Code came into force, the judicial review of administrative decisions is no longer carried out within the framework of the civil justice system, under the rules of the Code of Civil Procedure, but a new administrative court procedural law came into force and a new era began in the Hungarian administrative judiciary. In parallel with the enactment of the new Hungarian

[81] See: Poland: Part V of the Polish Code; Hungary: Act No. XCIII of 1990 on Duties.

[82] See: Poland: Part VIII of the Polish Code; Hungary: Act No. LIII of 1994 on Judicial Enforcement.

[83] Z. Magyary, *A magyar közigazgatás racionalizálása*, Budapest 1930, pp. 149–150.

Code the rules of administrative procedure were also renewed with Act No. CL of 2016 on the Code of General Administrative Procedure. We also find similar regulation in Poland in these fields of law.

Before going into the details regarding the different tools of the acceleration of the receipt of final decisions, this paper shall emphasise the provisions concerning the Hungarian Code's wide scope of application[84] compared to the Polish Code. The scope of the Polish Code is defined in Article 3.[85] There are some exclusions

[84] See: K.F. Rozsnyai, G. Barabás, *A törvény hatálya: Kp. 1 §*, [in:] *Kommentár a közigazgatási perrendtartáshoz: Kommentár a közigazgatási perrendtartásról szóló 2017 évi I. törvényhez*, G. Barabás, K.F. Rozsnyai, A.G. Kovács (eds.), Budapest 2018, pp. 29–39; M. Fazekas, *Hatósági ügy – közigazgatási jogvita (Az Ákr. és a Kp. tárgyi hatályának néhány kérdése)*, "Jogtudományi Közlöny" 2017, pp. 453–462.

[85] Article 3 of the Polish Code: '*The administrative courts control the activities of the public administration and adjudicate on complaints made against: 1. administrative decisions; 2. orders made in administrative proceedings, which are subject to interlocutory appeal or those concluding the proceeding, as well as orders resolving the case in its merit; 3. orders made in enforcement proceedings and proceedings to secure claims which are subject to an interlocutory appeal, with the exclusion of the orders of a creditor on the inadmissibility of the allegation made and orders dealing with the position of a creditor on the allegation made; 4. acts or actions related to public administration regarding rights or obligations under legal regulations other than acts or actions specified above excluding several acts and activities like the ones taken in the course of administrative proceedings specified in the Act of 14 June 1960, Code of Administrative Proceedings, etc.; 4a) written interpretations of tax law issued in individual cases, protective tax opinions and refusal to issue protective tax opinions; 5. local enactments issued by local government authorities and regional agencies of government administration; 6. enactments issued by offices of local government and their associations, other than those specified in point 6, in respect of matters falling within the scope of public administration; 7. acts of supervision over activities of local government authorities; 8. lack of action or excessive length of proceedings in the cases referred to in points 1–4 or excessive length of proceedings in the case referred to in point 4a; 9. lack of action or excessive length of proceedings in cases relating to acts or actions other than the acts or actions referred to in points 1–3, falling within the scope of public administration and relating to the rights or obligations arising from the provisions of law, taken in the course of the administrative proceedings referred to in the Code of administrative proceedings of 14 June 1960 and proceedings referred to in sections IV, V and VI of the Tax Ordinance Act of 29 August 1997, as well as proceedings to which the provisions of the above mentioned Acts apply; 10. matters where provisions of specific statutes provide for judicial review; 11. administrative courts also resolve*

from the jurisdiction of the administrative courts specified in Article 5 of the Polish Code, some of which are similar to the Hungarian cases excluded between parties in hierarchical or managerial legal relationships (Article 4c of the Hungarian Code is similar to Article 51 of the Polish Code).

The definition given by the Hungarian Code regarding its scope is more general than the list given by the Polish Code regarding the cases in which the Polish Code should be applied. Article 1 paragraph (1) of the Hungarian Code explains that the scope of the Code covers, on the one hand, administrative disputes adjudicated in an administrative lawsuit and, on the other hand, that there are other types of administrative court proceedings in which the Code should be applied. This division corresponds to the Codes' structure as has been outlined above:[86] Part Five of the Hungarian Code covers special administrative lawsuits and other administrative court proceedings such as the norm-control procedures regarding local government decree.

Article 1 paragraph (2) of the Hungarian Code, however, explains that there are some administrative legal disputes in which the Hungarian Code is not applicable. This could happen either by referring to a special procedural rule, or by a legal act prescribing the procedure of a court that does not qualify to be a court presiding over an administrative case. This is the case, for example, when reviewing the acts of the infringement procedures.[87]

The above articles should be examined bearing in mind Articles 4 and 5 of the Hungarian Code. Article 5 of the Code enumerates the five general cases in which different courts shall adjudicate the legal disagreements by applying the Hungarian Code:

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jurisdictional disputes between local government authorities and between self-government appellate boards, and disputes regarding competence between local government authorities and government administration agencies.'

[86] See: Part IV of the paper.

[87] See also: K.F. Rozsnyai, *Közigazgatási jogvita vagy közjogi jogvita?: A közigazgatási ügyben eljáró bíróságok végzései a pártok által elfogadott tiltott támogatásokról hozott állami számvevőszéki jelentésekkel és felhívásokkal szembeni közigazgatási bírói út hiányáról*, "Jogesetek Magyarázata" 2019, Vol. 10, No. 4, pp. 17–26.

A. In administrative disputes, when the subject of the administrative dispute is the lawfulness of an act regulated under administrative law and taken by an administrative organ with the aim to alter the legal situation of an entity affected by administrative law or resulting in such an alteration, or the lawfulness of the administrative organ's failure to carry out such an act. This is the so-called administrative activity.[88] It remains a general clause, which has three conceptual elements: that the activity is carried out by a public administrative body (the definition of administrative body is also given by the Hungarian Code).[89] This activity is regulated by administrative law and this administrative activity may be one way of enacting the administrative act, but it may also be realised by omission, when the public administrative body fails to act.[90] An essential feature of administrative activity is that it has legal effect. The different types of administrative acts are also listed in the Hungarian Code, as follows:

[88] Article 4 paragraph (1) of the Hungarian Code.

[89] Article 4 paragraph (7) states the following: '*1. administrative organ means: a) an organ of state administration and its organisational unit or entity vested with independent functions and powers, b) the representative body of a local government and its organ, c) the representative body of a national minority self-government and its organ, d) a statutory professional body, an institute of higher education and its official organ vested with independent functions and powers, e) other organisation or persons authorized by the law to carry out administrative acts.*' Regarding the structure of Hungarian public administration, see: *A közigazgatás tudománya és gyakorlata*, A. Szalai (ed.), Budapest 2020.

[90] The silence of administration is a long debated topic in Hungary. See: P. Darák, *A közigazgatás hallgatása elleni bírói jogvédelem*, "Magyar Közigazgatás" 1994, Vol. 44, No. 6–7, p. 419; A. Paulovics, *Gondolatok a közigazgatási szerv hallgatásáról*, "Jogtudományi Közlöny" 2000, Vol. 55, No. 3, pp. 82–89; G. Remes, *A közigazgatás hallgatásával szembeni jogvédelem egyes kérdései a bírósági gyakorlatban*, "Új Magyar Közigazgatás" 2012, Vol. 5, No. 1, pp. 39–45; A. Tamás, *A közigazgatás hallgatása*, [in:] *A hazai közigazgatási hatósági eljárási jog karakterisztikája*, A. Boros, A. Patyi (ed.), Budapest 2019, pp. 247–250; K.F. Rozsnyai, I. Hoffman, *New Hungarian Institutions against Administrative Silence: Friends or Foes of the Parties?*, "Studia Iuridica Lublinensia" 2020, Vol. 29, No. 1, pp. 109–127.

1) individual decisions, including any type of decision of the public administration: it may be formal or informal; it can be oral or written;
2) provisions of general effect, but not falling under the scope of Act No. CXXX of 2010 on Legislation, so they are not laws, normative decisions and normative instructions which should be applied in the individual cases such as a temporary placed traffic sign,[91] recommendations, announcements, methodological guides of autonomous state administrative bodies or independent regulatory bodies;[92]
3) administrative contracts, defined in the Hungarian Code as follows: a contract or an agreement concluded by and between Hungarian administrative organs to perform a public function, as well as contracts defined as such by an Act or government decree.[93]

B. Courts also adjudicate disputes of public law that fall, by virtue of an Act, under the jurisdiction of administrative courts. Disputes in public law may be distinguished from administrative disputes, on the one hand, by the fact that it falls not to public administrative bodies but to state bodies to makes the decision in the case. Another difference between administrative disputes and disputes of public law is the applicable law: there are also legal disputes between public administration

[91] See: Decision of the Curia Kfv. 37.393/2020/5.

[92] K.F. Rozsnyai, G. Barabás, *Közigazgatási normatív aktusok: egyedi ügyben alkalmazandó – a Jat. hatálya alá nem tartozó – általános hatályú rendelkezés*, [in:] *Kommentár a közigazgatási perrendtartáshoz: Kommentár a közigazgatási perrendtartásról szóló 2017 évi I. törvényhez*, G. Barabás, K.F. Rozsnyai, A.G. Kovács (eds.), Budapest 2018, pp. 52–57.

[93] Article 4 paragraph (7) of the Hungarian Code. See the latest Hungarian publications regarding administrative contracts: T. Papp, *A közigazgatási szerződés egyes kérdései a magánjog szempontjából – avagy a legújabb közigazgatási jogi fejlemények helyénvalóságáról*, [in:] *Közszerződési jogi koncepciók*, A. Auer (ed.), Hungary – on-line, 2022, pp. 1–13; M. Nagy, *A közigazgatási szerződés néhány elméleti és gyakorlati hiátusa a közigazgatási jog szemszögéből*, [in:] *Közszerződési jogi koncepciók*, A. Auer (ed.), Hungary – on-line, 2022, pp. 1–10; M. Nagy, *Szerződés a közigazgatási jogban*, "Jogtudományi Közlöny" 2022,Vol. 77, No. 4, pp. 137–146.

bodies that are not governed by administrative law, but for example by constitutional law (for example legal disputes between certain organs of the local government).[94]

C. Norm control procedures regarding local government are also decided by the Curia applying the Hungarian Code.[95]

D. Disputes related to public service relationship, defined as follows: a legal relationship that contains specific obligations and rights defined in an Act, established between the state or an organ acting on behalf of the state and a person employed on behalf of the state in order to perform work or provide a service, to serve the public; excluding the service relationship of judges, employees of the judiciary and the prosecution service, or as the legal relationships of those in employment relationships.[96] The Hungarian Code has brought significant changes in several respects in these lawsuits, including the composition of the trial; the lack of mandatory

[94] K.F. Rozsnyai, G. Barabás, *Közigazgatási bírói út: Kp. 5. §*, [in:] *Kommentár a közigazgatási perrendtartáshoz: Kommentár a közigazgatási perrendtartásról szóló 2017 évi I. törvényhez*, G. Barabás, K.F. Rozsnyai, A.G. Kovács (eds.), Budapest 2018, pp. 98–101.

[95] See: Z. Árva, *Közigazgatási normakontroll*, [in:] *Internetes Jogtudományi Enciklopédia*, A. Jakab, M. Könczöl, A. Menyhárd, G. Sulyok (eds.), Budapest 2020, https://ijoten.hu/szocikk/kozigazgatasi-normakontroll (accessed on: 15.12.2022); Z. Balogh, *A közigazgatási bíráskodás normakontroll-funkciója*, "Acta Humana" 2019, Vol. 7, No. 1, pp. 23–39; Z. Balogh, *Normakontroll eljárás mint különleges pertípus*, [in:] *A hazai és az uniós közigazgatási eljárásjog aktuális kérdései – Current Issues of the National and EU Administrative Procedures (the ReNEUAL Model Rules)*, B. Gerencsér, L. Berkes, Zs.A. Varga (eds.), Budapest 2015, pp. 199–212; I. Hoffman, *A normakontroll-eljárások a Közigazgatási Perrendtartás rendszerében – nemzetközi és történeti kitekintéssel*, [in:] *350 éves az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kara: a jubileumi év konferenciasorozatának tanulmányai (I.–II. kötet)*, A. Menyhárd, I. Varga (eds.), Budapest 2018, pp. 232–246; A. Patyi, *A helyi önkormányzatok rendeletei fölötti bírói kontroll néhány kérdése*, [in:] *Ünnepi kötet a 65 éves Imre Miklós tiszteletére*, E.M. Kovács (ed.), Budapest 2020, pp. 325–337; A. Kiss, K. Pollák, *XXV. Fejezet – Az önkormányzati rendelet más jogszabályba ütközésének vizsgálatára irányuló, valamint a helyi önkormányzat jogalkotási kötelezettségének elmulasztása miatti eljárások*, [in:] *A közigazgatási eljárás szabályai – Kommentár a gyakorlat számára* 4. kiadás, F. Petrik (ed.), Budapest 2021, pp. 392–413.

[96] Article 4 paragraph 7.3 of the Hungarian Code.

consultation at the first hearing of the case, characteristic of labour lawsuits.[97]

E. Lastly, the disputes regarding administrative contracts, defined above, shall also be decided in an administrative court case.

In the light of the above, the definition given regarding the scope of the Hungarian Code is more general and broader than the Polish Code. It might be considered to Polish legislators to broaden the scope of the Polish Code regarding disputes related to administrative contracts, as well as public service relationships.

One of the most important questions in the creation of the new Hungarian Code was not only the above regulation regarding the scope of the Code, but also the rules regulating court procedures, so the next part of the paper shall give an overview with a comparative aspect regarding new elements which helps to secure the accelerated reception of the final decisions in the codes regulating administrative litigation.

3.5. Novel rules regarding the acceleration of the receipt of final decisions

The acceleration of the receipt of final decisionsin administrative law suits is controversial. Before the enactment of the new Hungarian Code it was not unusual for an administrative proceeding with the administrative court to last more than three years from the submission of the application to the receiving of the court's final decision. If the administrative procedure or the administrative court procedure needed to be repeated because there was an illegality which could not be resolved in the remedy procedure, the whole procedure in extreme cases could take between five and ten years. One of the most

[97] Z. Petrovics, *Alapvető rendelkezések – 2. A közszolgálati jogvita*, [in:] *Kommentár a közigazgatási perrendtartáshoz: Kommentár a közigazgatási perrendtartásról szóló 2017 évi I. törvényhez*, G. Barabás, K.F. Rozsnyai, A.G. Kovács (eds.), Budapest 2018, pp. 76–78; J. Cséffán, *A közszolgálati jogviszonnyal kapcsolatos munkajogi igények érvényesítése a közigazgatási perben*, "Munkajog" 2019, Vol. 3, No. 2, pp. 23–38.

crucial parts of judicial protection for citizens is clearly to receive a speedy final decision from the court. In order to promote this the new Hungarian Code therefore introduced several new elements, some of which are also known in Polish regulations (V.1), and some of which cannot be found or are differently regulated in the Polish Code, so the adoption of similar rules as in the Hungarian Code might be considered by the Polish legislators (V.2).

3.5.1. SIMILAR REGULATIONS IN THE POLISH AND IN THE HUNGARIAN CODES REGARDING ADMINISTRATIVE COURT PROCEEDINGS

The Preamble to the Hungarian Code states that '*[t]he National Assembly, …recognising the need for independent rules of court procedures enabling the efficient, rapid and professional adjudication of administrative court actions*', adopts new rules regarding administrative court proceedings. Several new elements for realising this purpose were therefore adopted, of which this paper presents but a few of the most important. The Hungarian Code established real rules that help to achieve a more concentrated litigation procedure. The essence of the principle to ensure the concentration of proceedings (the definition given by the Code of Civil Procedure in Article 3) is that the court and the parties shall try to make available at the appropriate time all facts and evidence necessary to deliver the judgment, so that the legal dispute may be adjudicated, if possible, during one single hearing.[98] The addressee of this principle is the court, on the one hand, and, on the other hand, the parties. It is the court's obligation to ensure a fair hearing and completion of the lawsuit within a reasonable time. This principle is fundamental, so it needs to be respected in general, but it also appears in some specific rules of the Code, for example, regarding the amendment

[98] K.F. Rozsnyai, *A közigazgatási perjog néhány alapelvi aspektusa*, "Acta Humana: Hungarian Centre for Human Rights Publications" 2019, Vol. 7, No. 1, pp. 107–122.

of the claim as the plaintiff may only amend his/her claim at the first hearing at the latest.[99]

The first element to be noted regarding the acceleration to receive the final court decision is the differentiated installation of court powers. According to the importance, complexity and frequency of the cases, the first-instance jurisdictions are divided between the court levels in Hungary. Those cases that require special expertise are transferred to the highest judicial forum that creates an opportunity for specialisation, thus raising the professional level of judicial activity and speeding up the procedures.[100] The eight regional courts with an administrative department adjudicate administrative cases that are not conferred by law to the Budapest regional court of appeal or to the Curia.[101] To draw a comparison between Poland and Hungary, the voivodship courts hear as a principle all administrative matters, except cases reserved for the jurisdiction of the Supreme Administrative Court.[102]

In Hungary, meanwhile, we note that the Budapest regional court of appeal is the first-instance court a) in procedures for the designation of an administrative authority if there is a conflict over the subject-matter competence between two (or more) administrative bodies and b) in administrative cases defined by an act. The Curia of Hungary is the first and last instance court deciding the procedures for establishing the procedural means to remedy a constitutional complaint, procedures for reviewing the conflict of a local government decree with other laws, procedures due to the failure of a local government to fulfil its obligation to legislate and procedures

[99] Article 43 paragraph 1 of the Hungarian Code. See: M. Pomázi, *A Kúria határozata a közigazgatási perbeli keresetváltoztatásról: a felperes megtámadási jogának időbeli korlátozása a keresetváltoztatás fogalmának úgynevezett sajátképi értelmezésével*, "Jogesetek Magyarázat" 2021, Vol. 12, No. 2–3, pp. 53–61.

[100] A. Lapsánszky, *Hatáskör és illetékesség*, [in:] *Közigazgatási perjog*, E.Í. Horváth, A. Lapsánszky, Z. Wopera (eds.), Budapest 2019, pp. 91–106.

