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Exception to the rule of service of documents in administrative proceedings to an electronic delivery address

Keywords: electronic delivery, administrative procedure, confidence in public authority, rule of law

Summary. Service of documents is an essential material and technical act that produces several procedural effects. According to the act on electronic deliveries, it will become a rule that letters will be delivered by public administration bodies to electronic delivery addresses. This study analyzes the exception to this rule set out in Article 39 § 4 of the Code of Administrative Procedure. The exception depends not on the individual characteristics of the recipient, but on the type of letter that will be served in this manner.

Wyjątek od zasady doręczania pism w postępowaniu administracyjnym na adres do doręczeń elektronicznych

Słowa kluczowe: doręczenia elektroniczne, postępowanie administracyjne, zaufanie do władzy, zasady prawa

Streszczenie. Doręczenie jest istotną czynnością materialno-techniczną wywołującą szereg skutków procesowych. Zgodnie z ustawą o doręczeniach elektronicznych zasadą stanie się doręczanie pism przez organy administracji publicznej na adresy do doręczeń elektronicznych. W niniejszym opracowaniu analizie poddany został wyjątek od tej zasady określony w art. 39 § 4 kodeksu postępowania administracyjnego. Wyjątek uzależniony nie od cech indywidualnych odbiorcy, lecz od rodzaju pisma, które zostanie w ten sposób doręczone.

Introduction

Service of documents may seem such a simple and comprehensible activity that including it in legal norms is excessive casuistry, unnecessarily burdening the legal regulations. However, as it has been argued in the doctrine, such a view would be a superficial approach to an essential and consequential part of the administrative proceedings[1]. Service of documents is an explicit, sovereign, obligatory, formal and irrevocable procedural and technical action of a competent public administration body or one performing commissioned functions, by means of which letters are

[1] B. Graczyk, *Postępowanie administracyjne*, Warszawa 1953.

transferred (made available) to the addressee in administrative proceedings in the manner prescribed by law, with which the law binds certain legal effects[2]. The jurisprudence of the administrative courts also uniformly emphasises the significance of this substantive and technical action due to several procedural effects produced by proper service[3].

On 18 November 2020, the Polish Parliament, inspired by the government bill, passed the Act on Electronic Delivery of Documents[4]. Its provisions were to take effect between 1 July 2021 and 1 October 2029. However, while still in the *vacatio legis* period, an amendment was made on 15 June 2021, which postponed the effective date of the new electronic delivery arrangements, indicating 5 October 2021 as the starting date[5]. Still, the final date after which all public authorities: both executive and judicial will be obligated to serve documents in accordance with the regulations set forth in this law remained 1 October 2029[6].

As stated in the explanatory memorandum to the bill, its aim was to provide a default digital exchange of correspondence with public entities and to introduce simple and transparent electronic communication between public authorities and the citizen[7]. The argument of introducing "simple and transparent communication" between the public administration body conducting administrative proceedings and the citizen is contradicted by many provisions of both the discussed Act and the acts amended by it. Even the provisions specifying the deadlines for entry into force of particular arrangements, which differentiate these deadlines depending on the type of bodies obligated to serve the documents (Article 155 AEDD) or the time limitation for using ePUAP depending on the entities between which correspondence is transmitted, can be a source of interpretation problems for entities obligated to use them[8]. In this study, however, I am going to omit the very inspiring analysis of specific legal solutions and problems with adapting new reg-

[2] A. Matan, [in:] G. Łaszczyca, Cz. Martysz, A. Matan, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2010, vol. 1, p. 428.

[3] *E.g.*, ruling of the Supreme Administrative Court of 7 June 2011, I OSK 1037/11.

[4] Consolidated text: Journal of Laws of 2022 item 569, as amended, hereinafter referred to as AEDD.

[5] The Act of 15 June 2021 on the Amendment of the Act on Electronic Delivery of Documents, Journal of Laws of 2021 item 1135.

[6] Article 155 and Art. 166 AEDD. The Act on Electronic Delivery of Documents amends 86 acts which had previously been enacted and have still been in force.

[7] Explanatory memorandum to the Government Bill on Electronic Delivery of Documents. Sejm of the 9th term, Sejm paper no. 239, p. 7, https://orka.sejm.gov.pl/Druki9ka.nsf/0/D1349ADC36052E93C125850C003768C9/%24File/239.pdf (accessed on 23 June 2022).

[8] See G. Sibiga, *Przesunięcie zmian w KPA na 5.10.2021 r. nie rozwiązuje wątpliwości prawnych i dalszego prowadzenia postępowania administracyjnego na podstawie przepisów przejściowych*, https://legalis.pl/przesuniecie-zmian-w-kpa-na-1-10-2021-r-nie-rozwiazuje-watpliwosci-prawnych-i-dalszego-prowadzenia-postepowania-administracyjnego-na-podstawie-przepisow-przejsciowych/ (accessed on 11 November 2022).

ulations, which are imprecise and require complex interpretation, to the existing ones. However, it is worth noting that – contrary to the assurances of introducing in the administrative proceedings regulated by the provisions of the Code of 14 June 1960[9] a prevailing principle of delivery of letters by the body conducting the proceedings in an individual case settled by an administrative decision to an electronic delivery address – in Article 39(4) CAP the legislator sets out a major exception to it. The subject of this paper will be an analysis of the provision and the waiver of the new revolutionary rule marking the end of the paper age (*fin de l'ère du papier*) and beginning of the digital age.

Purpose of the regulation on electronic delivery of documents

The legislator in Article 1 of the Act of 18 November 2020 on Electronic Delivery of Documents defined 3 types of issues regulated by the provisions of this act. These are: rules for the delivery of correspondence using a public registered electronic delivery service and a public hybrid service; rules and conditions for the provision of a public registered electronic delivery service and a public hybrid service; and rules for the use of a qualified registered electronic delivery service to exchange correspondence with public entities.

Through the provisions of the Act, digital default was introduced, *i.e.*, the priority of digital solutions over traditional ones. This was to ensure the revolution of ending the paper age (*fin de l'ère du papier*) and beginning the digital age. Until the new regulations came into force, in all procedures – civil, criminal, administrative court and administrative – the rule was to deliver letters to external entities, including natural people, in a traditional way: against a delivery receipt by a serving agent (*e.g.*, a postal operator, an employee of an authority or a court, or another authorised entity), principally to a residential address. Polish citizens are accustomed to such deliveries, although many of them still do not understand why, even though they have not collected the letter from the post office, it is considered to have been delivered.

Beginning with Article 61 AEDD, the legislator made changes in the provisions of the acts already in force[10], including *i.e.*, the Civil Code[11], the Code of

[9] The Act of 14 June 1960 – Code of Administrative Procedure, consolidated text: Journal of Laws of 2022 item 2000, as amended, hereinafter referred to as CAP.

[10] The Act on Electronic Delivery of Documents amends 86 acts which had previously been enacted and have still been in force.

[11] The Act of 23 April 1964 – Civil Code, consolidated text: Journal of Laws of 2022 item 1360, as amended.

Civil Procedure[12], the Code of Criminal Procedure[13], the Tax Ordinance[14] or the Code of Administrative Procedure. The provisions of the latter Act amended by AEDD include Article 39. It constitutes the first provision of the separate Chapter 8 of Division I of the CAP, entitled "Service". Casuistic provisions contained in this chapter of the Code[15] until 4 October 2021 regulated exhaustively the issue of service in general administrative proceedings. And – consisting of one sentence – Article 39 CAP expressed the principle of official delivery[16], stipulating that the authority is obligated to deliver letters in administrative proceedings against receipt by the postal operator within the meaning of the Act of 23 November 2012 – Postal Law[17] by its employees or other authorised people or bodies. The case law emphasises that the public administration body has the power to choose the delivering entity, provided that it is this body and no other entities that are responsible for the defect in delivery[18]. Under the AEDD, the wording of Article 39 CAP was completely altered. Through this provision, the legislator has expressed a new rule which, in accordance with Article 155 AEDD and Article 157 AEDD, will to 30 September 2029, begin a digital revolution in the statutorily defined authorities.

Ultimately, *i.e.*, in general administrative proceedings, it will become a rule that letters will be delivered by public administration bodies to electronic delivery addresses. Letters served at the seat of the authority will be exempt from this obligation (Article 39(1) CAP). An exception will also be made for other methods of delivery, including using a public hybrid service, *i.e.*, automated conversion of an electronic document sent by a public entity from an electronic delivery address to a letter, in a manner ensuring protection of postal secrecy, in order to deliver the correspondence to the addressee (Article 46 AEDD). It should be noted, however, that in this case the letter is also sent from the authority to the electronic delivery address, but not to that of the addressee, but of the designated operator[19]. Only in cases where it will not be possible to deliver the letter to the addressee's

[12] The Act of 17 November 1964 – Code of Civil Procedure, consolidated text: Journal of Laws of 2022 item 2651, as amended.

[13] The Act of 6 June 1997 – Code of Criminal Procedure, consolidated text: Journal of Laws of 2022 item 1375.

[14] The Act of 29 August 1997 – Tax Ordinance, consolidated text: Journal of Laws of 2021 item 1540, as amended.

[15] *E.g.*, judgment of the Voivodship Administrative Court in Warsaw of 18 March 2008, VI SA/Wa 106/08, LEX no. 506201.

[16] *E.g.*, judgment of the Supreme Administrative Court of 15 July 1999, SA/Rz 1982/98, LEX no. 42498. More on this: A. Korzeniowska-Polak, *Zasada oficjalności doręczeń w postępowaniu administracyjnym i jej realizacja*, "Przedsiębiorczość i Zarządzanie" 2019, vol. 20, is. 3, part 3, pp. 17-28.

[17] Consolidated text: Journal of Laws of 2022 item 896, as amended, hereinafter referred to as PL.

