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Ewa Szewczyk

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Oficyna Wydawnicza Uniwersytetu Zielonogórskiego
65-246 Zielona Góra, ul. Podgórna 50, tel. (68) 328 78 64
www.ow.uz.zgora.pl, sekretariat@ow.uz.zgora.pl

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Introduction

A modern state is a state that serves its citizens, the environment, and the economy. Undoubtedly, a country that is ascribed to the features of modernity should be characterized by an efficient administrative and legal organization. Historians have been looking for this kind of features from the beginning of the modern times among the countries of the European cultural circle.

The studies included in this issue of the legal and administrative discourse have been published under the common title *Modern State*. What they have in common is that they concern the most current issues, mainly in the area of a broadly understood public law. A historical study, opening the considerations contained in this issue, illustrating the institutional life as well as the functioning and evolution of administration, answers the question whether the seventeenth-century Silesia can be included in the group of modern old-type countries.

The next study noted that over the past decades, the United Kingdom has become a major, if not the most important, center for the settlement of international disputes. The article answers the question of how Brexit will affect the legal framework of international disputes' settlement, in particular the determination of the law applicable to non-contractual obligations, is therefore of crucial importance – both for UK individuals and companies but also for the European Union. There is no doubt that Brexit is one of the greatest legal challenges of recent times.

The article on selected threats to the state administration in the context of the ongoing Russian-Ukrainian war deals with equally topical issues. This study addresses, inter alia, the issues of personal data protection, state secrets and threats to the strategic infrastructure.

In the article on clean transport zones, the author points out that in the model adopted in our country, the legislator applied an overly rigorous approach to this issue. The emphasis was placed on zero emissions, *i.e.*, the entry of hydrogen or natural gas vehicles to city centers. Meanwhile, in Polish realities, this type of vehicle is rare. The author advocates adapting clean transport zones to local condi-

tions and including low-emission vehicles (not zero-emission vehicles) in the first place in order to exclude the most polluting vehicles from traffic.

On the other hand, in the study related to the construction law, attention is drawn to the limitation of the so-called "Paper administration" for electronic forms. The new technical solutions introduced in this area made it possible to easily submit applications via the Internet, via the government website, where the generator of electronic applications, created at the Central Office of Construction Supervision, is available. Additionally, the study contains references to similar solutions adopted in the Georgian legal system.

Very interesting considerations are included in the study entitled "The legal challenge of universal dark skies protection". The author notes that the dark skies can be treated as a unique element of the cultural, natural (or mixed) landscape, which creates the identity of a site, giving it an outstanding universal value. The normative analysis includes: The Convention Concerning the Protection of the World Cultural and Natural Heritage, the European Landscape Convention, and resolutions of international organizations whose mission is to protect dark skies. In addition, the paper considers the source of the human right to dark skies as an inalienable human right, which grows out of the right to a clean environment.

Several studies were devoted to issues related to administrative proceedings and court-administrative proceedings. They concern: an exception to the rule of delivery to an electronic delivery address, computerization in administrative evidentiary proceedings, the principle of written form in administrative proceedings and access to administrative court files.

The author of the study "Tax inspection in the Polish Order" points out that inspections concerning the Polish Governance should have less severe sanctions for errors in applying the changes introduced by this reform. More certainty for the audited would be provided by limitation of the audit of the taxpayer. On the other hand, those under control for their own good should have the discretion to decide on control. This could be guaranteed by an inspection upon request and by providing more opportunities to participate in inspection activities.

In turn, the stability of the law in force with regard to election issues was highlighted in the study on the constitutionalization of the National Electoral Commission. The author draws attention to the need for a constitutional support in relation to the structure and composition of electoral bodies. These issues have become a regularity in countries reforming their electoral administration.

In this issue, there are also considerations concerning the protection of health in a modern country. To this end, it analyzes selected international agreements in terms of the sources of the right to health care, which is inextricably linked to human dignity. The article also examines and compares data contained in reports assessing health care in various countries around the world.

The authors of most of the analyses presented formulated *de lege ferenda* indications to the legislator, aimed at improving the existing administrative and legal solutions.

Ewa Szewczyk

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Jarosław Kuczer
University of Zielona Góra
ORCID 0000-0002-1344-3973
j.kuczer@wpa.uz.zgora.pl

Did the modern state emerge in the 16th century? Holy Roman Empire and the case of Silesia

Keywords: Silesia, modern state, political system, Silesian administration, Holy Roman Empire

Summary. In the construction of modern states, a particularly important role was played by the combination of supreme, central government, with the dominance of the power of society in the regions. The emergence of the modern state poses many difficulties for legal historians, especially concerning time, but also space. In the area of the Holy Roman Empire, the multiplicity of states and their internal differentiation strengthened the construction of this type of state, an example of which is Silesia, as well as Bavaria, Hesse, or Bohemia. The paper focuses mainly on the administrative factor, but also on the underlying social factor. The construction of a modern administration, sometimes absolutist, encountering local resistance, is one of the most important factors in the emergence of modern states, not only in the 15th century, as the article puts it, but also from the 13th century onwards, as Anglo-Saxon historians would rather boldly have it.

Czy „państwo nowoczesne" powstało w XVI wieku? Święte Cesarstwo Rzymskie i przypadek Śląska

Słowa kluczowe: nowoczesny, system polityczny, Śląsk, śląska administracja, Święte Cesarstwo Rzymskie

Streszczenie. W budowie państw nowoczesnych (modern state), szczególnie ważną rolę odgrywało połączenie rządów zwierzchnich, centralnych, z dominacją władzy społeczeństwa w regionach. Pojawienie się państwa nowoczesnego nastręcza historykom prawa wiele trudności, zwłaszcza dotyczących czasu, choć i przestrzeni. Na obszarze Świętego Cesarstwa Rzymskiego mnogość państw i ich wewnętrzne zróżnicowanie wzmacniały budowę tego typu państwa, czego przykładem może być i Śląsk, podobnie jak Bawaria, Hesja, czy Czechy. W artykule zwrócono uwagę głównie na czynnik administracyjny, ale i podbudowujący go czynnik społeczny. Budowa nowoczesnej administracji, czasem absolutystycznej, napotykającej na opór lokalny, to jeden z najważniejszych czynników wyłaniania się państw nowoczesnych, nie tylko w XV w. – jak to ujęto w artykule, ale i od wieku XIII, jakby chcieli tego dość odważnie historycy anglosascy.

The monarchical state (Ancient Greek *μοναρχία*, Latin *monarchia*), as defined by Aristotle, was the first of the 'proper' positive forms of state. Max Weber, in his sociological theory, posited that it had a monopoly on both legislation and the co-

ercive measures used in it[1]. The monarchy, as a monocratic system, was a contradiction of republican rule in modern times. In this sense, the Kingdoms of Spain, France, Denmark, Sweden or England, and finally the Holy Roman Empire of the German Nation, were monarchies in this period, as opposed to the system of mixed monarchies (*monarchia mixta*) that prevailed, for example, in the Polish-Lithuanian Commonwealth (from 1569). Although in Europe, we speak mainly of *stato*, *estado*, *état*, or the German *Staat*, as unitary states, scholars already see in the medieval period the moment of the emergence of modern states, and with this – or perhaps as a basis for this claim – of modern societies. The prerogatives of the king still included the principles mentioned by Charles Tilly of the declaration of war, the conduct of the state, the protection of subjects, in the absolute monarchy in the future three types of power were also specified, the disposal of property and population of the kingdom, or the means of production and state interventionism[2].

The model of the emergence of the modern state is viewed in different ways today. Benno Teschke, for example, believes that it must exhibit a particular model of wealth production, even if this took place because of pre-modern economic relations (feudalism). Christian Reus-Smit, on the other hand, paid attention to the constitutional order. To this day, a definitive caesura has not been adopted. Most often it is considered to date back to the distant past and is linked to events such as signing of the Treaty of Utrecht (1714), the Peace of Augsburg (1555), or the Council of Constance (1494), and signing of the Peace of Westphalia (1648), which gave the Old Continent a new political, social, and economic face. Some discussions even mention the 13th century. A few writings also argue that the modern state existed much earlier than we might think (Hendrik Spruyt). It was to be based on capitalism, property rights, free trade and cooperation that had existed since the early Renaissance, as well as on the differentiation of societies based on specific territories, even if they were part of a single state[3].

In the case of Silesia discussed here, we will be most interested in the following moments: its pre-constitutional, modern principles of administration and laws, the social separateness of exercising power in relation to the other territories of the Holy Roman Empire that it was a part of, defence and judiciary. On its example, while staying far from generalisations, the author will try to prove that the form in which these problems existed proved that the Empire should be treated as a "modern state". It was the possible existence of separate administrative forms within a single independent and sovereign state structure that testified to the emergence

[1] B. Dubreuil, *Human Evolution and the Origins of Hierarchies. The State of Nature*, Cambridge 2010, p. 189.

[2] Ch. Tilly, *Coercion, Capital and European States, AD 990-1992*, Blackwell 1992, p. 225.

[3] H. Spruyt, *The Origins, Development, and Possible Decline of the Modern State*, "Annual Review of Political Science" 2002 (1), no. 5, pp. 127-149.

of this form of state. The inspiration of combining the will of the monarch with the grassroots aspirations of societies was realised.

The history of the Silesian political system and individual duchies making up its political organism, are dealt with – with varying degrees of scientific sophistication – in the works by F.W. Pachaly[4], H. Simon[5], O. Balzer[6], H. Wutke[7], G. Croon[8], K. Śreniowski[9], as well as in more recent publications by K. Orzechowski[10] and M. Weber[11]. A particularly valuable publication dealing with the issue of institutional life and the functioning and evolution of the administration proved to be the work by M. Ptak dedicated to the problems of the system and forms of administration in the Duchy of Głogów[12]. The author has painted a remarkably synthesising picture of the origins and evolution of estate assemblies and offices, placing significant emphasis on clarifying the strictly legal conceptual apparatus associated with their existence.

Sixty years after the end of the Thirty Years' War, Heinrich L. Gude's work *Staat von Schlesien* was published in Leipzig. The title can be freely translated as "The Silesian State". The title itself was not an arbitrary way of understanding the role and place of the province in the structures of the state, and its content proves in detail the systemic, social and economic distinctiveness of the province, which

[4] F.W. Pachaly, *Sammlung verschiedner Schriften über Schlesiens Geschichte und Verfassung*, vol. 1, Breßlau 1790.

[5] H. Simon, *Die Ständische Verfassung von Schlesien*, Breslau 1846.

[6] O. Balzer, *Historia ustroju Austrii*, Lwów 1899.

[7] H. Wutke, *Die Entwicklung der öffentlichen Verhältnisse Schlesiens vornähmlich unter den Habsburgen*, vol. 1-2, Leipzig 1842-1843. *Idem*, *Die schlesischen Stände, ihr Wesen, ihr Wirken und ihr Werth in alter und neuer Zeit*, Leipzig 1847.

[8] G. Croon, *Die landständische Verfassung von Schweidnitz-Jauer*, [in:] *Codex Diplomaticus Silesiae*, vol. 27, Breslau 1912.

[9] K. Śreniowski, *Historia ustroju Śląska*, Katowice-Wrocław 1948.

[10] K. Orzechowski, *Akta do dziejów śląskiego sejmu (wiek XV-XVIII)*, "Sobótka" 1971, vol. 26, pp. 454-469; idem, *Geneza i istota śląskiego conventus publicus*, "Sobótka" 1972, vol. 27, pp. 561-577; *idem*, *Commissions of the Silesian Convention,* "Sobótka" 1974, vol. 29, pp. 35-54; *idem*, *Konwent--sejm-trybunał. Ze studiów nad zgromadzeniami stanowymi feudalnego Śląska*, "Sobótka" 1973, vol. 28, pp. 261-275; *idem*, *Kurie śląskiego sejmu w XVII i w pierwszej połowie XVIII wieku*, "Sobótka" 1978, vol. 33, pp. 313-331; idem, *O śląskich sejmach 1527 r.*, "Czasopismo prawno-historyczne" 1999, vol. 51, issue 1-2, pp. 205-218; *idem*, *Ogólnośląskie zgromadzenia stanowe, Warszawa-Wrocław 1979*; *idem*, *Podatek szacunkowy na tle systemu daninowego dawnego Śląska 1527-1740*. Studium historyczno-prawne, Wrocław 1999; idem, *Podejmowanie uchwał przez ogólnośląskie zgromadzenia stanowe pod rządami Habsburgów*, "Sobótka" 1975, vol. 30, no. 2, pp. 127-140; *idem*, *Porządek obrad śląskiego konwentu*, "Sobótka" 1974, vol. 29, no. 3, pp. 307-324; *idem*, *Sejm i sejmiki w ustroju feudalnego Śląska*, "Sobótka" 1976, vol. 31, pp. 197-207; *idem*, *Urząd zwierzchni i konwent. Z badań nad organizacją śląskiego conventus publicus*, "Sobótka" 1973, vol. 28, pp. 345-359; *idem*, *Z praktyki śląskiego sejmowania w połowie XVI w.*, "Sobótka" 1990, vol. 45, pp. 13-37.

[11] M. Weber, *Die schlesischen Polizei- und Landesordnungen der Frühen Neuzeit*, Köln-Wiemar-Wien 1996.

[12] M. Ptak, *Zgromadzenia i urzędy stanowe księstwa głogowskiego od początku XIV w. do 1742 r.*, Wrocław 1991.

was further developed in the work. Interestingly, the author himself has remained independent in his views and there is no indication to the contrary. He was writing at a time when the subjection of Silesia to the Habsburg dynasty was undeniable, and Prussian aspirations to own it, expressed as late as 1740, did not exist at all. He pointed mainly to a special form of government, but also to dependency, public/social interests and customs separate from the rest of the state, divergent development, and common military interests. He compared its conquest in the Middle Ages to that of Ancient Greece and derived many other myths not from his imagination but from existing, often now unknown sagas that are a separate cultural element, comparing the Jablunkov Pass to Thermopylae[13].

The title of the work itself indicated a way of perceiving Silesia as a separate structure, whose existence as such had to be understood in the world of that time. And it is this 'understanding' and the fact of Silesia functioning in this way that is the first clue to the possibility of defining Silesian society as a modern society, inhabiting a modern state. Interestingly, in 2005, Kazimierz Orzechowski, an outstanding scholar of Silesian history, founder and doyen of the Wrocław school of history of law, based on decades of his own research, proved in his work "Historia ustroju Śląska" how important for the existence of "poly-distinctiveness" of this part of the state, indicating at the same time the principles which determined the existence of a modern state. If the principles he enumerated had been adopted here, we must necessarily classify the Holy Roman Empire as a modern state[14].

A modern state must accommodate some "parts", understood as follows. First, a "part" must be a naturally distinct area, often geographically based, demographically and politically distinct. Second, such a part must be a historical structure, be a "historical fact", not the result of a subsequent assumption. Third, it should be a limited political structure. It must conform to the classical definition of a state (Georg Jelinek) and be a territorial unity, a unity of population and power, "but only so far as not to become a state." Fourth, there must be territories where power is/was autonomous, not delegated. Fifthly, such a part should be directly subordinate to the state, *i.e.*, the entities exercising power in it should be directly subordinate to the "highest authority of the state as a whole," and the laws enacted should directly reach the centre of the state. In conclusion, "Silesia, in its past, even exceeded these requirements"[15]. Thus, Kazimierz Orzechowski pointed out the systemic factors that distinguished Silesia in geopolitical and social terms. What is particularly important is that we will always deny it the title of complete 'state' or 'statistically special state', as suggested by the cognitively optimistic criteria and

[13] H.L. Gude, *Staat von Schlesien*, Frankfurt-Leipzig 1708.
[14] K. Orzechowski, *Historia ustroju Śląska (1201-1740)*, Wrocław 2005.
[15] Cited in: *ibidem*, p. 12.

arguments put forward, for example, in the eighteenth century by Friedrich Gude or Friedrich Pachaly[16].

Silesia is now regarded by historiography as one of the five parts of the Kingdom of Bohemia, along with Bohemia proper (*Böhmen*), Moravia *(Mähren*), and both Lusatias (*Ober- und Niederlausitz*). It thus belonged to the broader group of the so-called *Erbland*, states – as opposed to Reich territories – that were hereditary property of the Habsburgs. Between 1629 and 1740 Silesia was divided into 13 duchies and 6 free states. Most of them were divided into individual weichbilds (districts). It had a joint general estate assembly and a common General Governor, "ruling" on behalf of the Bohemian king. The duchies had, with some exceptions, a similar administrative structure. In terms of vassal subordination, they were divided into two types. On the one hand, there were the fief duchies, whose superiors were dukes who recognised the emperor's sovereignty. On the other hand, most of the territory consisted of duchies under direct ownership of the emperor, for which he held the title of duke[17].

All of them had their own unique official structure, separate from the rest of the state, as well as their own general estate assembly, sitting sometimes even permanently in Wrocław. Even King Vladislaus II, by his national privilege of 1498, upheld the office of the General Governor, who was initially elected from among the Silesian dukes and ruled this part of the Kingdom of Bohemia[18]. The supra governor was to be accountable to the estates of the Silesian duchies and subject to the ducal law. They had authority over the entire administration of the Silesian province and the hereditary duchies[19]. The state treasury and the Silesian national defence were also put under their supervision, which changed when the governor was a clergyman. The governor's office was initially a deputy authority, but with

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[16] *Ibidem*, pp. 11-12; H.L. Gude, *Staat von Schlesien*, Frankfurt-Leipzig 1708; F.W. Pachaly, *Sammlung verschiedener Schriften über Schlesiens Geschichte und Verfassun*, Breßlau 1790.

[17] Duchies of Świdnica-Jawor, Opole-Racibórz, Głogów, Wrocław, Cieszyn, Opawa, Karniów, Ziębice, Nysa-Grodków (Nysa), Brzeg, Legnica, Wołów, Żagań, Oleśnica; contemporaries, enumerating each of them separately, presented it as a division into 17 duchies: *Kurtze Fragen und Antworten Vom Herzogthum Schlesien, Vermöge Welcher die geographische, historische und politische Merckwürdigkeiten von Schlesien*, Breßlau und Leipzig 1733, p. 1.

[18] The political affiliation of subsequent governors was clearly defined: "Erstlichen, daß wir noch unserer rechte nachkommende Könige zu Böhaimb dem jetztgemelten Lande, keinen andern Obristen Hauptmann nicht setzen noch geben wollen, denn allein einen aus unsern Schlesichen Fürsten...", as cited in: J. Schiskfuss, *Ner Vehrmerte schlesische Chronika und Landes Beschreibung*, vol. 3, p. 97 (cited), 272; H. Wutke, *op. cit*., vol. 2, p. 109; H. Aubin, Geschichte Schlesiens, vol. 1, Breslau 1938, p. 295; K. Orzechowski, *Ogólnośląskie zgromadzenia stanowe,* Warszawa-Wrocław 1979, p. 345; C. Grünhagen, *Schlesien unter Rudolf II und der Majestätsbrief 1574-1609*, Gotha 1896, p. 94; K.A. Menzel, *Geschichte Schlesiens*, vol. 2, Breslau 1808-1810, p. 290.

[19] G. Croon, *Die landständische Verfassung von Schweidnitz-Jauer*, [in:] *Codex Diplomaticus Silesiae*, vol. 27, Breslau 1912, pp. 32 and 63-70; F. Minsberg, *Geschichte der Stadt und Festung Gross-Glogau*, vol. 2, Glogau 1853, p. 39.

time it moved away from its original role and became a representative office of the duchy's estates towards the Prague court. In 1629, the Habsburgs began transforming the office of the supra governor into the Superior Office, which created a kind of emperor's government for Silesian affairs[20]. Its powers were to mediate between the emperor and the Silesian estates. The estates themselves became the factor that politically constituted Silesia, and participation in the meetings of the assembly of representations was a measure of political and social affiliation to Silesia.

The form of the general Silesian assembly – *Fürstentag* – was referred to as *gemeiner tag, gemeines geschpreche,* or *gemeiner landtag*. The term *Fürstentag* did not become established until the second decade of the 16th century. Later, it was often referred to as *Fürsten und Stände*[21], and as a sign of its position, it received a seal from Emperor Ferdinand in 1544, which it was to use as the institution subordinate to the emperor's authority[22]. The structure of the general Silesian assembly was – with some exceptions – the pattern for the activity of the assemblies of the hereditary duchies, obviously on a qualitatively and quantitatively reduced scale because it referred to the administrative hierarchy of the given duchy.

The Silesian assembly was a lower instance in relation to the Departmental Assembly established by Ferdinand in Prague[23]. It was composed of estate representatives assembled in three curiae[24]. The first of these was reserved for Silesian dukes and gentlemen of free states, the second was composed of representatives of landowners: gentlemen, prelates and knights of the duchies referred to as hereditary duchies of the Bohemian Crown[25]. It also included the representatives of the town of Wrocław. In the third sat the deputations of hereditary towns. The fourth casting vote, the so-called *votum conclusivum*, was held by the chairman of the session, the Silesian governor[26]. When it came to voting, the strongest position was held by the dukes, each of whom could cast a vote individually. State owners, by contrast, had to mutually agree on a position by adopting a joint conclusion on the vote. The decision made during the dukes' curia meeting was also, in effect, binding on the other curiae, and its closed status was evidenced by the fact that the own-

[20] Österreichische Staatsarchiv, Haus- Hof- und Staatsarchiv, Staatenabteilungen: Ost- und Südeuropa AB VIII/7/4, Schlesien Ad. I/2, Krt. 4, Faz. 8: Kurzer Vermerk sowohl der ehemäligen Kayserlichen als nunmehrigen Königlichen Preußisch Schlesischen Landesverfassung (Krt. 4, pp. 50-109), p. 69; H. Wutke, *op. cit.*, vol. 2, p. 88; K. Orzechowski, *op. cit.*, p. 350.

[21] H. Wutke, *op. cit.*, vol. 2, pp. 138-139.

[22] H. Luchs, *Schlesische Landes- und Städtewappen*, Breslau 1881, p. 16.

[23] O. Balzer, *op. cit.,* p. 161.

[24] K. Orzechowski, *Kurie śląskiego sejmu w XVII i w pierwszej połowie XVIII wieku*, "Sobótka" 1978, no. 33, pp. 313-331.

[25] This curia consisted of representatives of the Duchy of Głogów, cf.: H. Simon, *Die Ständische Verfassung von Schlesien*, Breslau 1846, pp. 4 and 6.

[26] K. Orzechowski, *Akta do dziejów śląskiego sejmu (wiek XV-XVIII)*, "Sobótka" 1971, no. 26, p. 453.

er of the free state of Bytom-Siedlisko (since 1697) did not gain access to it otherwise than by way of alternation with the owner of the state of Bytom in Upper Silesia. The second curia was dominated by the nobility. Naturally, it would have been impossible to create forms of direct representation for the nobility because of the number of possessors in the entire province. Therefore, only representatives of this estate came to the assembly meetings, and traditionally it was established that each duchy could delegate two such persons. Appointment as a deputy to the general assembly took place at the duchy assemblies. The image of this curia was variable, as the number of its members increased as the duchies came under royal sovereignty. In practice, the duchy of Głogów occupied the second place in the curia, after the duchy of Świdnica-Jawor. Another major innovation was the inclusion, probably as early as 1547, of Wrocław as a centre with a prominent economic role in the Silesian world. The third curia, the town curia, was constantly degraded politically. Seats in it were held by delegations of weichbild towns. Only major centres had independent votes. Głogów, for example, had an independent vote, unlike the other six weichbild towns, which had a joint vote. This was also the case for the weichbild towns of the duchies of Świdnica-Jawor and Wrocław. Of the other later established hereditary duchies, only the more significant centres were admitted, or, as the example of the duchies of Żagań and Ziębice proves, they were not admitted at all. Participation in the Silesian general assembly was obligatory, as this assembly had the power to issue legislative acts, binding on the whole of Silesia[27]. The resolutions passed during the assembly meeting were also varied. Namely, they could be responses to royal recommendations, the so-called *Gravamina*, *i.e.*, complaints and demands, as well as Silesia-wide executive and legislative norms[28]. The interests of the estate representations of the individual duchies were often contradictory, and thus the assembly was not a political monolith. It may have been that it was placing government in the hands of the estates that made them weak. However, the assembly meetings were more or less regular depending on the political situation in the country[29]. P. Jurek even points out to their particular viability. The average number of meetings was to be 4 per year, and if they could not be convened, they were supported by substitute meetings[30].

[27] Cf. K. Orzechowski, *Podejmowanie uchwał przez ogólnośląskie zgromadzenia stanowe pod rządami Habsburgów*, "Sobótka" 1975, vol. 30, pp. 127-140; *idem*, *Z praktyki śląskiego sejmowania w połowie XVI w.*, "Sobótka" 1990, vol. 45, pp. 13-37.

[28] F. Rachfahl, *Die Organisation der Gesamtstaatsverwaltung Schlesiens vor dem dreissigjährigen Kriege*, Leipzig 1894, pp. 147-149.

[29] H. Wutke, *op. cit.*, vol. 1, p. 70.

[30] P. Jurek, *Czas obrad ogólnośląskich zgromadzeń stanowych w XVII w.*, "Sobótka" 1976, vol. 31, pp. 556 and 560.

By the outbreak of the Thirty Years' War, the estate forms of representation of the Silesian province had flourished and stabilised[31].

Over time, deliberations of the Silesian general assembly were deprived of the subject matter character typical of the debates[32]. This was because they began to deal only with matters submitted by the emperor and already approved at the Vienna chancellery. Thus, the Austrian emperors took away the legislative powers of the estates, which was made evident by the fact that all statutes approved locally had to be countersigned by the emperor[33]. From 1662 the general assembly took the name *conventus publicus*. The work in the convention was continued as before, with the difference that the dukes and free state owners did not participate in it in person, but through deputies. With the Superior Office, which now remained outside its structures, the convention was united by the office of a general state plenipotentiary (*General-Landes-Bestellte*)[34].

The general assemblies of the duchies were a correspondingly lower instance than the general assembly. Their origin is linked to the fiscal policy of the king, who was obliged to resort to them for tax resolutions. Only at the level of the assemblies did the king accept the right of resistance enjoyed by the nobility of the hereditary duchies. These assemblies served as estate representations. Their composition was similar to that of the Silesian general assembly, as only the nobility, clergy and representatives of the royal towns of the duchy could participate in their debates. Their role was both to decide on current issues related to the functioning of the duchy and to prepare a position for the upcoming Silesian general assembly. Anyway, during the 16th century, the emperor assumed the exclusive right to convene these representations. This could also be done by the duchy governor, who, when proposing the subject of the meeting, did so by the emperor's mandate, usually presiding over the meeting. In addition to these, there were also several *weichbild* assemblies[35]. The assemblies of the district duchies were represented during the sessions of the Silesian general assembly only by the person of the duke.

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[31] J. Balashke, *Regionalismus und Staatsintegration im Widerstreit. Die Länder der böhmischen Krone im ersten Jahrhundert der Habsburgerherrschaft (1526-1619)*, Munich 1994, p. 44.

[32] O. Balzer, *op. cit.*, pp. 239-240.

[33] J. Schichfuss, *op. cit.*, vol. 3, pp. 103-104.

[34] Österreichisches Staatsarchiv, Haus- Hof- und Staatsarchiv, Staatenabteilungen: Ost- und Südeuropa AB VIII/7/4, Schlesien Ad. I/2, Krt. 4, Faz. 8: Kurzer Vermerk…, p. 55; H. Wutke, *op. cit.*, vol. 2, p. 101; the genesis and functioning of the Silesian convention were discussed by: K. Orzechowski, *Geneza i istota śląskiego conventus publicus*, "Sobótka" 1972, vol. 27, pp. 561-577; *idem*, *Urząd zwierzchni i konwent. Z badań nad organizacją śląskiego conventus publicus*, "Sobótka" 1973, vol. 28, pp. 345-359; *idem*, *Komisje śląskiego konwentu*, "Sobótka" 1974, vol. 29, pp. 35-54; *idem*, *Porządek obrad śląskiego konwentu*, "Sobótka" 1974, vol. 29, no. 3, pp. 307-324; *idem*, *Konwent-sejm-trybunał. Ze studiów nad zgromadzeniami stanowymi feudalnego Śląska*, "Sobótka" 1973, vol. 28.

[35] M. Ptak, *Zgromadzenia i urzędy stanowe księstwa głogowskiego od początku XIV w. do 1742 r.*, Wrocław 1991, pp. 64-79; G. Croon, *op. cit.*, p. 90.

The various hereditary duchies differed in terms of how the estates shaped the forms of division of the curiae. In the duchy of Świdnica-Jawor, the estates gathered in two curiae. The first included the clergy and nobility, the second – representatives of the towns. The duchies of Opole-Racibórz, Opawa and Wrocław had 4 collegiate bodies (although their comparative composition varied), whereas, for example, the assembly of Głogów had three curiae. Their votes were considered separately. These were the curia of the chapter of Głogów and the common curia of gentlemen, protonotaries apostolic and knights. The third was composed of the plenipotentiaries of the royal towns: Głogów, Góra, Kożuchów, Polkowice, Szprotawa, Świebodzin and Zielona Góra[36]. The competence of such bodies included the election of officials, court and tax ordinances, matters of trade, police order and mint law. It also included general issues concerning the functioning of the community of a given duchy.

The importance of Silesia took on another dimension due to the strength represented by the local national defence (*Defensionsordnung*)[37]. It was enacted for the first time in 1529 in connection with the approaching Turkish war, although the idea of taking a census and structuring Silesia according to the districts that were to defend it was not new[38]. Divided into four districts, Silesia became one of the strong links in the structure of the Bohemian provinces administered by Vienna. The Lower Silesia district (as the third one), with the duchies of Głogów, Żagań, Legnica and Jawor, was placed under the command of Frederick II, Duke of Legnica. Further on, the district of Central Silesia under the governor of Wrocław Achatius Haunold, the district of Nysa, Ziębice, Świdnica and a small part of Brzeg under the command of Bishop Jakob von Salza, and the district of Upper Silesia under the command of John II of Opole were established[39]. Each was estimated in terms of population and property, which provided the basis for determining the number of recruits the districts fielded. In 1529, 1,600 infantry and 2,000 cavalry were placed at the disposal of the Crown. The Silesian nobility was obliged to field – if required by the emperor – a *levée en masse*. However, for internal security reasons, self-convening of these formations was prohibited[40].

[36] *Ibidem*, p. 89.

[37] The principles of military service were derived from the order of medieval codes: "Es soll kein Mensch oder Landsaß dieser Fürstenthümer auß dem Landes wider Ihre König. May. rücken und sich durchaus in keine Kriegsbestallung wider dieselbe einlassen": J. Schickfuss, *New Verrmehrte schlesische Chronika und Landes Beschreibung*, Jena-Breslau 1625, vol. 3, p. 494.

[38] C. Grünhagen, *Geschichte Schlesiens*, vol. 2, Gotha 1884, p. 45; H. Palm, *Schlesiens Landesdefension im XV., XVI. und XVII.* Jh., "Abhandlungen der Schlesischen Geselschaft für vaterländische Kultur" 1868, no. 2, pp. 73-75.

[39] J.S. Schickfuss, *op. cit*, vol. 3, p. 174; H. Wutke, *op. cit*., vol. 1, p. 75; C. Grünhagen, *Schlesien unter der Herrschaft König Ferdinands 1527-1564*, "Zeitschrift des Vereins für Geschichte und Altertum Schlesiens" 1885, no. 19, p. 77.

[40] F. Rachfahl, *op. cit*., pp. 177-179.

The Silesian treasury had a separate hierarchy and was represented to the Silesian estates by the Silesian Exchequer (*Landeszahlmeister*) and from 1552 by two general state treasurers. Lower in the hierarchy stood the accountants. Together, they constituted the General Tax Office (*Generalsteueramt*), which functioned from 1552 until 1740. Since 1570 it was headed by the General Tax Collector (*Generalsteuereinnehmer)*[41]. Royal affairs, in turn, were handled by the *vicedominius* appointed in 1552-1554. From 1558 it became a collegial office formed by two general collectors, headed by the Royal Chamber of Silesia, subordinated to the Vienna Court Chamber[42]. Such an arrangement indicated the high independence of the Silesian treasury. Also, noteworthy is the functioning in Silesia of the old principle (*Steuerbewilligungsrecht*), according to which the estates agreed to lay down tax sums rather than have them imposed by the monarch. It was sanctioned by the deed of Matthias Corvinus of 1474 and Vladislaus of 1491[43] .With time, it became only a decorative element of the Silesian general assembly resolutions. Besides, the monarch's realm was also weakened by the incoherent fiscal system in royal domains, which in turn affected the whole payment relations of Silesia[44]. First, the estates were obliged to pay a tax to the royal treasury, which over time became fixed. Second, the king as a grand duke in hereditary duchies had his own revenue. It was based on mint, mining, salt and customs regalian rights[45]. Active tax subjects included dukes, noblemen, clergy, burghers, burgher subjects and peasants[46]. As in the Polish Republic, royal domains were sold, and castles or royal offices were pledged. Taxes were enacted regularly since 1527. The most important of these was the so-called *Schätzungssteuer*, which was a $1^1/_3$% tax on property. It was paid by dukes, clergy, nobles, towns, and free peasants. After 1543 the picture changed to the detriment of peasant duties[47]. In 1527, an assessment of the amount and quality of the taxpayers' property was also made in order to collect tax. The cadastre outlined at that time, with minor changes, remained in force until the 18th century, when it was decided to make it more precise, due to the numerous *avulsa* and *non entia* that arose during the 16th and 17th centuries[48]. In addition to these levies, there were also *Anticipationen*, *i.e.*, amounts levied by the monarch towards

[41] J.R. Wolf, *Steuerpolitik im Schlesischen Ständestaat. Untersuchungen zur Sozial- und Wirtschaftsstruktur Schlesiens im 17. und 18. Jh.*, Heidelberg 1978, p. 11.

[42] K. Orzechowski, *Rachunki śląskich stanów (1527-1741)*, Wrocław 1994, p. 10.

[43] J.S. Schickfuss, *op. cit*., vol. 3, p. 169; H. Simon, *op. cit*., p. 6; Lehns- und Besitzurkunden Schlesiens und seiner einzelnen Fürstenthümer im Mittelalter, ed. C. Grünhagen, H. Markgraf, vol. 1, Leipzig 1881, p. 32; F. Rachfahl, *Die Organisation der Gesamtstaatsverwaltung Schlesiens vor dem dreißigjährigen Kriege*, pp. 110-111; J.R. Wolf, *op. cit*., p. 13.

[44] *Ibidem*, p. 89.

[45] F. Rachfahl, *op. cit*., pp. 263-277.

[46] *Ibidem*, pp. 110-111.

[47] F. Zimmermann, *Über die Steuerverfassung in Schlesien ein Versuch*,, vol. 1, Breslau 1799, p. 14.

[48] C. Grünhagen, *Geschichte Schlesiens*, vol. 2, p. 92.

future taxes, and various forms of indirect taxes, such as beer excise tax. As part of an assessment tax called indiction, starting from 1570 estates were required to pay 70,000 tal.[49] To collect it, in the hereditary duchies two persons from the noble estate and two others, usually educated for each *weichbild*, were elected. The organisation of the estate administration itself never developed similar functional efficiency to the royal one[50], and tax revenue decreased significantly after the end of the Thirty Years' War, as a result of the decline in the population of Silesia to about 1,114.720[51].

The Silesian judiciary in the first half of the 16th century remained subordinated to the estates, and in its entirety to the so-called right of evocation of the King of Bohemia, which provided for the highest judicial powers in the principality. By the deed of King Vladislaus II in 1488, *Ober-und Fürstenrecht*, or the Supreme Ducal Tribunal, was established. It consisted of the dukes of Silesia, representatives of the crown princes, and the governor of Silesia who presided over it. The cases heard there involved questions between the king and dukes or free state gentlemen. Over time, the authority of this body has been limited. Appealing the tribunal's rulings – with some exceptions – was not provided for by law. The tribunal's role declined gradually under Habsburg rule, and the scope of its activities was gradually taken over by the Prague Appeals Chamber, established in 1547, which represented the centralisation characteristic of the establishment of a modern state. It must be added that in Silesia, during the Austrian period, there was practically no codification of civil law. The judicial procedures of the individual duchies also remained different. Only criminal law was codified. This is because the *Constitutio Criminalis Carolina*, succeeded since 1707 by the *Josephina* (the code deeply rooted in the former), were in force in Silesia. In matters of procedural law, the appellate ordinances were the basis, while other procedural rules, such as substantive law, were carried by the land ordinances of each duchy separately. The highest authorities in the hereditary duchies became the regencies, or "duchy governments"[52].

Another aspect marking Silesia's distinctiveness was the participation of society, mainly the nobility, in public life. The entire noble estate of Silesia was automatically held accountable by the rulers for their actions, passivity, or political resistance. In the era of Austrian rule, state loyalty became the only option, and any deviation or action not in line with the interests of the Habsburg dynasty was highly risky. This does not mean, however, that the nobility remained completely

[49] J. Krebs, *Zur Geschichte der inneren Verhältnisse Schlesiens von der Schlacht am weißen Berge bis zum Einmarsche Waldsteins*, "ZVGAS" 1882, vol. 16, p. 35; F. Zimmermann, *op. cit*., p. 15.

[50] F. Rachfahl, *op. cit*., p. 316.

[51] J.C. Sinapius, *Schlesien in merkantilischer, geographischer und statistischer Hinsicht*, Sorau-Leipzig 1803, p. 25.

[52] *Historia Śląska*, ed. K. Maleczyński, vol. 1, part 3, Wrocław 1963, pp. 469-470.

restrained in their actions, and the royal offices dominated over others in terms of competence. The political involvement of the nobility was also visible in the field of appointments to positions of strategic importance for the functioning of the duchy. The noblemen monopolised both land and ducal (royal) offices, which gave them the opportunity to pursue a wide-ranging political career. Opportunities for public service were also opened by the courts of fiefdom duchies. Each of the dukes had such a centre, with burgraves and judges at its head.

Throughout the Habsburg period, the nobility of the hereditary duchies took an active part in the dualistic system of government. In this respect, its representatives can be divided into two categories. The first were the participants of the Silesian general assembly, representatives of estate bodies and strictly Silesian bodies in the duchies. The second type – the so-called *Beamtenadel*, or clerical nobility – remained in a different relation to central power. It was a group of people affiliated to the emperor's apparatus of power, operating within its bureaucratic structures, and remaining firmly bound to the crown in terms of wealth and politics. The nobility was attracted by the lucrative positions, which were dependent on accepting the direction of internal state policy. Generally, the competition for offices involved families that had not only succeeded in strengthening themselves economically in a short period of time, but also hereditary nobility, which had formed the political and administrative core of Bohemia and Silesia for years.

As early as the 16th century, the emperors aimed to make the nobility of the hereditary duchies dependent on them, and the noblemen, in turn, sought to gain as much influence as possible over matters affecting them – which often could not be achieved without an alliance with the crown and without involvement in the province's public life. Moreover, the duchies, remaining in fief relations, were not able to govern themselves like the duchies under independent dynasties, and the Głogów estates were not strong enough to demand it. By no means did they wish to be politically isolated, but only to ensure that the duchy remained one of the strongest in Silesia, both administratively and economically. This was reflected in the work of the Silesian-Lusatian Chancellery established in Prague in the second decade of the 17th century and transferred to Vienna in 1620. Its initiator was Emperor Matthias. This institution remained completely independent of Bohemian influence and was to independently handle Silesian-Lusatian affairs as the province's highest appellate authority. It was also referred to as the "German Chancellery." The Chancellery was designed as a ministry for Silesian and Lusatian affairs, and was dominated by Silesians and Lusatians, who had a voice in both the legislative and executive branches, mainly through the positions of vice-chancellor and secretary. Other positions were also held by representatives of these provinces. Thus, two Silesians took the offices of councillors, and the other two were

occupied by a Lower and an Upper Lusatian. The highest office earmarked for the countrymen, the vice-chancellorship, was awarded to the Silesian nobleman Georg von Schönaich, Baron of Bytom and Siedlisko, who was now subordinate to the Bohemian chancellor. He was assigned a secretary, A. Rössler, and advisors Otto von Nostitz, Dr. Melander, Friedrich von Minkwitz and Heinrich Stange von Stonsdorf[53].

The highest office in the duchies remained that of duchy governors (*Fürstenthumshauptmann*), also called land governors (*Landeshauptmann*). The duchy governors were deputy officials, and from 1508 their decisions had the force of royal decisions and did not require the confirmation of the monarch. In 1511, the principle was established that the governor headed all the *weichbilds* collectively[54]. By the deed of 24 January 1544, King Ferdinand introduced the rule that only a gentleman by birth, or other nobleman settled in the duchy and owning property there could be appointed to the office of the duchy governor[55]. However, despite their efforts, the nobility did not gain full influence over how the office was filled. The noble estate only managed to get approval to present its candidates. It also had the right to raise grievances against the governor's rule. The king himself appointed the governor, who in the presence of the estates took an oath to uphold the rule of law and another to the estates that he would respect their privileges and liberties[56]. In practice, the office of governor was usually held by a nobleman. The governor appointed his deputy, from among the nobility, for the period of his absence from the duchy. The estates tried to deprive the governor of the opportunity to participate in the duchy assembly and to simplify the role played by him to a liaison between estates and the emperor. Following its example, weichbild governors (*Weichbildshauptmann*) were appointed at the head of the local weichbild administration. The governor was assisted by other officials, gathered in the Royal Governor's Office (*Königliches Amt der Landeshauptmannschaft*), and their emergence followed the process of transforming the governor's office into a collegiate one. In the first half of the 17th century, it took the name of the regency of the Duchy of Głogów (*Amtregierung der Hauptmanschaft*). It consisted of the land

[53] C. Grünhagen, *op. cit*., vol. 2, p. 151; J. Blaschke, *Geschichte der Stadt Glogau und des Glogauer Landes, Glogau* 1913, p. 219; W. Barth, *Die Familie von Schönaich und die Reformation*, Beuthen 1891, p. 38.

[54] A. Gryphius, *Glogauisches Fürstentumbs Landes Privilegia aus dem Originalen an tag gegeben*, Lissa 1653, p. 44.

[55] *The analogy was kept in this respect with the election of a local duke to the position of the Silesian governor: N. Henelius, Silesiographia renovata necessariis Scholiis observationibus et indice aucta*, Wratislaviae-Lipsiae 1704, Cap. X, p. 901.

[56] A. Gryphius, *op. cit*., pp. 67-68.

governor of the duchy as chairman, the deputy land governor *(Amtsverweser)* and the secretary (*Amtssecretarius*)[57].

The outbreak of the Thirty Years' War made it possible to reinforce the policies already initiated by the first Habsburgs in public, social and religious terms. Silesia ceased to be, as it was described by German historiography, a "paradise of estates" (*Paradies der Stände*)[58]. Silesia was one of the many areas of the Holy Roman Empire where, from the late 15th century onwards, the influence of the ruler and the estate was balanced. However, the Silesian example did not, of course, yet prove that the empire could be counted among the modern states of the old type. This was evidenced by the existence of more than 300 such state formations on its territory and in the German Empire. With Silesia, we can compare Franche-Comté, the Duchies of Bavaria, Hesse, Württemberg, Bohemia proper, Brunswick, Brandenburg, or Saxony – all of them separate in their fief type form. They were all subordinated to a single central authority and remained in essence a kind of state similar to Gude's *Staat von Schlesien*. There, regional rule was intertwined with the centralisation of the emperor's power, local societies and their aspirations balanced the ruler's pursuits, problems of defence, economy, judiciary were combined with final arbitration of the crown.

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[57] M. Ptak, *op. cit.*, pp. 48-50 and 113.
[58] G. Croon, *Zur Geschichte der österreichischen Grundsteuerreform in Schlesien 1721-1740*, "ZVGAS" 1911, vol. 45, p. 344.

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Magdalena Wasylkowska-Michór
University of Zielona Góra
ORCID 0000-0002-5810-9186
m.wasylkowska-michor@wpa.uz.zgora.pl

Brexit and private international law. The effects of the United Kingdom's withdrawal from the European Union on the law applicable to non-contractual obligations

Keywords: Brexit, non-contractual obligations, Withdrawal Agreement, private international law, European Union, Rome II Regulation

Summary. With the expiry of 31 December 2020, Brexit has become a reality. However, already since the notification by the UK government that it intends to leave the European Union, there has been speculation as to what direction Brexit will go, *i.e.,* whether it will be so called "no deal" Brexit, or whether the EU and the UK manage to conclude a Withdrawal Agreement. The next crucial question was how the cooperation between the EU and UK in civil and private international law, would look like. The object of this article is to present a small part of this cooperation, namely in the field of determining the law applicable to non-contractual obligations. Accordingly, the article firstly presents alternative options for the arrangement of this cooperation and then deals with its successive stages. In the last part of the article the current regulations in this area are presented, *i.e.,* the main rule and the rules on the parties' choice of applicable law, regulated in the Rome II Regulation on the law applicable to non-contractual obligations.

Brexit a prawa prywatne międzynarodowe. Skutki wystąpienia Wielkiej Brytani z Unii Europejskiej dla prawa właściwego dla zobowiązań pozaumownych

Słowa kluczowe: Brexit, zobowiązania pozaumowne, umowa o odstąpieniu od umowy, prawo prywatne międzynarodowe, Unia Europejska, rozporządzenie Rzym II

Streszczenie. Wraz z upływem terminu 31 grudnia 2020 r., Brexit stał się faktem. Jednak już od momentu notyfikacji przez rząd brytyjski zamiaru opuszczenia Unii Europejskiej, pojawiały się spekulacje, w jakim kierunku pójdzie Brexit, tj. czy będzie to tzw. „no deal" Brexit, czy też UE i Wielka Brytania zdołają zawrzeć umowę o odstąpieniu od umowy. Kolejnym kluczowym pytaniem było to, jak będzie wyglądała współpraca między UE a UK w zakresie prawa międzynarodowego cywilnego i prywatnego. Przedmiotem niniejszego artykułu jest przedstawienie niewielkiego fragmentu tej współpracy, a mianowicie w zakresie określenia prawa właściwego dla zobowiązań pozaumownych. W związku z tym w artykule najpierw przedstawiono alternatywne warianty ułożenia tej współpracy, a następnie omówiono jej kolejne etapy. W ostatniej części artykułu przedstawione zostały aktualne regulacje w tym zakresie, tj. zasada główna oraz zasady wyboru przez strony prawa właściwego, uregulowane w rozporządzeniu Rzym II w sprawie prawa właściwego dla zobowiązań pozaumownych.

Introduction

Over the past decades, the United Kingdom has become a major, if not the most important, center for the settlement of international disputes – international companies are more likely to choose English law than any other one as the law applicable and on the other hand more likely to settle disputes in English courts than in other courts. The question of how Brexit will affect the legal framework of international disputes' settlement, in particular the determination of the law applicable to non-contractual obligations, is therefore of crucial importance - both for UK individuals and companies but also for the European Union. There is therefore no doubt that Brexit is one of the greatest legal challenges of recent times.

The issue of the law applicable to non-contractual obligations is currently regulated within the European Union by Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)[1].

This Regulation, of course, isn't applied anymore after the United Kingdom left the European Union. From the very beginning of the Brexit procedure, various ideas have been put forward on how to solve the problem of determining the law applicable to contractual and non-contractual obligations in the future. As one of the solutions, in the event of a so-called "no-deal Brexit"[2], it was proposed, for example, that the United Kingdom would apply the Rome Convention on the law applicable to contractual obligations of 19 June 1980 to determine the law applicable to contractual obligations[3]. In the absence of international conventions, the only solution for the UK will be to apply its own conflict of laws rules for determining the law applicable to contractual and non-contractual obligations. As a consequence, choice of law will no longer be subject to the same regime in the UK and the rest of the EU. This will make it more difficult for parties to predict which law

[1] According to Article 33 of the Polish Private International Law Act of February 4, 2011, (Journal of Laws 2015, item 1792, unified version), the law governing in respect of an obligation resulting from an event that is not an act in law shall be determined by Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.07.2007, p. 40).

[2] "No-deal Brexit" is the name of situation when the withdrawal agreement is not ratified before the withdrawal date (known also as „cliff-edge scenario" or "hard Brexit").

[3] This convention differs however from the solution included in the Rome I Regulation, which is binding for the other EU Member States in the subject of determining law applicable to contractual obligations. Moreover, if instruments of EU law were to be replaced by international conventions, there would be a loophole in the area of determining the law applicable to non-contractual obligations. Currently, the only international convention in force, concerning this subject, is the Hague Convention on the Law Applicable to Traffic Accidents of 4 May 1971, (J. Ungerer, *Consequences of Brexit for European Private International Law*, "European Papers" 2019, vol. 4, no. 1, p. 404).

will be applied to cross-border disputes. They also will not be able to trust that the choice of law will be equally enforced in the UK and in other Member States. In the case of so-called "soft Brexit", four alternative solutions have been envisaged in the doctrine of law. The first and the simplest solution relays on the concluding of an agreement between the UK and the EU, the subject of which will be applying the Rome I and Rome II Regulations even after Brexit[4]. However, this option would require the consent of the EU, which the EU in turn might not give – firstly, in order to set an example to other member states which want to leave the EU and secondly, the EU's consent to the application of existing EU law would certainly be conditional on the UK accepting the case law of the Court of Justice of the European Union. Under the second option, the UK should enter into a new international agreement concluded with the EU, which would address the issues of determination of applicable law, jurisdiction and recognition and enforcement

[4] There is no single figure for how much EU law already forms part of UK law. According to EUR-Lex, the EU's legal database, there are currently over 12,000 EU regulations in force (this includes amending regulations as well as delegated and implementing regulations). In terms of domestic legislation which implements EU law such as directives, research from the House of Commons Library indicates that there have been around 7,900 statutory instruments which have implemented EU legislation, (item 2.6). Simply repealing the ECA, (The European Communities Act 1972) would lead to a confused and incomplete legal system. This is because, as described above, some types of EU law (such as EU regulations) are directly applicable in the UK's legal system. This means they have effect here without the need to pass specific UK implementing legislation. They will therefore cease to have effect in the UK once we have left the EU and repealed the ECA, leaving large holes in the statute book. To avoid this, the Bill will convert directly applicable EU laws into UK law, (item 2.4). By contrast, other types of EU law (such as EU directives) have to be given effect in the UK through national laws. This has frequently been done using section 2(2) of the ECA, which provides ministers, including in the devolved administrations, with powers to make secondary legislation to implement EU obligations. Once the ECA has been repealed, all of the secondary legislation made under it would fall away. As this would also leave a significant gap in the statute book, the Bill will also preserve the laws we have made in the UK to implement our EU obligations, (item 2.5). Equally, there are rights in the EU treaties that can be relied on directly in court by an individual, and the Great Repeal Bill will incorporate those rights into UK law. The text box overleaf on workers' rights gives an illustration of why this is important in practice, (item 2.11). The Government has been clear that in leaving the EU we will bring an end to the jurisdiction of the CJEU, (Court of Justice of the European Union) in the UK. Once we have left the EU, the UK Parliament (and, as appropriate, the devolved legislatures) will be free to pass its own legislation, (item 2.12). The Great Repeal Bill will not provide any role for the CJEU in the interpretation of that new law, and the Bill will not require the domestic courts to consider the CJEU's jurisprudence. In that way, the Bill allows the UK to take control of its own laws. We will, of course, continue to honour our international commitments and follow international law, (item 2.13), The Repeal Bill: White Paper, Policy paper, Legislating for the United Kingdom's withdrawal from the European Union, Department for Exiting the European Union, Updated 15 May 2017, (https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union) (accessed on 30.05.2021).

of judgments[5]. In the third option, the UK would simply unilaterally decide to apply the Rome I and Rome II Regulations. It is a very good solution for determining the applicable law[6], but at the same time it requires a commitment from the UK courts that they will respect not only the "historic" case law of the CJEU, but also future case law. Finally, under the fourth option, the UK could replace the current European system with a more global one by negotiating new treaties with non-EU countries, for example within the framework of The Hague Conference on Private International Law. However, this is a long-term solution that can be achieved after many years of negotiations[7]. There have been arguments among specialists that the best solution for both the United Kingdom and the European Union would be an agreement on the applying of existing EU law instruments or concluding a new agreement which closely replicates those instruments[8].

