UNIWERSYTET W BIAŁYMSTOKU
WYDZIAŁ PRAWA

BIAŁOSTOCKIE STUDIA PRAWNICZE

BIAŁYSTOK 2018 VOLUME 23 nr 2

BIAŁOSTOCKIE STUDIA PRAWNICZE

VOLUME 23 nr 2

Redaktor Naukowy Wydawnictwa Temida 2: Cezary Kosikowski
Przewodniczący Rady Naukowej Wydawnictwa Temida 2: Emil W. Pływaczewski

Rada Naukowa:
Członkowie krajowi: Stanisław Bożyk (UwB), Leonard Etel (UwB), Marian Filar (UMK), Edward Gniewek (UWr), Ewa M. Guzik-Makaruk (UwB), Adam Jamróz (UwB), Dariusz Kijowski (UwB), Cezary Kosikowski, Cezary Kulesza (UwB), Agnieszka Malarewicz-Jakubów (UwB), Lech K. Paprzycki (Akademia Leona Koźmińskiego w Warszawie), Maciej Perkowski (UwB), Stanisław Prutis (UwB), Eugeniusz Ruśkowski (UwB), Walerian Sanetra, Joanna Sieńczyło-Chlabicz (UwB), Ryszard Skarzyński (UwB), Halina Święczkowska (UwB), Jaroslav Volkonovski (UwB), Stanisław Waltoś (UJ), Mieczysława Zdanowicz (UwB).

Członkowie zagraniczni: Lilia Abramczyk (Państwowy Uniwersytet im. Janki Kupały w Grodnie, Białoruś), Vladimir Babčak (Uniwersytet w Koszycach, Słowacja), Renata Almeida da Costa (Uniwersytet La Salle, Brazylia), Chris Eskridge (Uniwersytet w Nebrasce, USA), Jose Luis Iriarte Angél (Uniwersytet Navarra, Hiszpania), Marina Karasjewa (Uniwersytet w Woroneżu, Rosja), Aleksiej S. Kartsov (Federalny Trybunał Konstytucyjny w Sankt Petersburgu, Rosja), Bernhard Kitous (Uniwersytet w Rennes, Francja), Jolanta Kren Kostkiewicz (Uniwersytet w Bernie, Szwajcaria), Martin Krygier (Uniwersytet w Nowej Południowej Walii, Australia), Anthony Minnaar (Uniwersytet Południowej Afryki, Republika Południowej Afryki), Antonello Miranda (Uniwersytet w Palermo, Włochy), Petr Mrkyvka (Uniwersytet Masaryka, Czechy), Marcel Alexander Niggli (Uniwersytet we Fryburgu, Szwajcaria), Andrej A. Novikov (Państwowy Uniwersytet w Sankt Petersburgu, Rosja), Sławomir Redo (Uniwersytet Wiedeński, Austria), Jerzy Sarnecki (Uniwersytet w Sztokholmie, Szwecja), Rick Sarre (Uniwersytet w Południowej Australii, Australia), Kevin Saunders (Uniwersytet Stanowy w Michigan, USA), Bernd Schünemann (Uniwersytet w Monachium, Niemcy), Sebastiano Tafaro (Uniwersytet w Bari, Włochy), Wiktor Trinczuk (Kijowski Narodowy Handlowo-Ekonomiczny Uniwersytet, Ukraina), Elena Chernikova (Rosyjska Akademia Gospodarki Narodowej i Administracji Publicznej, Rosja), Bogusia Puchalska (Uniwersytet Central Lancashire w Preston, Wielka Brytania).

Redakcja Białostockich Studiów Prawniczych:
Redaktor naczelny: Elżbieta Kużelewska
Sekretarze naukowi: Anna De Ambrosis Vigna, Ewa Lotko
Członkowie: Andrzej Sakowicz, Urszula K. Zawadzka-Pąk

© Copyright by Wydział Prawa Uniwersytetu w Białymstoku, Temida 2, Białystok 2018

Żadna część tej pracy nie może być powielana i rozpowszechniana w jakiejkolwiek formie i w jakikolwiek sposób (elektroniczny, mechaniczny), włącznie z fotokopiowaniem – bez pisemnej zgody wydawcy.
Wersja papierowa jest wersją pierwotną Białostockich Studiów Prawniczych.

ISSN 1689–7404

Redaktorzy językowi: Ewa Brajczewska (język polski), Richard Tykocki-Crow (język angielski)
Redaktor statystyczny: Ewa Glińska
Redaktorzy tematyczni tomu: Anna De Ambrosis Vigna i Dariusz R. Kijowski
Sekretarz tomu: Anna De Ambrosis Vigna
Opracowanie graficzne i typograficzne: Jerzy Banasiuk
Projekt okładki: Bogusława Guenther
Wydawca: Wydział Prawa Uniwersytetu w Białymstoku, Temida 2
Każdy zeszyt można nabyć w Wydawnictwie Temida 2, adres: ul. A. Mickiewicza 1, 15-213 Białystok, e-mail: temida2@uwb.edu.pl, tel. 85 745 71 68

Contents

REVIEW

Introduction

This issue of Białystok Legal Studies is dedicated to the topic of the Europeanisation of administrative law.

In recent years much attention has been given to the phenomenon of the Europeanisation and globalization of administrative law. This is primarily due to the tightening of integration within the European Union zone. The Europeanisation of administrative law is a dynamic process which entails new problems and challenges both at the European Union level and for individual Member States. The Model Code of Administrative Procedure of the European Union adopted in 2015 by the international research team ReNEUAL is an important case in point.

There is no single definition of European administrative law. Likewise, the editors of the volume do not presume a uniform understanding of the Europeanisation of administrative law.

However, the contributing authors have addressed the following ideas of the meaning of this notion in their respective papers: European administrative law; Europeanisation of standards, values, and principles of administrative law; Europeanisation of public administration tasks; Europeanisation of administrative law-making; Europeanisation of the application of administrative law; pro-European interpretation of national administrative law and the importance of the Europeanisation of Administrative Law.

The editors would like to express their gratitude to all of the authors who have contributed to this volume of the journal. We are confident that the issues they have addressed and the problems presented will be a valuable addition to a general debate on the phenomena of the Europeanisation of administrative law.

Editors of the issue
Anna De Ambrosis Vigna
Dariusz R. Kijowski

Białostockie Studia Prawnicze
2018 vol. 23 nr 2

DOI: 10.15290/bsp.2018.23.02.01

Marcin Kamiński
Jagiellonian University in Cracow
marcin.kaminski@uj.edu.pl
ORCID ID: https://orcid.org/0000-0001-9181-2044

Internal and External Limits of the Principle of Consistent Interpretation of Domestic Law with the Directives of the European Union and Their Relevance for the Adjudication of the Administrative Courts

Abstract: This article examines the issues of external and internal limits of the consistent interpretation of the domestic law with the EU directives in the context of verification adjudication of the administrative courts. The external limits of the pro-directive interpretation are derived from the EU law and the case-law of the Court of Justice of the EU. The limits of the pro-directive interpretation can as well be derived from the domestic law of the member states (the internal limits). This kind of limitations is strictly connected with domestic limits of the judicial interpretation. In the considerations it is argued that the pro-directive interpretation which goes beyond the literal meaning of domestic provisions could not be treated as being contrary to the domestic law. In the case-law of administrative courts the necessity of functional, purposive and axiological meaning of the *contra legem* limit is especially significant. I*t is justified to state that consistent interpretation must embrace operations of* interpretation *secundum legem* and *praeter legem*. Therefore, the domestic *contra legem* limit is shaped and modified by the EU rules of interpretation.
Keywords: consistent interpretation of the domestic law with the EU directives; limits of the pro-directive interpretation; direct and indirect effects of the EU directives; supremacy of EU law; interpretation *secundum legem, praeter legem* and *contra legem*

1. Introductory remarks

The issue of the consistent interpretation of domestic law with the directives of the European Union is a fragment of the broader question of interpretation of domestic law in conformity with the European Union law (EU law). Since the European legal order is multi-level and complex, therefore the problem of the pro-European Union

interpretation of national laws of the member states is to be considered at three different levels[1].

At the first level, there is the legal obligation to interpret primary EU law in the light of the obligations of the European Union (EU) as an international organisation (first of all – in the light of treaties which have been concluded by the EU or which have binding force for the EU). At the second level, there is the legal duty to interpret secondary EU law (e.g. regulations, directives, decisions) in conformity with the primary EU law. And thirdly, the domestic law of the member states of the EU must be interpreted in the light of the wording and purpose of European Union law.

The analysed issue pertains to the third level of domestic law interpretation in the conformity with the EU law. Furthermore, the abovementioned notion is limited to the directives as specific instruments and sources of the secondary EU law. Therefore, the consistent interpretation of domestic law with the directives of the European Union must be treated as a special kind of pro-EU interpretation of domestic law[2]. The above interpretative model retains the qualitative and quantitative differences compared to the general model of pro-EU interpretation.

2. Normative sources of the principle of interpretation in conformity with the EU directives

The conceptual construction of the interpretation in conformity with the EU directives is the result of validity of the general principles of EU law. There is no doubt that the considered construction has been merged in the EU law as a logical and functional consequence of fundamental features of the EU legal order. The doctrine of consistent interpretation is anchored in at least two basic principles of EU law[3].

Firstly, one may indicate the principle of supremacy (primacy) of EU law over the national law of member states[4]. The essence of this principle lies in a specific mode of resolving normative contraries or inconsistencies between the EU law and the legal orders of member states. In the situation of the normative conflict in a concrete matter in which the EU law and national law are to be used, the norm of EU law prevails and the domestic norm must not be applied. Secondly, one may argue that the doctrine of consistent interpretation is derived from the principle of effectiveness of the EU

1 J.H. Jans, R. de Lange, S. Prechal, R.J.G.M. Widdershoven (eds.), Europeanisation of Public Law, Groningen 2007, p. 99.

2 See e.g. C. Herrmann, Richtlinienumsetzung durch Rechtsprechung, Berlin 2003, pp. 102 ff.

3 See e.g. A. Wróbel, Wykładnia prawa państwa członkowskiego zgodnie z dyrektywą, czyli tzw. pośredni skutek dyrektywy, (in:) A. Wróbel (ed.), Stosowanie prawa Unii Europejskiej przez sądy. Tom I, Warszawa 2010, pp. 110 ff.

4 T. Kruis, Der Anwendungsvorrang des EU-Rechts in Theorie und Praxis: seine Durchsetzung in Deutschland. Eine theoretische und empirische Untersuchung anhand der Finanz- und Verwaltungsgerichte und Behörden, Tübingen 2013, pp. 155 ff.

law and the latter principle is even – in the area of the interpretation in conformity with the EU directives – more important than the principle of supremacy. The approach of this sort seems to be justified since as far as the principle of supremacy is the source of primacy of application of the EU directive norms which are vertically directly effective, the principle of interpretation in conformity with the EU directives is applicable not only in vertical configurations but also in horizontal ones[5].

3. Characteristic features of the principle of consistent interpretation

The doctrine of consistent (harmonious) interpretation is a special and derivative principle of the EU law. This principle is also known as the principle of indirect effect[6]. The EU law norms which are the source of the consistent interpretation of domestic law generally do not involve directly legal effects unless they are directly effective. Therefore, this kind of interpretative influence of the EU law on the national legal orders of member states allows to qualify the EU law norms at least as indirectly effective.

The principle of consistent interpretation has certain characteristic features which determine its essence.

First of all, the above construction has a normative character. The European Court of Justice (ECJ) established the duty of consistent interpretation in the *Von Colson and Kamann* judgment[7]. With regard to EU directives the ECJ pointed out that "the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under [Article 4(3) Treaty on European Union (TEU)] to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive (...), national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of [Article 288 Treaty on the Functioning of the European Union (TFEU)]". The above judgment makes clear that the duty of consistent interpretation – regarding the directives – is based on Article 4(3) TEU, stipulating the duty of sincere cooperation, and Article 288 TFEU, requiring the implementation of directives. In the *Pfeiffer* judgment[8] the ECJ stated that the duty

5 Cf. M. Franzen, Privatrechtsangleichung durch die Europäische Gemeinschaft, Berlin – New York 1999, p. 294.

6 See e.g. C. Barnard, S. Peers, European Union Law, Oxford 2017, pp. 156 ff.

7 Judgment of the Court of 10 April 1984, Case 14/83, Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, European Court Reports (ECR) 1984, p. 01891.

8 Judgment of the Court of 5 October 2004, in joined Cases C-397/01 to C-403/01, Bernhard Pfeiffer and others v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV., ECR 2004, I-08835, § 114.

of consistent interpretation is "inherent in the system of the Treaty, since it permits the national court, for matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it". In many judgments of the ECJ the scope of this duty has been extended to the European Union law as a whole (including EU Treaties, general principles of EU law, regulations and recommendations)[9].

Secondly, it should be taken into account that the principle of pro-directive interpretation established the interpretative rule which prevails over the rules and methods of domestic law interpretation[10]. The interpretative priority of the directive-consistent meaning means that in a case of collision of domestic interpretative rules in the matter which contains the normative component derived from the EU-directive the resolution of this conflict must – as far as possible – provide the advantage of such a result of national law interpretation which fulfils the wording and purpose of directive provisions. Therefore, the national law-applying authorities (e.g. national courts) are required to choose only those interpretative versions of domestic law which are the most compatible with the contents, purposes, functions and axiological assumptions of the EU-directive. A separate issue is the problem of the type and the chronology of application of the interpretative rules. It may be argued that the priority of pro-directive consistent interpretation creates the autonomous and distinct rule[11]. One may also defend the view that this rule of interpretative priority must be observed within the framework of domestic rules and methods of interpretation[12].

9 See e.g. Judgment of the Court of 5 October 1994, Case C-165/91, Simon J.M. van Munster v. Rijksdienst voor Pensioenen, ECR *1994,* Page I-04661, § 34; Judgment of the Court of 10 February 2000, in joined Cases C-270/97 and C-271/97, Deutsche Post AG v. Elisabeth Sievers (C-270/97), Brunhilde Schrage (C-271/97), ECR 2000, I-929, § 62; Judgment of the Court of 13 December 1989, Case C-322/88, Salvatore Grimaldi v. Fonds des maladies professionnelles, ECR 1989, Page 04407, § 18; Judgment of the Court of 26 September 2000, Case C-262/97, Rijksdienst voor Pensioenen v. Robert Engelbrecht, ECR 2000, I-07321, § 39; Judgment of the Court of 17 January 2008, Case C-246/06, Josefa Velasco Navarro v. Fondo de Garantía Salarial (Fogasa), ECR 2008, I-00105, § 39; Judgment of the Court of 13 March 2008, in joined Cases C-384/06 to C-385/06, Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening (C-383/06) and Gemeente Rotterdam (C-384/06) v. Minister van Sociale Zaken en Werkgelegenheid and Sociaal Economische Samenwerking West-Brabant (C-385/06) v. Algemene Directie voor de Arbeidsvoorziening, ECR 2008, I-01561, § 59.

10 Cf. U. Ehricke, Die richtlinienkonforme und die gemeinschaftsrechtskonforme Auslegung nationalen Rechts, "Rabels Zeitschrift für ausländisches und internationales Privatrecht" 1995, vol. 59, p. 616; W. Brechmann, Die richtlinienkonforme Auslegung, München 1994, p. 259; C. Hermann, Richtlinienumsetzung durch…, *op. cit*., pp. 131 ff.

11 See e.g. M. Lutter, Die Auslegung des angeglichenen Rechts, „Juristen-Zeitung" 1992, no. 47, pp. 604 ff.; C.-W. Canaris, Gemeinsamkeiten zwischen verfassungs- und richtlinienkonformer Rechtsfindung, (in:) H. Bauer (ed.), Wirtschaft im offenen Verfassungsstaat. Festschrift für Reiner Schmidt zum 70. Geburtstag, München 2006, p. 49.

12 E.g. C. Hermann, Richtlinienumsetzung durch…, *op. cit*., pp. 132 ff.

It is also justified to assert that the construction of the pro-directive interpretation is the special kind of domestic law interpretation which combines a variety of features of the literal, systematic and purposive-functional interpretations[13].

Thirdly, it must be stressed that the requirement of conformity of interpretative result with the directive is not confined to the literal meaning of the directive provisions but must be extended to their purposes and functions[14]. Therefore, it means that the notion of pro-directive conformity provides relatively broad possibilities to ensure the full effectiveness of the European Union law within the limits of domestic law. The approach of this kind has found the corroboration in the conception of the presumption of directive implementation conformity.

The above conception has been formulated in the judgments of the ECJ. The Court has held that every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned[15]. The scope of the presumption of compliance is not unlimited.

There are three variants of situations which should be excluded from the scope of the presumption[16]. Firstly, the presumption may not be applied if the legislator intentionally did not transpose the directive into national law at all. Secondly, the presumption is not subject to apply if the legislator expressly refused to implement the directive into national law. Thirdly, a national law-applying organ (court) is not required to presume the intention of proper implementation of the directive if the legislator "neither amended the pre-existing legislation in order to implement the directive nor considered the pre-existing legislation to already satisfy the requirements of the directive".

The construction of the presumption of directive implementation conformity shall be differentiated from the rebuttal of the presumption. The case of the rebuttal covers the situation in which the national court "reaches an outer limit of consistent interpretation". The outer limit of the presumption of compliance defines the *contra legem* limit of the consistent interpretation. The legal duty of consistent interpretation does not require the court to infringe the prohibition of interpretation *contra legem*. Therefore, the presumption of compliance must be rebutted in such a situation in order to avoid the violation of the above prohibition. On the other hand, one must

13 See e.g. A. Wróbel, Wykładnia prawa państwa…, *op. cit*., pp. 116-117, 127-128.

14 See e.g. M. Nettesheim, Auslegung und Rechtsfortbildung nationalen Rechts im Lichte des Gemeinschaftsrechts, „Archiv des öffentlichen Rechts" 1994, vol. 119, pp. 261 ff.

15 Judgment of the Court of 16 December 1993, Case C-334/92, Teodoro Wagner Miret v. Fondo de Garantía Salarial, ECR 1993, I-06911, § 20; Judgment of the Court of 5 October 2004, in joined Cases C-397/01 to C-403/01, Bernhard Pfeiffer and others v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV., ECR 2004, I-08835, § 112.

16 Cf. M. Brenncke, A Hybrid Methodology for the EU Principle of Consistent Interpretation, "Statute Law Review" 2017, vol. 38, forthcoming Issue, available at SSRN: https://papers.ssrn.com/, id=2883447 (access 1.11.2017), pp. 10-18.

keep in mind that the ECJ stipulated that the duty of interpretation of domestic law in conformity with an applicable directive remains valid irrespective of "any contrary interpretation which may arise from the *travaux préparatoires* for the national rule"[17]. It means that the legislative preparatory materials which could have indicated on the intention of the national legislator to enact the provisions incompatible with the directive do not exclude the consistent interpretation of these provisions.

Fourthly, from the point of view of the above analysis, it is important to distinguish two kinds of limits of the interpretation of domestic law in the conformity with directives. The first kind of the limits results from the structural limitations of the EU legal order (these are so-called external limits of the consistent interpretation). The second kind of the limits is based on the certain principles, rules and features of the national legal orders of member states (these are so-called internal limits of the consistent interpretation).

4. The principle of the consistent interpretation of domestic law with the directives of the European Union in the sphere of administrative courts' adjudication activity

The issue of the pro-directive interpretation of domestic law – according to the title of the paper – must be related to the specificity of the adjudication activity of the administrative courts.

First of all, it must be borne in mind that the administrative courts' interpretation of national law in the light of the wording and the purpose of the directive takes place within the framework of the domestic model of judicial control of public administration. In accordance with the principle of procedural and structural autonomy[18] the issues of the structure, the proceedings, the scope of jurisdiction and the principles of adjudication of the administrative courts are determined by the national law of the member states of the EU.

In the Polish legal order, the system of administrative courts is based on the verification model of the judicial control of public administration. At its core such model posits that the administrative court controls the legality (a conformity with

17 Judgment of the Court of 29 April 2004, Case C-371/02, Björnekulla Fruktindustrier AB. v. Procordia Food AB., ECR 2004, I-05791, § 13.

18 E.g. A. Wróbel, Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2005, No. 1, pp. 35-58; D.-U. Galetta, Procedural autonomy of EU member states: Paradise Lost? A study on the "functionalized procedural competence" of EU member states, Berlin – Heidelberg 2010, pp. 7 ff.; A. Adinolfi, The "Procedural Autonomy" of Member States and the Constraints Stemming from the ECJ's Case Law: Is Judicial Activism Still Necessary?, (in:) B. de Witte, H.-W. Micklitz (eds.), The European Court of Justice and Autonomy of the Member States, Cambridge – Antwerp – Portland 2011, pp. 281 ff.

provisions of binding law) of the challenged administrative action or inaction without the adjudication of an administrative matter on the merits. The verification model is structurally related to the cassation competences of the administrative court. If the complaint is justified the court in principle sets aside or declares the invalidation of the contested action[19]. Controlling the legality of the activity of public administration the court reviews as well the correctness of the interpretation which has been made by the administrative authority. If the administrative interpretation is erroneous (i.e. it violates the law) the administrative court is empowered to substitute its own legal assessment for the interpretation of the controlled administrative authority[20]. The administrative court's power to determine the limits of administrative freedom of the interpretation is also extended to the interpretation of domestic law in accordance with the EU directives.

Since the member states' obligation arising from a directive to achieve the result provided for by the directive is binding first of all on all the national courts (including the administrative courts)[21], the court controlling the actions (or inactions) of public administration is required to ensure the fulfilment of that obligation by that means so that the judicial interpretation of domestic law in conformity with the applicable directive – as far as possible – must be substituted for the administrative interpretation which is incompatible with the directive and the illegal administration action which has been based on such interpretation must be quashed or invalidated. The court's obligation to deprive the challenged administrative act (action) of its binding force may be derived from the member states' obligation to "setting aside any provision of national law which may conflict with" the EU law and from the competence of the domestic law-applying authority to "refusing of its own motion to apply any conflicting provision" of national law[22].

The legal duty of national administrative courts has a relatively broad scope. It covers the whole domestic legal order[23], not only the provisions which have been established in order to implement the directive but also the domestic provisions which may indirectly influence the effectiveness of the EU law. Moreover, it is also

19 See The Act of 30th August 2002 Law on Proceedings before Administrative Courts (Journal of Laws 2017, item 1369 with changes).

20 See Art. 145 § 1 points 1-2 of The Act of 30th August 2002 Law on Proceedings before Administrative Courts.

21 See e.g. Judgment of the Court of 9 March 1978, Case C-106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA., ECR 1978, Page 00629, § 20-24; Judgment of the Court of 10 April 1984, Case 14/83, Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, ECR 1984, Page 01891, § 26.

22 Judgment of the Court of 9 March 1978, Case C-106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA., ECR 1978, Page 00629, § 21, 24.

23 See e.g. Judgment of the Court of 5 October 2004, in joined Cases C-397/01 to C-403/01, Bernhard Pfeiffer and others v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV., ECR 2004, I-08835, § 115 and § 119.

irrelevant whether these provisions were established before or after the directive entered into force[24], or whether their interpretation version was stabilized in the case-law of the highest national courts[25].

It is also clear that the duty of consistent interpretation is not subject to the condition of direct effectiveness[26] i.e. the direct effect of directive provisions is not the premise of this duty. The constructions of direct effect and indirect effect of the directive provide for alternative methods of ensuring the effectiveness of EU law. However, these methods with regard to the directive must be used in a specific order[27].

The administrative court's obligation to interpret the domestic law in conformity with the directive dispositions is actuated in the situation of real or potential incompatibility between the directive and the national law[28].

Firstly, the national administrative court must consider the possibility of the removal of normative collision by means of the interpretation of domestic law in conformity with the directive[29]. This operation shall be performed by the administrative court irrespective of whether a given directive provision is directly effective or not. Even if the directive provision is directly effective, the consistent interpretation of the domestic law may be sufficient to ensure the EU law the required effectiveness. One must bear in mind that it is difficult to indicate the moment in which the consistent interpretation is transformed into the construction of direct effect[30]. In the case of directive provisions which lack the feature of direct effectiveness the consistent interpretation is, however, in principle the exclusive manner of ensuring the effectiveness of EU law.

If the directive provision fulfils the conditions for it to have direct effect (i.e. the clear, sufficiently precise and unconditional provision seeking to confer rights or impose obligations) and the consistent interpretation in its light is not able to remove

24 Judgment of the Court of 13 November 1990, Case C-106/89, Marleasing SA v. La Comercial Internacional de Alimentacion SA, ECR 1990, I-04135, § 8; Judgment of the Court of 22 November 2005, Case C-144/04, Werner Mangold v. Rüdiger Helm, ECR 2005, I-09981, § 68.

25 Cf. Judgment of the Court of 13 July 2000, Case C-456/98, Centrosteel Srl v. Adipol GmbH, ECR 2000, I-06007, § 68.

26 See e.g. O. Gänswein, Der Grundsatz unionsrechtskonformer Auslegung nationalen Rechts. Erscheinungsformen und dogmatische Grundlage eines Rechtsprinzips des Unionsrechts, Frankfurt am Main 2009, pp. 39 ff.

27 Concerning the sequence of above methods – see e.g. W. Brechmann, Die richtlinienkonforme…, pp. 64 ff.

28 See more – e.g. M. Kamiński, Mechanizm i granice weryfikacji sądowoadministracyjnej a normy prawa administracyjnego i ich konkretyzacja, Warszawa 2016, pp. 484 ff.

29 Cf. O. Gänswein, Der Grundsatz unionsrechtskonformer Auslegung…, *op. cit.*, p. 310.

30 Cf. P. Craig, Directives: Direct Effect, Indirect Effect and the Construction of National Legislation, "European Law Review" 1997, vol. 22, pp. 526 ff.

the normative conflict[31], the administrative court is obliged to refuse the application of the domestic law which is inconsistent with the directive[32].

The refusal of domestic law application has a peculiar character within the framework of the verification model of judicial control of the public administration. Since the administrative court does not adjudicate on the administrative matter in a direct means but only controls the legality of the administrative competence behaviour, therefore it cannot be claimed that this court refuses the application of domestic law. In such a situation the administrative court eliminates the domestic provision – which is incompatible with the directive – from the legal basis of the controlled administrative action[33]. This normative elimination is legally binding for the administrative authority whose act was quashed by the administrative court[34]. The above effect of exclusion ("exclusionary effect of a directive") of the national law (direct negative effect)[35] creates a normative gap which must be filled by the administrative court. If the directive contains directly effective provisions, the normative gap may and should be closed by means of application of these provisions. This "substitution effect" of a directive[36] (direct positive effect) enables to modify the domestic normative basis of the administrative action which was controlled by the administrative court. It should be noted that in the literature not without reason it is claimed that the distinction between "exclusion", combined with the residual application of national law, and "substitution", entailing the application of "new" rules derived from the directive, "conceals more than it reveals"[37], and the limits between negative (exclusion) and positive (substitution) effects of the directive are flexible and elusive[38].

31 C. Höpfner, Die systemkonforme Auslegung. Zur Auflösung einfachgesetzlicher, verfassungsrechtlicher und europarechtlicher Widersprüche im Recht, Tübingen 2008, pp. 243 ff.

32 Judgment of the Court of 4 February 1988, Case C-157/86, Mary Murphy and others v. An Bord Telecom Eireann, ECR 1988, Page 00673, § 11; Judgment of the Court of 19 June 1990, Case C-213/89, The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others, ECR 1990, Page I-02433, § 20-23; Judgment of the Court of 5 March 1998, Case C-347/96, Solred SA v. Administración General del Estado, ECR 1998, Page I-00937, § 27; Judgment of the Court of 26 September 2000, C-443/98, Unilever Italia SpA v. Central Food SpA., ECR 2000, Page I-07535, § 52; Judgment of the Court of 24 January 2012, Case C-282/10, Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique i Préfet de la région Centre, ECR 2012, § 23.

33 Cf. Judgment of the Court of 22 December 2008, Case C-414/07, Magoora sp. z o.o. v. Dyrektor Izby Skarbowej w Krakowie, ECR 2008, I-10921, § 44.

34 Art. 153 of The Act of 30th August 2002 Law on Proceedings before Administrative Courts.

35 See C.W.A. Timmermans, Directives: their effect within the national legal systems, "Common Market Law Review" 1979, vol. 16, pp. 533 ff.

36 Cf. P. Craig, G. de Burca, EU Law. Text, Cases and Materials, Oxford 2011, pp. 210-211.

37 P. Craig, The Legal Effect of Directives: Policy, Rules and Exceptions, "European Law Review" 2009, vol. 34, pp. 368 ff.

38 See e.g. P. Brzeziński, Unijny obowiązek odmowy zastosowania przez sąd krajowy ustawy niezgodnej z dyrektywą Unii Europejskiej, Warszawa 2010, pp. 267 ff.

The discussed problem must be resolved differently with regard to normative components of the directive which are not directly effective[39].

On the one hand the lack of capability of involving the legal effects entails the necessity of ensuring the effectiveness of EU law by means of lawmaking interpretation of domestic law in conformity with the directive. On the other hand, there is the problem of establishing the legal source of such lawmaking operation.

The above problem results from a deficiency of normative patterns which could be used as the basis to construct of a new version of domestic law in order to achieve the state of conformity with the EU legal order[40]. Moreover, there are the crucial and contentious issues of delimitation between the lawmaking interpretation of domestic law in the light of wording and purpose of directive provisions and the direct effectiveness of these provisions. In the absence of directly effective provisions the operation of too extensive pro-directive interpretation of domestic law could lead to a situation which is comparable with the directive effectiveness[41]. However, the situation of this kind would not be amenable.

5. The external limits of pro-directive interpretation

The principle of the consistent interpretation of domestic law with the directives of the European Union is subject to limitations which result from the EU law and the national law[42].

The limits of the pro-directive interpretation of domestic law which are derived from the EU law (the external limits of pro-directive interpretation) are a consequence of the contents of the primary and secondary EU law and of the essence and structural features of the directive. This kind of limits may be internally divided into four categories[43].

Firstly, it is justified to distinguish the temporal limits of the pro-directive interpretation of domestic law. The issue of the scope of temporal limits is contentious. In the case C-212/04 *Konstantinos Adeneler and Others*[44], the ECJ on the one hand has

39 See e.g. M. Kamiński, Mechanizm i granice weryfikacji…, *op. cit*., pp. 490 ff.

40 See e.g. T. Kruis, Der Anwendungsvorrang des EU-Rechts…, *op. cit*., pp. 221 ff., 231-233 and the *literature there cited*; A. Kalisz, Wykładnia i stosowanie prawa wspólnotowego, Warszawa 2007, pp. 210 ff.

41 Cf. e.g. *S. Prechal*, *Directives* in EC Law, Oxford – New York 2005, p. 211; M. Lutter, Die Auslegung…, *op. cit.,* p. 597; W. Brechmann, Die richtlinienkonforme…, *op. cit.,* p. 73; A. Kaczorowska, European Union Law, London – New York 2009, p. 323.

42 See e.g. M. Weber, Grenzen EU-rechtskonformer Auslegung und Rechtsfortbildung, Baden – Baden 2010, pp. 140 ff; O. Gänswein, Der Grundsatz unionsrechtskonformer Auslegung…, *op. cit*., pp. 309 ff; T. Kruis, Der Anwendungsvorrang des EU-Rechts…, *op. cit*., pp. 200 ff.

43 M. Kamiński, Mechanizm i granice weryfikacji…, *op. cit*., pp. 496 ff.

44 Judgment of the Court of 4 July 2006, Case C-212/04, Konstantinos Adeneler and Others v. Ellinikos Organismos Galaktos (ELOG), ECR 2006, I-06057, § 114-124.

reminded that "before the period for transposition of a directive has expired, Member States cannot be reproached for not having yet adopted measures implementing it in national law (see Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 43)". On the other hand, the Court has held that "during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by it (*Inter-Environnement Wallonie*, paragraph 45; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58; and *Mangold*, paragraph 67)" and "the obligation to refrain from taking" the above mentioned measures "applies just as much to national courts". That is to imply that "from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive". Consequently the Court has stated that "where a directive is transposed belatedly into a Member State's domestic law and the relevant provisions of the directive do not have direct effect, the national courts are bound to interpret domestic law so far as possible, once the period for transposition has expired, in the light of the wording and the purpose of the directive concerned with a view to achieving the results sought by the directive, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive".

In the above context it may be noted that national courts have negative and positive pro-directive interpretation duties which are related to the time limit of transposition. From the date upon which a directive has entered into force to the expiry date of the period for transposition the courts have the negative obligation to refrain from interpreting domestic law in a contra-directive manner, whereas after the period for transposition has expired the courts are obliged – in the positive sense – to attain the objective pursued by the directive.

Secondly, it must be taken into account that certain limitations could result from the contents of the directive itself. The national court must consider carefully the scope of the implementation freedom which was bestowed on the domestic legislator[45]. If the scope of this freedom is relatively broad the court is obliged to demonstrate the necessary restraint in the pro-directive interpretation of domestic law. In this situation it may be required to confine the interpretative activism of the courts.

Thirdly, the duty of consistent interpretation is limited by the primary and the secondary EU law, including first of all the structural and general principles of the

45 Cf. M. Lutter, Die Auslegung…, *op. cit*., pp. 606 ff.

EU law and the fundamental rights of the EU[46]. In particular, the national courts' obligation is confined by the principles of legal certainty, non-retroactivity and proportionality[47].

Fourthly, the construction of pro-directive interpretation is limited by the essential and structural features of the directive and scopes of its validity. In the absence of proper transposition of the directive into national law the consistent interpretation cannot lead to the imposition or the extension of obligations or sanctions on individuals[48]. Consequently, the Member State which has violated the obligation of the directive implementation is not empowered to apply the directive by means of the pro-directive interpretation of domestic law (e.g. in tax law cases), if it would have led to the imposition or the extension of obligations or sanctions on individuals. This approach seeks to prevent "the State from taking advantage of its own failure to comply" with EU law[49]. Furthermore, it is not allowed to apply a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals in proceedings exclusively between private parties (the prohibition of direct effectiveness of the directive in horizontal relations)[50]. In the latter case the administrative court controlling the challenged administrative action is obliged to prevent such an interpretation consistent with the unimplemented directive which could lead to the indirect imposition or the extension of obligations on the private persons who are indirect addressees of the administrative action (who would be unfavourably affected by the consistent interpretation). The above situation

46 See e.g. M. Weber, Grenzen EU-rechtskonformer Auslegung…, *op. cit*., pp. 141 ff; W. Brechmann, Die richtlinienkonforme…, *op. cit.,* pp. 275 ff.

47 See Judgments of the Court in the Cases: Criminal proceedings against Kolpinghuis Nijmegen BV., Case 80/86, ECR 1987, Page 03969, § 13; Criminal proceedings against Silvio Berlusconi (C-387/02), Sergio Adelchi (C-391/02) and Marcello Dell'Utri and Others (C-403/02), Joined cases C-387/02, C-391/02 and C-403/02, ECR 2005, I-03565, § 66-69; Konstantinos Adeneler and Others v. Ellinikos Organismos Galaktos (ELOG), Case C-212/04, ECR 2006, I-06057, § 110.

48 See e.g. Judgment of the Court of 13 July 2000, Case C-456/98, Centrosteel Srl v. Adipol GmbH, ECR 2000, I-06007, § 15; Judgment of the Court of 12 December 1996, Joined cases C-74/95 and C-129/95, Criminal proceedings against X, ECR 1996, Page I-06609, § 24.

49 See e.g. Judgment of the Court of 8 October 1987, Case C-80/86, Criminal proceedings against Kolpinghuis Nijmegen BV., ECR 1987, Page 03969, § 9; Judgment of the Court of 14 July 1994, Case C-91/92, Paola Faccini Dori v. Recreb Srl., ECR 1994, I-3325, § 22; Judgment of the Court of 7 March 1996, Case C-192/94, El Corte Inglés SA v. Cristina Blázquez Rivero, ECR 1996, I-01281, § 16.

50 See Judgments of the Court in the Cases: M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), Case 152/84, ECR 1986, Page 00723, § 48; Paola Faccini Dori v. Recreb Srl., Case 91/92, ECR 1994, I-3325, § 20 ff., § 30; The Queen, on the application of Delena Wells v. Secretary of State for Transport, Local Government and the Regions, Case C-201/02, ECR 2004, I-00723, § 56; Bernhard Pfeiffer and others v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV., Joined Cases C-397/01 to C-403/01, ECR 2004, I-08835, § 108-109.

is typical for triangular relations between subjects of administrative law norms (e.g. in building law or environmental law cases).

6. The internal limits of pro-directive interpretation

The limits of the pro-directive interpretation can as well be derived from the domestic law of the member states. These limits may be called "the internal limits of pro-directive interpretation". However, the direct normative basis of these limits results from the national law, it is necessary to remind that the conceptual framework of interpretative limitations has been constructed by the ECJ.

According to the settled case-law of the ECJ (CJEU), on the one hand the Member States' obligation to achieve the result envisaged by the directive and their duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts[51]. On the other hand, national courts are obliged to interpret the domestic law, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result sought by the directive and consequently comply with the EU law[52]. From the above construction formula could be derived two internal limits of the pro-directive interpretation of domestic law.

Firstly, the national court's obligation of the pro-directive interpretation covers only these matters and competence actions which are established within its jurisdiction. The limit of this kind is based on the assumption that the scope of judicial powers is confined by the constitutional and statutory principles which define the structural and competence position of the courts in relation to the legislature and the executive power. This limit is also strictly connected with the domestic limits of the judicial interpretation. Since judicial lawmaking operations – within certain limits – are permitted by the legal orders of member states, the notion of interpretation shall embrace as well interpretative results of the domestic law which go beyond the literal meaning of provisions. However, these judicial interpretative operations and their results cannot violate constitutional rules and principles[53] (e.g. the principle of separation of powers between the judiciary and the legislature, the principle of subordination of judges to the constitution and statutes).

51 See e.g. Judgment of the Court of 5 October 2004, in joined Cases C-397/01 to C-403/01, Bernhard Pfeiffer and others v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV., ECR 2004, I-08835, § 114.

52 See Judgments of the Court in the Cases: Case 14/83, Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, ECR 1984, Page 01891, § 26; Marleasing, § 8; Faccini Dori, § 26; Case C-63/97 BMW, ECR 1999, I-905, § 22; Joined Cases C-240/98 to C-244/98 Océano Grupo Editorial and Salvat Editores , ECR 2000, I-4941, § 30; Case C-408/01 Adidas-Salomon and Adidas Benelux, ECR 2003, I-0000, paragraph 21.

53 Cf. M. Weber, Grenzen EU-rechtskonformer Auslegung…, *op. cit*., pp. 156 ff.

Secondly, it should be noted that the national court applying the provisions of domestic law intended to implement the directive is obliged to interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive[54]. The principle of interpretation in conformity with EU law requires the court "to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law"[55] and "applying the interpretative methods recognised by domestic law"[56], to ensure the full effectiveness of the directive.

The notion of pro-directive interpretation "as far as possible" must be understood by that as meaning that the national court is bound to use all legally possible and permissible methods of interpretation in order to achieve the result sought by the directive. However, the EU law does not oblige the national court to construe the domestic law *contra legem*[57], it cannot be unnoticed that the *contra legem* prohibition has a functional character[58] and its boundaries are defined by the domestic interpretation rules which determine the position of the literal meaning of the legal text. Within the above approach the interpretation which goes beyond the literal meaning of domestic provisions could not be treated as being contrary to the domestic law. In the case-law of administrative courts the necessity of functional, purposive and axiological meaning of the *contra legem* limit is especially significant. Controlling the legality of the administrative action (e.g. administrative decision) the administrative court is often empowered and obliged to ensure the full correctness and effectiveness of the directive's implementation by means of the lawmaking interpretation of domestic law. The court can particularly make interpretative operations of extension or reduction of the normative contents of the domestic law (e.g. reducing the scope of tax obligation or expanding the scope of tax relief).

54 See Judgment of the Court of 13 November 1990, Case C-106/89, Marleasing v. La Comercial Internacional de Alimentación, ECR 1990, I-4135, § 8-13 and other judgments – e.g. Judgments of the Court in the Cases: Wagner Miret v. Fondo de Garantía Salarial, Case C-334/92, ECR 1993, I-6911, § 20; Faccini Dori, § 26; Océano Grupo Editorial v. Salvat Editores, Joined Cases C-240/98 to C-244/98, ECR 2000, I-4941, § 30.

55 Judgment of the Court of 15 April 2008, Case C-268/06, Impact v. Minister for Agriculture and Food and Others, ECR 2008, I-02483, § 118.

56 Judgment of the Court of 10 October 2013, Case C-306/12, Spedition Welter GmbH v. Avanssur SA, ECR 2013, § 32, ECLI:EU:C:2013:650.

57 E.g. Judgment of the Court of 16 June 2005, Case C-105/03, Criminal proceedings against Maria Pupino, ECR 2005 I-05285, § 47; Judgment of the Court of 15 April 2008, Case C-268/06, Impact v. Minister for Agriculture and Food and Others, ECR 2008, I-02483, § 103; Judgment of the Court of 4 July 2006, Case C-212/04, Konstantinos Adeneler and Others v. Ellinikos Organismos Galaktos (ELOG), ECR 2006, I-06057, § 110.

58 M. Brenncke, A Hybrid Methodology..., *op. cit*., p. 18.

7. Conclusions

Consequently, one must accept the view that the pro-directive interpretation is permissible not only in typical situations of interpretation *intra legem/secundum legem* ("within the law"), but also in such situations where there is a necessity to construct the legal meaning of domestic provisions in conformity with the directive by means of interpretation *praeter legem* ("outside of the law" i.e. beyond the literal meaning of domestic provisions). This kind of quasi-lawmaking or even lawmaking judicial operations is an exemplification of the doctrine of law developing (the German term "*die Rechtsfortbildung*"). Since the ECJ (CJEU) "follows the French doctrine and does not distinguish between interpretation and development"[59] of the law (the French terminology: *interprétation et justification), it is justified to state that the consistent interpretation must embrace operations of* interpretation *secundum legem* and *praeter legem*. Therefore, the *contra legem* limit is "not fully determined by domestic law". The EU rules of interpretation shaping and confining the domestic interpretative methods establish a new "hybrid methodology" for consistent interpretation[60].

Accordingly, it must be concluded that the interpretation which goes beyond the literal meaning of domestic law in order to ensure the full effectiveness of European Union law is compatible with the doctrine of the *contra legem* prohibition.