[101] Article 12 paragraph (1) of the Hungarian Code.

[102] Article 13 paragraph (1) of the Polish Code.

relating to the exercise of the right of assembly except the dissolution and in other cases defined by an act, such as electoral cases.[103, 104]

In order to improve professionalism the Hungarian Code also restored the primacy of proceedings in the council, but took into account the complexity of the different cases too. It therefore remains possible for a single judge to adjudicate in first instance in cases regulated by the Hungarian Code such as actions for reviewing an administrative act taken in an administrative procedure of two instances or in actions brought upon a claim disputing a payment obligation not exceeding ten million forints (around 25,000 EUR), etc.[105] Even cases where there is a possibility that it be decided by a sole judge if justified by the particular complexity of the case, it may be ordered, prior to commencing the hearing, that a panel of three professional judges adjudicate in the case.[106] It shall be emphasised that the rule of proceeding in panel is strengthened by the Fundamental Law of Hungary in Article 27 paragraph (1) as follows: '*[u]nless otherwise provided in an Act, courts shall adjudicate in panels.*'[107] The Hungarian Code states that the panel consist of three professional judges unless otherwise provided for by the Code,[108] as in Article 8 paragraph (6) in proceedings before the Curia, when the council must consist of five professional judges. Lastly, regarding this element we note an interesting fact: the court council in its preparatory deliberation may order that one member of the council proceed as a single judge if the adjudication of the case is simple both in terms of facts and legal aspects.[109] Comparable to the above provisions, the Polish Code provides as a rule a panel of three judges hearing the case at trial (both in the administrative courts of first and second instance). An administrative court

[103] Article 229 paragraph (1) of the Act No. XXXVI of 2013 on election procedure.
[104] Article 12 paragraphs (2)–(3) of the Hungarian Code.
[105] The catalogue of the cases in which a single juge may decide is listed in Article 8 paragraph (3) of the Hungarian Code.
[106] Article 8 paragraph (4) of the Hungarian Code.
[107] See: Z. Árva, *Nagykommentár Magyarország Alaptörvényéhez*, Budapest 2020.
[108] Article 8 paragraph (1) of the Hungarian Code.
[109] Article 56 paragraph (4) of the Hungarian Code.

sitting in camera, however, is presided over by a single judge, unless otherwise provided by a statute.[110]

The third element that might accelerate the receipt of the final decision is the rules regarding the taking of evidence. It should be stressed that administrative court proceedings are not a special civil law case in which the evidence is presented first in the court procedure. Administrative court proceedings are not a new level of the administrative procedure, so there is only limited possibility to refer to new evidence regarding the facts defined in the administrative procedure in Hungary. The Hungarian Code therefore emphasises that the plaintiff or the interested person may only invoke a fact or circumstance that already existed during the administrative procedure, but which was overlooked if the fact or circumstance was not considered in the administrative procedure, despite being invoked by the plaintiff or interested person, or if it was not known to the plaintiff or interested person for reasons beyond his or her control.[111] The Hungarian courts evaluate the evidence separately and jointly, comparing them with the facts established in the administrative procedure.[112] The obligation to present the facts necessary for the adjudication of the administrative legal dispute and providing data and evidence substantiating such facts falls to the parties.[113] In only a very few cases may the court order the taking of evidence on its own motion, such as if an infringement jeopardising the interests of a minor or a person entitled to disability allowance is invoked, or if it is provided by an act.[114] A motion for evidence may be submitted and means of proof may be made available at the first hearing at the latest. After this, only in very few cases may the court allow the presentation of a motion for proof by setting a deadline of no more than fifteen days.[115] In accordance with these strict rules the Hungarian Code provides all assistance, significantly helping the

[110] Article 16 of the Polish Code.
[111] Article 78 paragraph (4) of the Hungarian Code.
[112] Article 78 paragraph (2) of the Hungarian Code.
[113] Article 3 paragraph (3) of the Hungarian Code.
[114] Article 78 paragraph (5) of the Hungarian Code.
[115] Article 78 paragraph (3) of the Hungarian Code.

speedy conduct of trials.[116] In the Polish system as in the Hungarian the public administration bodies in administrative proceedings must collect all the evidence of the case. The administrative courts tend to conduct the evidence proceedings only exceptionally. The court may on its own motion or at the request of the parties request additional documentary proof, if this is necessary to resolve substantial doubts and will not excessively extend the proceedings on the case.[117]

The settlement is another institution which also improves efficiency of court proceedings. During the settlement the parties do not dispute on the legality of public administration activity but discuss the possible resolutions for remedying the infringements. In order to reach a settlement, court mediation was also included in the toolbox of the Hungarian and the Polish Codes of administrative court proceedings: Articles 65–68 of the Hungarian Code contain the provisions regarding the settlement, while Articles 69–70 focus on court mediation.[118] Mediation proceedings are regulated in Articles 115–118 of the Polish Code, which seems to be more detailed than the Hungarian Code. This institution is not commonly used neither in Hungary nor Poland, as the Annual report of the Polish Supreme Administrative Court even states that in 2020 mediation proceedings were initiated only in three cases, and two cases were resolved.[119] Despite the above facts, the constructive

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[116] D.V. Dudás, A. Kovács, *A közigazgatási bírósági felülvizsgálat bizonyítási-mérlegelési szabályai és terjedelme a tisztességes eljáráshoz való jog tükrében*, "Jogtudományi Közlöny" 2018, Vol. 73, No. 3, pp. 155–164; Z. Wopera, *Az elsőfokú eljárás*, [in:] *Közigazgatási perjog*, E.Í. Horváth, A. Lapsánszky, Z. Wopera (eds.), Budapest 2019, pp. 269–295.

[117] Article 106 paragraph (3) of the Polish Code. See: M. Kopacz, *About the need to change the scope of the evidence proceedings in administrative court cases*, "Toruńskie Studia Polsko-Włoskie – Studi Polacco-Italiani di Toruń" 2022, pp. 251–260; ACA Europe, *Administrative justice in Europe. Report for Poland*, https://www.aca-europe.eu/en/eurtour/i/countries/poland/poland_en.pdf (accessed on: 15.12.2022).

[118] E. Rothermel, *Az egyezség és a közvetítés – egyezség*, [in:] *A közigazgatási perrendtartás magyarázata*, F. Petrik (ed.), Budapest 2017, pp. 238–246; I. Bereczki, *A közigazgatási per során elrendelt közvetítői eljárás*, Ph.D. Thesis, Debrecen 2020.

[119] Supreme Administrative Court of Poland*: Annual Report 2020. Outline of the activities of the Supreme Administrative Court and* voivodship *administrative courts in 2020*.

effect of alternative dispute resolution, a more detailed regulation seems to be needed for the more common use of these tools.

The last similar component which this paper highlights regarding the acceleration of court proceedings in administrative cases is the so-called simplified procedure. The aim of the regulation of these special procedures is that, on the one hand, it protects the procedural rights of the parties and, on the other hand, if the case is simple, easy to decide, to ensure a more flexible, therefore faster decision-making procedure.[120] Rules regarding the simplified procedure are regulated separately in both the Hungarian and in the Polish Codes: Articles 124–126 of the Hungarian Code, and Articles 119–122 of the Polish Code.

The cases are defined in both the Hungarian and in the Polish Code, in which simplified proceeding are possible. Unless otherwise provided by an Act, in Hungary court may proceed in a simplified form in the following administrative cases in actions relating to an official verification card, official certificate and official register, except for the land registry; in actions launched exclusively upon the claims of other participants in the authority procedure; in actions related to an ancillary administrative act; in actions relating to the right of assembly, except for dispersal. The court may adjudicate the action in accordance with a simplified procedure if requested by the plaintiff in the statement of claim and not objected to by the defendant in the statement of defence.[121] In the Polish Act a catalogue of the cases which may be decided in simplified procedures may also be found. The case may be heard in accordance with the simplified procedure when the administrative decision or order challenged before the administrative court is invalid or has been issued in violation of the law being the basis to reopen the proceedings, and when a party requests that the case be referred for a hearing under the simplified procedure and none of the other parties demands that a trial be conducted within 14 days of being

[120] See also: E.I. Horváth, *Különös közigazgatási perek és egyéb közigazgatási eljárások; Egyszerűsített per*, [in:] *Közigazgatási perjog*, E.Í. Horváth, A. Lapsánszky, Z. Wopera (eds.), Budapest 2019, pp. 405–408.

[121] Article 124 paragraphs (2)–(3) of the Hungarian Code.

notified about that request. A case may be recognised under the simplified procedure if the subject of the complaint is a decision issued in administrative proceedings which is subject to an interlocutory appeal, or if it concludes the proceedings and an order ruling on the merits of the case and orders made in enforcement proceedings and proceedings to secure claims which are subject to an interlocutory appeal or if the subject matter of the complaint is the failure of the authorities to act or the excessive length of proceedings. As of 2017 the simplified procedure also applies for cases in which the challenged administrative decision has been issued in simplified proceedings before administrative bodies. A case may also be examined under the simplified procedure if the authority fails to pass the complaint to the court despite the imposition of a fine.[122] The broadening of the eligibility of cases for the simplified procedures should clearly be considered if it does not prevent the correct decision, as it has the potential significantly to accelerate the litigation procedure.

Special procedural rules characterise the simplified administrative court procedures such as that the court shall decide without a hearing,[123] the judgment delivered in a simplified procedure may not be appealed in Hungary.[124] In Poland the administrative court examining a case under a simplified procedure is not bound by any limitations in referring the case to a public hearing. The court may do so either at the request of any party or *ex officio*, if it finds it necessary to examine the case under the standard procedure[125] as in Hungary: respecting the fundamental principle of a fair trial, the courts may order the continuation of the proceedings in general rules at any time during the court procedure, if it seems necessary.[126] Simplified proceedings in Poland are conducted in camera by three

[122] Article 119 of the Polish Code.
[123] Article 124 paragraph (5) of the Hungarian Code.
[124] Article 126 paragraph (3) of the Hungarian Code.
[125] Supreme Administrative Court of Poland, *Annual Report 2020. Outline of the activities of the Supreme Administrative Court and voivodship administrative courts in 2020*, pp. 20–24.
[126] Article 124 paragraph (4) of the Hungarian Code.

judges,[127] while simplified court procedures in Hungary tend to be conducted by a single judge.[128]

After the examination of the similar provisions in the Polish and in the Hungarian Codes regarding the acceleration of the receipt of administrative court proceedings, this paper will now focus on a few of the new rules in the Hungarian Code, which are not regulated or differently determined in the Polish Code.

3.5.2. DIFFERENCES IN THE REGULATIONS REGARDING ADMINISTRATIVE COURT PROCEEDINGS

So-called model action is a very new component of the Hungarian administrative court procedure law which may reduce the time taken by several cases at once.[129] The purpose of this institution is to speed up the handling of legal disputes where, on the same factual and legal basis, the court has to make a decision in many cases in parallel, and for this purpose, almost the same procedural actions must be taken in terms of content. In order to adjudicate such proceedings more quickly, the rules of procedure give the judge the opportunity to preliminarily conduct one proceeding by classifying it as a model action, a model case, and use the evidence and results of legal interpretation obtained in this model case to make a decision in other proceedings. The other procedures are suspended until the decision is adopted in the model case. The Hungarian Code defines one more condition: that there shall be at least ten actions before the court. The court, if coming to the conclusion that the suspended actions have the same legal and factual aspects as the model action, may adjudicate them according to the outcome of the model case without holding hearings. This is a very

[127] Articles 120–122 of the Polish Code.
[128] See: Article 8 paragraph 3 of the Hungarian Code.
[129] Article 33 of the Hungarian Code.

practical institution, and these provisions could also be considered by Polish legislators.[130]

Secondly, if a court decides without hearing, the case would be accelerated. In Poland, unless a specific provision provides otherwise, court sessions shall be public and the decision-making court shall hear cases at trial.[131] In Hungary, however, the possibility of court decision-making without hearing is also regulated in the Hungarian Code as follows: '*[i]f none of the parties requested a hearing and the court does not find it necessary, the court shall decide the case on the merits without a hearing.*'[132] Court decisions in first instance court proceedings are not the only cases that may be adjugated without a hearing; Budapest Regional Court of Appeal and the Curia may also decide without a hearing. The special rules related to the adjudication of legal dispute without a hearing neither limit the rights of the parties, nor extend the procedural obligations, but these provisions aim to make the courts' work more efficient and to speed up court proceedings.[133]

The possibility of amending the administrative decision in a court decision could also improve efficiency.[134] The general idea of the Polish administrative judiciary is that administrative courts shall not replace the public administration in its decision-making process. Proceedings before administrative courts are therefore governed by a cassation-appeal-based adjudication.[135] The new Hungarian Code regulates the possibility to modify the administrative decisions in court proceedings on a new basis. It is no longer an exceptional option granted by a list of few cases dedicated in an act, but a general decision alternative. The option to amend is related to the nature

[130] K.F. Rozsnyai, *Hatékony jogvédelem a közigazgatási perben: A magyar közigazgatási perrendtartás európai fejlődési tendenciákhoz illeszkedő kodifikációjának egyes előkérdései*, Budapest 2018, pp. 130–131. See for exemple first model case in the Curia: Decision of the Curia Kfv. IV 35.496/2018.

[131] Article 90 of the Polish Code.

[132] Article 77 paragraph (1) of the Hungarian Code.

[133] Decision of the Curia Kfv. I.35.697/2013/10.

[134] Article 90 of the Hungarian Code.

[135] Polish Supreme Administrative Court report: https://www.nsa.gov.pl/en.php (accessed on: 15.12.2022).

of the case, and not to specific characteristics of cases: when the nature of the case allows it and the facts are clarified and based on the available data, the legal dispute may be decided definitively by the court, the court may amend the administrative decision that violates the law, if the administrative act was carried out in a two-level administrative procedure or if there was only a one-level administrative procedure in which the administrative act was decided and an Act permits the change of the administrative act. The court shall also amend the unlawful administrative act if it is possible by the nature of the case and the administrative authority in the repeated procedure[136] took an act that is contrary to the court's judgment. The Hungarian Code strictly defines the cases that disallow the amendment as for an administrative act taken under the law by assessing specific circumstances, or for an administrative act relating to a payment affecting the budget based on exercising discretionary power.[137] The right to amend the decision in the first instance court procedure in administrative cases leads to the acceleration of the conclusion of the administrative dispute and may even better orient the public administration bodies through the interpretation of the law given by the court.[138] The fundamental obligation defines that in the course of the application law courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be granted primarily to the preamble of that law and the justification of the proposal for, or for amending, the law. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good (Article 28 of the Fundamental Law of Hungary).[139]

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[136] Repeated procedure is the new procedure ordered in the judgment of the court in which the court provides the administrative organ a categorical guidance covering all the relevant points of remedying the infringement established (Article 86 paragraph (4) of the Hungarian Code).

[137] Article 90 paragraph (3) of the Hungarian Code.

[138] See: K.F. Rozsnyai, *op. cit*., pp. 201–209.

[139] See: M. Sulyok, *Parancs, paradoxon vagy próbatétel? Az Alaptörvény 28. cikkének lehetséges megközelítései*, "Jog Állam Politika: Jog- és politikatudományi

The rules of the remedy system against administrative court decisions in the Hungarian and Polish systems against administrative court decisions are also quite different. In Hungary, there are three legal remedy possibilities against the court decision given in administrative matters: the appeal as a general remedy possibility against court decisions and extraordinary procedure remedies, therefore applicable against the final, binding judgment, are the review and the retrial procedure. In Poland, as was mentioned above, the Polish Constitution guarantees the right of any individual to have his or her case heard twice by courts, thus the exact rules for realising this constitutional obligation are defined in administrative cases in the Polish Code as follows: judgments and certain types of orders concluding the proceedings may be challenged with a cassation appeal and other orders indicated through an interlocutory appeal before the Supreme Administrative Court.[140] The Polish Code also regulates the possibility of re-opening the procedure,[141] which is very similar to the regulation of the Hungarian retrial procedure. The grounds for applying for these procedures are defined in both Codes (even though the Hungarian Code refers to cases defined in the Code of Civil Procedure; therefore, it is Article 393 of the Code of Civil Procedure that should be examined).

The Polish cassation appeal is an ordinary legal remedy, but its availability is limited by a variety of legal requirements, and it is more like the rules of the Hungarian review procedures. In Hungary, appeal procedure may only be initiated against a first instance decision stating that there is a violation of law or a deviation in question of law regarding a prior decision of the Curia.[142] It may only be used

folyóirat" 2022, Vol. 14, No. 1, pp. 121–142; N. Chronowski, *Az alkotmánykonform értelmezés és az Alaptörvény*, "Közjogi Szemle" 2017, No. 4, pp. 7–15; J. Föhlich, *Az Alkotmánybíróság és a Kúria alkotmányértelmezése: az Alaptörvény R) és 28. cikkei*, [in:] *Az Alaptörvény érvényesülése a bírói gyakorlatban 3.: Alkotmányjogi panasz: az alapjog-érvényesítés gyakorlata: tanulmánykötet*, E. Balogh (ed.), Budapest 2019, pp. 342–364.

[140] Articles 173–198 of the Polish Code.

[141] Articles 270–284 of the Polish Code.

[142] See also: K. Pollák, *Perorvoslatok és az alkotmányjogi panasz esetén követendő eljárás*, [in:] *A közigazgatási jogvédelem és jogérvényesítés alapintézményei*, A. Boros (ed.), Budapest 2019, pp. 100–110.

if there were no administrative procedures before the court procedure, for example, if there is an administrative contract or if a legal act states that there is a possibility to use this legal remedy. The appeal shall be presented before the first instance court, which has the right to examine the appeal first and may even reject the appeal in cases defined in the Hungarian Code if for example the appeal has been submitted late. The court of first instance may most efficiently and quickly decide whether the legal conditions for the merits of the appeal are met, so these rules of the Hungarian Code accelerate the court's final decision-making procedure, as the first-instance court has all the documents regarding the given case.[143] Similar to the Polish Code since 2015 the court of first instance has been provided with the powers of self-inspection in cassation appeals too.[144] It shall also be noted that even the second instance court, which is in general the regional court of appeal of Budapest in Hungary, may decide on the merits of the case. If there is an infringement of the law or deviation from the Curia's previous decision, the court of second instance may therefore amend the judgment of the court of first instance as a whole or in part, by upholding or setting aside certain provisions of the judgement.[145] This possibility also clearly accelerates the receiving of the final judgment.