The research method used in this work is dogmatic-legal method. The aim of the article is first to indicate which of the above-mentioned options has been finally chosen as the most appropriate one to determine the law applicable to non-contractual obligations. Then the purpose of this article is to assess the adopted solution. The article also presents regulations in the field of determining the law applicable to non-contractual obligations, which are in force today in relations between the United Kingdom and the European Union.

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[5] This solution was probably the closest to the UK government' s position at this stage of the negotiations, when it spoke of a "new strategic partnership with the EU" and "building new relationships with the help of a new trade deal". However, it should also be born in mind that negotiating a new international agreement will be time-consuming. Given how many years it took to negotiate existing EU legal instruments, it is unlikely that a new "deal" on Brexit could be signed and entered into force in a relatively short period of time. In addition, the UK and the EU would have to find a way to resolve disputes arising from this new regime, (G. Rühl, *Brexit Negotiations Series: The Effect of Brexit on the Resolution of International Disputes – Choice of Law and Jurisdiction in Civil and Commercial Matters,* https://www.law.ox.ac.uk/business-law-blog/blog/2017/04/brexit-negotiations-series-%E2%80%98-effect-brexit-resolution-international (accessed on 30.05.2021).

[6] This option, as well as the first option, was initially advocated by British Prime Minister Theresa May, who stated in her speech of January 17, 2017, that on leaving the European Union Great Britain would convert the acquis - a collection of existing EU law - into British law. This would give the country maximum certainty. The day after Brexit, the same rules and laws would apply as before. On the other hand, May promised that Great Britain would regain control of its law when the jurisdiction of the European Court of Justice came to end, (https://www.telegraph.co.uk/news/2017/01/17/theresa-may -brexit-12-point-plan-live /). Another problem with this option, however, is that it isn't suitable for jurisdiction and the recognition and enforcement of judgments which, unlike in the case of determination of the applicable law, are based on reciprocity, (Rühl G., *op. cit.*).

[7] *Ibidem*.

[8] S. Majakowska-Szulc, *Konsekwencje brexitu w dziedzinie prawa prywatnego międzynarodowego*, „Problemy Prawa Prywatnego Międzynarodowego", vol. 27/2020, p.140.

1. Brexit – a chronology of events

On 23 June 2016 — the British people voted in a referendum to leave the European Union. Subsequently, on 29 March 2017 the UK formally notified[9] the European Council of its intention to withdraw, and a month later the European Council's, at an extraordinary meeting, adopted guidelines[10] setting out a framework for negotiations.

What should also be stressed is that while withdrawing from the European Union, the United Kingdom has relied on the procedure introduced into the Treaty on European Union (TEU)[11] by the Treaty of Lisbon[12], *i.e.,* under Article 50. This article confirms that any Member State may decide, in accordance with its own constitutional requirements, about its withdrawing from the European Union. Such decision is an exclusive competence of the Member State, is not limited to specific situations and is subject to national law. The right to take such a decision is also a sign of State sovereignty[13]. What is more, it follows from above-mentioned Article 50[14] that the decision of a Member State to withdraw from the European

[9] A letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council, Cover Note from General Secretariat of the Council to Delegations , XT 20001/17, BXT 1 https://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf (accessed on 30.05.2021).

[10] Note from General Secretariat of the Council to Delegations. Subject: Special meeting of the European Council (Article 50) (29 April 2017)-Guidelines, EUCO XT 20004/17, (https://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf (accessed on 30.05.2021)).

[11] Treaty on European Union (Consolidated Version), (Official Journal C 326, 26/10/2012 P. 0001 - 0390).

[12] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal of the European Union of 17 December 2007, (2007/C 306/01).

[13] S. Biernat (ed.), *Podstawy i źródła prawa Unii Europejskiej*, "System Prawa Unii Europejskiej", Warszawa 2020, vol. 1, p. 681.

[14] Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements, (item 1). A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament, (item 2). The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period, (item 3). The withdrawal procedure therefore consists of three stages. Firstly, the Member State notifies the European Council of its intention to withdraw. Secondly, an agreement setting out the terms of withdrawal is negotiated and concluded, taking into account the framework for the country's future relationship with the European Union. Thirdly, the withdrawal itself takes effect from the date of entry into force of that agreement or, failing that, two years after notification to the European Council, unless the European Council decides unanimously to extend that period.

Union is a unilateral and unconditional act. Similarly, since withdrawal is a unilateral act, it does not require the conclusion of an agreement[15]. A withdrawal agreement may, however, establish the date of withdrawal (*i.e.* the date on which the withdrawal agreement enters into force) and agree on other arrangements, in particular: the financial aspects of the withdrawal, the rights of nationals of the withdrawing State residing in the Union and the rights of nationals of Member States residing in the withdrawing State, the status of the nationals of the withdrawing State employed in the institutions and other bodies of the Union and the other transitional issues[16].

The first withdrawal agreement[17] was negotiated by British Prime Minister Theresa May, but it didn't gain the approval of the British Parliament. It was only on 17 October 2019 that the European Council approved the revised withdrawal agreement and accepted the revised text of the political declaration[18], and on 21 October 2019 the Council adopted Decision (EU) 2019/1750 amending Decision (EU) 2019/274 (5) on the signature of the withdrawal agreement[19]. On 19 October 2019 the United Kingdom requested an extension of the withdrawal period referred to in Article 50(3) TEU until 31 January 2020. The European Council agreed to the above-mentioned extension[20].

On 9 January 2020 the House of Commons approved the Withdrawal Agreement Bill (WAB)21. The Council subsequently adopted in written proce-

[15] S. Biernat, (ed.), *op.cit*, p. 682. However, such a withdrawal from the European Union without an agreement, may have very negative consequences for both parties, and in particular for the withdrawing State, as it leaves the question of mutual relations after withdrawal practically unregulated.

[16] S. Biernat, (ed.) *op. cit*., pp. 684-685.

[17] Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 33–Commission to EU 27, https://ec.europa.eu/info/sites/default/files/draft_withdrawal_agreement.pdf (accessed on 30.05.2021).

[18] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, (2019/C 384 I/01), CI 384/1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=PL (accessed on 30.05.2021).

[19] Council Decision (EU) 2019/1750 of 21 October 2019 amending Decision (EU) 2019/274 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, LI 274/1, 28.10.2019, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019D1750&from=PL (accessed on 30.05.2021).

[20] European Council Decision (EU) 2019/1810 taken in agreement with the United Kingdom of 29 October 2019 extending the period under Article 50(3)TEU, LI 278/1, 30.10.2019, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019D1810&qid=1622750222171&-from=en (accessed on 30.05.2021).

[21] European Union (Withdrawal Agreement) Bill House of Commons Committee Stage Briefing January 2020 (https://files.justice.org.uk/wp-content/uploads/2020/01/06170033/JUSTICE-WAB-Briefing-Committee-Stage.pdf) (accesed on 30.05. 2021).

dure a decision to conclude, on behalf of the Union, an agreement on the UK's withdrawal from the EU. The European Parliament had previously given its consent in a vote on 29 January, and the EU and the UK signed the agreement on 24 January. The Council adopted the decision to conclude the Brexit agreement on behalf of the Union on 30 January 2020, which was equivalent to ratifying the agreement on behalf of the EU. From now on, the UK is no longer an EU Member State and is thus treated as a third country. On 1 February 2020, a transitional period commenced and lasted until 31 December 2020. During this time, the UK continued to apply Union law, but was no longer represented in the EU institutions22. The transitional period was therefore designed to give time to prepare for the withdrawal day.

Unless otherwise provided in this Agreement, during the transition period, any reference to Member States in the Union law applicable pursuant to paragraph 1, including as implemented and applied by Member States, shall be understood as including the United Kingdom, (article 127, paragraph 6). Without prejudice to Article 127(2), during the transition period, the United Kingdom shall be bound by the obligations stemming from the international agreements concluded by the Union, by Member States acting on its behalf, or by the Union and its Member States acting jointly, as referred to in point (a)(iv) of Article, (article 129).

2. Brexit and the law applicable to non-contractual obligations

As it was already indicated in the previous chapter, the first agreement concerning the UK's withdrawal from the EU was negotiated by Theresa May's government. According to Article 62 of that agreement, entitled applicable law in contractual and non-contractual matters, the following acts shall apply as follows: (b) Regulation (EC) No 864/2007 of the European Parliament and of the Council in respect of events giving rise to damage which occurred before the end of the transition period[23]. It follows. therefore, that above-mentioned agreement concerned only the transitional period but did not extend further for the time after the end of this period.

[22] Brexit: Council adopts decision to conclude the withdrawal agreement, https://www.consilium.europa.eu/pl/press/press-releases/2020/01/30/brexit-council-adopts-decision-to-conclude-the-withdrawal-agreement/ (accessed on 30.05.2021).

[23] Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 33–Commission to EU 27, https://ec.europa.eu/info/sites/default/files/draft_withdrawal_agreement.pdf (accessed on 30.05.2021) .

It should be noted here that further plans to determine the law applicable to non-contractual obligations were provided for in the so-called Great Repeal Act – an Act which was intended to prepare the UK for the European Union's exit.

According to item 1.12 of above-mentioned Act in order to achieve a stable and smooth transition, the Government's overall approach is to convert the body of existing EU law into domestic law, after which Parliament (and, where appropriate, the devolved legislatures) will be able to decide which elements of that law to keep, amend or repeal once we have left the EU. This ensures that, as a general rule, the same rules and laws will apply after we leave the EU as they did before. EU regulations will not be "copied out" into UK law, regulation by regulation. Instead, the Bill will make clear that EU regulations – as they applied in the UK the moment before we left the EU – will be converted into domestic law by the Bill and will continue to apply until legislators in the UK decide otherwise, (item 2.8). The treaties are the primary source of EU law. A substantial proportion of the treaties sets out rules for the functioning of the EU, its institutions and its areas of competence. While much of the content of the treaties will become irrelevant once the UK leaves the EU, the treaties (as they exist at the moment, we leave the EU) may assist in the interpretation of the EU laws we preserve in UK law (item 2.9). For example, in interpreting an EU measure it may be relevant to look at its aim and content, as revealed by its legal basis as found in the treaties, (item 2.10).

Regarding the case law of the European Court of Justice, the UK on one hand has explicitly stressed that 2.14. However, for as long as EU-derived law remains on the UK statute book, it is essential that there is a common understanding of what that law means. The Government believes that this is best achieved by providing for continuity in how that law is interpreted before and after exit day. To maximize certainty; therefore, the Bill will provide that any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU's case law as it exists on the day we leave the EU. Everyone will have been operating on the basis that the law means what the CJEU has already determined it does, and any other starting point would be to change the law. Insofar as case law concerns an aspect of EU law that is not being converted into UK law, that element of the case law will not need to be applied by the UK courts (item 2.14).

At the same time, the UK government underlined that the UK Parliament remains sovereign, and parliamentary sovereignty is the foundation of the UK constitution. As a consequence of the ECA, passed by the UK Parliament, case law makes it clear that EU law has supremacy for as long as we are a member state. National laws must give way and be misapplied by domestic courts if they are found to be inconsistent with EU law (item 2.18). Our proposed approach is that, where a conflict arises between EU-derived law and new primary legislation passed

by Parliament after our exit from the EU, then newer legislation will take precedence over the EU-derived law we have preserved. In this way, the Great Repeal Bill will end the general supremacy of EU law (item 2.19). If, after exit, a conflict arises between two pre-exit laws, one of which is an EU-derived law and the other not, then the EU-derived law will continue to take precedence over the other pre-exit law. Any other approach would change the law and create uncertainty as to its meaning, (item 2.20)[24].

The Great Repeal Bill's demands are reflected in Article 66 of the final version of the UK's Withdrawal Agreement from the EU. According to this Article in the United Kingdom, the following acts shall apply as follows: (b) Regulation (EC) No 864/2007 of the European Parliament and of the Council (72) shall apply in respect of events giving rise to damage, where such events occurred before the end of the transition period. Articles 158 and 159 of the above quoted Agreement are also worth noting, as they provide for special institutional arrangements to ensure that the United Kingdom honours its commitments towards the European Union. Where, in a case which commenced at first instance within 8 years from the end of the transition period before a court or tribunal in the United Kingdom, a question is raised concerning the interpretation of Part Two of this Agreement, and where that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in that case, that court or tribunal may request the Court of Justice of the European Union to give a preliminary ruling on that question (article 158). Then there is an obligation on the UK to set up a special governmental body in order to monitor compliance with the Part Two of the Agreement, (article 159)[25].

[24] The Repeal Bill: White Paper, Policy paper, Legislating for the United Kingdom's withdrawal from the European Union, Department for Exiting the European Union, Updated 15 May 2017, https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union) (accessed on 30.05.2021).

[25] In the United Kingdom, the implementation and application of Part Two shall be monitored by an independent authority (the "Authority") which shall have powers equivalent to those of the European Commission acting under the Treaties to conduct inquiries on its own initiative concerning alleged breaches of Part Two by the administrative authorities of the United Kingdom and to receive complaints from Union citizens and their family members for the purposes of conducting such inquiries. The Authority shall also have the right, following such complaints, to bring a legal action before a competent court or tribunal in the United Kingdom in an appropriate judicial procedure with a view to seeking an adequate remedy, (paragraph 1). The European Commission and the Authority shall each annually inform the specialised Committee on citizens' rights referred to in point (a) of Article 165(1) on the implementation and application of Part Two in the Union and in the United Kingdom, respectively. The information provided shall, in particular, cover measures taken to implement or comply with Part Two and the number and nature of complaints received, (paragraph 2). The Joint Committee shall assess, no earlier than 8 years after the end of the transition period, the functioning of the Authority. Following such assessment, it may decide, in good faith, pursuant to point (f) of Article 164(4) and Article 166, that the United Kingdom may abolish the Authority, (paragraph 3), (Agreement on the withdrawal of the United Kingdom of Great Britain and North-

To summarize, the Rome II Regulation has been applied in the UK during the transitional period. At the end of the transitional period, (23.00 London time, 31 December 2020):

– The Rome II Regulation ceased to apply on a reciprocal basis, except where the events giving rise to the damage occurred before the end of the transitional period;
– Above-mentioned regulation was converted into national law;
– an instrument called The Law Applicable to Contractual and Non-Contractual Obligations (Amendment *etc.*), (UK Exit) Regulations 2019 (SI 2019/834), (the Regulations) came into force. The Regulations deal with the continued application of the Rome II Regulation as domestic law in all parts of the United Kingdom[26];
– the Regulations are amended by the Jurisdiction and Applicable Law (Amendment), (EU Exit) Regulations 2020 — the amendments relate to definitions and the question of references of the Rome II Regulation to national law and national law to the Rome II Regulation[27].

After the end of the transitional period, the English courts therefore continue to apply the regime of Rome II when determining the law applicable to non-contractual obligations. Rome II Regulation apply regardless of whether the applica-

ern Ireland from the European Union and the European Atomic Energy Community, (2019/C 384 I/01), CI 384/1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=PL (accessed on 30.05.2021).

[26] The quoted legal act is divided into four parts. The first part contains introductory information, whereas the second part is a list of amendments that followed the implementation of the Rome I and Rome II regulations into the British legal order. They are amendments to the Prescription and Limitation (Scotland) Act 1973, the Foreign Limitation Periods Act 1984, the Contracts (Applicable Law) Act 1990, the Private International Law (Miscellaneous Provisions) Act 1995, the Consumer Rights Act 2015 and to the Foreign Limitation Periods (Northern Ireland) Order 1985. The third part is a list of amendments that took place in the so-called secondary legislation. They are amendments to the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008, the Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009, the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2009, the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 and to the Law Applicable to Contractual Obligations (Scotland) Regulations 2009. The fourth part contains amendments to the very content of the Rome II Regulation. These changes do not, however, concern the rules of determining the applicable law, but are only of formal nature. Thus, the expression "Member State" has been changed to "the United Kingdom or part of the United Kingdom" or "the United Kingdom", the expression "a court in the territory of the United Kingdom" should be substituted for "a court in the territory of the defendant", *etc.* (The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, UK Statutory Instruments 2019 no. 834, https://www.legislation.gov.uk/uksi/2019/834 (accessed on 30.05.2021).

[27] The Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020, UK Draft Statutory Instruments, ISBN 978-0-348-21268-6, https://www.legislation.gov.uk/ukdsi/2020/9780348212686/regulation/6 (accessed on 30.05.2021).

ble law is that of an EU Member State[28]. Consequently, the Rome II Regulation requires application regardless of whether the two parties are in any way connected to Member States of the European Union or whether any factual element of their relationship shows such a connection. The United Kingdom's lack of membership in the European Union will therefore not prevent the application of British law if it is applicable[29]. The Rome II Regulation is not based on the principle of reciprocity, and where the parties have chosen English law to govern their non-contractual obligations, the courts of the EU Member States would uphold that choice[30].

The law applicable to non-contractual obligations to which Rome II Regulation is not applied[31] will be determined by the Private International Law (Miscellaneous Provisions) Act 1995[32]. The main connecting factor used in this Act is the law of the place where the harmful event occurs, although in defamation cases the old, customary double rule (actionability) continues to apply[33].

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[28] Any law specified by this Regulation shall be applied whether or not it is the law of a Member State, (Article 3 of the Rome II Regulation).

[29] M. Jóźwiak, M. Miszewska, *„Twardy" Brexit utrudni transgraniczne postępowania sądowe*, "Rzeczpospolita 23.11.2020", (https://www.rp.pl/Opinie/311239946-Maciej-Jozwiak-Malgorzata-Miszewska-Twardy-Brexit-utrudni-transgraniczne-postepowania-sadowe.html) (accessed on 30.05.2021).

[30] *Impact of Brexit on Choice of Law, Jurisdiction and Enforcement* (https://www.nortonrosefulbright.com/en/knowledge/publications/a6ec9370/impact-of-brexit-on-choice-of-law-jurisdiction-and-enforcement (accesed on 30.05.2021).

[31] According to article 1 paragraph 2 of the Rome II Regulation the following shall be excluded from the scope of this Regulation: (a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations; (b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession; (c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character; (d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents; (e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily; (f) non-contractual obligations arising out of nuclear damage; (g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

[32] Private International Law (Miscellaneous Provisions) Act 1995, UK Public General Acts1995 c. 42, https://www.legislation.gov.uk/ukpga/1995/42/contents (accessed on 30.05.2021).

[33] This principle was first mentioned in The Halley (1868) judgement. This case concerned the act for which liability was provided for in the place where it was committed, but it was not provided for in English law. The English court of second instance dismissed the suit on the ground that foreign law could not be imposed in such a situation, (M. Sośniak, *Zobowiązania nie wynikające z czynności prawnych w prawie prywatnym międzynarodowym*, Katowice 1971, p. 68). Next there was a judgement in Phillips v. Eyre (1870) case, which established two basic conflict rules for tort liability. Firstly, the breach must be of such a nature as to justify an action in tort in an English court if the

3. General principle of the Rome II Regulation

3.1. Place where the damage occurred as a main principle of article 4 of the Rome II Regulation

According to Article 4, paragraph 1, unless otherwise provided for in this Regulation the law applicable to a non-contractual obligation arising out of a tort/delict shall be the low of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. It follows from the foregoing that the authors of Rome II Regulation explicitly declared for the application of the *lex loci damni* principle (the law of the place where the damage occurred). Such a solution is differently evaluated in the doctrine. The place of the occurrence of damage is usually closer to the injured party. Application of the law that is the closest to the injured party results in a significant reduction in costs of the litigation. On the other hand, *lex loci delicti* commissi principle represents the interests of the state in terms of sanctions, which means that the damage will not be compensated properly from the perspective of the injured party[34].

Contrarily, it is also stressed in the doctrine that due to the adoption of the *lex loci damni* rule, too many legal systems would have to be taken into account, especially in the case of global sales of goods manufactured in one of the Member States and causing damage in the other one[35]. The connecting factor of the place damage's occurrence doesn't work when the damage takes place in more than one country. This means that the other law will apply to the effects of the same incident, depending on which country the effect took place. Therefore, it is in the interest of legal certainty to apply the law of the country where the event causing damage occurred[36].

Critical statements in the literature of the subject are also raised in the context of the possibility of applying the *lex loci damni* principle to commercial activities conducted via the Internet because this rule causes difficulties in the case of loca-

tort was committed in England (actionable in England). Secondly, the act should not be justifiable by the lex loci delicti. (J.G. Collier, *Conflict of Laws*, Cambridge 2001, p. 221).

[34] *Deutscher Industrie une Handelskammertag (DIHK) Commentary* (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/deutscher_industrie_handelskammertage_de.pdf) (accessed on 30.05.2021).

[35] *FEDMA (Federation of European Direct Marketing) Commentary* (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/ferder_direct_marke_en.pdf) (accessed on 30.05.2021). *Advertising Association* Commentary, (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/advertising_association_en.pdf) (accessed on 30.05.2021).

[36] *Die Wirtschaftskammer Österreich Commentary* (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/wirtschaftskammer_osterreichd_de.pdf) (accessed on 30.05.2021).

tion of Internet damage[37]. In amazon.com's opinion, the new Regulation assumes that the business entity operating lawfully in one of the EU Member States, in order to avoid future claims and liability, will also have to act in accordance with the rules on torts/delicts applicable in each of the countries in which it operates. In the case of business entities operating online, this will be impossible in practice only because the website is available from around the world[38].

Reassuming, it should be emphasised that the *lex loci damni* principle generally fails in the case of so-called multi-place (dispersed) torts/delicts. In such cases a problem arises, the law which country to use when there is more than one place of damage. What's more there is no criterion in this matter. As a result, it follows from a language of this term literal interpretation that the law of each state in which the damage occurred should be applied insofar as it occurred there.

3.2. Place of the common habitual residence

According to Article 4, paragraph 2, however, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when damage occurs, the law of that country shall apply. As it results from the above-mentioned article, the Rome II Regulation does not contain a definition of "habitual residence" of a natural person. In such a case Article 23, paragraph 2, defines their registered office only to the extent to which they run a business[39], stating that for the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business. It also seems that, as in the case of other legal acts of EU law, also in the case of the Rome II Regulation, it should be assumed that the term "common residence" means that the parties involved in tort/delict have their actual center of life (*faktische Lebensmittelpunkte*[40]) in the same country[41].

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[37] *BEUC Commentary* (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/euro_consumer_en.pdf) (accessed on 30.05.2021).

[38] *Amazon Commentary* (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/amazon_com_en.pdf) (accessed on 30.05.2021).

[39] G. Wagner, *Die neue Rom II-Verordnung, Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax) 2008, vol. 1, no. I/II, p. 5.

[40] Judgement of the Court of 12 July 1973, Anciens Etablissements D. Angenieux fils aîné et Caisse primaire centrale d'assurance maladie de la région parisienne v Willy Hakenberg, (C 13-73, judgement of the Court of 17 February 1977, Silvana Di Paolo v Office national de l'emploi (C 76-76), judgement of the Court of 23 April 1991, Rigsadvokaten v Nicolai Christian Ryborg (C-297/89), judgement of the Court of 12 July 2001, Paraskevas Louloudakis v Elliniko Dimosio (C-262/99), judgement of the Court of 2 April 2009, Korkein hallinto-oikeus v A. (C-523/07).

[41] Von H. Ofner, *Die Rom II-Verordnung-Neues Internationales Privatrecht für ausservertragliche Schuldverhältnisse in der Europäischen Union,* Zeitschrift für Rechtsvergleichung (ZfRV) 2008, no. 3, p. 16.

It should also be born in mind that a common habitual residence must take place at the time when the damage occurs, and not on the date of the event causing the damage or the date of the court proceedings. If the damage is sustained over a certain period of time, the earliest moment should be taken into account. Change of the residence after this time will not be relevant for the application of the principle expressed in Article 4, paragraph 2, although this may be a factor taken into account when applying Article 4, paragraph 3[42]. The provisions of Article 4 paragraph, 2 do not apply if the parties live in different countries, even when the relevant provisions of these countries' laws are the same. The connecting factor of citizenship of the parties is of no significance here, but it can be taken into account on the basis of Article 4, paragraph 3[43].

3.3. Property of the law of a manifestly closer connection

According to Article 4, paragraph 3 of the subject Regulation where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the tort/delict in question. At this point, the question arises about the nature of the relationship between the parties which can be taken into account on the basis of Article 4, paragraph 3. A language interpretation of the above-mentioned paragraph suggests that this relationship may also be of a real nature, as Article 4 ,paragraph 3, uses the term "relationship", not the "contractual relationship". What is more, the term "contract" was mentioned only as an example of the relationship between the parties, which may be relevant from the perspective of this article[44].

Law alternatively indicated by Article 4, paragraph 3, must be the law other than that indicated by paragraph 1 or 2, what means that it must be a law other than the *lex loci damni* and the law of the place of common habitual residence of the parties. It is therefore assumed that if the choice is to be made only between the *lex loci damni* and the law applicable in the place of common habitual residence, the latter will always prevail. Article 4, paragraph 3, may be considered as a tool for mediation between article 4, paragraph 1 and Article 4, paragraph 2, insofar as

[42] A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, Oxford University Press 2009; pp. 339-340.

[43] J. von Hein, *Europäisches Internationales Deliktsrecht nach der Rom II-Verordnung*, Zeitschrift für Europäisches Privatrecht , "ZeuP" 2009, no. 6-33, p. 17.

[44] A. Dickinson, *op. cit*., p. 346., X.E.Kramer, *The Rome II Regulation on the Law Applicable top Non-Contractual Obligations: The European private international law tradition continued. Introductory Observations and General Rules*, Nederlands Internationaal Privaatrecht, "NIPR" 2008, p. 421.

factors other than the place of occurrence of the damage or the parties' common habitual residence are linking at the tort/delict with one of these states. If, on the other hand, the connecting factors from article 4, paragraphs 1 and 2 are the only ones, Article 4, paragraph 2 must be applied[45].

In particular, it is not clear whether the following two factors are relevant for the application of Article 4, paragraph 3: location of the event which is the source of the tort/delict and location of any indirect damage. Article 4, paragraph 1, states that the law applicable to a non-contractual obligation arising out of a tort/delict shall be the low of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. It directly follows from this provision that these factors have been rejected as connecting factors and that's why they shouldn't be taken into account when applying Article 4, paragraph 3. The total exclusion of the law applicable in the country where the event giving rise to the damage occurred may also result from Article 17 because this article clearly sets the limits in which the *lex loci actus* can be applied. Therefore, accepting the exclusion of these two above-mentioned connecting factors links means a very serious weakening of the meaning of article 4, paragraph 3[46].

In the practice, a great importance for the use of the manifestly closer connection clause Great importance in the practice of the use of an accessory clause under article 4, paragraph 3, will also have its relation to Article 14 Rome II Regulation. If the parties have chosen the law applicable to their contractual relationship, an accessory connecting factor from article 4 paragraph 3 will make this choice also relevant to tort/delicts claims[47].

4. Freedom of choice law in the Rome II Regulation

According to Article 14, paragraph 1, the parties may agree to submit non-contractual obligations to the law of their choice: (a) by an agreement entered into after the event giving rise to the damage occurred; or (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. The choice shall be expressed or demon-

[45] R. Fentiman, *The Significance of Closer Connection*, (in:) J.Ahern, W.Binchy (eds.) *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime*, Leiden 2009, p. 89.

[46] R. Fentiman, *op. cit*, pp. 99-100.

[47] T.K. Von Graziano, *Das auf ausservertragliche Schuldverhaeltnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung*, "Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht" (RabelsZ) 2009, vol. 73, no. 1, p. 21.

strated with reasonable certainty by the circumstances of the case, and shall not prejudice the rights of third parties.

It follows therefore from the above-mentioned provision that, so-called implied choice of law is basically acceptable on the grounds of Rome II Regulation. The only condition is that the choice of law "shall be expressed or demonstrated with reasonable certainty by the circumstances of the case". The implied choice of law made during a process (*Prozessverhalten*) is also acceptable[48]. Moreover, it is also to cancel or change the law chosen by the parties[49]. According to the statements of some representatives of the doctrine, choice of law in favor of a third party should also not be excluded[50].

Article 14, paragraph 2 lit. b requires all parties to the choice of law contract to run a commercial activity. This requirement must be met in relation to the time of the contract's concluding and its subject matter. For these purposes, according to A. Dickinson, "commercial activity" should be understood as encompassing any activity with commercial or professional objectives. In addition, if people act partly for commercial or professional purposes and partly for their own private purposes, commercial purposes should prevail unless their scope is so limited that they are not relevant in the overall context of the contract[51].

Another condition that must be fulfilled in order to make so-called previous choice of law effective, is the free negotiation of the terms of the contract - it is not enough that the contract is "negotiated", it must be "freely negotiated" and thus satisfy an even more severe criterion. It seems that the intention of this provision was to exclude situations where the chosen law would be imposed by one of the parties on the other, without giving it the opportunity to negotiate conditions[52]. On the other hand, the fact that a contract containing a provision on the law applicable to non-contractual obligations is in a standardized form will not automatically exclude it from the scope of application of Article 14, paragraph 1 letter b, if each party has the opportunity to influence on the terms of the contract, in particular on the choice of law clause[53].

Another issue that has not been sufficiently explained under Article 14 of Rome II Regulation is the kind of law that can be chosen by the parties. It seems that Article 14, paragraph 1, only allows to apply the law of a given country, and not,

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[48] A. Fuchs, *Zum Kommissionvorschlag einer „Rom II"-Verordnung*, "Zeitschrift für Gemeinschaftsprivatrecht" (GPR) 2003-2004, vol. 2, p. 104.

[49] J. Pazdan, *Rozporządzenie Rzym II – nowe wspólnotowe unormowanie właściwości prawa dla zobowiązań pozaumownych*, "Problemy Prawa Prywatnego Międzynarodowego" 2009, vol. 4, p. 28.

[50] H. Heiss, L.D. Loacker, *Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II*, "Juristische Blätter" 2007, vol. 10, p. 623.

[51] A. Dickinson, *op. cit.*, p. 561.

[52] *Ibidem*, p. 562.

[53] *Ibidem*, p. 563.

for example, the general principles of Sharia law[54] or Principles of European Tort Law, which were submitted by the European Group on Tort Law. According to the opposite point of view, Article 14 refers only to the choice of "law" without any further references, especially to the law of particular country[55]. It seems at first glance that in relation to non-contractual obligations, the first step may be to choose the, which were submitted by the European Group on Tort Law. At this point, it is worth to pay attention to the provisions of Roman Convention and the Rome I Regulation. As well as Article 3 of the Rome Convention on the Law Applicable to Contractual Obligations of 1980, Article 3 of the Rome I Regulation also regulates the choice of law issue, while Article 13 of this act clarifies that this Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention. Although such an explanation is lacking in the Rome II Regulation, it should be noted that all these three legal acts use the term "choice of law", which seems to eliminate all references to the rules other than the rules of law of the given country.

On the other hand, according to the prevailing point of view, law applicable to the agreement on the choice of law should be determined in accordance with the Rome I Regulation. On the contrary, it is not permissible, on the grounds of Rome I Regulation, to split the law applicable to various issues arising from the same contract, for example, concerning its validity or interpretation, (so called *dépeçage*). However, the parties may choose different law applicable to different non-contractual obligations[56].

Conclusions

It follows from the considerations presented above that, having the four options for future cooperation with the European Union on the subject of determining the law applicable to non-contractual obligations, the United Kingdom has chosen to incorporate the Rome II Regulation into its own legal system. This, of course, was possible only because the Regulations Rome I and II, are not applied, unlike the regulations on jurisdictional issues, on a reciprocal basis. The Regulation claims universal applicability, just like the Rome I Regulation; but here the significant difference is that no obligation from public international law would prevent the application of the Rome II Regulation in a case involving the UK as a Third State. Moreover, the Rome II Regulation does not allow deviation from compulsory EU law where a case is only connected to British law through the parties' choice of

[54] *Ibidem*, p. 553.
[55] T.K. Von Graziano, *op. cit.*, p. 9.
[56] A. Dickinson, *op. cit.*, pp. 552-553.

this future Third State law[57]. On the one hand, this solution is desirable insofar as it makes it possible to maintain, after Brexit, to some extent the status quo in the question of the law applicable to non-contractual obligations in relations with the European Union[58].

On the other hand, however, it should be noted that this status quo is only to a certain extent. In the European Union legislative activity is inseparably accompanied by the case-law of the European Court of Justice, which performs primarily an interpretative function, but also gives a new direction to the European Union's law-making activity. These two activities are therefore interconnected. Moreover, Brexit will inevitably lead to the elimination of the influence of the Court of Justice's case law on the British courts' case law, also in the field of determining the law applicable to non-contractual obligations. Admittedly, under Article 158, paragraph 1, of the Withdrawal Agreement, where, in a case which commenced at first instance within 8 years from the end of the transition period before a court or tribunal in the United Kingdom, a question is raised concerning the interpretation of Part Two of this Agreement, and where that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in that case, that court or tribunal may request the Court of Justice of the European Union to give a preliminary ruling on that question. Secondly, in the United Kingdom, the implementation and application of Part Two shall be monitored by an independent authority (the "Authority") which shall have powers equivalent to those of the European Commission acting under the Treaties to conduct inquiries on its own initiative concerning alleged breaches of Part Two by the administrative authorities of the United Kingdom and to receive complaints from Union citizens and their family members for the purposes of conducting such inquiries, (Article 159, paragraph 1). However, it cannot be overlooked that that above-mentioned the ECJ's control only concerns questions for a preliminary ruling, so its subject matter is limited. Secondly, it is limited also in time. Having regard to the fact that the interference of the European Court of Justice's case law in the activities of the British courts was one of the Brexit's causes[59], we should not expect that the British

[57] J. Ungerer, *op. cit.*, p.404.

[58] In addition, with regard to the London financial market, the law governing any non-contractual liability for misconduct will be determined by the Rome II Regulation in European courts. For instance, where such a damages claim is brought in Italy or Germany, the Rome II Regulation provides for the law of the place where the financial loss occurred to govern the case, which can be at the place of the claimant's habitual residence or its bank account.56 Even after Brexit, UK private international law will not have a say on the issue (J. Ungerer, *op. cit.*, pp. 404-405).

[59] In Lord J. Mance's view, too much lawmaking by the ECJ on the one hand, as well as the inconsistency of its judgments, often inspired not so much by legal but by political considerations, contributed to such unpopularity of the ECJ in the UK. In particular, the teleological approach of the ECJ and the political impact of its judgments were treated as contrary to the fundamental principles of parliamentary sovereignty and due process in the UK. Subsequently, in the United King-

courts will want to make use of the possibility offered to them by Article 158 of the Withdrawal Agreement. Conversely, in future we should rather expect that the same legal provisions of Rome II will be understood differently depending on whether they are interpreted by courts of Member States and ECJ or British courts.

Furthermore, it should be recognized that the European Union also has so-called acquis communautaire, which consists of legal instruments that complement and influence each other. A separate agreement between the European Union and the United Kingdom on the application of the one piece of this system, *i.e.*, the law applicable to non-contractual obligations, undoubtedly violates the cohesion of this system. Therefore, the question arises whether the individual elements of this system are capable of functioning separately and independently of each other on a different basis. Besides, regulations concerning the law applicable to non-contractual obligations may already be found in other instruments of EU law than the Rome II Regulation, and they may also be incorporated into them in the future. In the meantime, British regulations on the incorporation of the content of Rome II Regulation into English law do not address this issue at all.

Then, it is important to note that the Rome II Regulation can be reviewed in the future and certain of its provisions can be amended. Meanwhile, both The Law Applicable to Contractual and Non-Contractual Obligations (Amendment *etc.*), (UK Exit) Regulations 2019 (SI 2019/834), (Regulations) and Jurisdiction and Applicable Law (Amendment), (EU Exit) Regulations 2020 concern the incorporation of Rome II Regulation into the UK's legal system, but according to the current legal status. Therefore, the question arises as to what will happen if the content of Rome II changes in the future, in particular whether the British legislator decides in such a situation to revise the aforementioned legal acts. Here we have to also remember that representatives of the United Kingdom will no longer participate in negotiations concerning the adoption of the regulation in its new form, and thus will have no influence on its content. In the current state of knowledge, this question should be considered as an open one.

Finally, it should also be noted that within the United Kingdom itself, there may be differences in the legal rules applied to determine the law applicable to non-contractual obligations. In Scotland, the making of private international law instruments is a devolved competence which has been transferred to the Scottish Government. It may therefore be that the Scottish Government, which is relatively

dom lacks both a written constitution and a constitutional court. As a result, British courts are rather free in their jurisprudential activity (the common law system assumes to some extent the law making activity of the courts - author's note), and therefore reluctant to such an extensive system of control, (*Lord Jonathan Mance on the future relationship between the United Kingdom and Europe after Brexit* https://conflictoflaws.net/2020/lord-jonathan-mance-on-the-future-relationship-between-the-united-kingdom-and-europe-after-brexit/ (accessed on 30.05.2021).

EU-friendly, may seek to domestically align aspects of Scots private international law with EU law equivalents[60].

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[60] T. Kruger, *Brexit: No need to stop all the clocks*, https://conflictoflaws.net/2020/brexit-no-need-to-stop-all-the-clocks/ (accessed on 30.05.2021).

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Andrzej Stec
University of Zielona Góra
ORCID 0000-0002-3014-2400
a.stec@wpa.uz.zgora.pl

Selected problems of threats to the administration and the state in the context of the Russian-Ukrainian war in 2022

Keywords: threats to the administration, threats to the state, the Russian-Ukrainian war

Summary. The paper focuses on the status of public administration, which is increasingly taking over the competences of other authorities in providing basic security for citizens. The issue here are not violations of the constitution or laws, which need to be discussed separately, but to point out that, even with formal respect for the separation of powers, we are facing profound changes that must be resilient to the state crisis. The recent accumulation of the policy of force points to a threat to the existing paradigm of public administration, and academic reflection and analysis of legal norms do not always sufficiently capture the danger of another world war. The study draws conclusions on the greatest dangers to firmly maintaining the systemic foundations of the separation of powers in a democratic state of law. The main dysfunctions in the development of the Ukrainian public administration, forced to choose between freedom and sovereignty and the lives of its citizens, were also identified. In this context, the issues of information policy and the consequences of the rapid development of information technology using the destruction of the population according to the so-called "Syrian model" are also shown. Due to the dynamics of the warfare and the impossibility to verify much of the information at the scene, the author relied heavily on films posted on the internet, information presented by the Ukrainian authorities and information from the war refugees themselves. Some of the information has been compiled from US Department of Defence (Pentagon) press releases.

Wybrane problemy zagrożeń dla administracji i państwa w kontekście wojny rosyjsko-ukraińskiej w 2022 r.

Słowa kluczowe: zagrożenia administracji, zagrożenia dla państwa, wojna rosyjsko-ukraińska

Streszczenie. Artykuł poświęcony jest statusowi administracji publicznej, która w coraz większym stopniu zaczyna przejmować kompetencje pozostałych władz w zakresie zapewnienia podstawowego bezpieczeństwa obywatelom. Nie chodzi przy tym o przypadki łamania konstytucji lub ustaw, które muszą być omówione odrębnie lecz o wskazanie, że nawet przy formalnym poszanowaniu trójpodziału władz mamy do czynienia z tak głębokimi zmianami, które muszą oprzeć się kryzysowi państwowego. Kumulacja polityki siły w ostatnim czasie wskazuje na zagrożenie dotychczasowego paradygmatu administracji publicznej, a refleksja naukowa i analiza norm prawnych nie zawsze wystarczająco ujmuje zagrożenie kolejną wojną światową. W pracy sformułowano wnioski dotyczące największych niebezpieczeństw przy stanowczym utrzymaniu ustrojowych podstaw trójpodziału władzy demokratycznego państwa prawnego. Wskazano także główne dysfunkcje w rozwoju ukraińskiej administracji publicznej, zmuszonej do wyboru pomiędzy wolnością i suwerennością a życiem

jej obywateli. W tym kontekście ukazano także zagadnienia polityki informacyjnej i konsekwencji burzliwego rozwoju technologii informacyjnej przy użyciu niszczenia ludności według tzw. „wzorca Syryjskiego". W związku z dynamiką działań wojennych i brakiem możliwości zweryfikowania wielu informacji na miejscu autor oparł się w znacznej mierze o filmy zamieszczone w internecie, informacje przedstawione przez władze ukraińskie oraz informacje samych uchodźców wojennych. Część informacji została zebrana w oparciu o informacje prasowe Departamentu Obrony Stanów Zjednoczonych (Pentagonu).

1. The essence of local government and civic attitudes

Local government is an organisation of local community and at the same time a form of public administration, in which the residents form a community by law and decide with a high degree of autonomy on administrative tasks resulting from the needs of this community. In 2022, the administration faces a number of challenges in terms of which interests or objectives should be priorities for action. Weather anomalies, the COVID-19 pandemic, and the undeclared war of the Russian Federation and Belarus against Ukraine and the related problem of war refugees are difficult to address. The most prominent problem among these is the war, beginning to generate a conflict between civilisations of Europe and Asia, which in time may develop into a world war.

On February 24, 2022, the Russian Federation's military aggression was launched from the territory of Russia, Belarus, the so-called Donetsk and Luhansk Republics and occupied Crimea. An unprovoked war against Ukraine occurred with the use of cluster munitions and bombs, which have a wide area of effect, in Kiev, Kharkiv, Chernihiv and other localities[1]. Even worse, *i.e.* in the town of Okhtyrka, the Russians used a TOS-1 Buratino thermobaric missile launcher, similar in effect to the use of nuclear weapons but on a smaller scale, prohibited by Article 3 of the Convention on Certain Conventional Weapons of April 10, 1981 (Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects)[2]. The use of such weapons violates international humanitarian law and causes agony and death to both soldiers and civilians[3]. The Russians are also shelling civilians

[1] On May 30, 2008, 111 countries supported a ban on cluster bombs at a conference in Dublin. The Convention on Cluster Munitions entered into force on August 1, 2010.

[2] Effective as of December 2, 1983.

[3] This type of armament works by spraying an aerosolised explosive charge over an area and then setting it off. The blast lasts much longer than that of a conventional explosive and uses up all the oxygen available in the area to generate a high-pressure shock wave. This creates vacuum, which then causes a return wave. The result is pressure/vacuum surges (as much as several hundred kg per square cm) that tear soft materials, causing *e.g.,* the so-called barotrauma of the lungs or damage to the inner ear. To make matters worse, the zero zone has very high temperatures reaching up to 3,000 degrees Celsius. A blast in a given area leads to a 100 percent mortality rate, but death will not always be quick, as some casualties may be dying in agony for several minutes after the attack.

and representatives of international organisations, which led to the tragic death of Maryna Fenina, a national member of the OSCE Special Monitoring Mission to Ukraine, on March 1, 2022, in Kharkiv (information according to OSCE sources)[4].

The use during the invasion of Ukraine by the Russian Federation of more than 500 mercenaries from the so-called Wagner Group[5] and the 141st Motorised Regiment of the Chechen National Guard commanded by General Magomed Tushayev, famous for torture, executions, looting, rape and murder, to capture members of the Ukrainian government and representatives of state and local administration needs no comment and is a statement of caution for the authorities of the Member States of the European Union and NATO.

The war which is going on just outside Poland's borders should be properly interpreted because the seizure of the nuclear power plant in Chernobyl, the military actions and genocide which are taking place in Kiev, Kharkiv, Mariupol, Donetsk, Crimea and other Ukrainian territories carried out by the Russian Federation follow the methods developed according to the "Syrian model" (consisting in killing as many civilians as possible and intimidating the population) and are aimed at forcing migration flows.

To conclude, Ukraine has become the site of a civilisational struggle between the East, which represents a mentality comparable to that of the Golden Horde – a kind of power whereby one man determines everything and the rest nothing – and the democratic West. The Mongolian and then Russian (Kremlin) authorities completely reject any agreement, convention, cooperation, and consent between the subjects of international law. They recognise only the power of violence and understand only the language of force. Coming to quick conclusions, the Polish legislator should adapt the Act of November 21, 1967 on the Universal Duty to Defend the Republic of Poland[6] and other legal acts: Regulation of the Council of Ministers of June 25, 2002 on the Detailed Scope of Responsibilities of the Head of National Civil Defence, Heads of Voivodeship, District and Commune Civil

[4] https://www.osce.org/chairmanship/513280 (accessed on 3.03.2022).

[5] The Wagner Group is a private Russian military company funded by Vladimir Putin's trusted associate, the oligarch Yevgeny Prigozhin. It operates as the Kremlin's 'long arm' and is deployed to conflict sites in which Russia is not officially involved. It consists of mercenaries (ex-soldiers, criminals, and various diversion and sabotage specialists). They are relatively highly paid by the standards of the Russian Federation. Additionally, their wages are tax-free. A strong incentive to join the ranks of the organisation is the informal insurance conditions in case of death during operational tasks. The heirs of the killed mercenary are paid high compensations amounting to millions of roubles. When you join the ranks of the Wagner Group, you hand over your identity papers to the organisation. In return, the organisation issues its identity discs to each mercenary. Mercenaries are informally transferred to destabilised regions of the world, directly by aircraft or ships of the regular Army of the Russian Federation. Hence, they can arrive in the area of operations unnoticed and without identifying documents.

[6] Journal of Laws of 2021 item 372, 1728.

Defence (Journal of Laws of 2002 no. 96 item 850); Regulation of the Minister of Internal Affairs and Administration of September 26, 2002 on Service in Civil Defence (Journal of Laws of 2002 no. 169 item 1391); Regulation of the Council of Ministers of June 25, 2002 on the Detailed Scope of Responsibilities of the Head of National Civil Defence, Heads of Voivodeship, District and Commune Civil Defence, Journal of Laws of 2002 no. 96 item 850; Regulation of the Minister of Internal Affairs and Administration of September 26, 2002 on Service in Civil Defence, Journal of Laws of 2002 no. 169 item 1391; Regulation of the Council of Ministers of March 29, 2005 on the Principles of Employers Releasing Persons Called to Serve in Civil Defence in Connection with Combating Natural Disasters, Catastrophes and Environmental Threats from the Obligation to Perform Work (Journal of Laws of 2005 no. 60 item 518); Regulation of the Council of Ministers of March 29, 2005 on Positions Deemed to Be Equivalent to Civil Defence Service (Journal of Laws of 2005 no. 60 item 519); Regulation of the Council of Ministers of April 4, 2005 on the Uniforms of Persons Serving in Civil Defence (Journal of Laws of 2005 no. 84 item 722); Regulation of the Minister of National Defence of April 27, 2006 on Defining Categories of Reserve Soldiers Whose Assignment for Service in Civil Defence Requires the Consent of the Military Draft Commander (Journal of Laws of 2006 no. 83 item 576); Regulation of the Council of Ministers of January 7, 2013 on Systems for Detecting and Notifying Contamination Incidents and on the Competence of the Authorities in these Matters (Journal of Laws of 2013 item 96) to the aforementioned real threats which may soon take place in Poland. Amendments to the Emergency Management Act[7] of April 26, 2007, and its implementing acts will also be required.

2. Data protection

Personal data is any information relating to an identified or identifiable living individual. Individual information that, when combined, can lead to the identification of an individual also constitutes personal data. Protection of personal data of soldiers and representatives of territorial defence in Ukraine acquires special importance, since in addition to the buildings of administration of various levels, Russian occupiers are particularly intent on seizing mobile phone masts and radio and television masts. Then, they turn on their information propaganda and, using text messages, attempt to intimidate civilians and Ukrainian military personnel. A sample text message reads: "...Soldier of the Ukrainian army! Russia's army is already in Donetsk and Luhansk, run away while you still have a chance" or "...

[7] Journal of Laws of 2022 item 261.

Soldier of the Ukrainian army! Russia's army is already in Kiev and Kharkiv, run away while you still have a chance" or "...Soldier of the Ukrainian army! Russia's military is already here, surrender while you still have a chance" *etc.*

The basic legal assumptions of personal data protection related to the specifics of functioning of a uniformed and armed formation such as the Armed Forces of Ukraine in the conditions of war acquire special significance. Threats to military information systems containing personal data and the conditions and standards that should be met by military units and other institutions of the Ministry of Defence in this regard can be crucial to the security of a country that is defending itself against an invasion.

In view of the fact that no one can be obliged, other than by law, to disclose information concerning his or her person, and that the protection of personal data in the Armed Forces of Ukraine generally does not differ from civilian standards under conditions of threat to the existence of the state, this has become an important problem to be solved. In view of the years-long preparations for a full-scale aggression against Ukraine, the recently disclosed documents show plans for the invasion were approved as early as January 18, 2022 (while alleged peace talks were held until the last day), and the invasion was scheduled to take 15 days. Military detachments of the Russian Federation have strictly defined objectives and tasks (combat tasks, with a table of *noms de guerre*, a table of command signals, a table of secret command, proscription lists with the names of political opponents who will be outlawed, punished with death, or subjected to other repression by Wagner, Chechen and Spetsnaz forces). The orders also include the acquisition of archives of military and civilian personnel and cooperating entities.

With the above actions in mind, it would be important to amend the following legal acts taking into account the specifics of the military and of the administration cooperating with it: 1) Regulation of the Minister of Defence of October 31, 2014 on Military Records of Professional Soldiers (Journal of Laws of 2014 item 1638, as amended); 2) Regulation of the Minister of National Defence of May 26, 2010 on the Scope, Manner and Place of Reconstruction of Military Records of Persons Subject to Mandatory Military Service (Journal of Laws of 2010 no. 105 item 663); 3) Regulation of the Minister of National Defence of October 8, 2010 on Keeping Military Records (Journal of Laws of 2010 no. 199 item 1321, as amended); 4) Regulation of the Minister of Internal Affairs and Administration of November 17, 2009 on Registering Persons for the Purpose of Military Qualification and Establishing Military Records (Journal of Laws of 2009 no. 202 item 1565); 5) Regulation of the Minister of National Defence of June 14, 2004 on Military Records of Defence Services (Journal of Laws of 2004 no. 148 item 1556).

The specifics of functioning of the Polish Armed Forces requires special protection of personal data of professional soldiers or soldiers serving in a different capacity, as well as that of military personnel fulfilling the general duty to defend the Republic of Poland in various forms. The problem also concerns the cooperating administration. This forces military commanders, administrations, and employers to protect sensitive personal data from unauthorised access. This is personal data of professional soldiers and data on the course of their active military service, health, education, qualifications, marital and family status, distinctions, as well as judgments issued against the soldier in judicial, administrative, or disciplinary proceedings and professional liability. In addition, this is personal data of the army's personnel. Personal data in the army is processed on similar principles as in other organisational units, *i.e.,* in paper form, *i.e.,* in files, indexes, books, lists and other records, and in electronic form, *i.e.,* in IT systems, also in the case of data processing outside the data filing system.

To summarise: Russian military action under a foreign flag, or covert operations conducted to mislead, to create the impression that it is the Ukrainian people who are allegedly responsible for starting the war, dressing up its soldiers in the uniforms of the Ukrainian National Guard and then attacking the defenders, should be similarly provided for in Polish legislation. It should be noted that Russian occupiers are also despicably using cars that are disguised as ambulances (with symbols of the red cross on a white background) to transport ammunition and move troops. There have also been instances of shelling Ukrainians from RF tanks that were travelling with white flags, purportedly to surrender. The above barbaric actions should be included in the bill on defence of the homeland, which is being processed in the Polish Parliament[8].