BIBLIOGRAPHY

Adinolfi A., The "Procedural Autonomy" of Member States and the Constraints Stemming from the ECJ's Case Law: Is Judicial Activism Still Necessary?, (in:) B. de Witte, H.-W. Micklitz (eds.), The European Court of Justice and Autonomy of the Member States, Cambridge – Antwerp – Portland 2011.

Barnard C., Peers S., European Union Law, Oxford 2017.

Brechmann W., Die richtlinienkonforme Auslegung, München 1994.

Brenncke M., A Hybrid Methodology for the EU Principle of Consistent Interpretation, "Statute Law Review" 2017, vol. 38, forthcoming Issue, available at SSRN: https://papers.ssrn.com/, id=2883447 (access 1.11.2017).

Brzeziński P., Unijny obowiązek odmowy zastosowania przez sąd krajowy ustawy niezgodnej z dyrektywą Unii Europejskiej, Warszawa 2010.

Canaris C.-W., Gemeinsamkeiten zwischen verfassungs- und richtlinienkonformer Rechtsfindung, (in:) H. Bauer (ed.), Wirtschaft im offenen Verfassungsstaat. Festschrift für Reiner Schmidt zum 70. Geburtstag, München 2006

Craig P., Directives: Direct Effect, Indirect Effect and the Construction of National Legislation, "European Law Review" 1997, vol. 22.

59 M. Klatt, Making the Law Explicit. The Normativity of Legal Argumentation, Oxford and Portland 2008, pp. 16 ff.

60 M. Brenncke, A Hybrid Methodology..., *op. cit*., pp. 20, 33.

Craig P., G. de Burca, EU Law. Text, Cases and Materials, Oxford 2011.

Craig P., The Legal Effect of Directives: Policy, Rules and Exceptions, "European Law Review" 2009, vol. 34.

Ehricke U., Die richtlinienkonforme und die gemeinschaftsrechtskonforme Auslegung nationalen Rechts, "Rabels Zeitschrift für ausländisches und internationales Privatrecht" 1995, vol. 59.

M. Franzen, Privatrechtsangleichung durch die Europäische Gemeinschaft, Berlin – New York 1999.

Galetta D.-U., Procedural autonomy of EU member states: Paradise Lost? A study on the "functionalized procedural competence" of EU member states, Berlin – Heidelberg 2010.

Gänswein O., Der Grundsatz unionsrechtskonformer Auslegung nationalen Rechts. Erscheinungsformen und dogmatische Grundlage eines Rechtsprinzips des Unionsrechts, Frankfurt am Main 2009.

Herrmann C., Richtlinienumsetzung durch Rechtsprechung, Berlin 2003.

Höpfner C., Die systemkonforme Auslegung. Zur Auflösung einfachgesetzlicher, verfassungsrechtlicher und europarechtlicher Widersprüche im Recht, Tübingen 2008.

Jans J.H., De Lange R., Prechal S., Widdershoven R.J.G.M. (eds.), Europeanisation of Public Law, Groningen 2007.

Kaczorowska A., European Union Law, London – New York 2009.

Kalisz A., Wykładnia i stosowanie prawa wspólnotowego, Warszawa 2007.

Kamiński M., Mechanizm i granice weryfikacji sądowoadministracyjnej a normy prawa administracyjnego i ich konkretyzacja, Warszawa 2016.

Klatt M., Making the Law Explicit. The Normativity of Legal Argumentation, Oxford and Portland 2008

Kruis T., Der Anwendungsvorrang des EU-Rechts in Theorie und Praxis: seine Durchsetzung in Deutschland. Eine theoretische und empirische Untersuchung anhand der Finanz- und Verwaltungsgerichte und Behörden, Tübingen 2013.

Lutter M., Die Auslegung des angeglichenen Rechts, "Juristen-Zeitung" 1992, no. 47.

Nettesheim M., Auslegung und Rechtsfortbildung nationalen Rechts im Lichte des Gemeinschaftsrechts, "Archiv des öffentlichen Rechts" 1994, vol. 119.

Prechal S., Directives in EC Law, Oxford – New York 2005.

Timmermans C.W.A., Directives: their effect within the national legal systems, "Common Market Law Review" 1979, vol. 16.

Weber M., Grenzen EU-rechtskonformer Auslegung und Rechtsfortbildung, Baden – Baden 2010.

Wróbel A., Wykładnia prawa państwa członkowskiego zgodnie z dyrektywą, czyli tzw. pośredni skutek dyrektywy, (in:) A. Wróbel (ed.), Stosowanie prawa Unii Europejskiej przez sądy. Tom I, Warszawa 2010.

Wróbel A., Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2005, no. 1.

Białostockie Studia Prawnicze
2018 vol. 23 nr 2

DOI: 10.15290/bsp.2018.23.02.02

Martyna Wilbrandt-Gotowicz
Cardinal Wyszyński University in Warsaw
m.gotowicz@uksw.edu.pl
ORCID ID: https://orcid.org/0000-0003-1527-0305

Europeanisation of Administrative Proceedings Law – Opportunities and Risks

Abstract: The article presents a number of opportunities and risks to the Europeanisation of administrative proceedings law. This process may in particular lead to: the development of a system of institutions of administrative proceedings law in European terms, the more effective implementation of substantive law rules determined by EU law, the improvement of complex proceedings based on the cooperation of national administration authorities and EU institutions, the modernisation of national institutions of administrative proceedings law under the influence of European models and the strengthening of the standards of the protection of individual rights in administrative proceedings. However, at the same time it is open to a number of challenges, which may be perceived as risks to Europeanisation. These include, *inter alia*, the atomisation and disintegration of administrative procedure from the perspective of national legal systems, adoption by the EU legislator of procedural solutions incompliant with national models of administrative procedure, difficulties with the appropriate implementation of EU acts determining procedural solutions into national law, the appropriate co-application of national and EU procedural rules by administration authorities, and the diversification of the standards of protection for individuals in various cases. Additionally, the measures used to partially eliminate the risks of Europeanisation in the area of administrative proceedings law and increase the chances offered by this process for the development of administrative law and improving the standards for the protection of individual rights have also been pointed out.
Keywords: Administrative Proceedings, Europeanisation of Administrative Proceedings Law, Integrated Administrative Proceedings

1. Introductory remarks

The article addresses the issue of Europeanisation of administrative proceedings law. This issue has been considered from the perspective of the opportunities and risks related to the establishment of formal rules by the EU legislator to determine the course of administrative proceedings. A systemic (legislative) perspective for the

Europeanisation of law was adopted, in contrast to the interpretative Europeanisation that occurs as a consequence of the harmonising influence of European court decisions on administrative practice. In terms of subjective scope this article addresses only the legislative influence of the European Union, whereas for objective scope it focusses mainly on the influence of EU legislation on national legal systems (*top-down* Europeanisation[1]). However, emphasis has been placed on the attempts to create a general model of administrative proceedings at the level of EU institutions, authorities, and organisational units.

The subject matter calls for the dynamic perception of Europeanisation as an ongoing process, rather than as a static phenomenon. Its dynamics in respect of administrative proceedings law is significant, resulting in the development of new procedural models and institutions under the influence of EU law. The larger number of legal acts (other than substantive rules) include the formal regulations that considerably limit the procedural autonomy of Member States in particular types of cases. This relates both to the integration model (related to adopting rules having a direct effect) included in regulations, and the harmonisation model (associated with the establishment of certain procedural solutions in directives that need to be transposed into national law).[2]

As a consequence, it is possible to distinguish a specific group of administrative proceedings determined by EU procedural law, referred to here as administrative proceedings integrated into EU law. In such proceedings, certain actions of the administration authorities are dictated either by European Union or national rules determined by EU law. Such proceedings include proceedings in which a case is decided by:

- a national authority without the cooperation of the authorities of other states or EU institutions (a simple decentralised model),
- a national authority with the cooperation of the authorities of other states or EU institutions (a complex decentralised model),
- an EU institution (authority, organisational unit) without the cooperation of national authorities (a simple centralised model), or
- an EU institution (authority, organisational unit) with the cooperation of national authorities (a complex centralised model).[3]

The diversity of administrative procedures developed as a result of the Europeanisation of administrative proceedings law reveals the complex nature of the

1 A. Wróbel, D. Miąsik, Europeizacja prawa administracyjnego – pojęcie i konteksty, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), System Prawa Administracyjnego, vol. 3, Europeizacja prawa administracyjnego, Warszawa 2014, pp. 10-11.

2 K. Chorąży, W. Taras, A. Wróbel, Postępowanie administracyjne, egzekucyjne i sądowoadministracyjne, Warszawa 2009, p. 20.

3 M. Wilbrandt-Gotowicz, Zintegrowane z prawem Unii Europejskiej postępowania administracyjne, Warszawa 2017, p. 265.

influence of EU law, both internal (influence on national legal systems) and external (establishment of a European legal arena).

In terms of the internal aspect, it should be noted that national administration authorities, when issuing decisions in individual cases, are required to take into account not only national but also EU rules. In the application of law, they should take into consideration the general principles of EU law, which may lead to the non-application of a national provision that is contradictory to a rule provided by an EU regulation or the direct application (under certain conditions) of a provision of a directive that has either not been implemented or been wrongly implemented. The establishment of EU procedural rules is thus associated with both the limitation of the principle of the procedural autonomy of Member States and the requirement to take into account the general principles of EU law, including the principle of primacy and efficiency, as well as with the co-application of national and EU procedural rules. The complex procedural grounds for integrated proceedings means that they constitute a particular challenge for national authorities, including from the perspective of implementing the value of good administration.

With regard to the external aspect, EU legislative activities contribute to the standardisation of centralised proceedings, hence establishing foundations for the EU system of regulations of administrative proceedings. The solutions adopted are, as a matter of fact, fragmentary, as they are associated with the so-called sectoral method of the Europeanisation of law. However, there are works aimed at the development of model rules for EU administrative procedures, which would constitute a comprehensive codification of administrative proceedings.[4]

This article characterises selected opportunities and risks related, in the author's opinion, with the Europeanisation of administrative proceedings law.

2. Opportunities for Europeanisation of administrative proceedings law

2.1. Development of the system for institutions of administrative proceedings law from a European perspective

De lege lata lacks any provision for a coherent system of the institutions of administrative proceedings law in European terms. This is understandable, considering the different legal traditions of the Member States. One should not expect that Europeanisation will at any point spread to enable the replacement of national code regulations with European rules. However, it is possible to develop, as part of sectoral regulations (or alternatively complex codification), a certain system

4 Compare ReNEUAL Model Rules on EU Administrative Procedure, http://reneual.eu (access 1.09.2017). See also European Parliament resolution of 9 June 2016 for an open, efficient and independent European Union administration (2016/2610(RSP)).

for institutions of the administrative proceedings, which would be characterised by fairly uniform elements and coherent application in centralised procedures, and within a certain scope also in decentralised procedures (by national authorities in those cases falling within the scope of EU law).

So far there is a significant lack of coherence between the regulations of analogous institutions in different sectoral acts. Such differences do not usually ensue from the specific nature of the regulated subject, rather they are related, for example, to actions taken at the preliminary stage of proceedings instituted upon a motion (related to accepting a motion for examination, its approval, lack of confirmation of the acceptance or rejection) or prerequisites of the application of extraordinary modes and their consequences.[5]

One of the opportunities of Europeanisation may be thus seen in the development of a uniform group of institutions of administrative proceedings law in EU law. An introduction to this could be the model rules on EU administrative procedures developed by ReNEUAL.

2.2. More effective implementation of substantive law rules determined by EU law

The implementation of legal order, as expressed in the regulations of substantive law, is one of the fundamental tasks of administrative proceedings[6]; hence the "service" or "ancillary" function of formal rules vis-à-vis the regulations of substantive law is emphasised.[7] Despite the fact that at present the functions of procedural rules go beyond the ancillary role of vis-à-vis substantive law,[8] their functional relationship should be underlined.

Therefore, as part of the sectoral method of the Europeanisation of law, sets of procedural rules are included in acts regulating collectively a certain area of administrative law, inter alia, concerning the marketing of a given category of products (e.g. plant protection products,[9] or medicinal products[10]), provision of

5 M. Wilbrandt-Gotowicz, Zintegrowane..., *op. cit.,* 563.

6 K. Jandy-Jendrośka, J. Jendrośka, System jurysdykcyjnego postępowania administracyjnego, (in:) T. Rabska, J. Łętowski (eds.), System Prawa Administracyjnego, vol. 3, Wrocław 1978, pp. 139-140.

7 S. Jędrzejewski, Ochrona uprawnień obywatela w polskim systemie kontroli administracji państwowej, Toruń 1973, p. 42; J. Filipek, Założenia strukturalne procesu administracyjnego, (in:) L. Bar (ed.), Studia z dziedziny prawa administracyjnego, Ossolineum 1971, p. 206.

8 B. Adamiak, J. Borkowski, Postępowanie administracyjne i sądowoadministracyjne, Warszawa 2016, p. 25.

9 Regulation (EC) No. 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ L 309, 24.11.2009, p. 1).

10 Regulation (EC) No. 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal

services subject to control (e.g. authorisations to engage in the occupation of road transport operator,[11] or telecommunications activity[12]) or competition law.[13] Thus the unification of administrative proceedings is related mainly to the integration in particular areas of the common market. Formal sectoral solutions are strictly subordinated to the goals and methods of the substantive law regulations, irrespective of the delegating of power to issue decisions in individual cases to EU or Member State authorities.[14]

Hence the progress of Europeanisation in the scope of administrative procedural rules may contribute also to the more efficient application of substantive law regulations in those cases falling within the scope of EU law.

2.3. Improvement in complex proceedings based on cooperation between national administration authorities and EU institutions

A characteristic feature of integrated proceedings is that some are not based on the simple linear arrangement of a procedural relationship (an authority deciding on a case – a party[s] to the proceedings), but takes the form of complex models (centralised, decentralised), and even certain mixed procedural sets. This ensues from the possibility of participating in the issuance of decisions by entities from more than one state or institution, EU authorities and organisational units, which corresponds to the contemporary pluralistic model of administration organisation.[15] Apart from the classic jurisdictional proceedings of national authorities and proceedings of EU authorities, there are also procedures that involve the "mixed" decision-making powers of EU and Member State authorities. The latter are known as multistage proceedings (German *mehrstufiger*) or transnational,[16] composite procedures[17]or

products for human and veterinary use and establishing a European Medicines Agency (OJ L 136, 30.4.2004, p. 1).

11 Regulation (EC) No. 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (OJ L 300, 14.11.2009, p. 51).

12 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33).

13 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (JO L 1, 4.1.2003, p. 1).

14 M. Wilbrandt-Gotowicz, Zintegrowane..., *op. cit.,* 173.

15 C. Franchini, European principles governing national administrative proceedings, "Law and Contemporary Problems" 2004, no. 1, p. 183.

16 H.P. Nehl, Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung. Eine Studie gemeinschaftsrechtlicher Verfahrensgrundsätze unter besonderer Berücksichtigung „mehrstufiger" Verwaltungsverfahren, Berlin 2002, pp. 29–30.

17 H.C.H. Hofmann, G.C. Rowe, A.H. Türk, Administrative law and policy of the European Union, New York 2011, pp. 361-362; C. Franchini, European..., *op. cit.,* 184.

mixed administrative proceedings,[18] as well as multijurisdictional procedures or multi-level procedures.[19] A special group of such procedures comprises transnational proceedings, recognised by the author as part of the complex decentralised model, involving horizontal proceedings in which decisions are made by cooperating national authorities of different Member States (e.g. as regards procedures for the mutual recognition of authorisations).

Thus, complex procedures are not uniform. The level of their complexity, the group of entities participating in the handling of the case, the manner of (decision-making and executive) power division between national and EU administration authorities or the legal position of the remaining entities to the proceedings are different.[20] This triggers particular difficulties with regard to the application of administrative procedural rules. Therefore, Europeanisation of this area is important for the development of legal mechanisms facilitating the efficient and effective conduct of complex proceedings. Therefore, they constitute an opportunity for their optimisation.

2.4. Modernisation of administrative proceedings law of the Member States

When analysing the opportunities for the Europeanisation of administrative proceedings law, one cannot disregard the potentially modernising influence of EU procedural rules on national legislation. Certain tendencies or specific legal regulations may constitute a model for reflection on the changes required for a national legal system, enabling its adaptation to current needs. In the discussion on the shape of administrative procedures, the requirement to seek suitable mechanisms makes it possible to weigh (in the course of administrative proceedings executing various model assumptions) all kinds of interests and arguments as well as the methods of their protection, while the need to combine the principles of the rule of law and the demand for innovativeness in public administration and the requirements of pragmatism and efficiency of its actions is particularly emphasised.[21]

In the applicable regulations and directives, a number of innovative solutions may be identified. Some of them may be introduced into the Polish system of administrative procedure (e.g. general decisions), or they partly overlap with the changes adopted in the amendment to the Code of Administrative Procedure[22] of 7

18 G. della Cananea, The European Union's mixed administrative proceedings, "Law and Contemporary Problems" 2004, no. 1, pp. 197-199.

19 J. Supernat, Administracja Unii Europejskiej. Zagadnienia wybrane, Wrocław 2013, p. 26.

20 M. Wilbrandt-Gotowicz, Zintegrowane..., *op. cit.*, 255.

21 Z. Kmieciak, Współczesna formuła ochrony interesów w prawie administracyjnym (aspekt procesowy), ZNSA 2015, no. 2, p. 20.

22 The Act dated 14 June 1960 – Code of Administrative Procedure (Journal of Laws of 2017, item 1257).

April 2017[23] (e.g. with regard to simple proceedings or the tacit examination of the case). The interesting structures found in EU law include, *inter alia*, the concept of an interested entity and secondary parties, a ruling in the form of a general decision, separation of the initial stage of the proceedings instituted upon a motion, simplified modes of amending an authorisation decision, lower formal requirements for decisions issued in proceedings with the participation of multiple parties, simplified proceedings in similar cases, renouncing the right to a hearing when a positive decision is issued, elaborate forms of a decision with consensual elements, the form of a document (report) summing up explanatory proceedings, publicly available registers or, characteristic for complex procedures, mechanisms for the preventive review of drafted administrative acts based on consultations.[24]

2.5. Strengthening of the standards for the protection of individual rights in administrative proceedings

The Europeanisation of administrative proceedings law may also contribute, in European terms, to the strengthening of the standards of protection of individual rights in contacts with national and EU administration authorities, as well as to the implementation of the right to good administration, which was established in the CJEU decisions as one of the principles of law, defined in Article 41 of the EU Charter of Fundamental Rights.[25] It is perceived as the right expressed in procedural guarantees provided for individuals and as a standard in the form of procedural rules, which limit the discretion of authorities.[26] Article 41 of the EU Charter of Fundamental Rights provides for a number of special rights, with which the corresponding obligations of authorities are correlated – not only the right to reliable and impartial proceedings completing within a reasonable time, but also the right to defence, to present one's case (right to a hearing), access to case files, right to receive grounds for the ruling or to have damage caused by administration authorities and their officers redressed. This is an open catalogue, as it does not cover the whole content of the right to good administration.[27] Procedural guarantees of individuals related to this right are characterised by extensive "content capacity".

23 Journal of Laws of 2017, item 935.

24 M. Wilbrandt-Gotowicz, Zintegrowane..., *op. cit.,* 565.

25 A. Dauter-Kozłowska, Prawo do dobrej administracji w Karcie Praw Podstawowych Unii Europejskiej i w świetle Europejskiego Kodeksu Dobrej Administracji, (in:) C. Mik, K. Gałka (eds.), Prawa podstawowe w prawie i praktyce Unii Europejskiej, Toruń 2009, pp. 338-339. See also Judgment of the Court of First Instance of 27 September 2002, T-211/02, Tideland Signal Ltd., EU:T:2002:232.

26 E. Bălan, D. Troanţă, Considerations on the principles and evolutions of E.U. administrative procedure, "Curentul Juridic" 2013, no. 4, p. 16.

27 Z. Kmieciak, Postępowanie administracyjne i sądowoadministracyjne a prawo europejskie, Warszawa 2009, p. 59.

Given the manner of the regulation of procedural rules, it should be noted that sectoral acts include only general *de minimis* standards. National laws, including the Polish Code of Administrative Procedure, generally establish more detailed protective rules. An adequate level of protection of individual rights in integrated proceedings, with the participation of national authorities, is ensured in connection with this, provided the EU and national procedural rules are co-applied. It may take a simple (direct application of national rules in the scope not regulated in national law) or complex (reconstruction of multicentric rules of EU and national law) form.[28]

With regard to the proceedings, in which decisions are issued by EU administration authorities (centralised proceedings), strengthening of the standards of protection of individual rights may be a consequence of adopting appropriate regulations in sectoral acts (alternatively *de lege ferenda* for the establishment of model rules on EU administrative procedure).

3. Risks of Europeanisation of administrative proceedings law

3.1. Atomisation and disintegration of the administrative procedure from the perspective of national legal systems

Apart from the opportunities perceived in the further development of administrative procedural rules determined by EU law, the associated risks should be emphasised as well. The Europeanization of national law on administrative proceedings may, from such a perspective, be perceived as an atomisation factor of administrative procedure, and even disintegration of the subject matter of the code or general decodification of administrative proceedings. This leads to the development of an *ad casum* of complex procedural grounds for the actions of an authority, which comprise not only national rules not determined by EU law, but also rules implementing the directives or rules of EU regulations having a direct effect. Consequently, although the provisions of the Code of Administrative Procedure will remain the core and resource of model regulations for general proceedings, their application in particular cases will (due to the diversification of the solutions adopted in particular sectoral acts) be subordinated to even wider amendments and exclusions ensuing from special provisions conditioned by EU law (provisions of EU regulations or acts implementing directives).

From the internal perspective, Europeanisation is thus related to the disintegration of systematic, uniform sets of law provisions included in the Code's regular framework.[29] In the event of the establishment of special rules by a legislator other than a national legislator, which are aimed at harmonisation within all EU

28 M. Wilbrandt-Gotowicz, Zintegrowane..., *op. cit.*, 247.

29 M. Gajda-Durlik, Problematyka dekodyfikacji a proces rozwoju polskiego prawa o postępowaniu administracyjnym, "Administracja" 2007, no. 2, p. 50.

Member States, it should be expected that the procedural rules will become more diversified vis-à-vis national law than in the event where the legislation of a given state is taken into account.[30]

3.2. Adoption by the EU legislator of procedural solutions incompliant with national models of administrative procedure

The establishment of procedural rules to be applied not only at the EU level but also by the authorities of Member States of different legal traditions, poses a risk of incompliance of the regulations determined by EU law with the national models of administrative procedure. Such rules may, in fact, repeat the solutions adopted in a given national code or special provisions, as well as refer to procedural solutions at variance with those present in national law, and even the institutions provided for therein. It should be noted that there are quite significant terminological inconsistencies as regards the institutions determined in the EU regulations and Polish regulations within the scope of administrative procedure, with a similar or even identical legal character (e.g. rejection of a motion and the decision on the refusal to institute proceedings). Adopting EU procedural rules with the right of priority, which are not set in the legal tradition of the national administrative procedure (e.g. "withdrawal" of a decision with an *ex nunc* rather than an *ex tunc* effect) may cause problems both in respect of the appropriate implementation of EU acts (in accordance with the efficiency requirement), and their application by national administration authorities.

3.3. Difficulties with the appropriate implementation of EU acts determining procedural solutions into national law

A lack of coherence between the acts (and in particular between EU regulations and the legal solutions functioning in law of a given state) causes certain problems related to the appropriate implementation of EU acts. A national legislator is required not only to take into account the principle of the primacy of EU law, but also to ensure its efficiency in national legal order. Thus, the need for the implementation includes not only the transposition of procedural solutions determined by directives into domestic law, but also the appropriate implementation of those EU regulations having a direct effect into such law. It should be borne in mind that it is easier generally to ensure the efficiency of EU law when, in the course of its broadly understood implementation, the maximum convergence of the regulations, irrespective of their origin, is ensured.

With regard to procedural rules, special provisions implementing EU acts should guarantee that their application, which will not only be compliant with them as regards the procedural regulations provided, will as closely as possible correspond

30 M. Wilbrandt-Gotowicz, Zintegrowane..., *op. cit.,* p. 109.

to the model solutions of the national administrative procedure (e.g. by establishing an appropriate legal form for the actions of an authority and the possibility of challenging it, for which EU law provides only for a consequence, such as a refusal of a motion as a method of closing proceedings). With regard to directives, it should be remembered that there is a certain framework for their solutions. Repeating the terminology of directives in implementing acts, in respect of procedural solutions, should be reflected on taking into account the national system of administrative procedure. It cannot be automatic. The appropriate implementation may often be effected as a result of using procedural institutions set in national law.

3.4. Difficulties with the appropriate co-application of national and EU procedural rules by Member State authorities

The fragmentary nature, the lack of completeness of EU procedural rules and their divergence, combined with structural attributes – the multilingualism of EU law and its application in states with different regulation models, are (due to the efficiency principle) related to the requirement for the co-application of procedural rules of different origins in the course of the administrative proceedings conducted by national authorities. It may constitute a certain challenge for such entities. The models for the co-application of EU and national procedural rules are not uniform. They may take simple (direct application) or complex (reconstruction of multicentric rules) forms. In the former case, a national authority complementarily applies national procedural rules (rules not determined by EU directives) in the scope not regulated in EU law (and national acts implementing them). This is related to procedural institutions not regulated (in a manner which makes them directly effective or requires their transposition) in a given sectoral act, e.g. the suspension of proceedings or exclusion of a functionary of an authority from dealing with the case. Whereas in the complex model, the effective application of a given institution, indicated in an EU regulation, requires the reconstruction of a comprehensive rule taking into account not only the EU regulation, but alternatively also a national regulation (that is a multicentric rule). This is justified in situations where EU legal and procedural regulations determine the elements of a given rule in an incomplete or ambiguous manner (e.g. pointing to the procedural effect, but not determining the form of actions for an authority).[31]

Thus, the application of national law in integrated proceedings sometimes requires complex assessments in respect of the choice of procedural grounds for the action of an authority or its reconstruction from EU and national provisions, when taking into account not only the concept of the procedural autonomy of Member States, but also the principles of primacy and effectiveness (including the criteria of efficiency and equivalence).

31 M. Wilbrandt-Gotowicz, Zintegrowane..., *op. cit.,* p. 560.

3.5. Diversity of the standards for the protection of individuals in various cases

The last of the risks referred to is related to the popularisation of legal and procedural regulation in sectoral acts, without the development of a uniform apparatus for formal institutions in a general act at the European Union level. Associating procedural regulations with substantive regulations may lead to excessive diversification of the standards for the protection of procedural rights, e.g. in the scope of the right to defence, depending on the type of case examined, enhancing the instrumental dimension of procedural rules.

A remedy for such a risk is related to the above-mentioned challenges for national authorities. An optimum standard for the protection of individual rights in proceedings with the participation of Member State authorities may be ensured by the appropriate implementation of EU regulations into national law and the appropriate co-application of national and EU procedural rules in integrated proceedings (including assessment of such co-application by administrative courts). Such actions should take into account the right to good administration as a fundamental value. With regard to the procedures, in which decisions are issued by EU administrative authorities, this is guaranteed by the decisions of the Court of Justice of the European Union, based, *inter alia*, on the interpretation of Article 41 of the EU Charter of Fundamental Rights.

4. Summary

This article presents selected opportunities and risks related to the Europeanisation of administrative proceedings law. The former are related to the development of a system for the institutions of administrative proceedings law in European terms, the more effective implementation of substantive law rules determined by EU law, the improvement of complex proceedings based on the cooperation of national administration authorities and EU institutions, the modernisation of national administrative proceedings law and the strengthening of the standards for the protection of individual rights in administrative proceedings. It may be argued that they are related to conducting efficient and, at the same time, procedural justice-based activities of the administration authorities of EU Member States and EU administration.

In order to meet this objective, it is necessary to face a number of challenges, which may be perceived as risks to Europeanisation. These include: atomisation and disintegration of the administrative procedure from the perspective of national legal systems, adoption by the EU legislator of procedural solutions incompliant with national models of administrative procedure, difficulties with the appropriate implementation of EU acts that determine procedural solutions into national law,

difficulties with the appropriate co-application of national and EU procedural rules by Member State authorities and the diversification of the standards of protection for individuals in various cases.

However, it seems that they may be largely eliminated by suitable practices by national and EU legislators, administration authorities applying procedural rules provided for in EU law or determined by this law, as well as the courts controlling their actions. This calls for increasing legislators' awareness as to a wider scope of integrated proceedings as well as for establishing, not only in the EU case law, but also national law, a practice which would take into account the specific nature of such proceedings and the requirement to co-apply national and EU procedural rules. Additionally, it is worth taking into consideration not only the interpretation of national law, which is compatible with EU law, but also (within the scope allowed by EU law, e.g. the principle of efficiency) the interpretation of EU procedural rules, which is compatible with national systems of administrative procedure.

Greater cohesion between sectoral acts as well as between EU acts and national systems of administrative procedure can be achieved by developing comparative studies. Whereas, the fragmentation of sectoral regulations could be certainly prevented by adopting the codification of administrative proceedings at the EU level; nevertheless, it seems barely possible for such codification to cover decentralised procedures. What should be noted though is that EU law has an essential modernisation potential in respect of national procedural rules, e.g. as regards demands to introduce the institution of a general decision or interested entity and secondary parties into the Polish Code of Administrative Procedure.

Thus, it should be deemed possible that the risks of Europeanisation in the area of administrative proceedings law would be partially eliminated, and the chances, offered by this process, for the development of administrative law and improving the standards for the protection of individual rights would be increased.

BIBLIOGRAPHY

Adamiak B., Borkowski J., Postępowanie administracyjne i sądowoadministracyjne, Warszawa 2016.

Bălan E., Troanţă D., Considerations on the principles and evolutions of E.U. administrative procedure, "Curentul Juridic" 2013, no. 4.

Cananea G., The European Union's mixed administrative proceedings, "Law and Contemporary Problems" 2004, no. 1.

Chorąży K., Taras W., Wróbel A., Postępowanie administracyjne, egzekucyjne i sądowoadministracyjne, Warszawa 2009.

Dauter-Kozłowska A., Prawo do dobrej administracji w Karcie Praw Podstawowych Unii Europejskiej i w świetle Europejskiego Kodeksu Dobrej Administracji, (in:) C. Mik, K. Gałka (eds.), Prawa podstawowe w prawie i praktyce Unii Europejskiej, Toruń 2009.

Filipek J., Założenia strukturalne procesu administracyjnego, (in:) L. Bar (ed.), Studia z dziedziny prawa administracyjnego, Ossolineum 1971.

Franchini C., European principles governing national administrative proceedings, "Law and Contemporary Problems" 2004, no. 1.

Gajda-Durlik M., Problematyka dekodyfikacji a proces rozwoju polskiego prawa o postępowaniu administracyjnym, "Administracja" 2007, no. 2.

Hofmann H.C.H., Rowe G.C., Türk A.H., Administrative law and policy of the European Union, New York 2011.

Jandy-Jendrośka K., Jendrośka J., System jurysdykcyjnego postępowania administracyjnego, (in:) T. Rabska, J. Łętowski (eds.), System Prawa Administracyjnego, vol. 3, Wrocław 1978.

Jędrzejewski S., Ochrona uprawnień obywatela w polskim systemie kontroli administracji państwowej, Toruń 1973.

Kmieciak Z., Współczesna formuła ochrony interesów w prawie administracyjnym (aspekt procesowy), ZNSA 2015, no. 2.

Kmieciak Z., Postępowanie administracyjne i sądowoadministracyjne a prawo europejskie, Warszawa 2009.

Nehl H.P., Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung. Eine Studie gemeinschaftsrechtlicher Verfahrensgrundsätze unter besonderer Berücksichtigung „mehrstufiger" Verwaltungsverfahren, Berlin 2002.

ReNEUAL Model Rules on EU Administrative Procedure, http://reneual.eu.

Supernat J., Administracja Unii Europejskiej. Zagadnienia wybrane, Wrocław 2013.

Wilbrandt-Gotowicz M., Zintegrowane z prawem Unii Europejskiej postępowania administracyjne, Warszawa 2017.

Wróbel A., Miąsik D., Europeizacja prawa administracyjnego – pojęcie i konteksty, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), System Prawa Administracyjnego, vol. 3, Europeizacja prawa administracyjnego, Warszawa 2014.

Białostockie Studia Prawnicze
2018 vol. 23 nr 2

DOI: 10.15290/bsp.2018.23.02.03

Anna De Ambrosis Vigna
Uniwersytet w Białymstoku
a.budnik@uwb.edu.pl
ORCID ID: https://orcid.org/0000-0002-2892-6900

Dariusz R. Kijowski
Uniwersytet w Białymstoku
kijowski@uwb.edu.pl
ORCID ID: https://orcid.org/0000-0003-4236-2977

The Principle of Legitimate Expectations and the Protection of Trust in the Polish Administrative Law

Abstract: The principle of legitimate expectations concerns primarily the relationship between public administration and individuals. It endeavours to solve the conflict between the administration's goal to protect confidence in its activities and the need for change of the objectives of administrative policy. In the Polish administrative law, the concept of legitimate expectations has so far been identified with the principle of the protection of trust. The aim of this study is to demonstrate that the recent amendment to the Polish Code of Administrative Procedure should serve as an impulse for further research into the meaning of this principle in the domestic legal order.
Keywords: legitimate expectations, protection of trust, public administration, EU law, Polish law

1. Introduction

The principle of legitimate expectations concerns primarily the relationship between public administration and individuals. It endeavours to solve the conflict between the administration's goal to protect confidence in its activities and the need for change of the objectives of administrative policy. It might seem that the claim that the role of administrative law is to protect legitimate expectations of the individual should not raise any controversies. Only a consistent public administration which breaks its prior promises solely in justified cases can create a sense of justice and citizens' trust.

In the Polish administrative law, the concept of legitimate expectations has so far been identified with the principle of the protection of trust. The aim of this study is to demonstrate that the recent amendment to the Code of Administrative Procedure[1] (CAP), particularly its art. 8, should serve as an impulse for further research into the meaning of this principle in the domestic legal order. The study is based on the analysis of the European and Polish jurisdictions and of relevant literature.

2. The principle of legitimate expectations in European Union law

Protection of legitimate expectations originates in the German principle of *Vertrauensshutz* which means protection of trust and is directly related to the protection of the acquired rights[2]. The origin of the principle can be traced back to judgments concerning the withdrawal of unlawful administrative acts conferring benefits. In the judgments of the 1950's and 1960's a principle was looked for, which could relativise the principle of legality of the administration as a subprinciple of the rule of law. "The first judgments mentioned the principles of good faith and legal certainty as the source for the protection of legitimate expectations. Meanwhile the principle of legitimate expectations is established as an autonomous manifestation of the rule of law[3]". "In the German concept that principle aims to protect legitimate dispositions of individuals from changing assessments of the legal situation (administration) and changes in the legal framework (legislature). The principle does not protect from any disappointment; only those expectations are regarded legitimate which have led to relevant dispositions. The principle can be activated in combination with fundamental rights versus the executive branch or the legislature."[4]

The principle of the protection of legitimate expectations was later adopted by EU law as a result of the judicial activities of the European Court of Justice (now Court of Justice of the European Union - CJEU).

In the early stages of the development of the rules governing proceeding before EU administrative bodies, the principles contained in domestic legal acts, common law and those established through court decisions, which were sometimes reflected in the positive law, were used. The jurisdiction of the CJEU which has formulated many general principles of EU law is considered part of the primary legislation of the EU. Among other sources these principles are derived from constitutional

1 Act of 14 June 1960 (consolidated text Journal of Laws 2017, item 1257).

2 J. Lemańska, Uzasadnione oczekiwana w perspektywie prawa krajowego i regulacji europejskich, Warszawa 2016, p. 35.

3 The Protection of Legitimate Expectations in Administrative Law and EU Law. Answers to Questionnaire: Germany, Seminar organized by the Supreme Administrative Court of Lithuania and ACA-Europe, Vilnius, 21–22 April 2016.

4 *Ibidem*.

traditions shared by the member states as well as from international agreements, including the European Human Rights Convention. General principles of EU law are of constitutional nature and are binding for the member states[5]. General principles are principles of public law because they concern relations between individuals and EU administration or a member state[6]. The CJEU analyses the validity of a contested community act not merely based on relevant clear provisions of the Treaty and their interpretation included in the existing jurisdiction but also in light of "basic principles", which it itself has formulated, drawing on legal traditions of different member states[7].

The development of rules which govern EU law was largely influenced by its adoption of the European Convention of Human Rights.

The EU principles of human rights were included in the Charter of Fundamental Rights of the European Union (charter), which was adopted in Nice on December 7, 2000. This document became legally binding under the Lisbon treaty and now forms part of the primary EU law. What is relevant for our study is the right to good administration expressed in art. 41 of the charter. This right, stresses that individual cases should be investigated by the EU bodies and institutions impartially, fairly and within a reasonable timeframe. The administrative actions should be clear, intelligible and transparent. In the spirit of this requirement, every individual is ensured the right to access relevant documents and the right to express his or her opinion on the case before the verdict is given and administrative organs are obliged to justify their decisions.[8]

The principles which form the right to good administration were later developed in the European Code of Good Administrative Behaviour (Code). The Code is an important instrument which enables the implementation of good administration principles in the EU institutions. It helps citizens understand their rights and monitor their observance. Moreover, it increases the level of societal interest in an open, effective and independent European administration[9].

---

5 A. Krawczyk, Zasady postępowania przed organami administracji unijnej, (in:) System prawa administracyjnego. Europeizacja prawa administracyjnego, R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), t. 3, Warszawa 2014, pp. 208-209.

6 *Ibidem*, p. 209.

7 E. Sharpston, European Community Law and the Doctrine of Legitimate Expectations: How Legitimate, and for Whom, "Northwestern Journal of International Law & Business" 1990, vol. 11, issue 1, p. 89.

8 H. Babiuch, Europejski Kodeks Dobrej Administracji a polska procedura i praktyka administracyjna, "Zeszyty Naukowe Państwowej Wyższej Szkoły Zawodowej im. Witelona w Legnicy" 2017, no.1, p. 6.

9 Europejski kodeks dobrej praktyki administracyjnej, Europejski Rzecznik Praw Obywatelskich, p. 4, https://www.ombudsman.europa.eu/en/resources/code.faces/pl/3510/html.bookmark#/page/1 (access 8.12.2017).

The principle of legitimate expectations has been expressed in art. 10 of this document. The article says that: "The official shall be consistent in his own administrative behaviour as well as with the administrative action of the Institution. The official shall follow the Institution's normal administrative practices, unless there are legitimate grounds for departing from those practices in an individual case; these grounds shall be recorded in writing." Paragraph 2 of this article goes on to say: "The official shall respect the legitimate and reasonable expectations that members of the public have in the light of how the Institution has acted in the past."

The legitimate expectations principle was thus first expressed in normative terms in the European Code of Good Administrative Behaviour. Polish commentaries to this regulation describe it as the principle of the protection of trust which among other things implies predictability of decisions which is phrased as "legitimate expectations, consistent action and legal counselling"[10].

As mentioned above, in EU law, the principle of legitimate expectations was formed in the process of the judiciary activity of the CJEU. "The European Court did not establish the theoretical bases of the principle but in its decisions, it often indicated why it should be used. Among other things, it stated that this principle has a specific equitable function which ensured fair dealing and good faith as minimum standards of Community administration. It would be unfair for the administration to raise certain expectations as to its further conduct which are then subsequently disappointed, without good reason."[11]

The principle allows the European Court to strike a balance between justice and the legal rigor. In one of the investigated cases the Advocate General declared that the doctrine of legitimate expectations is "undeniably part of Community law"[12].

The European Court of Justice recognised that the principle of legitimate expectations originates from the principle of legal certainty[13]. The working of the principle of legal certainty means that violation of legitimate expectations is seen as violation of "the primary rule of law and order"[14].

In EU law the principle of legitimate expectations is primarily called for in cases which concern the agricultural market and industry. This seems understandable from the economic perspective. According to E. Sharpston "The general rule appears to be that the European Court will usually be prepared to back the Council

10 J. Świątkiewicz, Europejski Kodeks Dobrej Administracji (wprowadzenie, tekst i komentarz o zastosowaniu kodeksu w warunkach polskich procedur administracyjnych), Warszawa, March 2007, p. 27.

11 R. Thomas, Legitimate expectation and proportionality, Oxford-Portland Oregon 2000, p. 44.

12 Judgment of CJEU of 19 September 1985 on the joint cases Finsider v. commission, C-63 and 147/84.

13 Judgment of CJEU of 15 February 1996 on the case Duff and others v. Minister for Agriculture and Food, Ireland, and the Attorney General, C-63/93.

14 Judgment of CJEU of 14 May 1975 on the case CNTA SA v. Commission, C-74/74, p. 549.

and/or Commission and to hold that they are entitled to have a fairly wide margin of maneuver in market management, even where the chosen scheme has been subjected to fairly heavy criticism. This ties in with the basic principle essential, it is suggested, to a rational attempt at market management by the public authorities - that those authorities should be free to legislate (and to modify legislation) in the general economic interest, in the light of what they perceive to be the requirements of a changing overall economic situation."[15] In one of its decisions the European Court stated that "Every entrepreneur in which an administrative body raises legitimate hopes may appeal to the principle of legitimate expectations. On the other hand, if a reasonable entrepreneur subject to other treatment could have foreseen the adoption of a communal measure which could affect his interests, he or she cannot appeal to this principle if the measure has been adopted."[16] The European Court purports however that the discretionary power is not unlimited. For example, it can be seen in the decision on Mulder v. Minister van Landbouw en Visseri[17], concerning milk producers who entered into a joint programme through which for five years they received compensation for suspending their milk production and trade. Toward the end of that period the producers made investments to reactivate their production. In the meantime, another scheme, so called *super-levy*, came into force but producers who had joined the earlier one could not benefit from it because they did not meet the necessary requirement of a given quantity of milk produced in the referential period. For this reason their applications were rejected. The European Court decreed that the resolution was illegal because it violated the principle of legitimate expectations. A producer who suspended his production of milk cannot expect that he would not be subject to market or structural policy which is adopted in the meantime. The Court adjudged that a producer encouraged by a communal scheme to suspend his milk production for a given period has the right to expect that he/she would not be subject to restrictions for the exclusive reason of benefiting from communal regulations. Producers could not have foreseen that they would be excluded from the common market[18].