[18] Judgment of the Supreme Administrative Court of 13 January 1999, I SA/Lu 1389/97, LEX no. 36593.

[19] Until 31 December 2025 the only operator shall be Poczta Polska (Article 149 AEDD).

electronic delivery address or through a public hybrid service, a public administration body will be able to deliver a letter by registered mail, as defined in Article 3.23 PL, or by its employees or other authorised people or bodies. As follows from Article 39(1-3) CAP in its new wording, the initiators of these solutions assume that the most widespread arrangement nowadays, in which the authority delivers the letter in paper form against receipt by means of a postal operator, should be abandoned altogether.

However, despite these assumptions, by virtue of Article 61(5) AEDD, a provision was introduced to the Code of 1960 which may indicate that the drafter does not, in fact, envisage a complete elimination of delivery of letters in administrative proceedings by registered mail, referred to in Article 3(23) of the Act of 23 November 2012 – Postal Law either. It follows from the content of this provision that leaving the possibility of delivering decisions in paper form by a postal operator against receipt does not result from being aware of a large number of digitally excluded individuals in Poland or of the fact that there are many places in this country where the Internet signal does not reach[20]. The exception provided for in Article 39(4) CAP analysed in this study depends not on the individual characteristics of the recipient, but on the type of letter that will be served in this manner.

Electronic delivery in administrative proceedings

Service of letters is a statutory obligation of the authority conducting proceedings aimed at settlement of an individual case by way of an administrative decision. As it has already been pointed out, due to the significant procedural effects of this material and technical action, the legislator regulated the issues of service in a casuistic manner. For these reasons, public administration bodies are ordered to interpret the provisions contained in Chapter 8 of Division I of the CAP "strictly"[21]. It should be noted that from 5 October 2021, for proper service of letters in administrative proceedings, it is not enough to strictly apply the provisions of the Act of 14 June 1960. They must be combined with numerous definitions, rules and regulations contained in other highly specialised, technical, and informational legislation. It includes the already mentioned Act on Electronic Delivery of Documents, which defines *e.g.*, the "moment of receipt of correspondence using the public registered delivery service"[22], the Act on Informatisation of the Activities of Entities

[20] More on this: A. Korzeniowska-Polak, *The electronic delivery – a chance or an exclusion?*, [in:] I. Florek, I. Laki, (eds.), *Human Rights – From Reality to the Virtual World,* Józefów 2021, pp. 270-277.

[21] Judgment of the Supreme Administrative Court of 13 December 2017, II OSK 642/17.

[22] Article 42 and Article 41 AEDD in conjunction with Article 39[4] CAP.

Performing Public Tasks[23], the Act on the Provision of Services by Electronic Means[24], the Act on Trust and Electronic Identification Services[25] or the Postal Law. Certainly, such a wealth and variety of provisions which must be interpreted to determine the procedural effectiveness of service does not make it easy for employees of public administration bodies to apply them. In the maze of vague regulations, actions by public authorities contrary to the intention of the legislator are more likely to occur. But when the legislator does not express its intention explicitly, clearly, and unquestionably, it should expect that it may be misread. With respect to Article 39(4) CAP, being the subject of analysis herein, one may come to the conclusion that the drafter consciously intended that its will not be read.

Due to the constitutional principle of openness of the activity of public authority and its clarification contained in the provisions of the Act of 6 September 2001 on Access to Public Information[26], we are able to track the legislative process. The explanatory memoranda to the bills, available on the Parliament's website, should make it possible to learn about the motives behind a legislative initiative and the reasoning of those who drafted the bill. Sometimes, however, their wording leads to the conclusion that modifications introduced into solutions that have been functioning for many years are made on the basis of objectionable, too general or erroneous assumptions[27]. Unfortunately, with respect to some provisions, the explanations are only apparent. And that's precisely what happened in this case. The explanatory memorandum to the Bill on Electronic Delivery of Documents[28] proposes the following wording for Article 39(4) of the Code of 1960: "In the case of the service of a decision which has been granted an order of immediate enforceability by the authority, or a decision which is immediately enforceable by virtue of the act, in personal matters of officers and professional soldiers, or if an important public interest so requires, including vital interests of the state, and in particular its security, defence or public order, the authority may serve the decision in the manner specified in paragraph 3. The provisions of paragraphs 1 and 2.1 shall not apply".

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[23] The Act of 17 February 2005 on Informatisation of the Activities of Entities Performing Public Tasks, consolidated text: Journal of Laws of 2023 item 507, as amended.

[24] The Act of 18 July 2002 on the Provision of Services by Electronic Means, consolidated text: Journal of Laws of 2020 item 344, as amended.

[25] The Act of 5 September 2016 on Trust and Electronic Identification Services, consolidated text: Journal of Laws of 2021 item 1797, as amended.

[26] Consolidated text: Journal of Laws of 2022 item 902, as amended.

[27] A. Korzeniowska-Polak, *Uwagi na temat uzasadniania projektów ustaw nowelizujących kodeks postępowania administracyjnego,* [in:] M. Błachucki, T. Górzyńska (eds.), *Źródła prawa administracyjnego a ochrona wolności i praw obywateli*, Warszawa 2014, p. 44.