3. State secrecy

The issue of protecting state secrets is related to the political situation and the historical context in which the state has been situated over the years. State secrecy as a protected good related to state security has long been the focus of many legislators. The need to maintain certain secrets was strictly dependent on the activities of the state in the primarily military, but also political, economic, and scientific domains. It has long been an important element of state policy, on the one hand, to maintain the secrecy of certain information that could affect its defence or se-

[8] Cf. A. Stec, *Konflikt na Ukrainie w świetle prawa międzynarodowego publicznego*, [in:] T. Pączek, *Bezpieczeństwo państw Europy Środkowo-Wschodniej w kontekście konfliktu na Ukrainie*, Słupsk 2016, pp. 171-177.

curity, and on the other hand, to seek to obtain relevant information about the activities of other countries.

The miniaturisation of ICT devices and their widespread use allows very often for geotagging, which is a function of cameras, smartphones, tablets, and other devices that indicates GPS location data in the properties of the photo or video recorded. Although many social networks clear this type of data when photos are shared, if you receive the original photo files, the geotagging data will most likely still be preserved, assuming the person taking the photo does not delete it. The location information is stored as part of the metadata, which also includes details such as camera model, focal length settings, etc. So, those who are interested can view a table with information about the photograph. If the location data is stored, you will find it in the GPS section in the latitude and longitude fields. Based on this data, it is easy to find the place on the map where the photograph was taken and to programme various devices and destroy targets using military equipment.

Taking photographs of persons or facilities under wartime conditions, combined with the possibility of location, may cause a breach of state secrecy, and bring imminent danger to persons and state defence. Since 1999, there has been no ban on photographing state facilities in Poland, except for those important for the state security and defence. This is regulated by the Regulation of the Council of Ministers of June 24, 2003, on Facilities of Particular Importance for the Safety and Defence of the State and their Special Protection. These are facilities of the Police, Border Guard, and State Fire Service, as well as plants producing, repairing, and storing armaments, military equipment and means of warfare. This also applies to establishments where research and development or design work is carried out for production for national security and defence purposes. Therefore, prior to aggression against other states, Russian soldiers have their cell phones taken away, while the Ukrainian Army and the Territorial Defence Units of Ukraine forbid photographing defence infrastructure and thus verifying location data on social networks; this helps them avoid targeted shelling. A good example is the recent disabling of Google Maps in Ukraine to prevent them from contributing to many losses in this country.

A very big threat is generated by popular smartwatches, which, if used by people with access to essential state secrets, may contribute to irreparable damage to the defence capacity, security or other vital interest of the state. These devices collect a lot of important, yet seemingly insignificant, data about health, activity and more.

4. Threats to critical infrastructure

Critical infrastructure usually refers to the physical and cyber systems (facilities, equipment, or installations) necessary for the minimum operation of the economy and the state. It is important to note that not every strategic facility needs to belong to critical infrastructure. In our country, whether a facility qualifies as CI is determined by detailed criteria set forth in a classified annex to the National Critical Infrastructure Protection Programme.

According to the Emergency Management Act of April 26, 2007[9], critical infrastructure means systems and their functionally connected facilities, including buildings, equipment, installations, and services crucial for the security of the state and its citizens and for ensuring efficient functioning of public administration, as well as institutions and enterprises.

Meanwhile, the Russian Federation's armed assault, in addition to targeting civilians, focuses on attacking the following:

a) electricity and fuel supply systems,
b) communications systems,
c) ICT networks,
d) financial systems,
e) food supply chains,
f) water, heat, and gas supply systems,
g) health care,
h) transportation,
i) rescue systems,
j) systems ensuring continuity of public administration,
k) power systems (including the occupation of nuclear power plants, as on February 25, 2022, the Chernobyl nuclear power plant was occupied and on March 4, 2022, the armed forces of the Russian Federation shelled the Zaporizhzhia power plant, resulting in a fire at the site. Although the fire was extinguished, the premises of the Zaporizhzhia nuclear power plant were occupied by the armed forces of the Russian Federation and the personnel of the two plants was taken hostage, which constitutes a kind of nuclear terrorism).

Although according to official news the aggression of the Russian Federation claimed more than 12,000 dead Russian soldiers[10], it should be assumed that due to the massive attacks on civilian targets (hospitals, schools, orphanages, kindergartens) the number of victims who died in the rubble probably exceeded 3,000

[9] Journal of Laws of 2022 item 261.

[10] https://www.radiosvoboda.org/a/news-rosia-vtraty-henshtab/31742419.html (accessed on 9.03.2022).

as of March 9, 2022. The number is difficult to verify, especially since the OSCE offices in Kharkiv and Mariupol and the Red Cross offices *i.e.*, in Mariupol and other towns were destroyed and their representatives are not allowed to visit the war crime sites.

The warfare is a continuation of the hybrid war that has been going on for many years and has been conducted by Russian services using, *i.e.*, a virus called "Black Energy" as far back as 2015 and the "Telebots" software, which, by infecting computers, allows taking control over critical infrastructure. The targets of the most frequent attacks so far have been government websites, nuclear power plants and airports. The prelude to the war with Ukraine was the creation of a hybrid war on the Belarusian-Polish border in order to tie down Polish forces and resources and thus to prevent them from being used to help Ukraine.

Ukraine has been developing its Critical Infrastructure Protection System since 2014. It is modelled on global solutions, including those created by the Polish Government Centre for Security. Assistance to Ukraine in this area is organised by the NATO Liaison Office and the National Institute for Strategic Studies under the President of Ukraine. The experience gained in the armed conflict cannot be overestimated for Poland, especially in the context of possible attempts to force the so-called "Suwałki Corridor" or the so-called "Corridor to Kaliningrad", which are being considered with varying degrees of intensity in Russia[11].

5. Contemporary security challenges

In 2022, Europe will experience many new threats affecting its security, and its countries are constantly looking for new ways to both have an impact on and effectively defend against hard-to-define potential adversaries. The war launched at our borders preceded by hybrid actions on the part of Belarus acquires special significance in the context of hybrid war understood as a conflict conducted with the participation of states, international organisations, national and social groups, using all available means of struggle, with the participation of soldiers and civilians, started after the declaration of war or without it. Analysing the undeclared war of the Russian Federation against Ukraine, one can observe its being conducted in violation of humanitarian law, many conventions, with significant participation of non-military means, with large-scale use of economic, political, information and propaganda activities, with different and shifting targets of attack, and being aimed at defeating the opposing side or forcing the desired action on it.

[11] For more on this, Cf. A. Sakson, *Geostrategiczne aspekty „problemu kaliningradzkiego"*, "Przegląd Strategiczny" 2011, no. 2, pp. 161-184.

Learning from the armed conflicts in Abkhazia, Transnistria, and the war in Ukraine, bringing chaos and widely using propaganda and acts of diversion, the importance of public administration and the armed forces in preserving sovereignty and territorial integrity can hardly be overestimated[12]. It is therefore necessary to determine the quality of current and future capabilities of the public administration and the armed forces (state defence readiness) to counter threats to the state's existence. Today, the following questions need to be asked: Is the current national security system, including the state defence system, sufficiently prepared to meet emerging totalitarian threats? In which direction should international cooperation and internal defence capabilities develop to achieve security for the future? What should be the role of the administration in ensuring security and opposing, for example, the genocide of the Armed Forces of the Russian Federation in Ukraine?[13] Should top administrative officials – *i.e.* German Chancellors (Gerhard Schroeder, Angela Merkel) – blindly advance particularistic state interests, cooperating with people suspected of war crimes and genocide[14], who, under the guise of a 20-million diaspora scattered deliberately on the territory of former Soviet republics, aim to rebuild Russia's superpower position? Intimidation of the Ukrainian people and other neighbouring states of the Russian Federation through torture, execution, rape and murder, and the use of nuclear weapons in case of direct assistance from other armies is a manifestation of the war of civilisations between East and West and is aimed at forcing migratory movements. It should be stated quite clearly that the Russian authorities are implementing a plan aimed at destroying Ukraine and, later, other post-Soviet republics, drawing them into their sphere of influence.

6. Conclusions

Before our very eyes and with great help from Polish state authorities and citizens, Ukrainians are defending the system of European values, which is the opposite of the forms originating from Asia and modelled on Genghis Khan. It is difficult to overestimate the role of civil society and the administration (represented, for example, by Ukraine's President Volodymyr Zelensky, Kyiv's Mayor Vitali Klitschko, and many others) acting spontaneously when the army has to face an enemy that

[12] For more on this, see M. Sokół, *Mniejszość rosyjska jako instrument polityki zagranicznej Federacji Rosyjskiej po 1991 r.*, [in:] *Bezpieczeństwo państw Europy Środkowej i Wschodniej, kwestie społeczne, ekonomiczne, polityczne i militarne*, Poznań 2020, pp. 159-169.

[13] A more detailed analysis of the Russian Federation's pressure on the highest representatives of Ukraine can be found in A. Stec, *Pozycja ustrojowa prezydenta w systemie konstytucyjnym Ukrainy*, Lwów 2014, pp. 290-298.

[14] Cf. A. Stec, *Konstytucyjna ochrona praw człowieka w realiach nadzwyczajnych zagrożeń dla bytu państwowego na Ukrainie*, [in:] *Bezpieczeństwo państw Europy Środkowej i Wschodniej, kwestie społeczne, ekonomiczne, polityczne i militarne*, Poznań 2020, pp. 171-192.

has a five-fold advantage in men and a seven-fold advantage in military equipment. It is almost impossible to find legal norms of armed conflict that were not violated by the troops of the Russian Federation after the February 24, 2022, assault on the Ukrainian state. The failure of former post-Soviet states (Georgia, Moldova, Kazakhstan, Turkmenistan) to impose sanctions on Russia after the aggression is also alarming. Conducting military assaults on civilians moving through so-called humanitarian corridors and using civilians as human shields to cover tanks poses a threat to 'humanity' and the dignity of the human being in the 21st century. Unfortunately, the authorities of the Russian Federation recognise only the policy of force and disregard the force of arguments, and the former is the only way to stop the barbarism of Russian totalitarianism. It should also be borne in mind that in authoritarian states the decision-making process is much shorter than in stable democracies, and therefore instruments should be created to enable the administration to operate on an ongoing basis even in the event of armed or terrorist action, for example through greater access to weapons both in Poland and Ukraine. Increased access to weapons should of course be accompanied by training in their use. President of the Russian Federation Vladimir Putin respects only force. His usual pattern is to commit acts of aggression, take a look around, gauge the atmosphere and then, if there are no negative consequences, take the next step. With each successive act of terror, the criminal apparatus of the Russian Federation gains confidence and becomes more and more difficult to stop. There is no reason to believe that the vision of a Greater Russia announced by the Kremlin regime will be limited to Ukraine alone.

In conclusion, Russia should be expelled from all international and financial organisations and as many foreign ambassadors as possible should be withdrawn from the Russian Federation. There is no point in negotiating with the aggressor. The message from the international democratic community to the regime should be you can either stop and withdraw or be completely isolated. A crucial measure to achieve peace is to replace Russian oil and gas through OPEC decisions increasing production and to create optimum conditions for the administration to function even under war conditions, taking into account the Ukrainian experience.

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Sławomir Pawłowski
Adam Mickiewicz University, Poznań
ORCID 0000-0002-2060-6638
womir@amu.edu.pl

A model of introducing Clean Transport Zones in Poland – between optionality and obligatoriness

Keywords: local government, clean transport zones, clean air, climate protection

Summary. Clean Transport Zones are a novelty in Polish legislation. It is true that the formal possibility of introducing them should be bound by the Act of 11 January 2018 on electromobility and alternative fuels, nevertheless their actual establishment requires the adoption of an act of local law. Its proceedings are lengthy, hence only one such zone has been createds o far, in Krakow, in the Kazimierz district, but eventually it was abolished. In the initial text, the act was very strict, the emphasis was placed on zero emissions, hence the municipalities carefully used this instrument. The changes introduced in recent years, which can be considered significant, lead to the question whether the introduction of these zones should not be obligatory, as the deterioration of air quality is an objective value, or whether, as a result of flexibility, leave them optional.

Model wprowadzania stref czystego transportu w Polsce – między fakultatywnością a obligatoryjnością

Słowa kluczowe: samorząd terytorialny, strefy czystego transportu, czyste powietrze, ochrona klimatu

Streszczenie. Strefy Czystego Transportu to zagadnienie stanowiące w polskim ustawodawstwie *novum*. Co prawda formalnie możliwość ich wprowadzania wiązać należy ustawą z dnia 11 stycznia 2018 r. o elektro mobilności i paliwach alternatywnych, niemniej ich faktyczne ustanowienie wymaga uchwalenia aktu prawa miejscowego. Jego procedowanie jest długotrwałe, stąd dotychczas powstała tylko jedna taka strefa, w Krakowie, w dzielnicy „Kazimierz", ostatecznie jednak zniesiona. Ustawa w swym początkowym tekście była bardzo surowa, nacisk został położony na zero emisyjność, stąd też gminy ostrożnie korzystały z tego instrumentu. Poczynione w ostatnich latach zmiany, która uznać można za doniosłe skłaniają jednak do pytania, czy wprowadzanie tych stref nie powinno być obligatoryjne, gdyż pogorszenie jakości powietrza jest wartością obiektywną, czy też w ramach elastyczności pozostawić je fakultatywnymi.

1. Introduction

The ever-increasing number of cars driving around Polish cities, especially in city centres, is becoming a growing burden on the inhabitants of these areas. It should be noted that Poland ranks second in Europe, after Luxembourg, in terms of the number of cars per 1000 inhabitants: 747 cars (EU average: 628), while their aver-

age age exceeds 14 years (EU average: 11.4)[1]. Even though the numbers presented may not be completely up to date, they clearly indicate the scale of the problem that has arisen. Indeed, there is no doubt that the number of motor vehicles has a direct impact on air quality due to the continuous increase of emissions. This is true for both internal combustion engine vehicles and, or especially, diesel engines. This has an obvious effect on quality of life, although the consequences for human health, as well as that of other living beings, cannot be overlooked either.

To counteract these phenomena, acceptable emission standards have been introduced at EU level and a deadline is now being set for the phasing out of internal combustion engine production. However, these actions are future-oriented, and the situation in Poland requires immediate action. This is confirmed by the WHO guidelines on permissible levels of nitrogen oxides, which are repeatedly exceeded in the largest Polish cities. This phenomenon can be exemplified by the fact that the permissible average annual concentration since 2005 was 40 μg/m^3, and since 2021 – 10 μg/m^3, while in the largest Polish cities it exceeds 40 units (Warsaw, Wrocław, Katowice, Kraków). The lowest pollution is currently recorded in Toruń (18 μg/m^3); however, many cities still lack communication stations measuring pollution levels (Białystok, Gdańsk, Lublin, Olsztyn, Opole, Poznań, Zielona Góra)[2].

The transformation currently under way in the battle for clean air is taking place on many fronts. From a few years' perspective, the functioning of the Air Protection Programmes (APPs) adopted by the voivodship assemblies together with the respective strategies can already be assessed[3], though not necessarily positively[4]. As an aside to the principal considerations, it should be mentioned that in Poland a growing number of lawsuits are being brought before common courts related to exceeding permissible concentrations of harmful substances in the air[5]. Moreover, Polish NGOs, such as Polski Alarm Smogowy, ClientEarth Foundation,

[1] Based on Eurostat and ACEA data: https://nowiny24.pl/w-przemyslu-najwiecej-samochodow-w-calej-polsce-na-tysiac-mieszkancow-to-zasluga-ukraincow-rzeszow-na-22-miejscu/ar/c4-15681681 (accessed on 15 October 2021).

[2] *Stare diesle nie wjadą do miasta*, "Dziennik Gazeta Prawna" of 7 October 2021, no. 195; *Potrzebne większe restrykcje dla samochodów*, "Dziennik Gazeta Prawna" of 27 September 2021, no. 187.

[3] See Article 85 *et seq*. of the Act of 27 April 2001 on Environmental Protection (consolidated text: Journal of Laws of 2020.1219).

[4] *Rządowy spór o finansowanie programów ochrony powietrza*, "Dziennik Gazeta Prawna" of 14 October 2021, no. 200.

[5] See: resolution of the Supreme Court of 28 May 2021, III CZP 27/20, which states that: "Protection of personal goods (Article 23 of the Civil Code in conjunction with Article 24 of the Civil Code and Article 448 of the Civil Code) extends to health, freedom and privacy, which may be violated (threatened) by failure to meet air quality standards prescribed by law"; judgment of the District Court for Warsaw-Śródmieście in Warsaw of 24 January 2019 (VI C 1043/18), judgment of the District Court for the Capital City of Warsaw of 1 October 2019 (II C 661/19); cf. also R. Szczepaniak, *Smog a odpowiedzialność odszkodowawcza władz publicznych*, "Zeszyty Prawnicze Biura Analiz Sejmowych" 2020, vol. 66, no. 2, pp. 26-48.

Stowarzyszenie Nasze Miasto, are becoming more and more active in the fight for clean air. They are even attempting to file administrative complaints about the sluggishness of public administration bodies and their ineffective anti-smog policies[6]. The problem therefore becomes urgent. This is evidenced by the fact that in early February 2021 the European Commission called on Poland to comply with the requirements of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe[7].

This analysis does not cover all activities related to the fight against smog, but only the issue of the so-called Clean Transport Zones (CTZ), an institution introduced into the Polish legal system by the Act of 11 January 2018 on Electromobility and Alternative Fuels[8] (AEAF), implementing Directive 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the development of alternative fuels infrastructure[9]. It would seem that a widespread introduction of these zones should be a natural consequence of deteriorating air quality, primarily in urban municipalities. However, this issue has proved not so obvious, and the legislature, despite the short time this regulation has been in force, is still looking for optimal solutions.

As an aside to the principal considerations, it is worth mentioning that the reflections on Clean Transport Zones also lead to a more general hypothesis, which, however, will not be developed in this paper. Namely, whether, in view of the challenges of our civilisation, the right to clean air is not becoming a new category of human rights, which could even be classified as first-generation rights – it will be an emanation of the right to life and health, or the right to privacy.

2. Designation of CTZ and admissibility of its establishment

The legal basis for the establishment of Clean Transport Zones is provided by Articles 39 and 40 AEAF. Despite the fact that the regulations contained in these provisions are relatively young, having come into force at the beginning of 2018, they have been the subject of further reflection by the legislature and other stakeholders right from the start of their validity, which ultimately led to two important changes within a period of 4 years. The invariable element of CTZs can be considered the purpose of establishing them, which is to prevent negative impact of transportation emissions on human health and the environment. However, other

[6] See *Mieszkańcy mówią dość i skarżą nieskuteczną politykę antysmogową mazowieckich władz*, https://publicystyka.ngo.pl/mieszkancy-mowia-dosc-i-skarza-nieskuteczna-polityke-antysmogowa-mazowieckich-wladz (accessed on 27 October 2021).

[7] OJEU L 152/1-44 of 11 June 2008.

[8] Consolidated text: Journal of Laws of 2021, item 110, as amended.

[9] OJEU L 307 of 28 October 2014, p. 1.

issues are not so obvious. Discussions are held in particular around the designation of areas which would be subject to restrictions or even bans on the movement of certain categories of vehicles. The original text indicated that this would be an area of compact residential development with a concentration of public buildings. Such wording of the provision ensuring considerable flexibility, and above all its abstractness, left a lot of freedom to the municipality. The legal determinants were "compact residential development" and "concentration of public buildings", which had to be fulfilled jointly. The lack of more precise criteria meant that decisions in this area were discretionary. Consequently, it was for the municipality, after taking into account local conditions, to decide *in casu* on the need for its introduction. There were noticeable difficulties in determining whether both the criterion of "compactness" – the density of housing – was met, and that of sufficient "concentration" of buildings serving the general public. In particular, it should be noted that compact development is characteristic for areas located both in the centres of cities and on their outskirts, which may be an expression of the current trend in spatial planning consisting in increasing housing density (value raised in the National Spatial Development Concept 2030[10]). Furthermore, this provision lacks objective and quantifiable elements, including references to air quality. Only the second premise, relating to public buildings, made it possible to specify the boundaries of the Clean Transport Zone, which, however, did not have to mean that it would only be the downtown area.

Less than half a year after the entry into force of the AEAF, there was a change in this respect, which took place on the occasion of the amendment to the Act of 25 August 2006 on Biocomponents and Liquid Biofuels[11]. The introduced wording of Article 39( ) AEAF was in force until the enactment of the second of the amendments, *i.e.*, 2 December 2021[12]. According to it, a CTZ could be established in a municipality with more than 100,000 inhabitants for an area of inner-city development or its part, being a grouping of intensive development in the city centre, specified in the local spatial development plan, or, in the absence thereof, in the study of conditions and directions of spatial development of the municipality.

Defining the CTZ area in this way clarified its essence while introducing barriers to its establishment. Hence, the changes should be considered momentous. On the one hand, the possibility to introduce these zones has been substantially reduced by indicating the minimum number of inhabitants of the basic local government unit. Its establishment was only possible in urban municipalities with more than

[10] National Spatial Development Concept 2030 (Polish Official Gazette of 2012, item 252).

[11] Article 9(9) of the Act of 6 June 2018 Amending the Act on Biocomponents and Liquid Biofuels and Certain Other Acts (consolidated text: Journal of Laws of 2019, item 1356).

[12] Act of 2 December 2021 Amending the Act on Electromobility and Alternative Fuels and Certain Other Acts (Journal of Laws of 2021.2269).

100,000 inhabitants. At present, there are 37 such municipalities in Poland, while the total number of municipalities is 302 and the number of urban-rural municipalities is 652[13]. Thus, the introduced limitation of municipalities eligible for establishing CTZs determined *a priori* that every municipality with a population of less than 100,000 does not have problems with negative impacts on human health and the environment resulting from transportation emissions, which made one doubt the rationality of the legislature.

On the other hand, an attempt was made to specify the CTZ's area of applicability, *i.e.,* inner-city developments or a part thereof, which are precisely delineated by referring to the basic planning acts, *i.e.,* the said local plans and the study. The term "inner-city development" is recognised in both urban planning and legal language. It is understood as a grouping of intensive development in the city centre, specified in the local spatial development plan, or, in its absence, in the study of conditions and directions of spatial development of the municipality[14]. The study, as an obligatory planning act which all municipalities in Poland already possess, allows for an easy indication of the permissible borders of the CTZ. Nevertheless, the question arises whether it was necessary to formalise this sphere at all, precisely by referring to planning acts.

To conclude, after the first amendment, the premise of intensive development was left in place, but the "concentration of public buildings" was abandoned in favour of an "inner-city development" area. In turn, he second amendment significantly simplified the analysed provision, renouncing the criterion of 100,000 inhabitants, reference to planning acts and linking the CTZ to a specific type of development and city area – it is discussed in more details in the section four of the paper.

3. Obligatory versus compulsory establishment of CTZ

The model for introducing CTZs in Poland follows the principle of decentralisation of public administration. This means that their creation remains the responsibility of local government units, specifically the municipality. Moreover, their establishment is not a statutory obligation, but is connected with the municipality's discretionary power to pass a relevant local law act. As indicated in the justification of the draft, "the introduction of zones will not be obligatory, but may make it easier for local governments to fight urban air pollution"[15]. Therefore, as in the

[13] As of 1 January 2021, https://eteryt.stat.gov.pl/eteryt/raporty/WebRaportZestawienie.aspx (accessed on 29 October 2021).

[14] § 3(1) of the Regulation of the Minister of Infrastructure of 12 April 2002 on technical conditions to be met by buildings and their location (consolidated text: Journal of Laws of 2019.1065).

[15] Sejm of the 8th term, Sejm paper no. 2147.

case of the local spatial development plan, in principle there is no obligation to adopt them. The absence of such a provision can be seen as a disadvantage from the point of view that the achievement of the goal of minimising transport-related air pollution depends solely on the will of the basic local government unit. This is because the Act does not link these zones to air quality, a measurable and thus objective factor, which would oblige municipalities to introduce such zones after exceeding certain standards. Meanwhile, rational behaviour would require their automatic establishment in an area where the concentration of nitrogen oxides and other harmful substances causes threats to life and health. Consequently, even when quality standards are exceeded several times the creation of such zones is not an obvious consequence of this condition. From this point of view, this certainly puts the institution of CTZ in Poland as ineffective and defunct.

If the above is supplemented by the fact that entry to such a zone is to be allowed only for low- or zero-emission vehicles, then in Polish reality, *i.e.*, with a small number of electric cars and charging stations, its establishment must meet with opposition. An example of the above is the city of Kraków, which so far as the only one in Poland has attempted to introduce such a zone in accordance with the legislature's intention. The resolution was adopted in late December 2018 and included the city's historic downtown district, Kazimierz[16]. In this example, it became apparent that one of the key, and most conflicting, issues is the decision on determining exemptions to the CTZ entry restriction for third parties. The strictly enacted rule was immediately opposed by businesses. As a result of their actions, including legal action (a complaint to the Voivodship Administrative Court[17]), the original resolution was significantly amended as early as March of the following year[18]. First, a time frame for the zone's validity, a *de facto* expiry time, was set. Namely, according to § 2 its validity period was limited to the moment of establishment in Kraków of a downtown paid parking zone[19], however, not longer than until 31 December 2019 (it was terminated on 22 September 2019). The above suggests that the downtown paid parking zone can be treated as a substitute for the CTZ (sic!). Secondly, it obliged the Mayor of Kraków to present an analysis of the

[16] Resolution no. III/27/18 of the Kraków City Council of 19 December 2018 on the establishment of the "Kazimierz" Clean Transport Zone in Kraków (Municipal Gazette 2018.8944).

[17] See rulings of the Voivodship Administrative Court in Kraków of 5 June 2019, III SA/Kr 201/19 (CBOSA).

[18] Resolution no. IX/154/19 of the Kraków City Council of 6 March 2019 on amending the resolution no. III/27/18 of the Kraków City Council of 19 December 2018 on the establishment of the "Kazimierz" Clean Transport Zone (Municipal Gazette 2019.2344).

[19] See Article 13a(2) of the Act of 21 March 1985 on Public Roads (consolidated text: Journal of Laws of 2021, no. 1376).

effectiveness of the introduced zone by 3 December 2019. Thirdly, and most importantly, a significant modification has been made to the prohibition of the zone entry. Namely, the vehicles of customers and contractors of the businesses were also allowed from 9:00 a.m. to 5:00 p.m., Monday through Friday. Particularly the last exemption in fact made the reviewed CTZ a bogus institution, as the entry exceptions were outlined so broadly that they actually do not constitute any restriction whatsoever. Consequently, enforcement of the general prohibitions introduced became impossible.

The above indicates that the establishment of a CTZ depends on the "courage" and determination of the municipality's councillors. The current solution therefore puts their future in question, as they will definitely face opposition from local communities, whose voice will certainly be considered. Incidentally, this is a characteristic phenomenon of such zones, hence their implementation requires a difficult balancing of public and individual interests.

High hopes for a change in the current approach were pinned on the amendment of the AEAF, the work on which began in late 2020. The assumptions made in November indicated, among other things, obligatory creation of Clean Transport Zones, at the same time expanding the catalogue of vehicles eligible for entry, including LPG cars. In particular, in Article 39 (1a) it was proposed to introduce an obligation to establish a Clean Transport Zone for municipalities with more than 100,000 inhabitants. As indicated in the draft's explanatory memorandum, this was intended to help reduce harmful transportation emissions in urban areas where they are highest[20].

After public consultations, a new draft dated 11 February 2021 was published, but did not proceed for several months. The next version after work in subcommittees was presented on 2 July and made significant changes from the original intent. Finally, the government draft sent to the Sejm on 8 October 2021 no longer included a commitment to the obligatory establishment of CTZs[21]. As we read in the explanatory memorandum, "it was decided to leave a great deal of discretion to the municipality authorities as regards detailed solutions concerning the zone, assuming that the local authorities know best the needs of a given municipality and how they can be addressed by creating a zone" (p. 53).

[20] https://pspa.com.pl/wp-content/uploads/2021/04/PSPA_nowelizacja_ustawy_o_elektromobilnosci_komentarz_ekspercki.pdf,https://legislacja.rcl.gov.pl/projekt/12340506/katalog/12740110#12740110 (accessed on 20 October 2021).

[21] https://www.sejm.gov.pl/sejm9.nsf/agent.xsp?symbol=RPL&Id=RM-0610-123-21 (accessed on 20 October 2021).

4. The future of CTZs in Poland – towards flexibility

The latest proposals that have finally become law, contained in the government draft of 8 October 2021[22] seem to show that positive changes are taking place in thinking about Clean Transport Zones, which are an evolution rather than a revolution of the original intentions. As we read in the explanatory memorandum, the purpose of the proposed changes is to "clarify the rules regarding the establishment of Clean Transport Zones, the possibility of their establishment in all municipalities, and to define individual entry rights".

The first noticeable change includes the removal of the restriction on the establishment of CTZs only in municipalities with populations over 100,000. Consequently, any basic local government unit will be able to use this instrument to shape transportation trends[23]. The second change, functionally related to the former, concerns the principles of CTZ designation. As indicated above, the issue was initially sought to be rather formalised through specific necessary prerequisites for its introduction. However, the new solution has departed from this model. In light of the recently introduced changes, each municipality will be able to establish such a zone at any place as long as it is valid on the roads it administers, *i.e.*, primarily municipal roads[24]. As a result, the zone may even cover the entire municipality. This solution should be evaluated positively primarily because it makes it possible to actually counteract the negative impact of pollution emitted by means of transport in every municipality in Poland, and not only in selected ones. In the simplest terms, it will be possible to establish the zones wherever it is required to counteract high concentrations of harmful substances, which does not necessarily have to concern only inner-city developments. On the other hand, the time limit for its establishment, which is a minimum of 5 years, is a debatable solution (Article 39(3) of the draft). As this is an innovative solution, some kind of an episodic regulation, the lack of any guidelines in this respect should be seen as potentially problematic, not fully in line with the assumptions of the amendment for its flexibility. This provision may discourage municipalities from establishing such zones, or it may turn the established zones into bogus institutions, due to significant exemptions from the prohibition of entry. On the other hand, it would

[22] Government Draft Act to Amend the Act on Electromobility and Alternative Fuels and Certain Other Acts, Sejm paper no. 1633 (https://www.sejm.gov.pl/sejm9.nsf/agent.xsp?symbol=RPL&Id=RM-0610-123-21) (accessed on 10 January 2022).

[23] This solution implements the demands expressed in the declaration for the development of Clean Transport Zones signed by the Union of Polish Metropolises together with the Polish Alternative Fuels Association and local government units.

[24] See Article 19(2) and (5) of the Act of 21 March 1985 on Public Roads (consolidated text: Journal of Laws of 2021, no. 1376).

be worth considering the introduction of obligatory zones for municipalities with population over 100,000.

In addition, the provision was deleted allowing the exclusion of the ban on entry for residents of the CTZ for vehicles with a maximum permissible weight of 3.5 t that they own, hold or use (Article 39(3)(1)(e) AEAF). This issue could be another potential point of contention. Admittedly, the municipality council will have the right to modify this strict rule by defining additional subjective and objective exclusions in the resolution. In this respect, the current provision remains in force, which allows the municipality to flexibly construct prohibitions and orders (Article 39(4) AEAF). Nonetheless, the proposed direction of the amendments deprives CTZ residents of an exemption from its prohibitions by statute in favour of municipal discretion, which may raise legitimate concerns among stakeholders about whether the municipality will exercise this option. In this respect, therefore, the chosen direction of change is, in the extreme, towards zero carbon, which, as a long-term solution, deserves praise, but if introduced today would constitute a significant restriction for the zone inhabitants, it would even be disproportionate.

There are also noticeable changes in the purposes for which the CTZ entry fee can be used. Their scope has been expanded. They may include not only the marking of the zone and purchase of zero emission buses, but also the purchase of streetcars (obviously), or other means of public transport, as well as financing of programmes supporting the purchase of bicycles within the meaning of Article 3(47) of the Act of 20 June 1997 – Road Traffic Law. This provision refers to vehicles equipped with a pedal-operated auxiliary electrical drive powered by a voltage of not more than 48 volts with a rated continuous power of not more than 250 watts, the output of which decreases gradually and drops to zero when the speed exceeds 25 km/h. Changes are also envisaged for the CTZ entry fee. Namely, the stipulation that it can only be charged for driving in the zone between 9:00 a.m. and 5:00 p.m. is abandoned. Consequently, the fee will apply for the entire time the vehicle stays in the zone – a stricter solution.

To make the vehicles authorised to drive in the zone better identifiable, they are required to have a sticker affixed in the bottom left corner of the vehicle's windshield. This follows, as the explanatory memorandum reads, the pattern of some Western European countries. This applies to vehicles considered zero carbon and those using exemptions. A maximum amount of the entry fee (PLN 5) has even been specified.

The new regulation, just as the one currently in force, does not contain provisions on the detailed procedure for passing local law acts such as resolutions on establishing Clean Transport Zones. This issue is in fact part of a broader concern – that of the absence of general procedural rules in this matter, which in prac-

tice means a high degree of procedural discretion, especially by local government units. For we cannot forget that an element of the rule of law is also the procedure by which normative acts are adopted. In relation to the legislative activity of the parliament, this rule took the form of the principle of "correct" ("proper", "sound", "reliable") legislation, which is an emanation of one of the basic principles of the political system – the principle of the rule of law. It is also clear that this principle should apply to generally applicable local laws as well. As far as the local law acts are concerned, the rules of their creation are included in the legal system rather by way of exception. However, if they are already established, their observance determines the legality of the enacted local law act. The flagship example in this respect is the Act of 27 March 2003 on Spatial Planning and Development, which in a way contains a model procedure for the adoption of local spatial development plans[25]. Apart from this example, it is not easy to find other legislation on the subject. An exception in this respect is the establishment of hunting districts[26], although the introduction of a detailed procedure is only the result of a negative assessment of the hunting law by the Constitutional Tribunal[27], and not a deliberate action on the part of the legislature. It should also be added that one of the elements of modern democratic systems is public participation, which is expressed in the case of acts of local law by the obligation to hold public consultations[28].

From this point of view, the analysed amendment should be assessed unequivocally positively, as the proposed solutions are the first step towards meeting these requirements. Indeed, apart from the laconic and also debatable reservation[29] that the resolution on CTZ is a local law act, elements of public participation were introduced into the Act. Hence, the residents of the municipality must be consulted on the draft resolution. It is first posted on the municipality's website (it is not clear why it is not published in the customary manner and by public notice) and then there is a minimum 21-day period for submitting "comments". After considering them, the head of the municipality, town mayor or city president passes the draft resolution to the municipality council. The "comments" can therefore be submitted, they do not have to be taken into account and finally they have to be

[25] Consolidated text: Journal of Laws of 2021, item 741, as amended.

[26] See Article 27 of the Act of 13 October 1995 – Hunting Law (consolidated text: Journal of Laws of 2020, item 1683, as amended).

[27] Sentence of the Constitutional Tribunal of 10 July 2014, P 19/13, OTK-A 2014/7/71.

[28] See S. Pawłowski, *Konsultacje obligatoryjne i fakultatywne w ustawie o planowaniu i zagospodarowaniu przestrzennym a zakres uspołecznienia procesów planowania przestrzennego*, RPEiS 2015, no. 1, pp. 203-2017.

[29] In the doctrine, negative opinions are repeatedly formulated on the *a priori* assumption that resolutions of local government units are universally binding. Their nature should be determined by an assessment of their content and not by formal declarations of the legislature, see, for example, T. Bąkowski, *Wywłaszczenie krajobrazowe*, "Nieruchomości" 2019, no. 2, p. 51.

considered. Certainly, the indicated public consultations should be supplemented by at least one more element: public discussion, because it is in it, as an interactive instrument, that the call for participation in law making and arguing for adopted solutions is most fully achieved. In addition, as the majority of residents will be affected by restrictions or bans on entry, they are, by definition, the most interested in the final shape of the regulations.

The above leads to the conclusion that the previous CTZ regulation was too rigid and lacked flexibility. This is pointed out explicitly in the explanatory memorandum to the draft, claiming that other European countries have more lenient restrictions on entry to such zones (81/p. 30).

5. Conclusions

The general observation that arises in relation to the Polish model of establishing Clean Transport Zones is that its approach is too rigorous. It is manifested in the fact that the emphasis is on total zero carbon, *i.e.*, on the entry of electric, hydrogen or natural gas-powered vehicles (Article 39(1) AEAF). In view of the fact that very few vehicles of this type are driven on public roads, this approach raises legitimate objections from local communities and businesses within these zones. Thus, there is a noticeable lack of a progressive approach manifested in adapting the CTZs to broader local conditions – perhaps this is where the emphasis should be. An explanation for this state of affairs may be that in Europe, these types of zones began to be introduced more than a decade ago, and national regulation wants to catch up quickly. However, it seems that this is not the right way to go. Especially since the first zones were not Clean Air Zones, but rather Low Emission Zones (LEZ)[30]. The purpose of the latter is to keep the most polluting vehicles out of traffic. Only after this goal has been achieved can stricter regulations be phased in. Yet, hybrid cars, which would naturally be an intermediate step towards zero carbon, are excluded from entering the CTZs. The current approach makes it unlikely that any municipal government would risk conflict with residents and voters at the same time. It is worth mentioning that the LEZ project was under consideration in Poland a few years ago but was not adopted. It is also worth mentioning that it was not until 8 April 2019 that Ultra Low Emission Zones were introduced in London; now, they are being extended[31]. Similar demands were made during public

[30] Attempts to introduce them in Poland 2017 were unsuccessful, amendment to the Act on Environmental Protection, Sejm paper no. 1199, Sejm of the 8th term (https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?id=7CDDD9DEBAC540C0C12580A6002D35CB) (accessed on 29 October 2021).

[31] https://news.sky.com/story/londons-ultra-low-emission-zone-just-got-bigger-is-your-area-affected-12443458 (accessed on 29 October 2021).

consultations of the current draft by NGOs, which requested, among others, the possibility of creating the so-called zones within the zone. The example of the city of Kraków shows that the intermediate stage can hardly be avoided.

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Lucyna Staniszewska
Adam Mickiewicz University, Poznań
ORCID 0000-0003-3457-0901
lucynastaniszewska@amu.edu.pl

Digitization of the construction process in Polish and Georgian Law*

Keywords: construction law, digitization, digitalization of administrative processes, construction administrative bodies, administrative decision

Summary. This article concerns the introduction of digitization in the Polish and Georgian administrative procedure, based on the example of the construction process. A digital e-construction platform was introduced to streamline the administration process and contribute to the efficiency of construction procedures, simplifying the submission of applications by investors. However, this is the beginning of the reform of the construction law and spatial planning aimed at streamlining administrative procedures. It is also the first step for the legislator to consider introducing artificial intelligence in the issuance of certain administrative acts in the field of spatial planning and development and construction law.

The e-construction platform has been operating in Poland for a year and concerns investments in the field of construction, both private and public investments. Against this background, it should be considered how the legislator should adapt the legal regulations to the actual electronisation of the administrative procedure on the example of proceedings in cases of simple construction and demolition notifications, notifications, as well as more complicated procedures aimed at issuing permits.

Cyfryzacja procesu budowlanego w prawie polskim i gruzińskim

Słowa kluczowe: prawo budowlane, dygitalizacja, dygitalizacja procedury administracyjnej, administracja budowlana, decyzja administracyjna.

Streszczenie. Artykuł dotyczy wprowadzania w polskiej i gruzińskiej procedurze administracyjnej cyfryzacji, na przykładzie procesu budowlanego. Usprawnieniu procesu administrowania i przysłużeniu się efektywności postępowań budowlanych wprowadzona została cyfrowa platforma e-budownictwo, upraszczająca składanie wniosków przez inwestorów. To jest jednak początek reformy prawa budowlanego oraz planowania przestrzennego zmierzających w kierunku usprawnienia procedur administracyjnych. Jest to także pierwszy krok do być może rozważania przez ustawodawcę wprowadzenia sztucznej inteligencji w wydawaniu niektórych aktów administracyjnych na gruncie planowania i zagospodarowania przestrzennego oraz prawa budowlanego. Platforma e-budownictwo

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działa w Polsce od roku dotyczy inwestycji w zakresie budownictwa, zarówno inwestycji prywatnych jak i publicznych. Na tym tle należy rozważyć w jaki sposób ustawodawca powinien dostosować regulacje prawne do faktycznej elektronizacji procedury administracyjnej na przykładzie postępowań w sprawach prostych zgłoszeń budowlanych, rozbiórkowych, zawiadomień, jak i bardziej skomplikowanych postępowań zmierzających do wydania pozwoleń budowlanych.

1. Introduction

The importance of new information and communication technologies and digital platforms has been used in engineering and industry for years, but so far, it has not been widely discussed in the scope of activities of public administration, government administration and local government administration in Polish law. So far, relatively little has been written about the importance of digitization for the functioning and organization of the administration. This article tries to remedy the situation and attempts to highlight the development of digitization on the example of investment and construction proceedings. The example of the introduction of the e-construction platform shows the growing importance of digitization for public services and the new flows of information provided by these technologies. New information and communication technologies, in particular modern platforms communicating an entity with an authority, create conditions thanks to which the public administration gains both efficiency and effectiveness. A new public administration is emerging, and the new information flows and the computer networks that facilitate and mediate them are fundamental to this innovation process.

For digital administration to function well, also society must be characterized by developing convergence among a number of socio-economic and technological trends. As the usability of the telephone grows and costs decrease, as more and more subscribers connect to the network, so does computers. Changes in computing and telecommunications technologies have led to a situation where it is now relatively easy to network computers and thus obtain economies of scale (by dispersing the installed base in different locations and capturing information from them) and scope benefits (through the use of technologies and resources). informative for more uses). Indeed, and in addition, by exploiting more bandwidth, computer networks that can simultaneously transmit both voice traffic and data (as well as video and graphics) are increasingly being deployed by businesses and organizations, and further economies of scale are being made available. Universal and fast access to the network is becoming a prerequisite for the implementation of the e-government concept[1].

[1] See A. Pawłowska, *Informatyzacja w administracji publicznej, od wirtualnej biurokracji do elektronicznych rządów*, „Służba Cywilna" 2003/2004, no. 7.

The provisions of the Act of July 7, 1994 – Construction Law the amendment to before the Act of December 10, 2020, amending certain supporting the development of housing Acts[2]did not provide for no possibility of submitting documents to architectural and construction administration authorities and construction supervision authorities in electronic form (the only exception was Article 31 sec. 2a of the Construction Law Act[3], which provided for a model declaration for the demolition of a building constructed in the form of an electronic document within the meaning of the act of building law on the computerization of the activities of entities performing public tasks /Journal of Laws of 2020, item 346, as amended/). Thus, a citizen who wanted to perform any action under the Construction Law had to submit a paper-based application and for this purpose must go to the architectural and construction administration authority or the construction supervision authority[4].This form of contact of a citizen with a public administration body was made difficult, in particular, by the introduction of an epidemic threat and epidemic state on the territory of the Republic of Poland, due to the need to prevent the spread of COVID-19 disease.

The introduction of the state of epidemic threat and state of the epidemic on the territory of the Republic of Poland not only made it difficult for a citizen to contact public administration bodies, but also made it difficult or even impossible to submit applications (*e.g.* for a building permit) or notifications (*e.g.* for construction or construction works) in paper form, due to the circumstances related to the need to limit the spread of COVID-19 disease. It was also difficult to send such a document at the post office. Pursuant to the amending certain acts supporting the development of housing, the Construction Law[5] was amended in the scope of the possibility of submitting applications in the form of an electronic document via e-mail address in the following matters[6]: authorization to grant consent to a derogation (Article 9, sections 3a-3cp.b.), notification of construction or other construction works (Article 30, section 4dp.b.), demolition permit

[2] Journal of Laws of 2021, item 11.

[3] Constructing Act of 7 July 1994 (Journal of Laws of 2021, item 2351, as amended.), hereinafter referred to as: "p.b.".

[4] More broadly, the justification to the act amending certain acts supporting the development of housing, LEX / *el.*

[5] The Act of 10 December 2020 amending certain acts supporting the development of housing (Journal of Laws of 2021, item 11), which will become effective on July 1, 2021.

[6] Since February this year, 13 e-forms can be submitted via the e-construction platform, run by the Main Office of Construction Supervision, such as: notification of construction works or a permit for demolition. From July 2021, another 8 forms were introduced, including an application for a building permit with an attached plot or land development project and an architectural and construction project, an application for a derogation from technical and construction regulations, or an application for an occupancy permit. This means that from July 1, all construction procedures will be conducted in electronic form.

application (Article 30b, section 4p.b.), demolition notification (Article 31, section 1d), application for a permit for construction (Article 33 section, 2cp.b.), attaching a construction design, including a plot or land development design, an architectural and construction design and a technical design (Article 34, section 3fp.b.), issuing a separate decision approving a plot or land development design or architectural and construction design, change of a building permit (Article 36a, section 1bp.b.), issuance of a building permit for a temporary building object (Article 37a, section 1ap.b.) a decision on a building permit, 2) a decision on a permit to resume construction works, referred to in Article 51 sec. 4p.b.) the rights and obligations arising from the notification, against which the authority has not raised an objection (Article 40, section 5p.b.), notifying the construction supervision authority about the intended date of commencement of construction works (Article 41, section 4bp.b.), for a decision on the necessity entry to an adjacent building, premises or adjacent property (Article 47, section 2ap.b.), to initiate a simplified legalization procedure (Article 53a, section 3p.b.), notice of completion of construction shall be made and an application for an occupancy permit (article 57, section 3ap.b.), change in the manner of use of the building object or its part (Article 71, section 2bp.b.). In accordance with statutory provisions, rules containing the content of electronic forms must apply[7].

The legislative change and new technical solutions made it possible to submit applications *via* the Internet in an easy way through the government website, where the generator of electronic applications created at the Main Office of Construction Supervision is made available.

It can be argued that the electronisation of administration is currently one of the key technological processes in the modern world. It is based on the automation of information processing, which, as a result of numerous improvements and facilitations, lead to the achievement of benefits in various areas of life. A natural consequence of the digital development of society was the entry of computerization into legal solutions, including the law of spatial planning and construction law. This is happening in Poland as well as in other developing countries, young democracies, including Georgia.

An element of electronisation is the simplification of application procedures for investors. Electronic proceeding means converting information from analogue to digital form. In fact, submission of a document – *e.g.*, an administrative decision – digitization consists in scanning a document issued in a traditional paper form and saved on an IT data carrier. In such a situation, the so-called digital

[7] For example, the ordinance of the Minister of Development, Labor and Technology of February 26, 2021, on the specimen of the application form for a building permit (Journal of Laws of 2021, item 410).

mapping, consisting in the transformation of a non-electronic document into an electronic document.

This article uses the dogmatic-legal and comparative-law research methods.

2. Legal issues of digitization of administration

The issue of legal regulation of the use of new technologies in administrative law is extremely important. In the future, the legislator would like to create, in almost every regulation of administrative matters, digital IT platforms for communication between the administration and the units used to settle matters. Although it does not change the model of applying the law by the administration, the issue of e-administration[8] may be treated as a specific scientific problem.

In the subjective sphere, the electronic operation of the body gives to public administration body equipped with electronic tools with which it interacts with recipients of public services. Electronic administration may enter into relations both in external relations with a citizen, entrepreneur, and in internal relations between the administration bodies themselves. In the latter case, there is a very important issue of the digitalization of cooperation between administrative bodies in order to thoroughly explain the factual and legal status of the case.

A. Harężа even points out that the analysis of communication models conducted by administrative bodies makes it necessary to distinguish the concept of the information relationship, creating a new type of administrative-legal relationship[9]. However, it is impossible to agree with this position because the type of communication is only a technical issue and ancillary to the type of administrative-legal relationship. However, electronic communication is a way to establish an administrative-legal relationship[10]. In addition to the traditional methods of establishing an administrative and legal relationship, there is also the possibility of initiating it *via* electronic communication, using networks and informatic technologies systems. In both cases, the entities of the administrative-legal relationship will be the same, as will its character and characteristics. For example, an investor submitting an application for project approval and issuing a building permit, regardless of whether he submits an application in paper form or on an electronic form via the e-construction platform, has the same scope of rights and obligations, and the authority has the same competences, including that he may use information technology in relation to the party without fear of violating his rights and procedural guarantees.

[8] Sometimes also called: e-government, e-state.

[9] A. Harężа, *Wprowadzenie do problematyki elektronicznej administracji publicznej*, "Prawo Mediów Elektronicznych" 2011, no. 1, p. 7.

[10] See also: I. Lipowicz, *Administracyjnoprawne zagadnienia informatyki*, Katowice 1984, pp. 116-143.

There is an administrative system between public entities operating and using teleinformatic systems. M. Błażewski distinguishes two types of administrative systems. They are: 1) running separate public information and communication systems with an interoperability function; 2) the use of public teleinformatic systems operated by other public entities[11].

The first type of administrative system occurs when two or more public entities run a separate public teleinformatic system. It should be emphasized that each of these entities has a similar status, each of which simultaneously runs and uses its public teleinformatic system. These systems should meet the technical requirements enabling mutual cooperation. Public entities may or are required to run public informatic systems on the basis of detailed legal provisions regulating the manner of performing a public task.

The second type of administrative system takes place when one or more public entities use a teleinformatic system operated by another public entity. It should be emphasized that the status of these public entities is differentiated, one of which should run a public IT system, and other entities only use this system. This system should meet the technical requirements, the subject of which is, inter alia, the way the system is used by other public entities. The central public IT system is the Electronic Platform of Public Administration Services (e-PUAP) as well as the system for sending applications (e-construction)

Public administration is an information-intensive industry. It is, as the quotation above suggests, one within which the adoption of the technologies which convey information might be expected to be high. Informatic technologies are being regarded in government at all levels as increasingly significant, and that they are being more widely adopted as a consequence.

The first is the transition from centralized computing based on mainframe data processing to distributed networked systems. The second clear trend is the movement away from computing as part of the province of finance departments and towards networked information systems in all areas of government. Thirdly, there is much evidence which suggests considerable and recent increases in user skills in public administration, and of those increases being set to continue. Finally, expenditure patterns on informatic technologies adoption also indicate the rapid and large-scale growth of the technologies in government[12].

A good illustration of the growing significance of computer networking in government, the incipient importance of informatic technologies for a wide range of

[11] M. Błażewski, *Czynniki koniecznościowe współkształtujące układ pomiędzy organami administracji publicznej w związku z prowadzeniem i stosowaniem publicznych systemów teleinformatycznych*, *red. J. Korczak*, *Układ administracji publicznej*, Wrocław 2020, p. 127.

[12] J.A. Taylor, H. Williams, *Public admnistration and the informations polity*, "Public Administration" 1991, vol. 69, is. 2, pp. 175-176.

government departments, and the expansion of user skills is provided by the development digitalization platform for example: "e-construction platform" (www.e-budownictwo-gunb.gov.pl).

As part of the investment and construction processes, the target implementation of the spatial information platform will be particularly important, so that the planning and architectural and construction administration authorities can cooperate within the framework of internal relations in the process of issuing investment decisions, occupancy permit for the building object. In such a situation, the body conducting administrative proceedings by means of electronic communication will have access to all the most recent decisions of subsidiary bodies, to dependent decisions issued in separate proceedings, which will ensure faster implementation of citizens' subjective rights by using their resources.

An effective e-administration system requires the creation of electronic databases with data resources processed by administrative bodies (*i.e.*, databases, registers, censuses). However, the task of electronic administration is not only the management and development of electronic databases[13]. Its functions cannot be limited only to the issue of administration by networks, which admittedly provide new ways of carrying out tasks by the administration with the participation of private partners and non-governmental organizations. Electronic public administration is to create a digital platform connecting authorities with entities that are recipients of public services, accelerating economic processes, simplifying administrative procedures[14], while reducing operating costs, and consequently aims to lead to the issuance of automated simple administrative acts.

3. Party to the proceeding in the electronisation of the administrative procedure in Poland

The procedure for issuing and building permits is a type of jurisdictional procedure for issuance. The inspection is used in the management of the general administrative management code[15] and the administrator of the Construction Law Act.