Regarding the review procedures before the Curia of Hungary, two parts of this legal remedy procedure may be distinguished: the admissibility of the review application and deciding on merits of the case. To begin with, the Curia formally examines the review application, ascertaining whether it meets the criteria defined in the Hungarian Code.[146] This admissibility is not automatic, and

[143] Article 102 of the Hungarian Code.

[144] An overview is also given in the Polish Supreme Administrative Court's homepage: https://www.nsa.gov.pl/en.php 20. (accessed on: 15.12.2022).

[145] Article 109 paragraph 2 of the Hungarian Code.

[146] Fuflfillling the general obligations is similar to the Polish Code regarding cassation appeals like as professional legal representative is needed, legal remedy tool needs to be lodged within 30 days but this is not enough as the Curia find the review application admissible:

a) if reviewing the violation of the law that affects the merits of the case is justified,

only cases admitted are examined in detail by the Curia. The review procedure is, on the one hand, a remedy tool and, on the other, an important role regarding upholding the uniformity of law.[147] This admission procedure also accelerates the final decision, as, if the review application is not admitted by the Curia, the case will not be examined in detail, and the Curia will be obliged to decide on the admissibility of the review application within thirty days of the application's referral. In the review procedures the Curia may not only set aside the final and binding decision in full or in part, and if necessary, shall order to court that adjudicated in the case to conduct a new procedure and adopt a new decision if the decision requested to be reviewed violates the law in a way that affects the merits of the case or if there is deviation of the previous Curia's decision regarding the question of law, but may also amend the court decision as annulling the administrative act and order the administrative authority to conduct a new procedure.[148] In this way there is no need for the court that first decided on the case to act, but, as a faster solution, the Curia directly charges the administrative authority to act, thus this provision also promotes an accelerated receipt of the final decisions.

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aa) by the need to ensure the uniformity of jurisprudence or its further development,
ab) due to the specific gravity or social relevance of the legal issue raised,
ac) due to the need for the preliminary ruling procedure at the Court of Justice of the European Union, or
ad) due to the fact that there might be a violation of the applicant's basic procedural right, or other procedural violation affecting the merits of the case, or

b) because the decision contains a provision that deviates in the legal question from the published case law of the Curia (Article 118 paragraph (1) of the Hungarian Code).

[147] Zs.A. Varga, *Tíz gondolat a jogegységről és a precedenshatásról*, "Magyar Jog" 2020, No. 2, pp. 81–87.

[148] Article 121 paragraph (1) b) of the Hungarian Code, which is similar to the Article 145a of the Polish Code.

3.6. Conclusion

As a conclusion, it is to our great profit that we can make comparisons with foreign models, which is essential for the development and for the modernisation of each countries' public administration and its administrative justice system.[149] The constitutional background of administrative judiciary is nevertheless very similar in Poland and in Hungary (the rule-of-law clause, the tasks of the courts regarding the reviewing of administrative decisions, the right to seek legal remedy and of the right to a fair trial). The main differences, however, are the *expressis verbis* declaration of the right to satisfactory administration and of the constitutional possibility to complain regarding court judgements in Hungarian Fundamental Law, the rules of which may also be considered by Polish legislators. Secondly, it should be stressed that, while in Hungary ordinary courts decide on the lawfulness of administrative decisions, in Poland an independent administrative court system exist. There are clear positive effects on administrative judiciary of the realisation of an independent system of administrative courts separate from the ordinary courts. Not only are the organisational dilemmas important regarding the administrative judiciary, but so is the codification level of the administrative court procedure too. The explanation of the structure and most important rules of the Hungarian and Polish Code having been explained, this paper focused first on the similar provisions in the Polish and in the Hungarian Codes regarding the the acceleration of the receipt of final decisions. It then enumerates differentiated installation of court powers, decision-making by solo-judges, the rules regarding evidence-taking, settlement and mediation and the so-called simplified procedures as the tools in this. The differences in the regulations of the administrative court proceedings regarding the tools that help to realise the above goal were analysed such as the so-called model action in the Hungarian Code, decision-making without hearing, the general possibility of amending the administrative decision through a court decision

[149] L. Lőrincz, *Összehasonlítás a közigazgatásban*, [in:] *Közigazgatás az Európai Unió tagállamaiban*, L. Lőrincz (ed.), Budapest 2006, p. 19.

and the complexity of the remedy system against administrative court decisions. The paper also emphasised that the scope of the Hungarian Code is broader than the Polish Code, so it broadening the scope of the Polish Code might be considered by the Polish legislators regarding disputes related to administrative contracts, for example, as well as public service relationships.

There are two final points: first, the list of rules and institutions enumerated in the paper are incomplete. There are several more elements (such as the interim relief in the Hungarian Code), which help to speed up the receipt of final court decisions. Secondly, acknowledging that, both from the point of view of the parties and the legislator, the speed with which legal disputes may be concluded is important, but it cannot be the only goal and it cannot come at the expense of professionalism, at the thoroughness of the decision and at the independence of the decision-maker-judge.

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DR MATEUSZ PSZCZYŃSKI
University of Opole | DOI: 10.32041/9788367149365/4

Chapter 4. On-line Administrative Courts and the Rule of Justice

4.1. Introduction

The outbreak of the previously unknown SARS-CoV-2 virus in 2020, with its monumental spread and high risk of morbidity and mortality, came as a shock to many states. At the same time it forced emergency measures to be taken, which were intended to enable the protection of the population, as well as the functioning of the economy and the state. Numerous restrictions and limitations were introduced when decision-makers had incomplete or even false information. The information chaos, the restricted organisational, technical and human resources prepared and geared up to act in a period of massive incidence of an unknown virus compounded the uncertainty and the provisional nature of the measures taken. Despite the scale and speed of the spread of the virus, it was clear quite early that the state and the economy could not stand still, only slow down, and that could only be temporary An indefinite wait for a full diagnosis, cure and prevention of the effects of a possible disease of this magnitude was impossible. Public institutions and the justice system in particular, required solutions adapted to the epidemic to mitigate its impact.

The introduction of an epidemic emergency due to SARS-CoV-2 virus infection in Poland took place on 14 March 2020, based on

a Ministry of Health regulation. The regulation imposed restrictions on trading, limited freedom of movement, including cross-border movement, restricted freedom of assembly and specific conditions for the functionality of health facilities. These court restrictions were introduced under the Act of 2 March 2020 on special arrangements related to the protection, prevention and control of COVID-19, other infectious diseases and emergencies caused by them. The relevant court procedure is Article 15zzs, added as a result of the amendment dated 31 March 2020, which came into force on the day of the announcement. According to Article 15zzs (1)(1) of the CovAct, during the epidemic emergency or state of epidemic declared due to COVID-19, the course of procedural deadlines in, *inter alia*, administrative court proceedings could not be initiated and the one that has begun is suspended for this period. At the same time, the holding of hearings and public hearings was suspended under Article 15zzs (6) CovAct. This suspension did not extend to criminal proceedings with respect to the questioning of a witness in pre-trial proceedings by the court under Articles 185a–185c or Article 316(3) of the Code of Criminal Procedure when the suspect is detained and on a European arrest warrant. A type of judicially permissible statutory inaction was also introduced, which could not form the basis for legal remedies for inaction, protraction or violation of a party's right to have a case heard without undue delay (Article 15zzs (11) CovAct).

4.2. Administrative courts during a pandemic

These first regulations that severely restrict access to the courts were caused by ignorance of the virus' full behaviour, the way it spreads and the extent of its morbidity. Accounts from other countries reported high virulence, rapid progression of the disease and lack of medical measures available to combat the virus, which, combined with the limited possibilities of hospitalisation of the most seriously ill, led to the introduction of restrictive legal instruments not only in the field of justice, but in all areas of social and economic life. This

occurred all over the world, with different intensities and different measures taken.

The normative act defining the rules for the functioning of, among others, the courts during the COVID-19 pandemic was amended several times. The first to cease were the provisions on the suspension of time limits in proceedings. From the point of view of the operation of administrative those cases in which the time limit was not suspended, in accordance with Article 15zzs (2a) CovAct were as follows:

- those providing opinions and approving the draft study of the development of spatial conditions and directions, the draft local plan and the draft resolution establishing the terms and conditions for the placement of small architectural objects, billboards and advertising devices and fences, their size, quality standards and the types of construction materials they may be made of, by the bodies referred to respectively in Article 11 (5), Article 17 (6), Article 37b (2) (3–7) of the Spatial Planning and Land Development Act of 27 March 2003;
- those providing an opinion on the municipal revitalisation programme project by the authorities referred to in Article 17 (2) (4) of the Act of 9 October 2015 on the revitalisation (Journal of Laws of 2018, item 1398 and of 2019, item 730, 1696 and 2020);
- those referred to in Article 11 (1), Article 17 (1) of the Spatial Planning and Land Development Act of 27 March 2003;
- those issuing decisions referred to in Article 59 (1–2a) of the Spatial Planning and Land Development Act of 27 March 2003;
- those referred to in Article 7 (4), (5), (10 to 15) and (18) of the Act of 5 July 2018 on the simplifications in the preparation and implementation of housing investments and accompanying investments (Journal of Laws of 2020, item 219 and 471);
- those referred to in Articles 6 (4), 7 (1), 17 (4), 18 (1), 19 (3) and (3a), 19a (3) and (6), 25a (3), 27 (2) and 34 (4) of the Act of 24 April 2009, (4) of the Act of 24 April 2009 on investments in the liquefied natural gas re-gasification (LNG)

terminal in Świnoujście (Journal of Laws of 2019, item 1554, 1724 and 2020 and of 2020, item 284);
- those referred to in Article 4 (4) and (7), Article 5 (1), Article 20 (1), Article 21 (3) and (4), Article 22 (4) and (7), Article 29 (2), Article 31 (3), Article 32 (2) and Article 35 (4) of the Act of 22 February 2019 on the preparation and implementation of strategic investments in the oil sector (Journal of Laws, item 630 and of 2020, item 284 and 471);
- those referred to in Article 4 (3), Article 6 (1), Article 14 (3), Article 15 (3) and Article 25 (4) of the Act of 24 July 2015 on the preparation and implementation of strategic investments in the transmission grid (Journal of Laws of 2020, item 191 and 284).

This provision came into force on 18 April 2020. It indirectly affected the way the administrative courts functioned, as possible complaints against these actions of the public administration bodies could reach the court. Experience tells us, however, that the specificity of the cases excluded from the official suspension of proceedings did not convert into a large case of administrative court proceedings in this respect.

A key change took place on 16 May 2020 when Article 15zzs CovAct was repealed and replaced, as far as this paper is concerned, by Article 15zzs[4] CovAct. Among other things, the rules for the hearing of cassation appeals by the Supreme Administrative Court and for an electronic hearing, a closed session or an open session in administrative court proceedings were specified.

Pursuant to Article 15zzs[4] (1) of the CovAct (in the original wording), during the COVID-19 emergency or epidemic and within one year of the cancellation of the epidemic state, the Supreme Administrative Court may hear the cassation appeal in a closed session. A prerequisite for a closed session was that all parties agree to hear the cassation appeal in closed session. The court would notify the parties of its intention to hear the case in closed session and the parties would have 14 days to respond to the issue presented. Of course, a party could waive a hearing beforehand or request that the complaint be heard at a hearing pursuant to Article 176 (2) and Article 182 (2) of the Act the Law on Proceedings before

Administrative Courts. At the same time, it was stipulated that sittings before the Supreme Administrative Court in cassation cases were to be heard by three judges.

As a rule, in accordance with Article 15zzs[4] (2) of the CovAct, sittings of the Supreme Administrative Court and provincial administrative courts during the epidemic threat or state of epidemic declared due to COVID-19 and within one year from the cancellation of the epidemic are to be held via devices allowing simultaneous long-distance video and audio transmission. If technically possible, attending the hearing either in the court building or somewhere else would have been permitted. In other words, the court could conduct a hybrid hearing, with the adjudicating panel in the courtroom with the participation of the other participants in another administrative courtrooms or elsewhere. At the same time, the provision stipulated that the hearing could be conducted traditionally, as long as it caused no undue risk to the health of those participating in it, i.e. the judges, the court staff, the parties and their attorneys or other participants in the proceedings.

Article 15zzs[4](3) CovAct gives the presiding officer the authority to conduct a hearing in the form of a cabinet session, conducted in closed session. The prerequisites, left to the discretion of the presiding officer, are the danger of undue health risks for the hearing's participants and the lack of technical possibility of conducting the hearing remotely. At the same time, a three-member panel for *in camera* hearings was established. The law does not specify whether it be the chairman of the panel or the chairman of the department who would perform an administrative function. On the basis of Article 62 ProcAdmCourt, Piotr Pietrasz presumes that this refers to the chairman of the department or a person acting on his or her behalf who sets the date of the hearing and the session, and thus equally determines the form of the public hearing in the courtroom or a hybrid meeting. The above interpretation refers to Article 94 paragraph 2 ProcAdmCourt, but the analogous norm, the indication of the chairperson, without specifying the position in the administrative court intimates that on the grounds of the so-called COVID Law it should also be assumed that the order to refer the case to a remote hearing is issued by the chairperson of the department.

The interpretation of Article 15zzs[4] (3) of the CovAct, as postulated by Hanna Filipczyk, should be based on a strict interpretation according to which a closed hearing is an exception to a hybrid public hearing. She points out there in the obligation of a pro-constitutional interpretation, directed in particular to the principle of openness of the proceedings. The very editorial construction, the last paragraph of Article 15zzs[4] CovAct, indicates the adoption of a special solution in relation to the constructions adopted in the paragraphs that preceded it. In the light of this provision, the in camera meeting is also conditioned by the risk of danger to health and the simultaneous impossibility of applying technical solutions. In other words, the chairman of the department should demonstrate that there is an epidemic risk at the time of the remote examination of a particular case and that, at the same time, the parties have no access to the required equipment. Assuming otherwise results in a violation of Article 15zzs[4] (3) in conjunction with Article 15zzs[4] (2) CovAct in its primary wording.

The amendment issued in May 2021 was short-lived, as another amendment to the provisions came into force on 3 July 2021. There was a further restriction of a party's rights by assuming that the Supreme Administrative Court is not bound by the request for a hearing and has to conduct the case in closed session with a three-member panel (Article 15zzs[4] (1) of CovAct). The literal wording of Article 15zzs[4] (2) CovAct obliges the chairman to refer the case to an on-line hearing.

Only when it is impossible to hold an on-line hearing does it become necessary to refer the case for a closed hearing. The circumstances of the conduct of a cabinet hearing should be indicated in the reasons for the decision made in a particular case. From the beginning of July 2021, a case might be heard either in a remote, hybrid or closed session.

This regulation is still in force because, although the state of epidemic for SARS-CoV-2 infections has been revoked as of 16 May 2022, at the same time the state of epidemic emergency was introduced on the same date and holds until further notice. There is no indication that in the mid-September 2022 the Minister of Health would be inclined to revoke the state of emergency. In other words,

the effects of the May 2020 amendment and the abolition of traditional hearings and the possibility to hold on-line and in camera hearings remain in force and will continue to be in force for the time being.

During the epidemic and the *lex specialis* regulation relating to the activities of, *inter alia*, the administrative courts in connection with the outbreak of the SARS-CoV-2 virus, another change was made to the regulations affecting the conduct of administrative court hearings, resulting from the Official Delivery Confirmation Act. This law amended Article 94 of the Law on Administrative Court Proceedings by adding a paragraph, paragraph 2, according to which the chairman may order that a public hearing be conducted at a distance via technical devices. A prerequisite for holding an on-line session, also referred to as a remote, off-site or electronic hearing, is that the participants of the hearing must be in a room apart from the adjudicating panel, located in a court building, be it administrative or common. The transmission takes place from the courtroom of the administrative court to the participants in the hearing and from the room where the participants in the hearing are present to the courtroom where the panel is present. The communication involves the transmission of sound and video in real time in both directions. This does not directly derive from Article 94 (2) ProcAdmCourt. Adopting a recording or time delay formula would nullify the idea of a hybrid meeting or hearing before an administrative court.

Bogusław Dauter notes that holding a hearing or public hearing remotely is an exception to the rule of holding it at the seat of the court, and may be ordered at the discretion of the presiding judge. The lack of statutory criteria justifying the holding of an on-line session raises doubts. It may be assumed that Article 94 (2) Proc AdmCourt sets out a competence provision, indicating the authority, albeit imprecisely, authorised to order a hearing on-line, and that the conditions dictating when it may be ordered derive from other provisions. Dauter accepts, however, that Article 15zzs[4] CovAct refers to exceptional situations, justifying the lack of direct contact between the judging panel and the participants in the hearing or the hearing or technical reasons, concerning, for example, the size

of the meeting room and the number of participants in the proceedings. On the other hand, Pietrasz indirectly indicates that the on-line hearing implements, *inter alia*, the constitutional principle of reliability and efficiency of public institutions. Such an interpretation deserves attention, as the whole idea of the computerisation of public authorities particularly serves the realisation of this principle. At the same time, if we accept it as a premise defining the conditions for recognising the order of a so-called e-trial, the range of cases for which this procedural solution may be introduced is significantly expanded. The fact that this provision introduces the construction of discretion is to be welcomed. It is the court that, on the basis of its overall knowledge of the case, its complexity, relevance for the public interest, importance for public opinion, the number of participants, the emergence of extraordinary situations, e.g. relating to restricted movement in a certain area of the country, technical, organisational or other exigencies, should have the exclusive competence to assess whether a hearing or a trial should be held in a courtroom or in hybrid form.