In line with the European court jurisdiction, three conditions must be satisfied to justify a claim for entitlement to the protection of legitimate expectations. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Community authorities. Second, those assurances must be such as to give rise to a legitimate

15 E. Sharpston, European Community Law…, *op. cit.,* p. 90.

16 Judgment of the Court of 11 March 1987, Van den Bergh en Jurgens BV i Van Dik Food Products (Lopik) BV v. Commission, C-265/85.

17 Judgment of the Court of 28 April 1988, Mulder v. Minister van Landbouw en Visserij, C-120/86.

18 A. Jurcewicz, Traktatowe podstawy unijnego prawa rolnego w świetle orzecznictwa, Warszawa 2012, pp. 129-130.

expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules[19].

In seeking justification for respecting the protection of legitimate expectations the doctrine of many European states appeals to the reliance theory and the rule of law theory. The former means that "legitimate expectations should be protected because to do otherwise would inflict harm on individuals who rely upon such expectations[20]. A public authority's freedom to take action in the public interest is limited to the extent that it causes harm to particular individuals. If a public authority has induced a person to rely upon its representations or conduct, realising that such reliance was a real possibility, it is under a *prima facie* duty to act in a such way that the reliance will not be detrimental to the representee[21]. The rule of law as a source of legitimate expectations means that for individuals to be autonomous they must at least, be able to plan ahead and therefore foresee with some degree of certainty the consequences of their actions[22]. "Economic activity, which is an important aspect of autonomous decision-making, can only be carried out if economic operators 'can rely on something"[23]. In a dynamically changing and uncertain world this right is something they should be allowed to and largely rely on. It is emphasised that in administrative law certainty is particularly important in cases of discretionary administrative actions. The principle of the rule of law in administrative law means that protection and respect for expectations makes the discretionary action of administrative bodies more predictable. The principle of the rule of law establishes therefore legal certainty and predictability[24].

As concerns the relation between the European and domestic law the CJEU adjudged that the principles of legitimate expectations and legal certainty are part of the legal order of the Community. The fact that domestic legislation provides for the same principles which are to be applied in cases like return of unlawfully issued communal subsidy cannot thus be regarded as in conflict with the same legal order. Moreover, as investigation of domestic provisions of the member states regarding the annulment of administrative decisions and repayment of financial benefits which were unlawfully issued by public authorities clearly shows the worry of achieving balance between the principle of legality on the one hand and the principles of legal certainty and protection of legitimate expectations on the other,

19 Judgment of the Court of First Instance (Fifth Chamber) of 30 June 2005, Eugénio Branco v. Commission, T-347/03, § 120.

20 S. Shonberg, Legitimate expectation in administrative law, Oxford 2000, p. 9.

21 *Ibidem*, p. 10.

22 Judgment of the Court of 14 May 1975 in the case CNTA SA v. Commission, C-74/74, p. 549.

23 S. Shonberg, Legitimate expectation..., *op. cit.,* p. 12.

24 *Ibidem*, p. 12-13.

though in different ways, is commonly expressed in the regulations adopted by the member states[25].

3. Protection of legitimate expectations in the Polish law

The principle of the protection of legitimate expectations (as understood above) has not been explicitly expressed in the Polish law or jurisdiction. It does not mean, however, that it has not been taken note of by representatives of the administrative law doctrine. Thus far it has been customary in the Polish law to regard the principle of the protection of legitimate expectations as corresponding to the principle of citizens' trust in the state and its laws. In the Polish legal tradition, it corresponds to the above mentioned German principle of *Vertrauensschutz*. The principle is derived from art. 2 of the Constitution of the Republic of Poland and the principle of a democratic rule of law that it expresses.

Z. Kmieciak, shows that values and ideas identified with *legitimate expectation, Vertrauensschutz* or *confiance légitime* in the French law are sometimes directly identified with the principle of trust and the principle of legitimately acquired rights[26]. Following J.M. Woehrling he included the following principles in the "foundations" of the principle of the protection of trust: the principle of legal safety and legal certainty, the principle of coherence of public actions, the principle of good faith and the *estoppel* principle; the principle of impartiality, the principle of respect for fundamental rights and the principle of legitimately acquired rights[27].

Since it is assumed that the principle of legitimate expectations is to be derived from the principle of trust in the state and its organs, two provisions of the Polish legal order in which it has been expressed deserve special attention. These are the above-mentioned art. 2 of the constitution and art. 8 of the CAP.

The Polish Constitutional Tribunal (CT) has long since noticed that the principle dictating that the proceeding be conducted in a way which raises the trust of its participants in the public authorities, previously called raising citizen's trust in the state and its law, is an element of a democratic state under the rule of law[28]. The CT decreed that this principle is of basic importance for the normative content of the rule of law clause. It arises from the function of this clause which is to determine relations between a person and the state[29]. The primary meaning of the principle

25 Judgement of the Court of 21 September 1983 on the cases Deutsche Milchkontor GmbH et al. v. Germany, C-205/82 and C-215/82.

26 Z. Kmieciak, Ogólne zasady prawa i postępowania administracyjnego, Warszawa 2000, p. 65.

27 *Ibidem*, p. 70-71.

28 Judgment of the CT of 30 November 1988, K. 1/88, OTK 1988, item 6.

29 P. Tuleja, Komentarz do art. 2 Konstytucji, (in:) Konstytucja RP, tom 1, Komentarz do art. 1-86, M. Safjan, L. Bosek (eds.), Wraszawa 2016, Legalis/el.

is the need to protect and respect legitimately acquired rights and protect pending interests[30], but also to prevent the lawmaker from such normative constructs which are impossible to implement, form the illusion of law and as a result are merely a pretence of protection of those property interests which are functionally related to the content of the established substantive right[31]. The CT links the principle of trust primarily with the citizens' trust in the state and its laws. In another ruling the CT stated that the principle of trust relates to legal certainty and "legal certainty is not to mean stability of legal regulations which in this area may be hard to attain in some economic conditions of the state, as much as it refers to predictability of the actions of the state organs and the related conduct of citizens. Predictability of state actions warrants trust in the lawmaker and the laws"[32].

In the light of the CT jurisdiction the principle of the protection of citizens' trust in the state and its laws (also known as the principle of state loyalty to its citizens) is addressed to the state authorities and its content could be reduced to the disallowing of the lawmaker to 'set traps' for the citizens, and of the state to make empty promises or suddenly withdraw promises or established rules of conduct.[33]

The principle of the protection of an individual's trust in the state and its laws is closely related with the legal security of the individual[34]. It is expressed in such processes of law creation and law application, "which would prevent it from becoming a sort of trap for the citizens and enable them to organise their affairs trusting that they are not exposing themselves to legal consequences which could not have been foreseen at the time of decision making and activity and convinced that the actions which they undertake in line with the effective law would be acknowledged by the legal order also in the future."[35] The Polish CT also stressed that legal security, predictability of the law made by the state as well as respect of the authorities for actions undertaken with trust in the state, guarantees protection of human liberties[36]. Moreover, the CT concluded in its rulings that the principle of univocality of law as well as unlawfulness of the creation of illusory rights ensue from the principle of trust. "In a democratic state governed by the rule of law, the processes of law creation and law application cannot be a trap for the citizen and the citizen should be able to arrange his or her affairs with trust that he or she does not expose him/herself to

30 Judgment of the CT of 2 March 1993, K 9/92, OTK 1993, no. 1, item. 6.
31 Judgment of the CT of 19 December 2002, K 33/02, OTK-A 2002, no. 7, item 97.
32 Judgment of the CT of 2 March 1993, K. 9/92, OTK 1986-1995 (t. 4), 1993, part I, item 6; judgment of the Constitutional Tribunal of 24 May 1994, K. 1/94, OTK 1994, part I, item 10.
33 Judgment of the CT of 23 July 2013, P 4/11, OTK ZU No. 6/A/2013, item 82, p. 1132; judgment of the CT of 8 April 2014, SK 22/11, OTK ZU No. 4/A/2014, item 37, pp. 562-563.
34 P. Tuleja, Komentarz…, *op. cit*.
35 Judgment of the CT of 7 February 2001, K 27/00, OTK 2001, No. 2, item 29.
36 P. Tuleja, Komentarz…, *op. cit*.

adverse legal consequences of his/her decisions and actions which are impossible to predict at the time of making the decisions and undertaking the actions"[37].

According to art. 8 § 1 of the CAP: "The organs of public administration carry out their proceedings in a way that raises the trust of its participants in the public authorities, governed by the principle of proportionality, impartiality and equal treatment". Moreover, in art. 8 § 2 of the CAP, the lawgiver forbade the organs of public administration from abandoning the established decision-making practice when dealing with the same factual and legal situation.

The principle of trust was first formulated in the original version of the CAP but its origins can be traced back to the bill establishing the Supreme Administrative Court and later democratic changes which followed after 1989. It is pointed out that development of this principle should be ascribed to the jurisdiction of the Constitutional Tribunal, the Supreme Administrative Court and regional administrative courts[38].

The principle of trust is tied up with the principle of the protection of pending interests. It ensures protection of the individual in circumstances where he or she undertook a given venture based on existing regulations. The CT stresses, however, that it does not have an absolute character. This duty is of a more categorical nature, if the lawgiver set a timeframe in which given ventures can be conducted under predetermined rules[39].

The principle of the protection of trust in the state and its laws is also often appealed to by administrative courts. The Supreme Administrative Court (SAC) ruled that passing of a regulation which allows for its arbitrary interpretation constitutes the breach of the principle of the protection of trust in the state and its laws[40]. The principle of the protection of trust in the state and its laws requires, for example, that the tax payer should know whether his or her tax duty has or has not expired[41]. The Supreme Administrative Court referred to the principle of trust in the matter of judiciary actions. It stated that "In a democratic state governed by the rule of law it is wrong and unacceptable for the same court with a differently composed panel to issue a different ruling based on the same factual and legal situation."[42]

37 Judgment of the CT of 25 November 1997, K 26/97, OTK 1997, No. 5-6, item 64.

38 The Protection of Legitimate Expectations in Administrative Law and EU Law. Answers to Questionnaire: Poland, Seminar organized by the Supreme Administrative Court of Lithuania and ACA-Europe, Vilnius, 21-22 April 2016, p. 4.

39 P. Tuleja, Komentarz…, *op. cit.*

40 Order of the SAC of 21 October 2013, I FSK 2797/11, LEX no. 1378115.

41 Judgment of the SAC of 15 October 2013, I GSK 1543/11, LEX no. 1441241.

42 Judgment of the SAC of 10 October 2013., I FSK 1292/12, LEX no. 1504915.

The current wording of art. 8 of the CAP is a result of the amendment to the CAP which came into force in June 2017[43]. It is thus worthwhile to consider whether this change contributed a new perspective on the principle of the protection of legitimate expectations in the Polish legal system. Among the reasons given for introducing changes to the CAP it was pointed out that the set of the general principles of administrative proceeding included in the earlier code did not fully realize the principles of good administration which the Code expressed along with other sources. One can find statements in the Polish doctrine according to which the Polish administrative proceeding contains the principles included in the Code[44]. Other authors, e.g. A. Zoll, pointed out that Poland still has a long way to go in the task of including the Code in the Polish administrative proceeding[45].

A closer look at the normalising scope of art. 8 § 2 of the CAP and art. 10 of the Code shows that the Polish legislator did not intend to explicitly state the principle of the protection of legitimate expectations which is mentioned in the art. 10 paragraph 2 of the Code. Art. 8 § 2 of the CAP speaks only of a consistent application of administrative practice in the activities of public administration. We believe this does not exhaust the essence of the principle of the protection of legitimate expectations. According to P. Przybysz, the principle of respect for an established decision-making practice in the same factual and legal situation (art. 8 § 2) is an element of the principle of equal treatment[46].

It seems, however, that there is no need for a normative expression of the principle of the protection of legitimate expectations in the Polish legal system, for it can be derived from the effective legal provisions (the Constitution, the CAP and the tax ordinance).

According to J. Lemańska, legitimate expectations are a theoretical concept which signifies a legally qualified factual interest resulting from a subjective belief of an individual which is considered worthy of legal protection based on objectified circumstances even though it has no explicit basis in the content of a legal norm[47]. She also suggests that the source of the protection of legitimate expectations, which in Poland form a qualified factual interest, is article 7 of the CAP, which states that in

43 Act of 7 April 2017 amending the Act – Code of administrative proceedings and some other acts (Journal of Laws of 2017, item 935).

44 J. Boć, Administracja a obywatel, (in:) A. Błaś, J. Jeżewski, Administracja publiczna, J. Boć (ed.) Poznań 2004, p. 254.

45 A. Zoll, Prawo do dobrej administracji, (in:) Europejski kodeks Dobrej Administracji (tekst i komentarz o zastosowaniu kodeksu w warunkach polskich procedur administracyjnych), J. Świątkiewicz (ed.), Warszawa 2007, p. 5, https://www.rpo.gov.pl/pliki/1192700305.pdf (access 8.12.2017).

46 P. Przybysz, Komentarz do art. 8 Kodeksu postępowania administracyjnego, Lex/el. (access 8.12.2017).

47 J. Lemańska, Uzasadnione oczekiwana…, *op. cit.*, p. 74

their proceedings the public administrative bodies take account of the social interest and legitimate interest of the citizens. The legitimate interest of the citizens is not just their legal interest but also their qualified factual interest, i.e. (legitimate) expectations rightly understood, for the above-mentioned article of the CAP does not say that it is merely concerned with the legal interest[48]. It should be added that from art. 2 of the constitution which appeals to the principle of a democratic state under the rule of law one can derive directives which are relevant not only for the legislator but also for all public organs. And the principle of the protection of legitimate expectations is – as shown above – one of the constitutive elements of the concept of the democratic state under the rule of law.

In the Polish doctrine it had already been pointed out before that art. 10 of the Code alludes to previously adopted precedents which should be understood as established administrative practice. Societal opinion becomes accustomed to a given way of proceeding by the public administration and any deviations in uniform cases cause anxieties and a suspicion of subjectivism, if not abuse, on the part of the organs. If, therefore, there is a change of situation which requires abandoning of the existing practice (e.g. due to budget or financial constraints or a need to consider other priorities) the administrative organ ought to justify this departure[49].

The principle of the protection of legitimate expectations means that every individual who, as a result of administrative action, formed certain expectations concerning future administrative actions may demand that these expectations are met unless there are compelling reasons of public interest for not allowing this. The CJEU has indicated that from the juridical point of view this principle should be regarded as a kind of a legal expectation concerning the action of an organ which establishes or administers EU law in relation to an individual who cannot appeal to acquired rights[50].

It is beyond the scope of this short study to point to all rulings which invoke the principle of the protection of trust in the public organs or discuss all aspects of its application. We thus stop short of only a couple of examples. According to courts, an administrative organ must not inform a party of the content of legal regulations or ways to interpret them, nor can it at a later stage – when the party has undertaken action on the basis of acquired information, trusting in its content – undertake actions (issue rulings) which contradict the content of provided information[51]. Imposing sanctions on the party for his or her failing to meet an obligation, which

48 *Ibidem*, p. 80.

49 J. Świątkiewicz, Europejski Kodeks Dobrej Administracji (wprowadzenie, tekst i komentarz o zastosowaniu kodeksu w warunkach polskich procedur administracyjnych) Wydanie VI, Warszawa 2007, pp. 27-28, https://www.rpo.gov.pl/pliki/1192700305.pdf (access 30.11.2017).

50 Ł. Prus, the commentary to the judgment of the CJEU of 19 May 1992 r., C-104/89 oraz C-37/90, "Europejski Przegląd Sądowy" 2012, no. 3, pp. 33-38.

51 Judgment of the SAC of 28 November 1997, SA/Sz 1970/96, LEX no. 32028.

he or she could not have met even in due diligence, may be inconsistent with the principle which requires that the proceeding be conducted in a way that does not diminish the trust of its participants in the public organs[52]. The undertaking of contradictory actions in the same case by the public authorities will not help obey the principle which states that proceeding be conducted in a way that supports trust of its participants in public authorities[53]. A breach of the principle expressed in art. 8 of the CAP is also found in the changeability of legal opinions expressed in decisions issued by administrative organs in relation to the same addressee, based in the same factual situation, indicating the same legal basis for the decision and failing to provide justification for the change[54]. In a different ruling, the SAC stated that a situation in which administrative information leads to a breach of material legal regulations cannot be accepted[55].

The principle of trust in the actions of public organs in the Polish legal order has a wide scope. It also forms an imperative for the public administration to keep promises and respect the established practices if that serves the public interest. The principle of the protection of legitimate expectations in the Polish law is a standard whose origins can be traced to the principle of law and order as well as the principle of trust in the state and its organs.

Conclusion

The principle of the protection of legitimate expectations does not hold an autonomous status in the Polish legal system. Fulfilment of the principle of the protection of legitimate expectations in Poland is to serve the process of building trust in public administration organs. It also corresponds with the principles of equality, proportionality, legal certainty and subsidiarity[56].

What speaks for respecting the principle is the fact that since it is a European principle, it would prevent a situation in which individuals would enjoy broader protection before the EU organs than the scope determined in the regulations of the member states. If legitimate expectations are highly ranked on the EU level, it serves as an argument for providing the right scope of protection in the domestic law[57]. Moreover, Poland as the EU member has obliged itself to respect the standards of the rule of law and it should respect the principles of good administration.

52 Judgment of the Regional Administrative Court in Białystok of 25 July 2007, II SA/Bk 276/07,

53 Judgment of the SAC of 26 November 1999, V SA 978/99, LEX no. 49942.

54 Judgment of the SAC of 8 April 1998, I SA/Łd 652/97, ONSA 1999, no. 1, item 27, http://orzeczenia.nsa.gov.pl

55 Judgment of the SAC of 24 August 1988, SA/Rz 242/99, http://orzeczenia.nsa.gov.pl

56 P. Przybysz, Komentarz do art. 8…, *op. cit.*

57 R. Arigho, Legitimate Expectations in Irish and EU law – Lessons for Ireland? "Irish Journal of European Law" 2016, vol. 19, issue 1, pp. 77-78.

The recent amendment has introduced a new provision to the Polish administrative proceeding by outlawing departures from established decision-making practice in a factual and legal situation which undoubtedly expresses the principle of the protection of legitimate expectations of an individual. This does not however exhaust the content of the principle. Moreover, it should be noted that the amendment of the CAP at the same time satisfies recommendations outlined in the draft General Provisions of the Administrative Law. The authors of this bill, in line with the requirements of the right to good administration, called for an explicit inclusion of the principles of proportionality, impartiality and equality in the bill[58].

It is apparent then that the lawmaker has included in the existing provisions of administrative procedure the missing standards provided for in the European Code of Good Administrative Behaviour. It seems therefore that a separate formulation of the principle of the protection of legitimate expectations in the bill is superfluous. Moreover, as indicated in the above referenced rulings of courts and the Constitutional Tribunal, the content of the principle of trust in state organs in Poland corresponds to the understanding of the protection of legitimate expectations as expressed in the jurisdiction and doctrine of the European states and the EU. One could therefore hope that the principle will be taken note of and applied by Polish administrative organs and courts.

BIBLIOGRAPHY

Arigho R., Legitimate Expectations in Irish and EU law – Lessons for Ireland? "Irish Journal of European Law" 2016, vol. 19, issue 1.

Babiuch H., Europejski Kodeks Dobrej Administracji a polska procedura i praktyka administracyjna, Zeszyty Naukowe Państwowej Wyższej Szkoły Zawodowej im. Witelona w Legnicy" 2017, no. 1.

Boć J., Administracja a obywatel, (in:) A. Błaś, J. Jeżewski, Administracja publiczna, J. Boć (ed.) Poznań 2004.

Europejski kodeks dobrej praktyki administracyjnej, Europejski Rzecznik Praw Obywatelskich, https://www.ombudsman.europa.eu/en/resources/code.faces/pl/3510/html.bookmark#/page/1 (access 8.12.2017).

Jurcewicz A., Traktatowe podstawy unijnego prawa rolnego w świetle orzecznictwa, Warszawa 2012.

Kmieciak Z., Ogólne zasady prawa i postępowania administracyjnego, Warszawa 2000.

Krawczyk A., Zasady postępowania przed organami administracji unijnej, (in:) System prawa administracyjnego. Europeizacja prawa administracyjnego, R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), t. 3, Warszawa 2014.

58 Although the draft General Provisions of the Administrative Law did not explicitly include these principles, the authors pointed to the possibility of considering the introduction of the Code rules into the Polish regulation in an extended formula than it is determined in the existing Polish regulations.

Lemańska J., Uzasadnione oczekiwana w perspektywie prawa krajowego i regulacji europejskich, Warszawa 2016.

The Protection of Legitimate Expectations in Administrative Law and EU Law. Answers to Questionnaire: Germany, Seminar organized by the Supreme Administrative Court of Lithuania and ACA-Europe, Vilnius, 21-22 April 2016.

The Protection of Legitimate Expectations in Administrative Law and EU Law. Answers to Questionnaire: Poland, Seminar organized by the Supreme Administrative Court of Lithuania and ACA-Europe, Vilnius, 21-22 April 2016.

Prus Ł., the commentary to the judgment of the CJEU of 19 May 1992 r., C-104/89 oraz C-37/90, "Europejski Przegląd Sądowy" 2012, no. 3.

Shonberg S., Legitimate expectation in administrative law, Oxford 2000.

Świątkiewicz J., Europejski Kodeks Dobrej Administracji (wprowadzenie, tekst i komentarz o zastosowaniu kodeksu w warunkach polskich procedur administracyjnych), Warszawa, March 2007.

Świątkiewicz J., Europejski Kodeks Dobrej Administracji (wprowadzenie, tekst i komentarz o zastosowaniu kodeksu w warunkach polskich procedur administracyjnych) Wydanie VI, Warszawa 2007, https://www.rpo.gov.pl/pliki/1192700305.pdf (access 30.11.2017).

Sharpston E., European Community Law and the Doctrine of Legitimate Expectations: How Legitimate, and for Whom, "Northwestern Journal of International Law & Business" 1990, vol. 11, issue 1.

Thomas R., Legitimate expectation and proportionality, Oxford-Portland Oregon 2000.

Tuleja P., Komentarz do art. 2 Konstytucji, (in:) Konstytucja RP, tom 1, Komentarz do art. 1-86, M. Safjan, L. Bosek (eds.), Wraszawa 2016.

Zoll A., Prawo do dobrej administracji, (in:) Europejski kodeks Dobrej Administracji (tekst i komentarz o zastosowaniu kodeksu w warunkach polskich procedur administracyjnych), J. Świątkiewicz (ed.), Warszawa 2007, https://www.rpo.gov.pl/pliki/1192700305.pdf (access 8.12.2017).

Białostockie Studia Prawnicze
2018 vol. 23 nr 2

DOI: 10.15290/bsp.2018.23.02.04

Dominika Cendrowicz
Uniwersytet Wrocławski
dominika.cendrowicz@uwr.edu.pl
ORCID ID: https://orcid.org/0000-0002-2358-7188

Homelessness and the European Union's Initiatives to End It

Abstract: Hmelessness is a serious social problem in the countries of the European Union, which is currently exacerbated by the refugee crisis and migration phenomenon. The Member States of the European Union are taking various measures to reduce this problem. However, tackling homelessness requires appropriate actions also at EU level, including monitoring its European dimension. Still, EU Member States use different definitions of homelessness, methods of collecting and presenting data on homelessness, and implement different policies to address it. The purpose of this article is to attempt to analyse the initiatives undertaken at EU level concerning the fight against homelessness, the housing-led policy recommended in the European Union, and the typology of homeless people developed by the European Federation of National Organisations Working with the Homeless. Legal-dogmatic and empirical methods were used in the article.
Keywords: Standards in homeless services, homeless people, homelessness, EU strategies against homelessness, housing-led policy

1. Introduction

Homelessness is one of the most extreme and brutal forms of social exclusion[1]. It correlates with extreme poverty, unemployment, health loss and threat to life, and mental health problems. It is particularly distressing because the human being who experiences it, is without shelter and space where he could take refuge from difficult life situations[2]. Homeless people live without any material support, their family

1 Cf.: R. Mędrzycki, Bezdomność w świetle orzecznictwa sądów administracyjnych - wybrane aspekty, "Kwartalnik Prawa Publicznego" 2013, no. 1.

2 B. Moraczewska, Bezdomność. Definicja, problemy, rozwiązania obecne oraz historyczne odwołanie do ludzi luźnych, "Studia Gdańskie. Wizje i rzeczywistość" 2013, no. 10, p. 113.

ties vanish, and the surrounding society does not maintain contact with them[3]. This promotes the emergence of socialisation deficits and the isolation of homeless people at the individual and social level, especially because it is difficult for people who have a home to understand the homeless, even though they can now be found on the streets of just about every European city[4]. Nonetheless, the phenomenon of homelessness still escapes widespread public research on poverty, social exclusion and unemployment[5]. This situation is completely unjustified as the number of homeless people in EU countries is alarming. For example, according to 2012 data in France, at least 141,500 people were homeless[6]. In the Czech Republic, the number of homeless people in 2011 amounted to 11,496, while in Greece they numbered 20,000. In Hungary in the same period 15,000 people were homeless, half of whom lived in Budapest. In the same period in Spain the number of homeless was around 40,000 thousand[7], and in Germany 284,000 people were without a place to stay. The phenomenon of homelessness is also becoming increasingly noticeable in Poland, where according to a national survey of the homeless conducted on the nights of 8 to 9 February 2017, their number in the country as a whole, amounted to 33,400, of which 27,911 were men and 5,497 were women[8].

2. The role of the EU in the fight against homelessness and housing exclusion

Despite the alarming data on the number of homeless people in EU countries, monitoring the phenomenon across the EU is not an easy task[9]. This is related to the movement of homeless people between EU countries, the lack of a European definition of homelessness and the reluctance of homeless people to register for fear

3 See: e.g. M. Granat, Godność człowieka a problem bezdomności, (in:) I. Lipowicz (ed.), Bezdomność. Problemy prawne, innowacyjne rozwiązania, Warszawa 2016, pp. 14-28.

4 B. Moraczewska..., *op. cit.*, p. 113.

5 „Krajowy program przeciwdziałania ubóstwu i wykluczeniu społecznemu 2020. Nowy wymiar aktywnej integracji".

6 Data available at Homeless World Cup Foundation: https://www.homelessworldcup.org/homelessness-statistics/ (access 31.07.2017).

7 Global Homelessness Statistics, https://www.homelessworldcup.org/homelessness-statistics/ (access 31.07.2017).

8 Data available on the Ministry of Family, Labour and Social Policy website, http://www.mpips.gov.pl/aktualnosci-wszystkie/pomoc-spoleczna/art,8681,mniej-osob-bezdomnych.html (access 31.07.2017).

9 Cf.: V. Arapoglou, Researching Housing Exclusion and Homelessness in Southern Europe: Learning Through Comparing Cities and Tracking Policies, "European Journal of Homelessness" 2016, vol. 10, pp. 87-122; N. Pleace, Researching Homelessness in Europe: Theoretical Perspectives, "European Journal of Homelessness" 2016, vol. 10, pp. 19-44.

of social stigmatisation[10]. In addition, the problem of homelessness is not limited to the citizens of a particular country[11]. In many European cities the homeless or people threatened with homelessness are foreigners[12]. This is the case in London, for example, where a large proportion of people living on the streets are from Central and Eastern Europe[13]. The problem of homelessness among migrant workers also affects Polish citizens and in a frightening way[14]. However, the people who are most threatened in the EU, are not only immigrants but also young people and those living below minimum subsistence level; with increasing frequency, homelessness even affects whole families. In addition, the scale of the problem is exacerbated by the refugee crisis[15].

The very complexity of homelessness impacts research on the subject and the measures to prevent it, with EU Member States adopting different approaches in this regard; after all, responsibility for resolving the problem ultimately lies with them. Counteracting homelessness, also requires appropriate action to be taken by the EU. Thus, EU initiatives within the scope of combating the problem of homelessness complement and support the actions of Member States by providing funding from the European Social Fund, the European Regional Development Fund and the Fund for European Aid to the Most Deprived[16]. However, in order for the EU to create a common framework for supporting and monitoring the actions of Member States' related to the problem, it is first necessary to develop a European strategy for its prevention[17] and to formulate a clear definition of the term "homelessness" that can be applied across the Union. At present Member States not only use different definitions and methods of collecting and presenting data the issue, but also implement different policies to address it. This undoubtedly makes it the more difficult to conduct research

10 B. Szluz, Zjawisko bezdomności w wybranych krajach Unii Europejskiej, Rzeszów 2014, p. 15.

11 N. Pleace, Immigration and Homelessness, (in:) E. O'Sullivan, V. Busch-Geertsema, D. Quilgars and N. Pleace (eds.), Homelessness Research in Europe, Brussels: FEANTSA 2011, pp. 143-163.

12 B. Jabłecka, Dostęp do mieszkalnictwa i bezdomność migrantów w Anglii, Instytut Spraw Publicznych. Badania. Ekspertyzy. Rekomendacje, http://www.isp.org.pl/uploads/pdf/750397215.pdf (access 31.07.2017).

13 Global Homelessness Statistics, https://www.homelessworldcup.org/homelessness-statistics/ (access 31.07.2017).

14 Cf. MP Garapich, London's Polish Borders: Transnationalizing Class and Ethnicity among Polish, Stuttgart 2016, p. 124.

15 See: J. Doherty, B. Edgar and H. Meert, Immigration and homelessness in Europe, Policy Press 2004 and K Juul, Migration, Transit and the Informal: Homeless West-African Migrants in Copenhagen, European Journal of Homelessness 2017, no. 1, vol. 11, pp. 131-148.

16 Peer Review in Social Protection and Social Inclusion Social Europe Housing First Belgium, 16-17 March 2016, p. 7.

17 Cf. The report, commissioned by DG Employment, Social Affairs and Equal Opportunities, 'Measurement of homelessness at EU level', European Communities 2007, European Communities 2007, pp. 4-353, http://ec.europa.eu/social/BlobServlet?docId=114&langId=en (access 31.07.2017).

on the phenomenon at European level. In recognizing the need to develop European standards for aid to the homeless and a common definition of homelessness, it should be borne in mind that any idea or innovation in this area has to address the legal, financial and organizational constraints within the individual country concerned[18], as well as the fact that the reception of the standards of assistance by the homeless themselves depends on many factors, among which the feelings of those to whom this help is addressed, is a factor of paramount importance.

3. Coordinating the fight against homelessness in Europe: a key element of an EU strategy against homelessness

In recent years, many steps have been taken to put an end to homelessness, and tackling the issue is an important part of the EU's social security and social inclusion strategy, through which, the EU coordinates and supports national actions and policies to combat homelessness and social exclusion[19]. Already in the Charter of Fundamental Rights of the European Union,[20] proclaimed in Nice on 7 December 2000, the priority objectives of action to combat poverty and social exclusion were identified and the problems of the homeless directly addressed. One cannot forget that both in the Treaty on European Union (Article 3)[21] as well as in the TFEU[22] (Articles 9 and 208) it is stated that the fight against poverty and social exclusion, which often leads to homelessness, is an overriding aim of the EU[23].

Moreover, at the EU level, there are a number of activities aimed at developing knowledge on the scale of the homeless problem and devising ways to mitigate its effects. As an example, one may use the opinion of the European Economic and Social Committee adopted on 14/15 March 2007 on *Housing and regional policy*, in which the right to housing was mentioned, it being pointed out that accessibility to housing is a prerequisite for access to human rights and a decent standard of living. It was also

18 Cf. R. Mędrzycki, Nowe formy działania administracji publicznej i partnerów społecznych w zakresie przeciwdziałania bezdomności, (in:) I. Lipowicz, Bezdomność. Problemy prawne, innowacyjne rozwiązania, Warszawa 2016, pp. 63.

19 B. Szluz, Strategie Unii Europejskiej wobec problemu bezdomności, "SaeculumChristianum" 2008, no. 2, p. 186. See: N. Pleace, E O'Sullivan, W. Edgar, V Busch-Geertsema, Homelessness and Homeless Policies in Europe: Lessons from Research, Brussels: European Commission, 2010.

20 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.

21 Treaty on European Union (consolidated version), OJ C 326, 26.10.2012, further referred as to TUE.

22 Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, further referred as to TFUE.

23 Cf. The causes and consequences of poverty in Europe today: in search of new approach, (in:) Living in dignity in the 21st century. Apotics and inequality in societies in human rights – the paradox of democracies, Council of Europe, February 2013, p. 13 et seq.

recommended that European level proposals for a series of common goals in relation to access to housing be introduced, together with minimum standards of quality that would allow the definition of decent housing to be achieved. It was recognised that the establishment of such criteria would enable the realisation of human rights to housing[24]. Among EU measures to improve knowledge about homelessness and its prevention, there is also the report published by the Committee of the Regions in October 2008, which outlines ways to make homelessness a priority for EU social inclusion policies, particularly the new Europe 2020 strategy[25].

Among the activities undertaken by the EU authorities one should mention the numerous European Parliament (EP) initiatives. In particular, the EP Declaration of 2008 calling on the EU Council to agree to take joint action within the EU to tackle street homelessness by 2015, should be mentioned here[26]. The declaration contained several important postulates, among which were:

1) the EU Council's agreement to accept the commitment to eliminate street homelessness by 2015;
2) adoption by the European Commission of the definition of homelessness;
3) publication of reports on EU actions and progress towards the removal of homelessness;
4) encouraging Member States to create winter action plans in the framework of national strategies to eliminate homelessness[27];
5) recommendation of the housing-led approach "in order to strengthen the evidence base on effective combinations of housing and floating support for formerly homeless people and inform evidence-based practice and policy development"[28].

The EP's initiatives also include numerous resolutions, among which attention should be paid to the EP resolution of 14 September 2011 on homelessness[29], in particular the need to monitor homelessness regularly at European level, conduct research and gather knowledge regarding policy and related services, and to

24 B. Szluz, Przeciwdziałanie zjawisku bezdomności w Unii Europejskiej, "Przegląd Europejski" 2011, no. 2, p. 12.

25 Homelessness and housing exclusion initiatives within the European Strategy for Social Protection and Social Inclusion. Extract updated by the EC from "Building a comprehensive and participative strategy on homelessness", discussion paper for the peer review in Lisbon on 4-5 November 2010 by S. Fitzpatrick, Heriot-Watt University (Edinburgh). Updated on 8 December 2010, pp. 1-2.

26 The EP Declaration 111/2008 on Ending Street Homelessness, OJ EU C 259 E, 29 October 2009.

27 B. Szluz, Przeciwdziałanie.., *op. cit*., p. 12.

28 The EP Declaration 111/2008 on Ending Street Homelessness.

29 Resolution of 14 September 2011 on the EU Strategy for Prevention of Homelessness, OJ EU C 51 E, 22 February 2013.

introduce social innovations into such policy and related services[30]. Attention should also be paid to the EP resolution of 11 June 2013 on social housing in the EU[31] and to the EP resolution on an EU homelessness strategy of 16 January 2014[32].

However, the EP's actions are mainly limited to issuing resolutions and statements which, as needs to be emphasised, are not sources of EU law and therefore their role can only be a matter of raising awareness of homelessness and appealing for action to address it[33].

In promoting knowledge about homelessness and developing solutions for the services provided to those who are affected at EU level, the following documents also play an important role:

1) the Joint Report of the European Commission and Council on Social Protection and Social Inclusion, released in 2009[34]; and
2) the report on the social situation in the EU, published by the European Commission in 2009[35].

The Joint Report on Social Protection and Social Inclusion occupies an important place among actions undertaken at the EU level to combat homelessness. It calls on EU Member States to implement integrated policies to tackle the problem and to provide guidance on how to do so. In addition, the report assumed that "Tackling housing exclusion and homelessness requires integrated policies combining financial support to individuals, effective regulation and quality social services, including housing, employment, health and welfare services. More attention needs to be paid to the quality standards of social services and the specific obstacles the homeless face in accessing them."[36]

In the context of the EU's efforts to reduce the incidence of homelessness, the Europe 2020 Strategy adopted by the European Council on 17 June 2010, is of particular importance[37]. Its aim is to achieve economic growth that is: smart, sustainable and inclusive, with particular emphasis placed on job creation and

30 *Ibidem.*

31 EP Resolution of 11.06.2013 on social housing in the EU.

32 EP Resolution of 16.01.2014 on the EU Strategy for the Prevention of Homelessness, OJ EU C 482/141, 23 January 2014.

33 R. Mędrzycki, Problem bezdomności w świetle wybranych regulacji prawnych, "Przegląd Legislacyjny" 2016, no. 4 (98), p. 38.

34 Joint Report on Social Protection and Social Inclusion 2010, Luxembourg: Publication Office of the European Union 2010.

35 See: The social situation in the EU 2008. Manuscript completed in May 2009, Luxembourg: Office for Official Publication of the European Communities 2009.

36 Ibidem, p. 10.

37 Confronting Homelessness in the Framework of the European Semester 2014. A FEANTSA Monitoring Report, pp. 4-5, http://www.feantsa.org/download/confronting_homelessness_european_semester_2014673137152990775749O.pdf (access 31.07.2017).

poverty reduction[38]. The strategy identifies the three most important growth drivers supported both by EU and national level actions. These factors include: smart growth, sustainable growth and, a key point from the perspective of the discussed subject, growth conducive to social inclusion. Among the five main targets of the strategy, the fight against poverty and social exclusion for the first time was distinguished as a separate and binding commitment for the whole EU target scheduled to be achieved by 2020[39]. In addition, it was noted that the most severe examples of poverty and social exclusion in today's society are perhaps homelessness and housing deprivation. The strategy also emphasizes that although access to affordable housing is a fundamental need and the right of every person, guaranteeing this right continues to be a major challenge for many EU Member States. Therefore, the development of appropriate and integrated answers to questions on how to prevent homelessness remains an important part of the EU's social inclusion strategy and, as such, should find appropriate ways and means to ensure the optimal continuation of work begun on homelessness and housing exclusion (including the results of the European Consensus Conference on Homelessness, which took place on 9/10 December 2010 in Brussels)[40].

4. Promotion of housing-led and housing-first approaches at EU level

With regard to the EU's efforts to reduce the incidence of homelessness, it should be stressed that it draws attention to the fact that "the advancement of housing-led approaches can be considered milestones in homelessness research and policy in Europe"[41] and that "The ultimate solution to homelessness is getting access to permanent accommodation."[42]

This housing-led approach, the development of which is drawing much attention in Europe, is reflected in numerous EU documents. By way of example, one may mention that the EP decided on 14 September 2011 to call on the EU to

38 The quantitative parameters were assigned to the targets set out in the Europe 2020 Strategy. Cf. D. Kawiorska, A. Witoń, Ubóstwo i wykluczenie społeczne w kontekście strategii „Europa 2020": postępy w realizacji, "Myśl Ekonomiczna i Polityczna" 2016, no. 2 (53), p. 148.

39 *Ibidem*, pp. 142-143.

40 European Platform against Poverty and Social Exclusion: European Framework for Social and Territorial Cohesion, Europe 2020, European Union, Belgium 2011, p. 18.

41 V. Arapoglou, *op. cit.*, p. 101.

42 Commission Staff Working Document 'Confronting Homelessness in the EU' accompanying the document 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020', SWD/2013/042 final, EUR-Lex – 52013SC0042 – EN, http://eur-lex.europa.eu/legal-content/HR/TXT/?uri=celex:52013SC0042 (access 31.07.2017).

adopt a strategy to combat homelessness[43], which called for a focus on housing-based approaches within the social innovation chapter of the European Platform for Poverty Reduction and Social Exclusion, to gather convincing data on the successful linking of housing support to other forms of assistance for former homeless people, and collect information based on practical experience and policy making[44].

Speaking of the promotion of the housing-led approach in the EU, it should be noted that such policies were inspired by the so-called "Housing First" Program, a concept developed in the United States[45]. Also worth noting, is that the basic principle of this US social project is based on recognition that accommodation is the right of every human being, and that it is one of the primary existential goods: it meets elementary needs, gives a sense of security and shapes material and social conditions of human life[46]. The innovation of this approach and its philosophy for tackling homelessness was quickly recognized in Europe. This was expressed by the implementation of a European experimentation project for testing the housing-first approach ("Housing First Europe") in five European cities (Amsterdam, Budapest, Copenhagen, Glasgow, and Lisbon), funded by the European Commission.

Despite the significant differences between the housing-first and housing-led approaches, they are often identified with one another. However, this is erroneous as the housing-first approach, created in the United States, is based on access to apartments while the "European" housing-led programme is based on the provision of housing in general. The concept of housing-led was first introduced at the European Consensus Conference on Homelessness[47], during which a housing-first type approach was recommended, taking into consideration its European context. The Conference Jury duly recommended adopting the concept of housing-led "as a broader, differentiate concept of encompassing approaches that aim to provide housing, with support as required, as the initial step in addressing all forms of homelessness"[48].

So, there are significant differences between housing-led and housing-first approaches. The housing-led "approach or principle means that homelessness strategies should be geared towards securing permanent accommodation for the

43 EP Resolution of 14.09.2011 on the EU Strategy for the Prevention of Homelessness OJ C 259 E, 29.10.2009, 14 September 2011.

44 See: report: 'Housing-led policy approaches: social innovation to end homelessness in Europe' http://www.feantsa.org/download/14_11_2011_hf_position_paper_final_en2408443683520304907.pdf (access 31.07.2017).

45 *Ibidem*.

46 I. Sierpowska, Socjalne aspekty prawa do mieszkania, "Wrocławskie Studia Erazmiańskie", Wrocław 2010, no. 4, p. 280.

47 European Consensus Conference, 2010, p. 14.

48 Peer Review in Social Protection and Social Exclusion. Housing First. Synthesis Report. Belgium, 16-17 March 2016, p. 10.

homeless as quickly as possible and thus minimising the human and social costs of homelessness. The housing-led principle may translate in homeless strategies as a goal to prevent the loss of permanent accommodation and to provide assistance for the swift, stable re-housing of homeless people, with support if necessary."[49] This approach also prioritises treatment and addiction recovery cases[50]. In contrast, the housing-first approach "is a homeless assistance approach that prioritizes providing permanent housing to people experiencing homelessness, thus ending their homelessness and serving as a platform from which they can pursue personal goals and improve their quality of life."[51] Both approaches, however, are equally popular when it comes to addressing homelessness, but with the caveat that housing-led is recommended by the Jury of the European Consensus Convention.