A specific breakthrough and opening of procedures, including construction, to electronisation was the introduction in 2010 to Article 14 of the Code of Administrative Procedure electronic form to handle the case, and then, during the amendment in 2018, to clarify this principle in the context of communication

[13] J.Wróblewski, *Informatyka prawnicza możliwości wykorzystania cybernetyki*, "Państwo i Prawo" 1971, no. 3-4.

[14] Z. Stempnakowski, *Administracja elektroniczna*, [in:] A. Szewczyk (ed.), *Społeczeństwo informacyjne – problemy rozwoju*, Warszawa 2007, p. 58.

[15] The Code of Administrative Procedure of 14 June 1960 (consolidated text: Journal of Laws of 2021, item 735, as amended.), hereinafter referred to as: "k.p.a".

with the party to the proceedings. In turn, the amendment made by the Act of November 18, 2020, on electronic deliveries[16], which entered into force on July 1, 2021, significantly expanded the electronic procedure. The cited regulation, pursuant to Article 14 § 1a to 1d allows the use of an electronic document in proceedings and identifies it with a paper document. It should be emphasized that the signing of electronic letters takes place in one of the forms indicated by the Act, which include: a) a qualified electronic signature, which is still not very common because it involves the need to conclude a paid contract with the service provider, b) a trusted profile, which is a frequent and willingly used method of signing documents, and its obtaining is free of charge.

As in the case of submitting a digital tax return, the parties to the proceedings, by sending an electronic application together with documentation, *e.g.*, design documentation attached to the digital application, by signing it, confirm the content and correctness of the digital application and the documents sent digitally. This is even a kind of novelty, for example in German law only in 2020 individual federal states implement digital construction proceedings. The following countries are represented in the committee dealing with the implementation of new technologies in investment and construction proceedings: Saxony-Anhalt, Rhineland-Palatinate, Saxony, Schleswig-Holstein, Saarland, Hamburg, Baden-Württemberg, North Rhine-Westphalia and Bavaria, Mecklenburg- Front Pomerania[17] . The latter country was the first to implement the digitalization of submitted building permit applications. In Germany, about 220,000 are issued every year, the need to print application documents on paper, projects resulted in a significant use of paper. Electronic communication between the authorities and the investor is also a time and cost saving.

The administration is to provide system services using digital e-administration platforms. Each application submitted electronically is sent by e-PUAP, and the administration authority can print it, the sent documents are stored in the so-called in the cloud until the matter is settled in current files, and then they will be archived. To ensure security, each sent document should also be copied for backup in the event of a failure of the IT system. The administration authority communicates and exchanges documents with the party via the Electronic Inbox[18].

The authority, on the other hand, issues a decision and signs documents electronically using a qualified electronic seal with an indication in the content of the

[16] Journal of Laws of 2020, item 2320.

[17] Digital building permits, https://www-digitale-baugenehmigung-de/ (accessed on 20.02.2022), more about digitization B. Sujecki, *Das elektronische Mahnverfahren*, Tübingen 2008, pp. 122–128.

[18] M. Matuszewska-Maroń, K. Oskary, *Platforma ePUAP krok po kroku* [*ePUAP platform step by step*], "E-mentor" 2012, no. 3, p.17.

letter of the person who does it. The decision is sent by e-PUAP to the address indicated by the website.

For this purpose, the authority is required to obtain the data necessary to settle the administrative matter contained in individual databases or registers and public records, as well as an electronic application with electronic attachments sent *via* a digital platform. However, this does not cause technical or legal problems, because legal norms provide individual public entities with appropriate competences. The computerization of administrative proceedings also involves the implementation of modern data processing methods using software and computer devices. It is worth pointing out that the broader area of using technological solutions for the implementation of public tasks and services by the administration includes the concept of computerization. This term should be understood as the improvement of the quality of processes correlated with the use of technological progress and the use of computers, especially with an important organizational aspect. It includes the concept of computerization and is associated with the best possible use of digital resources, software, and computer devices. Informatization is an expression of effective, integrated, and comprehensive public management. It brings with it the improvement of the functioning of public entities, increasing their efficiency and potential possibilities[19].

Although currently all communication between the architectural and construction administration authority and the party may be carried out by means of electronic communication, the traditional procedure was retained at the same time. A drawback of the legal regulation, however, is the lack of an obligation on the part of the authorities to make the case files available in electronic form. The provision of Article 73 § 3 of the Code of Civil Procedure a public administration body may provide a party with an access to case files in its ICT system, after the party is authenticated in the manner specified in art. 20a paragraph 1 or 2 of the Act of February 17, 2005, on the computerization of the activities of entities performing public tasks. Unfortunately, this is an optional option, depending on the will and technical capabilities of the public administration body. The modification of the regulation was introduced by the provision of Article 15zzzzzn point 2 of the Act of March 2, 2020, on special solutions related to the prevention, counteracting, and combating COVID-19, other infectious diseases and crisis situations caused by them[20]; however, it is a temporary regulation related to the occurrence of a pandemic. It gives the authority conducting the proceedings the possibility of making the case files available to the party, in whole or in part, by means of elec-

[19] A. Haręża, *Wprowadzenie do problematyki elektronicznej administracji publicznej*, "Prawo Mediów Elektronicznych" 2011, no. 1, p. 7.

[20] Consolidated text: Journal of Laws of 2021, item 2095.

tronic communication. Therefore, this regulation is wider than Article 73 of the Code of Administrative Procedure the authority may use software tools enabling individual remote communication with the use of data transmission between ICT systems, in particular electronic mail. The difference is that pursuant to Article 73 § 3 of the Code of Civil Procedure could make the case files available in his IT system, but now he can do it by means of electronic communication by sending electronic (or reduced to electronic form) case files or individual documents constituting them to the address indicated in the contact details register 14 or another electronic address indicated by page[21]. Moreover, the legislator resigned from the requirement of page authentication. It should be postulated that such a regulation should be permanently introduced into the administrative procedure.

Undoubtedly, enabling the parties to the investment and construction proceedings to access the case file electronically each time would make the administrative procedure more transparent and accessible. Investors could forecast the time needed to settle the case and submit the necessary evidence. A good solution could be to use an analogous system at the disposal of common courts, the so-called court information portal. The party then has electronic access to the document before it is delivered to it. This improves communication and sending documents in the case.

You can still submit any applications in traditional form and communicate with the authorities in writing using traditional mail. The legislator could not introduce full digitization because it could lead to social exclusion of people who do not have access to the Internet or do not use digital devices. The legislator must pay special attention to ensuring that no social group is digitally excluded from participation in the administrative procedure due to the lack of access to electronic communications.

It should be noted that at the current stage of legislative and technical changes, the possibility of the electronisation of the appeal procedure in a construction case, in the form of sending appeals against decisions via the e-construction electronic platform, is not yet provided. However, this portal will be gradually expanded with new technical possibilities, and therefore, in the future, the appeal proceedings will also be conducted in full electronic form.

4. Electronisation of the administrative procedure in Georgia

Georgia is among the countries, where, despite high human capital, progress has stalled somewhat due to relatively less developed telecommunications infrastructure. The percentage of Internet users in Georgia is low compared to other coun-

[21] E. Szewczyk, *Modyfikacje postępowań administracyjnych prowadzonych w okresie stanu zagrożenia epidemicznego lub stanu epidemii*, "Samorząd Terytorialny" 2020, no. 6, p. 24.

tries in the region. According to this component, only about 63% of the population in Georgia use the Internet[22].

Georgia, however, is aware of the need to develop e-administration, including expanding the provision of digital services in administrative and construction procedures, increasing the institutional capacity to provide online services, or opening access to digital technologies and capabilities for society. Georgia follows international trends in having a common open data policy and regulations, national data strategy, data ecosystem and data technology.

The e-government survey is conducted every two years by the United Nations, Economic and Social Affairs Department and the Department of Public Institutions and Digital Government (DPIDG). Two Indexes, ranking 193 countries, are published as a result of the Survey: 1) E-Government Development Index and 2) E-Participation Index. According to the 2020 assessment, Georgia's e-government score stands at 0.72, which puts it at the 65th place among 193 countries. In terms of e-participation, Georgia improved its performance by 0.02 points and its position in the ranking by 7 places[23].

In the General administrative code of Georgia in Article 51, paragraph 3 titled: "The form of individual administrative acts" indicates that an individual administrative and legal act may be issued by automated management means must meet the requirements established under the Georgian Act on Electronic Documents and Trusted Electronic Services. This legislation Act treated about legal grounds for using electronic documents, electronic signatures, and electronic trust services.

If a natural person or a legal entity under private law chooses an electronic form to communicate with administrative bodies and the submitted document requires a signature and/or a seal, it shall be mandatory to put a qualified electronic signature and/or a qualified electronic seal on the document. This procedure shall not apply to cases when the Government of Georgia does not require a signature and/or a seal on the document (Article 3 paragraph 3 Georgian Act on Electronic Documents and Trusted Electronic Services). An administrative body shall be obligated to put a qualified electronic signature and/or a qualified electronic seal on an electronic document. Putting a qualified electronic stamp on a document by an administrative body shall suffice. Use of qualified electronic signatures shall not be mandatory within the structural units/divisions of administrative bodies and territorial bodies and/or during relations within their scopes. In this case, any used

[22] https://idfi.ge/en/e-governance-e-participation-georgia-index-2020#:~:text=In%20terms%20of%20E-Government%20Index%20Georgia%20scored%200.82%2C,th%20place%20in%20both%20rankings%20back%20in%202018 (accessed on 30.09.2022).

[23] Georgia in the UN. E-governement survey. Review of the 2020 Results, July 2020, p. 16. https://idfi.ge/public/upload/GG/E-Governance_E-Participation-ENG-final.pdf (accessed on 20.09.2022).

electronic documents and electronic signatures shall accordingly have the same legal force as tangible documents and handwritten signatures .It shall be impermissible to refuse electronic documents during administrative proceedings and court proceedings only because they are presented in an electronic form, however, this fact shall not exclude the refusal to accept an electronic document for the relevant proceedings, if it does not meet the rules established for the said proceedings.

It shall be impermissible to refuse to grant evidentiary effect to electronic signatures and/or electronic seals during administrative proceedings and court proceedings, only because they do not meet the requirements established by this Law for qualified electronic signatures and/or qualified electronic seals. The above-described rules apply to all administrative proceedings[24], also in construction matters. There is an online platform for dealing with administrative matters in Georgia ,"my.gov.ge", through which you can submit applications for the initiation of proceedings in construction and other administrative matters[25].

5. The administration body in the face of the digitalization of the construction process in Poland and in Georgia

In both countries, *i.e.*, in Poland and Georgia, administrative bodies conduct proceedings regarding construction permits, applications for construction, demolition, and use permits in traditional and electronic paper form.

There are two types of architectural and construction administration and construction supervision authorities in the construction process in Poland. The architectural and construction administration authorities are: starost, voivode, as well as the Chief Inspector of Building Supervision. Article 82, section 2p.b. reserves the powers of the first instance architectural and construction administration authority for the starost. These are competences in the field of government administration. As a consequence, the voivode is the second instance in matters he / she decides. The competences of the starost include the control function under Article 81p.b. issuing all decisions provided for by the act (Article 83, section 1k.p.a. of the reserves given decisions to the competence of the powiat building supervision inspector, and Article 82, section 3 k.p.a. Construction Law Act reserves issuing decisions in the first instance for the voivode). The presumption of the starost's competence is specified in art. 82 sec. 1 of the construction law. First of all, these will be decisions on building permits, demolition permits, decisions on the transfer of a building

[24] W. Loria, *Gruzinskji administrativnyj porjadok,* Tbilisi 2018, p. 102.

[25] K. Kalichava, *Permission Control of Contraction Activity (need of reform and perspectives),* "Journal of Administrative Law" 2016, no. 2, p. 98.

permit, decisions authorizing entry to the adjacent property. A change in the use of a building object should also be notified to the starost[26].

The construction supervision authority is most often the powiat construction supervision inspector, and in some cases the voivode and voivodship construction supervision inspector will be competent. These authorities deal with matters of facilities and construction works.

The digitization of the construction process is associated with the introduction of applications along with project documentation via the e-construction platform, which is a big challenge, especially for starosts. This is related to the launch of new services by the government administration, but also to equipping architectural and construction administration bodies with equipment of appropriate performance, enabling the reading of construction projects. Although the authorities received instructions and guidelines, they did not receive funds for the adaptation of local informatic infrastructure from government funds, the burden of financing was thus shifted to powiats and cities with powiat rights. It is also necessary to secure the services of the so-called helpdesk by the Main Office of Building Supervision. Such services are to support the employees of authorities in the field of technical issues of processing digitally submitted applications, in particular their reading, back-up, and archiving. Problems also appear in connection with the appeal stages and administrative court control in proceedings, *e.g.*, for project approval and granting a building permit. The body of the second instance, ruling on appeal, should be able to amend the approved project. It is also important in what form the project documentation is to be sent to the court, whether as part of access data to databases or in a printed version. As a result, the regulations, which entered into force partially in February and July 2021, are still functioning flawed, moreover, they have not been fully checked due to the ongoing proceedings.

In practice, many employees of the authority have not dealt with documents, especially projects in a "3D version" in digital form, so far, which may initially extend the time of settling the case. The system will only work properly when the administration authorities implement a uniform system of electronic document circulation integrated with the Electronic Platform of Public Administration Services (e-PUAP). Most engineers, architects and designers treat the digitization of construction as a positive change, beneficial due to the reduction in the number of visits to the office and the elimination of the need to create papers (by sending files in electronic form, the investor will not spend money on printing hundreds or even thousands of pages of documents).

[26] Z. Leoński, M. Szewczyk, M. Kruś, *Prawo zagospodarowania przestrzeni*, Warszawa 2012, p. 337.

At the same time, there is a risk that the time of conducting online proceedings will be longer for the first year from the entry into force of the regulations due to the habits of officials27 and underinvestment of architectural and construction administration authorities.

Despite many shortcomings, one can also notice a positive phenomenon in the field of digitization, which is the development of cooperation between public administration bodies. This cooperation is developing within the informal network of national authorities created on the initiative of the Chief Inspector of Construction Supervision with Voivodship Inspectorates of Construction Supervision. Meetings that are cyclically every quarter allow for the mapping of problems with the practical use of digitization occurring in individual regions. Hardware deficiencies exist, but not to the extent of blocking the digitization project. Nevertheless, as far as possible, the central authorities will provide technical and financial support to Provincial Building Supervision Inspector.

In Georgia, in force law is Georgia law on construction activities, the law defines the legal, organizational, and economic features of relations between participants in construction works on the territory of Georgia and establishes a mechanism for the protection and regulation of norms related to these activities[28]. The executive bodies of Georgia, the Autonomous Republics of Ajara and Abkhazia and local self-government bodies shall carry out the legal regulation of construction activities, within the scope of their authority, according to the Constitution of Georgia, the international treaties and agreements of Georgia, and the legal and subordinate normative acts of Georgia. The fundamental reform of Georgian construction law is connected with drafting the Code of Spatial Planning and Construction of Georgia that began back in 2012 and the discussions are still going on[29]. The act also allows for electronic submission of applications to construction administration authorities. In Article 108 Code of Spatial Planning and Construction of Georgia, which provides for administrative proceedings related to construction works, it is indicated that the administrative body issuing a building permit for an architectural design. The decision is made on the basis of the provisions of the General Administrative Code of Georgia. Applying for a building permit in order to agree an architectural design requires submitting an application in writing or electronically to the administrative authority issuing the permit.

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[27] F. Studnicki, *Prawo i cybernetyka*, Warszawa 1969, p. 86.

[28] Law of Georgia no. 829 of 23 December 2008, https://matsne.gov.ge/en/document/view/17338 (accessed on 20.09.2022). Spatial Planning, Architecture and Construction Code of Georgia (no. 3213-RS of 2018).

[29] U. Zakashvili, K. Kalichava, *Modern Development Tendencies in Georgian Construction Law,* "Studia Prawa Publicznego" 2018, no. 1(21), p. 11.

6. Digitization in construction - further stages in Poland

In 2021, work was completed on the new electronic central register of people with building licenses — e-CRUB. The register is intended for all stakeholders directly and indirectly involved in conducting the investment and construction process, this software can be used by investors, architects, engineers, employees of architectural and construction administration bodies, construction supervision employees. entitled disciplinary punished. The system is managed by Chief Inspector of Building Supervision based on data from the Polish Chamber of Civil Engineers and the Chamber of Architects of the Republic of Poland. The search engine allows you to quickly check the qualifications and building permissions of people who perform independent functions in the construction industry. The register enables faster commencement of the construction process by authorized persons to perform independent technical functions in the construction industry and will ultimately be integrated with other systems requiring confirmation of construction qualifications. The decision to enter in the register will be automated. It is therefore the first example of artificial intelligence used in the construction process.

It also created an electronic version of the search engine for the register of applications, decisions, and notifications in construction matters "RWDZ +". The digital system extracts data from other systems fully automatically using artificial intelligence. Compatibility is also being implemented with the domain program to support construction processes used in powiat starosts, e-construction service and other IT solutions that will be developed in the future. This system will improve control activities and transfer of information between architectural and construction administration authorities.

Soon, communes will also develop "Spatial Information Systems" with models of underground and above-ground infrastructure and supplement them with information on the existing buildings (including the shape and location) and the provisions of Local Plans or the Decision on the ZiZT, then it will also be possible to quickly verify the compliance of the investment with the regulated by them building conditions. This will make it possible to quickly determine the scope of the object's impact on neighboring buildings, using the data contained in the system. It also aims to fully automate the acceptance by building supervision. An important element is also the launch of the "Electronic Construction Log", under which there will be an investor's account with all pending matters related to the investment. The Electronic Construction Log will operate on a nationwide scale.

Central body The Chief Inspector of Construction Supervision has also started work on a new IT project, the System for Handling Administrative Proceedings

in Construction, *i.e.*, an IT system for authorities to conduct fully electronic administrative proceedings.

Therefore, technical work has been carried out on the existence of the systems, but there have been no legal changes to the Building Law Act yet.

Conclusions

Modernizing modern public administration enables the introduction of new information and communication technologies, in particular digital platforms, as well as information systems and information flows. These events raise many profound questions for public administration, some of which have immediate consequences and others of concern in the short and medium term.

In the immediate context and in the light of the examples used here, the information policy with numerous accompanying benefits seems to be developing also in the area of investment and construction procedures. However, a few caveats need to be made. First, the costs of developing some IT systems in public administration are enormous.

E-construction and related applications are a good example of this, as it represents one of the largest IT administration projects ever developed in Poland and also in Georgia. These systems require large-scale investment, and their justification and subsequent purely public funding are more difficult in times of public sector constraints, especially the financial problems of a long-lasting pandemic. Moreover, the rationale is hampered by the fact that there are few, if any, agreed criteria for assessing the costs and benefits of new digital platforms. The harmful consequence of this is that public organizations can become vulnerable to the powerful sales rhetoric of big computer companies, software vendors. Second, the maintenance and development of complex computing systems requires a high degree of expertise from the administrative staff themselves. The helpdesk system prepared by the Main Office of Construction Supervision to help the architects of architectural and construction administration should be positively assessed. Public authorities' wage rates make it difficult to recruit and retain such expertise, again exposing public authorities to a lack of qualified staff. Thus, "adaptation" of software to local conditions is difficult to achieve without appropriate expertise.

Third, there is growing concern about data security and the recurring impact on personal privacy[30]. Because large design documents are implemented in electronic systems, they are often included in specialized programs. The benefits seem to be the quick exchange of data between administrative bodies, as well as an increase

[30] H. Margetts, *The Automated State*, "Public Policy and Administration" 1995, vol. 10, is. 2, pp. 88-103.

in the willingness of informal cooperation between bodies and mutual assistance. However, the problem may be the privacy issue in a customer-centric perspective becomes a big problem and thus the need to protect data and information is effectively raised as a key issue[31].

In the long run, these information systems raise many important issues regarding the organizational shape of public administration. Information systems give localities (selected or not) the possibility to better manage their territories to developing a better understanding of local conditions and their ability to separate service activities and to target policy implementation accordingly. If the current transformation of public administration continues, with an emphasis on customer orientation, decentralized forms of administration should develop. However, in the case of the implementation of such costly legal solutions, the local government cannot be deprived of state funds for the implementation and implementation of digitization of construction procedures.

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Zakashvili U., Kalichava K., *Modern Development Tendencies in Georgian Construction Law,* "Studia Prawa Publicznego" 2018, no. 1(21), p. 11.

[31] More about it: K. Chałubińska-Jentkiewicz, *Prawna ochrona treści cyfrowych*, Warszawa 2021, p. 37.

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Katarzyna Szlachetko
University of Gdańsk
ORCID 0000-0003-4667-3756
katarzyna.szlachetko@prawo.ug.edu.pl

The legal challenge of universal dark skies protection. Some comments on opportunities and limitations

Keywords: dark skies protection, artificial light pollution, dark skies heritage

Summary. In public discourse, dark skies have long been considered as a common heritage of humanity that is being lost due to uncontrolled, excessive, and harmful artificial light emissions. The purpose of this paper is to identify an international model for the legal protection of dark skies. The qualification of the dark skies as a separate element of legal protection is problematic, because of the impossibility of defining its boundaries and territorial affiliation. However, the dark skies can be treated as a unique element of the cultural, natural (or mixed) landscape, which creates the identity of a site, giving it an outstanding universal value. The normative analysis included: The Convention Concerning the Protection of the World Cultural and Natural Heritage, the European Landscape Convention, and resolutions of international organizations whose mission is to protect dark skies. In addition, the paper considers the source of the human right to dark skies as an inalienable human right, which grows out of the right to a clean environment.

Wyzwanie prawne dotyczące powszechnej ochrony ciemnego nieba. Kilka uwag na temat możliwości i ograniczeń

Słowa kluczowe: prawna ochrona ciemnego nieba, zanieczyszczenie sztucznym światłem, dziedzictwo ciemnego nieba

Streszczenie. W dyskursie publicznym ciemne niebo od dawna jest uważane za wspólne dziedzictwo ludzkości, które jest zagrożone niekontrolowaną, nadmierną i szkodliwą emisją sztucznego światła, która stanowi specyficzny rodzaj „zanieczyszczenia światłem". Celem artykułu jest ustalenie międzynarodowego modelu prawnej ochrony ciemnego nieba. Kwalifikacja ciemnego nieba jako odrębnego elementu ochrony prawnej jest problematyczna ze względu na brak możliwości określenia jego granic oraz przynależności terytorialnej. Nocne niebo można jednak traktować jako unikatowy element krajobrazu kulturowego, naturalnego (bądź mieszanego), który tworzy tożsamość danego miejsca, nadając mu ponadprzeciętną uniwersalną wartość. W artykule analizie normatywnej poddano regulacje: Konwencji w sprawie ochrony światowego dziedzictwa kulturowego i naturalnego, Europejskiej Konwencji Krajobrazowej oraz rezolucji organizacji międzynarodowych, których misją jest ochrona ciemnego nieba. Dodatkowo poruszono kwestię źródła prawa człowieka do ciemnego nieba, które wyrasta z prawa do czystego środowiska, stanowiącego niezbywalne prawo człowieka.

Introductory remarks

The disappearance of the nocturnal landscape with its naturally starry dark skies is a growing problem in the modern world. According to scientific research conducted in 2016, up to 83% of humanity lives under skies polluted by artificial light and 1/3 of humanity has thus lost the opportunity to see the Milky Way at night[1]. What is more, the study shows that between 2012 and 2016, the artificially illuminated area of the Earth increased by 2.2 percent per year, and the total increase in radiation was 1.8 percent per year[2]. The loss of dark skies is a universal problem concerning not only metropolises[3] and big urban agglomerations, but also smaller cities, towns, and villages. Its source is excessive and uncontrolled emission of artificial light at night from streetlamps, squares, parking lots, sports facilities, office buildings, advertisements and billboards, illumination of architectural objects and other devices and objects belonging to outdoor lighting infrastructure[4]. The result of improper, excessive, and intrusive artificial lighting is a kind of environmental pollution called 'light pollution', which is the phenomenon of negative (even harmful) impact of man-made light on the environment and humans[5]. This kind of environmental pollution results from the alteration of natural night light levels by artificial light sources. This is one of the most visible contaminants in the Anthropocene epoch[6]. The increase in artificial light pollution is also induced by the advancement of modern technologies that make it possible to locate so-called mega-constellations of artificial satellites in low Earth orbit. It turns out that constellations of such satellites are visible from the Earth, especially right after their launch and also at dawn and dusk, providing a new source of artificial light pollution[7].

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[1] The detailed statistics released by the researchers in „The new world atlas of artificial night skies brightness" also indicate that over 99% of the population of the United States and Europe lives under skies polluted with artificial light. Territorially, as much as 23% of the world's land area between 75°N and 60°S, as well as 88% of Europe and nearly half of the United States experience light-polluted nights. See more F. Falchi, P. Cinzano, D. Duriscoe, C.C.M. Kyba, C.D. Elvidge, K. Baugh, B.A. Portnov, N.A. Rybnikova, R. Furgoni, *The new world atlas of artificial night skies brightness*, "Science Advances" 2016, no. 2(6), p. 4.

[2] C.C.M. Kyba, T. Kuester, A. Sánchez del Miguel, K. Baugh, A. Jechow, F. Hölker, J. Bennie, Ch.D. Elvidge, K.J. Gaston, L. Guanter, *Artificially lit surface of Earth at night increasing inradiance and extent*, "Science Advances" 2017, no. 3(11), p. 2.

[3] See more: E.E. Goronczy, *Light pollution in Metropolises. Analysis, Impacts and Solutions, Springer Fachmedien Wiesbaden GmbH*, part of "Springer Nature 2021".

[4] The most common sources of light pollution are described on the International Dark-Skies Association website, https://www.darkskies.org/light-pollution/ (accessed on 25.03.2022).

[5] Cf. F. Hölker, *et al.*, *The Dark Side of Light: A Transdisciplinary Research Agenda for Light Pollution Policy*, „"Ecology and Society" 2010, p. 2.

[6] F. Falchi, R. Furgoni, T.A. Gallaway, *et al.*, *Light Pollution in USA and Europe: The Good, the Bad and the Ugly,* "Journal of Environmental Management" 2019, vol. 248, p. 1.

[7] A. Venkatesan, J. Lowenthal, P. Prem, M. Vidaurri, *The impact of satellite constellations on space as an ancestral global commons*, "Nature Astronomy" 2020, vol. 4, p. 1044; J.S. Koller, R.C. Thompson,

The negative influence of artificial light on the night landscape was first noticed by astronomers[8]. They pointed out that excessive emission hinders not only amateur, but also professional astronomical observations. The basis of those observations is the contrast disturbed by streams of artificial light[9]. In addition to the loss of aesthetic value provided by the dark skies, it is necessary to emphasize the degrading effect of improper artificial lighting on biodiversity (especially the biological cycles and rhythms of animals and plants), human physical and mental health, traffic safety, and on the economy (causing energy waste) and climate too (enhancing the greenhouse effect)[10]. The issues related to light pollution are of interdisciplinary matter and the problems within particular disciplines are complex, which is also specific for legal aspects that require consideration of environmental and nature protection law, spatial planning law and construction law. Therefore, the considerations presented in this paper focus on dark skies protection from the perspective of legal landscape protection at the international level. The normative analysis includes: the Convention Concerning the Protection of the World Cultural and Natural Heritage adopted by UNESCO, The European Landscape Convention and non-binding resolutions of international organizations with the mission to protect the dark skies.

The legal protection of dark skies as a world heritage of humanity

First of all, it is necessary to determine whether the dark skies can be treated as a separate object of protection? Such a distinction is actually justified. It is hard to disagree with the statement that: "any area observed at night is very different from the same area seen in sunlight"[11]. The uniqueness of the nightscape comes from its diversity and dynamism. It can be a lunar or moonless night landscape, a starry

L.H. Riesbeck, *Light pollution from the satellites. Space Agenda 2021, Aeorospace 2020, Center for Space, Policy and Strategy*, https://aerospace.org/paper/light-pollution-satellites (accessed on 29.01.2021). The unofficial sources predict that the number of artificial satellites will rise to 100,000 in the next decade, a sign of the scramble to colonize space not only by individual countries, but also by large private consortiums.

[8] N. Sperling, *The disappearance of darkness*, [in:] D.L. Crawford (ed.), *Light Pollution, Radio Interference, and Space Debris*, "ASP Conference Series" 1991, vol. 17, pp. 103-104.

[9] K. Narisada, D. Schreuder, *Light pollution and astronomy*, [in:] K. Narisada, D. Schreuder (eds.), *Light pollution. Handbook*, "Springer Netherlands" 2004, p. 115.

[10] See more: J. Falcón, A, Torriglia, D. Attia, F. Viénot, *et al.*, *Exposure to Artificial Light at Night and the Consequences for Flora, Fauna, and Ecosystems*, "Frontiers in Neuroscience" 2020, passim; F. Hölker, C. Wolter, E.K. Perkin, K. Tockner, *Light pollution is a biodiversity threat*, "Trends in Ecology & Evolution" 2010, vol. 25 no. 12, pp. 681-682; T. Gallaway, R.N. Olsen, D.M. Mitchell, *The economics of global light pollution*, "Ecological Economics" 2010, no. 69, pp. 658-665.

[11] E. Mocior, P. Franczak, J. Hibner, P. Krąż, A. Nowak, M. Rechciński, N. Tokarczyk, *Typologia naturalnych krajobrazów efemerycznych w świetle dotychczasowych badań*, [in:] P. Krąż (ed.), *Współczesne problemy i kierunki badawcze w geografii*, Kraków 2014, vol. 2, pp. 85-86.

night landscape with meteors and comets sometimes visible[12] or stellar landscapes related to urban or rural areas, geoparks, as well as natural areas or sites related to tangible and intangible astronomical heritage[13]. As Edensor points out, the dark skies take on a different form under the influence of the changing position of the stars and the cloud cover, which varies its degree of illumination, and also under the influence of a given phase of the moon[14]. The dynamics of the nightscape is thus determined by the arrangement of the celestial bodies relative to the Earth, the time of night, and the weather[15]. Undoubtedly, the inimitable qualities of dark skies – in fact – justify the separation of the night landscape.

Another question is what does the protection of the dark skies mean? Lee defines this protection in a very simplified, but universal way as maintaining the possibility of observing the skies in conditions similar to those that existed before the industrial age and the related population explosion[16]. The given normative analysis presents whether the dark skies can be also the subject of separate legal protection or as a protected element of a landscape. In the world's public discourse, the naturally dark night skies have long been recognized as a common and universal heritage, inseparably linked to human civilization.

The Convention Concerning the Protection of the World Cultural and Natural Heritage

Formally, the term "World Heritage" covers places and objects on Earth inscribed by the World Heritage Committee on the World Heritage List due to their unique and universal value for humanity. The List was introduced by the Convention Concerning the Protection of the World Cultural and Natural Heritage adopted by UNESCO at its 17th session in Paris on November 16, 1972, which entered into force on December 17, 1975 (the Republic of Poland was one of the first States to have ratified the Convention on May 6, 1976)[17]. Determining whether dark skies can be considered a separate World Heritage Site within the meaning of this Convention requires an analysis of the legal basis for qualifying a listing.

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[12] *Ibidem*.

[13] https://www3.astronomicalheritage.net/index.php (accessed on 12.01.2021).

[14] T. Edensor, *Reconnecting with darkness: Gloomy landscapes, lightless places*, "Social & Cultural Geography" 2013, no. 14(4), p. 455.

[15] E. Mocior, P. Franczak, J. Hibner, P. Krąż, A. Nowak, M. Rechciński, N. Tokarczyk, *op. cit.*, pp. 85-86.

[16] W.H. Lee, *What Does it Mean to Preserve Dark Skies?*, [in:] *United Nations Educational, Scientific and Cultural Organization*, UNESCO Office in Mexico City, *The Right To Dark Skies*, p. 10. https://unesdoc.unesco.org/ark:/48223/pf0000246131 (accessed on 29.01.2022).

[17] Journal of Laws of 1976 no. 32 item 190.

The provisions of the Convention distinguish two categories of heritage: "cultural" and "natural", which are protected because of their "outstanding universal value". According to Article 1 of the Convention, "cultural heritage" is considered to be:

– monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings andcombinations of features, which are of outstanding universal value from the point of view of history, art, or science;
– groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity, or their place in the landscape, are of outstanding universal value from the point of view of history, art, or science;
– sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

Despite the obvious cultural values of the dark skies, which are ingrained in human civilization, especially: art, literature, science, philosophy, and religious beliefs[18], it cannot be considered cultural heritage on its own in the light of the cited Article 1. The unconditional basis in this case is the material factor or at least the participation of the anthropogenic factor in the creation of such heritage. The dark skies qualification issues also apply to natural heritage, which according to Article 2 of the Convention are:

– natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
– geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
– natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

Only the listed "goods of nature" can be protected under the Convention, and Article 2 is not subject to an expansive interpretation. At first glance, it may seem that the dark skies should be considered as s "natural site" that demonstrates "outstanding natural value from the point of view of science, conservation or natural beauty". However, the "delineated natural areas" condition for dark skies is problematic. The detailed criteria justifying protection are further elaborated in the "Operational Guidelines for the Implementation of the World Heritage Convention", which are intended to facilitate the implementation of its provisions.

[18] See more: D.W. Hamacher, K. De Napoli, B. Mott, *Whitening the Sky: light pollution as a form of cultural genocide*, "Journal of Dark Sky Studies" 2020, vol. 1, preprint.

The Operational Guidelines are amended from time to time to update approach of the World Heritage Committee. The Guidelines No. WHC 21/01 of July 31, 2021, are currently in force[19]. Although the 1972 Convention itself does not mention it, the Operational Guidelines also stipulate the protection of "mixed cultural and natural heritage", provided that some or all of the definitional criteria in Articles 1 and 2 are met. According to paragraph 49 of the Operational Guidelines, the "outstanding universal value" means "cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity". Despite its obvious qualities, dark skies do not withstand confrontation with the detailed assessment criteria, in particular "boundaries for effective protection". An essential requirement for establishing effective protection of nominated properties is the delineation of boundaries. The Operational Guidelines specify how the boundaries are to be drawn. Whereas it is not possible to draw precise boundaries of the dark skies as a separate object of protection, as well as it is not possible to determine its territorial affiliation to a particular state. The dark skies category is not subject to qualification as "property" in the juridical sense under the rules provided for other World Heritage sites, and therefore cannot be the sole element of nomination for inscription on the UNESCO World Heritage List[20].

This does not mean that dark skies cannot be protected as a natural attribute of another place or object. After all, dark skies are a natural environmental component of a place. Noteworthy is the concept of "Windows to the Universe" which are astronomical observatories. Their value is expressed by cultural attributes supported by intangible values from the point of view of science of astronomy, philosophy, and religion, as well as the natural attribute which is the unpredictable quality of dark skies enabling astronomical observations[21]. The UNESCO World Heritage criteria can be met for a site that constitutes a "Window to the Universe" which is composed of three elements: (1) the "dark skies" itself treated solely as an object of observation; (2) a specific place set apart in a permanent geographical, atmospheric, architectural, landscape or natural context; and (3) humanity using the observation site[22].

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[19] https://whc.unesco.org/en/guidelines/ (accessed on 30.03.2022).

[20] M. Cotte, *How can UNESCO World Heritage Criteria be applied to the "Windows to the Universe" Sites?*, "Proceedings of the International Astronomical Union" 2015, no. 11(A29A), pp. 121-123.

[21] M.G. Smith, *Session 21.6. Preserving Dark Skies and Protecting against Light Pollution in a World Heritage Framework*, [in:] *Proceedings of the International Astronomical Union 2015 11 (A29A)*, pp. 480–481. See also: A. Loveridge, R. Duell, J. Abbari, M. Moffat, *Night Landscapes: A Challenge to World Heritage Protocols*, "Landscape Review" 2014, vol. 15(1), p. 64.

[22] M. Cotte, *op. cit.*, p. 122.

The European Landscape Convention

The European Landscape Convention, drawn up in Florence on 20 October 2020[23], provides a universal and laconic definition of "landscape", defining it as "an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors" (Article 1(a) of the Convention). This Act refers to both natural landscape, *i.e.*, an area with no human influence (of a primordial nature)[24], the anthropogenic landscape, which is an area with varying degrees of human influence on its structure and functions[25], as well as takes into account the mutual permeation of natural and anthropogenic elements[26] forming the so-called cultural landscape[27]. As Solon points out, the term "landscape" in the Convention's terms refers to "the spatial and material dimension of terrestrial reality and denotes a complex, heterogeneous system consisting of forms, relief and waters, vegetation and soils, rocks and atmosphere, and the work of human hands"[28]. The scope of the Convention is broad. According to Article 2, it covers natural, rural, urban, and peri-urban areas. It includes land, inlandwater and marine areas. What is more, it concerns landscapes that might be considered outstanding, as well as everyday or degraded landscapes. The definition of landscape will be narrowed by Article 15(1), which refers to "the territory or territories" to which the Convention will apply. These two cited provisions clearly express that only 'the part of the land' (possibly also inland water and marine areas) is involved. This means that, under the Convention, the nocturnal dark skies landscape cannot constitute a distinct and separate object of protection.

Additionally, according to Recommendation CM/Rec (2008)3 of the Committee of Ministers to member states on the guidelines for the implementation of the European Landscape Convention (adopted by the Committee of Ministers on 6 February 2008 at the 1017th meeting of the Ministers' Deputies): "Attention

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[23] Journal of Laws of 2006 no. 14 item 98.

[24] See J. Kovarik, *Sustainability and Natural Landscape Stewardship: A US Conservation Case Study,* [in:] R. Brinkmann, S.J. Garren (eds.), *The palgrave handbook of sustianability. Case study and practical solutions*, The Palgrave MacMillan 2018, p. 22.

[25] U. Myga-Piątek, *Natural, anthropogenic, and cultural landscape and attempt to define mutual relations and the scope of notions*, "Prace Komisji Krajobrazu Kulturowego" 2014, no. 23, p. 46.

[26] The Convention takes into account the classical approach represented by A. von Humboldt, P. Vidal de la Blanche and A. Hettner, who defines landscape as a complex whole including elements from the natural and social sphere. See: U. Myga-Piątek, *op. cit.*, pp. 40-41.

[27] The cultural landscape is an area of "integration of natural and cultural heritage". See more: Z. Myczkowski, *Krajobraz kulturowy – fenomen integracji ochrony dziedzictwa kulturowego i przyrodniczego*, "Wiadomości Konserwatorskie" 2018, no. 56, pp. 70-87.

[28] J. Solon, *Krajobraz jako przestrzeń integrująca różne podejścia do ochrony dziedzictwa przyrodniczego i kulturowego oraz kształtowania warunków życia społeczeństwa,* [in:] S. Ratajski, M. Ziółkowski (eds.), *Krajobraz kulturowo-przyrodniczy z perspektywy społecznej*, Warszawa 2015, p. 30.

is focused on the territory as a whole, without distinguishing between the urban, peri-urban, rural and natural parts, or between parts that may be regarded as outstanding, everyday or degraded; it is not limited to cultural, artificial and natural elements: the landscape forms a whole whose constituent parts are considered simultaneously in their interrelations"[29]. It seems that such a holistic approach allows for the inclusion of the dark skies in the category of a protected landscape element. The Convention indicates the need for States Parties to pursue a "landscape policy" that means an expression by the competent public authorities of general principles, strategies and guidelines that permit the taking of specific measures aimed at the protection, management and planning of landscapes[30]. According to the Guidelines, it is about drawing up specific landscape policies as incorporated integral part of sectoral policies influence on changes of the territory, so that the landscape is not an add-on to other policies but is an integral part of them. The Convention regulation recommends four activities: (1) promoting "landscape protection"[31]; (2) "landscape management"[32] and (3) "landscape planning"[33], as also (4) organizing co-operation between the Parties[34].

The Convention allows Parties the flexibility to implement its provisions in accordance with national law and respecting the principle of subsidiarity. Due to the lack of explicit regulations for the protection of the night landscape, it should be considered that the dark skies as a landscape element can only be protected on the basis of internal (national) legal regulations. In this matter, the practice varies greatly, depending on the general awareness of the threat of light pollution, which leads to the loss of mankind's original heritage of unpolluted dark skies.

Soft law of international organizations

The special effort to protect the dark skies is made by the International Astronomical Union, which brings together professional astronomers from all over the world[35]. Decisions and recommendations of the International Astronomical Union are made

[29] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802f80c9 (accessed on 30.03.20220).

[30] Article 1(b) of the Convention.

[31] That means "actions to conserve and maintain the significant or characteristic features of a landscape, justified by its heritage value derived from its natural configuration and/or from human activity" (Article 1 (d) of the Convention).

[32] That means "action, from a perspective of sustainable development, to ensure the regular upkeep of a landscape, so as to guide and harmonise changes which are brought about by social, economic and environmental processes" (Article 1 (e) of the Convention).

[33] That means "a strong forward-looking action to enhance, restore or create landscapes" (Article 1 (f) of the Convention).

[34] The principles of cooperation are set forth in Chapter III of the Convention.

[35] https://www.iau.org/news/pressreleases/detail/iau2201/ (accessed on 30.03.2022).

by its General Assembly, so they are primarily addressed to professional members. However, due to the great authority of this Organization, the factual impact of the resolution is much greater than its legal nature implies. Therefore, very important step in drawing attention to the dark skies, as a world heritage, was the adoption by the International Astronomical Union of the Resolution No. A1 "Protection of the Night Sky" (XXIIIrd IAU General Assembly, Kyoto 1997)[36]. While this document is not generally binding, it does make a very clear recognition of the dark skies as the heritage of all humanity, which should therefore be preserved untouched. The resolution strongly indicated that protection of the night sky should be no less than has been given to the world heritage sites on Earth. Besides, this document marked an important point for the spread of considerations about the legal protection of dark skies.

Another non-binding act that has strengthened 'the dark skies protection matter' was the La Palma Declaration made at the International Conference in Defence of the Quality of the Night Skies and the Right to Observe the Stars (the Canary Islands, 2007)[37]. The meeting was organized under the auspices of UNESCO. Although, the promulgated document should be treated more as a manifesto (supported by international scientific organizations and expert institutions from 42 countries[38]), it included an explicit declaration of human right to dark skies. According to point one of the La Palma Declaration (2007): "An unpolluted night skies that allows the enjoyment and contemplation of the firmament should be considered an inalienable right of humankind equivalent to all other environmental, social, and cultural rights, due to its impact on the development of all peoples and on the conservation of biodiversity". The declaration very strongly emphasized that the preservation, protection and restoration of natural and cultural heritage of night landscapes is a commitment to work together for the quality of life. In addition, the signatories underlined that it is not possible to separate the conservation mission of places such as those belonging to the World Network of Biosphere Reserves, Ramsar wetlands, World Heritage sites, national parks and all those protected areas that combine unique landscape and natural values that also depend on the quality of the night skies. The Declaration made clear the need for action to save the dark skies as a common heritage, but due to its non-binding nature, it could only underline the need for raising awareness and spreading information among the entities responsible for the dark skies' protection. No landscape conservation policy can be regarded as effective and complete without taking into

[36] https://www.iau.org/static/resolutions/IAU1997_French.pdf (accessed on 30.03.2022).

[37] http://research.iac.es/congreso/quietdarkskies2020/media/2007StarlightDeclarationEN.pdf (accessed on 30.03.2022).

[38] C. Marin, *Starlight: a common heritage*, [in:] D. Valls-Gabaud, A, Boksenberg, *The role of Astronomy in Society and Culture*, "Proceedings IAU Symposium" 2009, no. 260, p. 449.

account the possibility of preserving naturally unpolluted dark skies. This impact on awareness should be multiphased and involve authorities at the international, national, regional and local levels. It was promoted by (among others) UNESCO, the International Astronomical Union, the UN-World Tourism Organisation (UNWTO) and the Instituto de Astrofísica de Canarias (IAC), with the support of several International Programmes and Conventions, such as the World Heritage Convention (WHC), the Convention on Biological Diversity (CBD), the Ramsar Convention on Wetlands, the Convention on Migratory Species (CMS), the Man and the Biosphere (MaB) Programme, and the European Landscape Convention[39].

In response to an appeal from La Palma, International Astronomical Union unanimously adopted Resolution B5 in Defense of the Night Skies and the Right to Starlight at the XXVII General Assembly in Rio de Janeiro (2009). The initiators of the resolution were the IAU Executive Working Group, the International Year of Astronomy 2009 Cornerstone Project Dark Skies Awareness Working Group, the Starlight Initiative, and the IAU Division XII/Commission 50 Working Group on Controlling Light Pollution[40]. The following Act treats the dark skies as a source of inspiration, emphasizes its scientific and cultural values, the phenomenon of the deteriorating view of the night skies. In addition, the resolution pointed out the need to educate how to use the intelligent lighting. It should be noted that the resolution was adopted during the International Year of Astronomy commemorating the 400th anniversary of the first recorded astronomical observations with a telescope by Galileo and the publication of Johannes Kepler's Astronomia nova[41]. The main objectives of the International Year of Astronomy explicitly included: "Facilitate the preservation and protection of the world's cultural and natural heritage of dark skies in places such as urban oases, national parks and astronomical sites". The provisions of Resolution B5 reaffirmed and extended the La Palma Declaration:

– an unpolluted night skies that allows the enjoyment and contemplation of the firmament should be considered a fundamental socio-cultural and environmental right, and that the progressive degradation of the night skies should be regarded as a fundamental loss;
– control of obtrusive and skies glow-enhancing lighting should be a basic element of nature conservation policies since it has adverse impacts on humans and wildlife, habitats, ecosystems, and landscapes;

[39] https://www3.astronomicalheritage.net/index.php/show-theme?idtheme=21 (accessed on 30.03.2022).
[40] https://starlight2007.net/iauresolutionb5.html (accessed on 30.03.2022).
[41] https://www.iau.org/public_press/iya/ (accessed on 30.03.2022).

– responsible tourism, in its many forms, should be encouraged to take on board the night skies as a resource to protect and value in all destinations;
– IAU members be encouraged to take all necessary measures to involve the parties related to skiesscape protection in raising public awareness – be it at local, regional, national, or international level – about the contents and objectives of the International Conference in Defence of the Quality of the Night Skies and the Right to Observe Stars.

The presented IAU Resolutions and La Palma Declaration do not constitute generally applicable law that would impose specific obligations on individual countries to ensure dark skies protection. The norms expressed therein are only internally binding in a given organization or represent a voluntary commitment of certain communities to undertake initiatives to protect the natural and cultural heritage of dark skies. Although the acts reviewed above constitute a rather unsanctioned soft-law system, they are nonetheless the source of basic policy standards for dark skies protection. Because of the authority of their signatories, they have significant factual impact, which should be appreciated.

An important component of the voluntary (soft) model for legal protection of dark skies is the certification system created by the U.S. International Dark-Sky Association. This organization has been working since 1988. Its dark skies protection efforts include publishing activities (handbooks, guidelines, policy documents) and efficient influence the creation of best practices in responsible outdoor lighting. IDA's flagship program is "The International Dark Sky Places". The aim is to recognize and promote excellent stewardship of the night skies in 5 categories: (1) International Dark Sky Community; (2) International Darky Sky Parks; (3) International Darky Sky Reserves; (4) International Dark Sky Sanctuaries[42]. Category status may be granted to an application that meets rigorous location requirements and technical standards for outdoor lighting, which ensure the protection of dark skies from harmful artificial light emission[43]. IDA works with administrators of certified sites to promote their work through media relations, member communications, and social media. The international designation of dark sky sites helps increase the visibility of designated locations and promotes increased tourism and local economic activity. Despite the real benefits for dark sky protection, Dark Sky Places are not universally protected forms of conservation. This model is based only on the recognition and authority of IDA.

[42] https://www.darksky.org/our-work/conservation/idsp/ (accessed on 30.03.2022).
[43] IDA, *How To Become An International Dark Skies Place?*, https://www.darkskies.org/our-work/conservation/idsp/become-a-dark-skies-place/ (accessed on 30.03.2022).

The right to dark skies versus the right to a clean environment

The issue of dark skies protection as a separate object or as an element of the nocturnal landscape (natural, cultural, or mixed) is an open discussion, not without controversy. Currently, there is a lack of evident legal means of protection at the international level that would provide a common model for dark skies protection. Meanwhile, it seems that this is the necessary impetus to take action at the national level. Legislative practice of individual countries is very diverse in this respect – from dedicated legal acts (France, Croatia, or Slovenia), through consideration of light pollution in nature protection regulation (such as in Germany, Hungary, or Spain, in the United States) to the lack of effective norms (as for example in Poland). There should be no doubt that the right to the dark skies' heritage grows out of the category of human rights, specifically the right to a clean environment.

In public discourse, the 'right to a clean environment' is considered an 'inalienable human right[44]. On October 21, 2021, the UN Human Rights Council adopted a milestone resolution recognizing the human right to a clean, healthy and sustainable environment as an important human right[45]. Although the resolution does not explicitly mention protection from environmental light pollution, as a universal manifesto it should also be an important step in recognizing naturally dark skies as an inherent part of the environment. Taking into account the results of scientific research, which testify to the undoubtedly negative impact of external artificial lighting on human physical and mental health, as well as nature and the natural landscape of the dark sky – the concept of "clean environment" should be enriched with an additional component, *i.e.*, reduction of excessive and harmful emission of artificial light.

Conclusion

In the new approach to landscape protection, P. Laureano points out the need to take into account: (1) the diversity and dynamics of landscapes, (2) variability of landscape definition and the need to adapt it to regional conditions, (3) integrated approach – taking into account "nature and culture", both tangible and intangible heritage; (4) protection not only of "extraordinary values", but simply everyday life (which is a great value in itself – note by K.Sz.), taking care not only of monuments, but also ecosystems; (5) not

[44] See more: G. Handl, *The Human Right to a Clean Environment and Rights of Nature: Between Advocacy and Reality*, [in:] A. Von Arnauld, K. Von der Decken, & M. Susi (eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, Cambridge 2020, pp. 137-153.

[45] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement (accessed on 30.03.2022).

only protection, but also prevention, management and security, (6) caring not only about "heritage", but also about society and people[46]. The presented tips fit perfectly with the concept of protecting the nightscape, of which the dark and starry sky is a key element. With no doubt, the primary threat to this heritage of humanity is artificial light pollution, which is still a rather neglected danger. On the other hand, it is not possible to completely abandon external lighting sources, which are the main cause of polluted dark skies. The answer to this challenge should be a sustainable outdoor lighting policy that aims to protect dark skies while ensuring that people's artificial light needs are met after nightfall.

Unfortunately, legal protection of nocturnal landscapes with a natural dark skies' component is ineffective at the international level. A systemic change in international landscape protection is necessary and should take into account the importance of dark skies not only because of unique aesthetic values, but also for the protection of ecosystems, human health, and life. The dark skies are an indivisible element of the natural environment and cultural property, which has accompanied mankind since time immemorial, creating the identity of a place, both in its material and immaterial dimensions. Legal protection of the landscape should be comprehensive – taking into account its diversity, providing flexibility in the selection of protective measures, which is particularly important in the context of the specificity and dynamics of the night skies.

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Ewa Szewczyk
University of Zielona Góra
ORCID 0000-0002-2980-6564
e.szewczyk@wpa.uz.zgora.pl

Request for electronic access to administrative court case files in the context of Art. 74a(1)(1) of the Act on Administrative Court Procedure

Keywords: administrative court procedure, electronic access to case files, electronic service of letters

Summary. The author analysed Art. 74a AACP which regulates the issue of electronic service of letters in administrative court procedure in the context of a request for electronic access to case files. The conclusion of the paper is that the legislator made the use of electronic service fully dependent on the express and undoubted consent of a party. Electronic filing of a request for mere access to the case file obligates the administrative court only to provide access to the case file in that form and does not authorise the administrative court to serve the party all correspondence electronically. If, after the case file has been made available in the electronic mode, further correspondence between the administrative court and the party is to be conducted in this mode, then the party should file a separate request referred to in Art. 74a(1)(2) AACP, or the court should request their consent under Art. 74a(1)(3) AACP to use electronic means of service.