Judicial practice clearly shows that administrative courts have adopted adjudication in closed sessions, only occasionally allowing for a hybrid hearing. This is pointed out by Wojciech Piątek and Sławomir Presnarowicz. In 2021, for example, there were 888 three-person closed hearings in the Financial Chamber, while there were 206 hybrid hearings. The situation was similar in the Commercial Chamber of the Supreme Administrative Court, where the majority of cassation appeals was heard in *in camera* sittings and only 55 took place by means of electronic communication. The 2021 report fails to indicate the number of cases the NSA's General Administrative Chamber heard in hybrid mode and the number that were heard in closed hearings. A similar pattern was observed in 2020, when in the Financial Chamber there were a few on-line hearings; in the Commercial Chamber it was indicated that the majority were decided in closed sessions; and the General Administrative Chamber made no reference to the issue at all. A review of the electronic proceedings for the individual months of 2022 also shows the predominance of closed hearings over remote hearings. There is a preponderance of closed hearings, although the proportions

vary. In the Voivodship Administrative Court (WSA) in Gliwice, for example, roughly half of the cases were heard in closed hearings, and in the Voivodship Administrative Court (WSA) as a whole in 2021, 78.14% of cases were heard in closed hearings. In other courts the prevalence of closed hearings was even greater. Initially, this statistic confirms the thesis that administrative courts prefer closed hearings over remote hearings. As Filipczyk states in the judgments analysed, the administrative courts occasionally referred to the prerequisites set out in Article 15zzs[4] (3) CovAct. Even more rarely they indicate that an on-line hearing was impossible. Of course, the question immediately arises as to why the courts prefer hearings *in camera*.

There may be several reasons for implementing acceptable statutory solutions, relating to the courts themselves and other participants in the proceedings. but also the adoption of such regulations. An in-depth analysis of the practice and reasons for the referral to closed hearings would have to be carried out. Some conclusions, especially concerning technical issues, are already emerging, but they are of a rather general nature.

The form of contact and organisation of the on-line hearing raises some technical and organisational questions. Participants interested in such court proceedings are required to submit a declaration seven days before the planned meeting that they have the necessary equipment enabling them to participate in the on-line hearing. They then receive a link to the meeting. The statement and link is sent via ePUAP (Electronic Platform of Public Administration Services). This is a rather simple solution, created *ad hoc* during the pandemic. The adoption of such a solution in subsequent years is questionable and should be changed to a more comprehensive IT service.

Reading the obligatory on-line form of the hearing as the basic one in emergency situations, it seems that the electronic system should be designed in differently. When issuing an order to refer a case to an on-line public hearing, it is up to the court to schedule it by use of automated tools on the relevant digital platform. The issuance of the order should be combined with the automatic booking of the room and the official electronic order to the participants in the proceedings. The parties and other individuals authorised to take part in the hearing should, after logging on to the platform,

also see the hearing scheduled together with the necessary formal and technical information. Admission to the case should take place at an appropriate time, either through a waiting room where the participants of the hearing should be identified or through an automatic identification system. The identification must also take place electronically or there must be a presumption that the person logging in from a given account is the identified legitimate subject of that action, with all the consequences thereof, both in law and in fact. Indeed, it is impossible to rely on the identification of a party or participant in the proceedings merely by presenting an identity card to the camera, a practice which sometimes happens today. The issue of legal representation, especially in the case of a change of attorney or substitution at a particular hearing, should also be resolved automatically or quasi-automatically. In the currently binding regulations, there are claims that attorneys acting as a substitutes for attorneys who have already been filed with the court or who have already appeared at other stages of the case are not allowed to participate in the hearings. The idea of an on-line hearing certainly needs to be analysed and the whole IT system that is available to the court, the participants in the proceedings and the public needs to be redesigned. A good idea for developing such an on-line court system might be to follow the idea of *design thinking*. The introduction of on-line courts will result in non-lawyers being the users in greater numbers, and therefore their perception of the system will ultimately the most important. Even if, in the initial period, on-line courts will be the domain of lawyers, in the long term the thinking about the functioning of the administrative court will change. The idea of design thinking in developing, for instance, on-line access to a hearing should therefore be based on identifying and meeting the specific needs of both the courts and professional attorneys, but above all the parties to proceedings before an administrative court. It is insufficient to create an IT system, but it is necessary to implement it and make it adopt a new system with an associated new philosophy of on-line court.

4.3. Evidentiary proceedings

Another significant limitation of the current on-line hearings and probably the consequence of an error made in early in the on-line system design is the issue of the evidentiary proceedings. As a rule, the evidentiary proceedings in the light of Article 106 (3) ProcAdmCourt are of a supplementary nature. This results from the adopted model of adjudication, in which the court reviews the legality of the challenged administrative decision on the basis of the administrative case file (Article 133 (1) ProcAdmCourt). It considers not only the legal state in force on the day the decision was issued, but also the facts established on the basis of the collected evidence. The essence of judicial review is to assess whether the public administration body has gathered sufficient evidence to establish all legally relevant circumstances. The court also examines whether the evidence has been properly assessed by the body, in accordance with the procedural rules. The already existing evidence in the form of a document shall therefore be assessed before the administrative court.

The court may exceptionally conduct supplementary proceedings upon request or *ex officio*, provided that they relate to significant doubts relating to the law and not to the facts. In supplementary proceedings documentary evidence that was not admitted or assessed in the administrative proceedings shall accordingly be admissible. Supplementary proceedings may not serve to establish facts towards a substantive decision of the case.

The evidentiary proceedings framework before the administrative court results from the fact that, in the actual situation of an on-line hearing, procedural steps will be greatly hampered, if not impossible. Indeed, a major limitation on the communicator used by the administrative courts is the lack of possibility to file supplementary documents in the case directly at the time of the hearing. An on-line participant of a hearing must submit the relevant documents via the court office or postal operator at least 3 days before the hearing. It is also possible to send them via ePUAP, in the manner described in Article 12b (2) ProcAdmCourt the day before the hearing. Pietrasz believes that sending the document electronically

is the best way. The procedural rights of a party are thus limited, as a request for evidence made at a hearing must be preceded by the prior submission of the requested evidence to the court.

There is also presently a predominance of paper case files, which also limits the possibility to evaluate them at a distance, via the internet. This does not exhaust the challenges that arise in evidentiary proceedings in an on-line public hearing, as only evidence in electronic form, be it a document or a video or audio recording, may be sent via the electronic mailbox. The term electronic evidence is presented by Oręziak, assuming that it is "any object located in cyberspace which provides evidence in a court trial." In the above definition, the very wording of the object is questionable. It is a kind of simplification, but it is relevant and accurate to indicate the sphere of evidence. A more precise and complete definition is that proposed by Lach, according to which electronic evidence includes conceptual content, which is a manifestation of human thought in electronic form and which may have procedural significance. What is relevant at this point is not the medium of that information but its content and digital form. It should be noted, however, that the medium of digital evidence may be relevant at the stage at which the value of evidence is assessed. At this point it is the technical possibilities available to the court to read out evidentiary information that are important. It is also important whether digital evidence has been tampered with, either accidentally or intentionally, resulting in a loss of evidentiary value. Possible falsification may be an indirect consequence of the medium on which the information is located, as well as due to the digital properties of the original digital information.

Court records include records produced by the court and records produced in the course of administrative proceedings. They may be in electronic or paper form. As an ancillary note to these considerations, it is important to note an important problem related to the terminological inconsistency existing in the rules of administrative court proceedings and referring to the paper and digital *documents*, which Pietrasz and others raise. This issue will not be analysed in this paper, but the terminological confusion is of great importance for the evaluation of whether the principle of justice is implemented by an on-line administrative court.

In the case of electronic communication, all documents should have a digital document version, in accordance with Article 12 b (3) ProcAdmCourt and, if they exist in paper form, they should be converted into electronic form as certified copies. The duplication of court records in terms of paper and electronic form is an organisational challenge, both in terms of the court and the participants in the proceedings. The presentation of evidence at a distance is related to its nature, which affects the possibility to present such an act on-line. It should also be noted that in the context of a supplementary evidentiary procedure, it is not so much the content of the document that may be assessed, but, in the case of a paper document, the medium as such, together with its graphic elements. This is particularly relevant when, for example, minutes are drawn up by hand, considered as an official document, with many elements undermining its credibility, e.g. blurbs, deletions, illegible handwriting, poorly imprinted stamps. The preparation of an electronic copy, even a certified copy, of such a document will not allow an effective assessment whether it has been drawn up correctly or whether its content has been properly read. A number of elements relating to the evidence procedure before the administrative court therefore relate to the digital or traditional form of the documents in the case file. If all relevant files are in electronic form, it is unlikely that problems will arise in on-line proceedings. On the other hand, in the case of paper and electronic documents, there is a greater risk of a breach of due process, whether administrative or administrative court. At the same time, on-line court proceedings are more difficult when there is the parallel use of paper and electronic files.

4.4. Comparison of public hearings under the CovAct and the ProcAdmCourt

When we compare the solutions arising from the ProcAdmCourt and the CovAct, it should be stated that, as regards the place one participates in the on-line session, the currently applicable procedural regulation is more liberal, *lex specialis*. The shortcoming of the solution adopted in the ProcAdmCourt is the fact that the

on-line session must be held on the grounds of the court (Article 94 paragraph 2 of the ProcAdmCourt). While a provision limiting the site of the on-line hearing to premises corresponding to the solemnity of the court is understandable, such a narrow approach is incomprehensible. The question arises as to whether it may not be extended to include premises of other types. After all, the public administration body, which is a party to the court-administrative proceedings, has a room corresponding to the specifics of the hearing. The self-governing bodies of counsels, attorneys and the professional attorneys themselves tend also to have such premises, which, in times of emergency, e.g. pandemics, were used to participate in actions before the courts in on-line form. This would increase the base of sites where one could attend an electronic hearing, in keeping with the solemnity of the court. An important value of the on-line hearing is the possibility to be outside the court premises, at a place more convenient for the parties, the attorney or other participants in the proceedings. Administrative courts, especially in large provinces, are more distant from the seat of the legal entity or places of residence than are general courts. Commuting to the hearing is undoubtedly an additional burden for a party, especially when he or she is temporarily or permanently abroad and wants or has to participate in the court session. It is not only matters of finances or time that are important, but also the comfort associated with not being afraid of the courtroom, a certain formalisation of behaviour and the stress of attending a hearing. On the other hand, too much casualness, freedom of behaviour, dress and place are not always appropriate to the solemnity of the court and the actions undertaken. Piątek points out that, in the case of remote hearings, the issues such as maintaining the dignity of the court, judges' attire, etc. require an adequate alternative, suitable for an on-line court. The half-way solution with respect to the determination of the place of participation in the hearing or on-line session is therefore clearly quite a drawback of the adopted solution and results from Article 94 ProcAdmCourt. One may not therefore fully understand the reason the solution adopted in Article 15zzs[4] CovAct was abandoned. An amendment to Article 94 paragraph 2 ProcAdmCourt regarding the place of participation in an on-line hearing along the lines of the

current structure should be considered. Perhaps some restrictions might be introduced to preserve the solemnity of the court while maintaining the flexibility of participation in an on-line hearing almost anywhere in the world. Finding the golden mean is essential in this respect.

4.5. The right to a public hearing as a principle of law

The constitutional regulation relating to the right to a hearing is defined in Article 45 (1) and (2) of the Polish Constitution. In the light of the first paragraph of this article everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. Publicity is a conditional category, as it may be limited within the restrictions set by paragraph 2 a concerning morality, state security, public order and protection of the private life of a party, or other important private interests. The limitation of publicity does not affect the publicity of the judgment, which shall be announced publicly.

The right to a court of law is a subjective right that everyone is entitled to, whether an individual or a private legal person. It is constituted by the right of access to a court, defined as the right to an adequate procedure, the right to a public and fair procedure and the right of a judgment on one's case.

The realisation of the right to a court is also associated with building trust in the state as a democratic legal state. It is therefore an elementary part of a democratic state ruled by law that an impartial and independent court guided solely by the applicable law determines whether individual rights have been violated. Accordingly, this regulation is clearly related to the principle of the state ruled by law expressed in Article 2 of the Constitution of the Republic of Poland. It clearly legitimises the judiciary and at the same time strengthens the realisation of the idea of a democratic state. The correlations of the rule of law and the right to a court are therefore closely aligned and reinforce each other.

The right to a trial is associated with the right of access to a court and is thereby closely linked to the idea of procedural justice. It may

be understood as a fair process in which, based on specific data, a certain line of reasoning leads to a decision. The implementation of this principle is particularly evident in the audit carried out by administrative courts, as the court assesses the correctness of the administrative process and verifies the correctness of the interpretation and application of substantive law. In other words, the administrative court verifies whether the public administration body was procedurally and metrically fair. Such an approach, however, does not explain the operation of the court and the implementation of the principle of procedural justice, as it refers to the action of a public administration body. The operation of an administrative court will be considered to comply with the principle of procedural fairness when the actions of the court comply with the letter of procedural law. When the court correctly determines the case on the basis of the principles of logic, the available and complete evidence in the form of the administrative case file relies on the relevant provisions of substantive law interpreting them correctly. In the context of the realisation of the right to an on-line trial, it is important to ascertain whether the technical means used and the procedural solutions adopted restrict this right. Pietrasz states that the principle of the right to a trial is a pattern for the assessment of new legal resolutions that are of an informative and communicative nature. At this point, a disclaimer should be made that the current experience of Sars-CoV-2 shows that, while IT and technical solutions are generally compatible with the principle of procedural fairness, courts that prefer hearings *in camera*, in reality, deny on-line hearings. The digital divide in the demographic that effectively undermines the realisation of the right to the trial, when hearings are held on-line is also a major challenge.

The right to a hearing of a specific case is an element of the right to a trial. When talking about a case, it is necessary to bear in mind such a legal relationship in which the situation of the subject is shaped by civil law, administrative law and a situation in which a real action is assessed regarding the prerequisites of criminal law. The case also extends to the determination of an individual's legal status and not only to an assessment of whether his or her right has been infringed. This is of particular importance in the case of

declaratory decisions operating under public law. The administrative court in determining the legal status of an individual by issuing a declaratory or constitutive decision enforces justice. At the same time, it exercises control over the executive power. At this point, a special role of administrative judiciary appears, as the legality of the public authority's action is subject to examination, ascertaining whether the state and its bodies are acting in accordance with the letter of the law and within the limits of the law. It is not a matter of settling a dispute, as happens in civil cases, but of assessing whether the public authority is infringing the legally determined interests of an individual by its action or omission. It is therefore crucial to build trust in the court, as, in the case of a fair hearing, it builds trust in the state.

The cited right to a trial is clearly related to the prohibition of closing the judicial path, thereby supplementing the content of Article 45 (1) of the Constitution. The right to pursue cases of infringed rights concerns entities outside the public sphere, and the perpetrators of this infringement may be the state and its authorities, as well as private law entities. The norm defined in Article 77 (2) of the Constitution of the Republic of Poland is of a systemic nature, the scope of which covers violations committed in horizontal relations. In the case of the administrative judiciary, the aspect of the rights claim against public entities has a special dimension, determined by the scope of control of the executive power by an independent and impartial court bound only by law. The jurisdiction of the subject-matter of the administrative court has therefore been formulated broadly, indicating a catalogue of administrative acts to be controlled and also including other acts and activities in the field of public administration (Article 3 (2) (4) ProcAdmCourt). This actually constitutes an open catalogue of cases resulting from actions of public administration and belonging to the jurisdiction of administrative courts.

The issue of the independence and impartiality of the court included in Article 45 of the Constitution of the Republic of Poland is a reference to the constitutional principles of the judiciary. This is a kind of reinforcement, on the one hand, independence and impartiality raised to the level of constitutional principles, referring

directly to the judiciary as such (Articles 173, 178 and 186 of the Constitution of the Republic of Poland) and, on the other hand, it belongs to the most important rights of the individual in a democratic state ruled by law, deriving from Article 45 of the Constitution of the Republic of Poland.

From the point of view of the functioning of on-line courts during the Sars-CoV-2 pandemic and the research questions raised, the most relevant in terms of the constitutional right to court being, besides the above-mentioned procedural justice, the openness principle of court proceedings. Mariusz Śladkowski argued that publicity of the trial is a guarantee of a fair trial. It enables social control of sentencing under conditions of judicial impartiality and independence, while at the same time building trust in the administration of justice. The rule thereby correlates strongly with other constitutional principles, including the principle of the right to a trial, but also the democratic state ruled by law.

Regarding the public accessibility principle, an element of a fair trial, it is important to point out the internal publicity that is realised by the parties to the proceedings exercising their procedural rights. A key element is the right to participate in the trial, which allows for the realisation of the right to be heard. Kaleta submits that the referral of a case to trial should be a rule that may only be departed from in exceptional, limited situations. The constitutional empowerment to limit publicity, expressed in Article 45 paragraph 2 of the Constitution of the Republic of Poland, should therefore be read closely, so as not to misrepresent the principle itself and so that the exceptions would be of an extraordinary and not a mundane nature. Sieniuć points out that the legislator deliberately considered the values set out in Article 96 paragraph1 ProcAdmCourt, such as morality, state security, public order or the need to protect facts constituting classified information, to be more important than the principle of openness. Such an approach clearly defines the limits of the exclusion of openness. The provision of procedural law implements not only the constitutional principle of publicity, but also the provisions of international law, of which Article 6 of the ECHR is a key norm. The limitation of openness, as defined in the CovAct also fulfils the constitutional conditions, as in accordance

with Article 31 (3) of the Constitution of the Republic of Poland it is permissible to restrict the exercise of constitutional freedoms and rights when it results from a law and, if and only if it is necessary in a democratic state for, *inter alia*, the protection of health. The practice of applying this provision is, however, important. As indicated above, there are considerable doubts about the abuse of the powers under Article 15zzs[4] (3) CovAct by overuse of the in camera procedure. It is consequently the responsibility of the adjudicating panel to demonstrate, on a case-by-case basis, the reason it is necessary to exclude openness in the proceedings. Without this clear statement that there are statutory grounds, derivativing from constitutional grounds, allowing the restriction of openness, there will be a complete and total mockery of the right to a trial. The referral of a case into closed session requires a strong justification, as there is an obligation to examine the complaint in open hearing in an on-line form. It is precisely the form of remote adjudication in emergency situations that should be the norm. The court must not lock itself in an ivory tower or "Closed capitals of the empire of law," as Kaleta calls such action.