5. Common framework definition of homelessness: another element of an EU strategy against homelessness

One of the key elements of EU strategy is to formulate a common framework definition of homelessness. As previously mentioned, there is no common functional definition of "homeless" at the EU level. The notion is understood in different ways depending on the Member State concerned[52]. It is worth mentioning in this context that the European Federation of National Organizations Working with the Homeless (FEANTSA) "has developed a European Typology of Homelessness and Housing Exclusion (ETHOS)[53] as a means of improving understanding and measurement of homelessness in Europe (...)"[54]. It is also worthy of mention that this typology has become a basis for discussion of the definition of homelessness for policy and data collection purposes across many countries in Europe[55].

49 *Ibidem*.

50 J. Galway, 'Housing First': An alternative approach to addressing homelessness?, http://www.assemblyresearchmatters.org/2017/03/14/housing-first-an-alternative-approach-to-addressing-homelessness/ (access 31.07.2017).

51 Housing First. Publication from the Website of National Alliance to End Homelessness, https://endhomelessness.org/resource/housing-first/ (access 31.07.2017).

52 Opinion of the European Economic and Social Committee on Homelessness (own-initiative opinion) 2012 / C 24/07, OJ EU C 24/35, 28 January 2012.

53 ETHOS typology was launched in 2005. Cf. K. Amore, M. Baker, P. Howden-Chapman, The ETHOS Definition and Classification of Homelessness: An Analysis, "European Journal of homelessness" 2011, no. 5(2), pp. 19-37.

54 http://www.feantsa.org/en/toolkit/2005/04/01/ethos-typology-on-homelessness-and-housing-exclusion (access 31.07.2017).

55 However, the ETHOS typology is not only used as a framework for debate but also for different purposes: for data collection purposes, for policy purposes, monitoring purposes, and in the media. It is important to note that this typology is an open exercise which makes abstraction

ETHOS – European Typology on Homelessness and Housing Exclusion

Conceptual Category		Operational Category		Generic Definition	National subcategories
Roofless	1	People Living Rough		Rough Sleeping (no access to 24-hour accommodation) / No fixed abode	
	2	People staying in a night shelter		Overnight shelter	
Houseless	3	People in accommodation for the homeless			
	4	People in Women's Shelter			
	5	People in accommodation for immigrants			
	6	People due to be released from an institution	6.1 6.2	Penal institutions Medical institutions	
	7	People receiving support (due to homelessness)	7.1 7.2 7.3 7.4	Residential care for homeless people Supported accommodation Transitional accommodation with support Accommodation with support	
Insecure	8	People living in insecure accommodation	8.1 8.2 8.3 8.4	Temporarily living with family/ friends No legal (sub)tenancy Illegal occupation of a building Illegal occupation of land	
	9	People living under threat of eviction	9.1 9.2	Legal orders enforced (rented) Re-possession orders (owned)	
	10	People living under threat of violence	10.1	Police recorded incidents of domestic violence	
Inadequate	11	People living in temporary / non-standard structures	11.1 11.2 11.3	Mobile home / caravan Non-standard building Temporary structure	
	12	People living in unfit housing	12.1	Unfit for habitation (under national legislation; occupied)	
	13	People living in extreme overcrowding	13.1	Highest national norm of overcrowding	

Source: adapted from FEANTSA, http://www.feantsa.org/download/ethospaper20063618592914136463249.pdf (access 31.07.2017).

of existing legal definitions in the EU Member States. http://www.feantsa.org/files/freshstart/Toolkits/Ethos/Leaflet/EN.pdf (access 31.07.2017).

The ETHOS typology makes it possible to identify four main concepts (being homeless, not having accommodation, living in harsh housing conditions, living in inadequate housing conditions) that can be considered as a lack of residence. On this basis, ETHOS classifies homeless people according to their living situation or the type of home they live in:

a) rooflessness (people without shelter of any kind);
b) houselessness (people living in institutions for the homeless/having temporary shelter: shelters for the homeless/temporary accommodation, shelters for women, accommodation for refugees and immigrants, people to be released from e.g. penal institutions, hospitals and caring institutions, specialised supported accommodation e.g. supported housing, supported collective housing, foyer – youth centres, accommodation for underage parents);
c) living in insecure housing (people threatened with exclusion due to e.g. eviction, renting instability, family violence);
d) living in inadequate housing (people living in inadequate housing conditions, in buildings that are unsuitable for repairs, extreme over-crowding, in caravans)[56].

The main advantages of the ETHOS typology are that the conceptual categories developed within it can be used in a variety of activities, such as providing a thorough picture of the problem of homelessness and the development or monitoring and evaluation of these activities. The additional advantage is that it allows one to compare the numbers of homeless people in different countries. The popularity of the concept developed by FEANSTA is visible in the fact that it is "widely accepted in almost all European countries (...)"[57]. Not all European countries, however, agree with all of the categories it contains, but "almost everywhere, national definitions are set in relation to ETHOS and it can be clarified which of the subgroups mentioned in ETHOS are included in homelessness definitions at the national level and which are not"[58]. In Poland, the typology of ETHOS has been adapted to suit Polish conditions. However, it constitutes a narrower version of the European model as it does not cover categories 5.1, 9 and 10 that describe housing exclusion[59].

56 European Federation of National Organizations Working with the Homeless, http://www.feantsa.org/download/ethospaper2006361859291413646324 9.pdf (access 31.07.2017).

57 V. Busch-Geertsema, Defining and Measuring Homelessness, (in:) V. Busch-Geertsema, E. O'Sullivan, D. Quilgars and N. Pleace (eds.), Homelessness. Research in Europe. Festschrift for J. Doherty and B. Edgar, Brussels: Feantsa, 2010, p. 19.

58 *Ibidem*, pp. 21-22.

59 Cf. J. Gruszka, Badania nad bezdomnością w Polsce. Wytyczne do ogólnopolskich badań osób bezdomnych, "Studia Humanistyczne AGH" 2012, vol. 11/4, p. 80.

6. Conclusions

In closing this discussion, one should recognize that homelessness has become a large social problem that has long since crossed national boundaries. Its negative effects are obvious. Lack of shelter or housing can lead to the degradation of an individual, to discrimination based on belonging to a particular social group, and sometimes even to death (especially during periods of extreme hot or cold weather). Today, it is widely believed that homelessness directly affects human dignity and the human rights referred to in, among others, the EU Charter of Fundamental Rights, the revised European Social Charter and the International Covenant on Economic, Social and Cultural Rights[60]. Despite the widespread recognition that homelessness is a menace to fundamental human rights and a serious social problem, the scale of the phenomenon is constantly increasing. This is shown by the homelessness statistics for the individual EU countries cited at the beginning of this article, making it impossible for the EU and Member States to downplay the phenomenon.

At present, it is not only EU Member States that run their own homeless policies. As already mentioned, the EU itself is also involved and in a variety of ways. At the EU level, a number of appeals, resolutions, strategies for tackling homelessness are being formulated and the EU is providing financial support to Member States. However, all these seem to be insufficient because the resolutions and appeals made by the EP are merely soft law and are not legally binding on Member States. As a result, the Member States are in many cases implementing different homelessness policies with varying degrees of success. In order to increase the effectiveness of homelessness measures at the EU level, it seems necessary to take more positive actions that are legally binding. However, assistance to the poor is specifically excluded from direct regulation in the EU, and therefore Member States remain free to conduct their own social policies. Subsequently, financial support and assistance from the Member States is needed for actions taken at EU level. They are not always the same in each of the states.

The problem of homelessness is so complex in its content and so dynamic, and the homeless population so internally diverse that it is impossible to find a single panacea. And this applies to the uniform definition of homelessness. On the one hand, the existence of a common definition of homelessness in the EU has its undeniable advantages, but on the other, it should be borne in mind that in fact "there is no single correct definition of homelessness, nor a single indicator that would fully illustrate the reality of this phenomenon. Different definitions and different indicators are needed, and their choice must depend on the needs and purpose of the study - typically the design of the aid programmes."[61] It seems, however, that a wider use of a homogenous

60 Opinion of the European Economic and Social Committee on Homelessness (own-initiative opinion) 2012 / C 24/07.

61 J. Wygnańska, Polish statistical report. Update, EOH FEANTSA 2006, p. 108.

definition of homelessness in the EU would foster equality of opportunities for the homeless to benefit from EU-funded assistance activities throughout the EU.

However, despite the fact that homelessness is in essence a phenomenon whose complete solution is neither an easy task nor a feasible one, every initiative to help the homeless should be regarded as a very valuable activity. It is in this context that EU-level initiatives in this area are essential, complementing and reinforcing Member States' actions in their fight against homelessness. In addition, they force discussion on the situation of the homeless and raise awareness of the public concerning the problems of homeless people. It is also an undoubted advantage of these activities.

Finally, I would like to add that today, the problem of homelessness is not so shyly hidden away as it was in the past in so many countries. On the contrary, the scale of this phenomenon is increasingly spoken of together with the need to help those who are its victims. This is a step forward in reinforcing the belief that homeless people should be helped because they are an integral part of every society, just like any other person with a roof over their head.

BIBLIOGRAPHY

Arapoglou V., Researching Housing Exclusion and Homelessness in Southern Europe: Learning Through Comparing Cities and Tracking Policies, "European Journal of Homelessness" 2016, vol. 10.

Busch-Geertsema V., Defining and Measuring Homelessness, (in:) V. Busch-Geertsema, E. O'Sullivan, D. Quilgars and N. Pleace (eds.), Homelessness. Research in Europe. Festschrift for J. Doherty and B. Edgar, Brussels: FEANTSA, 2010.

The causes and consequences of poverty in Europe today: in search of new approach, (in:) Living in dignity in the 21st century. A poverty and inequality in societes in human rights – the paradox of democracies, Council of Europe, February 2013.

Confronting Homelessness in the Framework of the European Semester 2014. A FEANTSA Monitoring Report, http://www.feantsa.org/download/confronting_homelessness_european_semester_2014673137152990775749O.pdf, https://www.rpo.gov.pl/pliki/1192700305.pdf (access 30.11.2017).

Doherty J., Edgar B. and Meert H., Immigration and homelessness in Europe, Policy Press 2004.

Galway J., 'Housing First': An alternative approach to addressing homelessness?, http://www.assemblyresearchmatters.org/2017/03/14/housing-first-an-alternative-approach-to-addressing-homelessness/ (access 31.07.2017).

Garapich M.P., London's Polish Borders: Transnationalizing Class and Ethnicity among Polish, Stuttgart 2016.

Global Homelessness Statistics, https://www.homelessworldcup.org/homelessness-statistics/ (access 31.07.2017).

Granat M., Godność człowieka a problem bezdomności, (in:) I. Lipowicz (ed.), Bezdomność. Problemy prawne, innowacyjne rozwiązania, Warszawa 2016.

Gruszka J., Badania nad bezdomnością w Polsce. Wytyczne do ogólnopolskich badań osób bezdomnych, "Studia Humanistyczne AGH" 2012, vol. 11/4.

Homelessness and housing exclusion. Initiatives within the European Strategy for Social Protection and Social Inclusion. Extract updated by the EC from "Building a comprehensive and participative strategy on homelessness", discussion paper for the peer review in Lisbon on 4-5 November 2010 by S. Fitzpatrick, Heriot-Watt University (Edinburgh). Up-to-date on 8 December 2010.

Housing First. Publication from the Website of the National Alliance to End Homelessness, https://endhomelessness.org/resource/housing-first/ (access 31.07.2017).

Jabłecka B., Dostęp do mieszkalnictwa i bezdomność migrantów w Anglii, Instytut Spraw Publicznych. Badania. Ekspertyzy. Rekomendacje, http://www.isp.org.pl/uploads/pdf/750397215.pdf (access 31.07.2017).

Juul K., Migration, Transit and the Informal: Homeless West-African Migrants in Copenhagen, "European Journal of Homelessness" 2017, vol. 11.

Kawiorska D., Witoń A., Ubóstwo i wykluczenie społeczne w kontekście strategii „Europa 2020": postępy w realizacji, "Myśl Ekonomiczna i Polityczna" 2016, no. 2 (53).

Mędrzycki R., Bezdomność w świetle orzecznictwa sądów administracyjnych – wybrane aspekty, "Kwartalnik Prawa Publicznego" 2013, no. 1.

Mędrzycki R., Nowe formy działania administracji publicznej i partnerów społecznych w zakresie przeciwdziałania bezdomności, (in:) I. Lipowicz, Bezdomność. Problemy prawne, innowacyjne rozwiązania, Warszawa 2016.

Mędrzycki R., Problem bezdomności w świetle wybranych regulacji prawnych, "Przegląd Legislacyjny" 2016, no. 4(98).

Moraczewska B., Bezdomność. Definicja, problemy, rozwiązania obecne oraz historyczne odwołanie do ludzi luźnych, "Studia Gdańskie. Wizje i rzeczywistość" 2013, no. 10.

Peer Review in Social Protection and Social Exclusion. Housing First. Synthesis Report. Belgium, 16-17 March 2016.

Pleace N., Immigration and Homelessness, (in:) E. O'Sullivan, V. Busch-Geertsema, D. Quilgars and N. Pleace (eds.), Homelessness Research in Europe, Brussels: FEANTSA 2011.

Pleace N., Researching Homelessness in Europe: Theoretical Perspectives, "European Journal of Homelessness" 2016, vol. 10.

Pleace N., O'Sullivan E., Edgar W., Busch-Geertsema V., Homelessness and Homeless Policies in Europe: Lessons from Research, Brussels: European Commission 2010.

Sierpowska I., Socjalne aspekty prawa do mieszkania, "Wrocławskie Studia Erazmiańskie", Wrocław 2010, no. 4.

Szluz B., Przeciwdziałanie zjawisku bezdomności w Unii Europejskiej, "Przegląd Europejski" 2011, no. 2.

Szluz B., Strategie Unii Europejskiej wobec problemu bezdomności, "SaeculumChristianum" 2008, no. 2.

Szluz B., Zjawisko bezdomności w wybranych krajach Unii Europejskiej, Rzeszów 2014.

Wygnańska J., Polski raport statystyczny. Aktualizacja, EOH FEANTSA 2006.

Białostockie Studia Prawnicze
2018 vol. 23 nr 2

DOI: 10.15290/bsp.2018.23.02.05

Klára Nagy
Széchenyi István University, Győr, Hungary
nagy.klara01@gmail.com
ORCID ID: https://orcid.org/0000-0002-7545-9540

Autonomy of Local Self-Governments From a Financial Perspective in Hungary

Abstract: Recently, there has been a constitutional change related to self-governments in Hungary. The article examines the status of Hungarian local governments in comparison with EU member states from a financial perspective. Autonomy has several aspects, but one of the most important factors is financial, which is the basis of an organisation's operation. Without an appropriate financing system local decision-making cannot work. The research uses statistics of Eurostat, which are a good standpoint for comparative work. Thus, the remarks are of comparative nature.
The study deals also with the changes in municipal tasks, because competence is the core of autonomy. Finance and municipal tasks are closely related, which largely determines the level of autonomy.
The author examines the connections with the European Charter of Local Self-Government which is implemented by Hungary. Is the Hungarian regulation in compliance with the provisions of the Charter? What will be the future? What kind of trend is in progress in Hungary? Is it in accordance with the EU model? These and other questions are discussed in the article. The aim of the article is to follow up the changes in autonomy of local governments in Hungary and try to predict the future of national self-governing authorities.
Keywords: autonomy, local governments in Hungary, constitutional changes, finance and municipal tasks, future prospects

Introduction

In Hungary there have been constitutional changes which affected the sphere of local governments. The Fundamental Law of Hungary[1] took effect on 1 January 2012, which laid down new foundations for local self-governments. From this date, the right to local self-governments ceased to exist in the Fundamental Law but remained

1 Title Published on 25 April 2011.

in place under the Self-governments Act.[2] In essence, the constitutional protection of this right was terminated.

Hungarian local governments are part of the state organisation.[3] By entering the Fundamental Law into force, local self-government became a state organisational issue and not a collective fundamental right. The most significant difference from state administration is that they have a certain degree of autonomy (but, not independence!). The state transfers rights, functions and competences to an organ having autonomy (namely self-governments) and waives the right to instruction as well (decentralisation). The state retains only the right to legal supervision of those autonomous organs.[4]

However, several new rules are heading in the direction of centralisation. This article will examine local governments from a financial perspective and will deal with the changes in local tasks. I try to answer the question: what may be and should be the future of local governments in Hungary?

1. State tasks versus tasks at local self-government level

Every change concerning the sphere of autonomy was based on the issue of effective operation of public administration. But what are the criteria of effectiveness? How can we measure it? It differs according to the time period and the area concerned. There is no general rule.

The advantage of local governments is that they are close to the local residents, they can handle local issues in a differentiated way and expenditure relates to meeting local needs at optimum level. Local solutions may be more flexible than those of the state.[5] Local governments have sufficient autonomy to decide, manage and rule which is ensured by the state (by way of an act).[6] But this does not lead to uncontrolled functioning. Thus, they are not independent from other state organs, but they do have the right to act under specific legal provisions.[7] However, it is true that there is not such close supervision over local self-governments as there is over other state administrative organs. Consequently, stricter control can be a good reason for centralisation.

2 Act CLXXXIX of 2011 Magyarország helyi önkormányzatairól [*on self-governments*] (henceforth: Self-governments Act).

3 Preamble of Self-governments Act.

4 I. Balázs, A helyi önkormányzati autonómiafelfogás változása az új törvényi szabályozásban, "Új Magyar Közigazgatás" 2012, vol. 5, no. 10, p. 38.

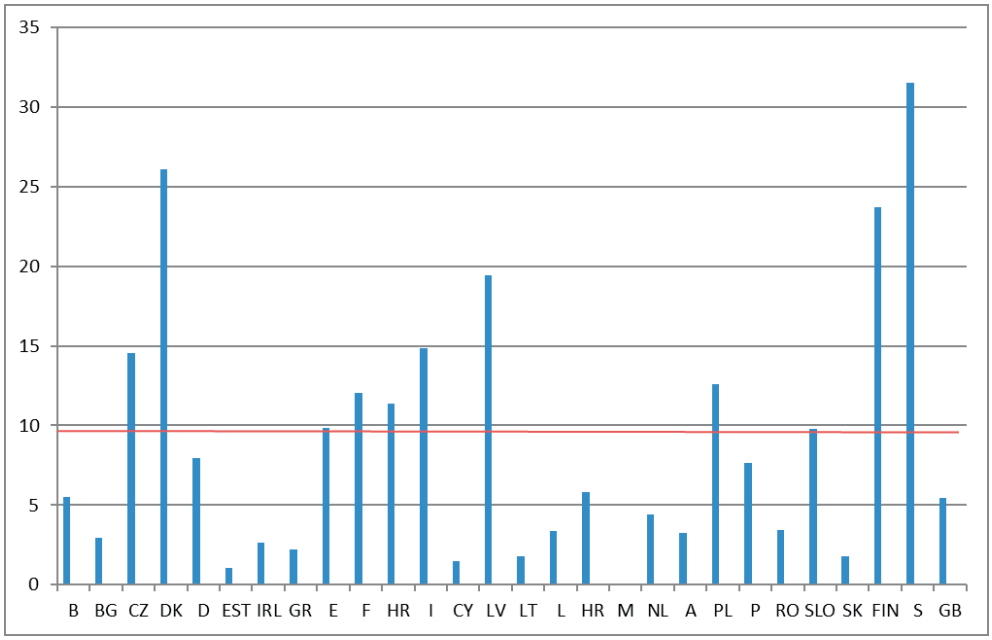
5 A. Vigvári, Is the conflict container full? Problems of fiscal sustainability at the local government level in Hungary, "Acta Oeconomica" 2010, vol. 60, no. 1, p. 50.

6 I. Dudinská – M. Cirner, Crucial Legislative Reforms in Public Administration in Slovakia Since 1990, "Hungarian Journal of Legal Studies" 2016, vol. 57, no. 1, p. 27.

7 *Ibidem*, p. 28.

The question here, is whether or not the system of Hungarian local self-government is an example of decentralisation in comparison with other EU member states. The data collected by Eurostat is a good starting point of the examination. The following chart shows the distribution of tax revenue between the member states and their respective local governments in the EU (2015):

Chart 1 – Percentage of tax revenues received by local governments



Sourece: Eurostat

It follows that local governments in Hungary receive less tax revenues than other EU member states. The red line on the chart shows the average percentage of distribution, and Hungary is below that line. As regard local governments in Hungary, financial centralisation is quite high.[8]

The table below contains data on the distribution of tax revenues in GDP ratio:

8 L. Jankovics, Local government finances in Hungary: from the culprit of fiscal slippages to a source of stability?, "Society and Economy" 2016, vol. 38, no. 4, p. 459.

Table 1 – Total receipts from taxes and social contributions after deduction of amounts assessed but unlikely to be collected (Million EUR)

GEO/TIME	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	
European Union (28 countries)	:	:	:	:	:	:	:	:	:	:	
European Union (27 countries)	:	:	:	:	:	:	:	:	:	:	
European Union (25 countries)	3,9	4,0	4,0	3,8	4,1	4,2	4,2	4,2	4,1	:	
European Union (15 countries)	3,9	4,0	4,0	3,9	4,1	4,2	4,3	4,2	4,2	:	
Belgium	2,6	2,4	2,7	2,6	2,6	2,5	2,6	2,5	2,6	:	
Bulgaria	0,8	0,9	0,8	0,7	0,8	0,8	0,8	0,9	0,9	:	
Czech Republic	4,8	4,7	4,6	4,5	4,6	4,6	5,0	5,0	5,0	:	
Denmark	11,2	11,2	11,7	12,1	12,1	12,2	12,3	12,3	12,4	:	
Germany (until 1990 former ter	3,1	3,2	3,0	2,9	3,0	3,1	3,1	3,1	3,2	:	
Estonia	0,3	0,4	0,4	0,5	0,5	0,4	0,4	0,4	0,4	0,4	
Ireland	0,9	1,0	1,0	1,0	1,0	1,0	1,0	0,9	0,6	:	
Greece	0,7	0,7	0,7	0,8	0,8	0,9	0,9	0,9	0,9	:	
Spain	3,0	2,8	2,7	2,9	2,9	3,1	3,3	3,4	3,4	:	
France	4,9	4,9	5,2	4,2	5,4	5,5	5,6	5,7	5,8	:	
Croatia	4,3	4,4	4,4	4,1	4,1	4,3	4,5	4,5	4,3	:	
Italy	6,6	6,5	6,0	6,1	6,2	6,7	6,6	6,7	6,4	:	
Cyprus	0,5	0,5	0,5	0,5	0,5	0,4	0,6	0,5	0,5	:	
Latvia	5,1	5,3	5,1	5,8	5,5	5,5	5,5	5,7	5,7	:	
Lithuania	0,4	0,4	0,5	0,5	0,5	0,5	0,4	0,5	0,5	:	
Luxembourg	1,6	1,7	1,8	1,6	1,7	1,5	1,4	1,3	1,3	:	
Hungary	4,4	2,6	2,6	2,4	2,4	2,4	2,2	2,2	2,3	:	
Malta	:	:	:	:	:	:	:	:	:	:	
Netherlands	1,5	1,5	1,6	1,6	1,6	1,6	1,6	1,6	1,7	:	
Austria	1,4	1,4	1,5	1,5	1,4	1,4	1,5	1,5	1,4	:	
Poland	4,6	4,6	4,1	4,0	3,9	4,0	4,0	4,1	4,2	:	
Portugal	2,7	2,6	2,5	2,4	2,5	2,5	2,8	2,8	2,8	:	
Romania	1,1	0,9	0,9	1,0	1,1	1,0	1,0	1,0	1,0	:	
Slovenia	3,4	3,3	3,8	4,1	4,1	4,2	4,1	4,0	3,6	:	
Slovakia	0,7	0,7	0,7	0,7	0,7	0,7	0,8	0,8	0,6	:	
Finland	8,8	9,0	9,7	9,9	9,7	9,7	10,2	10,3	10,5	:	
Sweden	14,3	14,7	14,8	13,9	13,7	14,2	14,3	14,0	13,9	:	
United Kingdom	1,8	1,8	2,0	1,9	1,9	1,9	1,9	1,9	1,9	:	
Iceland	9,8	9,1	8,7	8,5	9,2	9,3	9,5	9,5	9,4	:	
Norway	5,3	4,9	5,7	5,7	5,1	5,2	5,3	5,4	5,9	:	
Switzerland	4,2	4,1	4,2	4,1	4,1	4,1	4,1	4,0	4,1	:	
Serbia	1,5	1,4	1,4	1,6	1,5	1,4	1,4	1,4	1,4	:	

Source: Eurostat

If local taxes are examined in the GDP ratio, Hungary again lags behind other EU member states. In Hungary, local governments manage their tasks from almost half the amount of local tax revenue when compared with the EU average. The above table shows slow growth in the EU average. However, in Hungary there has either been in stagnation or decreasing over the past decade with the only exception to this trend being in 2015 when there was a very slight increase. The reason for this is the possibility for local governments to levy new wide-ranging local taxes.[9] Nevertheless, local governments are less independent from the state than in other EU countries, largely because their financing is not ensured by local taxes.[10]

9 From 1 January 2015, local governments may rule and levy such local taxes, which are not banned by other acts. [Art. 1/A of Act C of 1990 a helyi adókról [*on local taxes*].

10 L. Jankovics, Local government…, *op. cit.*, p. 460.

The competence levying local taxes was broadened in 2015,[11] but in other respect there are many (including new) statutory limits for the management of local governments. For instance:

- local governments may undertake guarantees or conclude a contract resulting in debt only with the prior consent of the government. [Art. 10(1) of Act CXCIV of 2011 on the economic stability of Hungary (henceforth: the Stability Act)];
- local governments (except counties) may conclude a contract resulting in debt if they levy a local business tax or at least one kind of property tax or municipal tax. [Art. 10(2) of the Stability Act];
- local government debt cannot endanger the level of state debt. [point a) of Art. 10/B(1) of the Stability Act];
- the level of debt undertaken may not exceed 50% of annual locally generated revenues. [Art. 10(5) of the Stability Act].

The Hungarian regulation follows two models, one based on governmental consent and the other based on normative provision. These are the two strictest rules related to borrowing. Two other models can also be applied, the first based on cooperation and the second on market discipline. The latter does not provide appropriate guarantees for the public sector,[12] but the model based on governmental consent gives the opportunity to influence local governments' management.[13]

The above rules are in compliance with the Fundamental Law and also with the interpretation of the Constitutional Court. Pursuant to constitutional rules, the legislator is only obliged to establish the financing system of local governments by way of several methods. The financing system of local governments only raises a constitutional question if the autonomy is infringed, namely where self-governance becomes dysfunctional or impossible to manage.[14]

These restrictions formally infringe the European Charter of Local Self-Government. The Charter states: "Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers." [Point 1 of Art. 9 of the Charter]

Another interesting question is whether or not the division of tasks between the state and local governments may have an effect on state debt. "In Hungary, most municipalities and counties were relieved from almost all of their aggregated debts in 2012, when the state budget assumed them. However, local authorities paid a huge price for this: central government took over some primary public services, such as

11 *Ibidem*, p. 472.
12 G. Kecső, A helyi önkormányzatok gazdálkodásának egyes kérdései nemzetközi kitekintésben, "Új Magyar Közigazgatás" 2013, vol. 6, no. 1, p. 9.
13 *Ibidem*, p. 11.
14 Decision 48/2001. (XI. 22.) AB.

education and/or most welfare, social and health facilities. In fact, county governments fared worse, they lost all of their institutions and have since become coordination centres for regional development and planning. In sum, the share of local government has reduced, with the costliest public services becoming centralised."[15]

As regards the reasons for decentralisation, spending may be more effective and better fitted to local differentiated needs. However, it may also result in duplication (e.g. in administration). It is an established fact that citizens are more willing to pay local taxes than state ones. Others argue that more money may lead to uncontrolled management.[16]

The Spanish example[17] shows that such fears have not materialised.[18] But what could be the reason? Decentralisation led to competition for tasks between regions.[19] It lasted until the economic crises in 2009, when local tax revenues depreciated more than state revenues.[20] Namely, local governments are more vulnerable and neither the rules nor the controls are accountable under these circumstances.[21]

2. Changes in local tasks

The Fundamental Law declares the groups of competence of local governments and acts within its framework may lay down further tasks. Because of the autonomy of the local governments, rules can be laid down only in statutes (acts) and not in other forms of law. Acts are passed by the Hungarian parliament, which is the guarantee of autonomy.

Primarily, the Self-government Act contains a list of tasks,[22] which is not exhaustive. Thus, other acts may establish other municipal competence for local governments. [Art. 13(1)-(2) of Self-government Act] On the other hand, this list is only a "menu", as the detailed rules of the tasks are laid down in other special acts (e.g. under what conditions and which local government shall perform certain

15 Point 63 of the Governance Committee CG/GOV05(2017)03 Coping with the debt burden: local authorities in financial difficulty – Draft report https://search.coe.int/congress/Pages/result_details.aspx?ObjectId=090000168070b135 (access 04.06.2018).

16 L. Jankovics, Local government…, *op. cit.*, p. 462.

17 As the democratic transformation in 1978, 17 parliaments and governments were established in regional level beside the local level. The expenditure at local and regional level was over 48% in 2008 (earlier it was only about 13%).

18 F. Toboso, Asymmetric decentralisation, economic cycle, regional and local government's borrowing in Spain, "Acta Oeconomica" 2014, vol. 64, no. 4, p. 441.

19 *Ibidem*, p. 447.

20 *Ibidem*, p. 456.

21 *Ibidem*, p. 458.

22 Art. 13 of Self-governments Act.

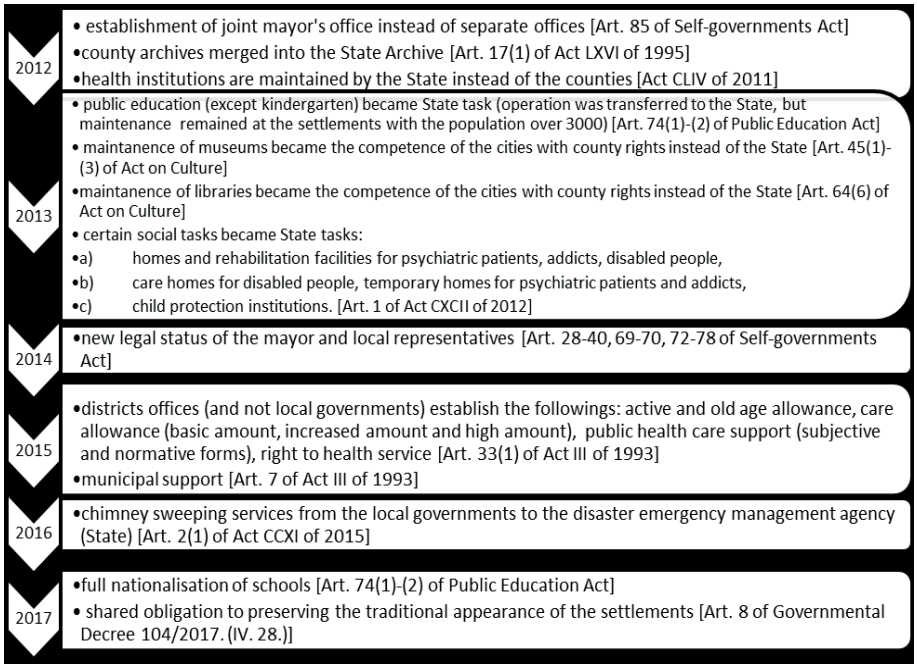
tasks). Thus, not all tasks can be considered compulsory tasks for all types[23] of local governments, but there are also voluntary tasks as well.

In determining competence, differentiation was always an important factor. Thus, the tasks of different types of local governments at different levels are ruled in other acts by which the need for differentiation is performed. Different types of local governments at different levels have different compulsory tasks.

The assignment of responsibilities must be examined regarding not only the relation among local governments, but also between the State and the local government sector. From the aspect of the right to self-government, this is of significant importance. During preparation of the Self-governments Act, the objective was that local governments shall perform general tasks to be provided at local level while services that require specialised support (as in settlements with a large catchment area) shall be performed by state organs.

It can be established that municipal tasks change from time to time, and this is true of what happened following the adoption of the Self-governments Act. The changes, which occurred between 2012 and 2017, are depicted in Figure 1 below.

Figure 1 – Main changes in the tasks of local governments (2012–2017)



23 These are the followings: local governments of the capital, the counties and of the settlements (cities with county rights, cities with district rights, cities, villages and districts in the capital), [Art. 3(1)-(3) of Self-governments Act].

In accordance with the subsidiarity principle,[24] tasks should primarily be assigned to the local government that is closest to the general population, and should only be assigned to another local government, if its reach extends beyond the administrative area of the settlement or infringes the requirement of economy and efficiency, and professional consideration justifies it.[25]

It is stated also by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, that the reform and rationalisation of a local self-government system which is based exclusively on financial considerations is not in compliance with the right of self-government, as it goes against the rules of the European Charter of Local Self-Government. According to the Charter: "Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population"[26] [Point 1 of Art. 3 of the Charter]. In this spirit, according to the opinion of the Congress for Local and Regional Authorities of the Council of Europe, the centralisation of tasks gives cause for concern, especially in the field of public education and health care.[27] So for example, the fact that public education and health care represent the highest costs burden among municipal tasks, this by itself should not constitute just reason for the state to relieve local governments of those services. In all cases it should be properly examined to determine whether or not increased cost-effectiveness can be reached by other means, e.g. by resource transfers.[28]

Similarly, the Venice Commission established that the European Charter of Local Self-Government, which is binding on Hungary, "requires compliance with a minimum number of principles that form a European foundation of local democracy, including, as a starting point, the principle of local self-government." Based on this, "the principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution" and should stipulate other important key principles (e.g. the principle of subsidiarity, the principle of financial autonomy and that of adequacy between resources and competences, the legal protection of local self-government, and limits of the administrative supervision of local authorities).[29]

24 It is declared neither in the Fundamental Law, nor in other acts.

25 I. Verebélyi, Az önkormányzatiság alkotmányos alapjai II., "Magyar Közigazgatás" 1995, vol. 45, no. 10, p. 549.

26 Helyi és regionális demokrácia Magyarországon, "Új Magyar Közigazgatás" 2014, vol. 7, no. 1, p. 13.

27 *Ibidem*, p. 6.

28 *Ibidem*, p. 14.

29 Opinion on the New Constitution of Hungary: Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011) http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)016-e (access 04.06.2018).

It is obvious that public services cannot be effectively provided below a certain population number. However, this statement requires some qualification.[30] For example, people living next to the border are in a different position to those living in the heartland of the country; geographical conditions, tourism characteristics, the existence of urbanization and industrial area, etc., are different in every settlement. The theory is over-simplified and taking into account only the population number is the wrong way to look at it.[31] It is fact that there is a settlement in Hungary where only nine people live (Iborfia in Zala County, 2015), while c.1.8 million people live in the capital. The types of settlement and counties vary widely.[32] The thinking must be more differentiated and more complex regarding the determination of tasks, than simply drawing a line based on population number. The Self-government Act differentiates based on the types of local governments, the nature of competence, and the different characteristics of the local governments (e.g. especially economic capacity, population number, and size of the administrative area). [Art. 11(1)-(2) of Self-government Act].

Several studies have shown that public services provided in one area frequently overspill into an adjacent area. Thus, people not living within the boundaries of a particular local government may nevertheless benefit from the services it provides. Therefore, it can be said that the effective and appropriate performance of tasks influences the way voters exercise their rights, either by moving to a settlement that meets their needs or by forcing their own local government to introduce services appropriate for them.[33] It is very difficult to rule on such circumstances with an act parliament.

Conclusions

It is undisputed that the right to local self-government is not protected by the Fundamental Law of Hungary. The protection of local governments has in fact weakened. However, the rules provided for in the former Constitution are incorporated in the act on local governments. The system of local governments may be amended by an act at any time. However, I cannot say that local governments have lost their power in the administration system.

The new financial rules restrict autonomy. They lead to a more centralised system. However, I must also emphasise that the current state of supervision does not infringe the autonomy declared in the Fundamental Law, as its goal is simply to enforce legality.

30 G. Zongor, Önkormányzati vissza- és előretekintés, avagy szubjektív értékelés az elmúlt csaknem negyedszázadból, "Új Magyar Közigazgatás" 2014, vol. 7, no. 1, p. 84.

31 E.g. in case of establishment of joint mayor's office [Art. 85 of Self-governments Act].

32 G. Zongor, Önkormányzati…, *op. cit.*, p. 85.

33 R. De Siano – M. D'uva, Fiscal decentralization and spillover effects of local government public spending: the case of Italy, "Regional Studies" 2017, vol. 51, no. 10, p. 1508.

In essence, the national regulation is literally in compliance with the provisions of the Charter. But, examining the spirit of the Charter, I arrive at an opposite conclusion. The Preamble of the Charter declares that, "the existence of local authorities with real responsibilities can provide an administration which is both effective and close to the citizen" and "the safeguarding and reinforcement of local self-government in the different European countries is an important contribution to the construction of a Europe based on the principles of democracy and the decentralisation of power". By signing the Charter, members states undertook to strengthen the system of local governments, but the recent tendency is to the contrary.[34]

I suspect that there will be a greater centralisation of national local self-governments. I can imagine that the principle of "one municipality in one settlement," which stems from the regime change, will be replaced. In my opinion, the power of local governments is more important than the number of tasks it performs. Thus, it would be in compliance with the Charter, if local government existed not necessarily in all settlements in Hungary, but where they did, it would be under circumstances of having real power in local affairs with an appropriate financial background. In my view, this is the optimistic scenario.

BIBLIOGRAPHY

Balázs I., A helyi önkormányzati autonómiafelfogás változása az új törvényi szabályozásban, "Új Magyar Közigazgatás" 2012, vol. 5, no. 10.

De Siano R. – D'uva M., Fiscal decentralization and spillover effects of local government public spending: the case of Italy, "Regional Studies" 2017, vol. 51, no. 10.

Dudinská I. – Cirner M., Crucial Legislative Reforms in Public Administration in Slovakia Since 1990, "Hungarian Journal of Legal Studies" 2016, vol. 57, no. 1.

Helyi és regionális demokrácia Magyarországon, "Új Magyar Közigazgatás" 2014, vol. 7, no. 1.

Jankovics L., Local government finances in Hungary: from the culprit of fiscal slippages to a source of stability? "Society and Economy" 2016, vol. 38, no. 4.

Kecső G., A helyi önkormányzatok gazdálkodásának egyes kérdései nemzetközi kitekintésben, "Új Magyar Közigazgatás" 2013, vol. 6, no.1.

Toboso F., Asymmetric decentralisation, economic cycle, regional and local government's borrowing in Spain, "Acta Oeconomica" 2014, vol. 64, no. 4.

Verebélyi I., Az önkormányzatiság alkotmányos alapjai II., "Magyar Közigazgatás" 1995, vol. 45, no. 10.

Vigvári A., Is the conflict container full? Problems of fiscal sustainability at the local government level in Hungary, "Acta Oeconomica" 2010, vol. 60, no. 1.

Zongor G., Önkormányzati vissza- és előretekintés, avagy szubjektív értékelés az elmúlt csaknem negyedszázadból, "Új Magyar Közigazgatás" 2014, vol. 7, no. 1.

34 I. Balázs, A helyi önkormányzati…, *op. cit.*, p. 41.

Białostockie Studia Prawnicze
2018 vol. 23 nr 2

DOI: 10.15290/bsp.2018.23.02.06

Justyna Symber
Uniwersytet Gdański
justynasymber@gmail.com
ORCID ID: https://orcid.org/0000-0002-2705-5373

Opportunities and Threats of EU Regulatory Governance in the Energy Sector with Reference to Public Service Obligations – the President of the Energy Regulatory Office as a Regulatory Authority (a Case Study)

Abstract: The article focuses on the opportunities and threats of EU Regulatory Governance in the energy sector with reference to public service obligations. There are two pillars of regulation: the first being the independence of regulatory authorities, the second making decisions based on the state of competition. The article looks in depth at the discretionary power of the National Regulatory Authority - the President of the Energy Regulatory Office. It should be considered that National Regulatory Authorities have acquired a main role in the implementation of European Union law. Regarding this issue the article discusses the case pending before the District Court – Antimonopoly Court in Warsaw, case ref. no XVII AmE 93/13, dated 19 November 2013. In the view of the case XVII AmE 93/13, the systemic flaws of legal protection of energy enterprise are that the President of the Energy Regulatory Office is limited by the category of justified costs and the need for a reasonable return on the capital employed in this activity, while exercising statutory entitlement to verification of costs planned by the energy enterprise.
Keywords: regulatory, energy, the President of the Energy Regulatory Office, National Regulatory Authority

1. Introduction

For the purpose of this work, the term "regulation" means a mode of making decisions by regulatory authorities predominantly in relation to infrastructure facilities. An independent regulatory authority makes decisions imposing regulatory obligations on enterprises in the energy sector, telecommunication, oil, gas and other infrastructural sectors. The main purpose of regulatory decisions is to balance the interests of infrastructure owners, other enterprises and consumers.

Early versions of the Treaty of Rome made no references to regulated sectors. The Treaty of Maastricht[1] introduced the notion of Trans-European Networks[2], while the Treaty of Amsterdam[3] introduced the Protocol on public broadcasters[4]. Currently, the following European Union legal foundations regarding regulatory governance are in force: Directive 2009/72/EC[5] (internal market in electricity), Directive 2009/73/EC[6] (internal market in gas), Directive 2002/21/EC[7] (telecommunications - framework directive), Directive 2002/19/EC[8] (telecommunications - access directive), Directive 2002/22/EC[9] (telecommunications - universal services directive).

There are two pillars of regulation: the first being the independence of regulatory authorities, the second making decisions based on the state of competition[10]. In general, the following parties to regulation should be distinguished: National Regulatory Authorities (NRA), European Union regulators, and regulated enterprises.

In Poland, the President of the Energy Regulatory Office (the President of ERO) is the central body of government administration established under the Energy Law Act of 10 April1997[11], to carry out tasks in the field of fuel and energy management regulation and to promote competition. The responsibilities and competences of the President of ERO are closely related to state policy in the field of energy, i.e. the economic conditions involved in the functioning of energy enterprises, the concept of market functioning and requirements resulting from the obligation to adapt

1 Treaty of Maastricht on European Union, Official Journal C 191, 29/07/1992 pp. 0001-0110.
2 See: D. Johnson, C. Turner, Trans-European Networks, London 1997, p. 122.
3 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Final Act, Official Journal C 340, 10/11/1997 p. 0115.
4 See: I. Katsirea, Public Broadcasting and European Law: A Comparative Examination of Public Service Obligations in Six Member States, Alphen aan den Rijn 2008, p. 325.
5 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, Official Journal of the European Union L 211/55.
6 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Text with EEA relevance), Official Journal of the European Union L 211/94.
7 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), Official Journal L 108, 24/04/2002 pp. 00330050.
8 Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), Official Journal L 108, 24/04/2002 pp. 0007-0020.
9 Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), Official Journal L 108, 24/04/2002 pp. 0051-0077.
10 See: F. Gilardi, M. Maggetti, The independence of regulatory authorities, Zurich 2010, pp. 1-21.
11 The Act of April 10, 1997 - Energy Law, Journal of Laws 2017, item 220.