Wniosek o elektroniczny dostęp do akt sprawy sądowoadministracyjnej w kontekście art. 74a §1 pkt 1 ustawy – Prawo o postępowaniu przed sądami administracyjnymi

Słowa kluczowe: postępowanie przed sądem administracyjnym, elektroniczny dostęp do akt sprawy, doręczenia elektroniczne

Streszczenie. Autorka poddała analizie art. 74a Prawa o postępowaniu przed sądami administracyjnymi, regulujący kwestię doręczania pism drogą elektroniczną w postępowaniu sądowo administracyjnym, w kontekście wniosku o udostępnienie akt sądowo administracyjnych sprawy drogą elektroniczną. Konkluzja pracy jest taka, że ustawodawca w pełni uzależnił korzystanie z usługi elektronicznej od wyraźnej i niewątpliwej zgody strony. Złożenie wniosku o udostępnienie akt sprawy drogą elektroniczną zobowiązuje sąd administracyjny jedynie do udostępnienia akt sprawy w takiej formie i nie upoważnia sądu administracyjnego do doręczania stronie wszelkiej korespondencji drogą elektroniczną. Jeżeli po udostępnieniu akt sprawy w trybie elektronicznym dalsza korespondencja między sądem administracyjnym a stroną ma być prowadzona w tym trybie, wówczas strona powinna wystąpić z odrębnym wnioskiem, o którym mowa w art. 74a ust. 1 pkt 2 lub sąd powinien wystąpić o jej zgodę na podstawie art. 74a ust. 1 pkt 3 do korzystania z elektronicznych środków doręczeń.

Computerisation of administrative court procedure

Computerisation is one of the key technological processes in the modern world. It consists in automation of information processing, which, as a result of numerous improvements and facilitations, leads to benefits in various areas of life[1]. A natural consequence of the digital development of the society was the entry of computerisation into legal solutions. The introduction of new technologies into the operations of public authorities in Poland began as early as the 1990s[2].

The computerisation of administrative court procedure is intended to streamline and speed up proceedings in administrative courts and reduce their operating costs. For the organisation of the administrative judiciary, computerisation means staff and financial savings. For the citizen, on the other hand, computerisation should mean greater accessibility to an administrative court (on a 24/7 basis) at a lower cost[3].

The broadly defined computerisation of administrative court procedure occurred gradually. One of its first manifestations was to make judgments of administrative courts available on the publicly accessible website, http://orzeczenia.nsa.gov.pl/cbo/query, and to publish the summary of cases in the electronic case list[4].

Electronic mailbox

As of 11 August 2014, by adding paragraph 1a to Art. 16 of the Act of 17 February 2005 on the Computerisation of Activities of Entities Performing Public Tasks[5], each public entity was obliged to make available and operate an electronic mailbox in accordance with the standards defined by the minister in charge of administration. According to this provision, "The public entity shall make available an electronic mailbox which meets the standards defined and published on the ePUAP platform by the minister in charge of computerisation, and make sure that

[1] J. Janowski, *Trendy cywilizacji informacyjnej. Nowy technototalitarny porządek świata,* Warszawa 2019, p. 17.

[2] See further G. Sibiga, *Komunikacja elektroniczna w Kodeksie postępowania administracyjnego. Komentarz*, Warszawa 2011, p. 18 ff.; S. Pieprzny, *Postęp techniczny w administracji samorządowej – wybrane zagadnienia,* [in]: *Wybrane aspekty informatatyzacji w samorządach a zasada dobrej administracji,* ed. by M. Sitek, P. B. Zientarski, Warszawa 2019, p. 127 ff.

[3] Cf. G. Sibiga, *Komunikacja elektroniczna…,* p. 14-15.

[4] The literature on the subject draws attention to the other side of the issue of computerisation of administrative court procedure, which is the appropriate technical equipment and software for administrative courts, which for obvious reasons will not be covered in this study – see more on the issue of computerisation of the administrative judiciary in P. Pietrasz, *Informatyzacja polskiego postępowania przed sądami administracyjnymi a jego zasady ogólne*, Warszawa 2020, p. 16, 69 ff.

[5] Consolidated text: Journal of Laws of 2019 item 700. Paragraph 1a was added to Art. 16 by the Act of 10 January 2014, Journal of Laws item 183.

it is operated". Thus, the legislator left no choice for public authorities but to use electronic communication and possibly replace traditional means of communication with it. However, the obligation to communicate electronically with the parties to the proceedings was introduced gradually. It had been imposed much earlier on public administration bodies which, for 6 years then, had been required to communicate with anyone concerned by electronic means whenever the latter so wished. However, in the proceedings in administrative courts, the fundamental changes related to the launch of electronic correspondence between the party to the proceedings and the court, including making case files available online, were initiated much later. They followed the entry into force on 31 May 2019 of Art. 4 of the Act of 10 January 2014 on Amending the Act on the Computerisation of Activities of Entities Performing Public Tasks and Certain Other Acts (Journal of Laws of 2014 item 183, as amended) and the entry into force of the Act of 12 April 2019 on Amending the Act on Administrative Court Procedure and Certain Other Acts (Journal of Laws of 2019 item 934).

The electronic mailbox is a nationwide ICT platform which is a publicly available means of electronic communication[6]. It is used to transmit an electronic document to a public body. It is part of the ePUAP system[7]. It should be emphasised that sending a letter by an interested party to a public authority by electronic means to any e-mail address of the authority or the administrative court is not the same as submitting a letter via an electronic mailbox. The provision of Art. 54(1a) of the Act of 30 August 2002 on Administrative Court Procedure[8] requires that a complaint be filed electronically via ePUAP. This excludes the possibility of transmitting the document in another way, *e.g.*, by handing it over to the administrative court on a data carrier (CD).

Incidentally, only with regard to filing complaints and requests referred to in Section VIII of the CAP, the legislator left the possibility of filing them electronically based on § 5 of the Regulation of the Council of Ministers of 8 January 2002 on the Organisation of the Receipt and Examination of Complaints and Requests[9]. For this reason, the administrative courts have e-mail addresses to which only letters of this type, *i.e.*, complaints or requests, can be sent. It means that an administrative court may contact a party to the proceedings by sending letters to

[6] More on the ICT system used by a public entity to perform public tasks, *cf.* K. Chałubińska-Jentkiewicz, M. Karpiuk, *Prawo nowych technologii. Wybrane zagadnienia,* part IV: *Reorganizacja władzy. Prawa i obowiązki jednostki oraz władz publicznych w warunkach nowych technologii*, chapter 10: *Przestrzeń e-administracji i demokracji cyfrowej*, 2) *Informatyzacja działalności podmiotów realizujących zadania publiczne*, Lex online (published: LEX 2015).

[7] The ePUAP system is also connected with other solutions within e-government, *e.g.*, "CEPIK" or "obywatel.gov.pl".

[8] Consolidated text: Journal of Laws of 2022 item 329 (hereinafter referred to as the "AACP").

[9] Journal of Laws of 2002 no. 5 item 46.

any e-mail address specified by the latter, while the effectiveness of a party to the proceedings sending a letter to an administrative court depends on whether the former uses their profile on the ePUAP platform.

Principle of openness of administrative court procedure

Providing access to the files of administrative court proceedings is an implementation of the principle of openness of administrative court procedure[10]. Although until 2010 the provisions of the AACP did not contain a regulation explicitly stipulating a party's right to unlimited access to the files of an administrative court case, it was not disputed that they are entitled to it under Art. 51(3) of the Polish Constitution[11]. According to this provision, "Everyone shall have a right of access to official documents and data collections concerning himself. Limitations upon such rights may be established by statute." This applies both to administrative court files in their full scope and to administrative files while such files are in court after being transferred pursuant to Art. 54(2) AACP. The doctrine of administrative court proceedings treats the "official documents" and "data collections" used in the cited provision as very broad terms, covering all documents and materials that make up the case files[12].

As indicated in the literature on the subject, being familiar with the case file is a prerequisite for the reliable preparation of pleadings addressed to the administrative court and speeches at the hearing. Moreover, access to the case file allows a party to scrutinise the assessments made by the court and possibly challenge them through legal remedies[13].

Electronic access to administrative court case files

Pursuant to § 2(1) of the Decree of the President of the Republic of Poland of 27 May 2019 on the Manner of Handling the Administrative Court Case Files in Voivodeship Administrative Courts and the Supreme Administrative Court, a case file is created by order of the chairperson of the department[14]. Files in adminis-

[10] M. Jaśkowska, [in:] M. Jaśkowska, M. Masternak, E. Ochendowski, *Postępowanie sądowo-administracyjne,* Warszawa 2004, p. 78.

[11] Journal of Laws of 1997 no. 78 item 483.

[12] G. Łaszczyca, *Akta sprawy w ogólnym postępowaniu administracyjnym*, Chapter 6: "Udostępnianie akt sprawy", 6.2: "Podstawy prawne czynności udostępniania akt sprawy", 6.2.1: "Podstawy konstytucyjne" – Lex.

[13] Commentary to Art. 12a(3) in Section III "Zasady udostępniania akt stronom postępowania" Legalis – Art. 12a AACP ed. by Wierzbowski 2019, 6th ed., Drachal/Wiktorowska/Rząsa.

[14] Journal of Laws of 2019 item 1004 (hereinafter referred to as the "RACCF").

trative court proceedings are created in electronic form (electronic files) or in paper form. The choice of form in a particular case is left to the chairperson of the department (§2(2) RACCF). The irreversibility of the computerisation process in this matter is guaranteed by the provision of § 2(2) RACCF according to which, if the file of a given case is kept in electronic form, it is not possible to change its processing to paper form[15].

The construction of Art. 12a(1) AACP, which provides that "files shall be created in electronic or paper form", indicates that the two forms are equivalent, and the creation of electronic files does not oblige the court to maintain paper files in parallel. The literature on the subject suggests that the systematics of Art. 12a AACP may indicate that the legislator intended that the electronic form of files should play the primary role[16].

Administrative course files are a structured collection of documents compiled by the administrative court and sent or submitted by the parties and other entities in connection with the adjudication of a case[17]. At the stage of proceedings in the Voivodeship Administrative Court, in addition to the documentation submitted directly to it and the materials produced by it, the administrative files sent by the public administration body should be taken into account together with the complaint and the answer to the complaint. The importance in administrative court proceedings of administrative files which should be complete and orderly is indicated by the wording of Art. 133(1) *ab initio* AACP, which provides that "the court shall issue a judgment" on their basis. In the judgment of 12 September 2019, the Voivodeship Administrative Court (WSA) in Poznań overruled the contested decision because the administrative files submitted to it by the authority were so incomplete that they did not allow the Court to review the arguments and course of action of the Social Insurance Institution (ZUS)[18]. At the same time, as the

[15] It is significant that analogous irreversibility of the computerisation process at the level of creating files in public administration bodies is ensured by the provision of § 1(4) of Appendix No. 1 – Chancellery Manual (Regulation of the Prime Minister of 18 January 2011 on the Chancellery Manual, Uniform Material Lists of Files and Instructions on the Organisation and Scope of Activity of Company Archives, Journal of Laws of 2011 no. 14 item 67), which introduced a ban on the renewed indication of the traditional system in the event of prior indication of the Electronic Document Management system as the primary means of documenting the course of handling cases. The administrative files are sent to the Voivodship Administrative Court once the complaint and the answer to the complaint have been forwarded to it. Thus, the creation of administrative files in electronic form undoubtedly has an impact on the speed with which administrative court files are made available to a party in the ICT system after the party submits a request in this regard. The analogue form of administrative files requires that they be digitised in order to obtain their digital reproduction.

[16] Commentary to Art. 12a(4) in Section II "Zasady zakładania, prowadzenia i przechowywania akt" Legalis – Art. 12a AACP ed. by Wierzbowski 2019, 6th ed., Drachal/Wiktorowska/Rząsa.

[17] Cf. ruling of NSA of 20 December 2016, I OZ 1915/16, CBOSA.

[18] III SA/Po 452/19, CBOSA.

Supreme Administrative Court (NSA) pointed out in its judgment of 27 June 2019, "the obligation to issue a judgment on the basis of the case file means only the prohibition to go beyond the material in the case file"[19].

Since case files should be kept in order, the documentation in them shall be collected in chronological order. Pursuant to § 3(1) RACCF, an electronic case file consists of electronic documents received by the court, electronic documents produced by the court, and documents converted from paper to electronic form including metadata. If a paper document needs to be attached to a case file created in electronic form, then pursuant to § 4(1) RACCF the document shall be converted to electronic form by making its certified copy. If full conversion of a document from paper to electronic form is not possible due to technical reasons or unreasonable due to the costs of conversion, the basic data allowing for identification of the document, data relevant for the case and the parts of the document that can be converted are stored in the case file in electronic form (§ 4(3) RACCF).

A party's right to inspect the file shall include all letters, materials, and documents on the basis of which the administrative court, pursuant to Art. 133(1) AACP, adjudicates the case. According to § 5(1)(1) of the Internal Rules of Procedure of the Administrative Courts[20] and § 3(1)(1) of the Internal Rules of Procedure of the Supreme Administrative Court[21], the tasks related to making files available to parties in individual administrative courts are carried out by the judicial information divisions. Access to the file may consist in allowing a party to inspect the file, or to obtain copies, reproductions, or excerpts thereof.

Access to files in the ICT system can only take place as a result of a request submitted electronically. Pursuant to Art. 12b(2) *ab initio* AACP, a request for access to the files in the ICT system in the form of an electronic document is submitted to an administrative court via the ePUAP electronic mailbox. As stated above, making such a request, and sending it to an e-mail address is ineffective. This address should not be confused with the electronic mailbox of the administrative court. To send a letter to an administrative court electronically, the requesting party must have an account on the ePUAP platform and affix an electronic, trusted, or personal signature to the request.

The date of filing a letter requesting access to the files in the court ICT system is the date of entry of the letter into the court ICT system, as specified in the official certificate of receipt. The administrative court shall make the case file available on PASSA within 5 business days of the request. Importantly, subsequent

[19] I OSK 2153/17, CBOSA.

[20] Decree of the President of the Republic of Poland of 5 August 2015, Journal of Laws item 1177.

[21] Resolution of the General Assembly of Judges of the Supreme Administrative Court of 8 November 2010, Official Gazette of the Republic of Poland 2010 item 86, as amended.

documents included in the case file during the course of the proceedings can be viewed based on the previously granted access without the need to make further requests in the case.

Regulations on electronic service of letters in administrative court procedure

The issue of electronic service of letters in administrative court proceedings was regulated by the legislator in Art. 74a AACP. According to this provision: "§ 1 Service of letters by the court shall be affected by means of electronic communication if a party has fulfilled one of the following conditions:

1) filed a letter in the form of an electronic document via the electronic mailbox of the court or authority through which the letter is filed;
2) requested the court for such form of service and provided the court with their electronic address;
3) agreed to be served by such means and provided the court with their electronic address.

§ 2 If a party elects not to have letters served by electronic means of communication, the court shall serve the letter in the manner prescribed for a letter in a form other than the form of an electronic document. The declaration that service is no longer to be affected by electronic means of communication shall be made by an electronic document".

Importance of the party's will concerning the electronic service of documents

The provision of Art. 74a AACP cited above entered into force on 31 May 2019. From that moment on, communication between a party and an administrative court should be effected electronically if the party, pursuant to Art. 74a(1)(1) AACP, files a letter to an administrative court in electronic form, or – pursuant to Art. 74a(1)(2) AACP, files a letter in traditional/paper form and then requests the court to be served electronically, or if the administrative court requests the party to express their consent to being served letters electronically (Art. 74a(1)(3) AACP).

The following categorical wording of Art. 74a(1) AACP by the legislator: "Service of letters by the court shall be effected by means of electronic communication if…" and the simultaneous enumeration of three cases when the court is entitled to use this form of service indicates that the choice of this method of service of letters is left to the will of the party to the proceedings. There is also no doubt that this will must be expressed in a clear and unambiguous manner.

It also follows from Art. 74a(2) AACP that a party at any stage of the administrative court proceedings has the right to withdraw their consent and resign from electronic service of letters. Moreover, they may exercise this right repeatedly and without limitation in a proceeding.

The above analysis leads to the conclusion that the legislator, when constructing Art. 74a AACP, was highly concerned with taking into account the will of the party each time when it comes to electronic service of letters.

Electronic request for access to case files in administrative court proceedings

The analysis of one of the WSA judgments leads to a disturbing conclusion that an administrative court of the first instance, relying on the solution adopted in Art. 74a(1)(1) AACP, takes the view that if a party files any letter, including a request for access to the case file, in the form of an electronic document, then all letters in a given case – following this step – should be served in this mode[22]. However, an analysis of the above provision leads to an unambiguous conclusion that the legislator's intention when introducing the provision of Art. 74a AACP was to always leave the party the choice as to whether to accept electronic service. This is because the provision was formulated in such a way that there is no doubt that even if a party files a letter by electronic means – it may at the same time express their will to be served letters by the court in a traditional manner.

There is no doubt that Art. 74a(1)(1) AACP applies when a party files any substantive pleading in a case, e.g. in the form of a complaint or cassation appeal or interlocutory appeal. This action, as it were, automatically results in the administrative court's obligation, as a result of a substantive letter – especially one that is the execution of a remedy – to serve such a requesting party all letters in the case electronically, as it may be concluded that the requesting party chose this form of communication with the court in the given administrative court case. At the same time, as it has already been said, even if the complainant files such a substantive letter, such as a complaint or cassation appeal or interlocutory appeal in electronic form, pursuant to Art. 74a(2) AACP, they may express the will to receive all correspondence in traditional form. Moreover, as noted above, the applicant may repeatedly in a proceeding express and withdraw their desire to correspond with the court electronically, thereby switching to a traditional form.

It should be emphasised that an analysis of the construction of Art. 74a(1) and (2) AACP leads to the conclusion that the way of construing of Art. 74a(1) indicated above should not apply to a non-substantive letter which is not an expression

[22] Ruling of WSA in Poznań of 3 March 2020, II SA/Po 440/19.

of execution of a remedy in the form of *e.g.* a complaint, but which is only a request for electronic access to the case file. In this case – which needs to be emphasised – the person filing such a request would not be able to simultaneously express their resignation from the electronic exchange of the requested correspondence with the administrative court, because it is obvious that the simultaneous electronic filing of a request for access to the case file and expression of the will referred to in Art. 74a(2) AACP would nullify the sense and logic of this action. By doing so, the requesting party would be contradicting themselves. Therefore, mere filing of a request for electronic access to a case file with the court should not result in any further correspondence – other than the access to the file itself – being sent to the requesting party in electronic form.

Priority of electronic form over paper form

The duality of solutions allowing for the creation of case files both in paper and electronic form results in the fact that a party has the possibility to demand that correspondence be addressed to them and that letters be served by the administrative court in traditional form or by means of electronic communication. Moreover, in the same case, a party – who has consented or requested it – may be served correspondence electronically, while a participant in the proceeding may be served in a traditional manner or vice versa.

In one of its recent judgments, NSA indicates that the electronic form should take precedence over the paper form if a party has agreed to electronic service of letters. Namely, in its ruling of 13 December 2019 (I OZ 1072/19 – CBOSA), NSA took the position that in a situation where a party files a complaint in both paper and electronic form, the administrative court is "bound by the fact of filing the complaint... in the form of an electronic document". For this reason, NSA found prior service by WSA of the summonses in traditional form to be ineffective. Thus, in a case – rare in practice – where a party submits the same complaint to an administrative court in both traditional and electronic forms, the latter has been given priority.

Conclusion

The provision of Art. 74a(1)(1) AACP, in force for one year now, undoubtedly constitutes a significant step forward in the functioning of the administrative judiciary, which may be viewed in the context of increasing the level of accessibility to the court for the parties by introducing the obligation to exchange correspondence with the parties in electronic form, provided that they express their will to

that effect. At the same time, it must be remembered that its application cannot take place without and against the will of the parties and their attorneys at law. Directing all correspondence to a party – and not only providing access to the case file – electronically, after the party has filed an application for electronic access to the case file, would nullify the legislator's assumptions underlying the construction of Art. 74a AACP. In principle, the legislator made such a method of service fully dependent on the express and undoubted consent of a party. Electronic filing of a request for access to the case file obligates the administrative court only to provide access to the case file in that form. If further correspondence between the administrative court and the party is to be conducted in this form, the party or their attorney at law should file an appropriate request referred to in Art. 74a(1)(2) AACP, or the administrative court should request their consent under Art. 74a(1)(3) AACP to use electronic means of service.

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Małgorzata Gajda-Durlik
WSPiA University of Rzeszow
ORCID 0000-0002-3432-7832
malgorzata.gajda-durlik@wspia.eu

Use of information technologies in administrative evidence proceedings – selected issues

Keywords: administrative proceedings, evidence proceedings, electronic document, electronically recorded letter, electronic material

Summary. The article deals with the basic issues related to the use of modern information and communication solutions in administrative evidence proceedings. The assessment of the functionality of the electronic document, referred to in Article 3(2) in conjunction with Article 3(1) of the Act on Informatisation of the Activities of Entities Performing Public Tasks in administrative evidence proceedings, in the context of changes in the Code of Administrative Procedure resulting from the Act on Electronic Delivery of Documents, was treated as particularly important. In connection with the resignation – as a result of the amendment – from using *i.e.,* the following terms: "electronic document", "form of an electronic document" within the meaning of the Act on Informatisation of the Activities of Entities Performing Public Tasks, the assessment of the legal character of an electronic document in administrative proceedings becomes an even more complex legal issue than it used to be. It is therefore fundamental to define the semantic scope of the term "electronic document" in legal terms in the context of regulations of the Code and to assess its essence and function in the phase of administrative evidence proceedings. In particular, it will be crucial to determine the relationship between the "document recorded in electronic form" within the meaning of Article 14 § 1a of the Code of Administrative Procedure and the "electronic document", as well as between it and the document in electronic form admitted as evidence and other evidence recorded electronically in the administrative evidence procedure.

Informatyzacja administracyjnego postępowania dowodowego – zagadnienia wybrane

Słowa kluczowe: postępowanie administracyjne, postępowanie dowodowe, dokument elektroniczny, pismo utrwalone w postaci elektronicznej, materiał elektroniczny

Streszczenie. W artykule poruszono podstawowe zagadnienia związane z wykorzystywaniem nowoczesnych rozwiązań informatyczno-komunikacyjnych w administracyjnym postępowaniu dowodowym. Jako szczególnie istotną potraktowano ocenę funkcjonalności dokumentu elektronicznego, o którym stanowi art. 3 pkt 2 w zw. z art. 3 pkt 1 ustawy o informatyzacji działalności podmiotów realizujących zadania publiczne w administracyjnym postępowaniu dowodowym, w kontekście zmian w k.p.a. wynikających z ustawy o doręczeniach elektronicznych. W związku z rezygnacją – w wyniku nowelizacji - z operowania m.in. pojęciami takimi jak: „dokument elektroniczny", „forma dokumentu elektronicznego" w rozumieniu ustawy o informatyzacji działalności podmiotów realizujących zadania publiczne, ocena charakteru prawnego dokumentu elektronicznego w postępowaniu administracyjnym staje się jeszcze bardziej złożonym - niż dotychczas - zagadnieniem prawnym. Zasadnicze

znaczenie posiada zatem wyznaczenie zakresu znaczeniowego pojęcia „dokument elektroniczny" w ujęciu prawnym - w kontekście regulacji Kodeksu oraz ocena jego istoty i funkcji w fazie administracyjnego postępowania dowodowego. Kluczowe dla rozważanej materii będzie w szczególności określenie relacji pomiędzy „pismem utrwalonym w postaci elektronicznej" w znaczeniu art. 14 § 1a k.p.a., a „dokumentem elektronicznym", a także pomiędzy nim a dowodem z dokumentu w postaci elektronicznej oraz innym materiałem dowodowym utrwalonym elektronicznie w administracyjnym postępowaniu dowodowym.

1. Introduction

The dynamic development of the information society, and thus the strengthening of the role and frequency of use of modern information and communication technologies in the private and public sphere, measurably affects the qualitative changes in administrative proceedings resulting from the conversion of paper-based administration to electronic administration. Processes related to the use of modern mechanisms enabling fast data transmission, being a consequence of the combination of IT and communication solutions, become first of all an integral element in the sphere of communication between public administration bodies and between them and parties or other entities in the course of proceedings. Apart from communication, these technologies should also increasingly be applied in the evidence phase of the proceedings as an effective tool for obtaining data and information in connection with establishing the facts of a case, and as an efficient mechanism for conducting evidence proceedings. In this respect, particularly important is the assessment of the functionality of the electronic document, referred to in Article 3(2) in conjunction with Article 3(1) of the Act on Informatisation of the Activities of Entities Performing Public Tasks[1] in administrative evidence proceedings, considered in the context of changes in the Code of Administrative Procedure resulting from the Act on Electronic Delivery of Documents[2]. After the changes introduced to the Code of Administrative Procedure by the above-mentioned Act, in connection with the resignation from using *i.e.*, the following terms: "electronic document", "form of an electronic document" within the meaning of the Act on Informatisation of the Activities of Entities Performing Public Tasks, the assessment of the legal character of an electronic document in administrative proceedings becomes an even more complex legal issue than it used to be[3]. It is

[1] Cf. the Act of February 17, 2005 (Journal of Laws of 2021 item 2070, as amended); abbreviated as AIAE.

[2] Cf. the Act of November 18, 2020 (Journal of Laws of 2020 item 2320, as amended); abbreviated as AEDD.

[3] Problems in assessing the legal nature of the electronic document in administrative proceedings, as well as in adopting conclusive assessments of the essence and function of this document in administrative proceedings are pointed out *i.e.,* by B. Kwiatek. Cf. B. Kwiatek, *Dokument elektroniczny w ogólnym postępowaniu administracyjnym*, Warszawa 2020, p. 105 ff.; see also G. Sibiga, *Ko-*

fundamental to define the semantic scope of the term "electronic document" in legal terms in the context of regulations of the Code of Administrative Procedure[4] and to assess its essence and function in the phase of administrative evidence proceedings. In particular, it will be crucial to determine the relationship between the "document recorded in electronic form" within the meaning of Article 14 § 1a of the Code of Administrative Procedure – in connection with the consolidation of the statutory nomenclature – and the "electronic document", as well as between it and the document in electronic form admitted as evidence and other evidence recorded electronically in the administrative evidence procedure.

2. Advances in the use of information technologies in administrative evidence proceedings

Significant for the development of the process of using information and communication technologies in administrative proceedings is *i.e.*, the Act of November 18, 2020, on Electronic Delivery of Documents. By virtue of the indicated Act, as of October 5, 2021, substantial changes were introduced in the construction of the principle of written form of administrative proceedings, previously expressed in Article 14 § 1 CAP[5]. Pursuant to the added Article 14 § 1a CAP: "Cases shall be handled and resolved in writing and recorded in paper or electronic form...". The introduced construction was based not only on the principle of equivalence of letters in administrative proceedings regardless of the form of their recording (on paper or electronically), but it was referred to *expressis verbis*, next to the form of resolving the case, to the procedural activities of each phase of the administrative proceedings. The changes resulting from the indicated Act also indirectly touch upon the important issue of expanding the functionality of the electronic document in evidence proceedings. Pursuant to the derogated provision of Article 14 § 1 CAP, until the effective date of the amendment, cases had to be resolved in writing or in the form of an electronic document within the meaning of the Act of February 17, 2005, on Informatisation of the Activities of Entities Performing Public Tasks, delivered by electronic means. A linguistic interpretation of this provision indicated, first, that the form of the electronic document was not a variation of the written form, but was a form separate from the written form – which significantly limit-

munikacja elektroniczna w Kodeksie postępowania administracyjnego. Komentarz, Warszawa 2011, p. 53 ff.; G. Szpor, [in:] G. Szpor, Cz. Martysz, K. Wojsyk, *Ustawa o informatyzacji działalności podmiotów realizujących zadań publiczne. Komentarz,* Warszawa 2015, p. 64 ff.

[4] Cf. the Act of June 14, 1960 (Journal of Laws of 2021 item 735, as amended); abbreviated as CAP.

[5] Cf. A. Wróbel, commentary to Article 14 CAP, [in:] M. Jaśkowska, M. Wilbrandt-Gotowicz, A. Wróbel, *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*, LEX/el. 2022.

ed its significance in the course of the proceedings, and second, that the electronic document was an alternative to the written form – an equivalent form of resolving the case[6]. There were fundamental doubts as to the meaning of the term "resolving the case" referred to in Article 14 § 1 CAP. The question arose as to whether the term "resolving the case" should be principally associated – in accordance with the literal wording of the provision – with the stage of completion of the proceedings or whether it should equally refer to other procedural actions of the authority and the parties (participants) in the course of proceedings[7]. The nomenclature used by the legislator in Article 14 § 1 CAP "Cases shall be... resolved..." referred directly to the terminology used by the legislator in Article 104 CAP which reads: "A public administration body shall resolve a case by issuing a decision, unless the provisions of the Code provide otherwise". "A decision resolves the case on its merits in whole or in part or concludes the case otherwise at a particular instance". The wording of Article 104 CAP therefore points to the decision as the basic form of resolving an individual case[8]. Analogous conclusions apply to rulings, both those constituting incidental acts[9] and those which by their nature represent the procedural form of the result of the proceedings in the case being settled[10].

However, crucial for the assessment of the semantic scope of the term "resolving the case", in the meaning adopted in Article 14 § 1 CAP, is the teleological and axiological dimension of the principle of written form of proceedings expressed – until the entry into force of the amendments arising from the Act on Electronic

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[6] Cf. R. Kędziora, commentary to Article 14 CAP, [in:] R. Kędziora, *Kodeks postępowania administracyjnego. Komentarz,* Warszawa 2017; H. Knysiak-Sudyka, commentary to Article 14 CAP, [in:] H. Knysiak-Sudyka, *Kodeks postępowania administracyjnego. Komentarz,* Warszawa 2019; A. Wróbel, commentary to Article 14 CAP, [in:] M. Jaśkowska, M. Wilbrandt-Gotowicz, A. Wróbel, *Komentarz aktualizowany...*, LEX/el. 2022.

[7] A. Wróbel argues that the electronic document referred to in Article 14 CAP is only a form of resolving the case, therefore the term "decision in the form of an electronic document", "decision having the form of an electronic document" etc. is legitimate. Cf. A. Wróbel, commentary to Article 14 CAP, [in:] A. Wróbel, M. Jaśkowska, M. Wilbrandt-Gotowicz, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2020. Another position is presented by Z. Kmieciak, who refers this form both to resolving the case and other procedural actions of the authority, the parties, other participants in the course of proceedings. Cf. Z. Kmieciak, commentary to Article 14 CAP, [in:] Z. Kmieciak, W. Chróścielewski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2019.

[8] More on this cf. J. Jendrośka, [in:] J. Borkowski, J. Jendrośka, R. Orzechowski, A. Zieliński, *Kodeks postępowania administracyjnego. Komentarz,* Warszawa 1989, p. 186.

[9] These include rulings made at various stages of the proceedings, i.e., initiation of the proceedings, investigation, decision-making, in the timespan of the proceedings from the date of its initiation until the final decision. More on this G. Łaszczyca, *Postanowienie administracyjne w ogólnym postępowaniu administracyjnym,* Warszawa 2011, p. 103 ff.

[10] *E.g.*, the ruling on the refusal to initiate proceedings (Article 61a § 1 and 2 CAP), ruling on correcting a decision (Article 113 § 1 and 3 CAP). More on this G. Łaszczyca, *Postanowienie administracyjne...,* p. 103 ff.

Delivery of Documents – in Article 14 § 1 CAP, and as a result of the amendments – in Article 14 § 1a CAP. The principle of written form of proceedings based on relative criteria in the administrative process in relation to the principle of oral form of proceedings, as an exception arising from Article 14 § 2 CAP, determines the sphere of proportions relevant for the form of proceedings (hearing, proceedings in chambers), remaining in direct relation to the institution of holding sessions in chambers, typical for the administrative process. Therefore, the principle of a written record in the course of proceedings, with the admission of a surrogate in the form of an electronic form of actions, as a manifestation of the transformation of public administration from "paper-based" to "electronic", remains the rule which is an external expression not only of the guarantee of precision in recording the actions having legal significance in the case, but also of the transparency of proceedings and certainty of legal transactions[11]. The essence and purpose of the principle of written form lies primarily in preventing possible disputes as to the content of the legal relations established in the proceedings[12]. It results basically from technical issues related to the duration of the investigation conducted as a rule in the form of sessions in chambers; special affirmation of documentary evidence; allowing the possibility of indirect performance of evidence taking activities – *e.g.* giving testimony in writing, submitting written statements; written record of evidence produced in the course of proceedings – *e.g.* evidence of hearing a party, witness, expert, evidence of inspection and expert opinions prepared with the participation of a representative of a public administration body. Thus, the principle of written form of proceedings is a technique for performing evidence taking and legal activities in the course of proceedings that is appropriate to the prevailing form of evidence proceedings in administrative cases[13]. Consequently, the meaning of the phrase contained in Article 14 § 1 CAP "Cases shall be... resolved..." could not be equated with the very act ending the proceedings. Its essence should each time be reduced to the form of recording in the case files all procedural actions that are significant for the outcome of the case and the course of proceedings[14]. As a consequence, the written form or the equivalent electronic document form should

[11] Cf. M. Gajda-Durlik, *Zasady ogólne postępowania administracyjnego a zasady ogólne postępowania cywilnego,* [in:] *System prawa administracyjnego procesowego,* G. Łaszczyca, A. Matan (eds.), *Zasady ogólne postępowania administracyjnego, vol. II, part 2,* J.P. Tarno, W. Piątek (eds.), Warszawa 2018, p. 612 ff., see also H. Knysiak-Sudyka, commentary to Article 14 CAP, [in:] H. Knysiak-Sudyka, *Kodeks...*, p. 167.

[12] Cf. J.P. Tarno, *Zasady ogólne KPA w orzecznictwie Naczelnego Sądu Administracyjnego*, "Studia Prawno-Ekonomiczne" 1986, vol. 36, p. 59.

[13] Cf. M. Gajda-Durlik, *Zasady ogólne postępowania…*, p. 612 ff.

[14] Cf. Z. Kmieciak, commentary to Article 14 CAP, [in:] Z. Kmieciak, W. Chróścielewski, *Kodeks postępowania…,* Warszawa 2019; see also H. Knysiak-Sudyka, commentary to Article 14 CAP, [in:] H. Knysiak-Sudyka, *Kodeks...,* p. 167.

refer both to the act that ends the proceedings in a case (decision, ruling, settlement), as well as other activities of the authority (e.g. summons, minutes, notes, notifications) or the parties or other participants (e.g. applications, i.e. requests, explanations, appeals, complaints) in the course of the proceedings; however, the use of the form of an electronic document within the procedural activities of the authority or the parties or other participants of the proceedings and its possible use as evidence in administrative proceedings depended on whether such a possibility was explicitly provided for in the provisions of the Code[15].

Here, it should be noted that while there were no doubts about the possibility to use an electronic document *i.e.*, as a form of recording the actions in proceedings to the extent permitted by law, including as a form of resolving a case and as a form of an application, it was not obvious whether an electronic document (within the meaning of Article 3(2) in conjunction with Article 3(1) AIAE) could be assigned the function of evidence in administrative proceedings[16]. As emphasised in literature, the legal solutions adopted by the legislator in the field of electronic document were created primarily for the needs of its use by the electronic public administration, and not *stricte* for the needs of general administrative proceedings[17]. Therefore, the problem of using an electronic document as evidence in a case has gradually gained importance along with a successive – staggered – process of implementing IT solutions throughout the administrative proceedings, including the phase of evidence proceedings.

The first significant step towards the use of information and communication technologies in the operation of public administration in general was the Act of February 17, 2005, on Informatisation of the Activities of Entities Performing Public Tasks[18]. It is understood that this act for the first time introduced a legal definition of the concept of electronic document, applicable in relations with public entities, not excluding administrative proceedings[19]. Article 16.3 AIAE provides for authorisation of the Prime Minister to issue an ordinance regulating the organisational and technical conditions for delivery of electronic documents and the form of official certification of receipt of such documents by the addressees[20].

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[15] Cf. Z. Kmieciak, commentary to Article 14 CAP, [in:] Z. Kmieciak, W. Chróścielewski, *Kodeks postępowania…*, Warszawa 2019.

[16] According to A. Wróbel, an electronic document within the meaning of Article 14 § 1 CAP should not be identified with an electronic document as evidence (means of evidence) within the meaning of a private or public document. Cf. A. Wróbel, commentary to Article 14 CAP, [in:] A. Wróbel, M. Jaśkowska, M. Wilbrandt-Gotowicz, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2020.

[17] Cf. B. Kwiatek, *Dokument elektroniczny…*, p. 98 ff.

[18] Journal of Laws no. 64 item 565.

[19] G. Sibiga, *Komunikacja elektroniczna...*, p. 57.

[20] Cf. the Ordinance of the Prime Minister of September 29, 2005, on the Organisational and Technical Conditions for Serving Electronic Documents to Public Entities (Journal of Laws no. 200 item 1651).

However, the changes introduced to the Code of Administrative Procedure by the aforementioned Act concerned a narrow range of issues, *i.e.*: delivery by electronic means (Articles 39[1] and 46 CAP), compliance with the time limit (Article 57 CAP), the date of commencement of the proceedings when filing a request by electronic means (Article 61 CAP), the manner of filing a request (Article 63 CAP). The structure and method of preparing letters in the form of electronic documents *stricte* for the needs of administrative proceedings; organisational and technical conditions for serving letters in the form of electronic documents, including the form of official certification of receipt of such letters by their addressee; the method of making copies of electronic documents available, taking into account the need to ensure security in the use of letters in the form of electronic documents and efficiency of the proceedings, were determined in the Ordinance of the Minister of Internal Affairs and Administration of November 27, 2006 on Preparing and Serving Letters in the Form of Electronic Documents[21], issued under the delegation of Article 39[1] § 2 CAP. The use of IT means in general administrative proceedings found normative expression only in those provisions that were introduced to the Code of Administrative Procedure. In the administrative process, there was no direct reference to the general application of the Act on Informatisation of the Activities of Entities Performing Public Tasks. As a consequence, the importance of the electronic document in the evidence taking phase was negligible[22].

Therefore, the evolution of the procedural situation (essence and function) of the electronic document in the general administrative procedure, including in the phase of evidence proceedings, was significantly influenced only by the subsequent amendments to the administrative procedure, primarily resulting from the changes noted in 2010-2013 and then in 2014-2021. Firstly, by virtue of the amendment of February 12, 2010 of the Act on Informatisation of the Activities of Entities Performing Public Tasks[23], regulations defining the rules of functioning of the electronic platform of public administration services (including the ePUAP trusted profile, signature confirmed by the ePUAP trusted profile and the ePUAP system signature), the rule of technological neutrality and changes in the scope of official certification of receipt and definition of an IT data carrier were introduced. In addition, one implementing act on the electronic document was introduced[24]. The changes in the provisions of the Code of Administrative Procedure included:

[21] Journal of Laws no. 227 item 1664.

[22] For more on this topic, cf. G. Sibiga, *Informatyzacja postępowania administracyjnego. Postulaty zmian w przepisach prawa*, El.Adm. 2008, no. 4, p. 15 ff.

[23] Cf. the Act of February 12, 2010, Amending the Act on Informatisation of the Activities of Entities Performing Public Tasks and Certain Other Acts (Journal of Laws no. 40 item 230).

[24] Cf. the Ordinance of the Prime Minister of September 14, 2011, on Preparing and Serving Electronic Documents and Making Forms, Templates and Copies of Electronic Documents Available (Journal of Laws of 2018 item 180).

resolving cases in the form of an electronic document (Article 14 § 1 CAP), delivery of documents by electronic means (Article 39[1] § 1, Article 46 § 4-6 CAP), summonses with the use of an electronic document (Article 54 § 2 CAP), calculation of time limits for sending letters in the form of an electronic document (Article 57 § 5(1) CAP), the way of submitting applications in the form of an electronic document (Article 63 § 1, 3a and 4 CAP), issues of access to letters in the form of an electronic document (Article 73 § 3 CAP), issuing and serving rulings and decisions in the form of an electronic document (Article 107 § 1, Article 109 § 1, Article 124 § 1, Article 125 § 1 CAP), issuing certificates in the form of an electronic document (Article 217 § 4 and Article 220 § 1 CAP). In the presented scope, particularly important for the phase of administrative evidence proceedings was the amendment of Article 14 § 1 CAP, whose wording provided not only for the possibility of resolving cases in the traditional written form, but also in the form of an electronic document, served by electronic means. In addition, it was assumed that the general reference to the Act on Informatisation of the Activities of Entities Performing Public Tasks unambiguously determined the application of the provisions of this Act throughout the administrative proceedings[25]. The literature also emphasised the importance of changes that involved the introduction of a catalogue of permitted methods of authentication of electronic documents, *i.e.*, using an electronic signature as well as the ePUAP trusted profile. They have noticeably increased the availability of e-services for addressees of activities of public administration bodies[26].

Subsequent amendments, falling between 2014 and 2021, have generally focused on the introduction of mechanisms and instruments to improve the implementation of administrative actions electronically using electronic tools. The implementation of new solutions by the Act of January 10, 2014[27] allowed not only to expand the possibility of using electronic means of communication in administrative procedure, but also to use, to a wider extent than before, an electronic document in the proceedings. Among others, the provisions which so far limited the recording of certain actions in the proceedings only to the letter in paper form[28] were revised. The modernisation of administrative proceedings was reflected in changes concerning: power of attorney in the form of an electronic document (Article 33 § 2, 2a and 3a CAP), delivery of documents by electronic means (Article 39[1] § 1

[25] Cf. B. Kwiatek, *Dokument elektroniczny…*, p. 83.

[26] Cf. B. Czerwińska, *Wnoszenie i doręczanie pism za pomocą środków komunikacji elektronicznej w e-Urzędzie*, [in:] J. Korczak (ed.), *Województwo – region – regionalizacja 15 lat po reformie terytorialnej i administracyjnej,* Wrocław 2013, p. 169.

[27] Cf. the Act Amending the Act on Informatisation of the Activities of Entities Performing Public Tasks and Certain Other Acts (Journal of Laws item 183).

[28] Cf. rationale to the government draft (7th term, Sejm paper no. 1637), p. 44.

and 1a-1d, Article 40 § 4, Article 41 § 1 and Article 46 § 3-10 CAP), summonses in the form of an electronic document or with the use of an electronic document and summons requirements (Article 50 § 1, Article 54 § 1(4), Article 91 § 2 CAP), submitting applications in the form of an electronic document (Article 63 § 3a, 3b and 5 CAP), annotations in the form of an electronic document (Article 72 § 1 and 2 CAP), access to the case file by electronic means (Article 73 § 3 CAP), certification of conformity with the original of a copy of a document in the form of an electronic document (Article 76a § 2a CAP), certificates in the form of an electronic document (Article 220 § 3-5 CAP). Also, a major change in the rules related to the commencement of the eIDAS Regulation[29] on July 1, 2016, created a new legal framework for the use of ICT tools in administrative proceedings. The eIDAS regulation – directly applicable in the Polish legal order – contains regulations concerning *i.e.*, the legal framework for electronic signatures, electronic seals, electronic time stamps, electronic documents, registered electronic delivery services and certified website services. The process of adapting Polish law to the requirements of the eIDAS regulation was reflected in the newly enacted Act of September 5, 2016, on Trust and Electronic Identification Services[30], as well as in the Act of November 18, 2020, on Electronic Delivery of Documents.

Within the regulations of the Code, adaptation amendments have taken place gradually. In the first phase they were focused on: powers of attorney in electronic form and authentication of their copies (Article 33 § 2a and 3a CAP), instructions related to the receipt of letters in the form of electronic documents (Article 46 § 4(3) CAP), affixing a signature to a summons using an electronic document (Article 54 § 2 CAP), requirements for applications lodged in the form of an electronic document (Article 63 § 3a(1) CAP), the way of access to case files in the ICT system (Article 73 § 3 CAP), certification of conformity with the original of copies of documents prepared in the form of an electronic document (Article 76a § 2a CAP), components of decisions and rulings (Article 107 § 1 CAP and Article 124 § 1 CAP)[31].

In the next stage, on the occasion of changes aiming at the de-formalisation and legalisation of the administrative procedure[32], the use of IT tools was intensified by introducing *i.e.*: copies of case files in the form of an electronic document, in order to transmit them together with a reminder (Article 37 § 4 CAP), delivery of

[29] Regulation of the European Parliament and of the Council of July 23, 2014, on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ EU L 257, p. 73); hereinafter: eIDAS.

[30] Journal of Laws of 2016 item 1579.

[31] Cf. amendments resulting from the Act of September 5, 2016, on Trust and Electronic Identification Services (Journal of Laws of 2016 item 1579).

[32] Cf. the Act of April 7, 2017, on the Amendment of the Act – Code of Administrative Procedure and Some Other Acts (Journal of Laws of 2017 item 935).

letters to an electronic mailbox to certain public entities acting as a party or other participant in administrative proceedings (Article 39^2 CAP), certification of conformity with the original of a copy of a document by an authorised official of the authority conducting the proceedings (Article 76a § 2b CAP), elements of a decision issued in the form of an electronic document (Article 107 § 1 CAP), the possibility of drawing up a settlement in the form of an electronic document (Article 117 CAP), defining the date of issuing an objection, a decision or a ruling ending the proceedings in the case in the form of an electronic document – for a tacit resolution of the case (Article 122b(3) CAP), the possibility to issue a certificate by way of a ruling in the form of an electronic document – for a tacit resolution of the case (Article 122f CAP), the obligation to file an application in the form of an electronic document when filing an application using an electronic form in simplified proceedings (Article 163c § 1 and 3 CAP). The introduction of those solutions, which made the usefulness of the electronic document more realistic, was assessed as particularly important for the administrative evidence procedure. It has become the primary means of communicating statements of intent, knowledge, or other electronically (digitally) recorded statements (information) by electronic means between public entities and between public entities and a non-public entity[33]. The general rules of evidence proceedings arising from objective truth and the authority's evidentiary discretion, including the rules of the open catalogue of means of evidence, did not allow either the possibility of treating an electronic document as a source of evidence to be ruled out (nor did they exclude the possibility of transmitting it directly to the authority on IT data carriers). However, it should be emphasised that despite the positively evaluated usefulness of the electronic document in administrative evidence proceedings, the Code itself lacked a legal definition of this document. The term "electronic document" appeared *expressis verbis* only in Article 54 § 2 CAP and in Article 117 § 1 CAP. In other provisions, whenever they provided for the right to use an electronic document, other wordings appeared at various times, such as "form of an electronic document" (Article 14 § 1 CAP), "letter in the form of an electronic document" (*e.g.*, Article 73 § 3 CAP), "document in the form of an electronic document" (Article 46 § 4-6 CAP). Regardless of the terminological inconsistency, the reference in Article 14 § 1 CAP to the "form of an electronic document" within the meaning of the provisions of the Act on Informatisation of the Activities of Entities Performing Public Tasks, has given rise to the claim that in determining the meaning of these terms it is necessary to use the definition of an electronic document within the meaning

[33] Cf. B. Kwiatek, *Dokument elektroniczny…*, p. 98.

of Article 3(2) AIAE, taking into account the modification of the legal solutions of this Act by the provisions of the Code[34].

After the changes introduced to the Code of Administrative Procedure by the Act on Electronic Delivery of Documents, the legislator has consistently abandoned the term of "electronic document" within the meaning of the Act on Informatisation of the Activities of Entities Performing Public Tasks. The conceptual changes are reflected not only in Article 14 § 1a CAP, which is a vehicle of the general principle of written form of proceedings and in the provisions relating to the procedural forms of implementation of the principle in the course of proceedings, but also in the provisions contained in those items of the Code of Administrative Procedure which have been directly or indirectly devoted to evidence proceedings (*e.g.* Article 76a § 2a CAP, Article 220 § 3 CAP). In this state of affairs, the problem of legal position – the essence and function of the electronic document defined in Article 3(2) AIAE in administrative evidence proceedings does not lose its relevance. In particular, the question of the forms of procedural actions of evidence proceedings, documents and other legally relevant data that can be materialised in these proceedings in electronic form – an electronic document, and thus, in essence, the problem of its scope of application in this phase of the proceedings, requires consideration and verification.

3. Use of IT tools in administrative evidence proceedings

3.1. Electronically recorded letter vs. electronic document in administrative evidence proceedings

The starting point for consideration of the use of IT tools in the administrative proceedings will be to confront the concept of "a letter recorded in an electronic form", which for the purpose of determining the form of conducting and resolving a case in the administrative proceedings is provided by Article 14 § 1a CAP, with the concept of "an electronic document", defined in the Act on Informatisation of the Activities of Entities Performing Public Tasks.

Pursuant to Article 14 § 1a CAP: "Cases shall be handled and resolved in writing and recorded in paper or electronic form...". The provision of Article 14 § 1a CAP, the normative meaning of which, just as that of the previously binding Article 14 § 1 CAP, establishes the principle of written form of procedure, means the obligation to record the procedural steps in the course of the proceedings and resolve the case by means of a letter in written form on paper or in an electronic

[34] Cf. G. Sibiga, *Komunikacja elektroniczna…*, p. 51 ff; see also B. Kwiatek, *Dokument elektroniczny…*, p. 106 ff.

written form. The new item of Article 14 CAP, *i.e.* § 1a, notwithstanding the use of uniform terminology – "letter" – to define the form of procedural actions and the form of resolving cases, as well as clear reference of a letter recorded on paper or electronically to procedural actions in the entire course of proceedings, also eliminates the discussion caused in the doctrine by the appearance in Article 14 § 1 CAP – in addition to the written form – also the form of an electronic document[35]. Nevertheless, even when the provision of Article 14 § 1 CAP was in force, it was rightly emphasised that the adoption of "the form of an electronic document"[36] did not constitute a denial or a qualitative change in the very principle of written form of proceedings. The introduction of the term "in the form of an electronic document" was only a manifestation of the adaptation of the principle of written form to the new technical conditions, while maintaining its previous essence[37]. Taking into account the above, it should be noted that the amendment introduced by the Act on Electronic Delivery of Documents is merely structuring and clarifying in this respect; it does not change the current normative meaning of the provisions of the Code of Administrative Procedure. Under the modern view of the principle of written form of proceedings, procedural actions should be expressed in writing (textually), regardless of the form of the carrier (i.e., paper, or electronic)[38]. The written form means only the condition of expression by writing, *i.e.*, as a text consisting of *i.e.*, letters, digits, and other special characters, fixed on a carrier that allows the reproduction of the content and form of the text[39]. Other forms are, for example, oral, audiovisual or graphic, where information is transmitted by means of an image[40]. This thesis is confirmed not only by the wording of Article 14 § 1a

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[35] The issues raised in the doctrine are pointed out by B. Kwiatek, *Dokument elektroniczny…*, p. 153 ff.

[36] Cf. the Act of February 12, 2010, Amending the Act on Informatisation of the Activities of Entities Performing Public Tasks and Certain Other Acts (Journal of Laws no. 40 item 230).

[37] Cf. M. Cherka, [in:] R. Hauser, M. Wierzbowski (eds.), *Kodeks postępowania administracyjnego. Komentarz,* Warsaw 2017, p. 143; also B. Kwiatek, *Dokument elektroniczny…*, p. 147. G. Sibiga emphasised, based on the validity of Article 14 § 1 CAP, that the term "form" ("written form", "form of an electronic document") refers in Article 14 § 1 CAP to the manner of written expression. Therefore, the "form" and "expression" – the latter understood as the materialisation of the former – are distinct concepts. Consequently, the form of an electronic document is an electronic expression of recording information – a subtype of the written form. Cf. G. Sibiga, *Komunikacja elektroniczna w Kodeksie postępowania administracyjnego. Komentarz*, LexisNexis 2011; also A.G. Citko, *Rewolucja czy ewolucja? Zmiany w postępowaniu administracyjnym i postępowaniu sądowo administracyjnym*, "Edukacja Prawnicza" 2010, no. 12, p. 3.

[38] Cf. B. Kwiatek, *Dokument elektroniczny…*, p. 147.

[39] Cf. G. Szpor, *Administracyjne problemy informatyzacji*, [in:] J. Supernat (ed.), *Między tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi,* Wrocław 2009, p. 721.

[40] Cf. P. Pietrasz, I. Szczepańska, *Nowe technologie w podatkowym postępowaniu dowodowym – wybrane zagadnienia*, [in:] F. Dowgier (ed.), *Ordynacja podatkowa. Stan obecny i kierunki zmian*, Białystok 2015, p. 87.

CAP, but also by the provisions constituting a manifestation of the implementation of the principle of written form in the course of proceedings. The legislator has consistently carried out unification of the statutory nomenclature for determining the form of procedural actions, including in the phase of evidence proceedings, as well as the form of resolving the case – using the term "letter", regardless of the form of its recording (paper or electronic). Whenever reference is made to a letter recorded in electronic form, it is technically understood to mean an electronic document, as an electronic form of materialisation of textual information[41].

From the perspective of the assessment of the semantic scope of the terms: "a letter recorded in an electronic form" within the meaning of Article 14 § 1a CAP and "an electronic document" within the meaning of the provisions of the Act on Informatisation of the Activities of Entities Performing Public Tasks, a separate issue is that the Code term "a letter recorded in an electronic form" has, on the one hand, a narrower meaning than the term "an electronic document" and, on the other hand, the legal existence of an electronic document in proceedings depends on the fulfilment of the legal and procedural requirements of the Code.

The provision of Article 3(2) in conjunction with Article 3(1) AIAE, while defining the term "electronic document" refers to a set of data constituting a separate meaningful whole, arranged in a specific internal structure, and recorded on a computer data carrier, *i.e.*, a material or device used for recording, storing and reading data in a digital form. It is assumed in the doctrine that the term "electronic document" – pursuant to Article 3(2) in connection with Article 3(1) AIAE – includes features and elements of a purely technical nature that must be present jointly, i.e.: 1) existence of a set of data constituting a separate meaningful whole – making up the content of the document; 2) arrangement of the data set in a specific internal structure; 3) recording the contents of the document – a set of data arranged in a specific internal structure on a computer data carrier, referred to in Article 3(1) AIAE.[42] The concept of the electronic document, in its technical sense, therefore indicates that it is adaptable to administrative proceedings to the extent legally relevant in those proceedings, including as a form of materialisation of the letter, but

[41] This thesis is confirmed, among others, by Article 61(1)(2) AIAE, in accordance with which, whenever in provisions on informatisation contained in separate acts reference is made to: electronic data, data expressed electronically, data in electronic form, IT data, information expressed electronically or information in electronic form – this should be understood, in case of any doubt as to interpretation, to mean the electronic document referred to in Article 3(2) AIAE.

[42] On the features and technical elements of an electronic document within the meaning of Article 3(2) in conjunction with Article 3(1) AIAE, cf. *i.e.* A. Haręża, *Postępowanie administracyjne prowadzone za pomocą środków komunikacji elektronicznej (Część I). Dokument elektroniczny (uwagi wprowadzające)*, "Casus" 2009, no. 52, p. 18 ff.; G. Sibiga *Komunikacja elektroniczna…*, p. 51; M. Jachowicz, M. Kotulski, *Forma dokumentu elektronicznego w działalności administracji publicznej*, Warszawa 2012, p. 43.

it is not limited thereto[43]. The semantic scope of the term "electronic document" is defined in more detail by the provisions of the eIDAS Regulation. Article 3(35) of the eIDAS Regulation defines "electronic document" as any content stored in electronic form, in particular text or sound, visual or audiovisual recording. At the same time, according to Article 46 of the Regulation, legal effect of an electronic document as evidence in legal proceedings is recognized; there is no reference to administrative proceedings[44]. Despite the adaptation changes to the EU legislation by the Act on Trust and Electronic Identification Services, both the definition of Article 3(2) in conjunction with Article 3(1) AIAE and the provisions of the Code of Administrative Procedure – which give legal significance to the electronic document in administrative evidence proceedings – have not been modernised.

In the phase of evidence proceedings, the semantic scope of the term "a letter recorded in an electronic form", referred to in Article 14 § 1a CAP, is determined, in turn, not only by the technical elements of the structure of an electronic document as a form of its recording. In administrative proceedings, the content of the data set, *i.e.*, the content of the document adequate for the use in the procedure, is decisive. Such a document will – to the extent consistent with its statutory purpose – be used in administrative evidence proceedings provided that it meets, in addition to the technical requirements, the requirements of the Code in terms of the substantive content of the document and its formal elements[45]. The essence of the form of an electronic document within the meaning of Article 14 § 1 CAP, and now – of a letter recorded in an electronic form within the meaning of Article 14 § 1a CAP, is constantly contained in the notion of written form as a condition for expressing by means of writing – a text recording human thoughts (statements of knowledge, intent, views on reality, assessments, judgments, conclusions, information). The legal and procedural requirements for certain letters in traditional form apply equally to the content of an electronic document. This shall also apply to the signature under the document. Pursuant to Article 14 § 1a CAP, letters recorded in an electronic form shall be affixed with a qualified electronic signature, a trusted profile or a personal signature or a qualified electronic seal of the public administration body with the indication of the person who affixes the seal in the content of the letter. The condition for the existence of an electronic document, as a form of recording the thoughts (statements) of a person in statutorily qualified forms,

[43] Cf. B. Kwiatek, *Dokument elektroniczny…*, p. 109; additionally, B. Kwiatek argues that the absence of any of these elements negates the very existence of an electronic document. See also: M. Jachowicz, M. Kotulski, *Forma dokumentu elektronicznego…*, p. 43.

[44] As stated in Article 46 of the eIDAS Regulation, "An electronic document shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form".

[45] Cf. G. Sibiga, *Komunikacja elektroniczna…*, p. 53.

such as an application, minutes, note, summons, notification, certificate, is therefore the ability to determine the originator of the document, *i.e.*, the person who expresses the statement contained therein, taking into account the requirement of electronic authentication of the content of the letter[46]. The determination of the originator shall not apply to automatically generated letters (bearing the qualified electronic seal of the authority) that are outside the direct (or with minimal) human involvement; they are, in fact, the result of the automated performance of official actions – such as the compilation of data by the ICT system[47]. Affixing an electronic signature (electronic seal) to a document is therefore an essential legal and procedural requirement of a letter recorded electronically in accordance with Article 14 § 1a CAP, also taking into account the fact that with regard to the creation of an electronic document within the meaning of Article 3(2) in conjunction with Article 3(1) AIAE, an electronic signature is not an integral part of it[48]. Additionally, the overall systemic solutions of the Code in the context of the changes resulting from the Act on Electronic Delivery of Documents, as well as in connection with the previously binding reservation of serving letters in the form of an electronic document only by electronic means, indicate that letters recorded in this manner are applicable in electronic legal transactions, including with the use of electronic delivery. It is important that they are recorded electronically in data formats that are interoperable with their simultaneous recording on paper[49]. Printouts of electronically recorded letters that meet the requirements set forth in Article 39^3 §2 and 3 CAP should be treated as a certified copy of the document[50].

In the discussed aspect of the issue, the concept of an electronic document as a letter recorded in an electronic form within the meaning adopted in Article 14 § 1a CAP, should be referred to 1) the form of conducting proceedings in the case (the form of procedural actions of the authority, the party and other participants in the proceedings, including those related to taking evidence, as well as the form of recording in the case file the actions of obtaining evidence and their content); 2) the form of resolving the case (the act ending the proceedings in the case); additionally, only to the extent to which the Code of Administrative Civil Procedure

[46] For more on this cf. B. Kwiatek, *Dokument elektroniczny…*, p. 123 ff.

[47] Cf. M. Wilbrandt-Gotowicz, commentary to Article 61 AEDD, [in:] K. Czaplicki, A. Gryszczyńska, M. Świerczyński, K. Świtała, K. Wojsyk, M. Wilbrandt-Gotowicz, *Doręczenia elektroniczne. Komentarz*, Warszawa 2021.

[48] Cf. A. Haręża, *Postępowanie administracyjne…*, p. 19.

[49] Cf. B. Kwiatek, *Dokument elektroniczny…*, p. 120 ff.

[50] See also A. Wróbel, commentary to Article 39^3 CAP, [in:] M. Jaśkowska, M. Wilbrandt-Gotowicz, A. Wróbel, *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*, LEX/el. 2022. Another position is presented by G. Sibiga, who points in this case to a new form of resolving a case, which was not provided for in Article 14 § 1 CAP; G. Sibiga, *„Odwrócona cyfryzacja" w postępowaniu administracyjnym ogólnym po nowelizacji Kodeksu postępowania administracyjnego z 16.4.2020 r.*, "Monitor Prawniczy" 2020, no. 18, p. 957.

reserves for procedural actions the form qualified as a letter – either explicitly (e.g. Article 39 § 1 CAP regarding the service of letters; Article 63 § 3 CAP regarding the application made in writing) or implicitly (e.g. Article 67 § 1 CAP regarding the form of minutes; Article 72 § 1 CAP regarding the form of a note). The literature on the subject, however, rightly emphasises that an electronic document within the meaning of Article 14 § 1 in conjunction with Article 3(2) in conjunction with Article 3(1) AIAE (currently a letter recorded in electronic form – Article 14 § 1a CAP) cannot be equated with an electronic document in the meaning of an official or private document admitted as evidence (means of evidence)[51].

3.2. Electronic document admitted as evidence in administrative evidence proceedings

The essence and function of an electronic document in administrative evidence proceedings shall be considered in other terms to the extent that the Code of Administrative Procedure does not introduce any qualified form for documents collected in case files. These will include, in particular, documents collected in the course of evidence activities, i.e., activities undertaken by a public administration body or by other parties to proceedings in order to establish the existence or non-existence of facts that are of significance for settling a case; however, this will generally apply to documents produced outside the proceedings. As it has already been pointed out, a letter in the form of an electronic document, in accordance with the nomenclature of Article 14 § 1 CAP, and now a letter recorded in an electronic form in accordance with Article 14 § 1a CAP, is included in the term "electronic document", but it is not equivalent to it[52]; nor does it exhaust the legal meaning of an electronic document in administrative proceedings. The literature on the subject emphasises that the basis for the creation of the electronic document was *i.e.*, the need to adapt modern methods of information and communication in the activities of public administration to the legally relevant extent; broader than just the form of recording the actions of conducting and resolving the case in writing in administrative proceedings. The provisions of the Act on Informatisation of the Activities of Entities Performing Public Tasks allow for the creation of electronic documents in data formats that allow for the expression of statements, information, etc., including in the form of a letter, but also sound, graphics, video, etc. Thus, an electronic document can be a carrier of writing or take the form of recording other than text (writing), forms of expressing statements or other data in data

[51] Cf. A. Wróbel, commentary to Article 14 § 1 CAP, [in:] A. Wróbel, M. Jaśkowska, M. Wilbrandt-Gotowicz, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2020.

[52] Cf. S. Kotecka, *Prawne aspekty nowych regulacji w obszarze dokumentu elektronicznego*, "Elektroniczna Administracja" 2007, No. 2, p. 33 ff.

formats provided for in Annexes 2 and 3 to the Regulation of April 12, 2012, on the National Interoperability Framework, minimum requirements for public registries and electronic information exchange and minimum requirements for ICT systems[53]. Writing is thus one possible form of expressing the content of an electronic document[54]. The essential characteristic of an electronic document, on the other hand, regardless of the form of the information recorded, is that it has the characteristics of a document as a source of confirmation of a factual or legal state[55].

Given that an electronic document is, by its very nature, a source of confirmation of a factual or legal state, it should therefore be understood in administrative evidence proceedings as in court proceedings, such as civil or criminal proceedings, *i.e.*, in a manner comparable to the essence of a traditional document in these proceedings. Also, the position and functions of such a document in an administrative procedure should be equivalent to a traditional document. However, the problem is that the Code of Administrative Procedure does not contain a legal definition of the term "document"; in fact, this term is defined inconsistently in the doctrine. Interpretations of the term "document" generally arise in connection with the analysis of Article 75 § 1 CAP, which in the catalogue of the specified means of evidence distinguishes documentary evidence, although the term "document" occurs in the Code of Administrative Procedure in other legal configurations as well[56]. It is assumed that a document is a written act that is an externalisation of specific thoughts or information[57]. For an act to be considered a document, it is essential that it be covered by writing, but the type of writing and the material on which it is drawn up are not important; only the manner in which the data is recorded in writing must make it reusable[58]. The essence of the term "document" within the meaning of Article 75 § 1 of the Code is further expressed in the substantive content and purpose of the use of this document in the proceedings as evidence (means of evidence). In turn, the purpose of evidence in the proceedings is to contribute to the clarification of the case. In this sense, a document, including an electronic document, admitted as evidence will be a written act which is a source of information enabling one to prove facts. What is irrelevant to the term

[53] Cf. Journal of Laws of 2017, item 2247.

[54] Cf. B. Kwiatek, *Dokument elektroniczny…*, p. 159.

[55] Cf. A. Harężа, *Postępowanie administracyjne…*, p. 18 ff.

[56] Cf. *e.g.*, Article 33 § 3 CAP which uses the term "document" within the scope of documents other than a power of attorney, indicating the authority of an attorney; Article 66a § 2 CAP which uses the term "document" within the scope of reference to a document in the contents of the case file, Article 70 CAP which uses the term "document" within the scope of documents relevant the case – attached to the record.

[57] H. Knysiak-Sudyka, commentary to Article 76 CAP, [in:] H. Knysiak-Sudyka, *Kodeks...*, p. 555 ff.

[58] Cf. R. Kędziora, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2017, p. 466.

"document", however, is whether or not the written act was signed. In the former case, it is a nominal document; in the latter, it is an anonymous one[59].

Article 76 § 1 CAP introduces the category of an official document (drawn up in the prescribed form by the authorised state bodies within their scope of action) which constitutes evidence of what has been officially stated therein. The term "public document" itself is not defined in the Code. Consequently, it is accepted in the literature that the definitions used in other statutory acts, including *i.e.*, the Act on Access to Public Information[60], may be used as subsidiary measures. Pursuant to Article 6(2) AAPI, "an official document within the meaning of the Act is the content of a statement of intent or knowledge, recorded and signed in any form by a public officer within the meaning of the Criminal Code, within the scope of his or her competence, addressed to another entity or entered in a case file"[61]. The elements of a document thus remain – in addition to the manner of recording – the content of the document ("statement of intent or knowledge"), the manner in which it is used, and the signature of the relevant person. Despite the clear reference in the Code of Administrative Procedure only to the form of an official document, the semantic scope of the term "document" as referred to in Article 75 § 1 CAP also includes a private document within the meaning adopted in Article 245 of the Code of Civil Procedure[62].

In conclusion, it should be stated that the understanding of the concept of "document" provided for in Article 75 § 1 CAP requires taking into account two elements: 1) the evidentiary significance of the document; 2) techniques for structuring and recording the document. The definition of an electronic document addresses only the second of these issues[63]. Consequently, the notion of "electronic document" under the Act on Informatisation of the Activities of Entities Performing Public Tasks does not change the meaning of the notions of "document" (*e.g.*, Article 75 § 1 CAP) or "official document" (Article 76 § 1 CAP) as set forth in the Code. The definition contained in Article 3(2) AIAE is limited to specifying the technique of recording the contents of the document in the system of electronic legal transactions, which distinguishes it from a document in paper form. The concept of an electronic document does not refer at all to its substantive content and formal elements, as well as the purpose of its use, leaving in fact open to the legislator the question of assigning a legal meaning to an electronic document (determining

[59] H. Knysiak-Sudyka, commentary to Article 76 CAP, [in:] H. Knysiak-Sudyka, *Kodeks...*, p. 555 ff; R. Kędziora, *Kodeks…*, p. 466.

[60] Cf. G. Sibiga, *Komunikacja elektroniczna …,* LexisNexis 2011.

[61] Cf. the Act of September 6, 2001, on Access to Public Information (Journal of Laws of 2020 item 2176, as amended); abbreviated as AAPI.

[62] Cf. the Act of November 17, 1964 – Code of Civil Procedure (Journal of Laws of 2021 item 1805, as amended); abbreviated as CCP.

[63] Cf. G. Sibiga, *op. cit.,* LexisNexis 2011.

the essence and function of this document in the various phases of the proceedings). The semantic scope of the term "electronic document" includes both an official document and a private document in administrative proceedings; therefore, it includes one of the means of evidence specified in the Code of Administrative Procedure, *i.e.*, documentary evidence. There is no doubt that equating an electronic document and documentary evidence in administrative proceedings is possible only if the electronic document meets the legal and procedural conditions of traditional document evidence. Despite the nomenclature used in Article 3(2) AIAE – the "document", it will be included in the category of means of evidence specified and typified in the Code of Administrative Procedure as documentary evidence only if it is a carrier (way of materialisation) of evidence in the meaning adopted in the administrative procedure.

3.3. Electronic document admitted as evidence versus other electronic evidence in administrative evidence proceedings

The discussions conducted so far have shown that the notion of an electronic document – despite its definition in the Act on Informatisation of the Activities of Entities Performing Public Tasks – may have a diverse legal meaning. Taking into account the legal aspect, the assessment of the nature and function of the electronic document in the various phases of administrative proceedings, as well as its legal typification is based on the legal and procedural regulations of the Code of Administrative Procedure. This is also important for the proper classification of electronic evidence in administrative proceedings. As a rule, the criteria for classification are: the carrier (distinction is made between documents recorded on paper, recorded in electronic form, recorded in audio, visual or audiovisual form); the elements (distinction is made between content, data set, recorded carrier, signature); the issuers (distinction is made between official issuers – defined as public authorities, public bodies and other state bodies, public officials, and "non-official" issuers); the collections containing the documents (distinction is made between files, records, materials, registers, systems). Essentially, the creation of a document requires the aggregation of data (characters suitable for processing on physical carriers). A data set is given different informational value (of reducing uncertainty) and, depending on it, different evidentiary value; whereby, in administrative evidentiary proceedings, legally relevant data sets will be those relating to events and conduct with which legal norms associate the creation, change or expiry of a legal relationship (legal facts). They serve informational (reducing uncertainty, including recording statements of intent and knowledge) and evidentiary functions. The issuer and the signature itself, as well as its type, are considered important factors

in differentiating these values[64]. It should be noted that the Code does not define the term "evidence". The word "evidence" has many meanings. Evidence can be a circumstance, a thing that proves something, speaks for something, testifies to something, indicates something, a sign of something, confirmation, justification, testimony[65]. Pursuant to Article 75 § 1 CAP: "Anything that may contribute to the clarification of the case and is not contrary to law should be admitted as evidence." In the legal procedure sense, evidence is any source of information that is in accordance with applicable law and that leads to the verification of facts, thus making it possible to prove facts. Regardless of how the Code's term "evidence" is defined; however, it is beyond the scope of those definitions to address the technology used to record information, statements of intent and knowledge, and other forms of communication that are intended to result from that evidence. The problem of typification of an electronic (electronically recorded) document in administrative evidence proceedings is therefore carried out taking into account the conventional criteria for the classification of means of evidence – adopted in the doctrine of administrative process. As the catalogue of means of evidence is open, an electronic document may be typified as specified or unspecified evidence (means of evidence). The function of specified evidence, *i.e.*, documentary evidence, will be fulfilled by such an electronic document within the meaning of Article 3(2) in conjunction with Article 3(1) AIAE which meets the characteristics of an official or private document in the meaning adopted in administrative proceedings. On the other hand, an electronic document within the meaning of Article 3(2) in conjunction with Article 3(1) AIAE covering the recording of events, conduct, other information in the form of a sound, visual or audiovisual recording will be electronic evidence other than documentary evidence, classified as unspecified means of evidence. It should be emphasised that electronic material is treated as an electronically recorded document admitted as evidence in administrative proceedings if it meets, first, the technical requirements for an electronic document within the meaning of the Act on Informatisation of the Activities of Entities Performing Public Tasks, secondly, the legal and procedural requirements for documentary evidence within the meaning adopted in the Code of Administrative Procedure[66], i.e. an official or private document. On the other hand, an electronic document in the technical terms of Article 3(2) in conjunction with Article 3(1) AIAE cannot be classified under the Code as an electronically recorded document admitted as

[64] For more on this topic, cf. G. Szpor, commentary to Article 3 AIAE, [in:] G. Szpor, Cz. Martysz, K. Wojsyk, *Ustawa o informatyzacji działalności podmiotów realizujących zadania publiczne. Komentarz,* LEX 2015.

[65] More on the interpretation of the notion of evidence in CAP, cf. C. Martysz [in:] G. Łaszczyca, C. Martysz, A. Matan, *Postępowanie administracyjne ogólne*, Warszawa 2003, p. 502 ff.

[66] Cf. B. Kwiatek, *Dokument elektroniczny…,* p. 258 ff.

evidence when it becomes a carrier (materialisation) of evidence other than a textual document. However, this does not affect the fact that the functionality of the electronic document in the Code is not limited solely to the set of electronic data contained in the representation of the graphic characters of the letter – corresponding to the legal and procedural requirements of the document[67]. Aa the catalogue of means of evidence is open, the category of "evidence" – for the purposes of administrative proceedings – includes everything that may contribute to the clarification of the case, thus also all means of evidence that are the result of technological progress and serve to confirm the factual and legal state (regardless of the form of electronic recording, e.g. graphic, music, film, multimedia, as well as the elements of the document's structure or the type of data carrier)[68]. They will meet the characteristics of an electronic document within the meaning of Article 3(2) in conjunction with Article 3(1) AIAE under the conditions of meeting the technical requirements set forth in this provision or other electronic evidence (which is not an electronic document in the technical sense) whose role and function in the administrative evidence proceedings as well as reliability and evidentiary value are subject to the discretion of the body. In procedural terms, however, it will be in each of the cases mentioned electronic evidence other than a document. It should therefore be assumed that electronic evidence as a form equivalent to traditional evidence – in accordance with the principle of equal probative value – occupies the same place in the classification of means of evidence under Article 75 § 1 CAP as traditional evidence.

4. Conclusion

In summary, the understanding of electronic document in legal regulation is evolving with the development of information and communication. Nevertheless – despite the long evolution of the implementation of information and communication measures in administrative proceedings – the deficiency of legal regulation is still clearly noticeable. The definition of an electronic document in the Act on Informatisation of the Activities of Entities Performing Public Tasks refers only to issues related to the technique of construction and recording of the document[69]. In contrast, the legal significance of an electronic document varies depending on the subject of the legal matter being regulated. Nevertheless, the notion of "electronic document" within the meaning of Article 3(2) in conjunction with Article

[67] M. Jachowicz, M. Kotulski, *Forma dokumentu elektronicznego…*, p. 41 ff.

[68] See also G. Łaszczyca, B. Wartenberg-Kempka, *Środki dowodowe nienazwane w ogólnym postępowaniu administracyjnym*, "Roczniki Administracji i Prawa. Teoria i Praktyka" 2000, vol. 1, p. 58 ff.

[69] Cf. G. Sibiga, *op. cit.,* LexisNexis 2011.

3(1) AIAE – despite the resignation of the legislator from the explicit reference to the application of this legal act in administrative proceedings – should be assigned, firstly, to qualified procedural actions of the course of proceedings and forms of resolving the case which remain in connection with the application of the general principle of their recording, in addition to the paper form, also in the electronic form (Article 14 § 1a CAP), secondly, to means of evidence, as a result of adaptation of modern information and communication methods for the purposes of administrative evidence proceedings. Within the scope of administrative proceedings regulated by the Code of Administrative Procedure, the essence of a document – regardless of the technique of its recording (in writing or electronically) – remains in connection with its content, which determines in legal terms also the function of a document in these proceedings. Its assessment and legal typification are based on the legal-procedural regulations of the Code of Administrative Procedure in the various aspects of the use of electronic materials in the proceedings. For these reasons, an electronic document being evidence should be distinguished from an electronic document which is a pleading in the course of proceedings (including a way of recording in writing – *e.g.* in the form of minutes – evidence created in the course of proceedings, *i.e.* testimony of witnesses and a party, expert opinions, inspections and expert opinions prepared with the participation of a representative of the authority) and from an electronic document which is a form of recording the manner of resolving the case in writing. For the same reasons, an electronic document, as a carrier of documentary evidence in the sense of an official or private document, will not equal an electronic document materialising another means of evidence in administrative proceedings. Notwithstanding the above, also electronic material having evidentiary significance that does not meet the technical requirements of an electronic document will be electronic evidence remaining in accordance with the modern convention of informatisation of administrative evidence proceedings.

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Agnieszka Korzeniowska-Polak
University of Social Sciences in Lodz
ORCID 0000-0002-7151-002X
adkorzeniowska@interia.pl

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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Krzysztof Kaszubowski
University of Gdańsk
ORCID 0000-0002-3006-131X
krzysztof.kaszubowski@ug.edu.pl

On the new approach to the principle of written form in general administrative proceedings (Article 14 CAP)

Keywords: general principles of the proceedings, administrative jurisdiction, principle of written form, application

Summary. One of the consequences of the introduction of the Act of 18 November 2020 on Electronic Delivery of Documents into the Polish legal system was the amendment of the provisions of the Code of Administrative Procedure. Even a cursory analysis of the new regulation indicates that the amendment was not merely an adaptation of the existing wording of the Code to the new solutions. It follows from the scope of the amendment that, as if "by the way", the legislator made significant changes in the scope of the permissible manner of conducting proceedings and handling individual cases. The legislator abandoned the previous manners of handling a case (in writing or as an electronic document) in favour of the "form" of recording the letter (paper or electronic), expanded the catalogue of ways of handling a case in administrative proceedings, and introduced the possibility of handling cases using automatically generated letters. The new way of handling cases is optional ("cases may be handled"), but there are no criteria in the Code for qualifying a particular action (the type of case being handled) for being handled in this manner. Moreover, the possibility of handling cases with the use of automatically generated letters leads to the necessity of redefining the notion of "public administration body" and considering how it may affect the scope of procedural guarantees of a party to the proceedings.

O nowym ujęciu zasady pisemności w ogólnym postępowaniu administracyjnym (art. 14 k.p.a.)

Słowa kluczowe: zasady ogólne postępowania administracyjnego, jurysdykcja administracyjna, zasada pisemności, podanie

Streszczenie. Jedną z konsekwencji wprowadzenia do systemu prawa polskiego ustawy z dnia 18 listopada 2020 r. o doręczeniach elektronicznych była nowelizacja przepisów Kodeksu postępowania administracyjnego. Już pobieżna analiza treści nowej regulacji wskazuje, że zmiana ta nie miała wyłącznie charakteru dostosowującego dotychczasowe brzmienie przepisów kodeksu do nowych rozwiązań. Z zakresu nowelizacji wynika, że niejako „przy okazji" ustawodawca dokonał istotnych zmian w zakresie dopuszczalnego sposobu prowadzenia postępowania i załatwiania spraw indywidualnych. Ustawodawca zrezygnował z dotychczasowych form załatwienia sprawy (formy pisemnej lub formy dokumentu elektronicznego) na rzecz „postaci" utrwalenia pisma (papierowej lub elektronicznej), poszerzył katalog sposobów załatwienia sprawy w postępowaniu administracyjnym oraz wprowadził możliwość załatwiania spraw z wykorzystaniem pism generowanych automatycznie. Nowy sposób załatwiania spraw ma charakter fakultatywny („sprawy mogą być załatwiane"), ale w kodeksie

nie ma żadnych kryteriów kwalifikowania danej czynności (rodzaju rozstrzyganej sprawy) do załatwiania w ten sposób. Ponadto, możliwość załatwiania spraw z wykorzystaniem pism generowanych automatycznie prowadzi do konieczności redefinicji pojęcia „organ administracji publicznej" i rozważenia w jaki sposób może ona wpływać na zakres procesowych gwarancji strony postępowania.

1. Introduction

One of the consequences of the introduction of the Act of 18 November 2020 on Electronic Delivery of Documents[1] into the Polish legal system was the amendment of the provisions of the Code of Administrative Procedure[2]. It consisted, essentially, in adapting the Code solutions to the new system of electronic delivery. The amendments to the CAP covered a total of thirty-six provisions, including Article 14 governing the principle of written form in administrative proceedings[3]. Even a cursory analysis of the new regulation indicates that the amendment was not merely an adaptation of the existing wording to the new solutions. It follows from the scope of the amendment that, as if "by the way", the legislator made significant changes in the scope of the permissible manner of conducting proceedings and handling individual cases. In addition to the repeal of the existing § 1 in Article 14 CAP[4] and the introduction of its equivalent in § 1a, it also provides for new ways of handling cases and regulates the form of letters addressed to public administration bodies. Under the new regulations, cases may be handled using automatically generated letters (§ 1b) and using online services provided by public administration bodies (§ 1c). In addition, letters addressed to public administration bodies may be fixed in paper or electronic form and signed in the same way as letters from public administration bodies (§ 1d). Article 14 § 2 CAP, which defines exceptions to the principle of written form in administrative proceedings, remained unchanged. For this reason, the criticisms raised against the wording of this provision remain fully valid[5]. The subject of this paper is the analysis of the changes introduced in the principle of written form and their influence on the course of administrative proceedings.

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[1] Consolidated text: Journal of Laws of 2022 item 569; hereinafter referred to as the AEDD.

[2] The Act of 14 June 1960 – Code of Administrative Procedure (consolidated text: Journal of Laws of 2021 item 735, as amended; hereinafter referred to as the CAP or the Code).

[3] This term shall be understood as a sequence of procedural steps regulated by the provisions of procedural law taken by the entities involved in the proceedings to resolve an administrative case in the form of an administrative decision, and procedural steps taken in order to verify an administrative decision – B. Adamiak, [in:] B. Adamiak, J. Borkowski, *Postępowanie administracyjne I sądowo administracyjne*, Warszawa 2021, p. 134.

[4] By Article 61(1)(a) AEDD.

[5] K. Kaszubowski, *Zasada ogólna załatwiania spraw w formie pisemnej w ogólnym postępowaniu administracyjnym (Artykul 14 k.p.a.),* „Przedsiębiorczość i Zarządzanie" 2019, vol. 20, is. 3, part 3, pp. 5-16.

2. Principle of written form in general administrative proceedings

The Explanatory Memorandum to the Bill on Electronic Delivery of Documents, in the section on the amendments to the CAP, indicates that the principle of handling cases in written form or in the form of an electronic document "has become largely obsolete"[6] . In its previous wording, Article 14 § 1 CAP stated that: "Cases shall be handled in written form or in the form of an electronic document within the meaning of the provisions of the Act of 17 February 2005 on Informatisation of the Activities of Entities Performing Public Tasks delivered by means of electronic communication".

The inclusion in one provision of "written form", understood as a letter written on paper and signed by hand, and "electronic document", *i.e.* data that may also be a sound or video recording, a database or vector graphics, was regarded by the drafters as one that "not only disrupts the logic of the provision, but also makes it necessary to introduce special requirements for specific types of electronic documents and, consequently, numerous detailed provisions". As the second reason for the amendment, it was pointed out that the current wording of the principle of written form is a factor inhibiting the development of modern online services in public administration. In order to provide such services, electronic identification of the applicant is sufficient and there is no need to use an electronic document within the meaning of Article 3(2) of the Act of 17 February 2005 on Informatisation of the Activities of Entities Performing Public Tasks[7].

According to the new Article 14 § 1a sentence 1 CAP, cases should be conducted and handled in writing recorded in paper or electronic form. This provision upholds the principle of written form as a principle of administrative procedure, while specifying that the written record may be in paper or electronic form. The legislator abolished the distinction hitherto existing in the CAP between the written form and the form of an electronic document as acceptable ways of handling a case. The form of handling the case specified in Article 14 § 1 CAP has been replaced by the manner of recording the letter, which is to avoid doubts whether the case handled in the form of an electronic document is a case handled in writing or perhaps "electronically".

The mandatory nature of the requirement to handle cases in writing is indicated by the phrase "cases shall be conducted and handled in writing recorded in paper or electronic form". The two manners of recording a letter were considered equivalent. However, the Code does not specify the criteria to be adopted in choosing

[6] Sejm of the Republic of Poland, 9th term, paper no. 239 – SIP LEX (accessed on 29 March 2022).

[7] Consolidated text: Journal of Laws of 2021 item 2070, as amended.

one of them. The decisive role in this regard must be attributed to specific provisions. In their absence, the moment when proceedings are instituted should determine how the letter is recorded. If the impulse initiating the proceedings is the party's application recorded in electronic form (see Article 63 § 1 CAP), it should be assumed that other letters in the case should be recorded in this way[8].

Optionally, the legislator has allowed for handling cases by means of automatically generated letters (§ 1b) or online services (§ 1c), orally, by telephone, by means of electronic communication within the meaning of Article 2(5) of the Act of 18 July 2002 on the Provision of Services by Electronic Means[9] or by other means of communication (§ 2). Only in the case of methods of handling cases specified in § 2 of Article 14 CAP, specific prerequisites for their application have been specified. The possibility of handling cases orally, by telephone, by means of electronic communication or by other means of communication may take place if it is in the interest of the party and a specific provision does not preclude it. The substance and relevant reasons for such manner of handling shall be recorded in the minutes or in a note signed by the party.

3. "Handling of cases" within the meaning of Article 14 CAP

It should be emphasised that in the previous wording of Article 14 § 1 CAP, the legislator referred to the concept of "handling cases" which was understood broadly in the science of administrative procedure. It covered all procedural steps taken from the proceeding being initiated up to the moment of its conclusion with an administrative decision, regardless of the instance in which the case is resolved[10]. In Article 14 § 1a CAP, the legislator has explicitly applied the requirement of written form not only to handling cases, but also to conducting them. The term "conducting a case" should be understood as taking all procedural steps in the course of the proceedings, the purpose of which is to examine and resolve the administrative case[11]. Therefore, it can be assumed that the legislator confirmed the

[8] Similarly, in the case of an application filed in writing, it would be appropriate to adopt a requirement that other letters be recorded in "traditional" form. In the case of proceedings initiated *ex officio* (in the absence of specific provisions), it is up to the public administration body to "decide" how to record the letter. The Code does not regulate the permissibility of changing the method of recording letters in the course of the proceedings either.

[9] Consolidated text: Journal of Laws of 2020 item 344, as amended.

[10] Cf. B. Adamiak, [in:] B. Adamiak, J. Borkowski, *Kodeks postępowani aadministracyjnego. Komentarz*, Warszawa 2016, p. 94; R. Kędziora, *Kodeks postępowani aadministracyjnego. Komentarz*, Warszawa 2017, p. 126; A. Wróbel, [in:] A. Wróbel, M. Jaśkowska, *Kodeks postępowania administracyjnego. Komentarz*, Warzawa 2018, p. 186.

[11] Cf. the lexical definition of the term "conduct" (Polish: *prowadzić*) – https://sjp.pwn.pl/szukaj/prowadzić.html (accessed on 30 March 2022).

validity of the views of the doctrine broadly interpreting the scope of the principle of written form. It is only necessary to add that the principle of written form in proceedings applies not only to the case handled under the ordinary mode, but also in extraordinary modes of decision verification and in summary proceedings (Article 163b – Article 163g CAP). Thus, it applies to any proceeding that seeks to handle an individual case resolved by an administrative decision or tacitly. In the latter case, the principle of written form applies only to the "conduct" of the proceedings and not to the handling of the case itself.

It is irrelevant for the application of this principle whether the proceedings are conducted by a public administration body, another state body or another entity appointed by law or under an agreement to handle individual cases (see Articles 1.1 and 1.2 CAP). The essence and importance of this principle also support the assumption that it should apply also in procedures in which individual cases are not resolved by an administrative decision, such as in the procedure for complaints and requests or for issuing certificates, as well as in procedures outside the Code[12] .

In the context of other changes to Article 14 CAP, it should be noted that in § 1b and § 1c, the possibility of using automatically generated letters and online services is limited only to "handling of cases"[13]. In comparison with the wording of § 1a, this may lead to the conclusion that the said manners were reserved only for "handling of cases" in the sense of issuing a decision ending the proceedings. In an extreme case, this would lead to the admissibility of adopting, for example, the automated issuance of decisions within a certain algorithm by an ICT system. Such a solution would be substantially contrary to the procedural guarantees for resolving an administrative case and to the essence of the decision-based application of administrative law norms[14]. As a result, broadening the subject matter of Article 14 § 1a CAP to include "conducting" cases should be regarded as an example of a regulation that does not explain or simplify anything, and may only be a source of additional doubt when interpreting the entire provision[15]. If the legislator had intended to broaden the substantive scope of the principle of written form, it should

[12] Cf. M. Wilbrandt-Gotowicz, *Komentarz do art. 61 ustawy o doręczeniach elektronicznych*, [in:] M. Wilbrandt-Gotowicz (ed.), *Doręczenia elektroniczne. Komentarz*, Lex/el. 2021 (accessed on 4 April 2021).

[13] The same is true for § 2 of Article 14 CAP.

[14] See: W. Dawidowicz, *O stosowaniu prawa administracyjnego*, "Państwo i Prawo" 1993, is. 4, p. 41 et seq. A separate issue, not covered here, is the admissibility of issuing "automated" decisions in repetitive, uncomplicated cases, in which the resolution basically comes down to substituting and calculating certain data, as is the case with, for example, housing benefits or certain family benefit cases.

[15] It is hardly reasonable to assume that the "conducting and handling" construction was introduced in connection with a tacit settlement of a case. This is not indicated in any way in the Explanatory Memorandum to the Bill on Electronic Delivery of Documents in the part concerning the amendment of the CAP. Also, it seems that current interpretation of "handling a case" within

have rather done so with reference to regulations contained in § 1b and § 1c. The limitation of the scope of these provisions to "handling" of cases may suggest that they are not so much about the ways of "conducting" cases in the sense of taking procedural steps, but about "resolving" them in the sense of the final effect, which is an administrative decision. Nor is the situation remedied by assuming that "handling" within the meaning of § 1b and § 1c means "handling and conducting" of cases. In such a case, the result of the grammatical interpretation of the indicated provisions is in conflict with the wording of § 1a. The aforementioned doubts could have been avoided if in § 1b and § 1c, instead of "handling" cases, the legislator had referred to "conducting" them.

4. Possible ways of signing letters by public administration bodies

The substantive scope of the principle of written form has been extended in the final part of Article 14 § 1a CAP by specifying the possible ways of signing letters. Pursuant to Article 14 § 1a sentence 2 and 3, letters in paper form shall be affixed with a handwritten signature, whereas letters in electronic form shall bear a qualified electronic signature, a trusted signature or a personal signature or a qualified electronic seal of a public administration body with the indication in the text of the letter of the person affixing the seal. This regulation is not complete, however, because Article 39^3 § 1 CAP provides that in the case of letters issued by a public administration body in an electronic form using an ICT system, in addition to the above-mentioned methods of signature, it is also possible to affix a letter with an advanced electronic seal[16]. Thus, due to the extension of the substantive scope of the principle of written form by acceptable ways of signing letters issued by a public administration body, for "decoding" of the content of the principle it is necessary to take into account, apart from Article 14 CAP, also Article 39^3 § 1 CAP[17].

The Code does not define the term "handwritten signature", but there should be no doubt that the phrase means the handwriting of the name and surname of the person making the statement on behalf of the public administration body. Letters recorded in electronic form can be affixed with a qualified electronic signature or a trusted signature or a personal signature or a qualified electronic seal

the meaning of Article 14 CAP was sufficient to apply this principle also to conducting those proceedings for which the legislator provided tacit settlement.

[16] See Article 3(26) of Regulation (EU) no. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ EU L. 2014.257.73.

[17] It should only be mentioned with regard to "legislative diligence" that the wording of Article 39^3 § 1 CAP was amended by Article 61(7)(b) AEDD. In the same Act amending the CAP, the legislator in one provision determines the possible ways of signing a letter, and then in the next provision introduces yet another way, not included in the former provision.

of a public administration body with an indication in the text of the letter of the person affixing the seal[18]. This regulation confirms the principle of equivalence of ways of signing (authenticating) a letter, which has been consistently adopted in administrative proceedings.

The indicated catalogue of ways of signing the letter should be considered closed, independent of the ways of recording the letter. This means that other types of signatures not listed in this provision are not possible. The requirement that the "traditional" letter must bear a handwritten signature means that the possibility of signing it by facsimile or affixing it only with a printed (copied) name and surname should be excluded. In such a case, until the handwritten signature is affixed, we will only be dealing with the draft of the letter. Service of such a "letter" on a party or other participant in the proceedings has no legal effect. Only the proper delivery, *i.e.*, in accordance with the requirements set forth in the CAP, of the signed letter means that it is entered into legal circulation and causes specific legal effects, such as *e.g.*, commencement of the period for lodging a legal remedy. The same remarks should be applied to letters recorded in electronic form and not bearing the types of signatures mentioned in Article 14 § 1a CAP and Article 39^3 § 1 CAP or "signed" in a manner not provided for in this regulation[19].

Expanding the substantive scope of the principle of written form in proceedings to include types of acceptable signatures raises questions in the context of other signature indication requirements. In Article 14 § 1a sentence 2 CAP, the legislator used an imprecise expression "letters... shall be affixed with a handwritten signature". However, it is not clear from the wording of this provision who is required to affix a handwritten signature to a letter. The provisions of the Code governing the preparation of typical, most common letters in administrative proceedings provide that the signature is the element that identifies the person acting on behalf of the public administration body. Therefore, the signature with the name and surname should still indicate the official position of the body's employee and include a reference to his/her authorisation to act on behalf of the public administration body[20]. This is the case with a summons (Article 54 § 2 CAP), a decision (Article 107 § 1(8) CAP), a settlement (Article 117 § 1a(4) CAP), a certificate of tacit settlement (Article 122f § 3(7) CAP) or a ruling (Article 124 § 1 CAP). Juxtaposing

[18] For more on the listed types of signatures and their legal character, see A. Wróbel, [in:] M. Jaśkowska, M. Wilbrandt-Gotowicz, A. Wróbel, *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*, Commentary to Article 14, vol. 8-10; Lex/el. 2022 (accessed on 31 March 2022) and B. Kwiatek, *Dokument elektroniczny w ogólnym postępowaniu administracyjnym*, Warszawa 2020, pp. 173-188.

[19] An exception is Article 39^3 § 1 CAP, which provides for admissibility of delivering a printout of a letter issued by a public administration body in an electronic form.

[20] Reference to the authorisation shall cover situations where a letter is signed by a person other than the holder of the office.

the wording of Article 14 § 1a sentences 2 and 3 CAP with the aforementioned provisions, it should be assumed that a letter recorded in paper form should be signed by an employee of the authority with his/her name and surname and official position. However, surprisingly enough, the legislator did not decide to transfer the requirement to indicate the official position from the cited provisions to the new Article 14 § 1a CAP, given that this provision was amended in terms of the types of admissible signatures. The repetition of the same regulation (regarding the requirement to indicate the official position of the signatory) in several different provisions is contrary to the principles of correct legislation[21].

5. Letters addressed to public administration bodies

The presented solutions concerned the direction of communication "public administration body" – "party (other participants in the proceedings)". Article 14 § 1d CAP, concerning letters sent to public administration bodies, was intended as a complementary regulation. This provision states that: "Letters addressed to public administration bodies may be made in writing recorded in paper or electronic form. The provisions of § 1a and § 1b shall apply to affixing them with signatures and seals".

The application remained the expression of will of a party (participant in the proceedings), the minimum formal requirements of which are set forth in the CAP. Pursuant to Article 63 § 2 and § 3 of the Code, an application should include at least: an indication of the person from whom it originates, his/her address, request, and signature, and meet other requirements set forth in specific provisions. An application submitted in writing or orally to the minutes should be signed by the applicant and the employee taking the minutes. Additional reservations concern applications submitted by a person who cannot or is not able to affix a signature, and applications submitted to an electronic delivery address (Article 63 § 3a CAP). In the first case, the application or the minutes are signed for him/her by another person authorised by him/her, making a note about it next to the signature, in the second case – if separate regulations require filing applications according to a specific template, the application should contain data in the format specified in the application template. In the amendment, the legislator also changed the wording of Article 63 § 1 CAP, indicating that applications recorded in electronic form shall be filed to an electronic delivery address. It also unambiguously specified that ap-

[21] See § 4(1) of the Regulation of the Prime Minister of 20 June 2002 on "Principles of Legislative Technique" (consolidated text: Journal of Laws of 2019 item 506, as amended; hereinafter referred to as the RPLT), which prohibits repetition in an act of provisions contained in other acts. Since the prohibition applies to repetition of provisions contained in other acts, it is all the more inappropriate to repeat provisions contained in the same act.

plications submitted to the e-mail address of a public administration body shall not be examined[22]. The purpose of the above amendment, apart from the adjustment of the provisions of the Code to the Act on Electronic Delivery of Documents, was to specify the legal consequences of filing an application in a manner contrary to the wording of Article 63 § 1 CAP, in particular to the e-mail address of the public administration body[23]. In the jurisprudence of the administrative courts[24] the position was presented that in such a case the procedure provided for in Article 64 § 2 CAP should be applied, which met with consistent criticism in the doctrine[25]. This issue has been a momentous practical problem that has not been resolved by the jurisprudence of the administrative courts[26]. The above amendment significantly broadens the scope of procedural situations in which leaving an application unexamined will apply. Both in the doctrine of administrative proceedings[27] and in the prevailing part of the jurisprudence[28] there are no doubts that leaving the application unexamined concerns only the event of failure to remedy formal deficiencies in the application lodged. Formal deficiencies are other elements required by law to structure the content of the application that are missing from the filed document. If an application with deficiencies is submitted, the public administration body is obliged to request the applicant to complete it by setting a deadline for this procedural action (Article 64 § 2 CAP). An exception to this shall be where the applicant fails to provide his/her address and it is not possible

[22] It is stipulated that separate regulations may provide otherwise in this respect.

[23] Until the amendment, the regulations required an "electronic" application to be submitted to an electronic mailbox of a public administration body.

[24] See *e.g.*: judgment by the Supreme Administrative Court of 23 February 2018, II OSK 1901/17, Lex no. 2450427; judgment of the Voivodeship Administrative Court in Warsaw of 11 June 2021, VII SA/Wa 147/21, Lex no. 3193756; judgment of the Voivodeship Administrative Court in Białystok of 7 May 2020, II SA/Bk 313/20, Lex no. 2983916.

[25] M. Jachowicz, M. Kotulski, *Forma dokumentu elektronicznego w działalności administracji publicznej*, Warszawa 2012, p. 122; G. Sibiga, *Zastosowanie środków komunikacji elektronicznej w postępowaniach w sprawach skarg, wniosków i petycji*, [in:] M. Błachucki, G. Sibiga (eds.), *Skargi, wnioski i petycje – powszechne środki ochrony prawnej*, Wrocław 2017, p. 107; K. Kaszubowski, *Wszczęcie postępowania administracyjnego na wniosek w czasie stanu epidemii*, [in:] J. H. Szlachetko, A. Bochentyn (eds.), *Cyfrowa czy analogowa? Funkcjonowanie administracji w stanie kryzysu*, Pelplin 2021, pp. 308-310.

[26] Cf. judgment of the Supreme Administrative Court of 14 July 2021, III OSK 3660/21, Lex no. 3226905; judgment of the Voivodeship Administrative Court in Warsaw of 28 September 2021, I SA/Wa 2703/20, Lex no. 3310194.

[27] B. Adamiak, [in:] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego*..., pp. 367-368; R. Kędziora, *Kodeks postępowania administracyjnego*, p. 408.

[28] Judgment of the Supreme Administrative Court of 22 February 2021, II GSK 2240/21, Lex No. 3325419; judgment of the Voivodeship Administrative Court in Gorzów Wielkopolski of 29 December 2021, II SAB/Go 208/21, Lex No. 3287101; judgment of the Voivodeship Administrative Court in Białystok of 23 September 2021, II SAB/Bk 99/21, Lex No. 3247752; judgment of the Voivodeship Administrative Court in Gliwice of 17 September 2021, II SA/Gl 652/21, Lex No. 3232790.

for the public administration body to determine that address on the basis of the data in its possession. If the applicant cannot be contacted, the application will not be examined. Failure to complete formal deficiencies has the same effect. No provision of the CAP has so far allowed leaving an application unexamined for any reason other than failure to complete formal deficiencies. In the current wording of Article 63 § 1 CAP, leaving the application unexamined will be possible also in the situation when the application is filed in a manner inconsistent with the provisions of the Code. In other words, the scope of application of the institution of leaving the application unexamined will include, apart from failure to complete formal deficiencies, also filing of the application in a manner contrary to the procedure set out in the CAP. The question may be posed whether the legal effect of infringement of the mode of filing the application as indicated in Article 63 § 1 sentence 3 CAP, according to its literal wording, concerns only filing the application to an e-mail address or other modes of filing the application not provided for in the Code (*e.g.*, on a DVD or on a memory stick). The above amendment to the Code is an example of interference by the legislator that is counterproductive. It should be assumed that the intention of the legislator was to solve the problem of filing an application to an e-mail address, and not to construct a basis for new interpretational doubts.

It should be emphasised that in the hitherto binding wording of the CAP, letters addressed to public administration bodies took the form of an application within the meaning of Article 63 § 1 CAP. Juxtaposition of the content of Article 14 § 1d CAP and Article 63 § 1 CAP leads to the conclusion that there are two types of "pleadings" to public administration bodies conducting the proceedings: letters and applications. This conclusion alone calls into question the rationale for adding a new provision. These doubts are exacerbated by the wording of Article 14 § 1d of the Code. It says that "letters addressed to public administration bodies may be made in writing". This kind of expression is an example of a logical fallacy known as a vicious circle (Latin *circulus in definendo*)[29]. Moreover, contrary to the wording of § 10 of the RPLT, an interpretive distinction of different referents is required in the same provision with respect to the same name. In the initial part of the sentence, a "letter" means a medium containing a statement of will or knowledge of the entity directing it to a public administration body. As used further in this sentence, a "letter" is a sequence of alphabetical characters fixed in paper or electronic form.

The presented action of the legislator is in obvious contradiction to one of the basic principles of law making, which prohibits giving different meanings to identical expressions. As it is recognised in legal theory, "identical expressions within the same legal act cannot be given different meanings unless there are indications

[29] O. Nawrot, *Wprowadzenie do logiki dla prawników*, Warszawa 2007, p. 88.

in that act that allow for such different understandings of the same expressions of particular norms"[30]. It should be emphasised here that the cited prohibition was formulated with reference to the same legal act, which means that it should apply even more to the same article in the legal text.

Similarly, as in the case of letters from bodies conducting proceedings (Article 14 § 1a CAP), the legislator did not specify what circumstances should determine the choice of the method of recording the "letter" submitted to the body. It must therefore be assumed that, unless a specific regulation provides otherwise, this choice is left to the pleader. Moreover, the optionality of submitting letters (essentially, these are applications within the meaning of Article 63 § 1 CAP) drafted "in writing" suggests that some other way of drafting letters is also permissible. Since letters addressed to public administration bodies may be made in writing, they may also be drafted in other ways. It should be assumed that in this case it is not so much about drafting letters as about the manner they are recorded (paper or electronic form).