Confronted by the restriction of openness as an exceptional situation, both the practice of the administrative courts and the official approach of the Supreme Administrative Court may come as a surprise. In a resolution adopted in the autumn of 2020, in the justification, the panel stated as follows:

> '*…that it will be permissible for the WAC (Voivodship Administrative Court) in Warsaw to examine the legal issue presented by the decision of 29 October 2019, VII SA/Wa 309/19, in closed session, as the holding of the hearing required by the Act could cause an undue risk to the health of the persons participating in it and it is impossible to conduct it remotely with simultaneous direct transmission of video and audio.*'

In a single sentence statement of reasons, the Court indicated the possibility of hearing a case in closed session. It did paid no attention to the burden of proof that the conditions for holding an in camera

hearing required. This resolution is significant to the extent that it was issued almost at the beginning of the pandemic and it clearly indicated the way for the adjudication panel of the VAC to review a case in a closed session. At the same time, it should be remembered that, due to the content of Article 269 ProcAdmCourt, the resolution has binding force on all adjudicating panels of administrative courts. It is impossible to agree with the limitation adopted in the resolution of the SAC (Supreme Administrative Court) that the provision of Article 15zzs^4 (3) of CovAct-19 should be treated as "special" within the meaning of Article 10 and Article 90 (1) of ProcAdmCourt. This norm is also special in relation to Article 15zzs^4 (2) of CovAct-19. In an epidemic an on-line hearing is the rule. Only the emergence of the additional cumulative conditions of the technical impossibility of holding an on-line hearing and the necessity to protect life and health makes it possible to refer the case to a closed hearing. This is a significant infringement of the parties' rights in terms of the openness of court proceedings in a situation where there are technical facilities for hearing a case remotely. It does not enhance trust in the courts and, at the same time, thwarts the evolution of information technology. It must be concluded that the practice of applying Article 15zzs^4 (3) of the CovAct is a substitute solution, allowing the administrative courts to catch up on hearing cases resulting from the COVID-19 pandemic. It seems that the administrative court has failed to recognise that almost all social life moved to the Internet during the pandemic and has remained alone in thinking of the court as a place of authority rather than service.

4.6. Admission of the public as an element of external disclosure

Admission of the public as an element of external disclosure is the second element of the principle of publicity and is addressed to the public, who have access to the content of the decision, its public announcement or the courts' information systems.

In the case of on-line courts, the challenge is the participation of the public in the on-line public hearing. This issue does not

arise directly from the provisions of Article 15zzs[4] of CovAct or 94 ProcAdmCourt. Article 95 ProcAdmCourt implies that admission to public hearings held in the courtroom is open only to persons of legal age, in addition to the parties and other participants. In exceptional cases the presiding judge may authorise the presence of minors. Admission of the public to the courtroom is an implementation of the principle of disclosure to the public, which is a practical implementation of the constitutional principle of publicity. In the case of on-line hearings, especially during a pandemic or epidemic emergency, compliance with this rule faces additional difficulties. Sanitary restrictions oblige court staff to limit the number of people in specific courtrooms.

Priority is given to the parties, their attorneys and other persons summoned. When a court is sitting in one courtroom, the attorneys are in another courtroom, since there may be insufficient available room in the court room. It should be borne in mind that there are many cases pending in the courts in parallel and that the case lists are set at the same times and on the same days, only in different courtrooms. There is therefore a danger of limiting publicity for lack of space. Being able to watch and listen to the trial on-line is clearly an excellent solution in such situations. There is, however, one catch. The request for admission to the electronic hearing must be made three days before the court session. A request for a link to the WEBEX portal is dealt with by the presiding judge of the division. Such a restriction may be somewhat questionable when the available technology is significantly ahead of existing procedures and court customs. After all, there is nothing that prevents a hearing for the public from being viewed by the public by logging on to a special portal, even taking into account the full identification of individuals viewing the case. The application, the time limit and the discretionary consent of the judge is clearly out of step with what could be the principle of openness of the courts for the whole society. After all, it should be borne in mind that the on-line audience will not interfere with the hearing, as only video and audio will reach them and they will be incapable of involvement in the hearing.

4.7. *De lege ferenda* remarks

The extraordinary legal regime of the SARS-CoV-2 pandemic19 significantly affected the realisation of the individual's constitutional rights regarding the right to a trial. The solutions introduced, undoubtedly determined by the situation, made it possible to ensure access to justice to some extent. The experience of the last two years allows for some conclusions to be drawn, which may be helpful in determining the directions of the administrative courts' computerisation policy.

Firstly, on-line adjudication, as a rule, meets the requirements set out in Article 45 of the Constitution of the Republic of Poland and fulfils the right to a trial. The right of the court to adjudicate on-line allows for the participation of the parties, and to some extent the public, in a hearing conducted outside the seat of the court. The adoption of the solution in the COVID regulations (Article 15zss (4)) is more party-friendly than the provisions under Article 94 (2) of the p.p.s.a, which will come into force after the pandemic. It is therefore necessary to consider amending the provisions of the ProcAdmCourt in the spirit of the current entitlement to be present at the hearing in any place, not only in the building of another court. Adopting such a solution allows for easier access to the court, as it is no longer necessary for a party to come to court. It should also be borne in mind that the proceedings before the administrative court involve the public administration body whose decision has been complained of. There is no doubt that the seat of the authority is sufficient to meet the eventual need to implement the solemnity of the court.

On-line hearings before administrative courts raise a number of significant challenges in terms of the taking of evidence, the completion of case files and the filing of certain motions under the procedural rules. If a permanent or optional solution is introduced, remote hearings should be conducted entirely electronically. This means that the court and the participants in the proceedings must be able to send every written document only in electronic form and the entire case file must be available in electronic form. The best solution would be to combine audio and video transmission systems

with an electronic document transmission system. The participant and the court would no longer need to use several tools at the same time, but within one portal, the system would use its individual facilities. The interface of this portal must be intuitive, designed with non-professional users in mind, based on design thinking principles. It is also worth thinking about technical support for the users of the system during the on-line trial. The solution could take the form of a technical assistant available at the disposal of the court. A second possibility is the introduction of a chat bot to support the administrative court process.

As a further analysis of the pandemic administrative court rules is needed, it is important to build a secure, safe and easy to use identification system for the participants in the proceedings before or during the hearing. The solutions cannot be based on the in camera presentation of identity documents or the apparent verification of the right of access to the trial link. Identification must take place at the hearing, in real time, so that both the court and other participants in the proceedings may be sure who is appearing before the justice system.

A major challenge for on-line courts is the principle of publicity, not only internally but also externally. When introducing new regulations for the computerisation of on-line court proceedings, the legislator cannot trivialise this element. It is necessary to introduce legal solutions that oblige the courts to adjudicate remotely in emergency situations. It is also necessary adequately to equip the courts with technical tools and software. Lack of hardware, faulty software and unsecured communication via the Internet fail to meet the requirements not only for access to court and implementation of the principle of openness, but will permanently undermine trust in the state and the court.

The last demand is the introduction of provisions obliging the court to hold an on-line hearing at the request of a party even at a time when there are no extraordinary circumstances such as a pandemic. The possible power of the court to disregard the request must be exceptional and defined by specific grounds. Neither should there be a provision under which it would be permissible for a public administration to object to a demand for an on-line hearing. The

state, in its role of servant to the individual, must keep up with the times and the available technical solutions.

The experience of COVID-19 provides the opportunity to evaluate emergency regulations. Some solutions keep abreast of the times, while others suffer from certain drawbacks. An in-depth analysis makes it possible to correct the flaws and propose better solutions. At the same time, legal solutions must be followed by funds for new technologies, so as to preserve the dignity of the court, build trust in the state and pursue justice in a democratic state ruled by law.

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DR HAB. PRZEMYSŁAW OSTOJSKI, PROF. AWS
Academy of Justice in Warsaw | DOI: 10.32041/9788367149365/5

Chapter 5. Standards of the Judicial Review of Administrative Decisions in Strategic Areas of the Polish Economy: Necessity for Change or Entrenchment of the *Status Quo*?

5.1. Introductory remarks

In Europe standards of judicial review of administrative decisions have become extremely important over recent years. This is also true with regard to reviews by administrative courts of the European Union member states. European scholars' focus of interest, however, has rarely been on judicial review of administrative authorities decisions in strategic areas of national economies, such as competition, energy, telecommunications and air and rail transport among others. The founding objective of the Common Market of the European Communities[1] means that competition law has been particularly important to the European Commission and the Court of Justice of the European Union. Some cases of competition law have been subjected to review by the European Court of Human Rights.

Judicial reviews of the decisions of national authorities are carried out by a variety courts. The French legal order in particular creates the most sophisticated system of judicial control of administrative activities. The clearest example is provided by the review of competition decisions which in the French legal order is exercised

[1] Based on the Treaty Establishing the European Economic Community (Rome Treaty from 1957).

by both ordinary courts and administrative courts, depending on the subject matter under review.[2]

This article is related to the judicial reviews of the decisions of the Polish authority for the protection of competition (President of the OCCP),[3] which is an example of the review in the area of strategic sectors of the Polish economy. These issues will be presented in the light of the standards of the CJEU and ECtHR, and the experiences of several national legal orders, e.g. of Hungary. Analyses will be conducted in order to verify the following theses: first, Polish law accomplishes the high European standards of judicial review with regard to decisions in the area of competition law; secondly, such standards would also be met if the review were transferred to the jurisdiction of Polish administrative courts.

Currently, judicial review of the OCCP's decisions is pursued by the District Court in Warsaw, the Competition and Consumer Protection Court (*Sąd Okręgowy w Warszawie* and *Sąd Ochrony Konkurencji i Konsumentów*; CCPC).[4] The name is consistent with the legal terminology used in European Union legal circles. The effect of Poland's accession to the European Union on 1 May 2004 represented an opportunity for the President of the OCCP and the CCPC to apply EU competition law.[5] In the settled case law of CJEU it is stated that the competence of the national courts to apply the provisions of Union law is derived from the direct effect of those provisions.[6] It should firstly be noted that Articles 101 and

[2] See: decision of the French Constitutional Council (*Conseil Constitutionnel*) of 23 January 1987, pp. 86–224; *DC, Law transferring the litigation of decisions of the Conseil de la concurrence to judicial jurisdiction*, https://www.conseil-constitutionnel.fr/decision/1987/86224DC.htm (accessed on: 2.09.2022).

[3] Currently, that authority is the President of the Office of Competition and Consumer Protection, abbreviated as: UOKiK; henceforth: OCCP or Office.

[4] Henceforth: CCPC.

[5] T. Skoczny, *Stosowanie wspólnotowych reguł konkurencji – także w Polsce – po 1 maja 2004 r.*, "Kwartalnik Prawa Prywatnego" 2004, nr 2, pp. 151 *et seq*.

[6] See: judgment of 27 March 1974, case 127/73, Belgische Radion en Televisie v. SV SABAM and NV Fonior (BRT I), ECLI:EU:C:1974:25, paragraph 15–16. See as well: J.W. van de Gronden, C.S. Rusu, *Competition Law in The EU. Principles, Substance, Enforcement*, Cheltenham–Northampton, MA, USA, 2021, pp. 10 *et seq*.

102 TFUE, as primary EU law provisions, produce direct effects in relations between individuals the national courts must safeguard. Secondary EU law also set forth, targeting the necessity of legal certainty, that national courts are empowered to apply the above provisions (Article 6 of the Regulation no. 1/2003).[7]

5.2. The European dimension of competition law

5.2.1. STANDARDS OF JUDICIAL REVIEW IN THE EU

5.2.1.1. General standards of EU law

The judicial review of decisions in the field of EU competition law is today exercised both by the Court of Justice of the EU and by national courts. The demarcation of jurisdiction between the EU Court and the national court is delineated by the jurisdiction of the authorities competent to issue a decision in the area analysed. The EU Commission is entrusted by Article 105(1) TFEU[8] with the task of ensuring the application of Articles 101 and 102 TFEU[9] and monitoring decisions of the competition authorities of member states in order to assure that the law is being interpreted consistently across the EU.[10] EU authorities have at the same time much less influence on member state courts.[11] The competition authorities of

[7] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/2003, pp. 1–25. Henceforth: Regulation 1/2003.

[8] Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26/10/2012, pp. 1–390.

[9] See judgment of the General Court of 16 May 2017, Agria Polska and Others v. Commission, T-480/15, ECLI:EU:T:2017:339, paragraphs 34, 35 and the case law cited therein.

[10] D.J. Gerber, *Competition Law and Antitrust: a Global Guide*, Oxford 2020, p. 120.

[11] It seems that it is for this reason that the EU legislator decided, in Article 16 of Regulation 1/2003, that, *verba legis*: '*When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty [currently: Articles 101 and 102 TFEU] which are already the subject of a Commission decision,*

the member states, when acting under Articles 101 or 102 TFEU, shall inform the Commission in writing before or immediately after the initiation of the first formal investigative measures.[12]

In the context of the application of Articles 101 and 102 TFEU, the relationship between the Commission, national competition authorities, and national courts is governed by a basic assumption relating to the existence of mutual trust in the common values on which the Union is based and consequently that the Union law implementing them will be respected.[13] Articles 4 and 5 of Regulation 1/2003 therefore provide that the Commission and the competition authorities of the member states have parallel powers

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they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.' To that effect, the national court may assess whether it is necessary to stay its proceedings. See also: CJEU, judgment of 27 March 1974, case 127/73, Belgische Radion en Televisie v. SV SABAM and NV Fonior (BRT I), ECLI:EU:C:1974:25, paragraph 21.

[12] If the initiation of proceedings by the Commission does not occur, the President of the Office is authorised to conduct proceedings and issue a contested decision based on the provisions of national competition law and Article 101 or 102 TFEU (Article 11 section 3 of Regulation 1/2003). See judgment of the General Court of 3 July 2007, Au Lys de France v. Commission, T-458/04, ECLI:EU:T:2007:195, paragraph 83 and the case-law cited therein; order of the General Court of 19 March 2012, Associazione 'GiùlemanidallaJuve' v. Commission, T-273/09, EU:T:2012:129, paragraph 68 and the case-law cited therein. See also: CJEU judgment of 16 February 2017, H & R Chempharm v. Commission, C-95/15 P, ECLI:EU:C:2017:125, paragraph 57.

[13] This assumption is the basis for the provisions on the European Competition Network, which, together with the provisions governing co-operation between the Commission and national courts in applying the aforementioned treaty norms, establish a system of close co-operation between the competent authorities based on the principles of mutual recognition and loyal co-operation. See, in particular, motives 15, 21 and 28, Article 11(1) and Article 15 of Regulation No. 1/2003, as well as point 2 *in fine* of the Commission Notice on Co-operation within the Network of Competition Authorities (OJ EU 2004/C 101/03). Exemplarily, in case Factortame (C-213/89; ECLI:EU:C:1990:257) Advocate General Léger has noted the role of the principle of loyalty as being '*to ensure the legal protection which persons derive from the direct effect of provisions of Community law*' and in Francovich & Bonifacy (C-6/90, C-9/90; ECLI:EU:C:1991:428) as being '*to ensure fulfilment of their obligations under Community law*'. See more: M. Klamert, *Effectiveness, Judicial Protection, and Loyalty*, Oxford Scholarship Online 2014, DOI: 10.1093/acprof:oso/9780199683123.001.0001.

to apply Articles 101 and 102 TFEU, while the systematics of Regulation 1/2003 are based on close co-operation between them (see Article 11(1)).[14] Pursuant to Article 35(1) of this regulation, the competition authorities of the member states should also ensure the effective application of Articles 101 and 102 TFEU in the general interest, whereby the courts may be among the competition authorities designated by the member states.[15]

Although the CJEU is no court of appeal against the decisions of national courts, among the Treaty priorities for the CJEU's activities are the unity and consistency of Union law.[16] The case law of the Luxembourg Courts has had and continues to have both epistemic and deontic authority. Within its jurisprudential activity the CJEU has developed a number of principles of EU law, including the principles of effective judicial protection, of primacy of application of EU law, the meta-principle of effectiveness of EU law, the principle of procedural fairness and the right to be heard or the right of defence, which should be respected by the authorities and courts of the member states when dealing with cases of EU origin.[17]

The EU Court of Justice has repeatedly said that the fundamental right to a fair trial before an independent court, guaranteed by the

[14] See General Court, judgment of 16 October 2013, Vivendi v. Commission, T-432/10, ECLI:EU:T:2013:538, paragraph 26.

[15] See, similarly, Court of Justice, judgment of 7 December 2010, VEBIC, C-439/08, EU:C:2010:739, paragraphs 56, 62. It should be mentioned that, according to Article 4 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 aimed at empowering the competition authorities of the member states to enforce the law more effectively and ensure the proper functioning of the internal market (OJ 2019, L 11, p. 3); the said authorities should have guarantees of independence and impartiality.

[16] See, among others, CJEU judgment of 9.09.2003, C-198/01, Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato, ECLI:EU:C:2003:430.

[17] See in more detail: K. Dobosz, *Jednolitość stosowania prawa konkurencji Unii Europejskiej przez organy i sądy państw członkowskich*, Warszawa 2018, pp. 162 *et seq*.; N. Półtorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych*, Warszawa 2010, pp. 273 *et seq*. together with the case law cited therein.

second paragraph of Article 47 of the Charter,[18] is of particular importance for the effective application of Articles 101 and 102 TFEU. Article 47 of the Charter enshrines the rights to an effective remedy, which in the second paragraph of that article, includes in particular the right of everyone to advice, defence and representation by a lawyer.

Worth noting is the fact that a national court may also have the power to adopt a ruling that differs from the regulator's decision. In a judgment dated 15 September 2016, C-28/15, Koninklijke KPN NV and Others v. Autoriteit Consument en Markt (ACM), the Court of Justice stated that in the course of reviewing remedies (tariff measures), the national court has the authority to assess the proportionality of the measure taken.[19]

5.2.1.2. Standards of review performed by the CJEU

Notwithstanding the above, the General Court and, in the second instance, the Court of Justice also perform judicial reviews of acts of EU institutions, bodies, organisational units, and agencies. With regard to the intensity of judicial review by the EU Courts, it is only necessary to point out the basic principles in this regard. First and foremost, these Courts may not under any circumstances substitute their own reasoning for that of the author of the challenged act.[20] On the contrary, they must limit themselves to examining whether the assessment made by the administration contains a manifest error or constitutes a misuse of power, or whether the authority manifestly exceeded the limits of its discretionary powers.[21] In substan-

[18] Charter of Fundamental Rights of the Union, OJ EU C 326/02; henceforth: Charter.

[19] ECLI:EU:C:2016:692.

[20] See the judgments of the CJ in case C-164/98, DIR International Film Srl and others v. Commission, ECLI:EU:C:2000:48; in case C-246/11, Portugal v. Commission, ECLI:EU:C:2013:118.

[21] Court of Justice, judgment in case C-331/88, The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, *ex parte*: Fedesa and others, ECLI:EU:C:1990:391. See as well: J. van den Brink, W. den Ouden,

tive terms, this standard therefore requires restraint by the Courts (*judicial deference*).[22] The 'manifest error' test was criticised in 2002, when CJEU handed down three judgments in the cases of Airtours,[23] Schneider[24] and Tetra Laval,[25] as well as in the 8 December 2011, judgments in the cases of KME Germany[26] and Chalkor.[27] Referring to the problem of 'complex economic assessments', the Court of Justice stated that although the Commission enjoys a certain margin of discretion in economic matters in the areas that lead to those assessments, this does not mean that the courts of the European Union must refrain from reviewing the Commission's interpretations of information of an economic nature. These courts must not only determine, among other things, whether the evidence relied upon is factually correct, reliable and consistent, but also whether that evidence contains all the information that must be taken into account to assess a complex situation and whether it is sufficient to justify the conclusions drawn from it.[28]

S. Prechal, R. Widdershoven, J. Jans, *General Principles of Law*, [in:] *Europeanisation of Public Law*, Groningen 2015, p. 182.

[22] See R. Widdershoven, *The European Court of Justice and the Standard of Judicial Review*, [in:] *Judicial Review of Administrative Discretion in the Administrative State*, J. de Poorter, E.H. Ballin, S. Lavrijssen (eds.), Berlin 2019, p. 54. 'Deferential' approach in examining administrative decisions is popular among common law systems, albeit to varying degrees. See P. Daly, *Understanding Administrative Law in the Common Law World*, Oxford–New York 2021, pp. 161–162. See also M. Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, "Colombia Journal of European Law" 2016, Vol. 22.2, pp. 275 ff.

[23] T-342/99, Airtours v. Commission, ECLI:EU:T:2002:146.

[24] T-310/01, Schneider Electric v. Commission, ECLI:EU:T:2002:254.

[25] T-5/02, Tetra Laval v. Commission, ECLI:EU:T:2002:264.

[26] C-272/09 P, KME Germany AG, KME France SAS and KME Italy SpA v. European Commission, ECLI:EU:C:2011:810.

[27] C-386/10 P, Chalkor AE Epexergasias Metallon v. European Commission, ECLI:EU:C:2011:815.

[28] C-272/09 P, KME Germany and Others v. Commission, paragraph 94. The grant of extensive powers to the EU General Court in the above rulings to examine factual findings made by the Commission in the course of administrative proceedings, as well as the reasons for the decision, subject to judicial review, however, does not mean that there are no limits to these powers. In its judgment of 10 July 2008, in case C-413/06 P, Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels Association (Impala),

In the course of judicial review, evidence is allowed in both the written and oral parts of the proceedings before the CJEU (*open record regime*). In this regard, Union law is similar to French, Dutch and German law.[29] European courts may play an active role in fact-finding, as long as the parties were able to define their position in this regard.

Although the CJEU 'declares' the invalidity of the act under review (declares the act void; Article 264(1) TFEU), which would suggest the declaratory nature of this ruling, the effect it has indicates its constitutive nature.[30] This is manifested in the restoration of the legal situation of the parties to the moment before the challenged act took effect. In other words, the effect of the Union Court's judgment goes back to the date on which the covered act came into force.[31] The consequence of the annulment of the act should be the

ECLI:EU:C:2008:392, paragraph 95, the Court of Justice overturned the judgment of the General Court of 13 July 2006, and referred the case back to the first instance. The Court stated in particular that: '(…) *General Court erred in law, first, in requiring the Commission to be particularly exacting as to the strength of the evidence and arguments submitted by the parties notifying the concentration* (…) *and, second, in concluding on that basis that the lack of additional market research* (…) *and the Commission's consideration of the appellants' defence arguments amounted to an impermissible transfer of the investigation to the parties to the concentration*'.

[29] M. Varney, *Conduct of Court Proceedings*, [in:] *Cases, Materials and Text on Judicial Review of Administrative Action*, C. Backes, M. Eliantonio (eds.), Oxford–Chicago 2019, pp. 365 *et seq.*

[30] E. Chevalier, *Remedies and Consequences of Court Decisions*, [in:] *Cases, Materials and Text on Judicial Review of Administrative Action*, C. Backes, M. Eliantonio (eds.), Oxford–Chicago 2019, p. 563.

[31] See CJEU rulings in cases: 22/70, Commission v. Council, ECLI:EU:C:1971:32; joined 97/86, 99/86, 193/86 and 215/86, Asteris and others v. Commission, ECLI:EU:C:1988:199. An exception to the above rule, which is provided for by the rule of Article 264 (2) TFEU, must, however, be emphasised. According to this provision, if the Court deems it necessary, it shall determine which effects of the act it has ruled should be considered final. This means that the EU Court may decide that certain effects of an administrative act will remain in force. See E. Chevalier, *Remedies and Consequences of Court Decisions*, [in:] *Cases, Materials and Text on Judicial Review of Administrative Action*, C. Backes, M. Eliantonio (eds.), Oxford–Chicago 2019, p. 563.

obligation of the EU institution to take the necessary measures to implement the CJEU judgment (Article 266 TFEU).[32]

The General Court was equipped with exceptional, unlimited jurisdiction under Article 31 of Regulation 1/2003. According to this provision, it had to review decisions in which the Commission has set a fine or periodic penalty and, under this power, the Court may annul, reduce or increase the fine or periodic penalty imposed by the Commission. In exercising this power under Article 31 of Regulation 1/2003, the General Court is also authorised to merely review the legality of the fine or periodic penalty, to substitute its own judgment for the sanction imposed by the Commission.[33]

5.2.2. HUMAN RIGHTS WITHIN COMPETITION LAW

5.2.2.1. General standards of judicial review according to ECtHR

In the settled case law of the European Court of Human Rights, administrative bodies may be entrusted with the adjudication of cases classified as criminal within the meaning of Article 6 of

[32] The CJEU has no instruments with which it may compel the institution to implement the judgment. Only the entity affected by the institution's failure to act may file a complaint in order for the Court to declare an infringement in this regard (Article 265 TFEU).

[33] See extensively on this topic: F.C. de la Torre, E.G. Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*, Cheltenham–Northampton, MA, 2017, pp. 312 *et seq*.; P. Ostojski, *Standardy sądowej kontroli działań administracji publicznej w Stanach Zjednoczonych oraz Unii Europejskiej*, Poznań–Warszawa 2022, pp. 223–237. See also judgments of the Court of Justice in cases: C-3/06 P, Groupe Danone v. Commission, ECLIEU:C:2007:88; Alliance One International v. Commission, C-679/11 P, EU:C:2013:606; Commission and Others v. Siemens Österreich and Others, C-231/11 P to C-233/11 P, EU: C:2014:256; Telefónica and Telefónica de España v. Commission, C-295/12 P, EU:C:2014:2062; Galp Energía España SA and others v. Commission, C-603/13 P, ECLI:EU:C:2016:38; of 25 July 2018, Orange Polska v. Commission C-123/16 P, ECLI:EU:C:2018:590. See also the judgment of the CJ in case C-297/98 P, SCA Holding Ltd v. Commission of the European Communities, ECLI:EU:C:2000:633.

the ECHR,[34] provided that they are not classic criminal cases[35] (outside the 'core' of criminal law).[36] Administrative proceedings in which fines are imposed are classified precisely as proceedings involving criminal cases in the broad sense.[37] A prerequisite for the admissibility of the adjudication of such criminal cases by an administrative body is that its decisions are subject to subsequent judicial review.[38] This is especially true in cases where the body is

[34] Whether a case (and the associated sanction) is criminal in nature is determined by examining whether the so-called 'Engel' criteria are met. The first criterion is the classification under national law, the second is the nature of the act (the basis of the accusation should be a general norm, having a preventative and repressive character and universal application), and the third is the nature and severity of the punishment (a significant punishment). These criteria, however, need not be met cumulatively and the least important is the classification in domestic law. See: judgments of the ECHR: of 8.06.1976 in Engel and Others v. Netherlands, Application No. 5100/71, paragraph 82; of 21.02.1984 in Öztürk v. Germany, Application No. 8544/79, paragraph 50; of 9.10.2003 in Ezeh and Connors v. United Kingdom, Application No. 39665/98, paragraph 82; of 23.07.2002 in Janosevic v. Sweden, ibid, paragraph 65; of 23.11.2006 in Jussila v. Finland, Application No. 73053/01, paragraph 30-32; the ECtHR's order of 29.01.2009 on admissibility in OAO Neftyanaya Kompaniya Yukos v. Russia, Application No. 14902/04, paragraph 451. The second and third Engel criteria are met in Polish antitrust proceedings. As for the second, more important, criterion, i.e. the nature of the act, the norms governing the prohibitions formulated in Articles 6 and 9 of the AIA have the character of general norms and are, in the public interest, universally applicable. The third criterion, the type of penalty and its significance, is also met. The monetary penalty imposed under Article 106(1)(1) of the u.o.k.k. for restrictive practices has a repressive and deterrent function, not a compensatory one: see M. Bernatt, *Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku na tle art. 6 EKPC*, "Państwo i Prawo" 2012, nr 1, pp. 50–63.

[35] See, in particular, the ECHR judgment of 27 September 2011, in Menarini Diagnostics S.R.L. v. Italy, Application No. 43509/08, paragraphs 63–67.

[36] ECHR judgment of November 23, 2006, in Jussila v. Finland, Application No. 73053/01, paragraph 43.

[37] M. Bernatt, *Czy Polska oferuje więcej niż wymaga Konwencja? O konwencyjnym wymogu pełnej jurysdykcji i polskim modelu sądowej kontroli kar nakładanych przez Prezesa Urzędu Ochrony Konkurencji i Konsumentów*, [in:] *Standardy rzetelności postępowania w sprawach z zakresu ochrony konkurencji i konsumentów. Między prawem administracyjnym a prawem karnym*, W. Jasiński (ed.), Warszawa 2016, pp. 131–153.

[38] ECHR judgment of July 23, 2002, in Janosevic v. Sweden, Application No. 34619/97, paragraph 81.

not fully independent of the political executive.[39] In contrast, a civil case within the meaning of Article 6 of the Convention concerns antitrust proceedings in merger control cases, which are characterised by prior (*ex-ante*) regulations so there is no infringement by the entrepreneur in this case. It refers to the freedom of economic activity and its manifestation is the possibility of mergers between entrepreneurs.[40]

In terms of the intensity of judicial review of administrative actions by the courts of the Convention's signatory states, certain standards were also established by ECtHR. In order to comply with Article 6 of the ECHR, a system in which an administrative decision is first made by an administrative body and then reviewed by a judge, the national court must exercise 'full jurisdiction'. In its 23 June 1983 judgment in Le Compte, van Leuven, and de Meyere v. Belgium,[41] the Court stated that a judicial determination must encompass both facts and law. The ECtHR has nevertheless shown some flexibility in the wide range of cases it has recognised as to what constitutes this 'full jurisdiction.'[42] In another case, the ECtHR stressed in the reasons for its judgment in the above case that the 'sufficiency' of judicial review should be examined according to such criteria as

(1) the subject matter of the contested decision;
(2) the manner in which the decision was made;
(3) the content of the dispute, including the claimed and factual grounds for the appeal; and
(4) the possibility of examining procedural defects.[43]

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[39] See M. Bernatt, T. Skoczny, *Publicznoprawne wdrażanie reguł konkurencji w Polsce. Czas na zmiany?*, [in:] *Europeizacja publicznego prawa gospodarczego*, H. Gronkiewicz-Waltz, K. Jaroszyński (eds.), Warszawa 2011, p. 2.

[40] The effect of merger proceedings is a decision in which the OCCP allows or prohibits a concentration. The decision therefore relates to property interests and concerns the rights of an entrepreneur which are of a civil nature. See M. Bernatt, *Czy Polska oferuje…*, *op. cit*., p. 59.

[41] Applications No. 6878/75; 7238/75.

[42] See, for instance, judgment of 23 September 1998, Malige v. France, Application No. 27812/95.

[43] ECtHR judgment of 22 November 1995, in Bryan v. United Kingdom, Application No. 19178/91.

5.2.2.2. 'Full jurisdiction' with respect to administrative courts. Potocka and others against Poland and Menarini Diagnostics S.r.l. v. Italy

The ECtHR noted that, in the legal orders of the Council of Europe member states, administrative law appeals generally do not involve:

(1) reconsideration of administrative cases;
(2) substitution of the administrative body's position for the court's assessment. or
(3) unlimited right to adjudicate facts.

More recent judgments of the ECtHR indicate that the court may be considered to have full jurisdiction, even if no new facts may be established in court proceedings.[44] The condition, however, is that the 'expediency aspect of the case' may be examined.

The ECtHR used the above phrase in assessing, from the complaint of Potocka and others v. Poland, the compliance with Article 6(1) of the ECHR of the Polish model of judicial review of public administration. According to the ECtHR, the Polish Supreme Administrative Court conforms to the standards set for a 'court' within the meaning of this provision of the Convention. This is because the Polish legislator has equipped this Court with the power to overturn the act challenged, in whole or in part, if a violation of procedural fairness requirements is found.[45] In considering the appellants' case, the Supreme Administrative Court examined in sufficient depth the issues related to the application of the provision of Article 107(3) of the Code of Administrative Procedure regarding the obligation to provide factual and legal reasons for an administrative decision. The European court concluded that the Polish court examined the 'expediency aspect of the case'. It found the applicants' claim unjustified and that the Court had contented itself with examining the case strictly within the limits of the legal doubts that had arisen.

[44] ECtHR judgment of 31 May 2007, Bistrovic v. Croatia, Application No. 25774/05.
[45] See also the earlier judgment in Schmautzer v. Austria, Application No. 15523/89.

From the perspective of the issue of the intensity of judicial review carried out by administrative courts, the most significant in the last decade was the ECtHR's decision in Menarini Diagnostics S.r.l. v. Italy,[46] handed down on 27 September 2011. In the circumstances of this case, the applicant was fined €6 million by the Italian Competition Authority (AGCM) for violating competition law. The complainant alleged in the complaint that the legality review carried out by the Italian administrative courts was incompatible with Article 6(1) of the ECHR, as they could not replace the AGCM's assessments with their rulings, but only apply the legal norms set by the AGCM; they had no ability to change the AGCM's decisions. The applicant company challenged the Italian Court of Cassation's practice of holding that, when an administrative body had discretionary powers, national courts could not substitute their judgments for the arguments of the independent administrative body. Rather, they only verified the logic and consistency of the power exercised by the administrative body.

Regarding the facts of the case analysed, the Court found that the Italian system of judicial review of competition decisions complies with Article 6(1) of the ECHR. According to the Court, the Italian courts went beyond a review of legality: they checked whether the authority had properly used its powers, assessed the reasonableness and proportionality of the choices made by the AGCM, and even checked the reasonableness and proportionality of the technical assessments made by the authority. In view of this, the Italian courts conducted a full review of the fine imposed by the AGCM.

5.2.2.3. 'Full jurisdiction with respect to common courts. Debut Zrt and others v. Hungary

The European Court of Human Rights stressed that, while these features cannot absolve a member state of its obligation to comply with all the guarantees contained in Article 6(1) of the ECHR, they may affect the ways in which they are implemented. The best

[46] Application No. 43509/08.

example is the practice of Hungarian courts based on the solutions in place during the years 2004–2012, which in Debut Zrt v. Hungary were reviewed by the ECtHR.[47] In the circumstances of this case, applicants (construction companies) were suspected of an unlawful cartel agreement, having shared the market for public road constructions between themselves. The Budapest Regional Court authorised investigators to enter the applicants' premises without prior notification and to search for direct evidence. On this issue, the applicant did not file an appeal. Investigators carried out dawn raids on the premises of several enterprises. The Competition Board established that the applicants and other companies had indeed divided the market between themselves, and they imposed substantial fines on them. Applicants sought judicial review, raising arguments about the inadmissibility of the documents mentioned as evidence and the unlawfulness of the procedure.

The Budapest Regional Court dismissed the action, holding that the Competition Office had conducted lawful proceedings and carried out properly reasoned and justified raids on the applicants' business premises. The Budapest Court of Appeal upheld this judgment. The Supreme Court dismissed the applicants' petition for review.

Crucially in this case, all three court instances addressed the merits of the applicants' petition for review. Accordingly, ECtHR first of all held that any potential unfairness occurring in the Competition Board's proceedings must be seen as having been remedied by the ensuing three court instances which examined the merits of the applicants' arguments about the admissibility of the documents as evidence. There was no appearance that the courts themselves lacked impartiality or that their procedure was otherwise unfair. There appeared to be no violation of the principle of the presumption of innocence. Secondly, ECtHR stated that measures, in particular the dawn raids, were indisputably lawful and pursued the legitimate aim of ensuring the '*economic well-being of the country*' by combating cartel practices. An unannounced court-ordered search of the suspected companies' business premises must be seen

[47] ECHR decision of 20 November 2012 in Debut Zrt v. Hungary, Application No. 24851/10, paragraph 1.

as an appropriate measure to collect evidence, without which the authorities had virtually no chance of unveiling those activities. Thirdly, in the opinion of the ECtHR, corporate premises are not *prima facie* related to a profession or business that may well be conducted from a person's private residence. These are therefore not under the protection of Article 8 of the Convention (the right to respect for private and family life).