Polish law to the law of the European Union[12]. Currently, the competences of the President of ERO arising from Article 23 sec. 2 of the Energy Law Act, include the following activities: cooperation with regulatory authorities of the Member States of the European Union, informing the European Commission about the designation of transmission system operators or concluding agreements with the regulatory authorities of other European Union Member States[13].

2. Public service obligation

According to Article 16 TEC[14], "given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions." Moreover, Article 106 TEC states that, "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them"15 and, "the development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

In the context of European Union law, a public service obligation (PSO) is an obligation imposed on an organisation by legislation or contract to provide a service of general interest within the territories of the European Union. PSOs may operate in any field of public service such as postal services, social services, energy, transport and banking.

In view of the foregoing, particular attention needs to be paid to the regulations contained in PSO Directive 2003/54/EC[16] and PSO Directive 2009/72/EC.

According to Article 3 §1 PSO Directive 2003/54/EC, "Members States may impose on undertakings operating in the electricity sector, in the general economic

12 See: M. Rejmus, Zadania Prezesa Urzędu Regulacji Energetyki a polityka energetyczna państwa, Poznań 2014, pp. 123-125.

13 See: P. Wroniecki, Kompetencje Prezesa Urzędu Regulacji Energetyki na gruncie wybranych regulacji ustawowych, Kraków 2015, pp. 40-46.

14 Treaty Establishing the European Community, Official Journal C 340, 10/11/1997 p. 0173 – Consolidated version.

15 See: K. Dougan, Blackstone's UK & EU Competition Documents, Glasgow 2015, p. 223.

16 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, Official Journal of the European Union L 176/57. The Directive 2003/54/EC has been replaced by the Directive 2009/72/EC.

interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency and climate protection". Also in Article 3 sec. 8 of PSO Directive 2009/72/EC it is said that, "Member States may decide not to apply the provisions of Articles 6, 7, 20 and 22 insofar as their application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest; and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community".

Member States may impose, in the general economic interest, public service obligations which may relate to: "security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection" (Article 3 §1 of PSO Directive 2003/54/EC). Such obligations must be precisely defined, translucent, non-discriminatory, verifiable and shall guarantee equality of access for electricity undertakings of the Community to national consumers[17]. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals and goals for energy from renewable sources, states may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system.

Article 3 § 8 of PSO directive 2009/72/EC, statues that "in order to promote energy efficiency, Member States or, where a Member State has so provided, the regulatory authority shall strongly recommend that electricity undertakings optimise the use of electricity, for example by providing energy management services, developing innovative pricing formulas, or introducing intelligent metering systems or smart grids, where appropriate."

Taking all into account, it might be said that the potential scope of public obligations is extremely wide. Public service obligations are an accepted issue in the infrastructural sectors of Member States. The importance of PSOs may vary but they prevail over competition rules.

3. Discretionary power of the National Regulatory Authority

The discretionary powers of regulatory authorities mirror the precarious position of infrastructural enterprises. What is more, National Regulatory Authority may define their markets according to local circumstances. According to Article 15 § 3 of Directive 2002/21/EC, "National regulatory authorities shall, taking the utmost account of the recommendation and the guidelines, define relevant markets

17 See: T. Kim, Introduction to EU Energy Law, Oxford 2016, p. 2.4.

appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law".

It should be considered that National Regulatory Authorities have acquired a main role in the implementation of European Union law. National Regulatory Authority are established by the Member States, implying that they are part of the national administrative organisation chart. Their formation, however, is mandatory under European Union law[18]. Today's National Regulatory Authority acquire most of their competences from European Union legislation, even if the formal legal basis of their tasks is generally the national legislation that implements the European Union directives.

4. Case study: District Court – Antimonopoly Court in Warsaw, case ref. no XVII AmE 93/13, dated 19 November 2013)

By decision on 6 October 2016 the President of ERO, acting under Article 155 CAP[19], Article 47 sec. 1 and sec. 2 in connection with Article 30 sec. 1 and Article 45 of the Energy Law Act, refused to amend the distribution energy tariff as submitted by distribution enterprise 'P'. 'P' established a tariff on energy distribution. The tariff was later approved by the Regulator on 17 December 2009. The procedure of making the tariff was also approved by the Regulator. On 2 June 2010, enterprise 'P' filed for the amendment of the tariff under art. 155 CAP. The proposed tariff increased prices by 5,4% on grounds that some of the cost of distribution was not going to be covered by the previous tariff.

In June and September 2010, enterprise 'P' filed for another increase of the tariff anticipating a further increase in the price of electricity. The predicted average purchase price of energy would be 187,52 PLN/MWh, or 170 PLN/MWh per unit in January-March 2010. The President of ERO declared that the tariff change would result in 3,68% increase in consumer prices (for the first tariff amendment). The second motion to increase the tariff would result in a further 3,47% increase and together the two motions would lead to an 8,84% increase. In the President of ERO's view, the fundamental importance has to be attached to the question of whether the conditions provided for in Article 155 of CAP have been satisfied[20] in the spirit of Article 23 of the Energy Law Act, mandating the President of ERO to balance the

18 See: S. De Somer, The independence of national regulatory authorities: required by EU law, ill-received by national constitutional law, http://www.osservatorioair.it/the-independence-of-national-regulatory-authorities-required-by-eu-law-ill-received-by-national-constitutional-law/ (access 2.01.2018).

19 The Act of 14 June 1960 Code of Administrative Procedure, consolidated text Journal of Laws 2017, item 1257, further referred as CAP.

20 According to Article 155 CAP the final decision by which a party has acquired the right may at any time with the consent of the party be revoked or amended by the public administration

conflicting interests. According to the President of ERO, the premise of justified interest of the party has not been satisfied. It is not true, as claimed by 'P', that the 2009 and 2010 tariffs had been calculated in violation of Article 45 section 1 and 2 of the Energy Law, that is they do not cover the justified cost borne by enterprise "P". It is reasonable to assess the profit of an enterprise in view of its general financial reports for its activity in energy distribution is its main activity, the other two activities being of a subsidiary nature. The reports for 2010 have shown profit. This constitutes a proof that revenues under the tariff were capable of covering the justified cost of distribution and the justified return on capital. That return is defined as gross profit and is not part of the cost. The very fact that enterprise 'P' has achieved profit indicates 'P's' capital is rewarded - there is a return on capital. To approve 'P's' motions would amount to a further increase of profitability. It is a role of the President of ERO to balance the interest of energy enterprises and of consumers under Article 23 sec. 2 pt 3c of the Energy Law. According to enterprise 'P' the plan of supplies for 2009 has not been achieved, which means that buyers were affected, directly or indirectly, by the crisis. Therefore, in the President of ERO's view, further deterioration of the financial condition of buyers struggling with the crisis means that the first premise of Article 155, i.e. public interest, has not been met. It is not in the public interest to follow with two price increases. Also, the increase would have triggered inflation and a general increase in prices. Two price increases in a short time make it impossible to plan spending by public entities, enterprises and households. The President of ERO indicated that prices for 2010 should not be higher than 170 PLN/MWh, because such a price allows to cover the justified cost and earn profit. There is an increase in gross sales and profitability by 13% to 19% with different energy sellers compared to 2008. No changes took place in the market to justify a price increase. Decisions to buy energy are independent decisions of an enterprise, and their business risk, particularly that 87,78% of the energy bought by enterprise 'P' was purchased from its own subsidiary which facilitates renegotiation of the contract.

In the President of ERO's view, there is no justified interest of enterprise 'P' for such an interest cannot be interpreted as avoidance of business risk. In the appeal, enterprise 'P' applied for:

- amendment of the President of ERO's decision and approval of the new tariff as proposed by enterprise 'P' in subsequent motions,
- in case of adjudication after the expiration of the tariff – repealing of the President of ERO's decision with a statement that the President of ERO's refusal to approve tariff change as proposed by 'P' has not been justified.

body that issued it, if the specific provisions do not preclude the revocation or revision of such a decision and there is a social interest or party's legitimate interest.

5. Systemic flaws of energy enterprise legal protection

In the light of case XVII AmE 93/13, the systemic flaws of energy enterprise legal protection lay in the fact that the President of the ERO is limited by the category of justified costs[21] and the need for a reasonable return on the capital employed in this activity[22], while exercising statutory entitlement to the verification of costs planned by the energy enterprise.

According to Article 3 sec. 21 of the Energy Law Act, justified costs are defined as the necessary costs to meet the obligations incurred by an energy company engaged in the generation, processing, storage, transmission and distribution of fuels or energy, and accepted by the energy company for the calculation of prices and tariff rates in an economically feasible manner justified with due diligence aimed at protecting the interests of the public.

According to Article 45 sec. 1 pt. 1-3 of the Energy Law Act, energy enterprises shall set tariffs for gaseous fuels or energy, in accordance with the scope of the economic activity referred to in Article 32 sec. 1 of the Energy Law Act. The tariffs shall be calculated in such way as to:

- cover the costs of legitimate business activity of the energy enterprise in the production, processing, transmission, distribution or trading of gaseous fuels and energy and the storage, liquefying or regasification of gaseous fuels together with a justified return on the capital employed in this activity,
- cover the costs of legitimate business activities of the energy enterprise in the field of gaseous fuel storage, including the construction, expansion and modernisation of gaseous fuel storage facilities, together with a reasonable return on the capital employed in this activity, of not less than a 6% return rate,
- cover justified costs borne by transmission and distribution system operators in the performance of their tasks,
- protect the interests of consumers against unjustified price levels and fees.

Article 45 of the Energy Law Act is an expression of the implementation into Polish law of European Union directives regulating the energy and fuels market, consistently striving to prevent the use of its economic advantage by energy companies while ensuring them a fair return of capital[23].

Tariff decisions of the President of ERO cannot expose the energy enterprise to operating at a loss, whereas, by law, it must provide a reasonable profitability provided that the revenue is maintained at the level of costs justified with a justified return from

21 Article 3 sec. 21 of the Energy Law Act.

22 Article 45 sec. 1 pt. 1 of the Energy Law Act.

23 See: B. Bednarski, Komentarz do art. 45 Prawa energetycznego, (in:) M. Kuliński, Prawo energetyczne. Komentarz, Warszawa 2017, p. 731-734.

the capital involved in this business. Article 45 sec. 1 of the Energy Law Act, aims to reconcile the interests of an energy company and, on the other hand, to protect the interests of consumers against unjustified price levels[24]. The core of Article 45 of the Energy Law Act, consists of the following rules:

- rules for ensuring the coverage of the costs of justified energy activities while guaranteeing the protection of consumers against unjustified tariff levels,
- the possibility to include in the tariff the cost of co-financing environmental investments and investment in energy efficiency improvement, as well as
- the criterion of cost of performance as the sole factor of price differentials and charges to customers.

The appeal of the party against the decision of the President of ERO is in essence the nature of the action and initiates proceedings from the beginning and on the basis of adversarial proceedings. The purpose of court proceedings is not to conduct administrative proceedings, but the merits of the case, which is the subject of a dispute between the parties arising only after the decision of the President of ERO.

Pursuant to the decision of the Supreme Court[25], it is ultimately up to the Court to apply the relevant standard of substantive law, on the basis of an explanation of the factual basis, covering all the factual elements foreseen in the hypothesis of that norm. Otherwise, it cannot be argued that the substantive law was correctly applied.

Proceedings before the Antimonopoly Court may be initiated only after exhaustion of administrative proceedings before the President of ERO. There can be used evidence gathered in administrative proceedings, but it is generally limited to the fact that administrative proceedings are a condition of admissibility of the court and that in court proceedings antimonopoly court exercises not only legality control, but also the validity of the decision issued by the President of ERO.

Consequently, the Antimonopoly Court is obliged to comprehensively investigate all relevant circumstances of the case, taking into account the principles of the burden of proof and the obligation of the parties to the proceedings. It should not be forgotten that the appeal process is very long in practice, which in turn obliges an energy enterprise to apply an approved tariff until the new proceedings are completed. Moreover, it should be noted that the elements of tariff building itself are subject to the rigors indicated by the President of the ERO, in particular in terms of electricity purchase prices and the rate of return (for distribution system operators).

24 See: M. Czarnecka, Komentarz do art. 45 Prawa energetycznego, (in:) M. Czarnecka, T. Ogłódek, Prawo energetyczne. Komentarz, Warszawa 2012, p. 620.

25 Supreme Court, case ref. no I CKN 1234/00, dated on 28 June 2002; Supreme Court, case ref. no. I CC 81/0, dated on 18 September 2003.

6. Court's reasoning and arguments

In principle, the Court's reasoning and arguments are justified in the settled case-law. The Court referred to the ruling of the Supreme Court, which ruled that under Article 45 sec. 1 of the Energy Law Act, a tariff must be calculated solely on the basis of justified cost and justified return. The Energy Law Act does not define "capital return" so this has to be borrowed from economics where it refers to "source of income". Under Article 45 sec. 1 pt 1 of the Energy Law Act, only the capital engaged in that specific activity can be taken into account when calculating the tariff. Therefore, the President of ERO is empowered to see whether the calculation takes into account solely the assets closely connected with the given activity[26]. What is more, according to the Supreme Court[27] a tariff can be amended if regulatory actions addressed to other market players caused changes in the elements of the cost on the part of the plaintiff.

Moreover, the plaintiff has a right to invoke the general principles of Article 45 of the Energy Law Act, however it misses the fact that it is up to the energy company to set up the tariff, even though the enterprise should not bear negative consequences of adjusting the tariff to regulatory expectations. The later remark would work only if the plaintiff managed to demonstrate that consumer interest should not be in the way of setting realistic prices, particularly if it was miscalculated to the detriment of the energy enterprise[28]. Although, the facts presented in this case, allow me to disagree with the principles of "capital return".

One of the basic principles of conducting business activity is the lack of admissibility, coverage of the costs of one type of business activity or costs related to one group of recipients of revenue from another type of business activity or from another group of customers. In this context, it can be stated that the reasoning given by the Court in the justification of the assumption of "combining operating costs" with all the activities carried out by the energy company by the licensed company, where they have ancillary character, is incorrect. I am not convinced by the fact that the financial assessment of economic activity "in the field of electricity distribution is based on reports prepared for total activity".

In addition, in the justification of the case, there is also information on the economic crisis and its consequences, among others. For the plaintiff decrease in electricity supply. In this regard, this could lead to a lack of fixed costs, but in the absence of detailed financial data in this area, it is not possible to reliably confirm to what extent this reduction in the value of capital was compared to the planned value.

26 A. Kisielewicz, Sądowa kontrola administracji w sprawach gospodarczych, Warszawa 2013, p. 171.

27 Supreme Court Resolution of 15 June 2004, III SZP 2 / 04, dated on 15 June 2004.

28 Supreme Court, case ref. no III SK 37/10, dated on 9 March 2011.

7. Conclusion

The crucial requirement regarding the regulatory design, in the EU legislation on the common market for energy, is that the regulators should be independent of commercial interests in the sector[29]. The above analysis of case XVII AmE 93/13, shows that the discretionary power of the National Regulatory Authority – the President of the Energy Regulatory Office, while exercising statutory entitlement to the verification of costs planned by the energy enterprise, is limited by the category of justified costs and the need for a reasonable return on the capital employed in this activity.

The energy enterprise should make a forecast of energy purchase prices based on its own knowledge and experience. In this context, it is irrelevant to use the tariffs published by the President of the ERO, as these data are not binding and only serve as an "indicator" when preparing the tariff for approval. The financial effect of the contract concluded occurs in the cost of running the business. There is no definitive justification for the view that the cost of doing business should be fully transferred to entities such as the final consumer. Contracts for trading electricity are subject to economic risk. In practice, this translates to both loss and profitability.

Moreover, the court rulings[30] indicate that a change of tariff is allowed if, as a result of actions addressed to other market participants by the regulator, the cost components of an enterprise requesting a tariff increase are used to change the decision approving it. Likewise, the interests of electricity consumers alone should not in principle block the possibility of price realisation, particularly where the premise for doing so has been wrongly established and could harm the energy company[31].

It is assumed in the judicial decisions that, despite the need to ensure stability of turnover through an annual tariff, it is necessary to respect the statutory rules of Article 45 sec. 1 of the Energy Law Act. A tariff calculated below the justified costs of the seller represents an advantage to the recipients as they receive the product at a discounted price. This advantage becomes unauthorized if it is obtained outside the vendor's risk limits, as a result of the administrative structure of the tariff setting.

There are no circumstances in the present case that would allow the application of Article 155 CAP. The legitimate interest of a party within the meaning of Article 155 CAP, could only happen if the party was able to demonstrate a change in the market environment as a result of intervention by the President of ERO. It should be noted that at the time of submitting the application for tariff approval, enterprise 'P' knew the purchase price of electricity, while in the period between the approval of the tariff and the submission of new requests for a change of tariff under Article 155 CAP,

29 P. Capros, Independence of energy regulators: new challenges, Athens 2003, p. 3.
30 Supreme Court Resolution of 15 June 2004, III SZP 2 / 04, dated on 15 June 2004.
31 Supreme Court Resolution of 15 June 2004, III SZP 2 / 04, dated on 15 June 2004.

there were no "exceptional circumstances" justifying a new application for a change of tariff.

BIBLIOGRAPHY

Bednarski B., Komentarz do art. 45 Prawa energetycznego, (in:) M. Kuliński, Prawo energetyczne. Komentarz, Warszawa 2017.

Capros P., Independence of energy regulators: new challenges, Athens 2003.

Czarnecka M., Komentarz do art. 45 Prawa energetycznego, (in:) M. Czarnecka, T. Ogłódek, Prawo energetyczne. Komentarz, Warszawa 2012.

De Somer S., The independence of national regulatory authorities: required by EU law, ill-received by national constitutional law, http://www.osservatorioair.it/the-independence-of-national-regulatory-authorities-required-by-eu-law-ill-received-by-national-constitutional-law/ (access 2.01.2018).

Dougan K., Blackstone's UK & EU Competition Documents, Glasgow 2015.

Gilardi F., Maggetti M., The independence of regulatory authorities, Zurich 2010.

Katsirea I., Public Broadcasting and European Law: A Comparative Examination of Public Service Obligations in Six Member States, Alphen aan den Rijn 2008.

Kim T., Introduction to EU Energy Law, Oxford 2016.

Kisielewicz A., Sądowa kontrola administracji w sprawach gospodarczych, Warszawa 2013.

Rejmus M., Zadania Prezesa Urzędu Regulacji Energetyki a polityka energetyczna państwa, Poznań 2014.

Wroniecki P., Kompetencje Prezesa Urzędu Regulacji Energetyki na gruncie wybranych regulacji ustawowych, Kraków 2015.

Białostockie Studia Prawnicze
2018 vol. 23 nr 2

DOI: 10.15290/bsp.2018.23.02.07

Evgenii Puchkov
National Research University Higher School of Economics (Moscow)
epuchkov@hse.ru
ORCID ID: https://orcid.org/0000-0002-1355-4032
Victor Vorobyev
National Research University Higher School of Economics (Moscow)
vvvorobyev@hse.ru
ORCID ID: https://orcid.org/0000-0002-7996-7438
Violetta Balzhinimaeva
National Research University Higher School of Economics (Moscow)
vbalzhinimaeva@hse.ru
ORCID ID: https://orcid.org/0000-0002-3832-7151
Sofia Engurazova
National Research University Higher School of Economics (Moscow)
sengurazova@hse.ru
ORCID ID: https://orcid.org/0000-0003-1534-9080

International Student Mobility: European and Russian Practices

Abstract: The Russian Federation is a relatively new player in the field of international education, although a strapping one, boasting more than 296 thousand inbound students in 2015/2016 according to the Project Atlas' data. However, most of those students come from former Soviet Republics and China and aim for degree programmes. The numbers of inbound non-degree seeking students and students from the OECD countries are still sparse. Proper internationalisation became a hot and debatable topic after the creation of the Academic Excellence Project 5-100 and subsequent promotion of Russia on the international education market.

This paper aims to compare the current state of student academic mobility in Europe to its state in Russian higher education institutions (HEIs). The authors believe that the fact that Russia might be considered "lagging behind" in academic mobility can be attributed to several factors, the main one being the general lack of applicable regulation and initiatives on the national level, as well as general inexperience when it comes to mobility programs. Europe (meaning the practices on the level of individual states as well as on the level of the European Union) is chosen as a reference region for its proximity to Russia and existence of a common framework in the sphere of higher education, namely the Bologna process.

The first part of the article explains the notion of academic mobility as it is understood both in Europe and in Russia. The second chapter deals with the perceived value of academic mobility and student mobility as its part. The third chapter is devoted to the analysis of relevant international agreements (mainly documents of the Council of Europe), as well as different practices within European countries. The fourth chapter is dedicated to the analysis and history of the flagship EU exchange scheme – the Erasmus Programme. The fifth chapter delves into the inner regulatory workings of academic mobility in the Russian Federation, comparing the existing situation with the practices analysed in the previous chapters in order to draw conclusions on the state of the regulatory framework of Russian academic mobility.

Keywords: globalisation, internationalisation, academic mobility, students

Introduction

Academic mobility is one of the crucial concepts in contemporary education, which demonstrates global processes in this sphere. The internationalisation of education, which is irrevocably linked to the concept of academic mobility, has risen to prominence in the last 30 years along with globalisation processes. It is defined as an intentional process of integrating an international, intercultural or global dimension into the purpose, functions, and delivery of post-secondary education, in order to enhance the quality of education and research for all students and staff and to make a meaningful contribution to society[1]. Even though scholars agree that having a solid stream of incoming international students and increase in international partnerships in any form is only a part of creation of internationalised university[2], the links between internationalisation and student mobility are obvious. It is widely accepted that internationalisation (and academic mobility as a part of it) has become one of the key drivers of education development in the last decades. However, as internationalisation is a borderline field between education as such and international relations, sufficient regulatory frameworks should be established in order to properly execute mobility programmes in such a way that they will be beneficial to all parties of the process, primarily students.

This paper's goal is to evaluate the current state of student mobility in European and Russian higher education institutions (HEIs) in a comparative perspective in order to identify possible ways to ameliorate current Russian practices in this regard.

The paper is divided into five parts, consecutively dealing with the notion of academic mobility and its value, relevant international agreements and exchange programs, the flagship EU exchange scheme – Erasmus, and, finally, Russian regulatory framework and practices as compared to their European analogues.

1 H. De Wit, F. Hunter, L. Howard, E. Egron-Polak, Internationalisation of Higher Education. Brussels: Policy Department, Directorate General for Internal Policies, European Parliament 2015, p. 283.

2 H. De Wit, Global: Internationalization of Higher Education: Nine Misconceptions, "International Higher Education", Summer 2011, no. 64, p. 6-8.

1. The notion of "academic mobility"

The Council of Europe's Council of Ministers in the Recommendation on Regional Academic Mobility (1996) defines the term "academic mobility" as follows: "a period of study, teaching and/or research in a country other than a student's or academic staff member's country of residence (henceforth referred to as the "home country"). This period is of limited duration, and it is envisaged that the student or staff member return to his or her home country upon completion of the designated period"[3].

A similar definition is used within the regulatory framework of the Bologna process – a process initiated between European countries for ensuring comparability in the standards and quality of higher education qualifications. The Bologna Declaration has greatly contributed to the spread of student academic mobility and growth of its value for education. Russia joined the Bologna Process in 2003.

In Russian legislation, there is no definition of either "academic mobility" or "student mobility". However, the term "academic mobility" is used twice in the Russian Law on Education[4]:

- in Article 15, in relation to the network form of realisation of educational programmes. Under the "network form" the law understands a possibility of studying the educational programme in several educational institutions, including foreign institutions. Section 3 of this Article establishes requirements for agreements on the network form of realisation of educational programmes, one of which is "the rules for organisation of student academic mobility";
- in Article 105, which is dedicated to international cooperation in education, international academic mobility is listed as one of the spheres of international cooperation to which the Russian Federation is contributing.

International instruments signed by the Russian Federation also mention academic mobility. For instance, the Interstate Programme of Innovative Cooperation of the CIS Member States for the Period until 2020[5] uses the term 'academic mobility' without defining it. However, according to a comparison between these provisions, made by Russian researchers, the notion of 'academic mobility' is much better developed in the Programme than in the Law on Education[6].

3 Recommendation No. R (95) 8 of the Committee of Ministers to Member States on Academic Mobility (Adopted by the Committee of Ministers on 2 March 1995 at the 531st meeting of the Ministers' Deputies).

4 The Federal Law of December 29, 2012 № 273-FZ "On Education in the Russian Federation".

5 Approved by Decision of the Council of Heads of Governments of CIS in St. Petersburg on 13 October 2012.

6 A. Babich, N. Sheveleva, I. Vasiliev, Academic Mobility of Students: Current Legal Regulation and Practice of its Application, "Law" 2016, no. 11, pp. 50-58.

Other regulatory documents scarcely mention academic mobility. For example, in the "Concept of State Migration Policy of Russian Federation until 2025"[7] academic mobility covered only the mobility of scientists and professors for demonstration of research results, exchange of experience and other professional purposes. This concept does not include students in academic mobility process, even though the text includes provisions on governmental assistance to educational migration.

In Russian research literature academic mobility is considered an integrative term that unites all types of mobility[8], and thus the concept of 'student mobility' is included in the concept of 'academic mobility'. Some authors use the term 'academic mobility of students', which confirms our point of view that there is no clear boundary between academic mobility and student mobility[9].

There are different approaches to definition of the notion of academic mobility. Some scientists define academic mobility as an "opportunity for external changes (getting new knowledge and skills to change one's social status etc.)". A more psychological approach is based on the assumption that academic mobility is a "characteristic of the inner freedom and internal need of a person"[10]. The main feature of this approach is the focus on personal characteristics, as opposed to the traditional definition concerned with people collaboration and mobility.

One more point of view on academic mobility is implying that the term combines sociological, psychological, pedagogical and cultural components. According to this approach academic mobility is an "opportunity for self-realisation and development of personal characteristics through studies in foreign universities, participation in educational programmes and receiving new experience from cultural and educational exchange".[11]

2. Value and positive effects of academic mobility for modern higher education

Considering current global processes, academic mobility is a necessary part of the higher education system. Academic mobility is significant both for STEM

7 Approved by the President of the Russian Federation on 13 June 2012.

8 T. Tregubova, Academic Mobility of Teachers and Students, "Kazan Pedagogical Journal" 2006, no. 2, pp. 28-30.

9 N. Vatolkina, F. Fedotkina, Academic Mobility of Students in the Conditions of Internationalization of Education, "University Management: Practice and Analysis" 2015, no 2, p. 17-26; E. Kostina, Academic mobility of students of the Higher School of Russia: a cross-cultural approach, "Philosophy of Education" 2014, no. 6 (57), pp. 64-76.

10 O. Proskura, I. Gerasimchuk, Concept of Mobility. Kinds of Mobility. Academic Mobility, "Bulletin of Chelyabinsk State University" 2014, no 13 (342), pp. 94-98.

11 T. Kravtsova, Concept of Academic Mobility in the Humanities, "Review of Omsk State Pedagogical University. Humanitarian Research" 2014, no. 3(4), pp. 88-90.

disciplines and humanities as international experience contributes to capacity development and professional skills.

Academic mobility enables to obtain new knowledge and professional skills, and to develop personal qualities such as cultural adaptation**.** Consequently, "academic mobility of students is an extremely important process for personal and professional development, because participants face and deal with life situations, analyse them from the perspective of their own and others' culture, helping universities to prepare qualified persons who can communicate effectively with other cultures".[12] In general, participation in long-term international mobility is expected to gain significant labour market returns[13] and indispensable skills – a study of alumni of the Erasmus programme states that 90% of beneficiaries of the programme regarded communication skills, adaptability and analytical skills, which they gained during their mobility period, as important for getting their first job.[14]

Getting to know a new culture contributes to the development of intercultural communication, tolerance and cross-cultural understanding. Students can get more understanding with foreign citizens in further professional activities through the recognition of intergroup and intragroup differences, interaction with the world around.[15]

That is why the correct preparation for another socio-cultural environment is a particularly important point and "the quality of exchange depends on the correct interaction of partner universities, knowledge of culture and traditions of the country".[16]

Staying in another cultural and educational environment contributes to the development of skills, independence and creative activity that is a requirement for adaptation to new socio-economic conditions. Involvement in international professional and scientific environment provides an opportunity for establishing personal ties and further cooperation. In addition, language practice allows to be in demand in the labour market.

There are, as well, several mentions of negative aspects of academic mobility: migration processes, brain drain, and the use of academic mobility as a tool to increase the perceived prestige of a university with a lack of concentration on the

12 E. Kostina, Academic Mobility of the Higher Education Students of Russia: A Cross-Cultural Approach, "Philosophy of Education" 2014, no. 6, pp. 64-76.

13 O. Bracht, C. Engel, K. Janson, A. Over, H. Schomburg & U. Teichler, The Professional Value of ERASMUS Mobility, International Centre for Higher Education Research, University of Kassel 2006.

14 Erasmus Impact Study. 2014. Luxembourg: Publications Office of the European Union, p. 116.

15 E. Kostina, Academic Mobility of the Higher Education Students of Russia: A Cross-Cultural Approach, "Philosophy of Education" 2014, no. 6, pp. 64-76.

16 O.U. Korneva, I.V. Plotnikova, Academic Mobility of Students: Social Problems "Sociological Research" 2015, no. 66, p. 114

quality of knowledge obtained by students during their participation in mobility programmes.

3. International regulation and the practices of European countries concerning academic mobility

In May 1949, following resolutions of The Hague Congress, the Council of Europe was created. It has since been one of the key actors in harmonisation and integration of national European higher education systems. There are several legal instruments created by the Council of Europe to help facilitate academic mobility in the member states.

First, in 1953 the European Convention on the Equivalence of Diplomas leading to Admission to Universities[17] was adopted by the members of the Council. It provided for the equivalence of those diplomas awarded in the territory of each other Contracting Party which constitute a requisite qualification for admission to similar institutions in the country in which these diplomas were awarded.

In 1955 leaders of European universities met for the first time after WW2 in Cambridge to discuss international co-operation under the presidency of the Duke of Edinburgh. That assembly later became the Standing Conference of Rectors and Vice-Chancellors of European Universities (CRE).

Shortly after, in 1956, came the European Convention on the Equivalence of Periods of University Study[18] that dealt mostly with modern languages study recognition. In 1959 the member States adopted the European Convention on the Academic Recognition of University Qualifications[19], which provided for mutual recognition of diplomas awarded at the end of undergraduate university studies, qualifying the holders to proceed to post-graduate studies.

The next milestone was in 1969, when the member States concluded the European Agreement on Continued Payment of Scholarships to Students Studying Abroad, which provided for the scholarships awarded by a Contracting Party to a national to continue to be paid if that person is admitted in an institution of higher education in the territory of another Contracting Party[20].

The Council of Europe's executive body, the Committee of Ministers, also played a role in promoting European integration in higher education. In 1984 the

17 European Convention on the Equivalence of Diplomas leading to Admission to Universities. ETS no. 015. Paris, 11 December 1953.

18 European Convention on the Equivalence of Periods of University Study. ETS No. 021. Paris, 15 December 1956.

19 European Convention on the Academic Recognition of University Qualifications. ETS No. 032. Paris, 14 December 1959.

20 European Agreement on continued Payment of Scholarships. ETS No. 069. Paris, 12 December 1969.

Committee of Ministers adopted Recommendation No. R (84) 13[21] concerning the status of foreign students which provided a comprehensive set of principles for the formulation of policies regarding foreign students. It stressed that students should be encouraged to spend one or two years of study abroad, depending upon the course of study.

In the 1990s the Council of Europe continued its efforts towards creating a common European higher education area. In 1990 the European Convention on the General Equivalence of Periods of University Study was adopted[22]. It provided a legal basis for recognition by a student's university of origin of periods spent in a university abroad, whether or not a certificate is issued attesting to them. Such recognition presupposes that there has been a prior agreement between the two universities concerned.

In 1997, the Convention on the Recognition of Qualifications Concerning Higher Education in the European Region, also known as the Lisbon Recognition Convention[23], was adopted under joint auspices of the Council of Europe and UNESCO; it also addressed the European Community as a potential signatory party. It called for recognition with a more demanding voice and was far more specific with regard to the implementation of these goals than preceding multilateral conventions.

European ministers of higher education also played an active role in the integration of European higher education systems. In 1998 at the Sorbonne University the so-called Sorbonne Declaration on the harmonisation of the architecture of the European higher education system[24] was signed by the ministers of higher education of France, Germany, Italy, and the United Kingdom. It was followed in 1999 by the famous Bologna Declaration[25], which called for a system of three cycles, leading respectively to a bachelor's degree, master's degree, and doctoral degree. In the following conferences of the ministers of higher education in Prague (2001), Berlin (2003), Bergen (2005) and London (2007), the Bologna Process agenda was extended and made more detailed.

The existing academic mobility programmes can be classified as follows: they can be unilateral, bilateral or multilateral. They can exist on a national level (cooperation

21 Recommendation no. R (84) 13 of the Committee of Ministers to Members States Concerning the Situation of Foreign Students (Adopted by the Committee of Ministers on 21 June 1984 at the 374th meeting of the Ministers' Deputies).

22 European Convention on the General Equivalence of Periods of University Study. ETS no. 138. Rome, 6 November 1990.

23 ETS No. 165 Convention on the Recognition of Qualifications concerning Higher Education in the European Region. Lisbon, 11 April 1997.

24 Joint declaration on harmonisation of the architecture of the European higher education system by the four Ministers in charge for France, Germany, Italy and the United Kingdom in Paris, the Sorbonne, 25 May 1998.

25 Joint Declaration of the European Ministers of Education. Bologna, 19 June 1999.

between countries) or on the institutional level (cooperation between universities). They can also be divided into degree-mobility programmes and temporary mobility programmes. Degree-mobility, i.e. mobility for whole degree programmes, is prevalent among students coming to Europe from other parts of the world, while temporary mobility is widespread within Europe[26]. For instance, *Chevening* is a British unilateral mobility programme that accepts students from 144 countries and territories to undertake postgraduate studies and pursue degrees in universities of the United Kingdom. It is funded by the British Foreign and Commonwealth Office. Visby and Stipendium Hungaricum are further examples of the same type of exchange programmes.

The *Visby* Programme provides a number of full scholarships for master's programmes in Sweden. Candidates from Armenia, Azerbaijan, Belarus, Georgia, Moldova, Russia and Ukraine can apply. The programme is funded by the Swedish Institute.

Stipendium Hungaricum is based on bilateral educational cooperation agreements signed between the Ministries responsible for education in the sending countries/territories and Hungary or between higher education institutions. It is funded by the Hungarian Government.

Such programs can be established not only by national, but also by regional governments. An example of such programme, *BAYHOST* (the Bavarian Academic Centre for Central, Eastern and South-eastern Europe), provides funding for incoming and outgoing student mobility between Bavaria and countries in Central, Eastern and South-eastern Europe, including Russia. As for the outgoing degree-mobility programmes in Europe, the Italian *"Master and Back"* programme could serve as an example. It was implemented in 2005 by the Italian region of Sardinia. The programme is co-financed by the European Social Fund and provides talented Sardinian students with scholarships to pursue master's degrees in the world's best universities. In 2014 a similar programme called "Global Education" was launched in Russia[27]. In exchange for the scholarship this programme demands its alumni to work in designated Russian organisations for three years after graduation.

But, of course, temporary mobility programmes are much more widespread within Europe.

The Central European Exchange Program for University Studies (*CEEPUS*) provides for student mobility between Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Hungary, Macedonia, Moldova, Montenegro, Poland, Romania, Serbia, the Slovak Republic, and Slovenia. Originally started by

26 U. Teichler, Internationalisation of Higher Education: European Experiences, "Asia Pacific Education Review" 2009, vol. 10, issue 1, p. 102.

27 Executive Order of the President of Russian Federation No. 967 "On measures on improvement of the HR potential of the Russian Federation". Moscow, 28 December 2013.

Austria, it is governed by the CEEPUS Agreement, the latest version of which was signed in Budva, Montenegro in 2010. According to CEEPUS rules there is no transfer of funds among Contracting Parties. CEEPUS scholarships, with the exception of travel expenses, are financed by the host country. Travel expenses are financed, where applicable, by the country of origin. Host countries and participating universities are encouraged to provide additional voluntary funding for CEEPUS scholarships.

AKTION Österreich – Tschechische Republik is an example of a bilateral cooperation programme between Austria and the Czech Republic, which offers grant funding for study and research periods in the partner country and participation in summer language schools and other summer school events.

The *Campus Europæ* programme is an example of an institutional level programme, which unites 30 universities from 20 countries. It is co-funded by the Erasmus+ programme of the European Union, and the financial support students receive is identical to that of the Erasmus+ programme.

North2north is a multilateral regional programme which involves universities situated in the North. Denmark, Greenland, the Faroe Islands, Canada, the United States, Finland, Sweden, Norway, Iceland and Russia participate in the north2north programme. It is conducted on the base of The University of the Arctic (UArctic), which is a cooperative network of universities, colleges, research institutes and other organisations concerned with education and research in and about the North. The University of the Arctic was created by the Arctic Council in 2001.

All of these programmes play their role in European higher education integration, but that role is mostly supplemental compared to the Erasmus programme.

4. Key European practice – Erasmus Programme

The Erasmus programme is a true cultural phenomenon for modern-day Europe. The European press frequently speaks of the "Erasmus Generation" as the generation of 40-30-year-old Europeans who benefited from the programme and the freedom of movement it allowed within the EU[28]. Films revolving around Erasmus mobility have even been created[29]. The European Commission estimates that more than 1 million children – "Erasmus babies", have been born to couples who met on exchange[30]. The

28 E.g. Erasmus Generation. "The Economist", Jun 15th, 2013, available at https://www.economist.com/news/special-report/21579148-overcome-its-skills-shortage-germany-needs-remodel-its-society-erasmus-generation; La génération Erasmus à la rescousse de l'Europe (2017, March 2), Le Monde, 02.03.2017, available at: http://www.lemonde.fr/campus/article/2017/03/02/la-generation-erasmus-a-la-rescousse-de-l-europe_5088465_4401467.html. (access 10.04.2018).

29 A major example is the French film "L'Auberge Espagnole" (2002), revolving around a group of people on their Erasmus mobility in Spain.

30 Erasmus Impact Study confirms EU student exchange scheme boosts employability and job mobility. European Commission Press Release. 22.09.2014, Available at http://europa.eu/rapid/

Erasmus programme is routinely referred to as a flagship project and one of the most successful[31] programmes of the EU – more than 3 million students have participated in it since its introduction in 1987 and last year it celebrated its 30th anniversary last year, the same year in which the Rome Treaty celebrated its 60th. We can see that the majority of EU programmes and activities concerning cooperation and integration in the education field appeared only slightly before establishment of the EU proper.

One of the reasons why education was out of priority for the European Communities at the time was because the agenda leaned towards economic and agriculture policies, while education was considered to be a "political" topic more suited for the Council of Europe[32] (as can be evidenced by its output analysed in Chapter 2). However, the 1968 student protests, as well as the 1973 and 1979 oil crises, prompted European decision-makers to place more focus on education. In 1976, the first Council decision on education was approved[33]. The action programme under the approved decision included so-called Joint Study Programmes, the precursor to larger mobility schemes were operational since 1976 and financially supported the networks of university departments that exchanged students for a period of up to one year and also included some funds for mobile students.

However, the original proposal for a larger mobility programme was withdrawn after negotiations – several developed countries, who had already established their own mobility schemes were opposed to the proposal, while other countries were in favour. After several months, a compromise was reached, and a new large-scale mobility scheme called the EuROpean Community Action Scheme for the Mobility of University Students (ERASMUS) was adopted in June 1987[34]. Regulation already included a grant support mechanism – fixed with an average of 2,000 ECU and maximum of 5,000 ECU. More than 3,200 students went on Erasmus exchange in the first year of its existence.

Another programme, Tempus[35], was established in 1990[10]. The Tempus programme is a true "chameleon" within EU education and youth programmes –

press-release_IP-14-1025_en.htm, projection derived from data from Erasmus Impact Study, p. 136.

31 From Erasmus to Erasmus+: a story of 30 years. European Commission Fact Sheet. available at: http://europa.eu/rapid/press-release_MEMO-17-83_en.htm (access 10.04.2018).

32 L. Pepin, The History of EU Cooperation in the Field of Education and Training: how lifelong learning became a strategic objective, "European Journal of Education" 2007, vol. 42, issue 1, p. 122.

33 Resolution of the Council and of the Ministers of Education, meeting within the Council, of 9 February 1976 comprising an action programme in the field of education. OJ C 38, 19 February 1976, pp. 1-5.

34 Council Decision 87/327/EEC of 15 June 1987 adopting the European Community Action Scheme for the Mobility of University Students (Erasmus). OJ L 166, 25 June 1987, pp. 20-24.

35 While Tempus means time in Latin, it is an acronym as well – Trans-European Mobility Scheme for University Studies.

each of its 4 iterations were different, reflecting changes in the political landscape of Europe. The so-called Tempus I (which ran from 1990 to 1994) focused on projects (including long-term student academic mobility) between the EU-12 and countries of Central and Eastern Europe (all of them being former Socialist countries)[36]. The importance of the programme[37] is evidenced by the fact that its budget was several times higher than the budget of the original Erasmus programme. Tempus I, consisted of 3 actions – support for joint European projects, a mobility grant scheme and complimentary activities.

The field of academic student mobility during the period of European Communities ends with the establishment of these two programmes. The regulatory documents establishing them are very broad and in the majority of cases do not contain much by way of information for analysis. The biggest reason for that is the fact that clear mention of the field of education was only included in the Maastricht Treaty – in current article 165 TFEU[38]. Before that, education was absent from the EC spheres of activity, which severely limited the tools available to EC bodies to operate in the field (as evident from the pushback to the original establishment of the Erasmus programme).