The general wording indicating that letters addressed to administrative authorities should be the basis for determining the entities that the new provision should be applied to. In the absence of any indication, it should be assumed that it applies to all letters, regardless of the category of entities (participants) in the proceedings. Therefore, it should concern the parties, entities with the rights of a party, and any other participants to whom the provisions of the Code confer a procedural role in the proceedings (*e.g.*, a person upon whom a disciplinary sanction was imposed). In this respect, the term "letter" within the meaning of Article 14 § 1d CAP corresponds to the term "application" in Article 63 § 1 CAP. How such "letters" would be affixed with a qualified electronic seal of a public administrative body is a separate issue. This possibility is clearly indicated in sentence 2 in Article 14 § 1d CAP, which provides that "the provisions of § 1a and § 1b shall apply" to the letters addressed to public administration bodies being affixed with signatures and seals. Both provisions indicate that a letter may be affixed with a qualified seal of a public administration body. According to the rules of interpretation, the absence of an order for the appropriate application of the provisions of § 1a and § 1b means that these provisions shall apply directly, which *de facto* means that their application is (partially) impossible.

As there are no restrictions on entities which are referred to in the provision on "letters addressed to public administration bodies", it shall be understood that "letters" addressed by other public administration bodies to the body conducting the proceedings are also covered by it. This means that if the public administra-

[30] J. Wróblewski, [in:] W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, Warszawa 1979, p. 401.

tion body that conducts proceedings in the main case applies to another public administration body for a position under Article 106 CAP, the letter containing the response should be recorded in paper or electronic form. It follows from the cited provision that the choice of the form in which a public administration body taking a position should express it is left to the discretion of that body ("letters... may be made in writing"). It remains an open question whether it can do so using other statutory solutions, *e.g.*, by telephone or other means of communication within the meaning of Article 14 § 2 CAP. Assuming that this is permissible leads to another procedural problem. In case of the cooperation procedure, Article 106 § 5 CAP provides for the issuance of a ruling, which excludes the possibility of handling the case in any of the ways indicated in the said provision.

In view of the reservations as to the drafting of Article 14 § 1d CAP and repeated (to some extent) regulation of the issue of the manner of communication between the party (participant in the proceedings) and the public administration body, the addition of this provision should be regarded as unnecessary. It is an example of a kind of "over-regulation", whereby further provisions are added to the Code to deal with the issues that have already been regulated. The legitimacy of this legislative practice is also undermined by the fact that these provisions are in the conflict with other provisions of the Code and only increase its inconsistency.

6. New ways of handling cases

By the amendment of the Code, two new ways of handling cases have been added: using automatically generated letters (§ 1b) and using online services (§ 1c). In both provisions, the legislator used the phrase "cases may be handled", which supports the conclusion that both ways are optional. However, no criteria were specified for choosing between the indicated manners of handling cases. Juxtaposition of these provisions with Article 14 § 1a CAP raises the question whether it is also possible to "conduct cases" using automatically generated letters and online services. This is because, in contrast to the indicated provision of § 1a, § 1b and § 1c refer only to "handling of cases" but not to "conducting" them. In an extreme case, this would lead to the admissibility of adopting, for example, the automated issuance of decisions within a certain algorithm by an ICT system. Such a solution would be substantially contrary to the procedural guarantees for resolving an administrative case and to the essence of the decision-based application of administrative law norms[31]. A lexical interpretation precludes the assumption that cases may also be "conducted" in the manner indicated in these provisions. On the other hand,

[31] See: W. Dawidowicz, *op. cit.*, is. 4, p.41.

however, it would be completely illogical to be able to handle a case using automatically generated letters or online services without being able to "conduct" it that way. For this reason, the result of the lexical interpretation should be rejected, and the meaning of this provision should be adopted using the results of the functional interpretation. Therefore, contrary to the literal wording of these provisions, it will be possible to both conduct and handle cases using the methods indicated in § 1b and 1c of the discussed provision. Thus, the legislator allowed for the possibility of resolving a case by means of an automatically generated letter, and thus considered permissible the situation in which the resolution of the case was left to the ICT system. The correctness of such a decision in terms of procedural rules remains a separate issue[32] . It should also be emphasised that in contrast to Article 14 § 2 CAP, which also provides for the optionality of other ways of handling the case than in writing, with regard to the new regulations no prerequisites for their application have been indicated.

As a result, broadening the subject matter of Article 14 § 1a CAP to include "conducting" cases should be regarded as an example of a regulation that does not explain or simplify anything, and may only be a source of additional doubt when interpreting the entire provision[33]. If the legislator had intended to broaden the substantive scope of the principle of written form, it should have rather done so with reference to regulations contained in § 1b and § 1c. The limitation of the scope of these provisions to "handling" of cases may suggest that they are not so much about the ways of "conducting" cases in the sense of taking procedural steps, but about "resolving" them in the sense of the final effect, which is an administrative decision. Nor is the situation remedied by assuming that "handling" within the meaning of § 1b and § 1c means "handling and conducting" of cases. In such a case, the result of the grammatical interpretation of the indicated provisions is in conflict with the wording of § 1a. The aforementioned doubts could have been avoided if in § 1b and § 1c, instead of "handling" cases, the legislator had referred to "conducting" them.

The evaluation of this solution must be decidedly negative. It means that in each case, the public administration body conducting the proceedings will decide on the admissibility of handling cases in an automated manner or via online ser-

[32] See M. Wilbrandt-Gotowicz, *Komentarz do art. 61 ustawy o doręczeniach elektronicznych*, [in:] M. Wilbrandt-Gotowicz (ed.), *Doręczenia elektroniczne. Komentarz*, Lex/el. 2021 (accessed on 4 April 2021).

[33] It is hardly reasonable to assume that the "conducting and handling" construction was introduced in connection with a tacit settlement of a case. This is not indicated in any way in the Explanatory Memorandum to the Bill on Electronic Delivery of Documents in the part concerning the amendment of the CAP. Also, it seems that current interpretation of "handling a case" within the meaning of Article 14 CAP was sufficient to apply this principle also to conducting those proceedings for which the legislator provided tacit settlement.

vices. Moreover, the choice of the manner of handling cases is left entirely to the discretion of the public administration body conducting the proceedings, which is not limited by any guidelines. For incomprehensible reasons, the legislator did not decide to make the application of the new methods of handling the case dependent on, for example, the interest of the party and absence of conflict with the law, as in § 2. The lack of any guidance on the permissibility of the discussed methods of handling cases will lead to situations where the same type of case will be handled in a "traditional" manner, using online services or in an automated manner. It does not seem, however, that the admissibility of the application of the automated manner way of handling cases[34] can depend only on technical and organisational aspects.

Undoubtedly, the solution to this problem would be to assume that it is the legislator in the substantive law that determines what types of cases can be handled in an automated manner[35]. However, the fact that such solutions have so far appeared in some specific provisions indicates that "the introduction of automated solutions in Polish legislation is not conceptually prepared"[36] . The discussed amendment to the CAP confirms this conclusion.

The Code does not specify what an automatically generated letter consists of (how it is created). It has been indicated in the literature that automation involves the replacement of human labour entirely or largely by machine (application) labour[37]. Referring to the semantic rules of common language, it should be assumed that it concerns a self-acting operation, performed or produced without human consciousness or will, by means of an appropriate device[38]. This means that the content of such a letter is created without the participation of an employee of the public administration body through the use of a specific algorithm. A consequence of the automated way in which letters are created is that their content is recorded in electronic form. Pursuant to Article 14 § 1a CAP, a letter recorded in electronic form shall be affixed with one of the following – in one of the ways prescribed in that provision: a qualified electronic signature, a trusted signature or a personal signature or a qualified electronic seal of the public administration body with an indication in the text of the letter of the person affixing the seal. However, § 1b of this provision contains a special regulation, according to which automatically generated letters should bear a qualified electronic seal of the public administration body. It should be emphasised that a qualified electronic seal

[34] It is also true for handling cases using online services.

[35] This was pointed out by G. Sibiga, *Czy algorytm może zastąpić człowieka w administracji*, „Rzeczpospolita" of 1 July 2021, no. 13; *Opinie. Przesunięcie zmian w KPA na 5.10.2021 r. nie rozwiązuje wątpliwości prawnych i dalszego prowadzenia postępowania administracyjnego na podstawie przepisów przejściowych*, Legalis C.H. BECK (accessed on 24 March 2022).

[36] G. Sibiga, *Stosowanie technik…*, p. 44.

[37] *Ibidem,* p. 36.

[38] sjp.pwn.pl/szukaj/automatycznie/html (accessed on 22 March 2022).

ensures data integrity and authenticity of the origin of the data which it is linked to[39]. In this case, the entire process of creating a letter, including the method of its signature, is automated. Thus, an automatically generated letter is the only type of a letter recorded in electronic form, which can only bear a qualified electronic seal of a public administration body. The limitation of ways to "authenticate" the letter adopted in this provision excludes the possibility to affix it with a qualified electronic signature, a trusted signature, or a personal signature. Justification for this solution should be sought in the essence of an automatically generated letter, and therefore in the fact that it is created (as a rule) without the participation of an employee of the administrative body. Requiring it to be signed, even with the use of said IT tools would undermine the very logic of such a letter. It should be emphasised that the lack of a requirement to affix an automatically generated letter with signatures and seals is a logical consequence of Article 14 § 1b sentence 1 CAP, therefore the confirmation of this *expresiss verbis* in the second sentence of this provision should be assessed negatively.

The presented solution significantly affects one of the most important legal constructions for the proceedings, or more broadly for the administrative law, *i.e.*, the construction of the "public administration body"[40]. It is the public administration body that conducts the proceedings, takes procedural actions, and resolves the case. The person acting on behalf of the public administration body is the holder of the office or an authorised employee, which is confirmed by his/her signature indicating his/her name and official position. In the case of automatically generated letters reflecting procedural actions, a doubt may arise as to "who is acting" – whether still a public administration body or already a "machine".

7. Conclusion

The amendment of Article 14 CAP made pursuant to Article 61(1)(a) AEDDis not directly related to the subject of electronic delivery. The legislator abandoned the previous manners of handling a case (in writing or as an electronic document) in favour of the "form" of recording the letter (paper or electronic) and expanded the catalogue of ways of handling a case in administrative proceedings. A consequence of the adopted solutions was to determine the ways of signing letters recorded in electronic form. The changes introduced were primarily aimed at streamlining and

[39] Article 35(2) of Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93 EC, OJ EU L. 2014.257.73.

[40] See: M. Stahl, *Zagadnienia ogólne,* [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System Prawa Administracyjnego. Podmioty administrujące*, Warszawa 2011, vol. 6, pp. 61-77; J. Zimmermann, *Prawo administracyjne*, Warszawa 2018, pp. 179-198.

unifying the wording of the provisions of the CAP. An important "novelty" in this respect is the possibility of handling cases with the use of automatically generated letters, which has already been referred to as "the principle of autonomous operation of an ICT system in proceedings"[41]. The rule is optional ("cases may be handled"), but there are no criteria in the Code for qualifying a particular action (the type of case being handled) for being handled in this manner. Moreover, the possibility of handling cases with the use of automatically generated letters leads to the necessity of redefining the notion of "public administration body" and considering how it may affect the scope of procedural guarantees of a party to the proceedings. As the analysis of this regulation shows, its introduction was not preceded by adequate deliberation and assessment of its impact on the current wording of the regulations governing administrative proceedings. As a result, any public administration body may use a back door excuse to qualify each handled case to the automated mode. The lack of unambiguous regulation may justify the assumption that in addition to performing all procedural actions "with the use of automatically generated letters" it is also possible to issue a decision ending the proceedings in this manner. However, the legislator did not indicate how the public administration bodies should resolve the conflict between the automated handling of cases and the general principles of proceedings, including the principle of active participation of a party (Article 10 § 1 CAP). This justifies the conclusion that the current construction of the principle of written form and the procedural consequences that are associated with it should become the subject of the next amendment of the CAP.

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[41] G. Sibiga, *op. cit.*, no. 13.

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Magdalena Kowalczyk
University of Zielona Góra
ORCID 0000-0003-1623-5237
m.kowalczyk@wpa.uz.zgora.pl

Tax audit in the Polish Deal programme

Keywords: tax audit, Polish Deal, verification purchase, temporary seizure of movable property

Summary. The Polish Deal *(Polski Ład)* is a government programme effective from the beginning of 2022. It is supposed to help to recover from the economic crisis Poland found itself in after the pandemic. It provides for changes in tax law. In addition to tax changes, it is intended to help solve housing problems. It also applies to healthcare, retirement and disability pensions, economic activity, social security, and, to a certain extent, labour law. The Polish Deal did not introduce changes to the tax audit, although this had been planned. Tax audit is still regulated primarily by the provisions of the Tax Ordinance and the Law of Entrepreneurs. It is conducted *ex officio* and is designed to check the application of tax laws by those being audited. A novelty in the tax legislation is a verification purchase, relating to the purchase of goods and services using a cash register. Additionally, temporary seizure of movable property was added to the National Tax Administration Act. It consists in the ability to seize the movable property of a taxpayer who is in arrears with payments to the tax authorities. This is done for a period of 96 hours. The enforcement authority may confirm the seizure or waive it. There are no direct provisions in the Polish Deal that would regulate tax audits. Several new approaches to the audit can be proposed in this regard. We may add to the regulations a request for a tax audit at the demand of the auditee, or provisions permitting an audited entity to request a selected audit activity, or a proposal to limit duration or number of audits at a taxpayers. The author proposes that one audit may be conducted once every five years at a given entity. A good solution in the first years of the Polish Deal may also be to apply lower penalties for mistakes in interpreting its provisions.

Kontrola podatkowa w Polskim Ładzie

Słowa kluczowe: kontrola podatkowa, Polski Ład, nabycie sprawdzające, tymczasowe zajęcie ruchomości

Streszczenie. Polski Ład to rządowy program obowiązujący od początku 2022 r. Ma on pomóc wyjść z kryzysu gospodarczego, w którym znalazła się Polska po pandemii. Przewiduje on zmiany w prawie podatkowym. Oprócz zmian w podatkach ma pomóc rozwiązać problemy mieszkaniowe. Dotyczy służby zdrowia, emerytur i rent, działalności gospodarczej, ubezpieczeń społecznych i poniekąd prawa pracy. Polski Ład nie wprowadził zmian do kontroli podatkowej, chociaż je planował. Kontrola podatkowa nadal regulowana jest głównie przepisami Ordynacji podatkowej i Prawa przedsiębiorców. Prowadzona jest z urzędu i ma na celu sprawdzać stosowanie przepisów podatkowych przez kontrolowanych. Nowością w przepisach podatkowych było wprowadzenie nabycia sprawdzającego. Dotyczy to zakupu towarów i usług przy użyciu kasy fiskalnej. Dodatkowo do ustawy o Krajowej

Administracji Skarbowej dodano tymczasowe zajęcie ruchomości. Jest to możliwość zajęcia rzeczy ruchomych podatnikowi, który zalega z płatnościami wobec organów podatkowych. Dokonuje się tego na czas 96 godzin. Organ egzekucyjny może potwierdzić zajęcie lub odstąpić od niego. Brak jest bezpośrednich przepisów w Polskim Ładzie dotyczących regulacji kontroli podatkowej. Można w związku z tym zaproponować kilka nowych rozwiązań do kontroli. Możemy dodać do przepisów wniosek o kontrolę podatkową na żądanie kontrolowanego. Również przepisy zezwalające na wnioskowanie kontrolowanemu z prośbą o dokonanie wybranej czynności kontrolnej. Następnie propozycja ograniczania czasowego i ilościowego w przeprowadzaniu kontroli u podatnika. Przyjmijmy, że można przeprowadzać jedną kontrolę raz na pięć lat u danego podmiotu. Dobrym rozwiązaniem w pierwszych latach obowiązywania Polskiego Ładu może być stosowanie niższych kar za błędy w interpretacji jego przepisów.

Introduction

We have come to live in interesting yet challenging times. On the one hand, we are experiencing an economic crisis caused by the coronavirus pandemic. On the other hand, we are seeing an increase in armed conflict incidence. A good example is the war in Syria, which has led to large migrations of people into Europe. Now, we are concerned about the conflict in Ukraine. All these events are of great importance for the quality of life in Poland. They also affect our law, forcing rapid change.

The Polish Deal has been conceived as an antidote to the current problems. It is a government programme designed to help us recover from the economic crisis. This programme was first proposed at the conference of the Law and Justice (in Polish: *Prawo i Sprawiedliwość*) party on 15 May 2021. The Polish Deal contains many legal changes, introduced with the citizens in mind. "The so-called Polish Deal is probably the biggest reform of the tax and contribution system in Poland in recent years. It is implemented under the slogan of a historic tax reduction..."[1].

The Polish Deal introduces many novelties or modifications to existing tax laws. Some of the new provisions are contained in the Tax Ordinance[2], the National Tax Administration Act[3], even the Act on Enforcement Proceedings in Administration[4], and other acts[5]. However, novelties or changes are not limited to tax acts. The programme is intended to have a comprehensive effect, to be felt this year and beyond.

The programme was developed by a wide array of specialists. The Polish Deal reform requires substantial expenditure: "Initially, according to the government's assumptions, about PLN 72 billion a year is to be allocated for the implementa-

[1] A. Bartosiewicz, *Polski Ład. Podatki i składki*, Warszawa 2022, p. 21.

[2] The Act of 29 August 1997 – Tax Ordinance (Journal of Laws no. 137 item 926, as amended), hereinafter: the Tax Ordinance or TO.

[3] The National Tax Administration Act of 16 November 2016 (Journal of Laws of 2016 item 1947, as amended), hereinafter: the National Tax Administration Act or NTAA.

[4] The Act of 17 June 1966 on Enforcement Proceedings in Administration (Journal of Laws no. 24 item 151, as amended).

[5] https://poradnikprzedsiebiorcy.pl/-kontrola-podatnikow-w (accessed on 23 February 2022).

tion of all projects under the Polish Deal. Total investment by 2030 is expected to exceed PLN 650 billion"[6].

Nearly 18 million Polish citizens are said to benefit from the tax reduction. The tax-free amount has been raised to PLN 30 thousand. The tax threshold has been raised to PLN 120 thousand.[7] In addition, beneficial arrangements for families are provided. Married couples will still be able to file their tax returns jointly, and the tax-free amount will be PLN 60 thousand. There are also beneficial solutions for single parents. Noteworthy solutions include *i.e.*, tax relief for return from emigration, or relief for 4+ families. Retirees receiving up to PLN 2500 per month will not pay tax[8].

The introduction of many reliefs and changes will require scrutiny in a tax audit. The Polish Deal, however, provides for no changes in it. Hence, the author proposes several new developments that may be considered by the legislator in the future.

1. Tax audit

In order to guarantee the certainty of fiscal law, the possibility of verifying compliance with the tax law through a tax audit was invented. Without control, it is impossible to speak of the effectiveness of legal norms. Tax audit is related to compliance with the provisions of tax law, *i.e.*, acts, international agreements, secondary legislation, and local tax laws. It is important to remember that frequent audits hinder proper functioning of the audited entities and are viewed negatively. "The intensity of scrutiny should therefore be reasonably distributed, according to the needs, the anticipated results and the side effects that it may produce"[9].

1.1. Basic rules of tax audit in Poland

Tax audit is conducted by tax authorities on the basis of the provisions of the Tax Ordinance, regulated in Section VI thereof[10]. Also, the Law of Entrepreneurs[11] contains provisions on conducting tax audits at entrepreneurs'. It stipulates *i.e.*,

[6] https://biznes.gazetaprawna.pl/artykuly/8260629,polski-lad—czym-jest-i-jakie-zmiany-przyniesie.html?gclid=EAIaIQobChMI0pSMsq-Y9gIVjtayCh3GGA04EAAYAiAAEgJX4_D_BwE (accessed on 23 February 2022).

[7] *Podręcznik Reforma Polski Ład*, Polish Ministry of Finance, legal status as on 7 February 2022, p. 4.

[8] https://www.podatki.gov.pl/polski-lad/podrecznik-polski-lad/ (accessed on 24 February 2022).

[9] J. Jagielski, *Kontrola administracji publicznej,* Warszawa 2007, p. 76.

[10] The Act of 29 August 1997 (Journal of Laws no. 137 item 926, as amended), hereinafter: the Tax Ordinance or TO.

[11] The Act of 6 March 2018 – The Law of Entrepreneurs (Journal of Laws of 2018 item 646, as amended), hereinafter: the Law of Entrepreneurs or LE.

on the audit duration[12]. In addition, in matters not regulated in Section VI "Tax audit", the provisions of Section IV "Tax Procedure" shall apply. This reference is derived from the Tax Ordinance and jurisprudence[13].

"Since the legislator has clearly distinguished the institutions of tax audit and tax procedure in the TO, the position that the tax proceeding initiated in the case is in fact a continuation of the completed audit is not correct"[14]. A tax audit is a special type of formal proceeding. It has a definite beginning (Articles 284, 284a) and end (Article 291 § 4). The result of the proceeding is included in the audit report. The content of this document is defined (Article 290)[15].

"A tax proceeding, despite the causal relationship, constitutes a new case in relation to the tax audit conducted, for which a separate file is established. The two proceedings are governed by different regulations. They also have an independent course, beginning and end. A tax audit is initiated by delivering to the audited entity an authorisation to conduct it and by presenting an official ID. A tax audit ends with the preparation of an audit report and its delivery to the auditee, while a tax proceeding generally aims at issuing a tax decision. If, however, a tax proceeding was to constitute only another stage of the same case, the legislator would not impose on the authorities the obligation to issue a separate decision to initiate it and would not attach such far-reaching legal consequences of the effectiveness of its issuance and delivery"[16].

Pursuant to Article 45(1) LE, control of an entrepreneur's business activity is conducted on the basis of the provisions of the Law of Entrepreneurs. What should also not be forgotten is the obligation to apply the provisions of generally applicable Community law or ratified international agreements. "However, according to paragraph 2, to the extent not regulated in Section 5 of the Law of Entrepreneurs, the provisions of special laws shall apply, which undoubtedly includes the Tax Ordinance; it determines the subjective scope of control of an entrepreneur's business activity and the authorities authorised to conduct such control"[17].

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[12] *Kontrola podatkowa i skarbowa – porównanie procedur*, https://poradnikprzedsiebiorcy.pl/-kontrola-podatkowa-i-skarbowa (accessed on 20 April 2020).

[13] Judgment by the Voivodship Administrative Court in Warsaw of 19 March 2004, case no. III SA 2616/02, not published.

[14] Judgment by the Voivodship Administrative Court in Olsztyn of 27 January 2010, case no. I SA/Ol 737/09, OSG 2010, no. 7.

[15] S. Babiarz, B. Dauter, B. Gruszczyński, R. Hauser, A. Kabat, M. Niezgódka-Medek, *Ordynacja podatkowa. Komentarz*, Warszawa 2009, p. 922.

[16] Judgment by the Voivodship Administrative Court in Gdańsk of 18 February 2020, case no. I SA/Gd 1627/19, Lex no. 3027116.

[17] D. Antonów, A. Bieńkowska, T. Grzegorczyk *et al.*, *Meritum. Podatki 2022*, Warszawa 2022, p. 1514.

1.2. Importance of the audit to the taxpayer

"The purpose of the tax audit is to ensure that the tax authorities implement the principle of substantive truth in tax proceedings, for which it is necessary to establish all the circumstances that shape the factual situation in terms of tax law. The audit is to secure documents, examine the tax books, establish the facts at the time of starting the audit, obtain the explanations that are necessary at this stage. The course of the audit is documented in a report which cannot contain any legal assessment of the matter subject to control, and its most important part is the factual findings and documentation concerning the evidence taken (Article 290 § 2 and 3 TO)"[18].

An essential element of a tax audit is to check whether the auditees fulfil the obligations imposed on them by law with respect to the State Treasury and local government units. Employees of the tax authorities check how the company fulfils its obligations under the tax law – proper calculation and payment of taxes and timely settlements. Auditors may inspect such taxes as: PIT, CIT, VAT, PCC, inheritance, and donation tax, etc. During the audit, revenue office employees (inspectors) must carry an authorisation which contains information on the subjective scope of the audit, the type of tax to be checked, the period covered by the verification and the duration of the audit[19].

A tax audit cannot be requested as it can only be initiated *ex officio* in accordance with the principle of the authority's obligation to act *ex officio*. "A tax audit is initiated *ex officio*, although signals justifying it may come from a variety of sources. They can come from external entities..."[20].

There are several stages to the audit procedure. First, revenue office employees must prepare a notification stating when the audit will take place. After that, the audit starts, and the inspectors proceed to the inspection activities. Once the investigation is complete, taxpayers receive an audit report. Then, depending on the result, the taxpayer may submit explanations and objections to the audit report within 14 days from its delivery. The Head of the Revenue Office responds to objections and explanations within 14 days of their submission and conducts further post-inspection activities.

The result of the tax audit is positive when irregularities are found. The taxpayer will be required to take action to correct them or face consequences, and sanc-

[18] Judgment by the Supreme Administrative Court in Warsaw of 29 May 2013, case no. II FSK 1895/11, LEX no. 1329415.

[19] Judgment by the Voivodship Administrative Court in Gliwice of 5 October 2017, case no. I SA/Gl 445/17, Legalis.

[20] H. Dzwonkowski, A. Huchla, C. Kosikowski, *Ustawa Ordynacja podatkowa. Komentarz*, Warszawa 2000, p. 666.

tions may also be imposed. When the tax audit is negative, no consequences will be incurred[21] .

2. Tax audit vs. the Polish Deal

The Polish Deal proposed several new changes in tax law. Amendments were made to the Tax Ordinance and the National Tax Administration Act. They include:

1) amendments to the regulations on e-delivery;
2) informing taxpayers by a tax authority on possible participation in a tax carousel;
3) possibility of filing a corrected return and its implications that do not always protect a taxpayer from a penalty;
4) tax risk management mandate for large investors;
5) application of the revised anti-avoidance clause;
6) regulations on voluntary disclosure which can still be filed electronically and to which authority;
7) a verification purchase using a cash register;
8) temporary seizure of movable property by the tax authorities on taxpayers in arrears[22].

However, the legislator did not introduce any changes to the tax audit in the Polish Deal. This seems surprising, although there was one proposed change to the tax audit, but it ultimately did not make it into the Polish Deal.

The Ministry of Finance prepared a draft on tax audit as part of the Polish Deal. The findings of a tax audit were to be reviewed by a decision not for six months as it is now, but until the end of the limitation period, which in case of tax liabilities is five years. The draft of this amendment was to be put down in the Tax Ordinance by adding a new § 4 to Article 165b. This provision was intended to allow initiation of proceeding at any time for a case in which a tax audit had been conducted. There were three reasons:

1) a substantiated presumption that the decision was issued under an evasion clause,
2) the same presumption about the so-called contractual benefits of double tax treaties,
3) the request of the Head of the National Tax Administration[23].

[21] M. Górczak, *Kontrola podatkowa*, https://www.zakiewicz-adwokaci.pl/prawo/kontrola-podatkowa.html (accessed on 23 February 2022).

[22] https://podatki.gazetaprawna.pl/artykuly/8332797,polski-lad-kontrola-podatkowa-postepowanie-podatkowe.html (accessed on 23 February 2022).

[23] https://www.rp.pl/podatki/art18735031-polski-lad-pis-coraz-wiecej-pulapek-na-obejscie-prawa-podatkowego (accessed on 23 February 2022).

The authority would have time to initiate the proceeding until the end of the limitation period on the tax liability and pursue the consequences of the violations found in the tax audit[24]. Transitional provisions assumed the extension of Article 165b § 4 to the proceeding that is initiated but not completed, and to tax audits completed before the effective date of the proposed amendment[25]. This solution would be less beneficial to the taxpayer. This would prolong the period of uncertainty in the taxpayer's life. This amendment was not made, the draft was not passed.

Currently, upon completion of an audit, the taxpayer submits objections to the audit report. The tax authority has six months to initiate a proceeding. If it does not do it by that time, the taxpayer considers the return to be correct. The legal status in this area has not changed, contrary to what was intended in the Polish Deal regulations. However, it should be remembered that current commentaries to Article 165b of the Tax Ordinance prove a conditional effect of this article. It is misleading to think that a proceeding is time-barred unconditionally. A tax authority can initiate the proceeding virtually any time it wishes to do so[26].

The Ministry of Finance was not the only entity which wanted to amend the tax audit regulations. The need for changes in tax audit was also suggested by entrepreneurs.

3. Entrepreneurs' proposals concerning tax audit

Entrepreneurs have raised the suggestion that a tax audit can be requested. For many years, tax audits have always been conducted *ex officio*. First, there is an audit notification, then the auditee is served with an inspection authorisation and the inspector presents their official ID. The audit may be conducted while the authorisation is valid and in accordance with its scope. The principle of the authority's obligation to initiate the audit *ex officio* raises various considerations for those audited. The current arrangement is acceptable because no one except authorised persons has any influence on the initiation and conduct of the audit. As a result, however, the audit comes as a big surprise to the auditee.

After the introduction of the Polish Deal, some entrepreneurs said that it would be advisable to provide for a tax audit on request. The audited entity could request the auditing authority to check on the correct application of the Polish Deal at the self-selected time[27]. As a result, the entrepreneur would promptly learn about

[24] https://www.rp.pl/podatki/art18735031-polski-lad-pis-coraz-wiecej-pulapek-na-obejscie-prawa-podatkowego (accessed on 24 February 2022).

[25] https://www.money.pl/podatki/pl (accessed on 24 February 2022).

[26] H. Dzwonkowski (ed.), *Ordynacja podatkowa. Komentarz*, Warszawa 2019, p. 993.

[27] https://www.rp.pl/prawo/art19108401-kontrole-podatkowe-bez-kar-pomysl-przedsiebiorcow-na-polski-lad-pis (accessed on 24 February 2022).

their errors, instead of waiting for the authority to conduct the audit in three- or five-years' time. Hence, a requested audit makes it possible to quickly verify reality against the legal status. Entrepreneurs are aware that mistakes in the application of the Polish Deal regulations are inevitable, as a considerable number of changes was introduced in a short period of time. Federation of Polish Entrepreneurs reports that the Polish Deal concerns changes in 26 acts. Thus, it can become quite confusing[28].

The entrepreneurs' proposal is general and needs to be clarified in regulations. Accordingly, the author proposes that the requested audit should proceed as follows. Let's start from requesting an audit. A taxpayer could request a tax audit from the relevant tax authority at any time. This arrangement will allow auditees to decide on a tax audit. They can choose a convenient time to initiate it, and they can also prepare for it. Such a request for a tax audit could be made by any entity that wishes to be audited. Once the request is delivered to the authority, it would have time to process it. A response should be made within 30 days. If the request is denied within 30 days, the authority would issue a ruling denying the audit. It is not necessary to provide a statement of reasons. The ruling would not be appealable. This procedure would not include appealing against a refusal to initiate an audit. This will also comply with the principle of active participation in the proceedings, which the inspected entity is entitled to during the audit. Active participation of the auditees is confirmed by their participation in evidence activities and their knowledge of the evidence. This principle is safeguarded for taxpayers in the tax legislation. By the introduction of the amendment proposed by entrepreneurs, this will also be implemented at the time of the initiation of the audit on request. Thus, the entity would actively participate in the proceeding from the very beginning. This can help to foster cooperation between the auditee and the inspectors during the inspection.

It was also proposed that a taxpayer receiving a warning from the Head of the National Tax Administration about a suspicious contractor could check it out by requesting the tax authority to conduct a tax audit of their company for the warning. Thus, the auditee will have the opportunity to verify the integrity of their contractors. This solution may give rise to many audits. Some may be willing to abuse this empowerment. Audits will not necessarily be undertaken to identify dishonest taxpayers[29].

[28] https://www.money.pl/podatki/polski-lad-daje-skarbowce-nowe-narzedzia-przedsiebiorcy-musza-byc-gotowi-na-nowe-kontrole-6666064773180192a.html (accessed on 24 February 2022).

[29] https://www.money.pl/podatki/polski-lad-daje-skarbowce-nowe-narzedzia-przedsiebiorcy-musza-byc-gotowi-na-nowe-kontrole-6666064773180192a.html (accessed on 24 February 2022).

These amendments were not introduced to the tax audit regulations. Instead, the legislator added provisions in the NTAA regarding two new institutions.

4. Changes to the Polish Deal that were included in the tax audit

The changes involve tax audit in a broader sense, *i.e.*, not only tax audit referred to Section VI of the Tax Ordinance, but also customs and fiscal audit. The Polish Deal introduced new solutions to the NTAA, in the form of a verification purchase (controlled purchase – Article 94k et seq. NTAA) and temporary seizure of movable property (Article 94y et seq. NTAA).

A revenue officer (authorised person) can pretend to be a customer and make what was previously called a "controlled purchase", with a view to assessing correct recording of sales using a cash register. This tool is intended to help combat the shadow economy. The loss of money in the shadow economy is estimated differently depending on the perpetrator – roughly at the level of over PLN 2 billion. However, the Foundation for the Development of Cashless Transactions estimates the shadow economy to be worth about PLN 10 billion. Verification purchase is therefore intended to be another tool to combat abuse of the VAT rules. It verifies correct and lawful recording of sales. "This action will not constitute a tax audit or a custom and fiscal audit, making it less formalised and therefore quick to conduct and not oppressive to taxpayers"[30]. If there is no VAT violation, the official will issue a note. If an infringement occurs, the official will draw up a report and fine the offender with the appropriate amount.

It is desirable to introduce clearer provisions and more precise regulations for the verification purchase regulated by the NTAA. A controlled purchase can apply to the sales of a good as well as a service. It can be conducted at any time. However, a fine should be imposed only when the value of the goods or services exceeds PLN 100. The fine should be proportionate to the amount of the offence. There is too much discretion in the current regulation in imposing the fine. These provisions need to be further refined, a more accurate and precise table of fines should be defined. Besides, the first-time unrecorded sales are discovered, it would be recommended to make a note and instruct the offender. Only the next case of sales made without a cash register should be punished with a fine.

Another solution proposed by the Polish Deal is temporary seizure of movable property. Debtors whose tax arrears exceed PLN 10,000 (the amount does not include: interest, reminder costs, other enforcement costs) may have their movable property temporarily seized by the revenue office. After 96 hours, such a seizure

[30] https://www.ptpodatki.pl/polski-lad-najwazniejsze-zmiany-w-zakresie-kontroli-i-postepowan-podatkowych/ (accessed on 23 February 2022).

must be accepted by the enforcement agency[31] . In accordance with Article 94y et seq. NTAA, this new institution was added. Temporary seizure of movable property is a tool used during a custom and fiscal audit. It is intended to increase the effectiveness of ongoing administrative enforcement and conducted on the basis of issued enforcement orders. Temporary seizure of movable property may be applied to a natural person, a legal person, and an unincorporated organisational unit with tax arrears. The period of 96 hours shall be counted from the time the report is signed by the obliged party. After signing the report, the debtor is deprived of the right to temporarily dispose of the seized item[32] .

The proposal for temporary seizure of movable property still needs to be refined. In case of taxpayers who correctly settle their accounts with the tax authorities and have never been in tax arrears, the procedure should look different than the NTAA proposes. A seizure with such a taxpayer should be preceded by a warning. The authority shall serve a written warning before seizing the movable property for 96 hours, reading that in 3 days' time after the warning has been issued the movable property concerned shall be attached. After 3 days, when the amount due is not received in the authority's account, a temporary seizure of movable property shall be affected. In addition, items required for the continuation of economic activity should be exempt from temporary seizure. It is important that the entrepreneur has the ability to earn money to pay back the debt. The regulations should specifically list items that are not subject to temporary seizure. This includes computers, manufacturing equipment and machinery, and one car. Other items could be subject to seizure for 96 hours. After that time, the enforcement authority should confirm the seizure of the movable property or waive it.

These two institutions were introduced in the NTAA. However, there are still other changes to be made to improve tax audits.

5. Additional proposed changes to the current tax audit

Let us consider making some improvements and changes for the auditors and the auditees. These can be brought to the attention of the legislator and considered for enactment.

Another manifestation of active participation in the audit may be the introduction of a request to carry out the desired inspection activity during the audit. The auditors gather all evidence in the audit. They decide which activities shall be

[31] https://podatki.gazetaprawna.pl/artykuly/8332797,polski-lad-kontrola-podatkowa-postepowanie-podatkowe.html (accessed on 23 February 2022).

[32] https://poradnikprzedsiebiorcy.pl/-kontrola-podatkowa-i-skarbowa (accessed on 23 February 2022).

performed in the audit. Therefore, the proposal is that a taxpayer can request a selected activity at any time. This reasoned request should come to the authority in writing. The auditing party should then review it within 3 days. If the auditor does not accept the activity, a notification of refusal shall be issued. It shall not need to be substantiated and shall be non-appealable. After consideration, the auditor shall deliver it in writing to the auditee within 3 days. Upon delivery, the second copy shall be included in the audit file.

Proposal for lower penalties for errors in the application of the Polish Deal regulations. Mistakes in applying the reform in its first years, *i.e.*, 2022 to 2025, should lead to more lenient sanctions. Therefore, audits of taxpayers in these years should result in more lenient penalties. The taxpayer should suffer a penalty, but one that is less severe than provided for under current tax regulations. Authorities should collect arrears at a lower rate than hitherto. The procedure should be as follows. If, as a result of the audit, the authority finds tax arrears up to the amount of PLN 1,000, then the penalty shall be waived. Instead, the authority shall issue an appropriate written instruction and guidance for the future. The justification for this will be that the value of the arrears is too low. If errors in the application of the Polish Deal exceed PLN 1,000 but are lower than PLN 10,000, the consequences will be different. The authority will recommend payment of the calculated arrears on which no interest will be charged. Instead of interest, the taxpayer will pay the cost of inflation. In the case of an audit that reveals errors in the amount of PLN 10,000 to 100,000, taxpayers will incur a penalty of 50% of the calculated arrears plus statutory interest. In other cases, *i.e.*, if the errors exceed the amount of PLN 100,000, the regulations shall remain unchanged. The offender shall have to pay the amount of irregularities calculated by the authority plus statutory interest.

It may be important for taxpayers to ensure that repeated and frequent audits of the same taxpayers are prohibited. The law guarantees to taxpayers that the same scope cannot be audited twice. In addition, strict time limits can be put in place, limiting the number of tax audits to one every five years. An exception to this may be the case of fraudulent taxpayers, who need to be audited more frequently. This limitation should not apply to audits at the request of the taxpayer. In case of VAT and undisclosed sources of income, the proceeding would be different. More frequent audits can be used in these cases. Better audit conditions for so-called honest taxpayers are also important. If no irregularities are found, the audit duration could be shortened, and a subsequent audit could be conducted not earlier than in five years.

These aforementioned improvements can be included in the tax legislation. These regulations are more favourable than the existing ones. Hence, it would be advisable to introduce them. This will benefit both the auditors and the auditees.

Conclusion

The provisions of the Polish Deal did not change the tax audit. It still exists and is still needed. That is why the legislator did not remove this tool from the legislation, though some changes to the procedure should have been made. The Polish Deal regulations were introduced very promptly and there are problems in interpreting them. Taxpayers have already been applying the current amendments since the beginning of the year. During tax audits, inspectors will be checking on the changes made to taxes by the Polish Deal. Hence, audits related to the Polish Deal should have more lenient sanctions for errors in applying the changes introduced by this reform. Limiting the time and number of audits conducted at a taxpayer's would mean more certainty for auditees. The number of tax audits shall be limited to one every five years. Long and frequent audits disorganise work in audited entities and disrupt their operations.

It is positive, since fewer and fewer audits have been carried out in recent years. This does not mean that the audits should be less frequent than before. In fact, they are now more effective than before. Revenue offices are currently doing much more data analysis. Officials have changed their strategy. The uniform control file helps them to detect irregularities. A report published by the Supreme Audit Office in 2018 says that the reform of the National Tax Administration has worked well. Revenue offices are more efficient in their operations and in collecting VAT[33] . Additionally, provisions on the introduction of a verification purchase should be helpful.

Without the tax audit, there would be no guarantee of tax revenue for the state budget. This is further aided by the temporary seizure of movable property. The role of auditors is to prevent abuses of the law, and to this end they should be equipped with appropriate means of combating phenomena that are undesirable in fact and in law. Hence, there is a lot of responsibility on the auditors. On the other hand, the entities subject to scrutiny, for their own sake, should have the right to decide on an audit. This can be guaranteed by an audit on request and by providing more opportunities to participate in audit activities. More cooperation between the auditors and the auditees will bring better results.

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Agnieszka Daniluk
University of Bialystok
ORCID 0000-0002-4342-6023
adaniluk@uwb.edu.pl

The need to constitutionalise the National Electoral Commission – selected issues

Keywords: election administration, election law, administrative law

Summary. The author analyzed the legitimacy of the constitutionalisation of the State Commission. The observation of the activities of the democratic state institutions made us reflect once again on the need or even justifiability of assigning the status of a constitutional body to the NEC. The conclusion of the considerations introduces the postulate to raise to the rank of constitutional State Electoral Commission, which is an organ of state control and protection of the law. The constitutional foundation is extremely important for the structure and composition of the electoral bodies. The analysis of the tasks of the NEC proves that the constitutionalization of this central electoral body, supervising the implementation of passive and active electoral law, and of a body independent of the executive, seems to be necessary in the light of its current competences.

O potrzebie konstytucjonalizacji Państwowej Komisji Wyborczej – wybrane zagadnienia

Słowa kluczowe: administracja wyborcza, prawo wyborcze, prawo administracyjne

Streszczenie. Autorka poddała analizie zasadność konstytucjonalizacji Państwowej Komisji. Obserwacja działalności demokratycznych instytucji państwa skłoniła do pochylenia się po raz kolejny nad potrzebą czy wręcz zasadnością nadania PKW rangi organu konstytucyjnego. Konkluzja rozważań wprowadza postulat podniesienia do rangi konstytucyjnej Państwowej Komisji Wyborczej, będącej organem kontroli państwowej i ochrony prawa. Umocowanie konstytucyjne jest niezmiernie istotne dla struktury i składu organów wyborczych. Analiza zadań PKW dowodzi, iż konstytucjonalizacja tego centralnego organu wyborczego, nadzorującego realizację biernego i czynnego prawa wyborczego oraz organu niezależnego od władzy wykonawczej, wydaje się być konieczne przez pryzmat jej aktualnych kompetencji.

Historical outline of the constitutionalization of the National Electoral Commission

In a democratic state under the rule of law, the stability of the applicable law is a relevant value, which becomes more meaningful when referred to constitutional provisions, preferably ones that offer continuity.

The problem of constitutionalisation of the National Electoral Commission was widely discussed during the work of the Constitutional Committee of the National Assembly[1]. At a session held by the Constitutional Commission on the constitutionalisation of the NEC on 17 October 1995, the draft constitution regulating the legal position of the NEC was discussed[2].

Member of Parliament, R. Grodzicki, on the side of maintaining the provisions on the NEC in the draft Constitution, stated that the basic argument in favor was 'in fact, that it issues regulations. He also mentioned that this was also the only reason why the provisions on the National Broadcasting Council were included in the draft Constitution. Continuing the arguments for retaining the NEC in the draft Constitution, he stated that this body that acts a law-making institution, should have its place in the Constitution, due to the fact that it does not fall under government administration. Unfortunately, the proposed Article 196 omitted the most important legislative aspect of the National Electoral Commission from this point of view of constitutionalisation. As those in favor of keeping the NEC in the draft constitution noted, this body participates in the creation of regulations "which affect how a key civil right is exercised—*i.e.*, the right to elect representative organs or one-person state organs provided for in the Constitution or legislation". During the session held by the Constitutional Committee of the National Assembly, committee expert P. Winczorek spoke against the constitutionalisation of the NEC, arguing that the National Electoral Commission should not establish law but apply it. P. Winczorek also argued that he did not know of a constitution "that would make an institution such as the National Electoral Commission a constitutional institution"[3]. He expressed the conviction that: "It is an institution that primarily applies electoral law rather than creating it, organises elections, with a variety of duties not involving arbitration or supervision but organization". As for normative duties, P. Winczorek shared a view during the committee meeting

[1] The committee established by the constitutional act of 23 April 1992 on the procedure for the preparation and adoption of the Constitution of the Republic of Poland.

[2] *Constitutional Committee of the National Assembly* - Bulletin XXVI, Warsaw 1996, Wydawnictwo Sejmowe, pp. 71-72. In line with this project:

Aricle 1:The National Electoral Commission shall conduct elections and supervise the democratic holding of elections to the Sejm, Senate, elections for the President, local government authorities, conduct referendums and perform other activities specified in the acts of law.

Article 2: The National Electoral Commission shall consist of 9 judges elected by three of the Constitutional Tribunal, the Supreme Court, and the Supreme Administrative Court. Article 177 does not apply to the judges of the Constitutional Tribunal appointed to the National Electoral Commission.

Article 3: The chairman of the National Electoral Commission and his two deputies shall be elected by members of the Commission from among their members.

Article 4: The organisation and manner of operating the National Electoral Commission are specified by the act of law.

[3] *Ibidem*.

those various internal regulations and recommendations issued by the NEC, although significantly affecting the general public to some extent, do not constitute universally binding standards. While the commission was working, a similar view was represented by S. Gebethner, a representative of the Council of Ministers. However, S. Gebethner focused on the fact that "the courts exercise control over the democratic holding of elections, and the role of the NEC is merely organizational", while arguing that those who supported including electoral bodies in the Constitution were confusing the issue of applying the law with its interpretation of the law. At the same time, he emphasised that "every institution applying the law interprets it, and if an institution misapplies the law, it is possible to appeal against this decision to the Supreme Court". S. Gebethner also proposed an innovative structure for electoral bodies, whose duties would fall within the scope of the constitutionalisation of the NEC. The proposal concerned the introduction of so-called electoral courts or quasi-judicial institutions. Ultimately, however, the representative of the Council of Ministers did not submit a proposal to amend Article 196 regarding the NEC.

The Secretary of the National Electoral Commission, Justice K. Czaplicki, took the position that after 1990 the election law "clearly aims at making the election bodies autonomous and independent in matters related to the election procedure until the end of voting". As the secretary of the National Electoral Commission noted, this institution is in many cases a body of appeal against decisions of other lower-ranking electoral bodies, and NEC decisions are not often subject to appeal. Therefore, according to Justice K. Czaplicki: "It is not true that the NEC only organises elections and then holds them. This institution primarily supervises compliance with the law". According to the NEC secretary, another argument in favor of the constitutionalisation of the central electoral institution was also the fact that this body "issues resolutions that are de facto general legal acts because they are addressed to an unlimited group of addressees". However, Justice Czaplicki's arguments did not persuade other members of the Commission. Senator P. Andrzejewski submitted a motion for the deletion of Article 196 regulating an electoral body—*i.e.*, the National Electoral Commission— stating that: "The general philosophy of the Constitution does not involve cluttering the basic law with material appropriate to individual ordinary laws"[4]. In the vote, the motion received 13 in favor, 12 against and 5 abstentions. Thus, the content of Article 196 was not included in the uniform draft of the Constitution of the Republic of Poland. Thus, the National Electoral Commission was unconstitutionalised by just one vote.

[4] *Komisja Konstytucyjna Zgromadzenia Narodowego* – Biuletyn XXVII, Warszawa 1996, Wydawnictwo Sejmowe, p. 4.

Tasks of the National Electoral Commission

After many years, practical observation of the activities of democratic state institutions prompts us once again to focus on the need or even justifiability of assigning the status of a constitutional body to the NEC. Have the arguments used by the representatives of the doctrine of constitutional and administrative law turned out to be accurate in terms of the functional aspect of the NEC nowadays? In order to answer this question, it would seem relevant to define the duties of the NEC, which will, consequently, define the role played by this institution.

Under Article 157 § 1 of the Electoral Code, the NEC became the highest permanent electoral authority competent in matters of conducting elections and referenda. It follows from the statutorily defined position of the system that the NEC is a state, collegiate, permanent (non-adjudicated) and central institution. The only problem is the attempt to locate the NEC within the system of state authorities, as it breaks from the traditional division of power into legislative, executive, and judicial. It is not an institution of executive power, although it performs state duties aimed at implementing citizens' rights under the Constitution and runs general elections. Nor is it a judicial institution[5]. The NEC judges, the highest-ranking in terms of composition, should ensure professionalism of action as well as apoliticality. It is precisely this solution that raises particular doubts in the light of the constitutional principle of the separation of powers. Since the NEC is not a judicial body, but a permanent state institution competent for the preparation, organisation and holding of elections, it does not belong to the judiciary authority. However, do the judges there not violate the principle of the separation of powers?[6]

The State Electoral Commission is an autonomous, independent state body, endowed with budgetary autonomy, located outside the classical division of powers, but remaining in close cooperation with each of them. In the case of government administration, the independence of the NEC raises doubts in situations where the power to issue regulations in strict electoral matters is vested in the competent ministers. Consequently, the NEC's lack of constitutional power means no authority to issue generally applicable acts in the field of electoral law. This is undoubtedly a systemic flaw, as no other judicial body has the right to legislate in the field of electoral law. Despite a lack of formal competence to legislate universally, the NEC, adopts a number of guidelines that are addressed to an unlimited number of recipients. Examples include resolutions on the rules of district and precinct election commissions, templates of voting papers or the rules and procedure for

[5] A. Sokala, *Administracja wyborcza w obowiązującym prawie polskim,* Toruń 2010, pp. 69-70.

[6] F. Rymarz, *Udział sędziów w organach wyborczych*, [in:] F. Rymarz (ed.), *10 lat demokratycznego prawa wyborczego Rzeczypospolitej Polskiej (1990-2000)*, Warszawa 2000, p. 46.

submitting to the competent district election commissions the results and protocols of voting from districts established abroad and on Polish ships. These resolutions are addressed to all voters, election committees and members of election commissions, which makes them general and abstract standards. These standards are also included in the amending resolution of 17 February 2020 on the method of nominating candidates for members of electoral commissions, the application form and the rules for appointing territorial electoral commissions and precinct election commissions in elections to municipality councils, powiat councils and voivodeship assemblies, councils of the Capital City of Warsaw and district councils in the Capital City of Warsaw[7] , where, inter alia, the requirements for members of the territorial commission and the district electoral commission are specified.

The duties of the NEC have changed over the years, extended by successive regulations. Today, the NEC not only organises and runs elections for the Sejm, Senate, European Parliament, the office of the President of the Republic of Poland, local elections and nationwide referenda, but also supervises local elections and referenda, controls the financing of elections and referendum campaigns, controls the financing of political parties and performs other duties arising from various pieces of legislation. When analysing the set of normative acts defining the work of the NEC, these tasks can be divided into several groups: organisational, supervisory, auditory and legislative, as well as duties related to public trust[8].

Organisational work mainly consists in preparing and holding nationwide elections and referenda, announcing the results of elections and referenda, the seats won in nationwide elections and the results of nationwide local elections, or submitting reports on elections or referenda to the Supreme Court, and expressing opinions on election protests. Duties in this field also include informing the President of the Republic of Poland, the Marshal of the Sejm, and the Marshal of the Senate about the implementation of the provisions of the legislation applied in the election and referendum process, together with proposals for possible changes.

The institution of NEC reports on the course of elections with conclusions on the validity of the elections is relevant to the implementation of the constitutional principles of a democratic state ruled by law and the legality of the action taken by public authorities. The NEC's opinion on this matter, submitted to the Supreme Court, together with opinions of adjudicating panels issued when examining election protests, is one of two or, in the absence of election protests, is the only prerequisite for declaring the validity of an election.

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[7] M.P. 2020, pos. 262.

[8] Cf. A. Żukowski: „Zadania NEC są rozległe i dotyczą kompetencji nadzorczych, kreacyjnych, stanowiących, wykonawczych i regulacyjnych", *idem, System wyborczy do Sejmu i Senatu RP*, Warszawa 2004, p. 36.

Since its inception, the NEC has also supervised compliance with electoral law through its subordinate committees, election commissioners and all other entities participating in elections during the preparation, organisation and holding of elections and referenda, as well as during the determination and announcement of their results. Information about any violations of the law committed by these bodies is obtained by the NEC in the course of examining claims about their operation, or their own findings, the findings of an NEC inspection and in the course of checking election protocols. Within the scope of its duties, the NEC repeals resolutions made by district electoral commissions that were adopted in violation of the law or inconsistent with its binding guidelines, while also referring the case to the competent commission for re-examination or with the case being adopted for substantive adjudication[9]. There is no right of appeal against adjudications issued by the NEC taken within the scope of its general jurisdiction to supervise compliance with electoral law, including adjudications revoking the verdicts of the election commissioner. The new Regulations of the National Electoral Commission of 21 March 2011, adopted for the purposes of the Electoral Code, indicate in § 18 the means by which the Commission supervises the observance of electoral law. Firstly, this means the jurisdiction to issue guidelines and explanations as well as information on legal provisions. Due to the fact that NEC does not have the right to issue acts of generally applicable law, the guidelines and explanations of the NEC can therefore be included in the provisions of domestic law referred to in the Constitution of the Republic of Poland[10]. Another statutory measure related to the supervision of compliance with electoral law is the possibility of repealing resolutions and other decisions taken by lower-level electoral bodies adopted in violation of the law or inconsistent with its guidelines and referring the case for reconsideration or adopting a different decision on the matter. Within the scope of its supervisory powers, the NEC examines claims about the operations of lower-level electoral bodies and inspects the operations of local self-government units involved in running elections. The NEC may request that electoral bodies subordinate to it provide information on the performance of their duties.

The NEC is entitled to make two types of supervisory adjudications: firstly, cassation that involves overruling the decision of an election body and referring the case to that body for reconsideration, and secondly, amendment to the ruling of the election body and adjudication by the NEC regarding merit (only in the event of a review of the ruling of the constituency electoral commission).

The NEC also has supervisory powers in the process of establishing election results. The NEC is obliged to verify these results after receiving from the district

[9] Article 161 § 2 of the Electoral Law.
[10] Article 93 of the Constitution of the Republic of Poland.

election commission the protocol determining the election results in a particular district and the election protocol of members of parliament and senators. In the event of irregularities in the election results, the NEC makes a supervisory decision to order the regional commission to re-establish these results.

NEC verdicts, issued as a result of examining an appeal of the election committee against the decision of the constituency electoral commission to refuse to register the constituency list due to formal faults in the application, is also supervisory in nature. The NEC's decision in this case is final and is not entitled to any legal recourse. Therefore, it is of key significance, as it directly determines the participation in elections of specific entities in electoral competition.

The NEC may also establish its own inspection and define its scope of duties for the duration of the elections. The function of inspector is usually entrusted to KBW employees of the district electoral commission. The persons included in the inspection are entitled to access the documentation of lower-level electoral bodies and regional commissions, as well as the documentation related to elections, kept by governmental or local government administration authorities and in their subordinate organisational units. After the elections, they submit an immediate report on their operations.

The legislator also grants the NEC supervisory powers in matters of maintaining and updating the electoral roll and drafting the list of those entitled to vote. The catalogue of supervisory measures includes verifying that the electoral roll has been maintained and updated correctly along with list of those entitled to vote and checking the compliance of the register and list with the data from the population register and civil status records. In addition, the NEC may ex officio apply to competent authorities to remove persons from the register or list who have been entered in violation of the law, as well as collect and publish (at least once a quarter) information about the number of voters included in the register and provide details about the number of voters entered in the registers as of the date of their preparation for a given election[11].

The consequences of exercising this supervision are contained in the provisions of the Electoral Code, which state that the National Electoral Commission shall submit to the Sejm proposals to change the boundaries of constituencies and the number of members of parliament elected therein, should such a necessity arise from changes in the main territorial division of the state or from a change in the number of inhabitants in a particular constituency or in the country as a whole.

The legislator does not enumerate an exhaustive list of supervisory measures, and by using the term "in particular" envisages the possibility of extending their statutory catalogue. However, the literature reveals accusations regarding the un-

[11] Article 165 § 1 of the Electoral Law.

lawful characterisation of those legal measures as supervisory measures. The essence of supervision is to enable, by legal means, interference in the activities of the supervised entity in order to repair or improve its functioning, and such operations entail specific legal consequences. On the other hand, the addressee of an intervention by the National Electoral Commission shall be, first and foremost, the competent municipal authority, which is not subject to it, and may therefore follow the recommendations of the NEC, but may also refuse to take or elect not to take any action. In such situations, the NEC has no authority that might sway any improper behavior of the authority. It may only request that the voivode take appropriate supervisory action against the local government body in accordance with the Act on Municipal Self-Government or file a complaint with the provincial administrative court against the inaction of the municipal body. Only when an irregularity in compiling list involves entering unauthorised persons or omitting them from the list of entitled persons, may they be considered a crime against elections and referenda under the Criminal Code[12].

Considering the catalogue of measures listed in the code, one may notice that they are more geared towards auditing, consisting only in the right of the NEC to examine the actual state of maintenance of the register and electoral lists and to determine whether they meet the statutory requirements, rather than supervisory powers.

The National Electoral Commission is not only an institutional guarantor of free elections and referenda, but also an authority that controls the financing of elections and of political parties. Other duties of an auditing nature include checking that electoral entities and other entities comply with the provisions on election and referendum campaigns and verifying support for civic legislative initiatives.

The task of verifying support for a citizens' legislative initiative is related to the constitutional right of a group of at least 100,000 citizens with active voting rights to submit a bill to the Marshal's desk (Article 118 (2) of the Constitution). If the Marshal of the Sejm has reasonable doubts as to whether the submission of the required number of signatures for a civic bill is correct, he is obliged to request that the NEC confirm if the required number of signatures has in fact been submitted. The NEC has 21 days to perform the checks required. The decision issued by the NEC in this matter, made in the form of a resolution, is binding. A confirmation that the required number of signatures has been submitted for a given bill obliges the Marshal of the Sejm to run a civic legislative initiative. If the number of signatures proves insufficient, the project may be rejected[13].

[12] Article 248 of the Criminal Code.

[13] Article 12 of the Act of 24 June 1999 on the Exercise of Legislative Initiative by Citizens (Journal of Laws no. 62, item 688).

From its very inception, the National Electoral Commission has participated in implementing the constitutional principle of open financing of political parties[14]. This principle is rarely formulated in basic laws, and tends to be included in laws on political parties. Its inclusion in Chapter I, entitled Rzeczpospolita, should be considered as its acknowledgement as one of the basic principles, and therefore the most important for the functioning of the state[15]. The constitutional principle of open financing of political parties arises from many minor principles, including transparency of sources of party financing and of a party's assets, definition of the rules of subsidising a party from the state budget in a generally applicable normative act, the accuracy of financial reports submitted by parties to the competent authorities or the supervision of finances by state authorities

The principle of transparency should therefore be treated as a tool enabling social control over the activities of individual entities and for assessing whether actions undertaken are aimed at achieving the intended goals and comply with the principles of a democratic state ruled by law[16].

In Poland, the principle of transparency regarding the financing of political parties, founded in the Constitution, has been specified in ordinary legislation. Monitoring the financing of political parties is performed on the basis of the Act of 27 June 1997 on political parties. The regulation of financing election campaigns was introduced by the Act of 27 September 1990 on the election of the President of the Republic of Poland, according to which representatives of election committees are obliged to submit to the chairman of the NEC a financial report on the sources of funds collected by them and the costs incurred for conducting an election campaign. These reports have been made open and available to the public by the NEC, although they have not provided for any substantive control or sanctions for violating financial regulations. Successive amendments to this act, enactment, and amendment of other acts[17] as well as adoption and amendment of the

[14] F. Rymarz, *Jawność i kontrola finansowania kampanii wyborczej w wyborach prezydenckich i parlamentarnych w latach 2000 i 2001. (Na tle praktyki Państwowej Komisji Wyborczej)*, "Przegląd Sejmowy" 2002, no 6(53); F. Rymarz, *Jawność i kontrola finansowania działalności statutowej partii (w praktyce Państwowej Komisji Wyborczej)*, "Przegląd Sejmowy" 2004, no. 3(62).

[15] Article 11 (1). The Republic of Poland ensures the freedom to create and operate political parties. Political parties associate all citizens on a voluntary basis and on the basis of equality in order to influence the shaping of the state's policy through democratic methods. Article 2. The financing of political parties shall be public and transparent.

[16] M. Bidziński, *Finansowanie kampanii wyborczych do samorządu*, [in:] M. Chmaj (ed.), *Finansowanie polityki w Polsce na tle europejskim*, Toruń 2008, p. 95.

[17] This institution developed further as a result of the adoption of the Act of May 28, 1993 – Electoral Regulations to the Sejm of the Republic of Poland 22, which slightly developed the current direction of indicating sources of financing, the limiting of expenses and the transparency of proceedings. but only the amendment to the act on the election of the President of the Republic of Poland of 27 September 1990, made in 2000, introduced control over the correctness and reliabili-

act of 27 June 1997 on political parties (Journal of Laws of 2001, no. 79, item 857, as amended) created a model for the financial monitoring of political parties and election committees based on the NEC's examination of reports submitted annually by political parties, or by election committees following an election campaign. The imprecision of the provisions and numerous legal loopholes in this and other acts on political financing, enabling the circumvention of regulations and the fostering of corruption, emphasise the substantial role of the NEC in the system of party financing[18]. The pathologies of this system distort the decision-making mechanisms in the state administration and the disposition of public funds, and the conviction that corruption gains traction contributes to the delegitimisation of democracy.

The role to monitor the financing political parties granted to the NEC as the highest, independent electoral body eludes the essence of its activity, but at the same time makes the NEC an independent state body of control[19]. However, doubts remain as to whether the entity of control should be the NEC. M. Chmaj draws attention to Bulgarian or Hungarian solutions, where there are specialised institutions that monitor party finances[20]. In Bulgaria, this is the Accounts Office, whose task is to audit the financial activities of parties and the management of their assets, while in Hungary the responsibility falls to the State Audit Office to examine the legality of the financial management of political parties. This is the constitutional auditing body of the parliament, overseeing the management of public finances[21]. In France, candidates' financial accounts are audited by the Constitutional Council in the case of presidential elections and the National Commission on Election Accounts and Party Financing in the case of other elections[22]. However, in many countries these are politically empowered bodies. In Germany, it is the responsibility of the parliamentary administration to verify annual reports (including a list of donators), comment on them and publish them in the parliamentary newspa-

ty of financial statements. Electoral ordinance to the Sejm of the Republic of Poland and the Senate of the Republic of Poland of 12 April 2001 introduced more detailed and restrictive rules for controlling the financing of election campaigns. The basic assumption of the amendments was the adoption of the principle that political parties are to obtain funds for their activities, and above all for expenses related to participation in elections, almost exclusively from the state budget.

[18] Incl. a specification within the act of components of "party assets" and not their "sources of financing", no monitoring of the cost of election campaigns incurred by election committees, no authorisation to verify the data contained in the report. Cf. the report of the Batory Foundation and the Institute of Political Science on the monitoring of election finances and proposed changes, no closed catalogue of sources of party financing.

[19] M. Ekiert, K. Lorentz, *Rola Państwowej Komisji Wyborczej w systemie kontroli finansowania partii politycznych i kampanii wyborczych*, Warszawa 2014, p. 256.

[20] M. Chmaj, *Finansowanie partii politycznych,* [in:] M. Chmaj (ed.), *Finansowanie polityki...*, pp. 195-197.

[21] *Ibidem*.

[22] A. Ławniczak, *Finansowanie partii politycznych*, Warszawa 2001, p. 59.

per[23]. The report is submitted to the chairman of the federal parliament, who carries out a formal audit, while the content-related audit of the accounts is carried out by the statutory auditor. Similar regulations can be found in Italy, where financial statements are checked by the speakers of both houses of parliament, assisted by statutory auditors[24].

Against this background, the model implemented in Poland, whereby jurisdiction in this area has been entrusted to apolitical and fully independent electoral bodies, may appear to be an appropriate solution, taking into account the fact that the controlling body, apart from substantive preparation, should be completely impartial so that its decisions do not arouse even the slightest suspicion of bias.

The NEC audits not only the financing of political parties, but also election and referendum campaigns. With regard to checking compliance with the provisions of law concerning the conduct and financing of election campaigns, election laws oblige the representatives of financial election committees to submit an election report to the NEC[25]. The report on the committee's revenues, expenses and financial liabilities, including bank loans obtained and the conditions for obtaining them, along with the statutory auditor's opinion and report, must be submitted within 3 months from the date of the election[26].

Therefore, the legislator places the NEC's auditing of election campaign financing beyond the controlled entity and limits it to merely verifying the election report prepared and submitted by said controlled entity together with the documentation attached thereof. The legal instruments used by NEC in the course of an audit are identical to those used while auditing annual financial statements. The NEC selects a statutory auditor from the list of the National Council of Statutory Auditors, who then presents an opinion and a report on the election report submitted by an election committee. In the event of doubts as to the correctness of the election report, the NEC calls on the election committee to remedy any faults in the report or to provide explanations within a specified period. It may also commission an expert appraisal or opinion on the matters covered by the report.

The National Electoral Commission, when examining the election report, may request necessary assistance from state authorities, although the principles behind

[23] K.H. Nassmacher, *Analiza porównawcza finansowania partii politycznych w ustabilizowanych demokracjach*, [in:] M. Walecki (ed.), *Kulisy finansowania polityki*, Warszawa 2002, p. 34.

[24] A. Ławniczak, *op. cit.*, p. 93.

[25] Failure by the attorney to comply with this obligation is punishable by a fine, restriction of liberty or imprisonment for up to 2 years, Article 87 g (1) of the law on the election of the president.

[26] In the case of elections to the European Parliament, within 4 months from the date of the elections.

such cooperation with other state institutions are described very generally in the statutes and do not ensure that the NEC shall receive the necessary assistance[27].

The NEC also performs duties related to public trust. One example is the maintenance of a Register of Interests[28] for persons occupying managerial state functions. The obligation to disclose interests applies to members of the Council of Ministers, secretaries and undersecretaries of state in ministries and the Chancellery of the Prime Minister, heads of central offices, voivodes, deputy voivodes, members of voivodeship boards, voivodeship treasurers, members of powiat boards, secretaries of powiats, powiat treasurers, village heads (mayors, presidents of cities), deputy mayors, secretaries of municipalities and treasurers of municipalities, or their spouses.

The Register of Interests should include the following: information on all remunerated positions and occupations performed both in public administration and private institutions as well as professional work performed on one's own account; instances of material support given in exchange for public activities performed by the notifier; donations received from domestic or foreign entities, if the value exceeds 50% of the minimum wage; domestic or foreign travel not related to public function whose cost was not covered by the applicant or spouse or their employing institutions or political parties, associations or foundations to which they belong; other benefits obtained of a value greater than those indicated above, not related to the positions held or activities performed or professional work referred to at the beginning of this calculation. Information on participation in foundations, commercial companies or cooperatives should also be reported in the Register of Interests, even if no cash benefits are collected on this account.

Within the duties related to public trust, the NEC should collect vetting declarations from candidates and incumbent persons holding the office of the President of the Republic of Poland, members of parliament, senators, and members of the European Parliament, and forward them to the Institute of National Remembrance, as appropriate. The informative role of the NEC in this respect, consisting in the dissemination of knowledge about electoral law, is equally relevant.

The NEC also plays a significant informative role related to the dissemination of knowledge about the provisions of electoral law, as well as collecting comments and conclusions on the implementation of electoral laws and the experiences of other countries for the development of democratic electoral institutions.

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[27] Cf. A. Sokala, *Administracja wyborcza w obowiązującym prawie polskim*, Toruń 2010, pp. 63-121.

[28] Article 12 (8) of the Act of 21 August 1997 on the restriction of economic activity by persons performing public functions (Journal of Laws no. 106, item 679, as amended).

Conclusion

In the face of the above arguments of a legislative, supervisory, control or constitutional nature, the postulate to raise the National Electoral Commission to the rank of a constitutional one, as an institution of state control and protection of the law, seems justified. Constitutional empowerment for the structure and composition of electoral authorities is becoming a regularity in countries undertaking reforms of their electoral administration[29]. In 2000, at the request of the United Nations, the International Foundation of Electoral Systems in Washington issued a report demonstrating that the constitutionalisation of electoral bodies limits the possibility of easily amending the electoral system by means of an act or decree of power. The constitutionalisation of the NEC as the central electoral body supervising the implementation of passive and active electoral law and independent of the executive authority would seem to be necessary in the light of its current duties and jurisdiction.

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Juliusz Szewczyk
Poznan University of Medical Sciences
ORCID 0000-0003-2314-072X
juliusz.szewczyk@ump.edu.pl

Healthcare in a modern state

Keywords: health care, right to health care, modern state, quality of health care system

Summary. The article is devoted to health protection in the modern state. To this end, it analyzes selected international agreements in terms of the sources of the right to health care, which is inextricably linked to human dignity. The article also examines and compares data contained in reports assessing health care in various countries around the world. Based on the results presented in these reports, conclusions are made about the characteristics that should characterize health care in a modern country.

Ochrona zdrowia w nowoczesnym państwie

Słowa kluczowe: opieka zdrowotna, prawo do ochrony zdrowia, nowoczesne państwo, jakość systemu ochrony zdrowia

Streszczenie. Artykuł poświęcony jest ochronie zdrowia w nowoczesnym państwie. W tym celu analizuje wybrane umowy międzynarodowe pod kątem źródeł prawa do ochrony zdrowia, które jest nierozerwalnie związane z godnością ludzką. W artykule badane i porównywane są także dane zawarte w raportach oceniających ochronę zdrowia w różnych krajach na świecie. W oparciu o wyniki prezentowane w tych raportach sformułowane zostały wnioski dotyczące cech, jakimi powinna charakteryzować się opieka zdrowotna w nowoczesnym państwie.

Introduction

Health is a fundamental human right. It is inextricably linked to human dignity and guaranteed by various acts of international and national law of individual states. In an organized structure such as a modern state, the preservation of health requires the involvement of citizens and public authorities. What, then, should be the characteristics of health care in a modern state? What factors determine that health care in one state is at a higher level than in others? Does a modern, safe, and effective health care service require significant financial resources, or, however, does proper management of the system, appropriate legislation, and quality

standards play a key role? Within the framework of this article, the author will try to provide answers to the above questions.

Right to health care

The second of the nine principles formulated in the preamble to the **Constitution of the World Health Organization**[1] was adopted at the International Health Conference held in New York from June 19 to July 22, 1946, and signed on July 22, 1946, by representatives of 61 countries, ratified on April 7, 1948, reads: "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social situation". The author does not doubt that these words are stronger and more relevant than ever. So, what does the right to health mean for all people? It means that everyone should have access to the health services they need, when and where they need them, without financial hardship and regardless of background, social status, gender, or age. It also means the ability to control one's health, to take an active role in taking care of oneself, the right to informed consent, and access to services free from violence and discrimination, respect for the right to privacy, and to be treated with respect and dignity. According to the author, all of the above are standards of modern health care.

The human right to health care is also addressed in the **Universal Declaration of Human**[2] **Rights** proclaimed by the United Nations General Assembly in Paris on December 10, 1948, in General Assembly Resolution 217/III-A. Although the Declaration was not binding and was not a source of international law, it became a common standard for all nations. It was a landmark document in the history of human rights, as it defined for the first time basic human rights subject to universal protection. Its text has been translated into more than 500 languages. The issue of health protection is regulated in Article 25 (1) of the Declaration[3]. According to its wording, every person is entitled to a level of well-being that ensures the preservation of this personal good for him and his family, in particular through access to medical care. The Declaration does not indicate specific systemic solutions through which this entitlement is to be realized. As Jaskólska rightly notes: "For

[1] Constitution of the World Health Organization, World Health Organization, 1946, https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1 (accesssed on 30.09.2022).

[2] *Universal Declaration of Human Rights*, United Nations 1947, https://www.un.org/en/about-us/universal-declaration-of-human-rights (accessed on 30.09.2022).

[3] Article 25 (1) of Universal Declaration of Human Rights reads:
1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

these are already issues of concrete policy, which can only be resolved in individual regimes, through the formulation and implementation of specific legislation. The role of the Declaration here essentially boils down to raising awareness that such rights exist and should be realized"[4].

An example of an act of international law with global reach is the International **Covenant on Economic, Social and Cultural Rights**[5] at the core of which is the Universal Declaration of Human Rights mentioned above. This treaty was adopted by the General Assembly of the United Nations on December 16, 1966 and entered into force on January 3, 1976. It commits its parties to work for the granting of economic, social, and cultural rights, including the right to health. As of July 2020, it has been adopted by 171 States Parties. Another four countries, including the United States, have signed but not ratified the Pact. The issue of health has been devoted to Article 12[6]. The first paragraph of the article in question defines the right to health. In turn, the next one lists examples of obligations by which States Parties are to enable the full realization of this right. The right to health should not be understood solely as the right to be healthy. The right to health includes both freedoms and entitlements, including the right to control one's health and body, sexual and reproductive freedom, and the right to be free from interference (the right to be free from torture, the right to consensual medical treatment). It also includes the right to a health care system that provides equal opportunities for people to enjoy the highest attainable standard of health. The concept of "the highest attainable standard of health" referred to in Article 12(1) of the Covenant takes into account both the biological and socioeconomic conditions of the individual and the available resources of the state. Many aspects cannot be considered

[4] J. Jaskólska, *Treść Powszechnej Deklaracji Praw Człowieka*, „Człowiek w Kulturze" 1998, vol. 11, p. 81, https://bazhum.muzhp.pl/media/files/Czlowiek_w_Kulturze/Czlowiek_w_Kulturze-r1998-t11/Czlowiek_w_Kulturze-r1998-t11-s49-97/Czlowiek_w_Kulturze-r1998-t11-s49-97.pdf (accessed on: 30.09.2022).

[5] International Covenant on Economic, Social and Cultural Rights, General Assembly resolution 2200A (XXI), United Nations General Assembly 1966, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights (accessed on 30.09.2022).

[6] Article 12 of Covenant on Economic, Social and Cultural Rights reads:
1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
b) The improvement of all aspects of environmental and industrial hygiene;
c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

solely within the framework of the relationship between States and individuals; in particular, a State cannot ensure good health, nor can it protect every possible cause of human ill health. Accordingly, variables such as genetic factors, individual susceptibility to ill health, and the adoption of unhealthy or risky lifestyles can play an important role in an individual's health. Thus, as rightly noted in the commentary to Article 12 of the Covenant in question, "the right to health must be understood as the right to enjoy the various facilities, goods, services, and conditions necessary to realize the highest attainable standard of health"[7].

Among the sources of European international law, two agreements should be singled out. The first is the **European Social Charter**[8], opened for signature on October 18, 1961, in Turin, effective February 26, 1965. This basic agreement of the Council of Europe on socio-economic rights is a guarantee of both civil and political rights and freedoms. It is based on equality based on race, color, and gender, religion, political opinion, national or social origin. The Charter guarantees several rights and freedoms of the social sphere, including the right to health protection, outlined in Article 11 of the Charter[9], and the right to social and medical assistance, found in Article 13 of the document[10]. Inherent in the norm flowing from Article 11 is human dignity, which is the source of all human rights and freedoms.

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[7] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, https://www.refworld.org/docid/4538838d0.html (accessed on 30.09.2022).

[8] *European Social Charter*, Council of Europe, Turin 1961, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048b059 (accessed on 30.09.2022).

[9] Article 11 of European Social Charter reads: With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:
1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases.

[10] Article 13 of European Social Charter reads: With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting Parties undertake:
1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.

Consequently, the right to health care is a condition for the inviolability of human dignity. The legal provision in question imposes an obligation on member states to eliminate as far as possible the causes of disease, to provide a system of guidance and education on health matters and prevention, by making the public aware of its individual responsibility and the need to improve health and to prevent, as far as possible, epidemic, endemic and other diseases, as well as accidents. All of the responsibilities listed above should be carried out by member states at both the central and local government levels. The task of eliminating (as much as possible) the causes of diseases and providing a system of guidance can be carried out by the authorities of member states, through the organization of a universal and effective health care system involving the public and private sectors. Great emphasis should be placed on preventive and educational measures. Related to the latter is the goal of building public awareness of and responsibility for health security in the broadest sense, which can be achieved through information and education campaigns using a variety of tools, in places such as schools, workplaces, and public spaces. When evaluating the effectiveness of the public authority's activities in carrying out the above tasks, attention should be paid to the extent to which the intended goals have been achieved in society as a whole and in particular groups, including among those at risk of social exclusion.Concerning persons who lack sufficient resources and are unable to provide for themselves from other sources, Article 13 of the Charter establishes the right to social and medical assistance. In terms of the right to medical assistance, these persons, in the event of illness or deterioration of their health, have gained a guarantee of access to necessary medical care. At this point, it should be emphasized that the question support should also include counseling at an appropriate level[11]. As in the case of the previously presented acts, the duty to create an adequate health care system lies with the authorities of the Council of Europe member states.

The second act of international law limited to the EU area is the **Charter of Fundamental Rights of the European Union**[12]. In its original form, it was enacted and signed on behalf of the three Community bodies: Parliament, the Council, and the European Commission. This took place on December 7, 2000, in Nice during the European Council summit. The agreement eventually became binding

[11] For more on Articles 11 and 13 of the European Social Charter, see A. M. Świątkowski, M. Wujczyk, *Karta Praw Społecznych Rady Europy Jako Szansa Ustanowienia Jednolitej Koncepcji Obywatelstwa Unii Europejskiej*, "Roczniki Administracji i Prawa. Wyższa Szkoła Humanitas" 2016, no. 16(2), p. 415, http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-f847bd20--3aff-4a65-8de4-a11fa6747b78 (accessed on 30.09.2022).

[12] Charter of Fundamental Rights of the European Union, European Convention, 2000, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT (accessed on 30.09.2022).

through the Lisbon Treaty, signed on December 13, 2007, and which entered into force on December 1, 2009. The Charter establishes political, social, and economic rights in EU law for both citizens and residents of the area. The issue of health care is regulated in Article 35 of the Charter of Fundamental Rights[13]. The principles outlined in this article are based on repealed Article 152 of the EC Treaty[14], now replaced by Article 168 of the Treaty on the Functioning of the European Union[15], and Articles 11 and 13 of the European Social Charter, discussed earlier.

[13] Article 35 of Charter of Fundamental Rights of the European Union reads: Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.

[14] Article 152 of the UC Treaty read:

1. A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities. Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education. The Community shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.
2. The Community shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action. Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination.
3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.
4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this article through adopting:
a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;
b) by way of derogation from Article 37, measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;
c) incentive measures designed to protect and improve human health, excluding any harmonisation of the laws and regulations of the Member States. The Council, acting by a qualified majority on a proposal from the Commission, may also adopt recommendations for the purposes set out in this article.
5. Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care. In particular, measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.

[15] Article 168 of Treaty on the Functioning of the European Union (ex Article 152 TEC) reads:

1. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and comba-

Juxtaposing Article 35 of the Charter of Fundamental Rights with Article 168 of the EU Treaty, it should be noted that the former defines the powers of the European Community in a very general way, while the latter already in the first paragraph contains an extensive catalog of more concrete powers such as: defining and implementing all Union policies and activities, the duty to ensure a high level of human health protection, activities directed at improving public health, preventing human diseases and ailments, removing sources of danger to physical and mental health, combating epidemics by developing research focused on determining their causes and ways of spreading and preventing them, promoting health information

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ting serious cross-border threats to health. The Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.
2. The Union shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action. It shall in particular encourage cooperation between the Member States to improve the complementarity of their health services in cross-border areas. Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.
4. By way of derogation from Article 2(5) and Article 6(a) and in accordance with Article 4(2)(k) the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this Article through adopting in order to meet common safety concerns:
a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;
b) measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;
c) measures setting high standards of quality and safety for medicinal products and devices for medical use.
5. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.
6. The Council, on a proposal from the Commission, may also adopt recommendations for the purposes set out in this Article.
7. Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.

and education, monitoring and early warning of serious cross-border health threats and combating such threats, as well as measures to reduce the harmful effects of drug addiction involving information and prevention. In this regard, it should be understood that Article 35 of the Charter of Fundamental Rights establishes two general principles. First, member states must ensure equal access to health services. Second, in defining and implementing all Union policies and activities, it is an obligation to ensure a high level of human health protection.

It should be noted that although all of the aforementioned acts referred to the issue of health care in their content, only two of them, namely the International Covenant on Economic, Social and Cultural Rights in Article 12 and the Charter of Fundamental Rights of the European Union in Article 35, specify the level of quality that the health care system should meet. The former of the aforementioned acts refers to the right of everyone to enjoy the highest attainable level of physical and mental health protection, while the latter refers to a high level of human health protection. According to the author, the health care system in a modern state should be of the highest possible level. With this in mind, it is worth looking at the results of selected studies on the quality of health care in individual countries.

Quality of health care around the world

A WHO report published in January 2000, entitled „**Measuring Overall Health System Performance for 191 Countries**"[16], shows that at the time the top ten health care rankings were: France, Italy, San Marino, Andorra, Malta, Singapore, Spain, Oman, Austria, and Japan. Given that medicine is one of the fastest growing sciences, the above ranking has lost its relevance. Subsequent research in this area has produced new, updated lists.

The result of the Ipsos[17] international survey on healthcare was a report published in October 2018 entitled "Global Views On Healthcare – 2018"[18]. It presented results related to topic areas such as Personal Health Perceptions, Evaluating the Healthcare System, Patient Experience, Expected Changes in Healthcare, Adoption

[16] A. Tandon, C.JL. Murray, J.A. Lauer, D.B. Evans, *Measuring Overall Health System Performance for 191 Countries*, GPE Discussion Paper Series, World Health Organization 2000, no. 30, https://www.researchgate.net/publication/255624050_Measuring_Overall_Health_System_Performance_for_191_Countries (accessed on 30.09.2022).

[17] Ipsos is an independent research company controlled and managed by research professionals. Founded in France in 1975, Ipsos has developed into a global research group with a strong presence in all key markets. Ipsos ranks third in the global research industry. With offices in 89 countries, Ipsos provides reliable knowledge in six research specialties: advertising, customer loyalty, marketing, marketing, media, public affairs research, and research management.

[18] *Global Views On Healthcare – 2018*, Ipsos, 2018, https://www.ipsos.com/pl-pl/global-views-healthcare (accessed on 30.09.2022).

of Healthcare Technology, and Healthcare Information[19]. The information in the Personal Health Perceptions section shows that more than half of all adults surveyed worldwide (56%) enjoyed good health. Among the countries surveyed, those with the highest levels of reported good health were India (70%), Serbia (68%), and Saudi Arabia (67%), while the lowest levels were recorded by Hungary (47%), Poland (48%) and Russia (49%). It should be noted here that the entire survey was conducted using the Ipsos Global Advisor platform, which required Internet access[20]. In terms of access to necessary medical care, globally, half (49%) confirmed that they have such access, while as many as 24% said they do not. The countries where the highest percentage of adults disagreed that they receive needed medical care were Russia (44%), Peru (44%), Poland (42%), and Chile (40%). On the other side of the scale were Germans (11%), as well as Belgians, Australians, and Britons (12% each). Compared to medical care, a slightly smaller percentage of people worldwide (46%) confirmed that they receive necessary dental care, while 28% of respondents answered in the negative.

The Evaluating the Healthcare System section presents consumers' assessment of the quality of healthcare. The results varied widely from country to country. Globally, 45% of respondents rated it well, while 23% expressed dissatisfaction with their country's healthcare quality. In 14 of the 28 countries, the majority rated it as good, with the highest in the UK (73%), Malaysia (72%), and Australia (71%). The lowest ratings were in Brazil (39%), Poland (31%), and Russia (29%). In the ranking based on this data, the top ten places are held by the UK, Malaysia, Australia, Belgium, the US, Canada, Spain, Argentina, Germany, and France.

[19] According to the website www.ipsos.com, the results are from a survey conducted in 2018 on the Ipsos Global Advisor platform using the Ipsos Online Panel system. The first survey (questions A1-A5) was conducted between April 20 and May 4, 2018, with a sample of 20,767 adults in 27 countries: Argentina, Australia, Belgium, Brazil, Canada, Chile, China, France, Germany, Great Britain, Hungary, India, Italy, Japan, Malaysia, Mexico, Peru, Poland, Russia, Saudi Arabia, Serbia, South Africa, South Korea, Spain, Sweden, Turkey, and the United States. The second survey (covering questions B1-B13) was conducted between May 25 and June 8, 2018. With 23,249 adults in 28 countries (same as above plus Colombia). All survey respondents are 18-64 years old in Canada and the United States, and 16-64 years old in all other countries. Data are weighted according to population profile.

[20] In 17 countries, Internet access is high enough to consider the samples representative of the national population in the age ranges covered: Argentina, Australia, Belgium, Canada, France, Germany, Hungary, Italy, Japan, Poland, Serbia, South Korea, Spain, Sweden, the UK, and the US. Brazil, Chile, China, Colombia, India, Malaysia, Mexico, Russia, Peru, Saudi Arabia, South Africa, and Turkey have lower levels of Internet access. The samples from these countries should not be considered fully representative of the country, but rather represent a more affluent, connected population, representing an important and emerging middle class.

Table 1. Summary of top ten rankings by WHO (2000) and Ipsos (2018)

Ranking position	Country (2000 / WHO)	Country (2018 / Ipsos)
1	France	UK (#18 in 2000)
2	Italy	Malaysia (#49 in 2000)
3	San Marino	Australia (#32 in 2000)
4	Andorra	Belgium (#21 in 2000 r.)
5	Malta	USA (#37 in 2000)
6	Singapore	Canada (#30 2000)
7	Spain	Spain (#7 in 2000)
8	Oman	Argentina(#75 in 2000)
9	Austria	Germany (#25 in 2000)
10	Japan	France (#1 in 2000)

Only four in ten adults (41%) surveyed in 28 countries expressed confidence that their country's health care system would provide them with the best treatment, while nearly three in ten people (31%) did not trust their country's health care system. Spaniards (64%), Britons (63%), Malaysians (63%), and Australians (61%) expressed the highest appreciation. At the bottom of the table were Hungary (13%) and Russia (13%). In terms of waiting time to see a doctor, globally, 60% of respondents expressed their dissatisfaction, considering it too long. The exceptions were patients from Belgium, South Korea, the US, Australia, and Japan. At the same time, only 41% of people said they did not encounter difficulties in making a medical appointment in their area, while 32% disagreed with this statement. Countries, where more than 60% of people agreed with this statement, were Spain, Australia, and India. Countries, where residents encountered difficulties in this regard, included Brazil, Peru, Hungary, and Poland. As many as 55% of respondents felt that their country's health care system is overburdened. This opinion was most often expressed by the British (85%), Hungarians (80%), and Swedes (74%). Three in five (58%) respondents said that many people in their country cannot afford good health care. At the same time, only 32% of respondents said their country's health care system provides the same standard of care for everyone, while 40% had the opposite view. Only in Malaysia, the United Kingdom, Spain, and Canada did a majority of respondents give an affirmative response, while in Hungary, Poland, South Africa, and all four South American countries surveyed, the percentage of positive responses was less than 20%. Respondents also expressed concerns about the security of their data. Exactly half (50%) admitted that they feared their data would be shared with third parties without their consent. The countries with the highest percentage of such individuals were Mexico (67%) and Peru (65%).

The data presented in the Patient Experience section shows that although consumers in many countries had mixed opinions about their healthcare system, their views on interactions with individual healthcare professionals were generally positive. For the most part, adults participating in the survey in 28 countries were treated with dignity and respect (60%), seriousness (56%), acceptance (55%), felt safe (52%), and knew what to expect from their doctor (52%) during their last visit to a healthcare professional.

Another section titled Expected Changes in Healthcare focuses on issues related to expected changes in healthcare. It is noticeable that the vision of the future in emerging countries differed from that of already economically developed countries. Optimism prevailed in the first group (especially in China, India, Saudi Arabia, Malaysia, and all of Latin America), while pessimistic sentiment prevailed in many countries belonging to the second group (especially in Western Europe). Globally, more people believed that the availability of treatment for various conditions would improve (47%) rather than worsen (18%). The opposite trend was noticeable in Germany, Italy, France, and Sweden. Also, on the issue of the quality of health care and the availability of providers, optimists outnumbered pessimists (by 18 and 15%, respectively), while pessimists prevailed in most European countries. Regarding healthcare costs, more consumers in all countries surveyed expected them to be higher in a decade (34%). When it came to costs, pessimism prevailed in countries otherwise optimistic about the future of health care, including the US, Australia, South Africa, and Turkey.

The Adoption of Healthcare Technology section of the report presented findings in the area of technology adoption in healthcare, including telemedicine. According to the results presented, only 10% of all respondents had ever used telemedicine. There was a noticeable disparity between the use of telemedicine in Europe (2% in Belgium, 3% in Serbia, 4% in Russia, France, Spain, and Hungary) and the emerging countries of Asia and the Middle East (31% in Saudi Arabia, 27% in India, 24% in China, 15% in Malaysia) and the United States (15%). Among the 10% who had been exposed to the solution, about two-thirds said they would use it again, and one-third said they would not. In contrast, 44% of all respondents said they had not used telemedicine but would like to try it.

Data from Healthcare Information shows that medical personnel were then the primary source of information on healthcare, disease symptoms, and treatment options. For 58% of respondents, it was the only source of information. In all countries except Japan and Saudi Arabia, medical personnel were the primary source of information, followed by search engines (43%), family and friends (37%), pharmacists (34%), online encyclopedias (22%), and online medical information tools (22%). The availability of information about health services and how to take care

of one's health varied from country to country. Of all respondents, 47% said that information about health care services was readily available, while 50% said they encountered no difficulty in obtaining information on how to take care of their health. This attitude of respondents can be found in most English-speaking countries, as well as in Malaysia, Turkey, Sweden, Germany, Spain, and South Korea. In contrast, the lowest percentage of positive responses was recorded among respondents living in South America, Central Europe, Italy, and Japan.

In the report in question, among the key problems faced by each country's health care systems were access to treatment and long waiting times (40%), insufficient staff (36%), medical costs (32%), and excessive bureaucracy (26%). In the eight countries surveyed, access to treatment and waiting times to see a doctor was cited as the main problems. The greatest dissatisfaction among respondents was expressed by Poles (70%), Serbs (68%), Hungarians (65%), and Chileans (64%). In contrast, lack of staff was complained about by at least half of the respondents in six countries, including Sweden (68%), France (67%), Hungary (63%), and Germany (61%). Among the issues of serious concern in some countries were the high cost of access to treatment (64% in the US and 56% in Russia), poor quality of treatment (59% in Russia), an aging population (52% in Japan and 46% in China), lack of investment (more than 40% in Argentina, Brazil, the UK, and Spain), excessive bureaucracy (46% in Mexico), and low standards of cleanliness (30% in India and South Africa).

In turn, the report published on August 4, 2021, by The Commonwealth Fund[21], "Mirror, Mirror 2021 - Reflecting Poorly: Health Care in the U.S. Compared to Other High-Income Countries"[22] presents the results of a study that assessed the performance of the health care system in 11 high-income countries. Australia, Canada, France, Germany, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and the United States were selected as representative groups. Five indicators were used to assess them: Access to care, Care process, Administrative efficiency, Equity, and Health care outcomes.

[21] According to its website, https://www.commonwealthfund.org/about-us, The Commonwealth Fund is dedicated to promoting an efficient, equitable health care system that provides better access, better quality and greater efficiency, especially for the most vulnerable populations, including people of color, low-income people, and the uninsured. The Fund carries out this mandate by supporting independent research on health care issues and awarding grants to improve health care practice and policy. The International Health Policy Program aims to stimulate innovative policies and practices in the United States and other industrialized countries.

[22] E.C. Schneider, *Mirror, Mirror 2021 – Reflecting Poorly: Health Care in the U.S. Compared to Other High-Income Countries*, Commonwealth Fund Aug. 2021, https://doi.org/10.26099/ 01DV-H208 (accessed on 30.09.2022).

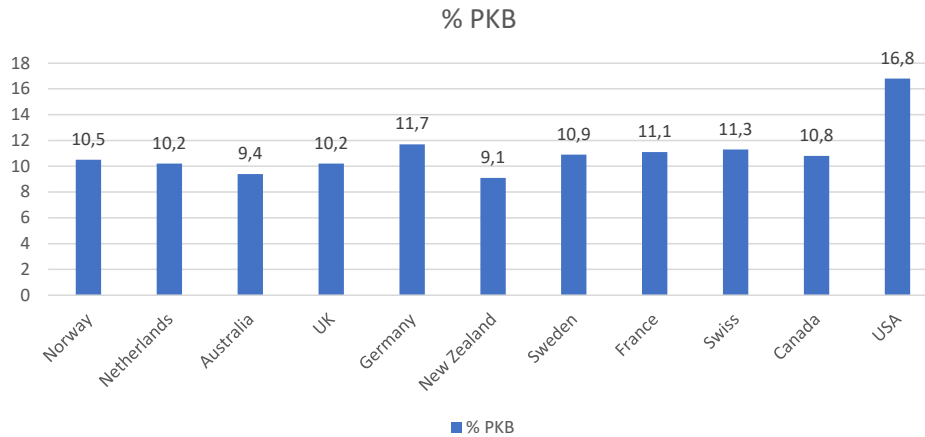

Figure 1. Percentage of GDP allocated by country to health care
Source: E.C. Schneider, *Mirror, Mirror 2021 — Reflecting Poorly: Health Care in the U.S. Compared to Other High-Income Countries*, Commonwealth Fund Aug. 2021, https://doi.org/10.26099/01DV-H208 (accessed on 30.09.2022).

Based on the data presented here, the following ranking was created: Norway (#1), Netherlands (#2), and Australia (#3). United Kingdom (#4), Germany (#5), New Zealand (#6), Sweden (#7), France (#8), Switzerland (#9), Canada (#10), United States (#11). By comparison, these countries ranked as follows in the 2000 and 2018 rankings by WHO and Ipsos, respectively: Norway (WHO – #11, Ipsos – no data), Netherlands (WHO – #17, Ipsos – no data), Australia (WHO – #32, Ipsos – #3), United Kingdom (WHO – #18, Ipsos – #1), Germany (WHO – #25, Ipsos – #9), New Zealand (WHO – #41, Ipsos – no data), Sweden (WHO – 23, Ipsos – 13), France (WHO – 1, Ipsos – 10), Switzerland (WHO - 18, Ipsos – no data), Canada (WHO – 30, Ipsos – 6), United States (WHO – 37, Ipsos – 5). The Commonwealth Fund survey found that the United Kingdom, Germany, and New Zealand had very similar scores. The United States, on the other hand, fared the worst, with a result well below the average for the other countries and well below Switzerland and Canada, which ranked directly above the US. The only area in which the U.S. did not come in last place was Care Process, where it ranked second. As stated in the report "The United States is such an outlier that we calculated an average score based on the other 10 countries, excluding the United States"[23]. It should also be noted that while all countries increased health spending as a share of gross domestic product (GDP), spending growth in the United States – by far the worst performer overall - far outpaced that of the other 10 countries. The data

[23] *Ibidem*.

presented in Figure 1 shows that the amount of money spent on health care does not translate proportionately into quality. The U.S., which fared the worst overall, allocates the largest share of GDP, at 16.8%, while Norway, which ranked first in the ranking, allocates only 10.5%. Interestingly, the United Kingdom, Germany, and New Zealand, which ranked fourth, fifth and sixth respectively, allocate 10.2%, 11.7%, and 9.1% of GDP, respectively. In the author's opinion, the above proves that proper management and appropriate legal solutions, combined with reasonable levels of funding, can translate into an effective, high-quality health care system.

The data presented in the Access to care section deals with access to health care, which examined affordability and waiting times for medical care. In this area, of the 11 countries, the Netherlands performed best, ranking at or near the top in both subdomains. Norway and Germany also scored well in terms of access to health care, but all three countries were overtaken in terms of affordability by the UK. The last ranked country in terms of access to care was the United States, which recorded the weakest score in terms of affordability. The second least attractive country in this regard was Switzerland. Residents of the top-performing countries in the timeliness subdomain are more likely to have same-day and after-hours care. In this case, the United States ranked 9th.

The Care process section included assessments of preventive care activities, health care safety, coordinated care, and patient engagement and preference.

In this survey, the United States ranked a high second. The United Kingdom, Sweden, and the United States outperformed in the preventive care subdomain, which included rates of mammography screening and influenza vaccination, as well as the percentage of adults who talked to their doctor about nutrition, smoking, and alcohol consumption. New Zealand and the United States, with their large numbers of reported computerized warnings and routine drug reviews, scored best in terms of safety of care. In all countries, more than 10 percent of adults report that treatment or medication errors occurred during their care.

In the subdomain of coordinated care, New Zealand, Switzerland, and the Netherlands performed best. And in communication between primary care physicians and specialists, Switzerland, New Zealand, Australia, Norway, and France scored well. In terms of patient engagement and preferences, the highest scores were achieved by the United States and Germany. Among patients with chronic diseases, Americans showed the highest level of awareness manifested by the fact that they were most likely among those surveyed to show interest in the goal, priorities, and possible therapeutic methods. The findings on e-medicine are also noteworthy. Well, in the year preceding the COVID-19 pandemic, Swedish and Australian primary care physicians were most likely to use video consultations.

Administrative efficiency noted that in many countries with good health care systems, over-documentation was reduced for patients who use health services frequently, and insurance coverage, billing, and payment were simplified. In this area, Norway, Australia, New Zealand, and the United Kingdom boasted the best results, and the United States the worst. It is U.S. physicians who most often encounter problems in providing patients with medications or treatment due to limitations imposed by the scope of benefits covered by health insurance.

The Health Care Outcomes section was devoted to health care outcomes. It emphasized that better outcomes are not dependent on higher spending. In terms of efficient use of resources, Australia, Norway, and Switzerland ranked top. The study found that Norway has the lowest infant mortality rate (2 deaths per 1,000 births) and Australia has the highest life expectancy after age 60 (25.6 years of additional life expectancy for those who survive to age 60). In nine out of ten indicators, the United States was again the worst performer.

An analysis of the reports compiled by Ipsos, and the Commonwealth Fund allows us to conclude that problems in the area of health care arise even in those economically developed countries where resources allocated to the system are substantial. Nonetheless, lessons from countries at the top of the rankings may prove helpful to other countries in designing changes to improve health care.

The proper directions for health care development in a modern state

A modern country's drive to improve health care and the health of its population requires both changes in health policy and beyond. Countries recording the best results in the rankings are guided by the following:

- Ensure universal access to health care services and remove financial barriers so that people can get the proper care when they need it, in a manner consistent with their will and ability. Countries at the top of the ranking provide near-complete coverage for preventive services, primary care, and effective management of chronic diseases. Germany abolished co-payments for medical visits in 2013, while several countries have introduced fixed annual limits on health spending (ranging from about $300 a year in Norway to $2,645 in Switzerland). In Australia in 2019, 86 percent of citizens incurred no out-of-pocket costs for primary care visits;
- Investing in primary care systems so that high-value services are evenly available locally in all communities, to all people - reducing the risk of discrimination and inequity;

– Reducing the administrative burden on medical staff and patients. Administrative procedures both consume the time and money of patients, medical staff, and managers, and move them away from the goal of improving health care. Many countries have simplified their health insurance and payment systems through changes in legislation, regulation, and standardization. In Norway, for example, patient payments for physician fees are determined at the regional level. In doing so, standardized surcharges are applied to all doctors practicing in the public sector within a given specialty in a given geographic area. In contrast, in countries such as the Netherlands, where private insurance companies compete for customers, the standard includes a mandatory minimum package of basic benefits, community classification, and cost-sharing ceilings. All of this is intended to make it easier for beneficiaries to choose an insurer. It also aims, for insurers to compete on service and quality, rather than avoiding people with higher health risks. In Germany and Canada, mechanisms for joint negotiation and standardized payments for services are used at the national or regional level, which is intended to translate into simpler transactions and fewer errors and appeals;
– Investing in social services that increase equal access to nutrition, education, childcare, community safety, housing, transportation, and employee benefits, leading to a healthier population and less need for health care;
– Carrying out policies aimed at reducing premature mortality by, among other things, developing maternal primary health care to ensure continuity of care from conception to the postnatal period, and expanding primary health care services to include mental health diagnosis and early intervention and treatment, as well as promoting social connectedness and suicide prevention. For example, countries such as the Netherlands, Sweden, and Australia often integrate mental health practitioners into primary care teams.

As the Commonwealth Fund report rightly notes, "Health outcomes are influenced by a wide variety of social and economic factors, many of which are beyond the control of health systems. Public policies and investments in education, employment, nutrition, housing, transportation, and environmental safety shape population health". This is borne out by the health situation in the United States, where relatively little government funding is allocated to social programs such as early childhood education, parental leave, income support for single parents, support for workers such as unemployment protection, and labor market incentives. This is an ideal, though not isolated, the example of a country where health outcomes can be improved through measures beyond health care.

Health care in a modern state should not aim to provide high-quality care for the population that has access to care and the means to pay for it, while providing low- or no-quality care for the portion of the population that does not have those means. The health care system should also not create obstacles to its use by poorer and socially excluded people. Low-income people who work long hours, as well as those with limited health literacy, may find it difficult to navigate the health care system or complex insurance eligibility procedures. In the face of these problems, the United States can serve as a model, where health navigators are employed to help patients navigate both the insurance and health care systems.

Attention should also be paid to the use of new technologies in the health care field. On the one hand, their presence in the modern state seems to be a natural phenomenon. The use of high-tech devices in medicine undoubtedly serves to improve the quality of health care. The same effect is achieved by conducting educational campaigns using the Internet. However, at this point, it is worth quoting data published in the report „Wykluczenie społeczno-cyfrowe w Polsce. Stan zjawiska,trendy, rekomendacje"[24], which was created in 2021 as a result of cooperation between the Orange Foundation and the Stocznia Foundation. This report shows that 10% of Polish society does not have access to the Internet, with more than 52% of households without access to the network citing a lack of appropriate skills as the reason for not using the Internet. 55% of those who have never used the network live in rural areas. According to the report's authors, the key form of digital exclusion determining non-use of the Internet remains motivational exclusion. Nearly 66% of those who do not use the network justify it by lack of need, even though - depending on the sociodemographic group – 20-45% of them have a device at home that provides access to the network. Low awareness of the need for things that are important in the lives of individuals that can be done through the network, and lack of knowledge of what the Internet can be used for, were cited as the basis for motivational exclusion. Although exclusion due to physical inability to access the Internet is already a marginal problem in Poland, lack of appropriate skills as a reason for not using it was indicated in more than 52% of households without access to the network. Interestingly, although the COVID-19 pandemic, nationwide, contributed significantly to the increase in Internet use, the group of households with the lowest income did not have access to the Internet, as many as 25% of them. The above data should not so much cast doubt on the sense of using

[24] A. Bartol, J. Herbst, A. Pierścińska, *Wykluczenie społeczno-cyfrowe w Polsce. Stan zjawiska, trendy, rekomendacje*, Fundacja Orange i Fundacja Stocznia 2021, https://fundacja.orange.pl/strefa-wiedzy/post/wykluczenie-spoleczno-cyfrowe-w-polsce-2021 (accessed on 30.09.2022).

the network as a tool for improving the level of health care and modernizing it, as it should be a contribution to the undertaking by relevant authorities and entities, both public and private, of extensive information and education campaigns on the opportunities offered by the use of a tool such as the Internet and other goods, such as the various types of applications that can be used through it.

Conclusion

When considering health care in a modern state, it is necessary to keep in mind the content of the international regulations cited in this study, which, although not the latest legal developments, remain relevant all the time. So, what attributes should distinguish the health care of a modern state? In the author's opinion, it should be characterized in particular by general accessibility, trust on the part of patients, use of only up-to-date medical knowledge, patient safety, use of new technologies, respect for the dignity of patients and medical personnel, transparency and completeness of health care information understandable to patients, public education, security of sensitive data concerning the patient, efficiency translating primarily into short waiting times for necessary services, low or no direct payment, reasonable and adequate to the possibilities of society, and effective management.

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