In conclusion, it should be pointed out that, although in a decision from 20 November 2012, the Court declared the complaint inadmissible, it nevertheless stated that possible (unappreciated by the ECtHR) procedural defects in the collection of evidence by the Hungarian competition authority had been remedied in a three-instance process before Hungarian courts. Indeed, these courts examined the admissibility of the evidence. The ECtHR thus assessed the standard of judicial review of Hungarian courts as fully meeting the requirements of Article 6 of the ECHR.

5.3. Standards of judicial review exercised by the CCPC

5.3.1. ADMINISTRATIVE LEGAL SCHEME AND SUBJECT MATTER OF REVIEW

Article 81 of the Law on Competition and Consumer Protection sets forth the general rules for appealing decisions issued by the President of the OCCP in the course of proceedings before him or her. These are decisions declaring practices to be restrictive of competition within the meaning of Article 10(1) of the ACCP, in which the President of the Office orders the abandonment of practices that violate the prohibitions referred to in Article 6 or Article 9 of the ACCP, or Article 101 or Article 102 of the TFEU if the practice has not been discontinued by the time the decision is issued. In order to end the practice or remove its effects, the President of the OCCP may order measures in the decision consisting, in particular, of granting licences of intellectual property rights on non-discriminatory terms; allowing access to certain infrastructure on non-discriminatory terms; amending a contract; providing other

entities with the supply of certain products or the provision of certain services on non-discriminatory terms; and entrusting the performance of certain business activities, including the performance of those activities at different levels of trade, to individual entities within a capital group or to separate organisational units within the entrepreneur's structure. If the entrepreneur alleged to have violated the indicated prohibitions undertakes or abandons certain actions to end the violation or remove its effects, the President of the Office may, by decision, oblige the entrepreneur to perform these obligations. In the decision, the President of the OCCP may also set a deadline for the fulfilment of the obligations and also impose an obligation on the entrepreneur to submit information on the degree of fulfilment of the obligations within a specified period of time (Article 10–12 of the ACCP). The President of the Office for Competition and Consumer Protection may also impose on an entrepreneur, by way of a decision, a fine of no more than 10% of the turnover achieved in the fiscal year preceding the year in which the fine is imposed, if the prerequisites referred to in Article 106 of the ACCP are met.

Completion of the proceedings before the President of the Office by means of a final decision is a condition for the admissibility of a process before the CCPC. In the literature, the term 'pre-trial' or 'pre-jurisdictional proceedings' is used to designate the mandatory proceedings that precede court proceedings.[48]

Anti-trust proceedings conducted by the President of the OCCP under the ACCP are of a special nature, regulated both by the provisions of that Act and, through numerous references in that Act, by the provisions of the Code of Administrative Procedure,[49] the Code of Civil Procedure, and the Code of Criminal Procedure.[50] The special nature of these proceedings has been noted and emphasised, by referring to them as 'special administrative proceedings',

[48] K. Piasecki, *Procedury poprzedzające sądowe postępowanie cywilne*, "Palestra" 1985, z. 7–8, pp. 11–24.

[49] Act of 14 June 1960, Code of Administrative Procedure, unified text: Journal of Laws of 2021, item 735, as amended.

[50] Act of 6 June 1997, Code of Criminal Procedure, unified text: Journal of Laws of 2022, item 1375.

in the jurisprudence of the Polish Constitutional Court.[51] Some researchers, on the other hand, point to the 'hybrid' nature of the proceedings before the OCCP President. In an article published in 2002 in the pages of 'State and Law', entitled *Proceedings in Competition Cases and the Concept of Hybrid Procedure*, Professor Zbigniew Kmieciak derived the thesis that the assumptions of the mode of proceedings before the President of the OCCP are so complex that '(…) *it becomes debatable, and in any case insufficient, to label it as administrative proceedings or special administrative proceedings*'. Kmieciak has referred to the proceedings before the President of the OCCP as a 'hybrid procedure'. The term is used both in doctrine and jurisprudence, with the term being used to denote proceedings in which a case is initially considered by an administrative authority and, on appeal, is considered by an ordinary court (CCPC).[52]

The above thesis is justified insofar as, in the ACCP, the Polish legislator, in terms of appealing decisions issued within its framework, orders to apply the relevant provisions of the Code of Civil Procedure. This refers to the provisions regulating civil proceedings in economic cases, i.e. in particular, those in the field of competition protection (Article 479 [28] *et seq.* of the Code of Civil Procedure) and also the general provisions (Article 479 [1]–479 [22] of the Code of Civil Procedure). This means that the provisions of Articles 127 *et seq.* of the Code of Administrative Procedure, relating to appeals against decisions of administrative bodies, and Articles 141 *et seq.* of the Code of Administrative Procedure, relating to complaints against decisions of such bodies, do not apply in the indicated scope.[53]

A party dissatisfied with the content of the decision of the President of the OCCP is not entitled to appeal under the general rules of

[51] See: judgment of the Constitutional Court of 31 January 2005, ref. SK 27/03 and the decisions cited therein; publ., https://trybunal.gov.pl/s/sk-2703 (accessed on: 9.07.2022).

[52] See: Supreme Administrative Court, order of 11 February 2009 in case II GSK 749/08, publ.: Central Database of Administrative Court Rulings (Centralna Baza Orzeczeń Sądów Administracyjnych, henceforth: CDACR, https://orzeczenia.nsa.gov.pl).

[53] See: Provincial Administrative Court in Warsaw, judgment of 19 January 2011 in case VI SA/Wa 1867/09, publ.: CDACR.

administrative procedure to a body of second instance. Due to the fact that the ACCP also excluded the possibility of challenging the decision of the President of the OCCP in the so-called extraordinary administrative proceedings (see Article 82), an appeal to a Competition and Consumer Protection Court is therefore the only form of challenge to the decisions made by the President of the OCCP.[54] This point was emphasised by the CCPC in its decision of 31 January 2000, in case XVII Amo 2/00,[55] in which it was stated that, within the meaning of the provisions of Article 157 paragraph 1 in conjunction with Article 156 of the Code of Administrative Procedure, the Court is not a 'higher authority' in an administrative process. The Court therefore has no jurisdiction to annul a decision issued by the regulator in the meaning of Article 156 paragraph 1 of the Code of Administrative Procedure.

The location of the provisions on proceedings before CCPC within the Civil Procedure Code means that cases involving appeals against decisions of the President of the OCCP are civil cases in the formal sense. This circumstance precludes the jurisdiction of the administrative courts in anti-trust matters. From a substantive point of view, the subject matter of cases heard by this Court is nevertheless of an administrative legal nature. Due to the need to ensure the effectiveness in the Polish legal order of the provisions of the ECHR, the Polish Supreme Court in turn assumes that judicial review of decisions of competition authorities and regulations on the imposition of a penalty on an entrepreneur should take place accounting for the standards applicable to criminal proceedings.[56]

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[54] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz do art. 81*, LEX Legal Information System 2008; M. Sieradzka, *Publicznoprawny charakter postępowania związanego z ochroną konkurencji i konsumentów. Glosa do postanowienia NSA z dnia 11 lutego 2009 r., II GSK 749/08*, "Gdańskie Studia Prawnicze – Przegląd Orzecznictwa" 2010, nr 1, pp. 65–74.

[55] Legal Information System LEX no. 56430.

[56] Judgments of the Supreme Court: of 14 April 2010, in case III SK 1/10, LEX no. 577853; of 1 June 2010, in case III SK 5/10, LEX no. 622205; of 21 September 2010, in case III SK 8/10, LEX no. 646358; of 21 October 2010, in case III SK 7/10, LEX no. 686801; of 10 November 2010, in case III SK 27/08, LEX no. 677766; of 21 April 2011, in case III SK 45/10, LEX no. 901645.

This view is also presented in Polish legal science[57] and will be discussed further below.

The filing of an appeal against a decision issued by the President of the Office, under the provisions of the Law on Competition and Consumer Protection, initiates first instance court proceedings under the principles of adversarial proceedings. The subject matter of the court proceedings is therefore the dispute caused by and concerning the decision of the President of the OCCP. A party dissatisfied with the ruling of the CCPC has the right to appeal to the Court of Appeals in Warsaw (Article 367 of the Code of Civil Procedure). The judgment of the latter Court is final. Due to essential material violations of substantive or procedural law in judgments of lower courts, a party, as well as the Attorney General and the Ombudsman, may, however, file a cassation appeal to the Supreme Court.

5.3.2. PROCEDURAL DOUBTS AROUND THE MODEL OF JUDICIAL REVIEW BY THE CCPC

Over the past 32 years of the Polish Court of Competition and Consumer Protection there have been disagreements in both legal scholarship and judicial decisions about the essence and model of judicial review of the decision of the President of the OCCP. They resulted from the fact that, as mentioned above, the proceedings before this Court appear to be first instance but at the same time the subject matter of the court's examination is, in each case, the decision of the President of the OCCP. In other words, appeals to the

[57] See K. Kowalik-Bańczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych w kierunku unifikacji standardów proceduralnych w Unii Europejskiej*, Warszawa 2012, Chapter 6.2. See as well: K. Kowalik-Bańczyk, *Prawo do nieobciążania się w prawie unijnym i polskim w sprawach z zakresu ochrony konkurencji*, A. Błachnio-Parzych, *Zasada ne bis in idem a odpowiedzialność w sprawach ochrony konkurencji i konsumentów*, D. Czernika, D. Czerwińska, *Domniemanie niewinności w sprawach ochrony konkurencji i konsumentów*, M. Ziemba, *Dopuszczalność nielegalnie uzyskanych dowodów w sprawach ochrony konkurencji i konsumentów*, [in:] *Standardy rzetelności postępowania z zakresu ochrony konkurencji i konsumentów. Między prawem administracyjnym a prawem karnym*, W. Jasiński (ed.), Warszawa 2016, pp. 19–39, 57–114, 206–220.

CCPC have traditionally been considered the equivalent to lawsuits in general civil proceedings, primarily due to the fact that the formal requirements as to appeals set forth in Article 479(28) paragraph 3 are similar to the requirements of a lawsuit under Article 187 of the Civil Procedure Code.[58] It was therefore considered that, since the CCPC is examining the case anew and deciding the case on its merits, it should conduct factual and legal findings independently of the findings made by the President of the OCCP. This scheme of reasoning rejected the admissibility of examining the anti-trust authority's errors in factual findings and, in this regard, violations of procedural law. This point of view was confirmed in 2012 rulings of CCPC and the Warsaw Court of Appeals.[59] The courts did not address the procedural allegations raised at all. The Court of Appeals in Warsaw stated that, for example, that '(…) *it is a well-established view in jurisprudence that violations of the provisions of the Code of Administrative Procedure* (…) *is, in principle, irrelevant when considering an appeal.*'[60]

As the Supreme Court emphasised in its early judgment of 29 May 1990 in case III CRN 120/91,[61] the CCPC has the power to remedy defects in the OCCP's decision. Since the provision of Article 81(1) of the ACCP stipulates that an appeal to the CCPC is '*against the decision of the President of the Office*', and, if the appeal proves to be well-founded, the Court may reverse or modify the decision of the OCCP (Article 479^{31a} section 3 of the Code of Civil Procedure), there should be no doubt that, in judicial proceedings, the CCPC exercises judicial review over the legality, reasonableness and purposelessness of the decision issued by the OCC.[62] Some researchers hold that there are strong arguments for the thesis that

[58] See, for instance, J. Gudowski, [in:] T. Ereciński, J. Gudowski, M. Jędrzejowska, *Komentarz do Kodeksu postępowania cywilnego. Część pierwsza. Postępowanie rozpoznawcze*, tom I, Warszawa 2001, p. 959.

[59] See the analysis made by M. Bernatt in the article: *W sprawie kontroli sądowej postępowania przed Prezesem UOKiK*, "Państwo i Prawo" 2013, nr 3, pp. 94 *et seq*.

[60] Court of Appeals in Warsaw, judgment of the of 17 May 2012 in case VI ACa 31/12, LEX no. 1222137.

[61] 'Rulings of the Supreme Court Civil Chamber' 1992, no. 5, item 87.

[62] 'Rulings of the Supreme Court Civil Chamber' 1992, no. 5, item 87.

the judicial review of OCCP decisions exercised by the CCPC is in fact very similar to the judicial review of administrative actions carried out by administrative courts.[63] The OCCP, like administrative courts, as part of its judicial activity, formulates a relevant phrase about the legality or illegality of the OCCP President's decision. According to Professor Mark Szydło:

> '(…) *[i]t is true, of course, that the CCPC's judiciary competence to adjudicate is not limited to cassationary rulings [to remand the case P.O.]. However, it is worth noting that the vast majority of CCPC rulings that are reformatory in nature involve the CCPC interfering with the amount of the fine imposed in the decision of the President of the OCCP. Particularly in the last few years, one can observe a growing number of cases in which the CCPC does not, as a rule, question the relative return contained in the decision of the President of the OCCP on recognising a given practice such as limiting competition or violating the collective interests of consumers, but instead reduces, sometimes significantly, the amount of the monetary penalty imposed on the entrepreneur.*'[64]

In a large number of cases, the CCPC is rather limited to an *ex-post* verification of whether the findings made in this regard by the President of the OCCP meet a certain standard of proof, certain legal standards commonly accepted in anti-trust jurisprudence (in Poland or throughout the EU) or in the competition law doctrine.[65]

Doubts about the essence and model of judicial review exercised by the CCPC seem to be dispelled by the judgment of the Warsaw

[63] According to Polish model of judicial review of administrative actions, administrative courts are neither allowed to conduct an evidentiary hearing nor to amend the decision under review; see Act of 30 August 2002 – Law on proceedings before administrative courts, OJ 2022, item 329, Articles 106(3) and 145–150.

[64] M. Szydło, *Sądowa kontrola decyzji Prezesa UOKiK w świetle prawa unijnego i prawa polskiego*, "Europejski Przegląd Sądowy" 2015, nr 7, p. 17.

[65] *Ibidem*, pp. 17–18.

Court of Appeals of 8 March 2012 in the case VI ACa 1150/11.[66] The theses derived in this judgment reconcile both of the above positions by assuming that the CCPC recognises the appeal as a court of first instance. This applies, however, only to the mode of hearing the case, not to its essence. In the Court's opinion, the CCPC performs a first instance review of the decision of the President of the OCCP, at least in a formal sense, since competition protection proceedings are hybrid in nature, combining the elements of first instance judicial proceedings that predominate with certain elements of second instance review of an administrative decision. This is because the judgment of the CCPC resolves the legal existence of the decision appealed, eliminating it from legal circulation or maintaining it in legal circulation in its previous or amended form.[67]

5.3.3. SUBSTANTIAL REVIEW

A. The Court's assessment of the OCCP's compliance with procedural rules

aa. Procedural fairness: standard of protection

As is concluded above, the CCPC has the authority to review whether the competition authority has acted in accordance with procedural law. This has important practical implications. First of all, in anti-trust and regulatory proceedings, both criminal and civil, in the sense of the ECHR, it is necessary to ensure guarantees of procedural fairness under Article 6(1) of the ECHR.[68] This includes, in particular, ensuring the right to a hearing; access to information about the proceedings pending; access to the case file; the opportunity to comment on the evidence gathered in the case during the proceedings

[66] LEX no.1131091.
[67] LEX no.1131091.
[68] See extensively M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Scientific Publishing House of the Faculty of Management, Warszawa 2011, pp. 99–323.

and before the final decision is issued; and the provision of the opportunity for an oral hearing (access to a hearing; see Article 6(2) of the ECHR).[69] The proceeding should also be open to the public (taking into account, however, the need to protect the interests of entrepreneurs, such as business secrets) and completed within a reasonable time. Entities whose interests are affected by these proceedings should be allowed to participate on an equal basis.[70] These rules, along with the obligation of the administrative body to provide exhaustive factual and legal justification for its decisions, correspond essentially to the rights guaranteed by Article 41 of the EU Charter of Fundamental Rights, which is directly applicable on the territories of the member states. This provision defines these rights, which are collectively referred to as the right to good administration.[71] The national court, when hearing cases from appeals against decisions of the competition authority, is obliged to verify the OCCP's compliance with the norms of EU law in this regard.

By way of example, in a 21 November 2013 ruling in the case of XVII AmA 114/10 from the appeals of twenty banks against the President of the Authority, the CCPC found that the absence of an obligation imposed by law on the anti-trust authority to designate the relevant market at a particular stage of the proceedings supports the legislature's allowing of the possibility to change the relevant market designated in the case whenever the findings in the case justify it. The Court stressed it is necessary to ensure that participants in the proceedings are able to participate in the proceedings at every stage and that the parties are able to express themselves in order properly to protect their interests.[72]

Secondly, when it comes to proceedings in anti-trust and regulatory cases which are criminal in nature under the ECHR, it is additionally necessary to respect the requirements of Article 6(2–3) of the ECHR. It is therefore a matter of guaranteeing the presumption

[69] M. Bernatt, *Sprawiedliwość…*, *op. cit.*, p. 62.
[70] *Ibid*.
[71] See: judgment in case C-84/94, United Kingdom v. Council, ECLI:EU:C:1996:431.
[72] LEX no. 2155774.

of innocence and, consequently, freedom from self-incrimination,[73] and the opportunity to defend oneself, which should be linked, among other things, to the guarantee of equality of arms,[74] the provision of information about the nature and cause of the charges (Article 6 [3][a] of the ECHR), and the guarantee of secrecy of legal advice.[75] The necessity of such control, in terms of the manner of imposing fines, was also indicated by Poland's Supreme Court in rulings in cases III SK 1/10[76] and III SK 7/10.[77] The Supreme Court explained that it is related to the essence of the public legal relationship under review by CCPC and that it is a matter of the power to punish, on the one hand, and the right of defence, on the other. The Court takes into account the entrepreneur's right to defence analogously to a criminal court, before which the accuser, in order to obtain judicial confirmation of the accusation, must, in particular, demonstrate the unfoundedness of the defendant's explanations.[78] In turn, in its judgment in case III SK 8/10,[79] the Supreme Court stated that, due to the validity of the standard of protection analogous to a criminal case, it becomes important to respect the institutional and procedural guarantees of individual rights provided for in both substantive and procedural law.

[73] ECtHR judgment of 17.12.1996 in case Saunders v. United Kingdom, Application No. 19187/91, paragraph 67–69.

[74] ECHR judgment of 27 X 1993 in case Dombo Beheer v. Netherlands, Application No. 14448/88, paragraph 33.

[75] See the quoted parts of the collective monograph edited by W. Jasiński, entitled *Standardy rzetelności postępowania w sprawach z zakresu ochrony konkurencji i konsumentów. Między prawem administracyjnym a prawem karnym*, Warszawa 2016, pp. 19 ff.

[76] 'Supreme Court Jurisprudence Labour Chamber' (OSNP) 2011 no. 21–22, item 288.

[77] 'Supreme Court Jurisprudence Labour Chamber' (OSNP) 2012 no. 3–4, item 53.

[78] 'Supreme Court Jurisprudence Labour Chamber' (OSNP) 2012 no. 3–4, item 53.

[79] 'Supreme Court Jurisprudence Labour Chamber' (OSNP) 2012 no. 3–4, item 52.

bb. *Ab initio* fact findings

A record gathered in the proceedings before the Anti-trust Authority may be used in court proceedings.[80] The court's jurisprudence emphasises nonetheless that, since the proceedings before the CCPC are of a first instance nature, the Court should make its own findings of fact in the anti-trust case. In its judgment in case VI ACa 142/06, Polskapresse Sp. z o.o. in Warsaw v. OCCP,[81] the Warsaw Court of Appeals overturned the CCPC's judgment, modifying the OCCP's decision, and remanded the case back to this Court due to significant flaws in the fact finding. The Court of Appeals concluded that the Court of First Instance, when establishing the facts, limited itself to stating that the facts established in the decision of the President of the OCCP in question are uncontested. The Court of Appeals stated that such a position is unacceptable, as the District Court should review the case from the beginning (*ab initio*).[82] The District Court should also have, in the performance of its task, considered the totality of the evidence, made its own findings, cited the evidence on which it relied, and also discussed the opposing evidence.[83] According to the Warsaw Court of Appeals, the attribute of 'indisputability' of the facts of the case, as well as the conclusion as to the legitimacy of the parties' position, may only be derived from the findings of fact. The Court of Second Instance stated that, since the reasons for the judgment do not contain the Court's arguments but only a very brief restatement of the plaintiff's position, as well as completely failing to indicate the reasons the Court did not account

[80] See mentioned Supreme Court judgment of 29 May 1990 in case III CRN 120/91, 'Rulings of the Supreme Court Civil Chamber' (OSNC) 1992 no. 5, item 87.

[81] OJ OCCP 2007 no. 1, item 13.

[82] More pertinent to the judicial review method described is the expression '*de novo* review' used in the in U.S. literature, for instance in the legal space of the Freedom of Information Act. See: J.T. O'Reilly, *Federal Information Disclosure*, Vol. 1, 2016, pp. 531–544; N. Slegers, *De Novo Review Under the Freedom of Information Act: The Case Against Judicial Deference to Agency Decisions to Withhold Information*, "San Diego Law Review" 2006, No. 43, pp. 209–238.

[83] See the well-established position of the Supreme Court in this regard: see, for example, the Supreme Court decision of 8 October 1997, II CKN 312/97; of 24 October 2002, I CKN 1465/00, LEX no. 75278.

for the evidence indicated by the defendant and did not share the arguments of the President of the OCCP, the CCPC's position in this case was arbitrary.[84]

Justifications of CCPC judgments today generally contain separate sections entitled: 'The Court of Competition and Consumer Protection has established the following facts.'[85] This style is in line with the methodology of drafting opinions to judgments by civil courts of first instance. This does not, however, mean that the CCPC must conduct all the evidence from the beginning, thus duplicating the evidentiary steps previously carried out by the OCCP. The CCPC frequently bases its findings on the materials gathered in the case by the regulatory body. It is also permissible for the Court to consider facts as established on the basis of factual presumptions (Article 231 of the Civil Procedure Code).[86]

At the same time, the CCPC may admit any evidence that it deems necessary for a proper determination of the relevant facts. This raises the question whether evidence gathering should be conducted by the OCCP if it neglects the most relevant evidence. In such a case, the competition authority's decision clearly suffers from a defect of gross procedural violation that disqualifies it and it

[84] See the well-established position of the Supreme Court in this regard: see, for example, the Supreme Court decision of 8 October 1997, II CKN 312/97; of 24 October 2002, I CKN 1465/00, LEX no. 75278.

[85] See, for instance, CCPC judgments of 15 December 2021, in case XVII AmA 27/19, LEX no. 3322571 and of 7 October 2020, XVII AmA 42/18, LEX no. 3097128.

[86] The Supreme Court explained that the application of a factual presumption should take place when there is a lack of direct evidence or there are significant evidentiary impediments to establishing a fact, while at the same time it is possible to establish this fact by applying the rules of logical reasoning and principles of knowledge and life experience. The content of a factual presumption is the recognition of the existence of a certain fact arising from the mutual, logical connection between other established facts and judgments about these facts. At the same time, it must be correct from the point of view of the principles of logic (see Resolution of a panel of seven judges of the Supreme Court of 21 November 1969, III PZP 24/69, 'Rulings of the Supreme Court of the Civil Chamber' (OSNC) 1970 No. 5, item 76. See also, for instance, CCPC judgments of 15 December 2021, in case XVII AmA 27/19, LEX no. 3322571 and of 7 October 2020, XVII AmA 42/18, LEX no. 3097128.

should be eliminated from the legal circulation. The jurisprudence of the Supreme Court points to the principle already indicated above, according to which the subject of two-instance court proceedings may be the determination (on the merits) of the grounds (factual and legal) of the competence of the President of the OCCP applied in the decision contested. The Court thus either confirms or contradicts the findings made in the pre-trial proceedings (administrative anti-trust proceedings).[87]

An additional argument supporting the above conclusion is the dimension of 'control' of the CCPC's judicial review, which should prevail in favour of the necessity of annulling an OCCP decision in case of the above violation of procedural law by this authority. Otherwise, it would be the Court rather than the President of the Office that would exercise the role of the competition authority.

According to Article 232 of the Code of Civil Procedure '*Parties are obliged to indicate evidence to establish the facts from which they derive legal effects. The court may admit evidence not indicated by a party*'. In the jurisprudence it is indicated that the provision mentioned expresses the principle of concentration of evidence. In addition to the material collected by the regulatory body, the CCPC decides on the basis of the assertions and evidence provided by the parties and may, that means basically does not have a duty to conduct evidence proceedings *ex officio*. Such an obligation cannot be seen in cases of an economic nature pending with professional entities and when the parties are represented by professional attorneys.[88] In a judgment dated 13 October 2009 in case ACa 377/09 the Court of Appeals in Katowice expressed the position that any omission of evidentiary initiative must be assessed as culpable by the party.[89]

As verbalised above, in its 14 April 2010 ruling III SK 1/10 the Supreme Court formulated the principle that, in cases involving appeals against decisions of a market regulator imposing fines for the

[87] See decision of the Supreme Court of 29 April 2009, in case III SK 8/09, LEX no. 1235853.

[88] Judgment of the Warsaw Court of Appeals of 19.01.2011 in the case VI ACa 1031/10, LEX no. 818495.

[89] LEX no. 574510.

violation of obligations under the law or a decision, entrepreneurs should be provided with a higher level of judicial protection of rights. This may result in the necessity of admitting evidence under certain circumstances, such as the explanations of an entrepreneur who was not heard in the anti-trust proceedings even without a party's evidentiary request (*ex officio*). Otherwise, the CCPC may expose itself to the charge of incomplete clarification of the facts of the case.

It should be noted that the case law of the Supreme Court has repeatedly emphasised that, pursuant to art. 479[28] of the Civil Procedure Code, the Court is bound by the demand specified in the appeal. It cannot therefore formulate an allegation of a monopolistic practice that was not the subject of the appeal, nor with regard to a monopolistic practice not covered by the appealed decision and the party's request to initiate anti-trust proceedings.[90] Secondly, in an appeal against an OCCP decision, an allegation of a different monopolistic practice from that that was the subject of the request for administrative anti-trust proceedings recognised in the decision appealed cannot be successfully raised for the first time.

cc. Interpretation and application of substantive law

As mentioned above, according to the jurisprudence of CJEU, national courts are obliged, on the one hand, to review the legality of the decisions of national competition authorities and, on the other hand, to apply Articles 101 and 102 TFEU directly.[91] It is ultimately up to the Court to apply the relevant substantive legal norm based on an explanation of the factual basis, including all the factual elements provided for in the hypothesis of this norm.[92]

[90] See, for instance, Supreme Court, judgment of 19 January 2001, in case I CKN 1036/08, LEX no. 52708. See also: CCPC, judgment of 9 January 2002, in case XVII Ama11/01, LEX no. 56537.

[91] General Court judgment of 9 February 2022, in case Sped-Pro S.A. v. European Commission, T-791/19, ECLI:EU:T:2022:67; Court of Justice judgment of 15 September 2016, in case Koninklijke KPN NV v. Autoriteit Consument en Markt (ACM), C-28/15, ECLI:EU:C:2016:692.

[92] See the judgments of the Supreme Court: of 20 September 2005, III SZP 2/05, LEX no. 2640398; of 5 May 2021, in I NSKP 7/21, LEX no. 3225327.

Unlike 'typical' courts of law (administrative courts), however, the CCPC does not generally focus on disputes over the law that was or should have been applied in the case. The dispute between litigants mostly relates to the facts and their subsumption into the undisputed content of competition law. Of course, this does not preclude an appellant raising an allegation that the OCCP's interpretation of the substantive law was flawed, and this allegation may prove to be valid. Court practice, however, shows that such a situation is extremely rare. Despite the fact that the CCPC acts as a court of appeal against the decisions of the OCCP, its conduct of factual findings *ab initio* makes this Court a 'court of facts' in practice. Any disputes as to the law generally arise in proceedings before the Warsaw Court of Appeals and, if the case is allowed to be heard by the Supreme Court, before this Court.

In the justification of the above judgment of 21 November 2013, for example, in the case XVII AmA 114/10, the Court stated that:

> '(…) *the plaintiffs' doubts as to the principles of application of EU rules by national courts are unfounded, and the provisions of Article 81 (1) of the EC and Article 81 (3) of the EC, in conjunction with Article 1 (2) of Regulation no. 1/2003, are so clear, and do not raise legal doubts as to their interpretation and application, that the national court may interpret them independently*'.

In such circumstances the CCPC declined to submit preliminary questions to the CJEU on the interpretation of these provisions of EU law. The circumstance of recognising the case *ab inito*, also in the area of substantive law determinations, nevertheless causes the CCPC to examine the content of legal provisions independently and reconstruct the legal norms from them. If the Court concluded that the OCCP had misinterpreted the norms of substantive law, to the correctly established facts, it would change the decision of the anti-trust authority, forming legal relations in the area of competition law on its own.

dd. Court's remedial powers

In typical civil cases Article 316 of the Code of Civil Procedure means that the court is also ordered to consider events that occurred in the course of the court proceedings. The above rule does not, however, apply to cases heard by the courts as a result of appeals filed against administrative decisions, since in this case, the cognizance of ordinary courts is special. According to the judgment of the Warsaw Court of Appeals of 8 March 2012 in the case VI ACa 1150/11[93] the cognition of the CCPC is limited to the subject matter of the decision appealed and therefore does not cover events occurring after the decision was issued and therefore not covered by the administrative proceedings.

As mentioned above, according to ECtHR jurisprudence, the court performing judicial review need not have the power to change an administrative decision. From the point of view of the concept of full court jurisdiction, the appellate court not only reviews the complaint, but also has the opportunity to repeal the appealed decision and remand the case back for a new decision by an impartial authority.[94] Regarding the powers of court referred to as penalties imposed by administrative authorities, it is also clear from ECHR's rulings in many cases that the court should have the authority to assess the magnitude of the penalty and to overturn the decision of the administration in this regard.[95]

Regulations on the review of the correctness of OCCP decisions are designed to ensure effective control of these decisions, including the possibility of issuing a different decision (Article 47 of Charta).[96] On the other hand, the Court of Justice stated, in the

[93] LEX no. 1131091.

[94] ECtHR judgment of 7 November 2000, judgment in Kingsley v. the United Kingdom, Application No. 35605/97.

[95] See, *inter alia*, judgments in cases: Grande Stevens v. Italy, Application No. 18640/10; Silvester's Horeca Service v. Belgium, Application No. 47650/99; Valico Srl v. Italy, Application No. 70074/01, Segame v. France; Application No. 4837/06.

[96] See Court of Justice, judgment of 15 September 2016, C-28/15, Koninklijke KPN NV et al. v. Autoriteit Consument en Markt (ACM), ECLI:EU:C:2016:692.

above case Koninklijke KPN NV et al. v. Autoriteit Consument en Markt (ACM), C-28/15,[97] that the national court should provide effective remedies against the decisions of national regulatory authorities and therefore has the power to adopt a ruling that differs from the decision of such authority. In doing so, the Court of Justice stressed that EU law requires that national regulators take 'the utmost account' of the European Commission's recommendations (guidelines) when carrying out their tasks. This also applies to the decisions of the national court under competition law, which should account for the Commission's previous decisions.

According to Article 479[31a] of the Code of Civil Procedure, the CCPC either upholds or dismisses the appeal. This Court dismisses an appeal against a decision[98] of the Anti-trust Authority if there are no grounds for allowing it. If the appeal is allowed, the Court either reverses[99] or amends the appealed decision in whole[100] or in part[101] and rules on the merits of the case. The Polish Constitutional Court noted that the competencies of the CCPC are different from those of administrative courts, as the court may fully realise a party's right to demand a substantive resolution of its case. The court in a case before it assumes the decision-making powers of the President of the Office.[102] In other words, the Court is empowered to issue a new decision, 'taking the place of the competition authority', as it

[97] ECLI:EU:C:2016:692.

[98] See, for instance, CCPC judgment of 1 March 2013, in case XVII AmA 24/10, on-line database of Warsaw Court of Appeals (SAOS), https://www.saos.org.pl (accessed on: 24.07.2022).

[99] See, for instance, CCPC judgment of 21 May 2015, in case XVII AmA 71/13, SAOS (accessed on: 24.07.2022).

[100] See, for instance, CCPC judgments of 30 September 2015, in case XVII AmA 140/13; of 10 May 2022, in case XVII AmA 61/21, unpublished – obtained following the author's request for public information, no. BEZP-0153-1087/22.

[101] See, for instance, CCPC judgment of 21 November 2013, in case XVII AmA 114/10, SAOS (accessed on: 24.07.2022).

[102] See the judgment of the Constitutional Tribunal of 31 January 2005, in the case SK 27/03 from the constitutional complaint of the company Przedsiębiorstwo Usług Morskich 'Gdańsk-Pilot' sp. z o.o. for examination of the compliance of: Article 479(28) paragraph 3 and Article 479(35) paragraph 2 of the Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws of 1964 No. 43, item 296, as amended) with Articles 45(1), 78 and 176(1) of the Constitution

were. At the same time, this means that the Court should not limit itself to pointing out the defects in the OCCP's decision but has the power, if justified by the circumstances of the case and the facts and evidence gathered, to remedy (correct) the defects in that decision.

Article 479^{31a} of the Code of Civil Procedure does not provide for the possibility of referring the case to the OCCP for reconsideration. The Court's cassation decision, the revocation of the Authority's decision, means that the Authority's decision, in the opinion of the Court, finds insufficient legal grounds. The need to conduct new proceedings and issue a new decision is already left to the discretion of the anti-trust authority in such a case.

The Civil Procedure Code provides for the possibility of concluding a settlement of an appeal to the CCPC, which is subject to approval by the Court. On the basis of an approved settlement of an appeal to the CCPC, the President of the Office shall revoke or amend the appealed decision or take another action according to the circumstances of the case within the scope of his jurisdiction and competence (Article 479^{30c} of the Code of Civil Procedure).

5.4. Conclusions

The research carried out with regard to the standards of judicial review of the decisions of the competition authority in Poland has led to the conclusion that both theses posed at the outset are true. First, the Polish procedural model of judicial protection of entrepreneurs in competition cases achieves the high European standards of judicial review with regard to decisions in this area of law. This model is characterised by the high intensity of examination by the CCPC of the decisions of the President of the Office. The Court is authorised not only to review the correctness (lawfulness) of the decision of the OCCP, but it also reconsiders and decides the case, having the right to conduct a full evidentiary proceeding. Although the CCPC initially uses the evidence gathered by the competition

of the Republic of Poland, 'Jurisprudence of the Constitutional Court Series A' (OTK-A) 2005/1/8.

authority, it is not bound by it and, in examining the case *ab initio,* it may (and in certain circumstances should) admit evidence on its own. It may therefore fully realise the right of a party to demand a substantive resolution of its case already at this stage of the proceedings. In other words, the CCPC has far-reaching, intervening, remedial powers which are reformatory in nature. The Court may change the challenged decision of the OCCP in whole or in part. Using terminology borrowed from the French tradition of *contrôle juridictionnel de l'administration*, the Polish model of judicial review by the CCPC should therefore indubitably be characterised as the most far-reaching, exercised under *plein contentieux* (full litigation).

Secondly, the above mentioned features of judicial review performed by the CCPC distinguish the judicial review exercised by this Court from the review exercised by administrative courts. The minimum standards set by the ECtHR and the CJEU also correspond to the control of administrative actions by Polish administrative courts. These courts may also examine the legality of the OCCP President's decision. This issue would certainly require more extensive research. The transfer of review to administrative courts in this regard would, however, clearly require an answer to the question: is it of greater value to grant the court the power to conduct an evidentiary hearing to the full extent and the possibility of a reformatory settlement of the case; or is the higher value the systemic and constitutional consistency of the judiciary and, for example, the speed of the processing of cases (which is undoubtedly the domain of administrative courts in Poland)? *De lege ferenda*, it seems reasonable to create such a system, both in Poland and in other countries, which may be done by creating a special procedure before administrative courts, which would combine all of the above-mentioned elements, i.e. granting these courts broad opportunities for evidence and exceptional powers to rule on the merit of the case.

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