In 1994, the majority of European education and science programmes have been combined into two umbrella programmes – "Leonardo" for vocational education activities[39] and "Socrates" for general education activities[40]. The Erasmus mobility scheme became part of Socrates. However, unlike its counterpart, which dissected the parts of the previous programmes and rearranged them within a new one, Socrates merely grouped previous programmes while adding new components. This allowed to sustain the brand of Erasmus while striving for better administrative efficiency of the process, which was a successful feat – support for student mobility substantially increased under Socrates[41]. The establishment of cooperation also changed – from applying as a network of cooperating institutions, and concluding agreements between and within said networks, bilateral cooperation became the operative mode

36 Council Decision 90/233/EEC of 7 May 1990 establishing a trans-European mobility scheme for university studies (TEMPUS). OJ L 131, 23 May 1990, pp. 21-26.

37 European Commission. 2011. TEMPUS @ 20 – A retrospective of the Tempus Programme over the past twenty years, 1990-2010, p. 25.

38 L. Pépin, The History of European Co-operation in the Area of Education and Training, Europe in the Making – an Example, European Commission 2006, p. 126.

39 Council Decision 94/819/EC of 6 December 1994 establishing an action programme for the implementation of a European Community vocational training policy. OJ L 340, 29 December 1994, pp. 8-24.

40 Decision No 819/95/EC of the European Parliament and of the Council of 14 March 1995 establishing the Community action programme 'Socrates'. OJ L 87, 20 April 1995, pp. 10-24.

41 U. Teichler (ed.), ERASMUS in the SOCRATES Programme – Findings of an Evaluation Study, Lemmens 2002, p. 14.

of establishing Erasmus mobility projects. The Tempus programme was then stripped of its long-term mobility scheme (which was subsequently put into Erasmus).

After being stripped of its long-term mobility scheme, the Tempus programme focused on projects related to education policy reform and capacity building within the neighbours of the EU (former Soviet republics joined after the establishment of Tempus II in 1994, and the geography kept on growing).

The Socrates Programme was replaced in the next funding cycle by the Lifelong Learning Programme[42] (LLP), which brought about a further bundling of activities – the Socrates and Leonardo activities were merged into a single education-related programme, which contained 6 different sub-programmes, one of which being Erasmus. Financial contribution to Erasmus activities within the LLP amounted to 40% of the general budget of the programme[43].

The latest and most ambitious EU programme in the field of education and youth is called "Erasmus+" and it runs from 2013[44]. This programme is the currently functioning one. In continuation of a unification trend, Erasmus+ became an umbrella for the majority of different youth engagement programmes, initiatives and actions carried out by the EU within one comprehensive regulatory framework. The nature of the enabling document had also changed from decision of the European Council to the regulation, which ensures its implementation in the member states and provides for more thorough regulation than before.

The adoption of one single catch-all programme helped to once again significantly ease the management of mobility activities (education and youth-related), which had been scattered in different programs under different sets of regulations. Even though the practice of using umbrella programmes is not new (Socrates and Lifelong Learning Platform being the previous iterations of the same concept), it is widely believed that the collection of all related youth, education and sport activities permits for a more synergetic regulation and evaluation of concrete actions.

Erasmus+ consists of 3 Key Actions ('KA') – Mobility of individuals (KA1), Cooperation for Innovation and Exchange of Good Practices (KA2) and Support for Policy Reform (KA3). Additionally, separate areas exist for the funding of sport activities (Erasmus+ Sport) and higher education activities in the field of European

42 Decision No. 1720/2006/EC of the European Parliament and of the Council Of 15 November 2006 Establishing an Action Programme in The Field of Lifelong Learning. OJ L 327, 24 November 2006, pp. 45-68.

43 Decision No. 1720/2006/EC of the European Parliament and of the Council Of 15 November 2006 Establishing an Action Programme in The Field of Lifelong Learning. OJ L 327, 24 November 2006, pp. 45-68. Annex B.11.

44 Regulation No. 1288/2013 Of the European Parliament and of the Council Of 11 December 2013 Establishing 'Erasmus+': The Union Programme for Education, Training, Youth and Sport and Repealing Decisions No 1719/2006/EC, No 1720/2006/EC And No 1298/2008/EC. OJ L 347, 20 December 2013, pp. 50-73.

integration (the Jean Monnet Activities). The Programme has an overall funding of more than 16 billion euros of the EU Budget for the seven years (2014-2020)[45].

What is commonly called "Erasmus exchange" or "Erasmus" currently resides under Erasmus+ KA1, the first of its sub actions provide for support for academic mobility for a period of study from 3 to 12 years in a host institution in another country. Academic student mobility with partner countries of the programme[46] is regulated by different action under KA1 – International Credit Mobility (ICM). KA1 as a whole receives the majority of funding under the programme – 2016 saw an allocation of 54% of yearly budget towards it[47]. The current grant scheme takes into account the costs of living in sending and receiving countries, with the average monthly grant being around 250-275 Euros.

One of the major changes between "normal" Erasmus and ICM is the source of the funding. While Erasmus+ activities are funded from its own budget line, ICM is considered part of external affairs of the EU and uses several different sources of funding. Five funding strands called 'instruments' provide this budget, with each instrument covering one or several countries in the world. For example, funding for projects with the Russian Federation and Serbia is provided through the European Neighbourhood Instrument (ENI) and funding for projects with the United States and Canada – through Partnership Instrument (PI). Additionally, when applying for projects under the Erasmus+ programme, applicants need to prove the "added value" of having a country-based participating partner.

This system places the accessibility to mobility under the political will of the EU, which makes it a powerful weapon in negotiations between EU and non-EU member programme/partner countries – Switzerland's partnership for example was frozen in the programme following a referendum limiting the immigration of EU citizens into the country and it is unlikely to return until the next cycle[48]. On the other hand, the system provides for the possibility of yearly adjustment and smarter targeting of funds. For example, from 2018 a dedicated budget envelope (a group of countries for which the funding is being provided) is being created for West African countries.

45 Erasmus+ Online Guide. What is the budget? European Commission. Available at: https://ec.europa.eu/programmes/erasmus-plus/programme-guide/part-a/what-is-the-budget_en (access 10.04.2018).

46 Erasmus+ participating countries are split in two major pools – Programme Countries and Partner Countries, the latter of which in turn splits into Countries neighbouring the EU and all other countries of the world.

47 EU suspends Swiss Erasmus participation for 2014 (2014, February 26). Euronews. Available at: http://www.euronews.com/2014/02/26/eu-suspends-swiss-erasmus-participation-for-2014 (access 10.04.2018).

48 EU suspends Swiss Erasmus participation for 2014 (2014, February 26). Euronews. Available at: http://www.euronews.com/2014/02/26/eu-suspends-swiss-erasmus-participation-for-2014 (access 10.04.2018).

Management of mobility is conducted by Erasmus/mobility coordinators in the sending and receiving institutions, however, the management and evaluation of projects and, therefore the allocation of grant funding, is not being done *en masse* by the European Commission itself. Since the Lifelong Learning Programme commenced, this task has been managed by designated National Agencies (NAs), which deal with all Erasmus+ related activities within the country. In several countries, the role of NA is performed by existing educational agencies, such as DAAD in Germany of and the British Council in the United Kingdom. Several countries have different NAs for different language groups or different agencies for youth and education activities (both apply in Belgium, for example).

Erasmus+ has made an effort to tackle some long-standing problems, however, significant issues remain. Barriers to enter the programme existed a decade ago[49] and continue to exist now[50]. The availability of Erasmus exchanges to students from disadvantaged backgrounds remains quite low, even with the introduction of additional top-up grants. The availability of exchange to people with disabilities, notwithstanding additional grant support, remains miniscule – 0.14% in the year 2013-2014[51] with the number staying relatively the same year-on-year. The availability of exchanges to students from partner countries continues to be lower due to stricter rules for establishing partnerships and an inability to initiate the partnership from the side of the partner country's higher education institutions.

However, it is argued that, even though education is not one of the areas of competence of the EU, this belongs to a so-called supportive competence[52], the large amount of funding and comprehensive regulatory documents concerning the quality of exchange (primarily concerning the recognition of exchange studies and host institution services) coupled with pan-European advancements in harmonisation of education systems (primarily the Bologna Process and creation of ECTS) constitutes a major contribution to the reforms in European higher education[53].

The current programme runs to the 2020/2021 academic year, and the 30th anniversary prompted the policy-makers as well as non-governmental organisations

49 M. Souto-Otero, The Socio-Economic Background of Erasmus Students: A Trend Towards Wider Inclusion? "International Review of Education" 2008, vol. 54, no. 2, pp. 135-154.

50 M. Souto-Otero, J. Huisman, M. Beerkens, H. de Wit, S. Vujic, Barriers to International Student Mobility: Evidence from the Erasmus Program, "Educational Researcher" vol. 42, issue 2. pp. 70-77.

51 http://ec.europa.eu/dgs/education_culture/repository/education/library/statistics/ay-12-13/facts-figures_en.pdf (access 10.04.2018).

52 Article 6 TFEU.

53 A. Batory, N. Lindstorm, The Power of the Purse: Supranational Entrepreneurship, Financial Incentives, and European Higher Education Policy, "Governance" 2011, vol. 24, issue 2, pp. 311-329.

in the field of youth and education to start a comprehensive debate on the next iteration of the combined youth & education projects funding scheme.

A public campaign was launched to increase the funding of the successor to the Erasmus+ by ten times, named *Erasmusx10*[54], which tries to play on a statement by the President of the European Commission, Jean-Claude Juncker, to be "9 times more ambitious with the future of the Erasmus+ programme"[55]. Statements of support for larger financial contributions to the Erasmus+ successor programme in the next cycle were also made by France's president Emmanuel Marcon[56] and members of his cabinet[57].

The final celebration of the 30th anniversary saw the unveiling of the Erasmus Generation Declaration, which consists of 30 major points to be tackled in the future programme, amongst them further internationalisation of the programme by making it even more global than it is right now and preparing the beneficiaries of the programme for life in the modern age[58].

5. Academic mobility in Russia

Despite the fact that the Russian law on education does not contain a general definition of academic mobility, Russia's education policy is aimed at development in this area.

Academic mobility in Russia exists on two levels — international and national, with a significant imbalance in applicable law towards the former.

In Russian Federal Law "On Education in the Russian Federation", academic mobility is referred to in the context of a network form of realisation of the educational programme, which was mentioned in the first part of this article. Academic mobility here is used as one of the ways of interaction between educational institutions to ensure the ability of students to study educational programmes implemented by those institutions jointly. The concept of academic mobility in this regard is discussed

54 See *Erasmusx10* campaign website, available at: http://erasmusx10.eu (access 10.04.2018).

55 How do you celebrate Erasmus+ 30 years? With 9 times more ambition! 2017, June 21. European Commission Press-Release. Available at: https://ec.europa.eu/programmes/erasmus-plus/news/how-do-you-celebrate-erasmus-30-years-9-times-more-ambition_en (access 10.04.2018).

56 Le plan de Macron pour l'Europe résumé en dix points, « Le Figaro" 27 Sep 2017. Available at: http://www.lefigaro.fr/politique/le-scan/2017/09/26/25001-20170926ARTFIG00105-ce-que-macron-va-proposer-pour-l-europe-dans-son-discours-a-la-sorbonne.php (access 10.04.2018).

57 A. Robert, Pro-Europeans call for more Erasmus funding from Jan 10, 2017. Available at: https://www.euractiv.com/section/all/news/pro-europeans-call-for-more-erasmus-funding/ (access 10.04.2018).

58 European Commission. 2017. Erasmus+ Generation Declaration. Available at: https://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus2/files/erasmus-generation-declaration_en.pdf (access 10.04.2018).

in more detail in the recommendations of the Ministry of Education and Science[59]. The recommendations contain an indication that the development of programmes in a network form should be carried out by introducing regulations on academic mobility into the by-laws of educational institutions. At the same time, the need to develop a mechanism for credit recognition is separately indicated. Also, the recommendations serve to fix the status of academic mobility as one of the steps for development and approval of joint educational programmes.

Thus, it can be concluded that when partnerships between educational institutions are established the issue of academic mobility between those institutions should be addressed by them. Consequently, academic mobility is presumed to be one of the important forms of interaction between educational institutions.

The Russian law on education does not establish that the provisions on the network forms in the implementation of educational programs are applied exclusively to Russian institutions. Therefore, the above conclusions are valid for international academic mobility, which is separately mentioned in the text of the law. Academic mobility is an integral part of Russia's international educational cooperation in accordance with Article 105 of the Russian law on education. Development of international academic mobility is one of the priority projects of the Ministry of Education and Science of Russian Federation. As such, academic mobility is one of the focal points in the Academic Excellence Project 5-100, which is implemented in Russia since 2013 in accordance with the regulation introduced by the Russian Government following an executive order from the President of the Russian Federation in 2012[60]. The main aim of this project is to raise the positions of Russian universities in international higher education institutions ratings: by 2020 at least 5 Russian universities should be placed in the top hundred in such ratings as Times Higher Education, QS, ARWU etc.

In this programme the main focus is placed on the incoming mobility programme – the creation of the necessary conditions for attracting international students is included in the task list of the "Concept of Long-term Social-Economic Development of Russian Federation until 2020"[61].

The statistical data presented by the Ministry of Education and Science on the academic mobility of students for 2012-2016, demonstrates a steady increase in the

59 Letter of Ministry of Education and Science of Russian Federation from 28.08.2015 N AK-2563/05.

60 Executive Order of the President of the Russian Federation No. 599 of 5 May 2012. Collection of Legislative Acts of the Russian Federation, 7 May 2012, no. 19, art. 2336; The Directive of the Government of the Russian Federation No. 2006-R of 20 October 2012. Collection of Legislative Acts of the Russian Federation, 5 November 2012, no. 45, art. 6288.

61 Adopted by the Directive of the Government of the Russian Federation N 1662-R of 17 November 2008. Collection of Legislative Acts of the Russian Federation, 24 November 2008, no. 47, art. 5489.

number of foreign students attending Russian educational institutions[62]. In terms of the number of foreign students studying in Russia the CIS countries are leading – Kazakhstan and Ukraine. We see a different picture in the statistics of outgoing mobility: its numbers declined in the analysed period. It should be noted that Russian students mainly choose European countries for training.

In light of the above circumstances, the Ministry of Education and Science of the Russian Federation made a decision to launch a project to increase the attractiveness of Russian education. Within the framework of this project it is planned to achieve a 3-fold increase in the number of incoming students by 2025.

In practice, international academic mobility in Russia is being implemented in several forms:

– *Implementation of intergovernmental agreements in the field of education.* Currently, the Russian Federation is currently party to 86 international agreements[63] with different states on the matter of cooperation in science and education, which implies, among others, a commitment to the development of international academic mobility (exchange studies as well as full-degree studies). Russia joined the Bologna Process in 2003, which also permitted to advance the development of international academic mobility in Russia through greater convergence of education systems within the EHEA. The Government of the Russian Federation also defines quotas for education of foreign citizens and stateless people from the funds of the federal budget[64];
– *Participation in international exchange programs*. Currently Russian HEIs participate, among others, in such international programs as Erasmus+ (Russia is a Partner Country in the programme), North2North, etc. However, not all HEIs can provide their students with the possibility to participate in such programs. This can be linked to several factors: the financial resources of Russian HEIs do not permit to provide their students with equal possibilities to participate in such programs (especially taking into account that the average cost of living is lower in Russia and travel to host institutions costs significantly more than same-distance travel within the EU); some of the exchange programs (especially Erasmus+) do not provide for equal participation of Russian HEIs in their activities; and the fact that the curricula of the Russian HEIs is not fully unified in accordance with international criteria (mainly EHEAs) gives rise to issues with the choice of courses on mobility period and subsequent recognition of studies at home

62 The Letter of Ministry of Education and Science of Russia of 26 September 2017, no. MON-P-4472.
63 Full list of bilateral agreements in the field of higher education can be found on the website of Main State Centre for Education Evaluation – http://nic.gov.ru/en/docs/foreign/collaboration.
64 Adopted by the Decree of the Government of the Russian Federation N 891 on 10 August 2013. Collection of Legislative Acts of the Russian Federation. 14 October 2013. No. 41, art. 5204.

institutions. Within international mobility programmes the focus is being placed on individual student mobility, or so-called free-mover mobility, which is based on the personal initiative of the student and does not imply any kind of institutional support on behalf of a home university. A substantial amount of grant programmes provides for an opportunity to study for one year in foreign HEIs. However, the question of getting the free-mover period approved by the home institution (starting from the granting of leave of absence and finishing with the possibility of credit recognition) is one which is posing many difficulties for free-movers due to necessity to negotiate every miniscule detail with both institutions without being able to rely on common provisions of agreements and programmes;

– *Partnership Agreements between HEIs.* In the present day this form of institutionalising of academic mobility becomes more and more widespread. Partnership agreements, among other things, simplify the procedures on formal issues – comparability of courses' workload, rules for credit recognition, etc. These rules are being agreed to between the administrations of the universities, who are initiators of the creation of new academic mobility partnerships. This allows the student to carry out academic mobility as part of the learning process at the domestic university. These agreements can be conducted on a departmental as well as on a university-wide level.

According to the research results[65], at the beginning of the 2015/2016 academic year, the number of international students in Russian HEIs amounted to 5 percent of the overall student population. It should be noted that the distribution of international students is uneven – the majority of students study in the HEIs of Moscow and St. Petersburg.

These statistics demonstrate a problem which is characteristic for the Russian education system and which is relevant for the issue of academic mobility within the country. Russia has around 900 HEIs[66], but only 1% of them are included in international rating QS World University Rankings 2017/2018. Additionally, the access to education in those "top" universities is severely hindered by their concentration in the metropolitan regions.

As was mentioned earlier, Russia practically does not have any legal regulation on academic mobility within the country. In light of this fact, examples of the realisation of exchange programs for students within Russia are singular and confined to the

65 Academic mobility of foreign students in Russia. Institute of education of HSE., 2016, Facts of Education. № 7. Available at: https://ioe.hse.ru/data/2016/08/04/1119531130/ФО7.pdf (access 10.04.2018). Academic mobility of foreign students in Russia, 2016, Facts of education 7.

66 According to the Project Atlas database. Available at: https://www.iie.org/en/Research-and-Insights/Project-Atlas/Explore-Data/Russia (access 10.04.2018).

practices of single universities. Several forms of national academic mobility should be noted:

- *Inter-university student mobility*. Norms on realisation of this type of student mobility are normally contained in the official documents of universities. Model agreements on student mobility between universities do not exist and are planned to be created in light of recent initiatives by the Ministry of Education of the Russian Federation[67]. By-laws of HEIs generally allow to benefit from this type of mobility at all levels of higher education. It should be noted that this definition of inter-university mobility also includes such types of short-term academic mobility as conferences, seminars, summer schools, etc.[68]
- *Intra-university student mobility*, which can be divided into:
- *Inter-campus mobility* (implemented by the Higher School of Economics, being one of the biggest HEIs in Russia with 4 campuses in four different Russian cities (Moscow, St. Petersburg, Perm and Nizhny Novgorod). Intra-university mobility provides students with the opportunity to study in another campus for a period of 4 to 6 months, with this opportunity limited to full-time students of the HEI[69]; and
- *Mobility between academic programmes* (implemented by Astrakhan State University). This type of mobility allows the student to study individual academic disciplines or parts of them within the framework of full-time education in another university's educational program[70].

All of the above demonstrates that Russian universities have an interest in creating and expanding academic mobility programmes within the country, but it is premature to speak of real development in this direction. This statement can be supported by the large number of problems that universities will inevitably encounter when trying to create or participate in mobility programmes. Among them the financial issues and the difference of educational programmes due to which, the disciplines studied at different universities are not comparable (the European

67 HEIs Support the initiative of the Ministry of Education and Science on the introduction of academic mobility. 2017, December 4. TASS News Agency. Available at: http://tass.ru/obschestvo/4781032 (access 10.04.2018).

68 Regulations on the organization of academic mobility of students of the Higher School of Economics (Appendix to the Order of the Higher School of Economics No. 068/01/ 2806-06 of June 28, 2013).

69 Regulations on the organization of academic mobility of students of the Higher School of Economics (Appendix to the Order of the Higher School of Economics No. 068/01/ 2806-06 of June 28, 2013).

70 Order of the rector of Astrakhan State University No. 08-01-01 / 76 on Regulations on the organization of academic mobility of students of Astrakhan State University. February 13, 2015. Available at: http://asu.edu.ru/images/File/ilil6/ak_mod.pdf (access 10.04.2018).

Universities' Credit System has not as yet been introduced in all Russian universities). These problems are common for universities and require a solution at the regulatory level.

In June 2017, the Minister of Education and Science of the Russian Federation, announced the launch of a pilot program to expand networking in the framework of academic mobility between Russian universities but, as of the beginning of 2018, the details of the future program have not been disclosed. Questions on what exactly the concept of internal Russian academic mobility planned by the Ministry of Education will be and when it will be implemented, remain open.

Conclusions

As evident from this brief study of different modes of international student mobility, there is a continuous trend for integration and harmonisation of European higher education systems, which involves both EU countries and the wider network of the Council of Europe and EHEA.

There is substantial legal basis for HE integration in the form of international treaties, concluded mostly between the members of the Council of Europe.

The Russian national legal system lacks a proper regulatory framework for academic mobility, at least in the form of general rules regarding student exchanges. As we can see, major financial incentives paired with unambiguous rules regarding the administration of the programme and the rights of participants (namely the Erasmus Charter for Higher Education) can slowly push even the most conservative HEIs in the right direction.

Even established grant schemes for obtaining state support for education abroad, such as the Russian Global Education scheme, are inadequately regulated, which, in turn, leads to a low number of participants in the scheme (relative to the funds procured for it).

Moreover, Russian participation in major mobility schemes, such as Erasmus, hinges on the fact that these programs are funded by other states, and Russia does not actively contribute to it. Therefore, they cannot be used as a method of intercultural dialogue, but as a political tool, thus harming the understanding between the youth. The creation of Russia's own programmes and mobility grant systems for exchange studies, could be an answer to these issues.

BIBLIOGRAPHY

Academic mobility of foreign students in Russia. Institute of education of HSE., 2016, Facts of Education. No. 7. Available at: https://ioe.hse.ru/data/2016/08/04/1119531130/ФО7.pdf (access 10.04.2018).

Batory A. and Lindstorm, N., The Power of the Purse: Supranational Entrepreneurship, Financial Incentives, and European Higher Education Policy, "Governance" 2011, vol. 24, issue 2.

Babich A., Sheveleva N., Vasiliev I., Academic Mobility of Students: The Current Legal Regulation and Practice of its Application, "Law" 2016, no 11.

Bracht O., Engel C., Janson K., Over A., Schomburg H. & Teichler U., The Professional Value of ERASMUS Mobility, International Centre for Higher Education Research, University of Kassel 2006.

Concept of Long-term Social-Economic Development of Russian Federation until 2020. Adopted by the Directive of the Government of the Russian Federation no. 1662-R of 17 November 2008.

Concept of State Migration Policy of Russian Federation until 2025. Approved by the President of the Russian Federation on 13 June 2012.

De Wit, H., Global: Internationalization of Higher Education: Nine Misconceptions, "International Higher Education", Summer 2011, no. 64.

De Wit, H., Hunter F., Howard, L., Egron-Polak, E. Internationalisation of Higher Education. Brussels: Policy Department, Directorate General for Internal Policies, European Parliament 2015.

Erasmus Generation. "The Economist" 15 June 2013, available at https://www.economist.com/news/special-report/21579148-overcome-its-skills-shortage-germany-needs-remodel-its-society-erasmus-generation (access 10.04.2018).

Erasmus Impact Study confirms EU student exchange scheme boosts employability and job mobility. European Commission Press Release. 22.09.2014. Available at http://europa.eu/rapid/press-release_IP-14-1025_en.htm, projection derived from data from Erasmus Impact Study.

Erasmus Impact Study. 2014. Luxembourg: Publications Office of the European Union.

Erasmus+ Online Guide. What is the budget? European Commission. Available at: https://ec.europa.eu/programmes/erasmus-plus/programme-guide/part-a/what-is-the-budget_en (access 10.04.2018).

EU suspends Swiss Erasmus participation for 2014 (2014, February 26). Euronews. Available at: http://www.euronews.com/2014/02/26/eu-suspends-swiss-erasmus- participation-for-2014 (access 10.04.2018).

EU suspends Swiss Erasmus participation for 2014 (2014, February 26). Euronews. Available at: http://www.euronews.com/2014/02/26/eu-suspends-swiss-erasmus-participation-for-2014 (access 10.04.2018).

European Commission. 2011. TEMPUS @ 20 – A retrospective of the Tempus Programme over the past twenty years, 1990-2010. P. 25

European Commission. 2017. Erasmus+ Generation Declaration. Available at: https://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus2/files/erasmus-generation-declaration_en.pdf (access 10.04.2018).

HEIs Support the initiative of the Ministry of Education and Science on the introduction of academic mobility. 2017, December 4. TASS News Agency. Available at: http://tass.ru/obschestvo/4781032 (access 10.04.2018).

How do you celebrate Erasmus+ 30 years? With 9 times more ambition! 2017, June 21. European Commission Press-Release. Available at: https://ec.europa.eu/programmes/erasmus-plus/news/how-do-you-celebrate-erasmus-30-years-9-times-more-ambition_en (access 10.04.2018).

Interstate Programme of Innovative Cooperation of the CIS Member States for the Period until 2020. Approved by Decision of the Council of Heads of Governments of CIS in St. Petersburg on 13 October 2012.

Korneva O.U., Plotnikova I.V., Academic Mobility of Students: Social Problems "Sociological Research" 2015, no. 6.

Kostina E., Academic mobility of students of the Higher School of Russia: a cross-cultural approach, "Philosophy of Education" 2014, no. 6 (57).

Kravtsova T., Concept of Academic Mobility in the Humanities, "Review of Omsk State Pedagogical University. Humanitarian research" 2014, no. 3(4).

La génération Erasmus à la rescousse de l'Europe "Le Monde" 2 March 2017, available at: http://www.lemonde.fr/campus/article/2017/03/02/la-generation-erasmus-a-la-rescousse-de-l-europe_5088465_4401467.html (access 10.04.2018).

Le plan de Macron pour l'Europe résumé en dix points, "Le Figaro" 27 September 2017. Available at: http://www.lefigaro.fr/politique/le-scan/2017/09/26/25001-20170926ARTFIG00105-ce-que-macron-va-proposer-pour-l-europe-dans-son-discours-a-la-sorbonne.php (access 10.04.2018).

Souto-Otero M., Huisman J., Beerkens M., de Wit H., Vujic S., Barriers to International Student Mobility: Evidence from the Erasmus Program, "Educational Researcher" vol. 42, issue 2.

Souto-Otero M., The Socio-Economic Background of Erasmus Students: A Trend Towards Wider Inclusion? "International Review of Education" 2008, vol. 54, no. 2.

Pépin L. The History of European Co-operation in the Area of Education and Training, Europe in the Making – an Example, European Commission 2006.

Pepin L. The History of EU Cooperation in the Field of Education and Training: how lifelong learning became a strategic objective, "European Journal of Education" 2007, vol. 42, issue 1.

Proskura O., Gerasimchuk I., Concept of Mobility. Kinds of Mobility. Academic Mobility, "Bulletin of Chelyabinsk State University" 2014, no. 13 (342).

Robert A. 2017, Jan 10. Pro-Europeans call for more Erasmus funding. Available at: https://www.euractiv.com/section/all/news/pro-europeans-call-for-more-erasmus-funding/ (access 10.04.2018).

Teichler U. (ed.), ERASMUS in the SOCRATES Programme – Findings of an Evaluation Study, Lemmens 2002.

Teichler U., Internationalisation of higher education: European experiences, "Asia Pacific Education Review" 2009, vol. 10, issue 1.

Tregubova T., Academic Mobility of Teachers and Students, "Kazan Pedagogical Journal" 2006, no. 2.

Vatolkina N., Fedotkina F., Academic Mobility of Students in the Conditions of Internationalization of Education, "University Management: Practice and Analysis" 2015, no. 2.

Białostockie Studia Prawnicze
2018 vol. 23 nr 2

DOI: 10.15290/bsp.2018.23.02.08

Jakub Grzegorz Firlus
Jagiellonian University
firlus.jakub@gmail.com
ORCID ID: https://orcid.org/0000-0002-5360-1833

Kamil Klonowski
Jagiellonian University
klonowski.kamil@gmail.com
ORCID ID: https://orcid.org/0000-0001-9511-9917

Legal and Non-Legal Justifications for 'Administrative Mediation' – Remarks on Polish Administrative Praxis

Abstract: In recent years lawmakers were obliged to harmonise the Polish legal system with the so-called *ius commune proceduralis*. This ongoing process is vital for both sustainable development, market stability and effective dialog amongst the various actors involved in field of public affairs. In the new era of the administrative state, the so-called 'classic' model of administrative proceedings became an obstacle for administrative actions. Effective dialog between public authorities and individuals was hard to achieve. The lack of instruments to ensure effective communication between decision-makers and an individual created a crisis of confidence in public administration bodies and intensified the trend of challenging administrative decisions. In order to reverse these negative phenomena, administrative mediation was implemented into the Polish Code of Administrative Procedure. Apart from the benefits related to making the procedure more 'flexible', the implementation of ADR methods also brought with it some negative phenomena. Therefore, the authors of this paper have attempted to present justifications for the implementation of mediation into administrative proceedings. Our analysis also includes comments on the prospects of the application of mediation by public administration authorities.
Keywords: mediation, administrative proceedings, participatory formulas, third generation of administrative procedures

1. Introduction

The constantly changing social and economic environment in which public administration functions causes a number of Code solutions to become outdated[1]. The classic, inquisitorial (court-like) administrative proceeding model based on the command and control scheme[2] is not conducive to ensuring real participation of an individual in the decision-making process concerning his/her rights and obligations. The lack of instruments to ensure effective communication between decision-makers and an individual created a crisis of confidence in public administration bodies and intensified the trend of challenging administrative decisions. The negative phenomenon of abusing the right to appeal[3] by parties stems not so much from dysfunctional social attitudes[4] but rather from the obsolete nature of the procedural regulations.

The reasoning behind the majority of amendments introduced over the years to the Act of 14 June 1960 – Code of Administrative Procedure (CAP)[5], was based on an attempt to realise the postulate of streamlining the procedure and increasing its effectiveness by issuing administrative acts which would meet the requirements expressed in the primary rules of the proceeding while at the same time increasing the level of their acceptability by the addressees. One of the mechanisms for the realisation of this postulate is to create a basis for real participation of an individual in the process of actualisation of his/her rights and obligations. A form of its realisation may include, among other things, mediation, which is generally a type of negotiations between the parties in a conflict involving an impartial and independent third party called a mediator[6]. The fundamental aim of mediation is to reach a compromise by making concessions to one another so that the prospect of redress proceedings being launched (both internal and external) will be avoided[7]. The final result of mediation should satisfy the participants of the proceedings and may take the form of either

1 J. Parkin, Adaptable due process, "University of Pennsylvania Law Review" 2012, vol. 160, no. 5, p. 1309; Z. Kmieciak, Dylematy reformy prawa o postępowaniu administracyjnym, "Państwo i Prawo" 2016, z. 1, p. 4; A. Szpor, Mediacja w prawie administracyjnym, (in:) E. Gmurzyńska, R. Morek (eds.), Mediacje. Teoria i praktyka, Warszawa 2014, p. 397.

2 J. Barnes, Reform and Innovation in Administrative Procedure, (in:) J. Barnes (ed.), Transforming Administrative Procedure, Sevilla 2015, pp. 25-26.

3 M. Szwast, M. Szwed, Nadużycie prawa do sądu w postępowaniu sądowoadministracyjnym, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2016, no. 6.

4 W. Chróścielewski, Czy potrzebny jest nowy kodeks postępowania administracyjnego?, (in:) L. Zacharko, A. Matan, D. Gregorczyk, Administracja publiczna – aktualne wyzwania, Katowice 2015, pp. 50-51.

5 Consolidated text Journal of Laws 2017, item 1257.

6 K.A. Lambert, Fundamentals of Alternative Dispute Resolution, "Franchise Law Journal" 1992, vol. 11, p. 100.

7 J. Wegner-Kowalska, Koncepcja włączenia instytucji mediacji do kodeksu postępowania administracyjnego, "Przegląd Prawa Publicznego" 2016, no. 11, p. 56.

a settlement or issuance of an act towards which the addressees will not trigger any legal remedies (the so-called negotiated decision).

From 1 June 2017 on, mediation became part of the Polish jurisdictional administrative proceedings model. As a manifestation of the implementation of Alternative Dispute Resolution (ADR) methods into public law, it should promote the acceptability of administrative decisions, both on an individual and collective level, without prejudice to the realisation of the rule of law in public administration activity. At the same time, it is a manifestation of the "Europeanisation of administrative law", understood as a process of influencing national legal systems, including administrative law, by EU legislation[8], or a soft-law enacted by the Council of Europe[9]. Mediation is also a result of 'borrowings' from foreign[10] legal systems[11] and is in line with the trend towards the voluntary harmonisation of procedural solutions in European countries.

It seems that the incorporation of mediation into administrative proceedings in Poland was mainly inspired by the form of an administrative agreement[12] which functions in German[13] law and is classified as a public-law contract (*öffentlich-rechtlicher Vertrag*) that was introduced under the provisions of the Federal Act on Administrative Proceedings of 25 May 1976 (which entered into force on 1

8 M. Cherka, Doskonalenie procedur administracyjnych jako wyzwanie dla administracji, (in:) J. Osiński (ed.), Administracja publiczna na progu XXI wieku. Wyzwania i oczekiwania, Warszawa 2011, p. 321.

9 Recommendation Rec (2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties.

10 J. Wegner-Kowalska, Mediacja w sprawach administracyjnych – pytania i wątpliwości, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2017, no. 6, p. 41.

11 The ADR formulas are widespread and highly popularized not only in common law states (e.g. the United Kingdom, Australia, U.S.A.) but also in Asian countries (e.g. Hong Kong, Japan) or in European states with an established culture of administration (e.g. the Netherlands, France); K.J. de Graaf, A.T. Marseille, H.D. Tolsma, Mediation in Administrative Proceedings: A Comparative Perspective, (in:) D.C. Dragos, B. Neamtu (eds.), Alternative Dispute Resolution in European Administrative Law, Springer-Verlag, Berlin-Heidelberg 2014, pp. 591-592. By way of example in Asian praxis creation of bilateral communication plate as well as pursuit of political centers to create a friendly investment environment resulted in development of forms of administrative process that are more flexible including ADR formulas; S. Kakiuchi, Regulating Mediation in Japan: Latest Development and Its Background, (in:) C. Esplugues, L. Marquis (eds.), New Developments in Civil and Commercial Mediation: Global Comparative Perspectives, Springer Verlag, Switzerland 2015, pp. 371-372.

12 B. Dolnicki, Umowa publicznoprawna w prawie niemieckim, "Państwo i Prawo" 2001, z. 3, pp. 81 ff.

13 It is symptomatic that besides the fact that the administrative agreement (settlement) seems to be characteristic factor of German's public law and administrative praxis the other ADR formulas and informal redress are slightly popular; U. Stelkens, Administrative Appeals in Germany, (in:) D.C. Dragon, B. Neamtu (eds.), Alternative Dispute…, *op. cit.,* pp. 33, 45-48.

January 1977)[14]. This act distinguishes two main types of agreements: subordination and coordination[15]. The former is concluded between entities whose relation is characterised by the state of subordination of one to another while the latter occurs in situations of equivalence[16]. These agreements include, among other things, a settlement (*Vergleichsvertrag*) – § 55 VwVfg, which is used to remove, by way of bilateral concessions, the uncertainty concerning an actual state relevant from the viewpoint of the application of the law[17]. By way of example, these concessions may consist in the form of a commitment to reduce the burden on an individual, refrain from issuing an administrative act with a specified content, revoke an act already issued, withdraw a complaint or provide benefits[18]. The scope of application in certain types of administrative matters is very wide, and contract forms are even used in some cases[19].

Apart from the benefits related to making the procedure more flexible, the implementation of foreign procedural institutions into the CAP also brought with it some negative phenomena. The evaluation of the idea of "Europeanisation" implemented in this way and the analysis of the related risks and opportunities require taking into account a number of nationally located factors. Other countries' experiences show that the formula of 'copying' ('borrowing') procedural solutions does not always bring the desired effects[20]. Therefore, the authors of this paper have attempted to present reasons for the implementation of mediation into the administrative proceedings. Our analysis also includes comments on the prospects of the application of mediation by public administration authorities.

2. The essence of administrative mediation

For the purposes of the paper, it was assumed that administrative mediation introduced into the CAP by the 'April's Amendment'[21] (Article 13, Articles 96a-96n of the CAP) is an optional stage of advanced investigation proceedings allowing to

14 Verwaltungsverfahrensgesetz vom 25. Mai 1976 in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 20 des Gesetzes vom 18. Juli 2016 (BGBl. I S. 1679) geändert worden ist (hereinafter: VwVfg).

15 M.P. Singh, German Administrative Law, Springer-Verlag, Berlin-Heidelberg 1985, pp. 50-51.

16 H. Maurer, Ogólne prawo administracyjne, K. Nowacki (ed.), Wrocław 2003, p. 196.

17 Z. Cieślik, Umowa administracyjna w państwie prawa, Kraków 2004, p. 45.

18 *Ibidem*, pp. 54–58.

19 H. Maurer, Ogólne…, *op. cit.*, p. 204.

20 P. Bystranowski, Ekonomiczna analiza prawa wobec problem optymalnej precyzji dyrektyw prawnych, "Państwo i Prawo" 2016, z. 5, pp. 31-32.

21 The Act of 7 April 2017 amending the act – Code of Administrative Procedure and some other acts (Journal of Laws 2017, item 935).

conclude it – alternatively – in the form of a settlement, a decision without triggering their verification or withdrawal of the application by a party or a combination of these forms of procedural activities, assuming the possibility of dividing the case. In model terms, the mediation introduced into the CAP makes it possible to adopt two variants of completing the proceedings. In the first one, mediation participants establish mutual arrangements under the guidance of a mediator, whose adoption renders unnecessary the issuance of an administrative decision. In the other variant, which incorporates the obligation to issue an administrative decision, the dialogue between the party and the authority only delays the adjudication; mediation will constitute merely an instrument for improving communication and clarifying the legal or factual controversies revealed in the course of the proceedings (dialogue-oriented mediation)[22]. The aim of the latter formula is solely to provide greater acceptability of an administrative act and lower the prospect of triggering internal or external redress by the party.

3. Legal and non-legal justifications for the introduction of mediation within administrative procedure in Poland

The authors of this paper limit themselves to the reconstruction of typologies of non-legal and legal justifications, supplemented by an analysis of the existing or planned (proposed) normative solutions, in order to determine the positive and negative effects of administrative mediation.

Firstly, administrative mediation can foster the transformation[23] of relations between the administration and the individual. It should be noted that in the 21st century, individuals in relation to the actions taken by the state apparatus ceases to be merely a "supplicant", "subordinate" or "party" and their subjectivity is strengthened by expressions such as "partner" or "client"[24]. Establishing a dialogue, which takes the form of a bargain, strengthens the sense of a relatively equal positioning of both actors taking part in the proceedings. This is particularly important for administrative proceedings concerning the issues of social assistance and welfare benefits. As

22 J.G. Firlus, K. Klonowski, Mediacja w ogólnym postepowaniu administracyjnym, "Casus" 2017, no. 3 (87) pp. 16-17.

23 About the so-called 'transformative mediation' H. Zillessen, The transformative effect of mediation in the public area, "ADR Bulletin" 2004, no. 5, vol. 7, p. 79 ff. Some scholars strongly believed that mediation as a procedural tool is capable of transforming the structure and attitude of public authorities; A. Szpor, Mediacja…, *op. cit.,* p. 400.

24 Proper example of new attitude and approach towards individuals might be seen in wording of Hungarian Code of Administrative Procedure (Act CL of 2016 on General Public Administrative Procedure); Z. Kmieciak, Węgierska ustawa o ogólnych zasadach postępowania w sprawach administracyjnych – koegzystencja dwóch wizji porządku prawnego, "Państwo i Prawo" 2017, z. 4, p. 18 ff.

shown by the conducted studies, the acceptability of an administrative decision by an individual is directly proportional to the experience gained from mutual communication on the official-citizen line[25]. Undoubtedly, mediation strengthens and organises the dialogue. Further, it strengthens the individual's feeling that their case has a unique and "individual"[26] character and the public administration has given it due attention.

Secondly, ADR formulas in proceedings before public administration bodies may facilitate conflict management in policy-making proceedings especially at local and regional level[27]. The decisions whose scope covers a larger group of stakeholders require a balanced approach and an active attitude on the part of the public administration. At the threshold of the implementation of the model of third-generation administrative procedures[28], mediation and the formula of community negotiations seem to be their inherent components. The need to adopt proper solutions enhancing dialog between stakeholders in local communities[29] is also recognised by the legislator. In the discussed context, attention should be drawn to the proposed solution in the draft of the Architectural and Construction Code, i.e. planning mediation[30].

Thirdly, mediation can fulfil an educational function and enhance the confidence of an individual in the public authorities' actions; both factors are not of separating character. In view of the above-mentioned tendency to abuse procedural rights by parties, officials' pro-individual attitude and openness to dialogue may reduce the willingness to question administrative decisions in the long run. This is how the reductive function of mediation is implemented. Of significance is also the question of the voluntary performance of obligations by third parties. While the primary importance should be attached in this respect to the justification of the administrative

25 D. Cowan, S. Halliday, The Appel of Internal Review. Law, Administrative Justice and the (non-) emergence of disputes, Hart 2003, pp. 124-125.

26 Undoubtedly every administrative case has in model approach its individual character; yet in order to define the role of mediation in public law one have to distinguish normative description (e.g. Article 1 CAP) of administrative case and the way in which proceedings are conducted. This is to say in administrative praxis, especially when authorities are adjudicating in repeatedly manner, the case and proceedings are lacking *de facto* individual character. In such cases mediation seems to be optimal tool for restoration an individual approach (attitude) of public authorities in each and every case despite its repetitive characteristics esp. in social and welfare benefits cases.

27 S.B. Goldberg, F.E.A. Sander, N.H. Rogers, S.R. Cole, Dispute Resolution. Negotiation, Mediation and Other Processes, Austin-Boston-Chicago-New York-The Netherlands 2007, pp. 513 ff.

28 J. Barnes, Towards A Third Generation of Administrative Procedures, p. 10 https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_barnes_towards.pdf (access: 5.11.2017).