[28] Article 59(4)(b) of the explanatory memorandum to the Government Bill on Electronic Delivery of Documents. Sejm of the 9th term, Sejm paper no. 239, pp. 88-95, https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=239 (accessed on 11 November 2022).

The introduction of a completely new solution to the Code which has been in force continuously for over 60 years was justified specifically and literally as follows: "In addition, in the case of necessity of a decision which has been granted an order of immediate enforceability by the authority, or which is immediately enforceable by virtue of the act, as well as in personal matters of officers and professional soldiers, or if an important public interest so requires, including vital interests of the state, and in particular its security, defence or public order – the decision may be delivered by registered mail or by employees or by other authorised persons or bodies. In these cases, the provisions on the necessity for prior verification of the possibility of delivery using a public registered electronic delivery service or a public hybrid service shall not apply". The quoted sentences mean that the drafter, instead of justifying or explaining why it is proposing such a provision, just repeated its wording without adding even one sentence of explanation[29]. Thus, the drafter did not justify in a single sentence the need for the proposed regulation which constitutes a significant exception to the rule of service to an electronic delivery address, with negative consequences for the procedural situation of a party. What is most surprising, as it results from the wording of Article 39(4) CAP, this exception concerns the situation when a party to administrative proceedings has an electronic delivery address, and the delivery in such a way is possible and has actually taken place in the course of the proceedings.

It is unquestionably negative that the initiator did not refer at all to the proposed exception that breaches the principle of confidence in public authorities[30] by making it difficult and even impossible to read its intentions. However, in the legislative process, the parliament did not pay attention to it. The provision was enacted with a slight modification from the proposed wording. The Senate clarified only one of the premises and instead of the words "or if an important public interest so requires, including vital interests of the state, and in particular its security, defence or public order, the authority may" inserted: "or if an important public interest so requires, in particular the state's security, defence or public order, the public administration authority may..."[31] . The Act introducing the discussed

[29] The sentence contained in the explanatory memorandum: "Of course, provision is also made for situations in which it is not possible, for various objective reasons, to conduct correspondence in the above-mentioned manner, and then, due to the need to provide the entities with the tools to carry out their duties, it is exceptionally permissible to carry out correspondence using standard letter mail" refers to the exceptions set out in Article 39(2) and (3) CAP.

[30] Cf. M. Borucka-Arctowa, *Zaufanie do prawa jako wartość społeczna i rola sprawiedliwości proceduralnej*, [in:] *Teoria prawa. Filozofia prawa. Współczesne prawo i prawoznawstwo*, Toruń 1998.

[31] Item 54 of Resolution of the Senate of the Republic of Poland of 28 October 2020 on the Act on Electronic Delivery of Documents. The Senate did not address the rationale and purpose of such a regulation either, https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=724 (accessed on 11 November 2022).

amendment to the Code of Administrative Procedure was passed by 442 MPs, only 4 were against and 5 abstained[32] .

Especially in the case of this regulation, it should be emphasised that any provision defining an exception should be interpreted narrowly and not restrictively. It is also necessary to make a purposive interpretation, searching for an answer to the question what goal the legislator wanted to achieve through a regulation. Unfortunately, as shown above, the bill's initiator has not provided any information to help establish this goal. Therefore, it seems reasonable to ask whether the drafters did not deliberately conceal their reasons and objectives which might possibly be achieved in the future by public authorities through the application of this provision.

Despite the drafter's silence about the real reasons for introducing such an exception, an analysis of the changes made to other provisions of the Code of Administrative Procedure leads to the conclusion that the legislator secured the possibility of applying the arrangement set out in Article 39(4) CAP. This is evidenced by the new wording of Article 63(2) CAP, in force since 5 October 2021. When defining the minimum requirements for an application submitted by a party to a public administration body, *i.e.* a request, explanation, but also legal remedies – an appeal, a complaint, the legislator stipulated that the application should contain at least the identification of the person from whom it originates, their address, also in the case of an application submitted in electronic form, and the essence of their request, and meet other requirements set out in specific regulations. In interpreting this provision, it is important to be aware that electronic delivery addresses will be identifiable in a central registry which is to be the database of electronic delivery addresses[33]. It has to be remembered, however, that non-public entities, *i.e.*, pursuant to Article 2(5) AEDD natural people and entities other than those mentioned in Article 2(6) AEDD as public entities, are (as a rule) neither obligated to possess an electronic delivery address nor to enter the possessed electronic delivery address in the database of electronic addresses. Thus, an individual may, for example, have one electronic delivery address listed in the electronic address database, but may equally well have an unlimited number of electronic delivery addresses provided under qualified registered electronic delivery services. Selecting a destination address can be difficult in this situation. However, Article4 AEDD

[32] https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=239 (accessed on 11 November 2022).

[33] Pursuant to Article 9 AEDD, *e.g.* advocates, legal advisers, tax advisers or notaries, i.e. non-public entities which professionally participate in legal transactions, as well as non-public entities entered in the register of entrepreneurs as referred to in Article 1(2)(1) of the Act on the National Court Register, and each non-public entity entered in CEIDG (Central Register and Information on Economic Activity) as referred to in Article 2 of the Act on CEIDG, are obligated to have electronic delivery addresses entered in the database of electronic addresses.

sets out clear and explicit guidelines for public entities on addressing correspondence. In such case, delivery shall be made to the electronic delivery address entered in the database of electronic addresses, or, if the electronic delivery address of the non-public entity is not entered in the database, to the electronic delivery address from which the correspondence was sent. In the light of these arrangements contained in Article 4 AEDD, it should be assumed that the term "address, also in the case of filing an application in electronic form" should be understood as a traditional address, described in the explanatory memorandum as a "regular delivery address"[34] , enabling the authorities to use "alternative forms of service". This means that in every application filed with a public administration body in the course of administrative proceedings, the applicant is obligated to provide such an address, "even if they filed the application in electronic form and chose to communicate with the body electronically[35]".

In cases specified in Article 39(4) CAP, therefore, despite the fact that the party, its legal representative or attorney has an electronic delivery address, *i.e*. entities to whom the authority is obligated to deliver letters during the proceedings, and the fact that the authority knows this address (because it is listed in the database of electronic addresses or an external entity sends applications from it), and the fact that the party or its representative has chosen to communicate with the authority electronically, the authority will be able to deliver the final result of the proceedings *i.e*. a decision settling the individual administrative case on its merits to a traditional address. This means that it will be able to send the letter by registered mail with return receipt requested or to have it delivered by its employees or by other authorised people or bodies. In the first case, it will mean sending a letter indicating a specific point in space defined by the town, street and building number and also the number of the premises in that building. This involves the possibility of effective service through the legal presumption set forth in Article 44 CAP, *i.e*., by the so-called advice note. In the second case, service can occur anywhere. It should be remembered that Article 42(3) CAP remained unchanged. According to this provision, if it is impossible to deliver a letter to a natural person in his/her home or workplace or to a correspondence address indicated in an electronic address database or in the premises of a public administration body, or if the delivery is necessary, letters shall be delivered at any place where the addressee can be reached. Article 46(1) CAP requires that service be confirmed by a delivery receipt by the recipient. However, also in this case it is possible to apply the fiction of delivery specified for such cases in Article 46(2) and Article 47 CAP.

[34] Sejm of the 9th term, Sejm paper no. 239, https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=239 (accessed on 11 November 2022).

[35] *Ibidem*.

Prerequisites for the applicability of the exceptional arrangement

In view of the striking silence on the part of the drafter as to the purposes for which Art. 39(4) CAP provides a special exception to the rule of delivering letters to an electronic delivery address to an entity which has such an address, it becomes necessary to try to figure out the intention behind it. It is also worth analysing what benefits or threats and for which of the participants of the administrative proceedings are entailed by the possibility to apply the analysed provision.

The analysis of Article 39(4) CAP should begin with a linguistic interpretation. Comparing this provision with the preceding paragraphs of the same article as well as with other provisions contained in Chapter 8 of Division II of the CAP, one can note that the exception set forth therein was provided only for the service of decisions. Therefore, it cannot be applied to any other letter served by a public administration body in the course of administrative proceedings. It is undisputed that the collective term "letters" used in paragraph 1, 2 and 3 includes summonses, notices, rulings, and decisions, as well as minutes, settlements, resolutions and their copies, and any other document[36]. In accordance with the literal wording of Article 39(4) CAP, the exceptional service stipulated therein may not refer to a summons, a notice, or a ruling. While amending many provisions of the Code of Administrative Procedure pursuant to Article 61 AEDD, the legislator did not change the wording of Article 126 CAP. This provision, in turn, provides an exhaustive list of provisions related to decisions and applicable *mutatis mutandis* to the rulings[37].

Moreover, not all, but only some decisions may be served in accordance with Article 39(4) CAP. These are decisions which have been granted an order of immediate enforceability by a public administration authority and decisions which are immediately enforceable by virtue of the act. An example of the first of these may be a decision by the head of the municipality, town mayor or city president to grant a purpose-specific allowance for the purchase of food[38]. Decisions that are immediately enforceable by virtue of the act include, for example, decisions of voivodes on compensation in connection with the introduction of a state of emergency on the territory of part of the Podlaskie voivodeship and part of the Lubelskie

[36] G. Łaszczyca, [in:] G. Łaszczyca, A. Matan, *Doręczenie w postępowaniu administracyjnym ogólnym i podatkowym,* Zakamycze 1998, pp. 49-55; J. Borkowski, [in:] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2012, ed. 12, p. 241; A. Wrzesińska-Nowacka, [in:] L. Klat-Wertelecka, A. Mudrecki, *Kodeks postępowania administracyjnego. Komentarz dla praktyków,* Gdańsk 2012, p. 183.

[37] The term "applicable *mutatis mutandis*" means that some provisions will apply directly, others with appropriate modifications, and some will not apply at all.

[38] Article 108 CAP in conjunction with Art. 39 of the Act of 12 March 2004 on Social Welfare, consolidated text: Journal of Laws of 2021 item 2268, as amended.

voivodeship in 2021[39], decisions of voivodes issued in connection with the preparation and execution of projects in connection with the design, construction, alteration or renovation of stadiums and other facilities on the territory of the Republic of Poland and other undertakings necessary to organise the 3rd European Games in 2023[40], as well as decisions of voivodes or the minister competent for health on assigning people to work to combat epidemics[41]. As can be seen from the examples given, these can be decisions both granting rights and imposing obligations.

The second type of decisions that can be served in a "traditional" manner are those related to "personal matters of officers and professional soldiers". With respect to this premise, it is really difficult to understand the choice that was made by the drafter and followed by the legislator. One may wonder if the acquisition by unknown perpetrators of the e-mail messages of one of the most important politicians of the ruling party had an impact on the regulation of service other than to an electronic delivery address in the matters of certain people It should be noted, however, that the group of these people has been defined in a very imprecise manner. For incomprehensible reasons, once again the legislator introduces the term "officers" into the CAP without providing a definition. It did so *i.e.*, in Article 7a(2)(2) and Article 81a(2)(4) CAP added by the amendment of 7 April 2017[42]. This is important because the Polish legal system uses and defines the term "public officer". The legislator has included such definitions in *e.g.*, Article 115(13) of the Criminal Code[43] or in Article 2(1)(1) of the Act of 20 January 2011 on the Financial Liability of Public Officers for Gross Violation of the Law[44]. Neither the explanatory memorandum to the draft amendment to the Code of 7 April 2017[45] nor the explanatory memorandum to the Bill on Electronic Delivery of Documents explains what is meant by the term "officer" which is not qualified by the adjective "public".

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[39] Article 3(4) of the Act of 29 September 2021 on Compensation in Connection with the Introduction of a State of Emergency on the Territory of Part of the Podlaskie Voivodeship and Part of the Lubelskie Voivodeship in 2021, consolidated text: Journal of Laws of 2022 item 425.

[40] Article 23 of the Act of 2 December 2021 on Support for the Preparation of the 3rd European Games in 2023, Journal of Laws of 2022 item 1550, as amended.

[41] Article 47(2) and 47(6) of the Act of 5 December 2008 on Preventing and Combating Infections and Infectious Diseases in Humans, consolidated text: Journal of Laws of 2022 item 1657, as amended.

[42] The Act on the Amendment of the Act – Code of Administrative Procedure and certain other Acts, Journal of Laws of 2017 item 935.

[43] The Act of 6 June 1997 – Criminal Code, consolidated text: Journal of Laws of 2021 item 2345.

[44] The Act of 20 January 2011 on the Financial Liability of Public Officers for Gross Violation of the Law, consolidated text: Journal of Laws of 2016 item 1169.

[45] https://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=1183 (accessed on 11 November 2022).

Another prerequisite for the applicability of the exception set forth in Article 39(4) CAP was determined not by the characteristics of the decision or the individual to whom the decision pertains, but in relation to the circumstances of the case. The legislator worded it as follows: "if an important public interest so requires, in particular the state's security, defence or public order". The separateness of this prerequisite from the previous two is emphasised by the conjunction "or". The phrase "so requires" indicates that it is this important public interest, in particular the state's security, defence, or public order, which requires that a decision terminating the proceedings in each instance be served not to the electronic delivery address held by the party or its procedural representative and already used by the authority in that particular proceeding, nor through a public hybrid service. And in this case, too, it should be noted that also from 1 June 2017, the legislator introduced provisions to the Code of Administrative Procedure in which it granted the authorities conducting the proceedings the power to deviate from the code-defined rules due to the protection of an important public interest, including vital interests of the state, and in particular its security, defence, or public order. These were Article 7a(2)(1), Art. 81a(2)(3) CAP. However, these terms are not defined in any provision of the Code, nor did the drafters do so in the explanatory memoranda to their proposed regulations. This is important because the qualifiers used in these underdefined terms make it difficult to interpret the provisions in which they are contained. For it is difficult to imagine a public interest other than important and an interest of the state other than vital. It is also difficult for the author of this study to imagine that a vital interest of the state will justify not using the means of electronic communication regulated by this state, the use of which by all bodies functioning in this state is *de facto* made mandatory by law. It should be borne in mind that defining the possibility of departing from a rule, which by its nature should occur extremely rarely and in truly exceptional situations, by means of underdefined concepts on the one hand ensures the flexibility of such regulation, but on the other hand – may lead to abuse.

An attempt at a purposive interpretation of the discussed provision is limited to asking a few questions. If in the explanatory memorandum to the Bill on Electronic Delivery of Documents, the drafter explicitly points out that "the requirement, arising directly from the currently effective provisions, to serve documents in paper form... effectively impedes the use of electronic delivery"[46] , then why does the drafter propose, and the legislator enact a provision allowing such an effective impediment to the use of electronic delivery? If it is assumed that "handling correspondence electronically" will result in "a reduction in the time required

[46] Explanatory memorandum to the Bill on Electronic Delivery of Documents, p. 4. Sejm of the 9th term, https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=239 (accessed on 11 November 2022).

to complete delivery processes"[47], then why can decisions with an order of immediate enforceability or enforceable by law be served by traditional mail? By its very nature, such service will occur much later. Doesn't the legislator itself believe its own assertions that electronic delivery will be faster, more efficient, will result in "a reduction in the time required to complete delivery processes", "ensure that parties to service are mutually identified" and provide "legally effective proofs of delivery in the form of proofs of sending and proofs of receipt of correspondence"[48]?

It should also be reminded that the legislator justified the need to regulate electronic delivery *i.e.*, with the necessity to "de-localise the process of delivery by making it possible to send and receive correspondence from any place", which would result in "no need to inform current and potential correspondents about any change of one's physical location"[49]. It was also assured that this would create the legal, organisational, and technological basis "for the implementation of cross-border service"[50]. How, then, can we assess a situation when an individual, trusting public authority and the law made by it, applies to the minister competent for digitisation for the creation of an electronic delivery address, obtains such an address, it will be entered in the central register available to public entities, letters in administrative proceedings will be delivered to that address, but the act ending the proceedings, determining the rights and obligations of the individual, *i.e.* the decision will be delivered to them at their residential address, without checking whether anyone is staying at that address, and if so, whether that person is authorised to receive correspondence for the addressee. What if an individual, relying on the authority, fails to report moving to another physical location while diligently checking electronic mail incoming to their electronic delivery address, in anticipation of further letters, including a decision? In the opinion of the authority, the decision will be effectively served even if it is not actually received. The legal presumption contained in Article 44 CAP, *i.e.*, delivery by the advice note, shall apply. As a result, a decision that has been granted an order of immediate enforceability or which is immediately enforceable by law will already be enforceable. In the case of a decision imposing an obligation or revoking a right, it will be possible to enforce it by applying the provisions of the Act on Enforcement Proceedings in Administration[51].

47 Explanatory *memorandum*, p. 7.
48 *Ibidem*.
49 *Ibidem*.
50 *Ibidem*.
51 The Act of 17 June 1966, consolidated text: Journal of Laws of 2022 item 479, as amended.

The role of general principles in applying a provision specifying the exceptional arrangement

In the light of the analysis of Article 39(4) CAP presented above, it is justified to argue that every vague provision requiring multi-level interpretation and clarification of underdefined terms poses a temptation to use it for a purpose other than that intended by the legislator. The likelihood of such a situation becomes greater when even the drafter has not specified what the purpose of the proposed provision is.

For these reasons, it is reasonable to state that an authority exercising the power granted to it under Article 39(4) CAP is obligated to apply this provision taking into account the directives arising from the general principles of administrative procedure. It is these, as it were, overarching provisions[52] that primarily serve to protect the individual from the actions of public authorities and to strengthen the procedural position of a party[53]. Also, the act of service itself is a guaranteed element of the proceedings, and the rules governing it should constitute a guarantee of compliance by the public administration body with the principle of a democratic state of law. Thus, none of the provisions governing these actions of the authority should be subject to liberal interpretation[54], nor should they be interpreted "as it were, to the detriment of the citizen"[55]. And the entire procedure and the legal remedies set forth therein should be "a weapon in the hand of an individual to protect them from misconduct of administration"[56].

It is necessary to emphasise that when applying such an exception, the public administration body will be obligated to fulfil the obligations set forth in Article 9 CAP expressing the principle of information. According to this provision, the public administration bodies are obliged to inform the parties duly and comprehensively about the factual and legal circumstances which may affect the determination of their rights and obligations which are the subject of the administrative proceedings. In addition, the authorities have a duty to ensure that the parties and other people involved in the proceedings are not harmed by ignorance of the law. For this purpose, the authorities shall provide them with the necessary explanations and guidance. The jurisprudence formulates the view that the obligation of the authority to inform and explain to the parties all the factual and legal circumstanc-

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[52] S. Rozmaryn, *O zasadach ogólnych kodeksu postępowania administracyjnego*, "Państwo i Prawo" 1961, is. 12.

[53] Cf. judgment of the Voivodship Administrative Court in Warsaw of 19 May 2007, II SA/Wa 1911/2006.

[54] Cf. judgment of the Supreme Administrative Court of 22 April 2013, I OSK 201/13.

[55] Judgment of the Supreme Administrative Court of 4 April 2008, II GSK 3/08, LEX no. 468732.

[56] W. Chróścielewski, Z. Kmieciak, J.P. Tarno, *Czy nowy kodeks postępowania administracyjnego?*, "Państwo i Prawo" 1993, is. 5, p. 67.

es of the pending case should be understood as broadly as possible[57]. To properly fulfil the obligations set forth by this rule, a public administration body that decides to serve a decision using the exception set forth in Article 39(4) CAP should send a comprehensive notice to the party's electronic delivery address known to it. It should contain information on how the authority will deliver the decision – whether by registered mail, referred to in Article 3(23) of the Postal Law, or by its employees or other authorised persons or bodies, as well as to which address the decision will be sent, and which prerequisites of which provisions the authority found to be met. The lack of such notice will violate both the principle of information and the principle of the rule of law and of fostering confidence in public authority among participants in administrative proceedings. It should be emphasised, however, in the era of the digital revolution initiated, for example, by the Act on Electronic Delivery of Documents, that the recommendation resulting from the latter principle "to create a climate that deepens the citizen's confidence in the authorities"[58] is aimed at humanising relations in administration[59]. It is not a duty or a natural characteristic for the participants of the procedure to have confidence in public authority. It is the administrative authorities who are responsible for exercising due diligence in the exercise of their statutory powers in order to achieve the objective set out by the authors of the Code of Administrative Procedure: "to infuse confidence in the public mind". The implementation of this principle, otherwise known as the principle of loyalty of the state to its citizens, consists in conducting proceedings by public administration bodies not only in accordance with the law, but also in a reliable and transparent manner, so that the citizen has no doubts about the objectivity (fairness) of the authorities.

Entry into force of the special arrangement

Complementary to these arguments is a reminder of the conditions set forth in Article 158 AEDD. Again, it is reasonable to stipulate that any departures or exceptions should be worded unambiguously, leading all interpreters to the same conclusion. Unfortunately, this provision requires a reckless interpretation. The legislator stipulated therein that in the period from the date of entry into force of the Act on Electronic Delivery of Documents until the day preceding the day on which the obligation to apply it "arises", which dates are listed in Article 155 AEDD, delivery by public entities "within the meaning of the Act amended in Article 105" to

[57] Judgment of the Supreme Administrative Court of 10 April 2019, I OSK 1164/19.

[58] E. Iserzon, [in:] E. Iserzon, J. Starościak, *Kodeks postępowania administracyjnego. Komentarz, teksty, wzory i formularze,* Warszawa 1961, pp. 26-27.

[59] J.S. Langrod, *Uwagi o kodyfikacji postępowania administracyjnego*, "Państwo i Prawo" 1959, no. 5-6, p. 895 ff.

entities which are not public entities within the meaning of the Act on Electronic Delivery of Documents made in the teleinformatic system of a public administration body "shall be subject to Article 39, Article 39[1], Article 40(4) and Article 46(4-9) of the Act amended in Article 61 in the current wording". This means that in the period of several years – to 1 October 2029 some bodies, *e.g.*, government administration bodies, will already be able to use the right specified in Article 39(4) CAP, while others, such as local government bodies will not yet be able to use this exception. Unfortunately, even a correct interpretation of Article 158(1) in conjunction with Article 155 and Articles 105 and 61 AEDD and the Act of 17 February 2005 on Informatisation of the Activities of Entities Performing Public Tasks does not make it possible to establish with certainty which of the bodies may exercise the right specified in Article 39(4) CAP. Further, the legislator has made this possibility dependent on a circumstance not of law but of fact. Article 158(2) AEDD stipulates that the provision of section 1 does not apply if the public entity has an electronic delivery address. Thus, it may be that some of the bodies may, to the party's surprise, already serve the documents in this extraordinary form, while other of them may not. This example applies to all authorities that will apply to the minister competent for digitisation at different times for an electronic delivery address and will receive such an address on different dates.

Conclusion

It is to be hoped that the regulation enabling the revolution of ending the paper age (*fin de l'ère du papier*) and beginning the digital age will have a positive impact on the procedural situation of parties to administrative proceedings and will help to conduct individual proceedings resolved by administrative decisions faster and more efficiently. The achievement of this goal will be possible, *i.e.*, only in the case of truly exceptional use of the powers set out in Article 39(4) CAP and the application of this provision together with the provisions setting out the general principles of administrative procedure.

At the same time, it is worth noting that the analysed provision may also be an important contribution to the discussion on the legislative process. How is it possible, and what consequences can it have, that the parliament passes the law in the version presented by the initiator, even though there is not a single sentence of explanation as to what purpose such a legal solution is supposed to serve. It should be emphasised once again that the solution contained in Article 39(4) CAP is an exception to the principle adopted by the legislator. It would be advisable to be particularly careful when enacting exceptions to the existing rules and, in the legislative process, to require the drafter to justify in detail, not just ostensibly, the

need for any exceptions. Against the background of the discussed provision and a complete failure to explain why it was enacted, the *de lege ferenda* postulate formulated many years earlier by the author for keeping a record of the legislative process and disclosing documents that would make it possible to determine who, when prepared which bill, who amended it, who adopted particular assumptions of the new legal regulation and who substantiated them remains valid[60].

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[60] A. Korzeniowska-Polak, *Uwagi na temat...*, *op. cit.*, p. 67.

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