29 F. Cardona, The Delegation Of Administrative Decision-Making Powers: A Tool For Better Public Performance https://pdfs.semanticscholar.org/a77f/0f71b61afe9c8947f255206eb13b62fab572.pdf (access: 5.11.2017).

30 Section IX of Code; http://www.konsultacje.gov.pl/node/4354 (access: 5.11.2017).

decision and the conduct of the proceedings in a manner that gives the individual confidence, the bilateral dialogue during the proceedings seems to make it possible to present the motives of a given decision in a manner that is more transparent to the individual.

The perspective of the realisation of the socially desirable effects of the implementation of mediation in the CAP depends mainly on the procedural tools established in the law and put at the disposal of both the authorities and the parties in the proceedings. Undoubtedly, the statutory framework of administrative mediation is a 'measure' of its practical effectiveness; yet solutions adopted in the CAP may reduce the tendency of those involved in the proceedings to resort to the available instrument of conflict resolution and elimination of misunderstandings.

However, the procedural solutions adopted in April 2017 to the CAP do not give cause for optimism. Despite the unquestionable added value of ADR in public law, the normative environment of the institution in question will lead to the intensification of negative attitudes in administrative proceedings. As an example, it is worth pointing out that mediation may constitute an important element of procedural tactics of both the authority and the parties aimed at the prolonged conduct of the proceedings, without the risk of the consequences provided for in Article 37 of the CAP[31]. As a rule, mediation is only a stage of proceedings preceding the authoritative activity of public administration. When making reciprocal concessions, the participants of the mediation proceedings do not have a guarantee of their future realisation. On the one hand, paradoxically, contrary to Article 96n (1) of the CAP, in the absence of sanctions for 'disloyal behaviour', the public authorities are not obliged to issue the so-called administrative decision corresponding to the content of the arrangements recorded in the post-mediation protocol[32]. On the other hand, another participant (namely party) of the proceedings may seemingly show an interest in the ADR formula only in order to prolong the duration of the proceedings. For example, a party may communicate to the authority an intention to waive its right of appeal[33] in the course of mediation on condition that the body makes a decision with a content determined during the mediation proceedings. Although recorded in the contents of the protocol, the party's statement does not have any independent procedural effect. Moreover, pursuant to Article 127a of the CAP, a party may make use of its procedural right at the earliest on the date of publication or service of the administrative decision.

31 Under Article 37 of the CAP special remedy against administrative inaction is prescribed (*ponaglenie*).

32 J.G. Firlus, K. Klonowski, Mediacja…, *op. cit*., p. 21.

33 As the authors of a draft amendment stated in its rationales; http://orka.sejm.gov.pl/Druki8ka.nsf/0/F3388D1AB00B1313C125809D004C3C8E/%24File/1183.pdf, p. 41 (access: 5.11.2017).

The above-described case further highlights the shortcomings of the adopted solution. Firstly, the legislator has not correlated the legal form of the conclusion of the proceedings with the subject matter of the mediation proceedings on the normative level. The original concept of supplementing the CAP with the ADR formula was based on the implementation of an administrative agreement (contract) in addition to the mediation proceedings[34]. Both procedural institutions were thus of complementary nature. The above-mentioned relation is seen by the authors of the draft amendment of the new Tax Ordinance Act, as expressed in the contents of Article 375 (1)[35]. Secondly, the institution of mediation will not favour expediting proceedings in each and every case. The fiasco of bilateral dialogue may paradoxically lead to an intensification of the actual conflict, instead of mitigation, as a result of which the perspective of challenging the decision and obstruction at the stage of enforcement proceedings seem very real.

Despite a number of practical imperfections of the adopted solution, attention should be paid to those elements of the legal nature of mediation that underline its usefulness for judicial administrative proceedings. One should emphasise the attribute of coherence of mediation with some of the assumptions of the proceedings model set out in its principles. As has already been pointed out, this is certainly true of the principle of speedy proceedings, but it is much more important that it be compatible with the rule of law, the substantive truth and the active participation of a party (right to be heard) in proceedings and the right to information. Generally speaking, it can be stated that administrative mediation fits well into the general model of administrative proceedings and allows for its effective implementation. At the same time, these features fit into the model of a "negotiated" administration in a legal state.

From the viewpoint of the realisation of the legality criteria, an important element is the solution contained in Article 96 (3) of the CAP which stipulates the purpose of mediation to clarify and consider the factual and legal circumstances of the case and make arrangements for its settlement, emphasising that they must be within the limits of the applicable law, including by issuing a decision or reaching a settlement. Thus, mediation may not be considered as an attempt to compromise between the rule of law and flexibility of administrative actions. This indicated directive defining the manner in which mediation be conducted is consistent with the primacy of the rule of law and the substantive truth over the quickness of proceedings, as coded in Chapter II, Section I of the CAP. A failure to comply with this requirement will have important implications for the effectiveness of mediation.

34 J. Wegner-Kowalska, Mediacja…, *op. cit.,* pp. 43-44.

35 The draft bill of 6 October 2017 – Tax Ordinance Act; http://www.mf.gov.pl/ministerstwo-finansow/dzialalnosc/ciala-kolegialne/komisja-kodyfikacyjna-ogolnego-prawa-podatkowego/prace-komisji (access 5.11.2017).

As the party hosting the proceedings and the spokesman of the public interest, the public administration body is obliged to supervise the course of the mediation proceedings and verify its results. The lawfulness of the administrative actions cannot give in to the needs of the moment. Therefore, the arrangements of the participants of mediation made in violation of the law can result in the application of sanctions in redress proceedings both judicial (external) and administrative, or possibly of triggering extraordinary (*ex officio*) administrative proceedings, i.e. annulment[36] or revocation of final administrative decision[37]. This is because the legislator does not give an administrative decision negotiated in mediation any attribute of irreproachability or "exceptional binding force". The jurisprudence of the countries with developed ADR formulas rightly states that negotiated administrative acts "(...) shall not be accorded any greater deference by court (...)"[38]. Securing the lawfulness of the proceedings in which administrative mediation has taken place is also ensured by the prosecutor's independent entitlement to participate in court proceedings. Even if the party waived its right of appeal, the prosecutor's remedies are available both in internal and external review[39].

The vital rationale for the introduction of mediation into administrative praxis is to provide the authorities with additional possibilities for realising the principle of the substantive truth. This is justified in any event, even despite the assumption that mediation is launched at an advanced stage of the investigation proceedings. Mediation can, thus, be used when the authority's capacity to conduct investigation proceedings has been exhausted, but all the circumstances relevant from the viewpoint of the hypothesis of the norm of the substantive law have not been established yet. Since factual background of the case must be established it is vital to foster the parties' engagement in proceeding. Lacking information and knowledge may be then gathered by authorities during administrative mediation in order to fulfil the requirements arising from the abovementioned principle. This effect is realised in the first and second variant of mediation (see item 2). At the same time, it creates grounds for the resolution of the dispute over the facts without limiting the duties of the body to investigate the substantive truth in the formula of the *ex officio,* inquisitorial proceedings. If a mediator is established and the authority enters the mediation as a participant, it informally transfers some of the competence to conduct the proceedings to the mediator only within the scope of investigation proceedings[40], and the mediator is also bound by the principles of the proceedings arising from the

36 Article 156 CAP.

37 Article 145 ff. CAP.

38 S.B. Goldberg, F.E.A. Sander, N.H. Rogers, S.R. Cole, Dispute…, *op. cit.,* p. 526. For further reading W. Funk, Bargain toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest, "Duke Law Journal" 1997, vol. 46, no. 6.

39 A. Golęba, (in:) T. Woś (ed.), Postępowanie administracyjne, Warszawa 2017, p. 473.

40 J.G. Firlus, K. Klonowski, Mediacja, *op. cit.,* p. 22.

principles of substantive truth, officiality and others. On this level, one can consider the adoption of an assumption that the mediator has some autonomy in relation to the decision-maker for the realisation of the substantive truth. This remark does not apply to procedural institutions that define the course of the whole proceeding which are exclusively assigned to the authority conducting the 'main' proceedings.

At the same time, the legislator assumed that the participants of mediation are obliged to keep secret all the facts they became aware of in connection with the mediation process unless they decide otherwise (Article 96j (2) of the CAP). Thus, in the absence of their consent, the obligation to realise the substantive truth in the scope covered by the above-mentioned factor which can be described as the confidentiality of mediation, is also to be excluded in relation to the body after the failure of mediation. It is important to recognise that this safeguard is essential to create the conditions for conducting mediation, regardless how much in conflict with the principle of the substantive truth it is. Without it, the parties were not interested in participating in mediation, providing the body or mediator with the knowledge of the relevant circumstances of the case since it could be used against them. In this way, the safeguard referred to as the 'confidentiality of mediation' is also consistent with the principle of individual's trust in the public administration as a whole.

The principle of active participation of the parties (right to be heard) in the proceedings, contained in Article 10 of the CAP, sets out the duties of the body in the form of notifying the parties, which are not participants of mediation within the meaning of Article 96a (4) of the CAP, of the date and place of the mediation meeting and its subject matter. On the other hand, the party already involved in mediation should be given an opportunity to participate freely and actively. This increases the activity of individuals. The above-mentioned safeguard contained in Article 96j (2) of the CAP should also intensify this phenomenon.

4. Conclusions

Attempting to determine the nature of mediation based on its comparison with the standard ADR model, one can classify it as a proper alternative method of conducting administrative proceedings. From the viewpoint of the relation to the proceedings, it is an internal alternative that is primarily of a reductive nature.

Implementation of mediation to the Polish CAP by lawmakers in 2017, seems to be the first step for the further application of the participatory formulas within public law. What is more the reorientation of the legislator's approach on the admissibility and advisability of the implementation of mediation and the related consensual legal forms of the functioning of public administration seems to take the form of a certain trend. This is exemplified by the above-mentioned proposals for the implementation of the ADR methods in tax proceedings and – to a certain extent – in the investment

and construction process. One may even consider a hypothesis whether, over the years, new, specialised forms of mediation would be adopted into the legal system. A specific 'decodification' would make to greater extent adaptable certain features of given administrative cases with basic elements of so-called administrative mediation. As it seems, this legislative approach is necessary, taking various functions of mediation formulas. For example, the principle of confidentiality of mediation applicable to administrative or tax proceedings could not be applied in relation to the negotiated formulas of local policy-making.

Comparing the above-mentioned rationales, one can generally conclude that the administrative mediation is to be crucial element of administrative praxis because of both: the procedural position of an individual but also from the viewpoint of the duties of the authority in the proceedings; yet, clearly, it should have a positive effect only in certain categories of administrative matters. It seems that ADR formulas can play a significant role in the cases where the legislator uses some form of discretion in administrative law. One can also ask why the legislator has only now decided to introduce mediation into the legal system despite the fact that it had been functioning for years in foreign legal systems? It seems to have been clear for some time now that the mere effect of expediting proceedings by imposing disciplinary measures can only apply to cases where the adjudication and decision-making process depends solely on the activity of the authority or its staff members. In a situation where the outcome of the proceedings is dependent on the individual's involvement and active participation, these mechanisms did not have to work. In this case, it was necessary to create a framework for a new type of dialogue between the decision-makers and the individual with a system of "incentives" and procedural safeguards. As has been shown, the praxis of foreign legal systems has been used for this purpose. However, is the Polish administration prepared to use this form of proceedings? In the authors view, the key obstacle may be the lack of trust[41] between the authorities and the parties involved in the proceedings and the lack or incompleteness of the knowledge of the institution of mediation[42].

The problem of mediation can also be seen in the context of the stability of the legal order. There seems to be a relationship between the discussed institution and the indicated value. The less stable the legal system, the more difficult it is to implement the basic factors of mediation formula. Being aware of the instability of the legal system, both the individuals and the administrative decision-makers will not be interested in conducting mediation. The uncertainty of the body in relation to

41 J. Wegner-Kowalska, Mediacja…, *op. cit.,* p. 41.

42 Despite certain procedural obligations which flown from Article 13 A.P.C. By the wording of mentioned provision authorities are obliged to inform parties about possibilities of and benefits from the administrative mediation.

the legal framework and the individual's lack of knowledge of the rules that provide the framework for mediation will hinder its application.

It seems that mediation will not fulfil the hopes associated with it, among other things, because of the lack of coherence of the attributed "flexibility" to authoritativeness, inquisitiveness and extreme legalism[43] imposed in the general principles of the proceedings which determine the method of actualisation of norms of substantive administrative law in administrative proceedings, regardless of the fact that it is incorporated into the formula of the principles of procedure.

In order to create better conditions for the use of this form of proceedings, it is necessary to make a change in the basic assumptions of the administrative process system which involves the introduction, to a greater extent, of the indefiniteness and discretion in competence norms, the limitation of the burden of proof imposed on the authorities with simultaneous shifting it to the parties. One could also consider the assumption – in reference to the solutions applicable in the Federal Republic of Germany – that ADR formulas should be conducted only within proceedings composed of two actors: one party of the proceedings and one decision-maker ('one-on-one scheme'). Furthermore, the analysis of foreign praxis provides[44] the basis for the conclusion that it is the administrative agreement, which functions in Germany, that is the solution that could best serve the purposes of administrative mediation in administrative proceedings.

BIBLIOGRAPHY

Barnes J., Reform and Innovation in Administrative Procedure, (in:) Barnes J. (ed.), Transforming Administrative Procedure, Sevilla 2015.

Barnes J., Towards A Third Generation of Administrative Procedures, https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_barnes_towards.pdf (access 5.11.2017).

Bystranowski P., Ekonomiczna analiza prawa wobec problem optymalnej precyzji dyrektyw prawnych, "Państwo i Prawo" 2016, z. 5.

43 So-called *hyperpositivsm* seems to be differential criterion for post-socialist legal culture including Polish administrative praxis; R. Mańko, Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome, "Pólemos – Journal of Law, Literature and Culture" 2013, vol. 7, no 2.

44 The ADR formulas in public law are becoming immanent element of public administration day-to-day praxis. As evidenced in literature both in countries with well develop administrative culture (e.g. Germany, the United Kingdom), post-socialist states (e.g. Hungary, Poland) or western Balkan states (e.g. Slovenia) proper tools for greater participation and bipartisan communication are included within administrative procedure scheme; K.J. de Graaf, A.T. Marseille, H.D. Tolsma, Mediation…, *op. cit.,* p. 592; P. Kovač, Mediation and Settlement in Administrative Matters in Slovenia, "Hrvatska Javna Uprava" 2010, no. 10, p. 744 ff.

Cardona F., The Delegation Of Administrative Decision-Making Powers: A Tool For Better Public Performance, https://pdfs.semanticscholar.org/a77f/0f71b61afe9c8947f255206eb13b62fab572.pdf (access 5.11.2017).

Cherka M., Doskonalenie procedur administracyjnych jako wyzwanie dla administracji, (in:) Osiński J. (ed.), Administracja publiczna na progu XXI wieku. Wyzwania i oczekiwania, Warszawa 2011.

Chróścielewski W., Czy potrzebny jest nowy kodeks postępowania administracyjnego?, (in:) Zacharko L., Matan A., Gregorczyk D., Administracja publiczna – aktualne wyzwania, Katowice 2015.

Cowan D., Halliday S., The Appel of Internal Review. Law, Administrative Justice and the (non-) emergence of disputes, Hart 2003.

De Graaf K.J., Marseille A.T., Tolsma H.D., Mediation in Administrative Proceedings: A Comparative Perspective, (in:) Dragos D.C., Neamtu B. (eds.), Alternative Dispute Resolution in European Administrative Law, Springer-Verlag, Berlin-Heidelberg 2014.

Dolnicki B., Umowa publicznoprawna w prawie niemieckim, "Państwo i Prawo" 2001, z. 3.

Firlus J.G., Klonowski K., Mediacja w ogólnym postepowaniu administracyjnym, "Casus" 2017, no. 3 (87).

Funk W., Bargain toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest, "Duke Law Journal" 1997, vol. 46, no. 6.

Goldberg S.B., Sander F.E.A., Rogers N.H., Cole S.R., Dispute Resolution. Negotiation, Mediation and Other Processes, Austin-Boston-Chicago-New York-The Netherlands 2007.

Kakiuchi S., Regulating Mediation in Japan: Latest Development and Its Background, (in:) Esplugues C., Marquis L. (eds.), New Developments in Civil and Commercial Mediation: Global Comparative Perspectives, Springer Verlag, Switzerland 2015.

Kmieciak Z., Dylematy reformy prawa o postępowaniu administracyjnym, "Państwo i Prawo" 2016, z. 1.

Kmieciak Z., Węgierska ustawa o ogólnych zasadach postępowania w sprawach administracyjnych – koegzystencja dwóch wizji porządku prawnego, "Państwo i Prawo" 2017, z. 4.

Kovač P., Mediation and Settlement in Administrative Matters in Slovenia, "Hrvatska Javna Uprava" 2010, no. 10.

Lambert K.A., Fundamentals of Alternative Dispute Resolution, "Franchise Law Journal" 1992, vol. 11.

Maurer H., Ogólne prawo administracyjne, Nowacki K. (ed.), Wrocław 2003.

Parkin J., Adaptable due process, "University of Pennsylvania Law Review" 2012, vol. 160, no. 5.

Singh M.P., German Administrative Law, Springer-Verlag, Berlin-Heidelberg 1985.

Stelkens U., Administrative Appeals in Germany, (in:) D.C. Dragon, B. Neamtu (eds.), Alternative Dispute Resolution in European Administrative Law, Springer-Verlag, Berlin-Heidelberg 2014.

Szpor A., Mediacja w prawie administracyjnym, (in:) Gmurzyńska E., Morek R. (eds.), Mediacje. Teoria i praktyka, Warszawa 2014.

Szwast M., Szwed M., Nadużycie prawa do sądu w postępowaniu sądowoadministracyjnym, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2016, no. 6.

Wegner-Kowalska J., Koncepcja włączenia instytucji mediacji do kodeksu postępowania administracyjnego, "Przegląd Prawa Publicznego" 2016, no. 11.

Wegner-Kowalska J., Mediacja w sprawach administracyjnych – pytania i wątpliwości, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2017, no. 6.

Woś T. (ed.), Postępowanie administracyjne, Warszawa 2017.

Zillessen H., The transformative effect of mediation in the public area, "ADR Bulletin" 2004, no. 5, vol. 7.

Białostockie Studia Prawnicze
2018 vol. 23 nr 2

DOI: 10.15290/bsp.2018.23.02.09

Radosław Mędrzycki
Cardinal Wyszyński University in Warsaw
r.medrzycki@uksw.edu.pl
ORCID ID: https://orcid.org/0000-0002-9407-4881

Mariusz Szyrski
Cardinal Wyszyński University in Warsaw
m.szyrski@uksw.edu.pl
ORCID ID: https://orcid.org/0000-0001-8536-4054

Energy Poverty as a European Union and Polish Legal Issue

Abstract: The aim of this paper is to answer the question of whether energy poverty prevention is a type of "patched" style of Europeanisation. The descriptive section accompanying the presented research identifies the basic legal instruments for energy poverty prevention found within European Union law and local (Polish) law. The article will present the most important Polish and European law acts with particular reference to Poland's situation.
Keywords: energy poverty, energy law

1. Introduction

The Europeanisation of domestic law and administration in EU Member States is a widely observed fact. However, the extent of the process varies; it heavily depends on a country's level of integration[1] and the sphere of influence EU regulations have on local legislation. European Union law, as omnipotent in many areas as it may be, does not have full impact on every area of local state regulations. This leads to the observance of specific "patches", which are governed by EU law but only to a limited extent, or, which are not covered by EU regulations at all. From a scientific point of

1 I. Lipowicz, Europeizacja administracji publicznej, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2008, no. 1, p. 6.

view, the current situation is indeed intriguing, as it is characterised by a network of interconnected regulations of varying levels and styles of Europeanisation.

The aim of this paper is to answer the question of whether or not energy poverty prevention is a "patched" style of Europeanisation. The descriptive section accompanying the presented research identifies the basic legal instruments for energy poverty prevention found within European Union law and local (Polish) law.

2. Energy poverty as one of the issues of modern societies

Poverty, as convenient as it is for any research, is in fact quite an undefinable and untranslatable term. Nevertheless, poverty is a name given to a relation between one reality to another, even a hypothetical one, specified by basic needs. The term, therefore, may be understood as relational. It is a mindfully reached conclusion expressing the relation of various realities which differ by exhibiting certain need deficits resulting from different states: assumed and existing. Anything else is conventional and stems from initial assumptions.

It may, for instance, be assumed that the reference point for the comparison of realities would be a unit, or a group of units, and the analysis of their living conditions using chosen criteria. The process may be taken as far as to the formation of arguments regarding inequality and inconsistencies created within societies by the investigated phenomenon, making it a significant element (an issue) for social policy[2], which would make it (or describe it, to be precise) as something undesirable. A slightly different perspective would lead to the conclusion that poverty is a virtue which should be desired and existing instances of it cultivated. Poverty belongs to the sphere of culture (which makes it variable) yet may phylogenetically be part of natural human needs (which makes it constant). This inherent duality makes a simple definition of the term virtually impossible to reach.

Considering the living conditions of selected groups of individuals, it has become a convention to distinguish economic poverty as a separate category which has a fundamental significance for national social policy. It can be further divided, thus creating various types of poverty. The focus on the income level (income criteria) entitling one to social assistance marks the so-called statutory poverty (ubóstwo ustawowe in Polish)[3]. The income limit in Poland is established every three years by the Rada Dialogu Społecznego (Social Dialogue Council) or by the Rada Ministrów (Council of Ministers)[4].

2 GUS, Ubóstwo w Polsce w latach 2013-2014, Warszawa 2015, p. 7.
3 GUS, Ubóstwo w Polsce w latach 2013-2014, Warszawa 2015, p. 7.
4 Article 9 Act of 12 March 2004 – Social Welfare Act, Journal of Laws of 2016, item 930.

The literature points to two approaches to poverty: absolute and relative. The former describes the existing reality through the fulfillment of basic human needs. The latter compares it to the situation of other social groups[5].

Assuming that poverty is a kind of poorness or insufficient satisfaction of needs, it must be noted that one human need is not merely the provision of shelter, but accommodation meeting certain heat criteria, both for heating and cooling[6]. Therefore, such an issue may concern people living in places varying in terms of geography and climate within the whole of the European Union, who might reside in over or underheated lodgings. Energy poverty may be treated as part (a type) of poverty, or as an independent category[7].

As has been found by the European Economic and Social Committee, energy poverty kills both physically and socially[8]. EUROSTAT specifies that "Living in a cold home has an impact on illness, with those living in lower temperatures reporting an increased incidence of cardiovascular and respiratory illnesses"[9]. Living in harsh energy conditions is such a heavy burden, that it may even lead to social exclusion. Energy poverty, as an element of social exclusion and a separate issue, is a challenge both for the European Union and for the country-specific administration and governance of individual Member States.

The extent of energy poverty within the EU cannot be precisely estimated, mostly due to the differences in defining energy poverty by individual Member States[10], although it has been announced in 2011 that the number of people suffering from it may be estimated to have reached 50 million. The affected groups are mostly those of small income, "such as the over-65s, single-parent families, the unemployed and those in receipt of social security benefits"[11].

Therefore, those suffering from energy poverty do not form a uniform group, although it may appear that the main determinant here is the lack of funds necessary to fulfil the energy needs on an acceptable level, which is a common issue among certain social groups. For instance, Polish seniors are not included among the groups

5 A. Lach, Świat społeczny bezdomnych i jego legitymizacje, Katowice 2007, pp. 22-24.

6 Opinion of the European Economic and Social Committee on 'Energy poverty in the context of liberalisation and the economic crisis' (exploratory opinion), 2011/C 44/09.

7 M. Lis, K. Sałach, K. Święcicka, Rozmaitość przyczyn i przejawów ubóstwa energetycznego, Warszawa 2016, p. 5.

8 Opinion of the European Economic and Social Committee on "For coordinated European measures to prevent and combat energy poverty" (own-initiative opinion), 2013/C, 341/05.

9 EUROSTAT, Manual for statistics on energy consumption in households, Luxembourg 2013, p. 173.

10 EUROSTAT, Manual for statistics on energy consumption in households, Luxembourg 2013, p. 173.

11 Opinion of the European Economic and Social Committee on 'Energy poverty in the context of liberalisation and the economic crisis' (exploratory opinion), 2011/C 44/09.

of the smallest income[12], however, in the face of all expenses related to their advanced age, especially including physiological and health issues[13], they become susceptible to energy poverty.

3. Energy poverty in EU regulations and strategy documents

The problem of energy poverty is the subject of various EU documents, both normative and non-normative ones. It must be noted that the attention of EU institutions to the issue of poverty, including energy poverty, has significantly increased in recent years.

Chronologically speaking, the issue in question has already been mentioned in directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC[14], and directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC[15]. Directive 2009/72/EC directly states that "energy poverty is a growing problem in the Community and Member States which are affected and which have not yet done so should therefore develop national action plans or other appropriate frameworks to tackle energy poverty, aiming at decreasing the number of people suffering such situation." It also points to the fact that Member States could form an integrated approach as part of their social policies, and the implemented tools could also include an improvement of social policies and housing energy efficiency. Further regulations concern the protection of final recipients, especially those classified as vulnerable customers: "Member States shall take appropriate measures to protect final customers, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers, and also that – formulating national energy action plans, providing benefits in social security systems to ensure the necessary electricity supply to vulnerable customers, or providing for support for energy efficiency improvements, to address energy poverty where identified, including in the broader context of poverty." The EU regulations provide rules (still relatively loose) which should be followed in the case of the so-called vulnerable customers.

12 M. Kubiak, Ubóstwo czy wykluczenie społeczne ludzi starszych w Polsce? (in:) Oblicza biedy we współczesnej Polsce, M. Popow, P. Kowzan, M. Zielińska, M. Prusinowska, M. Chruściel, Gdańsk 2011, p. 161.

13 G. Barbacka-Surowiak, J. Surowiak, Rytmika dobowa – jej rola w wieku podeszłym, (in:) Fizjologia starzenia się, A. Marchewka, Z.Dąbrowski, J. A. Żołądź, Warszawa 2013, p. 42.

14 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, L 211/55.

15 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, L 211/94.

Directive 2010/31/EU[16] on the energy performance of buildings contains a statement which says that "existing and proposed measures listed by Member States may include, in particular, measures that aim to reduce existing legal and market barriers and encourage investments and/or other activities to increase the energy efficiency of new and existing buildings, thus potentially contributing to reducing energy poverty." The measures concern energy efficiency, which is the subject of directive 2012/27/EU[17]. Consequently, the mechanisms concerning the improvement of energy efficiency become a significant challenge in the area of energy poverty as well.

After 2011, the non-normative strategy documents contained a number of opinions directly concerning energy poverty. One of the most significant is the "Energy Roadmap 2050"[18]. In its introductory section it is stated that a "well-functioning internal market and energy efficiency measures are particularly important to consumers."[19] Later in the text it was noted that, "vulnerable consumers are best protected from energy poverty through a full implementation by Member States of the existing EU energy legislation and use of innovative energy efficiency solutions."[20] What is interesting is the fact that for the first time it has been noticed that energy poverty is one of the sources of poverty in Europe, and that the social aspects of energy pricing should be reflected in the energy policy of Member States. The Energy Roadmap describes the issue of energy poverty as one of the most fundamental forms of poverty in Europe. It also mentions that all Member States are obliged to develop proper pricing policies regarding energy and fuels, in order to improve their citizens' standards of living and household economic situation.

The Opinion of the European Economic and Social Committee on "Energy poverty in the context of liberalisation and the economic crisis" (2010)[21], says that "combating energy poverty is a new social priority that needs to be tackled at all tiers of government and the EU should provide common guidelines to ensure that

16 Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, L 153/13.

17 Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, L 315/1.

18 Communication from The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy Roadmap 2050, Brussels, 15.12.2011 COM (2011) 885 final.

19 Communication from The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy Roadmap 2050, Brussels, 15.12.2011 COM (2011) 885 final.

20 Communication from The Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy Roadmap 2050, Brussels, 15.12.2011 COM (2011) 885 final.

21 Opinion of the European Economic and Social Committee on 'Energy poverty in the context of liberalisation and the economic crisis' (exploratory opinion), 2011/C 44/09, C 44/53.

all Member States adopt the same approach to eradicating this phenomenon."[22] It also proposes a new definition of energy poverty, which is a "difficulty or inability to ensure adequate heating in the dwelling and to have access to other essential energy services at a reasonable price."[23] It has been specified that it would mean an inability to keep a steady temperature of 21°C in the living room and 18°C in other rooms, and for energy access – the lack of access to reasonably priced energy services, such as lighting, transportation or electricity required for the use of the internet or other devices. The definition is still general, yet it directs the attention regarding energy poverty to heating and electricity. It has also been noticed that energy poverty concerns not only the energy sector, but also other spheres, including healthcare, consumption and housing. It was concluded that "EKES wishes to highlight the potential benefits in some cases for consumers - including the most vulnerable ones – of decentralised energy production, because this would: bring production closer to consumption centres, by installing smaller units, thus reducing energy loss through transport (for electricity, estimated at between 7 % and 10 %); promote the generation of renewable energies; boost technological development; have the potential to create jobs and complement centralised energy production."[24]

Energy poverty has also been mentioned in the 2012 Communication from the Commission "Making the internal energy market work"[25], which said that "Member States should emphasise the importance of energy efficiency improvements in addressing consumer vulnerability and energy poverty."[26] The issue has again been linked to energy efficiency.

The 2013 Opinion, "For coordinated European measures to prevent and combat energy poverty"[27], focused on the connection between energy poverty and energy security. The authors of the document state that "European energy security and solidarity commitment would drive forward a truly European policy for combating energy poverty and encouraging solidarity based on the recognition of a universal

22 Opinion of the European Economic and Social Committee on 'Energy poverty in the context of liberalisation and the economic crisis' (exploratory opinion), 2011/C 44/09, C 44/53.

23 Opinion of the European Economic and Social Committee on 'Energy poverty in the context of liberalisation and the economic crisis' (exploratory opinion), 2011/C 44/09, C 44/53.

24 Opinion of the European Economic and Social Committee on 'Energy poverty in the context of liberalisation and the economic crisis' (exploratory opinion), 2011/C 44/09, C 44/53.

25 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Making the internal energy market work, Brussels, 15.11.2012, COM (2012) 663 final.

26 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Making the internal energy market work, Brussels, 15.11.2012, COM (2012) 663 final. p. 11.

27 Opinion of the European Economic and Social Committee on 'For coordinated European measures to prevent and combat energy poverty' (own-initiative opinion), 2013/C 341/05, C 341/21.

right of access to energy, which the EESC considers to be an essential common good, so that everyone can lead a decent life."[28]

The Communication from The Commission "A New deal for energy consumers"[29] treated the discussed matter more seriously. It underlined the fact that fighting energy poverty is significant for the development of the EU and is directly linked to the issue of energy efficiency. It also stressed that reports prepared by the Member States are crucial for proper monitoring of the issue[30].

The proposed regulations regarding energy poverty found within the Winter Package, published at the end of November 2016 by the European Commission, are of significant importance as well. One of the documents from the Package, "Proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity"[31], says that "with rising levels of energy poverty as well as a lack of clarity on the most appropriate means of tackling consumer vulnerability and energy poverty, the new market design proposal requires Member States to duly measure and regularly monitor energy poverty based on principles defined at EU level" and "the revised energy efficiency and energy performance of building Directives provide for further measures to tackle energy poverty." Therefore, the EU presents a shift towards the well-being improvement for people who suffer from energy poverty. The winter package is estimated to be promulgated in 2018 and shall become the basis for the protection of people who might suffer from energy deficiency.

4. The Issue of energy poverty within the Polish legal system

The Polish legal system provides no definition of energy poverty. From the perspective of the discussed proposals regarding the legal regulation of the term, the

28 Opinion of the European Economic and Social Committee on 'For coordinated European measures to prevent and combat energy poverty' (own-initiative opinion), 2013/C 341/05, C 341/21.

29 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Delivering a New Deal for Energy Consumers, Brussels, 15.7.2015, COM (2015) 339 final.

30 Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Launching the public consultation process on a new energy market design, COM (2015) 340 final; Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Delivering a New Deal for Energy Consumers COM (2015) 339 final; Opinion of the European Economic and Social Committee on the Prosumer Energy and Prosumer Power Cooperatives: opportunities and challenges in the EU countries (own-initiative opinion).

31 Proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity Brussels, 23.2.2017, COM (2016) 861 final/2, 2016/0379(COD).

Polish legal system remains independent from the EU. It does not mean, however, that the issue is not recognized in Polish regulations, which, for instance, define the status of a vulnerable customer, and regulate revitalisation; not to mention the existence and tasks of various social law institutions.

In 2014, 4.2 million people (approximately 11.5% of all households) lived in underheated rooms (subjective measure). Energy poverty mostly affects poor citizens of Poland living in post-war tenement houses equipped with inefficient heating systems (old coal furnaces), poor people living in old detached houses with little or no thermal insulation, multigenerational families of farmers or labourers living in large houses, and the elderly living alone in large houses in the countryside[32]. It is therefore clear that the issue of energy poverty in Poland is directly connected with: low income, living alone, building condition, and the demographic challenges of an ageing population.

4.1. Energy allowance

The Energy Law Act of 10 April 1997[33] introduced two crucial terms: vulnerable energy consumer, and vulnerable gas fuel consumer. The former is a person who has been granted housing allowance, as described in art. 2 § 1 of the Act of 21 June 2001 – on housing allowances[34], who is a party to a comprehensive contract or an energy sales contract signed with an energy company, and who lives in the energy receiving lodging. The latter is a person who was granted the right to pay a lump sum for heating fuels, as described in art. 6 § 7, who is a party of a comprehensive contract or an energy sales contract signed with an energy company, and who lives in the fuel receiving lodging. Those definitions are therefore not autonomous and are dependent on other normative acts[35]. Their nature results from the criteria enumerated in the Act on housing allowances, which form the conditions certain groups are required to fulfil in order to be granted specific privileges. Polish courts have noticed that in order to be recognized as a vulnerable consumer, a person must fulfil all criteria enumerated in art. 3 pt. 13c and art. 5c of the 1997 Energy Law[36]. If at least one of the conditions is not met, a person cannot be recognized as a vulnerable recipient and cannot be granted an energy allowance[37].

32 M. Lis, A. Miazga, K. Sałach, A. Szpor, K. Święcicka, Policy Brief – Ubóstwo energetyczne w Polsce – diagnoza i rekomendacje, Warszawa 2016, p. 18.

33 Act of 10 April 1997 – Energy Law, Journal of Laws of 2017, item 220 with amendments.

34 Act of 21 June 2001 on housing allowances, Journal of Laws of 2017, item 180 with amendments.

35 M. Swora, Komentarz do art. 3 Prawa energetycznego, (in:) Prawo energetyczne. Tom 1. Komentarz do art. 1-11s, M. Swora, Z. Muras (eds.), Warszawa 2016, p. 319.

36 Judgment of Regional Administrative Court in Warsaw of 27 September 2016, II SA/Wa 291/16, Lex no. 2137458.

37 *Ibidem.*

The Polish regulations set specific conditions for granting the energy allowance (which, in principle, is thought to decrease the extent of energy poverty) which are based on the situation of a specific person and whether or not they are a vulnerable consumer. The annual energy allowance cannot exceed 30% of the ratio of energy use limit to average energy price for a private household. The limit per year is set at 900 kWh for a single-person household, 1250 kWh for a 2-4 persons household, and 1500 kWh for a household of at least 5 persons. These amounts result from the 13 April 2017 announcement of the Minister of Energy regarding the amount of energy allowance to be granted from 1 May 2017 to 30 April 2018. The allowance granted in this period amounted to: 11.22 PLN for a single-person household, 15.58 PLN for a 2-4 persons household, and 18.70 PLN for a household of at least 5 persons. Clearly, compared to the market prices of electricity in Poland, the allowance is too small, and the extent to which it could help those suffering from energy poverty is insignificant. It is, therefore, only an aid. Moreover, it does not include heating or hot water usage, only electricity consumption for lighting and nominal power.

It is also noticed in the doctrine, that the energy allowance is linked to the housing allowance, which in effect causes people who were not granted the latter to be unable to receive the former as well, as its level is lower than 2% of the lowest pension[38]. The issue is most prevalent among those people who reside in lodgings with no central heating and need to use electricity to heat water[39].

The energy allowance granting process belongs to the competence of local self-government. According to art. 5d of the Energy Law, the allowance is granted by a wójt, burmistrz (read as a mayor or alderman of a municipality) or the president of a city, who issues a decision after receiving an application duly completed and signed by the consumer claiming energy vulnerability. The administration, therefore, cannot begin the procedure on its own, but can only work after receiving an application[40]. On the other hand, according to art. 5f § 1, the payment of the allowance is a task of central government administration[41]. Communities receive subsidies from the national budget for the payment of energy allowances, and the budget strictly limits the funds provided for this specific cause.

It must then be concluded that the regulations have not been thoroughly thought through. The little-to-none worth of the allowance, high administrative costs, arduous procedure and little knowledge of its existence among consumers, results in the allowance not fulfilling its goal of protecting individual consumers from rising

38 G. Manjura-Niśkiewicz, Prawo energetyczne. Komentarz (in:) G. Manjura-Niśkiewicz, Dodatki mieszkaniowe. Komentarz. Lex Polonica 2016.

39 *Ibidem*.

40 See: Judgment of Regional Administrative Court in Cracow of 6 May 2016, III SA/Kr 1421/15, Lex no. 2050421.

41 See: M. Cyrankiewicz, Rusza dodatek energetyczny, "Rzeczpospolita. PCD" from 2.01.2014, thesis no. 3, 190523/3.

energy prices, and therefore does not reduce the rate of energy poverty at all[42]. It is, however, consistent with the proposed EU guidelines for dealing with energy poverty.

4.2. Energy poverty and energy efficiency

Energy poverty is strongly connected with low energy efficiency of buildings, which in turn is caused by inefficient heating systems and lack of renovation (e.g. old window carpentry). The Polish legislator has introduced a number of regulations concerning social assistance for such households, such as the 21 November 2008 Act on Supporting Thermo-modernisation and Renovation[43], which specifies the rules of financing from the Thermo-modernisation and Renovation Fund (art. 1). This states that, Thermo-modernisation shall lead to improvements which would decrease the energy requirements for room and water heating, as well as heating of detached houses and blocks of flats (…); the decrease in primary energy loss in local heating networks and local heating sources feeding them; and the decrease of the costs of heat supply for the aforementioned buildings through the establishment of terminals connecting them to a centralised heating source with the simultaneous removal of local heating sources[44]. Although no legal definition of "modernisation" is given, it is commonly defined as a permanent modernising improvement e.g. of an existing building leading to the increase of its use value[45]. It also includes all work related to the improvement of the aesthetic and use value of a building or other object[46]. However, the legislator does not guarantee the return of all funds spent for the thermo-modernisation, which in fact excludes certain investors from undertaking such projects (e.g. poorer homeowner associations). The refund may only cover 20% of the used loan funds taken for the purpose of thermo-modernisation and cannot exceed 16% of all costs of the project and twice the estimated yearly financial savings on energy, determined by an energy audit (art. 5).

Building modernization has been legally recognized in the 9 October 2015 Revitalisation Act[47], which (in art. 2 § 1) introduces legal mechanisms for "the process of leading degraded areas out of the emergency state they are in, carried out in a holistic way through integrated actions directed towards the local community, area and economy (…)." The modernization of building facades through their renovation

42 M. Lis, A. Miazga, K. Sałach, A. Szpor, K. Swiecicka, Ubóstwo energetyczne w Polsce diagnoza i rekomendacje, 2016, http://ibs.org.pl/app/uploads/2016/12/IBS_Policy_Brief_01_2016_pl.pdf (access 16.01.2018).

43 Consolidated text: Journal of Laws of 2017, item 130.

44 See: Judgment of Regional Administrative Court in Gliwice of 30 April 2010 r., III SA/Gl 1460/09, Lex no. 620021.

45 M. Ofiarska, Przedsięwzięcia termomodernizacyjne - gmina jako inwestor oraz podmiot wspierający ich realizację przez inne osoby, "Przegląd Podatków Lokalnych i Finansów Samorządowych" 2015, no. 9, Lex no. 270218/1.

46 *Ibidem.*

47 Consolidated text: Journal of Laws of 2017, item 1023 with amendments.

may also include thermal insulation. The actions taken, in their comprehensive nature, should not only lead to social exclusion or purely spatial changes, but also influence the eventual use of the object or objects renovated.

The Act on Energy Efficiency of 20 May 2016 should also be looked into, as it governs the rules regarding the formation of the national energy efficiency strategy, the tasks of public sector units in the area of energy efficiency, the rules for the realization of the obligation to achieve proper energy savings and the regulations concerning energy auditing for businesses. This act is a new development in Polish legislation and is a direct effect of the influence of EU regulations on Polish law. It also defines energy saving as the amount of energy which equals the difference between the amount of energy potentially used (by an object, equipment or installation) within a set period of time before one or more actions leading to the improvement of energy efficiency, and the amount of energy actually used (by the same object, equipment or installation) after the improvements have been carried out, taking all external normalised conditions influencing energy consumption into consideration. Energy efficiency policy can also be found in the Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/27/EU on energy efficiency[48], and Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/31/EU on the energy performance of buildings[49]. Both documents are found within the aforementioned, November 2016 Winter Package.

The analysis has so far focused on the direct forms of preventing and reducing the effects of energy poverty. The catalogue of legal forms of aid towards the needy also includes several indirect forms of assistance which may help in combating energy poverty. The following observations are not core to the issue in question but shall serve as complementary data. At present, energy poverty is not an independent prerequisite set by the 12 March 2004 Act on Social Assistance[50], nevertheless it must be regarded as one of the risks, or a specific type of poverty described in art. 7 pt. 1. Any form of financial aid, such as a permanent or temporary allowance provided under the Social Assistance act, may lead to a reduction in energy poverty. Nevertheless, every case must be investigated individually in terms of whether the material-law regulation can be applied and result in granting an allowance, yet not every type of allowance will eventually be used to pay for heating. As already concluded, social assistance (*sensu largo*) is loosely related to the issue of energy poverty, although several direct

48 Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/27/EU on energy efficiency, Brussels, 30.11.2016, COM (2016) 761 final, 2016/0376(COD).

49 Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/31/EU on the energy performance of buildings, Brussels, 30.11.2016, COM (2016) 765 final, 2016/0381(COD).

50 Consolidated text: Journal of Laws of 2017, item 1769 with amendments.

and indirect methods of poverty prevention may lead to a certain (rather minute) reduction in energy poverty.

5. Conclusions

Energy poverty is a multifaceted issue of great complexity. Such phenomena often cannot be easily defined by law, i.e. it is difficult to express their nature unambiguously. Unfortunately, this leads to a fragmentary legal approach to such issues and a, so to speak, patchwork-type of regulations which focus on the most critical areas one at a time, which is quite understandable. Such approach, however, leads to a lack of complementarity of various legal regulations and, in effect, creates clear absurdities in the interpretation of the regulations. Despite that, it is not a result of legislators' irrationality, but their wish to solve the existing problems, at least at the most crucial points. The EU legislation has recently been trying to develop a consistent definition of energy poverty, yet a proper legal definition is still to be established. Moreover, the problem has not yet been thoroughly and attentively investigated in any text of legal nature.

At the very beginning of the paper we have asked the question of whether energy poverty prevention is an example of a "patched" type of Europeanised law. Considering the analysis presented, it must be concluded that no unambiguous stimulus coming from the EU legislation for the Europeanisation of local laws can found. What we do observe is an increase in non-normative documents, while the directives, even those of great importance, do not force uniform Europeanisation of the approach to the issue, despite providing clear diagnosis and examples of successful prevention methods developed by a number of Member States. Therefore, the influence of the EU law on local state legislation is not uniform. Moreover, energy poverty is often seen as part of a broader category of poverty, for which there should exist special instruments of social assistance, which in their nature are an "autonomous area of local [state] regulations".[51]

BIBLIOGRAPHY

Barbacka-Surowiak G., Surowiak J., Rytmika dobowa – jej rola w wieku podeszłym, (in:) Fizjologia starzenia się, A. Marchewka, Z. Dąbrowski, J.A. Żołądź, Warszawa 2013.

Bomba K. (in:) Bezrobocie i polityka zatrudnienia, Z. Góral (ed.), Lex Omega, Wykluczenie z rynku pracy jako rodzaj wykluczenia społecznego.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy Roadmap 2050, Brussels, 15.12.2011.

51 I. Sierpowska, Pomoc społeczna jako administracja świadcząca, Warszawa 2012.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Making the internal energy market work, Brussels, 15.11.2012, COM (2012) 663 final.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Delivering a New Deal for Energy Consumers, Brussels, 15.7.2015, COM (2015) 339 final.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Launching the public consultation process on a new energy market design, COM (2015) 340 final; Opinion of the European Economic and Social Committee on the new energy market design.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Delivering a New Deal for Energy Consumers COM (2015) 339 final; Opinion of the European Economic and Social Committee on the Prosumer Energy and Prosumer Power Cooperatives: opportunities and challenges in the EU countries (own-initiative opinion).

Cyrankiewicz M., Rusza dodatek energetyczny, "Rzeczpospolita. PCD" from 2.01.2014, thesis no. 3, 190523/3.

EUROSTAT, Manual for statistics on energy consumption in households, Luxembourg 2013.

GUS, Ubóstwo w Polsce w latach 2013-2014, Warszawa 2015.

Kubiak M., Ubóstwo czy wykluczenie społeczne ludzi starszych w Polsce?, (in:) Oblicza biedy we współczesnej Polsce, M. Popow, P. Kowzan, M. Zielińska, M. Prusinowska, M. Chruściel, Gdańsk 2011.

Lipowicz I., Europeizacja administracji publicznej, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2008, no. 1.

Lis M., Miazga A., Sałach K., Szpor A., Święcicka K., Policy Brief – Ubóstwo energetyczne w Polsce – diagnoza i rekomendacje, Warszawa 2016.

Lis M., Sałach K., Święcicka K., Rozmaitość przyczyn i przejawów ubóstwa energetycznego, Warszawa 2016.

Manjura-Niśkiewicz G., Prawo energetyczne. Komentarz, (in:) G. Manjura-Niśkiewicz, Dodatki mieszkaniowe. Komentarz. Lex Polonica 2016.

Ofiarska M., Przedsięwzięcia termomodernizacyjne – gmina jako inwestor oraz podmiot wspierający ich realizację przez inne osoby, Przegląd Podatków Lokalnych i Finansów Samorządowych No. 9/2015, Lex no. 270218/1.

Opinia Europejskiego Komitetu Ekonomiczno-Społecznego w sprawie ubóstwa energetycznego w kontekście liberalizacji i kryzysu gospodarczego (opinia rozpoznawcza) 2011/C 44/09.

Opinion of the European Economic and Social Committee on 'Energy poverty in the context of liberalisation and the economic crisis' (exploratory opinion), 2011/C 44/09.

Opinion of the European Economic and Social Committee on 'Energy poverty in the context of liberalisation and the economic crisis' (exploratory opinion), 2011/C 44/09, C 44/53.

Opinion of the European Economic and Social Committee on 'For coordinated European measures to prevent and combat energy poverty' (own-initiative opinion), 2013/C 341/05, C 341/21.

Sierpowska I., Pomoc społeczna jako administracja świadcząca, Warszawa 2012.

Swora M., Komentarz do art. 3 Prawa energetycznego, (in:) Prawo energetyczne. Tom 1. Komentarz do art. 1-11s, M. Swora, Z. Muras (eds.), Warszawa 2016.

Białostockie Studia Prawnicze
2018 vol. 23 nr 2

DOI: 10.15290/bsp.2018.23.02.10

Dominik Kościuk
University of Białystok
d.kosciuk@uwb.edu.pl
ORCID ID: https://orcid.org/0000-0002-2695-8212

General Data Protection Regulation (GDPR) – The EU Law Strengthening the Information Society in Poland

Abstract: The purpose of this paper is to illustrate how the General Data Protection Regulation (GDPR), now implemented in the Polish legal system, strengthens protection in the collection, processing, storage and transfer of digitised personal data. This undoubtedly represents a step forward in the further development of the way sensitive data is handled while at the same time providing a better understanding of the functioning of the information society, both throughout the EU in general and in Poland specifically.
Keywords: GDPR, information society, Poland

1. Introduction

The General Data Protection Regulation 2016/679 (GDPR), in Polish *Rozporządzenie o ochronie danych osobowych (RODO),* of the European Parliament and of the Council of 27 April 2016, repealing Directive 95/46/EC [*95/46/WE*],[1] entered into force in Poland on 25 May 2018. The purpose of this normative act is to harmonise the protection of fundamental rights and freedoms of natural persons with regard to the processing of their personal data, while at the same time ensuring the safe free flow of such data between Member States. As grounds for adoption of the Regulation, the legislator cited the following: first, economic and social integration resulting from the functioning of the internal EU market has led to a substantial

1 Regulation (EU) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [95/46/WE] (The Official Journal of the European Union L.2016.119.1).

increase in the cross-border flow of personal data; second, the exchange of personal data between public and private bodies, including natural persons, associations and undertakings across the Union has increased; third, national authorities in the Member States are being called upon by Union law to cooperate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State.[2]

Simultaneously, the European legislator pointed to the fact that technological development and, as a natural consequence globalisation, have brought new challenges to the fore in the protection of personal data. The advances in information technology that have occurred in recent years and upon which the information society is built, has reached a point where the scale of collection and sharing of personal data has increased significantly. Thus, technology allows both private companies and public authorities to make extensive use of personal data in order to respectively pursue their commercial and civic activities. Furthermore, natural persons (of their own free-will) increasingly make sensitive personal information available publicly and globally, which is clearly visible in the social media.

Undoubtedly, the development of information technology has transformed both the economy and social life, having facilitated the flow of information and that has led to a new dimension in commerce, namely in the provision of online services of every and all kind. Such developments have increased the flow of personal data to an unprecedented level, which led the legislator to the conclusion that: "those developments [affecting economic, social and private life, etc.] require a strong and more coherent data protection framework in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across the internal market. Natural persons should have control of their own personal data. Legal and practical certainty for natural persons, economic operators and public authorities should be enhanced".[3] It is difficult not to agree with the outlined recitals.

It should raise no doubts, that the architects of GDPR intended to create a comprehensive tool for protecting personal data within the area of the European Union, the misuse or abuse of which can result in catastrophic consequences not least to the economy.And that leads to the purpose of this paper which is to illustrate how the introduction of GDPR, now implemented in the Polish legal system, strengthens protection in the way personal data is collected and processed, which, undoubtedly represents a step forward in the ongoing development of the so-called information society in Poland.

2 Vide recital 5 of GDPR [RODO].
3 Vide recital 7 of GDPR [RODO].

However, before attempting to support the above, let me briefly outline the notion of "information society" and how the tools for personal data protection regulated by the GDPR are to be applied in Poland under RODO.

Since this paper is of an "indicatory" nature only (i.e. introductory to further specific research) the approach herein is solely dogmatic and analytical.

2. The definition of "information society"

The notion of "information society" has already been defined many times in the literature. C. Jonscher, linked "society" and its development with "information", as fast flowing "data" and generally available "knowledge", acquired through IT networks connecting a number of computers.[4] P. Levinston, also pinpointed fast information flow via the Internet as a very important factor of societal development.[5] In many instances, the notion of information society is linked to the idea of A. Toffler's "Third Wave Society". This author wrote that the First Wave had relied on so-called necessary inventions and skills relating to agriculture, but also on the popularisation of immobility and settlement within communities. The Second Wave, i.e. the industrial wave, Toffler correlated with the invention and introduction of printing, steam engines, electricity, mechanised industrial technologies and advanced forms of travel, whereas the Third Wave, the present one, is associated with new technologies enabling limitless communication through the development of services with a shift away from economic production.[6] The definition worded by M. Goliński, is also worthy of attention. This author, in part echoing the words of H. Kubick, wrote that "the notion of information society means socio-economic formation, in which productive use of information as a resource and know-how of intensive production play a dominant role". At the same time, the author pointed out that "the information society term is used to describe a society, in which individuals as consumers or employees use information intensely".[7]

T. Goban-Klas and P. Sienkiewicz, created a definition referring to elements of economics. They stated that the information society was a society which made technologically developed means of information processing and communication available to create a national income base, which, in consequence, led to providing a livelihood for the majority of the society.[8]

4 C. Jonscher, Wired life: Who are we in the digital age, Warszawa 2001, pp. 57-72, 193.

5 P. Levinson, Soft edge, Warszawa 1999, p. 199.

6 A. Toffler., The third wave, Warszawa 1997.

7 M. Goliński, Information society – definition and measurement problems, p. 47, publ. http://www.di.univ.rzeszow.pl/tom%201.pdf#page=43 1 (access 8.03.2018).

8 P. Goban-Klas, P. Sienkiewicz, Information socjety. Chances, risks, challenges. Kraków 1999, p. 134.

K. Krzysztofek and M. Szczepański, in turn stated that the information society was characterized by a condition within the area of which information had widely applied in everyday social, cultural, economic and political life. In their view, such a society is well equipped with a highly developed means of communication and information processing as a prevailing base of national income and provider of most people's livelihood.[9]

According to G. Niedbalska, attention should also be paid to the IBM Community Development Foundation report, in which the notion of information society is framed as following: "*information society is a society characterised by a high level of information intensity in the everyday life of most citizens, in most organisations and workplaces; by the use of common or compatible technology for a wide range of personal, social, educational and business activities; and by the ability to transmit and receive digital data rapidly between places irrespective of distance.*"[10] In my view, this latter definition deserves particular consideration.

3. The legal nature of GDPR

In line with the wording of Article 288 of the Treaty on the Functioning of the European Union[11], to exercise the Union's competences, the institutions adopt regulations, directives, decisions, recommendations and opinions. Regulations have general application. They are binding in their entirety and directly applicable to all Member States. Directives, in turn are binding, as to the result to be achieved, upon each Member State to which it is addressed, but they leave to the national authorities the choice of form and method. Decisions are binding in their entirety, but a decision which specifies those to whom it is addressed is binding only on them. Recommendations and opinions have no binding force.

In the light of the above, the EU Regulation is binding in its entirety and is directly applicable in every Member State. To gain such binding force, there is no need to implement the regulation into national law nor to announce it – under the rules of individual Member States. Sufficient, and as well necessary, is its official publication in respective EU journals.

The European Court of Justice states that there is no possibility to impose (on certain bodies – not only Member States, but also natural and legal persons, and unincorporated entities) obligations contained in Community legislation which has

9 K. Krzysztofek, M. Szczepański, Understanding development. From traditional to information societies, Katowice 2002, p. 170.

10 G. Niedbalska, OECD Blue Sky Research, The concept of knowledge in the knowledge society in light of the Nico Stehr theory, "Nauka i Szkolnictwo Wyższe" 2009, no. 1, p. 145 and next.

11 Treaty on the Functioning of the European Union of October 26, 2012 (Official Journal of the European Union No. 326, p. 47).

not been published in the Official Journal of the European Union in the language of the Member State to which it applies, even if those persons concerned could have learned of the legislation by other means.[12]

Simultaneously, the Polish Constitutional Tribunal confirms the status of the EU regulation as a commonly and directly applicable legal act in Poland. For example, in the judgment Ref. No. SK 45/09, particularly in its statement of reason, the Tribunal clarified that "a normative act within the meaning of Article 79(1) of the Constitution may not only be a normative act issued by one of the organs of the Polish state, but also – after meeting further requirements – a legal act issued by an organ of an international organisation, provided that the Republic of Poland is a member thereof. This primarily concerns acts of EU law, enacted by the institutions of that organisation. Such legal acts constitute part of the legal system which is binding in Poland and they shape the legal situation of the individual".[13]

It is worth noting that Articles 94 and 99 of GDPR in conjunction with the principle of "sincere cooperation" (pursuant to which the Member States are obliged to transpose Union law into their national laws) point to the reasonable conclusion that the moment GDPR enters into force, the Directive 95/46/EC (95/46/WE) shall be repealed. The aforementioned Article 94 of GDPR confirms not only the repeal of Directive 95/46/EC (95/46/WE) with effect from 25 May 2018, but also, as stated in 94(2), that references to the repealed Directive are to be construed as references to this Regulation. Whereas, from Article 99 it should be inferred that since GDPR is binding in its entirety and directly applicable in all Member States, the other acts of national law on relevant issues concerning protection of personal data, including the applicable provisions of the Polish act on protection of personal data are to be repealed as well. All normative acts of the Union law and of national laws of Member States on protection of personal data are undergoing an analogical combination of circumstances from the day of 25 May 2018, when GDPR (in the form of RODO) became enforceable.

Further attention should be drawn to the fact that the "removal" of Article 5 from the Polish Act on Protection of Personal Data – which foresees that should the provisions of any separate laws on the processing of data provide for more effective protection of the data than the provisions hereof, the provisions of those laws shall apply – is a simultaneous consequence of the repeal of this act. Here the GDPR lacks a comparable regulation and takes precedence over any Polish separate rules regardless of whether they included provision for more effective protection than provided by the regulation. P. Litwiński has worded a similar opinion to the above, stating that: "the aforementioned article relates then to the lex specialis derogate legi

12 Vide Judgment of CJEU (Grand Chamber) December 11, 2007 Case C-161/06.

13 Judgment of the Constitutional Tribunal, 16 November 2011, Ref. No. SK 45/09, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20112541530/T/D20111530TK.pdf (access 8.03.2018).

generali principle, except that legis specialis apply when they foresee more effective protection. RODO lacks analogical rule which indicates precedence of its provisions over those of national law, but also over regulations concerning protection of personal data foreseen in EU law."[14]

4. Selected data protection instruments strengthening the flow of digitised information

In drawing up the notion of "instruments" characteristic of the information society, I thought of and referred to provisions on the ability to quickly acquire and exchange information. From my perspective, these are regulations specifically concerning the digital computerisation of data. Having this in mind, I find it important to identify the "instruments" GDPR provides in order to enable fast flowing information on processed and protected personal data to be achieved.

In my opinion, regulations supporting the flow of information concerning personal data protection are noticeable in many areas. Thus, there are several exemplary regulations in GDPR that govern the use of electronic means to gather and process personal data that are worth mentioning.

The first is the regulation on how and when the information is to be or can be gathered. To effectively exercise one's own rights, including those referring to personal data protection, one needs to be able to clearly understand what those rights are. A person whose data may be processed, should have access to understandable and coherent information, and GDPR regulates this in Article 12, where it states that the "controller" (the entity responsible for collecting the data for processing) shall take appropriate measures to provide any information in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child. The information shall be provided in writing, or by other means, including where appropriate, by electronic means.

Similarly, a very important and supportive factor in strengthening these rights is to set a time limit for providing information requested by the "data Subject" (a natural person, legal person or other entity), which is covered by Article 12(3), which states that the Controller, without undue delay and in any event within one month of receipt of the request, shall provide information on the action taken in response to the request. The period may be extended by two further months where necessary (taking into account the complexity and number of requests). The controller shall inform the data subject of any such extension within one month of receipt of the request, together with the reasons for the delay. Where the data subject makes such

14 P. Litwiński, Regulation (EU) on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Commentary, Legalis On-line 2018.

request in electronic form, the information shall be provided in a commonly used electronic form where possible, unless an alternative method of communication has otherwise been asked for. This demonstrates that the legislator links the speed of response closely with digital communication (i.e. the Internet).

Secondly, attention is worth focusing on the issue of enabling the data subject to access information on sources of personal data used by the entity holding it. According to Article 15 of GDPR, a data subject has the right to obtain from the controller confirmation as to whether or not personal data concerning them has been collected and processed, and, where that is the case, to have access to such data. The controller, in keeping with the doctrine, cannot abrogate the obligation to provide information on the source of the data, even though the information may be subject to professional secrecy or the like.[15] The above applies analogically to actions by electronic means. In accordance with Article 15(3) of the GDPR, the controller shall provide a copy of the personal data undergoing processing. Where the data subject makes the request by electronic means (unless requested otherwise), the information shall be provided in a commonly used electronic form as before.

A third example worthy of mention is that pursuant to Article 21(1) of the GDPR, wherein it states that every data subject shall have the right to object (on grounds relating to their particular situation) at any time to the processing of personal data concerning them. The controller shall, on receipt of the objection, cease to process the personal data unless (exceptionally) the controller demonstrates compelling legitimate grounds for the continuation of processing which override the interests, rights and freedoms of the data subject, or for the establishment and exercise or defence of legal claims, or where it is in the public interest to do so. In the context of Article 21(5), the data subject may exercise their right to object by automated means. Regarding such objection the legislator, albeit indirectly, enables the data subject concerned to obtain information by electronic means. In line with Article 21(4) of the GDPR, by the latest at the time of the first communication with the data subject, the right referred to in paragraphs 1 and 2 shall be explicitly brought to the attention of the data subject and shall be presented clearly and separately from any other information. Thus, in a situation where the first communication with the data subject takes place through an electronic network, the data subject should be informed of the right to object through the same network.

Another aspect requiring consideration might be the fact that, according to GDPR provisions each controller and processor maintains a record of processing activities under its responsibility. That record contains all of the following information: the name and contact details of the controller and, where applicable, the joint controller, the controller's representative and the data protection officer; the purposes of the processing; a description of the categories of data subjects and of the categories of

15 P. Litwiński, Regulation (EU) on the protection of natural persons… *op. cit*.

personal data; the categories of recipients to whom the personal data have been or will be disclosed including recipients in third countries or international organisations; where applicable, transfers of personal data to a third country or an international organisation; the envisaged time limits for erasure of the different categories of data; and a general description of the technical and organisational security measures. These records may, as stated in Article 30(3) of GDPR, be maintained in electronic form. However, Article 30(4) states that the controller or the processor and, where applicable, the controller's or the processor's representative, shall make the record available to the supervisory authority on request. This leads to the conclusion that the legislator provided for the obligation to inform about the record also via electronic means. Notwithstanding, in Practical terms it would be wholly unrealistic to imagine that such information might be provided in hard copy form or delivered orally.

Furthermore, it should be noted that each Member State is obliged to provide for one or more independent public authorities to be responsible for monitoring the application of this Regulation, in order "to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union"[16]. In Poland, such authority is the President of the Office for Personal Data Protection, in Polish *Urzędu Ochrony Danych Osobowych (UODO)*. The supervisory authority should be competent to handle complaints lodged by a data subject (to whom the data concerns), including bodies, organisations or associations, and to conduct investigations to the extent of the subject matter of a complaint. The EU legislator has foreseen the digitalisation of information flow as well, for under Article 57(2) of the GDPR, the supervisory authority is obliged to facilitate the submission of complaints by measures such as a complaint submission form which can also be completed electronically.

At the same time, it is essential to draw attention to the fact that during the complaint proceedings there may arise the necessity to cooperate with other authorities or bodies competent in matters concerning personal data protection (particularly within the scope of sharing information on the progress and outcome of investigations, and the sharing of documentation and the like) this Regulation imposes an obligation on the authorities to mutually communicate (share and supply information to each other) by electronic means. The above solution only confirms the already existing in Polish administrative law (Article 39^2 of the Polish Code of Administrative Proceedings) obligation of lodging and service of procedural document via electronic means if a public body (i.e. performing its public tasks) being a party or other participant to the proceedings is obliged to make accessible and use the electronic inbox.[17] Taking the fact that GDPR has foreseen the autonomy

16 Vide Article 51 of GDPR [RODO].

17 The obligation is a consequence of assumption by the legislator that computerization of administration in Poland might significantly accelerate only when the obligation of using (by

of Member States in extra EU procedural regulations into consideration (on condition that the adopted solutions do not interfere with the effective performance of obligations under EU law), the obligation of mutual communication between supervisory authorities should not raise any doubt.

5. Conclusion

To Summarise. From the foregoing it is clearly visible that, in line with the introductory thesis presented in this paper, GDPR, now under the auspices of RODO, serves to strengthen the foundation upon which Poland's information society is structured. There are regulations that govern when and how personal data can be gathered, how it can or cannot be processed, how it can or cannot be shared, how it should or should not be stored and the period over which it can be retained. Similarly, there are regulations that govern the privacy of private data, the rights of those persons natural or legal to whom that data belongs, the degree of transparency required from entities gathering the data, and the way in which those same entities must provide information using concise clear and plain language that people from all levels of society can understand. In addition, it regulates how communications may be conducted between the parties relating to requests for information and in response to complaints. GDPR also introduces penalties (not previously addressed in this article) for the abuse, misuse and misplacement of personal data, whether by accident or design, as well as for failure to provide adequate systems to ensure its safekeeping. The aforementioned regulations should be evaluated positively since the previous Polish data protection law lacked many of the binding provisions that GDPR now provides. Indeed, it is that very lack of specific provisions that dissuaded many entities (particularly in the public sector) from embracing IT to its fullest extent. Hopefully, with RODO now in place in the Polish legal system, this might "encourage" a rethink and perhaps also tempt the Polish legislator to promote the use of modern IT systems and tools in other fields governed by applicable laws.

BIBLIOGRAPHY

Goban-Klas P., Sienkiewicz P. Information socjety. Chances, risks, challenges, Kraków 1999.

Goliński M., Information society – definition and measurement problems, http://www.di.univ.rzeszow.pl/tom%201.pdf#page=43 (access 8.03.2018).

Jonscher C., Wired life: Who are we in the digital age, Warszawa 2001.

Krzysztofek K., Szczepański M., Understanding development. From traditional to information societies. Katowice 2002.

competent authorities and auxiliary bodies) information technology was due to the applicable law and not left the authorities at their free disposal.

Levinson P., Soft edge, Warszawa 1999.

Litwiński P., Regulation (EU) on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Commentary, Legalis On-line 2018.

Niedbalska G., OECD Blue Sky Research, The concept of knowledge in the knowledge society in light of Nico Stehr theory, "Nauka i Szkolnictwo Wyższe" 2009, no. 1.

Toffler A., The third wave, Warszawa 1997.

Białostockie Studia Prawnicze
2018 vol. 23 nr 2

DOI: 10.15290/bsp.2018.23.02.11

Maria Karcz-Kaczmarek
University of Lodz
Mkaczmarek@wpia.uni.lodz.pl
ORCID ID: https://orcid.org/0000-0002-4786-4872

Zofia Duniewska, Małgorzata Stahl, Artur Krakała (eds.)

Zasady w prawie administracyjnym. Teoria, praktyka, orzecznictwo. [Principles in Administrative Law. Theory, Practice, Judicature]

Published by Wolters Kluwer, Warszawa 2018, pp. 826

The institution of legal rules and principles is of fundamental importance to the process of law interpretation as well as to its application. Due to the very wide and complex scope of administrative law (regulated issues) and the frequent interchangeability of administrative law norms, presenting and discussing the rules and principles of administrative law fully deserves recognition and approval. The reviewed scientific monograph "*Principles in administrative law. Theory, practice, judicature*" is an important voice in the theoretical legal debate regarding the concept, substance and type of law principles, including the principles of administrative law. At the same time, due to the specific and contemporary scientific problems it addresses, the monograph has practical value and is a useful tool for both representatives of science, as well as employees of public administration and people functioning in the broadly understood judicial affairs. The editors of the reviewed publication are researchers from the University of Lodz, who undertook the difficult challenge of scientific and editorial elaboration of the original studies that make up the subject publication. The monograph consists of eight parts. They concern general issues, principles in constitutional law and principles in social welfare law. One part is devoted to the issues of principles in spatial development law, construction law and the law of real estate management, another discusses the principles of environmental law. The principles functioning in significantly different areas of administrative law are

analysed in part VI. The monograph also considers the principles in administrative proceedings and in proceedings before administrative courts.

Part I, *"Principles of law – general issues"*, covers issues concerning, above all, the concept, character and verification of legal principles. The chapter, written by Małgorzata Stahl, gives attention to the multiplicity of ways of understanding the concept and meaning of the principles (rules) of law and resulting difficulties in interpretation. According to this researcher, such a circumstance does not exclude the possibility of reaching a consensus by the representatives of the legal doctrine with regard to the principles of law. This author, as the basic functions of legal principles, considers: 1. the function of filling legislation gaps, 2. the interpretative function, 3. the corrective function and the creative function. Zofia Duniewska, in the chapter "On reflection on the concept and character of the principles of law", draws attention to the fact that nowadays the basic source and the building block of the rules of law is the law itself (legal texts). The author of this text emphasizes, that during discovering the content of legal principles, it is valuable to refer to non-legal axiology, for example, ethical or economic values. The statement, that legal principles do not form a homogeneous category, but constantly expand their catalogue, should be fully shared. In the chapter entitled "The character and role (importance) of the administrative law principles", its author Eliza Komierzyńska-Orlińska, based on the analysis of the views of numerous legal doctrine, presents the non-uniform character of the concept of the principles of law itself, which makes it difficult to clearly answer the question of their importance in administrative law. Marcin Kamiński, in the chapter "Norms – rules of administrative law and their concretization" draws attention to the need to distinguish norms-rules and norms-principles in the general theory of law. This researcher also distinguishes norms of a closed nature and norms-rules of an open nature. This fragment of the monograph also emphasises the importance and legal consequences of the issue of openness and closure of content and scope norms and their relationship to mandatory and facultative competences. Piotr Ruczkowski, discusses *"The principle of supremacy of international law over national law in the system of administrative law"*. Due to the numerous interpretative doubts that arise in the process (in practice) of the application of international law, including EU and national law, it is very important to discuss this issue. In conclusion, this author states that the general principle of international law primacy over national law (at least in relation to national ordinary legislation) should be included in the rules of administrative law. "The construction of the abuse of law in the context of general principles" is discussed by Jerzy Parchomiuk. The indicated construction is presented by this author in relation to the principle of a democratic state ruled by law, principles of legal certainty, equality and justice. The problem of verifying the principles of administrative law is analyzed by Krystian Ziemski. For the insufficiency of legislation, this author recognizes the lack of explicitly pointing out in legal acts an axiological justification and the general definition of the content of principles by the

legislator. This situation results in many shortcomings in the area of law enforcement, in the sphere of making supervision acts, and even in the field of judicial control of the administration. According to Krystian Ziemski, this situation requires quick and comprehensive action in the sphere of legislation and in law sciences.

Part II begins with the chapter entitled "The rules of system of the Polish public administration" by Iwona Niżnik-Dobosz. The conducted analysis shows a constant and close relationship between the systemic administrative and legal regulations and constitutional regulations. The object of Michał Kasiński's considerations is trust in public authorities in the light of the principle of a democratic state ruled by law. This author notes, that nowadays trust in the public authorities has been replaced with widespread distrust, which makes it difficult to build a culture of trust. The instruments of implementing the idea of good administration on the basis of the parliamentary system of government, are analyzed by Łukasz Buczkowski. According to this researcher, despite the fact that the principle of good administration is not explicitly stated in the Constitution of the Republic of Poland, control instruments which exist in Polish law, ensure the principle of good administration in the sphere of the parliamentary system of government. The principle of administrative efficiency on Tadeusz Kotarbiński's comparison of praxeological evaluation and directive is addressed by Ewa Olejniczak-Szałowska. Extending *stricte* legal considerations with the threads of efficient organization and good performance is of great value, because these aspects shall not be ignored in the practical activities of public administration. The problem of efficiency is also taken up by Rafał Budzisz, who analyses it in the operation of local government constitutive bodies. In the view of this researcher the applications of *de lege ferenda*, shall have a positive impact on the efficiency of local government constitutive bodies. The principles of efficiency and effectiveness of public administration activities in the market are assessed by Agnieszka Żywicka. This author analyses these principles with reference to the contemporary model of non-combined (non-unified) administration structures. Anna Gross, takes up the issue of the principles of social consultations in administrative law. It is pointed out, that consultations are a specific and an approved form of influencing citizens in the domain of public authority. This monograph also deals with the issue of transparency. Michał Ulasiewicz, analyses the functioning of transparency in local government units, in turn Mateusz Karciarz analyses transparency in the activity of local government constitutive bodies. Part II also includes a chapter written by Dominik Kościuk, concerning the issue of information policy in the context of E-government law (E-administration). The considerations tendered are more than valid given the development of ICT tools in public administration. Part II ends with a chapter written by Konrad Kędzierski, entitled "Hierarchity as the basic principle of organization in the Police". In it, the author states that the centralisation of tasks within the centralised system employed does not change the hierarchical structure of the Police.

Part III *"The rules in the social welfare law"* begins with the considerations of Artur Krakała regarding the concept, genesis and protection of human dignity, as one of the most important categories of law. Mirosław Wincenciak, stresses the importance of respecting the principles of law on the example of care benefits. These considerations are carried out from two perspectives. Firstly, the indication of legislative imperfections, secondly the indication of interpretations in accordance with the standards of the democratic state ruled by law, which are applied by entities applying the law. In turn, Ryszarda Michalska-Badziak presents the importance of the principle of subsidiarity in the social assistance law and its role in shaping relations between public administration, the local community and individuals. The good of human beings as a rule of administrative legal regulations for counteracting of alcohol addiction and its effects, is analysed by Przemysław Wilczyński. This researcher discusses state interference in the sphere of alcohol problems in the context of, among others, human and economic freedom.

In Part IV, Marta Woźniak draws attention to the need of valuing in planning and spatial development. This author, in the *de lege ferenda* comments, refers to the valuation of the project of the *Urban and Construction Code* (from 2016). The problems of spatial planning are also addressed in the chapter written by Jacek Jaworski, who emphasises the need to include in this kind of activity the principle of protection of individual interests. The obligation to respect the legitimate interests of third parties in the construction process is the subject of Anna Ostrowska's considerations. In her opinion, the mentioned principle is not only an ornament, but it is an important interpretive tool, among others, to fill gaps in the law. The issue of construction law is also taken up by Maciej Kruś, in the chapter "Rules in Construction Law". Here it is pointed out, *inter alia*, that the legislator endeavors to eliminate under-defined standards and discretion in constructing regulations. Ewelina Dziuban and Mariusz Kotulski, comment on the "good neighbourhood" as a norm-rule. In their opinion, the principle of good neighbourliness shall be applied in an "all or nothing" manner, as its partial application is excluded. The monograph contains also an analysis of the principle of efficiency (effectiveness) of the administration's activities in the area of public infrastructure investments. Łukasz Stelmaszczyk, points out standards and special legal procedural instruments for the practical implementation of the principles he mentions. Sławomir Pawłowski, discusses the principle of citizens' trust in the state in substantive administrative law on the example of Article 98 of the Law on Real Estate Management. In this chapter, among other things, he analyses and assesses court case law regarding the possibility of using the institution to return expropriated property back to real estate, property divided pursuant to Article 98. The considerations of Part IV, are concluded in the chapter written by Łukasz Kamiński, regarding the constitutional principle of property protection and the administrative and legal protection of spa areas. It states that restrictions on the right to ownership in such designated areas do not violate constitutional principles.

Part V, contains considerations about the principles of environmental law. Anna Haładyj, draws attention to the problem of the disintegration of general principles of environmental law in the context of its effectiveness. In the monograph the basic principles of environmental law, such as the principle of proportionality in the collection and processing of waste, is discussed in the chapter written by Anna Barczak and Adrianna Ogonowska. The principle of *ne bis in idem* in the context of the postulate of recourse to the principle of administrative sanctions and the concurrence of criminal and administrative liability appears in the chapter written by Agnieszka Jaworowicz-Rudolf, while the "polluter pays" principle with regard to radioactive waste as municipal waste is the subject of the chapter written by Artur K. Modrzejewski. The problem of the principle of prevention as the basis for the interpretation of the concept of undertaking in the procedure of an individual environmental impact assessment, is presented by Piotr Korzeniowski, while comments on the direction of the proposed systemic reforms in the field of integration on the example of environmental protection services are expressed by Elżbieta Wituska.

The principles of law in other areas of administrative law are discussed in Part VI. Agnieszka Wilczyńska referring to the axiology of the principle of stabilizing surnames, discusses the surname as a personal value, family value and a general social value. Principles of food law, including the principle of responsibility for food and feed safety and the principle of traceability and risk, are discussed by Małgorzata Korzycka and Paweł Wojciechowski. The principle of universal protection of monuments and its significance for the protection of non-historical cultural property, is discussed by Anna Fogel. Monika Majak, presents the principle of economic freedom in the aspect of activities related to trade in medicinal products. The chapter written by Anna Lichosik, concerns the rules of administrative supervision over the capital market (subjective and objective aspect of supervision). Adrian Misiejko, discusses the principle of organizing public mass transport in road transport by local government units (including the principle of sustainable development of public transport and non-discriminatory principles). Principles in administrative proceedings are presented in the publication in a broad and interesting way. Jan Olszanowski, when analysing judicial decisions, refers to the principle of the rule of law from the constitutional perspective. Implementation of the principle of persuasion is the subject of analysis in the chapter written by Paulina Ura and Ewa Kubas. Here, the authors draw attention, among others, to the importance of the principle of persuasion in the conditions of administrative recognition and discretionary powers. Katarzyna Celińska-Grzegorczyk, also refers to the problem of the implementation of the principle of persuasion in general administration proceedings. The consequences of incorrect instructions of the party in administrative proceedings and legal instruments for the protection of the party's rights with regard to the principle of trust in state authorities is taken up by

Anna Ważbińska-Dudzińska. Martyna Wilbrandt-Gotowicz, analyses the principle of decisions durability in administrative proceedings integrated with European Union law. Paulina Bieś-Srokosz, draws attention to the specificity of implementing the principles of *the Code of Administrative Procedure* in proceedings conducted by organs of government agencies. Her considerations relate mainly to The Agency for Restructuring and Modernisation of Agriculture (ARMA). The reviewed monograph also refers to the validity and significance of general principles in selected acts in the field of substantive administrative law and on the basis of enforcement proceedings in administration. The principle of insight, speed and simplicity in matters related to social assistance is analysed by Alina Miruć. This author indicates that the implementation of principles mentioned in the chapter, is the timely consideration (handling) of public administration matters. The importance of general principles of administrative proceedings regarding provision of selected administrative laws is also analysed by Wojciech Piątek. The author refers to proceedings for granting social assistance benefits, proceedings for granting a building permit and the principles of administrative enforcement proceedings. Legal principles applied in the enforcement proceedings in the administration are discussed by Magdalena Strożek-Kucharska. This chapter points to the principles contained in the Constitution of the Republic of Poland, the Code of Administrative Procedure, the Law on enforcement proceedings in administration and special legal acts.

Part VIII, contains considerations about the rules in proceedings before administrative courts. Renata S. Lewicka and Marek Lewicki, draw attention to the constitutional aspects of uniformity in administrative court decisions. In the opinion of the authors, such uniformity is an instrumental value serving to ensure implementation of the principle of equality before the law and the factor serving the implementation of judges' independence. Konrad Łuczak referring, among others, to theses of American legal realism, discusses the principles of applying the law by administrative courts and legal pragmatism. Magdalena Sieniuć, analyses the validity of the principle of openness and the consequences of its violation in court and administrative proceedings. Although this principle is not absolute, it has a special procedural role that ensures access to information and guarantees impartiality of the judge. Jakub Polanowski, also addresses the principle of openness by discussing the anonymisation of administrative court decisions. The author points out the need to maintain a balance between keeping disclosure requirements and the protection of personal data. Deleting personal data "*just in case*" is a mistake. Ewa Wójcicka, recognizes the principle of procedural information as a manifestation of fair court and administrative proceedings. This principle strengthens the adversariality of proceedings, the equal rights of parties and contributes to increasing the legal awareness of citizens.

The scientific value of the reviewed publication is enhanced by the inclusion of issues concerning the principles of administrative penalty in the legislation of the Slovak Republic submitted by Matej Horvat, Maria Srebalova and Maria Havelkova.

To summarise, the reviewed publication is a very important addition to the publishing market and its presence fully deserves to be recognised. The monograph provides a valuable voice, a "milestone" in the discussion on the essence and importance of principles in administrative law. The work presents a comprehensive and significantly different set of logically systematised considerations regarding the theory, practice and judicature in administrative processes. Equally important is the extensive and up-to-date bibliography it provides. Due to its multi-faceted presentation and timeliness of considerations, the monograph is perfectly recommendable for theoreticians as well as for legal practitioners. The editorial board does not raise any negative comments. On the contrary, the aesthetics combined with the clear and understandable layout of this work encourages one to read it. Therefore, the great amount of effort that has gone into producing this monumental publication of more than 800 pages is to be applauded. Moreover, as a scientific work it will almost certainly hold a permanent position in the canon of obligatory literature on administrative law. The "*Principles in Administrative Law. Theory, Practice, Judicature*" is a masterpiece definitely worth reading.

Maria Karcz-Kaczmarek
University of Lodz

Contributors

Violetta Balzhinimaeva – a graduate of the Faculty of Law at the Higher School of Economics in Moscow; completed postgraduate studies at the Post-Graduate School of Law at HSE; currently a PhD candidate and a manager at the Centre for Education Law at HSE.

Anna De Ambrosis Vigna – PhD. LL.M, assistant professor at the Department of Administrative Law at the Faculty of Law, University of Bialystok; graduate of the Michigan State University College of Law; author of publications on administrative law, comparative law, higher education law.

Dominika Cendrowicz – PhD in Law, assistant professor at the Institute of Administrative Science, Faculty of Law, Administration and Economics, University of Wrocław; her research interests include administrative science, administrative law, comparative administrative law, social assistance, civil service systems in comparative perspective, sociology of organizations and English language in administrative law. She is especially interested in social tasks of the Polish local self-government; she has particular interests in the sphere of social assistance and homelessness.

Sofia Engurazova – research assistant at the Centre for Education Law, Institute of Education, Higher School of Economics in Moscow; currently finishing her bachelor's degree at the Faculty of Law and starting her master's studies in financial law.

Jakub Grzegorz Firlus – M.A. in law and administration, assistant professor, Chair of Administrative Procedure, Jagiellonian University.

Marcin Kamiński – Professor of the Jagiellonian University in Cracow at the Department of Administrative Proceedings; author of more than 80 publications on administrative substantive law, administrative procedural law and judicial-administrative proceedings; Judge delegated to adjudicate in the Supreme Administrative Court.

Maria Karcz-Kaczmarek – PhD, assistant professor at the Department of Administrative Law and Administrative Science at the Faculty of Law and Administration, University of Lodz; author of numerous articles on administrative law, including professional and economic self-government as well as the legal aspects of cultural activities and monument protection; co-author of the Law Encyclopedia, the Local Government Encyclopedia and academic textbooks, completed a scientific scholarship at the University of Strasbourg, becoming acquainted with the functioning of institutions of the European Union and Council of Europe; expert in the project "Good law – efficient governance" (2014 -2015) implemented by the Ministry of Administration and Digitization under the European Social Fund.

Dariusz R. Kijowski – professor, Chief of the Department of Administrative of Law at the Faculty of Law, University of Białystok; President of the Self-government Appeal Board in Białystok; member of the Legislative Council at the Prime Minister Office.

Kamil Klonowski – PhD, adjunct (lecturer) and Chair of Administrative Procedure, Jagiellonian University.

Dominik Kościuk – PhD, assistant professor at the Department of Administrative Law, Faculty of Law, University of Białystok.

Radosław Mędrzycki – associate professor at the Faculty of Administrative Law and Local Government of the Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw; his research focuses on the social aspects of lawmaking and application, including in particular groups of socially excluded people or those at risk of social exclusion (in particular the homeless, people with disabilities, the elderly) and social solidarity.

Klara Nagy – PhD, works at the Széchenyi István University and at the Mayor's Office in Győr, Hungary; her research interests focus on the issue of local governments.

Evgenii Puchkov – research assistant at the Centre for Education Law, Institute of Education, Higher School of Economics in Moscow and the deputy head of the Committee for External Relations at the HSE Student Council; he is currently pursuing his master's degree in international trade and finance law at the Faculty of Law at HSE.

Mariusz Szyrski – PhD, associate professor at the Department of Administrative Law and Local Government at the Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw; he deals with energy law (RES), environmental law, administrative law and the theory of local self-government.

Justyna Symber – a graduate of the Faculty of Law and Administration at the University of Gdansk, presently defending her MA thesis in the Faculty of Criminal Law and Criminology; she is a PhD candidate at the Faculty of Law and Administration of the University of Gdansk and a trainee legal advisor at the Regional Chamber of Legal Advisors in Gdańsk.

Victor Vorobyev – research assistant at the Centre for Education Law, Institute of Education, Higher School of Economics in Moscow; he is currently finishing his master's degree at the Faculty of Law and starting doctoral studies at the Post-Graduate School of Law at HSE; currently Chair of the Student Council and a member of the Academic Council at the HSE Faculty of Law; formerly a Deputy Chair of the Russian Student Union, Head of the Russian Federation Commissioner for Student Rights' Legal Department and a parliamentary assistant at the Legislative Assembly of St. Petersburg's Permanent Commission for Education, Culture, and Science.

Martyna Wilbrandt-Gotowicz – PhD in law, lecturer Chair of Administrative Procedure, Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw.