

STRUCTURE OF THE PROCEDURE FOR GRANTING TELEVISION AND RADIO BROADCASTING CONCESSIONS

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ABSTRACT

The considerations undertaken in this article concern the structure of the concession procedure conducted for audiovisual concessions. If by structure we understand the relationship between the elements constituting a given type of proceeding, then the concession procedure before the KRRiT is unique, as the decision on the concession is entrusted to two bodies within a single administrative proceeding. Against this backdrop, numerous procedural doubts arise regarding the place and role of the KRRiT and the President of the KRRiT in such proceedings, as both bodies decide on radio and television concessions. The joint action of these bodies in issuing a decision is an original solution in Polish law, which warrants theoretical justification. The article proposes a solution based on the exercise of joint competence by these authorities. Such a construction is permissible and appears to result from existing regulations under the Law on Radio and Television Broadcasting; however, it fundamentally changes the structure of the entire procedure, necessitating a fresh examination of procedural relations, the responsibilities of the authorities, and the mechanisms for controlling their actions. The solution presented in this article, beginning with the concept of the structure of concession proceedings, aims to ensure the efficiency of these proceedings while primarily safeguarding the rights of the entities involved.

Keywords: National Radio and Television Broadcasting Council, concession, interaction, competence of the body, scope of action

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INTRODUCTION

Etymologically, the term 'structure' derives from the Latin *structura*. In contemporary Polish, it has several meanings. Philosophically and, particularly in methodological terms, structure refers to the arrangement of components and the set of relationships between them, characteristic of a given system as a whole.¹ In a narrower sense, it describes how constituent elements are assigned to each other and connected to form a whole, or the system of relationships between the elements of a given system and between the individual elements and the system as a whole. The term may be understood somewhat differently in empirical sciences, where 'structure' refers to a system of relationships and interdependencies between elements, conditioned by their belonging to a particular system. In biological sciences and the humanities, the concept of structure is often linked to the idea of totality. As a result, in these fields, structure is commonly defined as both the interrelationships of the elements that constitute the whole and the specific whole constructed from these elements.

In legal terms, particularly in the context of any legal procedure, structure should be understood as the relationship between the elements constituting a specific type of procedure. When defined in this way, structure refers to the mutual relationships between the procedural institutions that form the proceedings as a whole, resulting in a decision on the application of the law. This understanding of structure closely aligns with its meaning in the humanities, though it also reflects philosophical concepts. In the theory of procedural law, where every legal procedure is a process, a distinction is made between the function and the structure of the procedure. The function of a procedure is to achieve the objectives it is intended to serve, namely, the determination of its scope and the results it seeks. Conversely, the structure of a procedure is the legally determined mechanism that facilitates the achievement of its function, i.e., the effective application of the law. This understanding of structure can be analysed in terms of its constituent elements or from the perspective of its operation. Thus, the process may be regarded as having both static and dynamic aspects.²

The issue of the structure of the procedure for granting concessions for broadcasting television and radio programmes is a significant legal problem. This assessment is influenced by the fact that broadcasting audiovisual programmes is a crucial component of public access to information and, therefore, the realisation of a constitutional right that protects individual freedom. This issue is also relevant because the right to broadcast television programmes is exercised through a concession procedure, which inherently affects economic freedom, another constitutional value. Hence, a proper definition of the structure of such proceedings, in particular the roles of the entities responsible for conducting the concession process, is vital for ensuring the effective realisation of these fundamental values.

¹ See *Słownik języka polskiego* (Polish Language Dictionary), PWN, <https://sjp.pwn.pl/sjp/struktura;2576373.html> [accessed on 21 October 2024].

² More details can be found in Waligórski, M., *Proces cywilny. Funkcja i struktura*, Warszawa, 1947, pp. 32–33.

Above all, it is a matter of determining the limits of the legal actions of the bodies participating in the procedure for granting a concession or its extension for the specified duration. The issue presented is also a significant legal matter because the Polish television broadcasting concession proceedings are uniquely structured and differ from classic concession proceedings, which are typically entrusted to a single legally designated authority. Even when other bodies are involved in such proceedings, they generally hold the status of opinion-giving or concurring bodies, meaning that the concession remains the decision of a specific authority. In the case of television and radio concessions, however, the situation is different, as the law entrusts the issuance of such a decision to two bodies, which must act jointly. This arrangement gives rise to numerous detailed problems, which, in practice, may lead to the infringement of various procedural rights of entities applying for a concession. Such a situation is problematic, as it obscures the scope of responsibility of the authorities issuing the concession, thereby diminishing the level of protection for the applicants. The ambiguity of the current legal solutions in this area leads to practical controversies and inconsistencies in the application of the law. Thus, this background continually provides grounds for legal debate.

AUTHORITIES ISSUING TELEVISION BROADCASTING CONCESSIONS

The Act³ entrusts the issuance of radio and television broadcasting concessions to the National Radio and Television Broadcasting Council (KRRiT)⁴ and the President of this Council. Consequently, the Act establishes a specific formal relationship between these two entities, empowering them, in a substantive sense, to issue a single decision. Although such a decision can only be made after each body has taken a legally defined action – namely, a resolution by the KRRiT and a decision by the President of the KRRiT – the concession for broadcasting a television programme may be granted only if both bodies complete these actions. It should also be noted that a positive decision on the concession, i.e., the issuance of a decision by the President of the KRRiT, is strictly dependent on the resolution of the KRRiT. This means that the President of the KRRiT cannot issue a decision unless a resolution has been adopted by the KRRiT.

Structuring the concession-granting procedure in this way raises several legal questions regarding the nature of the acts performed by the bodies responsible for granting concessions and the process for verifying the decisions they make. These questions are particularly important because they directly affect the scope and nature of the protection of the rights of concession applicants. They also have significant implications for the liability of the authorities for actions taken during the concession process. This is not only about potential liability for damages arising from the process but, above all, concerns administrative ‘liability’ in its broadest sense. Within this framework, issues related to the course of the concession process itself, such as delays

³ Act of 29 December 1992 on Radio and Television Broadcasting (Journal of Laws of 2022, item 1722), hereinafter ‘the Act on Radio and Television Broadcasting’ or ‘the Act’.

⁴ Hereinafter ‘the KRRiT’.

or inaction in the proceedings and the method of reviewing acts issued by various authorities, must be considered. The latter aspect is especially crucial, as it determines the method of verification and, consequently, the procedure and admissibility of control over the decisions made. Ultimately, this influences the process of appealing these rulings in court, thereby indirectly impacting the realisation of the right to a fair trial as guaranteed by Article 45 of the Constitution of the Republic of Poland.⁵ A proper understanding of the issues presented requires a clear definition of the roles of the KRRiT and the President of the KRRiT in concession proceedings.

The KRRiT was established under an Act amending the Constitution of the Republic of Poland.⁶ As a result, this authority was accorded high status, with its competencies and principles of operation specified in the Constitution. In legal scholarship, precise status of the KRRiT is not clearly defined, particularly concerning its constitutional position.⁷ While it seems indisputable that the KRRiT is not part of the government administration, other aspects remain the subject of ongoing legal debate, with findings that are far from conclusive. To illustrate this issue, three distinct groups of viewpoints regarding the legal status of the KRRiT have emerged in legal scholarship. The first group considers the KRRiT to be an independent regulatory authority outside the traditional framework of authorities defined by the principle of the tripartite division of power.⁸ This view is prevalent in the field of constitutional law. The second group of viewpoints holds that the KRRiT is a unique organ of state administration, albeit distinct from the government administration.⁹ The peculiar status of this authority arises from uncertainties surrounding its classification as a non-governmental organ of state administration, given the competencies granted by law and the methods of appointing its members and selecting the President of the KRRiT. However, the fact that the KRRiT has been granted the authority to issue regulations and resolutions based on statutory delegation appears to support its inclusion among administrative bodies.¹⁰ The third and final group of views maintains that the KRRiT is indeed a state administration authority.¹¹

⁵ Journal of Laws of 1997, No. 78, item 483.

⁶ Act of 15 October 1992 on amending the Constitution of the Republic of Poland, Journal of Laws of 1993, No. 7, item 33.

⁷ See Garlicki, L., *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa, 2006, p. 320 *et seq.* Cf. also Piątek, S. (ed.), *Ustawa o radiofonii i telewizji. Komentarz*, Warszawa, 2014, pp. 78–79, also: Patyra, S., in: Niewęglowski, A. (ed.), *Ustawa o radiofonii i telewizji. Komentarz*, Warszawa, 2021, pp. 146–149.

⁸ E.g., Sokolewicz, W., Garlicki, L. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 3, Warszawa, 2003, Chapter IX, p. 6, also: Zięba-Załucka, H., 'Krajowa Rada Radiofonii i Telewizji', in: Zięba-Załucka, H. (ed.), *System organów państwowych w Konstytucji Rzeczypospolitej Polskiej*, Warszawa, 2005, p. 262.

⁹ See Sobczak, J., *Radiofonia i Telewizja. Komentarz*, Warszawa, 2001, p. 109 *et seq.*

¹⁰ A strong opinion in favour of such a status of the KRRiT was expressed by J. Jagielski who indicated that although KRRiT has been organisationally separated from the administrative apparatus, it is functionally included in executive and administrative activities. See Jagielski, J., 'Administracja centralna', in: Wierzbowski, M. (ed.), *Prawo administracyjne*, Warszawa, 2006, p. 178 *et seq.*

¹¹ See Zdyb, M., 'Krajowa Rada Radiofonii i Telewizji', in: Stelmasiak, J., Szreniawski, J. (eds), *Prawo administracyjne ustrojowe. Podmioty administracji publicznej*, Lublin, 2002, p. 155.

The presented analysis of views on the legal status of the KRRiT, although somewhat superficial, appears sufficient for examining the structure of concession proceedings conducted before this authority. From all the positions regarding the place and role of the KRRiT within the Polish legal order, one consistent conclusion emerges: the KRRiT is a state authority, a collegiate body, which belongs to the executive branch of the state and performs control and executive tasks in the area of freedom of speech in the public sphere, regulating the space where communication occurs through radio and television signals. For describing the role of the KRRiT in the concession procedure, less emphasis is placed on determining the constitutional and regulatory nature of this authority and analysing its connection with the executive or legislative powers.

From a theoretical perspective, such findings are important but secondary to the issuance of a concession. What matters in this context is that, regardless of how the legal status of the KRRiT is defined, it functions as an authoritative entity in individual cases, which necessitates recognising it as a public administration authority. There may still be a debate about the precise nature of its status, but for assessing its actions within the concession procedure, it is irrelevant whether it is considered a systemic body or merely a functional one.¹² In both instances, the same procedural regulations outlined in the Administrative Procedure Code,¹³ including amendments arising from the Law on Radio and Television Broadcasting, will apply. This assertion does not eliminate doubts about the form in which the KRRiT makes decisions on concessions, but it serves as an important starting point for evaluating the actions taken by this authority in concession proceedings. Furthermore, it provides a basis for determining how these actions should be verified, which is crucial for understanding the structure of these proceedings. It also allows for an initial assumption in assessing the KRRiT's actions: as a public administration authority in matters of concessions, it is bound by the principle of legalism. This statement, although seemingly obvious, may be significant in defining the role of the KRRiT within the structure of concession proceedings in the field of audiovisual services. It notably raises the question of the internal nature of the acts performed when issuing concessions.

In light of the foregoing comments, it seems appropriate to state that the specific position of the KRRiT as a state authority combining various functions, along with its competencies and the manner of its appointment specified in the Constitution of the Republic of Poland, does not support the notion that the KRRiT is not a public administration authority. Nonetheless, the legally defined features of this body clearly grant it a degree of autonomy in relation to the executive branch, particularly the government administration. However, such autonomy cannot imply the absence of control over the KRRiT's actions concerning the adjudication of individual cases, including the granting of concessions. Structurally, the concession procedure consists of two stages: first, the adoption of a resolution by the KRRiT, and second,

¹² See Sadowski, J., in: Safjan, M., Bosek, L. (eds), *Konstytucja RP. Tom II. Komentarz*, Warszawa, 2016, p. 1454; also: judgment of the Constitutional Tribunal of 18 February 2014, K 29/12, OTK – A 2014, No. 2, item 11.

¹³ Journal of Laws of 2023, item 775.

the implementation of this resolution through a decision by the President of the KRRiT. The statutory structuring of the procedure in this manner, combined with the attribution of autonomy to the KRRiT, raises a fundamental question regarding the admissibility of judicial review of the resolution adopted by the KRRiT. In this context, both legal doctrine¹⁴ and jurisprudence¹⁵ are inconsistent. The prevailing view is that a resolution of the KRRiT adopted pursuant to Article 6(1)(3) of the Act on Radio and Television Broadcasting is an internal act, which must serve as the basis for the President of the KRRiT to issue a concession decision. However, it cannot be independently challenged in an administrative court. This view does not seem to be well-supported by the law, yet it has become a common position in judicial practice and has been indirectly accepted in legal doctrine.¹⁶

Doubts regarding the legal nature of the KRRiT's resolution on the concession authorising the broadcasting of radio and television programmes arise because, pursuant to Article 33(2) of the Act on Radio and Television Broadcasting, the President of the KRRiT is designated as the competent authority in matters of concessions. At the same time, Article 33(3) of this Act stipulates that the President of the KRRiT issues a decision on the concession based on a resolution of the KRRiT. Furthermore, Article 6(2)(3) of the Act on Radio and Television Broadcasting states that the tasks of the KRRiT include making decisions on concessions for broadcasting programmes, recording them in the programmes register, and maintaining this register. It is argued in legal scholarship that the solution adopted in Article 33(3) is a consequence of the specific legal status and character of the KRRiT. Under the current law, it is a state body of a collegial nature, within which the President of the KRRiT acts as a member, equipped with two types of competences. One of these is organisational in nature and should undoubtedly be associated with the internal sphere of the collegiate body's operations. However, with regard to the granting of concessions, the President of the KRRiT has been vested with his own competencies, as Article 33(2) of the Act states that he is the competent authority for granting the concession.

The rationale behind such a solution cannot be linked to the speed and efficiency of the concession procedure. By design, it stands in serious opposition to the basic principles of administrative procedure,¹⁷ yet the concession process must still be conducted in accordance with these rules. It appears to reflect the

¹⁴ See Sobczak, J., *Radiofonia...*, op. cit., pp. 399–400; Chruściak, R., *Krajowa Rada Radiofonii i Telewizji w systemie politycznym i konstytucyjnym*, Warszawa, 2007, p. 231; Zimmermann, J., 'Głosa do wyroku NSA z dnia 1 października 1998 r., II SA 916/97', *Orzecznictwo Sądów Polskich*, 1998, No. 2, item 29.

¹⁵ See judgment of the Supreme Administrative Court of 22 September 1994, II SA 695/94, CBOŚA, judgment of the Supreme Administrative Court of 27 February 2018, II GSK 1412/16, CBOŚA, judgment of the Supreme Administrative Court of 12 October 2006, II GSK 400/05, CBOŚA, a different view was expressed in the judgment of the Supreme Administrative Court of 1 October 1998, II SA 916/97, CBOŚA.

¹⁶ See footnotes 14 and 15.

¹⁷ For more details on the principle of speed and efficiency of jurisdictional administrative proceedings, see Żukowski, L., Sawuła, R., *Postępowanie administracyjne*, Przemysław-Rzeszów, 2012, pp. 96–97, also: Kędziora, R., *Kodeks postępowania administracyjnego. Komentarz*, Warszawa, 2008, pp. 105–106, also: Zimmermann, J., *Aksjomaty postępowania administracyjnego*, Warszawa, 2017, p. 41 *et seq.*, also: Zimmermann, J., *Aksjomaty prawa administracyjnego*, Warszawa, 2013, pp. 91–92.

legislator's intention to ensure impartiality and a multifaceted evaluation in the matter of granting audiovisual concessions.¹⁸ However, this intention was realised in a questionable manner, relying on an innovative solution that introduces a specific form of cooperation between the authorities in issuing decisions. It is difficult to classify such a solution as cooperation, as genuine cooperation is always based on a clear procedural framework, which involves an unambiguous definition of the roles of the authorities in the decision-making process. In practice, this arrangement has led to numerous uncertainties, particularly regarding the division of competences between the KRRiT and the President of the KRRiT, as well as the nature and relationship of the acts issued by these bodies.

As previously noted, various views have been expressed in legal doctrine, ranging from the opinion that the KRRiT's resolution has not only a primary but also a substantive character¹⁹ in this context, to those claiming that the resolution is merely an internal act in the licensing process, although necessary for the President of the KRRiT to issue a decision. By its very nature, a resolution of the KRRiT, considered as an internal act, cannot establish any rights or obligations for an entity applying for a concession, as it is addressed exclusively to the President of the KRRiT. Consequently, the rights and obligations of a licence applicant are shaped solely by the decision of the President of the KRRiT.²⁰ Under this assumption, a KRRiT resolution is not a legal act producing direct effects in the realm of external legal relations, which implies that until the President of the KRRiT issues a decision, the resolution may be amended, repealed, or replaced by another resolution.²¹

LEGAL NATURE OF THE RESOLUTION OF KRRiT IN CONCESSION PROCEEDINGS

The findings presented thus far indicate that the granting of an audiovisual concession occurs within an administrative procedure, characterised by an innovative approach to defining the material competence of the authority granting the concession. In this procedure, we encounter the actions of two distinct authorities, and it is crucial to emphasise that these are the actions of two authorities in a single case. Against this backdrop, questions naturally arise about which of these authorities serves as the concession-awarding authority, what the relationship between their proceedings is, and how these authorities interact throughout the concession process. Finally, the question of the judicial review process of their actions should also be considered valid. All these issues present significant procedural challenges due to the structure of the proceedings themselves and, most importantly, the correct delineation of the pathways for controlling the legality of their actions.

¹⁸ See Sobczak, J., *Radiofonia...*, op. cit., p. 400.

¹⁹ See Chruściak, R., *Krajowa Rada...*, op. cit., p. 231.

²⁰ See, *inter alia*, judgment of the Supreme Administrative Court of 22 September 1994, II SA 698-712/94, ONSA, 1995, No. 3, item 126.

²¹ See judgment of the Supreme Administrative Court of 12 October 2005, II GSK 400/05, CBOSA.

Under the current legal framework, there should be a critical assessment of the concept adopted by jurisprudence and doctrine, often referred to as a two-stage concession procedure. This approach explicitly assumes that the granting of a concession for radio and television broadcasting is carried out in two steps. The first step involves the adoption of a resolution by the KRRiT, in accordance with the content of Article 6(2)(3) in conjunction with Article 9(1) and (2) of the Act on Radio and Television Broadcasting. An analysis of these provisions leads to the conclusion that the resolution adopted under Article 6(2)(3) of the Act on Radio and Television Broadcasting constitutes a decision on the concession for the broadcasting of a programme. Article 9(1) of the Act specifies the forms in which the KRRiT operates. This provision clearly outlines the forms of action available to the KRRiT, specifying that it may issue either regulations or resolutions. In matters related to concessions, the only permissible form of action by the KRRiT is a resolution, as only such an act can be associated with an individual case. A regulation may be issued by KRRiT within the scope of general matters, although it will not always be an act implementing the Act on Radio and Television Broadcasting within the meaning of Article 92(1) of the Constitution of the Republic of Poland,²² however, it is always based on this Act.

Adopting such a solution as a model for action in granting an audiovisual concession has significant legal consequences. Firstly, it leads to a different understanding of the roles and implications of the acts undertaken by the KRRiT and the President of the KRRiT in the concession proceedings. This may result in two procedural solutions. One assumes that the resolution of the KRRiT on granting the concession is merely an internal act in the concession proceedings, whereas the decision of the President of the KRRiT on the concession is made in accordance with Article 33(2) of the Act on Radio and Television Broadcasting, which designates the President of the KRRiT as the competent authority in concession matters. Such an approach to the structure of the analysed proceedings is predominant in legal scholarship²³ and is generally a consequence of jurisprudence.²⁴ A different view on this matter – one which, in my opinion, is correct – holds that both authorities in the concession proceedings, structured in this manner, are autonomous²⁵ with respect to each other in terms of jurisdiction. Consequently, the acts taken by them in these proceedings, i.e., a resolution of the KRRiT and a decision of the President of the KRRiT, constitute separate decisions on matters assigned to them by law. Each of

²² M. Wiącek presents the issue of various types of regulations in greater detail. See Wiącek, M., in: Safjan, M., Bosek, L. (eds), *Konstytucja RP. Tom II. Komentarz*, Warszawa, 2016, pp. 176–177. In this regard, an important observation on regulations as general acts can be found in: Szewczyk, E., Szewczyk, M., *Generalny akt administracyjny*, Warszawa, 2014, p. 157 *et seq.*, also Czarnik, Z., 'Ograniczenie praw i wolności w stanie choroby zakaźnej u ludzi', in: *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2021, No. 10, special issue: *Ius est ars boni et aequi. Studia ofiarowane prof. R. Hauserowi Sędziemu Naczelnego Sądu Administracyjnego*, pp. 139 *et seq.*

²³ See Piątek, S., *Ustawa...*, op. cit., p. 362.

²⁴ See judgment of the Supreme Administrative Court of 28 March 2023, II GSK 2280/22, CBOSA.

²⁵ Such a view appears to be put forward by R. Chruściak – idem, *Krajowa Rada...*, op. cit., p. 231.

these acts is subject to proper control depending on the scope of the decision, even though together they form the entirety of jurisdiction in the concession proceedings.

There are several arguments in favour of this approach to these acts in the proceedings for granting an audiovisual concession, which effectively challenge the view that the KRRiT's resolution is an internal act and that only the decision of the President of the KRRiT constitutes an external act, i.e., a concession for broadcasting radio and television programmes. The first argument supporting the autonomy of decisions by both bodies is the normative regulation of their competences. According to Article 6(2)(3) of the Act on Radio and Television Broadcasting, the KRRiT makes decisions on concessions within the scope specified by law. Although the Act uses the general notion of the KRRiT's tasks and assigns to these tasks the adjudication of concessions, it seems that Article 6(2)(3) of the Act on Radio and Television Broadcasting cannot be interpreted literally, and the adjudication referred to in this provision cannot be equated with the tasks of the authority. From a theoretical perspective, the tasks of a public administration authority are the areas statutorily assigned to the authority within which it can undertake actions,²⁶ so conceptually these tasks relate to the scope of the authority's operations, which involves listing the matters the authority deals with.²⁷

In the case under analysis, the KRRiT's decision on the audiovisual concession cannot be viewed as a task but should be understood as a competence.²⁸ In legal scholarship, it is noted that in administrative law, competence functions in two distinct contexts.²⁹ One interpretation of competence is as a mechanism that separates from the totality of public administration activities those actions carried out by a specific body. In this sense, competence becomes synonymous with the tasks of an organ or even the scope of its activities. This broader understanding of competence contrasts with the narrower definition of competence as the ability to sovereignly shape the legal situation of an entity outside the administration.³⁰ Thus, the scope of an authority's activities encompasses a list of matters handled by the authority, whereas to take specific sovereign actions within such a defined scope, a competence is necessary – i.e., a legal provision authorising a sovereign action in a particular manner.

Undoubtedly, the sovereign shaping of rights and obligations occurs when the KRRiT decides on the concession. It should be noted that this action pertains to an entity outside the administration, as such an entity is any applicant for a concession. Thus, it should be assumed that the decision on the concession is an authoritative act within the domain of public administration. Of course, only the nature of this act may be disputed, i.e., whether it constitutes a decision or

²⁶ See Ochendowski, E., *Prawo administracyjne. Część ogólna*, Toruń, 2006, pp. 239–240.

²⁷ More broadly, Cieślak, Z., Jagielski, J., Lang, J., Wierzbowski, M., Wiktorowska, A., *Prawo administracyjne*, Warszawa, 1996, p. 51; Jagielski, J., Wierzbowski, M. (ed.), *Prawo administracyjne*, Warszawa, 2022, pp. 191–192.

²⁸ See Zimmermann, J., *Aksjomaty prawa...*, op. cit., p. 160 *et seq.*

²⁹ More broadly, Matczak, M., *Kompetencja organu administracji publicznej*, Kraków, 2004, p. 25; Matczak, M., 'Kompetencja w prawie administracyjnym', in: Hauser, R., Niewiadomski, Z., Wróbel, A. (eds), *System prawa administracyjnego. T. 1. Prawo administracyjne materialne*, Warszawa, 2010, p. 361 *et seq.*

³⁰ See Zimmermann, J., *Aksjomaty prawa...*, op. cit., p. 162.

another form of public administration act. However, the authoritative nature of this act and its individual character cannot be questioned, as this follows directly from the wording of Article 6(2)(3) of the Act on Radio and Television Broadcasting, which states that the KRRiT decides on the concession. As a rule, competence provisions should be distinguished from those indicating the tasks and scope of activity of the authority, because the competence of the authority falls within the realm of substantive law rather than constitutional law, as is the case with tasks and scope of activity. However, this is not always true, as seen in Article 6(2) of the Act on Radio and Television Broadcasting, which encompasses various matters related to both the scope of action and competence of the KRRiT.

The competence of this authority is referenced in all regulations that permit the KRRiT to shape the legal situation of entities in an authoritative manner. This applies not only to Article 6(2)(3) of the Act, but also to paragraphs 3a, 6, and 6a of this provision. Although the KRRiT will shape the legal position of entities differently based on these provisions – whether through regulations on licence fees, determining fees for granting a licence, or entering a programme into the register – in each situation, it acts authoritatively, i.e., it exercises a competence granted by law. Establishing this fact allows us to conclude that Article 6(2) of the Act on Radio and Television Broadcasting is heterogeneous in content, as it addresses matters related to the scope of activity of the authority while also specifying the competencies of the KRRiT. On this basis, it should be assumed that within the scope of the concession procedure, the KRRiT exercises its competence in deciding whether to grant the concession.

Thus, the power to grant a concession rests with the KRRiT and not with the President of the KRRiT, who, pursuant to Article 33(2) of the Act on Radio and Television Broadcasting, is the competent authority in matters of concessions.³¹ The material competence of the President of the KRRiT is formal in nature, limited solely to conducting the proceedings in a technical sense and issuing a decision that confirms the KRRiT's decision. This scope of action by the President of the KRRiT has been almost unanimously accepted in case law, which clearly emphasises the internal nature of the act undertaken by the KRRiT that contains the decision on the concession. The recognition that the President of the KRRiT primarily performs technical functions in the concession proceedings is derived from the role assigned to this body by law. An analysis of the concession regulations, specifically Chapter 5 of the Act on Radio and Television Broadcasting, leads to the unequivocal conclusion that the President of the KRRiT prepares the application for a concession for the distribution of radio and television programmes, focusing on the fulfilment of the technical and legal conditions for granting the concession. Within these regulations, the President of the KRRiT does not hold any independent authority related to the

³¹ See judgment of the Supreme Administrative Court of 22 September 1994, II SA 695/94, CBOSA; judgment of the WSA in Warsaw of 27 July 2005, VI SA/Wa 163/05, CBOSA; and judgment of the Supreme Administrative Court of 28 March 2023, II GSK 2280/22, CBOSA. A different position in this regard is presented in the judgment of the Supreme Administrative Court of 10 January 2023, II GSK 1391/22, CBOSA.

decision to grant or refuse the concession. Of course, this does not imply that the role of this body in the concession procedure is insignificant or devoid of any authority.

Pursuant to Article 34(1) of the Act on Radio and Television Broadcasting, the President of the KRRiT is required to announce, in the manner prescribed by law, information regarding the possibility of obtaining a concession. He must also announce, pursuant to Article 36b of the Act, the necessity of holding a tender in the concession procedure or the initiation of the process for withdrawal of the concession under Article 38(3) of the Act on Radio and Television Broadcasting. Additionally, he must, pursuant to Article 36c of the Act, make the selection of tenders in a number corresponding to the available concessions, if a tender process was conducted and the number of applications exceeded the number of possible concession awards.

The competences of the President of the KRRiT in concession proceedings, as outlined above, lead to the conclusion that his authoritative powers do not extend to making the concession decision itself. These powers are attributed to the KRRiT, not only for granting a concession but also for revoking it or granting consent for the transfer of the concession in accordance with Article 38a(3) of the Act on Radio and Television Broadcasting, following legal transformations of the entity to which the concession was awarded. An analysis of the legal basis for the actions of the President of the KRRiT indicates that the authoritative competences in adjudicating on the audiovisual concession are divided between two bodies, but the line dividing these competences has not been clearly defined. In practice, such a situation leads to many procedural difficulties, which burden the concession process. Against this background, from the very outset of the Act on Radio and Television Broadcasting being in force, there was a need to find a coherent legal solution that would define the relationship between the two bodies involved in concession proceedings. This relationship could not be accommodated within the framework of procedural law formulas for the interaction of authorities. The relationship inherent in such interaction is not preserved here; on the one hand, there is the action of the ruling authority, and on the other, the interacting authority. The interacting authority must act, but its position, even if binding because it constitutes an agreement rather than merely an opinion within the meaning of Article 106 of the Code of Civil Procedure, is never the resolution of the main case.³² Therefore, under the Act on Radio and Television Broadcasting, the relationship between the KRRiT and the President of the KRRiT in concession proceedings should be treated as one of co-competence³³ rather than cooperation.

Making such an assumption does not yet solve the problem related to the structure of the adjudication itself. It is a matter of correctly defining the nature of the acts undertaken within the framework of concurrent competence. It seems that in this respect, solutions may vary. They range from scenarios where the authorities take a joint decision to those where there is a temporal sequence of acts leading to the resolution of the case.

³² More broadly, Sobczak, J., *op. cit.*, pp. 399 *et seq.* In general on the subject of cooperation, Adamiak, B., Borkowski, J., *Kodeks postępowania administracyjnego. Komentarz*, Warszawa, 1996, pp. 471–474; Adamiak, B., 'System Prawa Administracyjnego', in: Hauser, R., Niewiadomski, Z., Wróbel, A. (eds), *Prawo procesowe administracyjne*, Vol. 9, Warszawa, 2010, pp. 110–111.

³³ *Ibidem*, p. 111.

Under this assumption, each of the authorities participating in the joint competence acts on a specific part of the case, with the final outcome being the resolution of the case. Adopting such a structure for the proceedings, where the administrative case is settled, is possible with different approaches to the acts undertaken by the interacting authorities that ultimately resolve the administrative case. These acts may be structured in a relation internal act–external act or based on the assumption of their equivalence. However, in the latter case, the acts should still differ in nature, although failure to meet this condition does not preclude the correct structure of co-competence. Nevertheless, it seems that the acts implementing joint adjudication should have different legal statuses, as this would clarify the method of their verification and interdependence. The precise determinations of these relationships must stem from the existing legal solutions applicable to cases jointly decided by the authorities.

In cases concerning the granting of audiovisual concessions, the previously presented relationship assumes that the resolution of the KRRiT is an internal act, albeit decisive for the concession, while the decision of the President of the KRRiT serves as the execution of this resolution and is, therefore, an external act.³⁴ This solution, however, appears flawed. This conclusion arises from the analysis of the provisions regulating the concession procedure under the Act on Radio and Television Broadcasting and from systemic considerations. Regarding the latter, it should be noted that the Polish legal system, since the enactment of the Act, has introduced many new instruments related to the control of public administration bodies' activities – legal solutions that were not in place when the first decisions regarding television and radio concessions were made. The approach to the competencies of the KRRiT and the President of the KRRiT, developed at that time, does not account for the fact that each body acts authoritatively in its respective part of the concession case and should be controlled accordingly. Due to the nature of their operations, different types of actions and decisions made by these bodies will be subject to different types of control, which may occur under separate procedures, albeit ultimately before an administrative court.

The specificity of decisions made by the concession authorities under the Act on Radio and Television Broadcasting has been noted in jurisprudence.³⁵ However, the view that the decisions of both authorities are self-contained has not been

³⁴ This procedure was generally shaped by case law such as judgment of the Supreme Administrative Court of 27 February 2018, II GSK 1412/16, CBOSA, and was essentially accepted by legal doctrine, see Niewęglowski, A. (ed.), *Ustawa o radiofonii i telewizji. Komentarz*, Warszawa, 2021, p. 479, and the literature cited therein.

³⁵ See Lubeńczuk, G., in: Niewęglowski, A. (ed.), *Ustawa o radiofonii i telewizji. Komentarz*, Warszawa, 2021, p. 481: 'under the Act of 11 May 1995 on the Supreme Administrative Court (Journal of Laws of 1995, No. 74, item 368 as amended), the Supreme Administrative Court (NSA) expressed the position that resolutions adopted by the KRRiT in concession matters constitute substantive decisions on the right to a concession, and thus are individual acts of public administration subject to its review (judgment of the Supreme Administrative Court of 1 October 1998, II SA 916/97, LEX No. 36388). According to the NSA, the removal from the legal order of a defective KRRiT resolution, which serves as the basis for the contested concession decision issued by its President, is necessary for the final settlement of the case, and there are no legal grounds to exclude the most important part of the concession procedure, in which KRRiT adopts a resolution either granting or denying the concession, from judicial review.'

widely accepted. This state of affairs should be critically evaluated, and it should be proposed to return to the assumption that both the KRRiT's resolution and the decision of the President of the KRRiT are independent and authoritative acts of the authorities. The key distinction is that a resolution is an act different from a decision, with the latter being issued in accordance with the provisions of the Code of Administrative Procedure. In other words, a decision is an act of public administration that concerns rights or obligations arising from legal provisions, as referred to in Article 3 § 4 of the Act on Administrative Proceedings. Adopting such an assumption may face the criticism that allowing appeals against acts by both authorities involved in audiovisual concession proceedings could potentially prolong the proceedings. Indeed, this risk exists, but it is also present under the current system, as it is not possible to prohibit a party from filing a complaint against a resolution if no such prohibition exists in the Act, particularly given Article 3 § 4 of the Act on Administrative Proceedings.³⁶ Any such complaint would, in any case, initiate administrative court proceedings that must be resolved appropriately.

However, allowing for the possibility of reviewing both types of concession decisions would streamline the structure of the concession procedure itself, as it clarifies the roles of the bodies involved in issuing the audiovisual concession. It also enhances clarity regarding the legal liability of these bodies. It should be noted that such responsibility may ultimately affect specific individuals associated with these bodies. For these reasons, it would be advisable to opt for a separation of authorising powers when granting radio and television concessions, rather than establishing the concept of a strict binding of the concession decision to a resolution of the KRRiT. Since the President of the KRRiT cannot issue a decision without a resolution, he cannot be held accountable for not issuing the decision if the KRRiT fails to adopt a resolution.

Although the President of the KRRiT, pursuant to Article 7(2b) of the Act on Radio and Television Broadcasting, is elected and dismissed by the KRRiT from among its members, and pursuant to Article 10(1) manages its work and represents the authority externally, he does not hold specific competencies under the Act that would allow him to influence the resolution on the concession. According to Article 9(2) of the Act on Radio and Television Broadcasting, the KRRiT adopts resolutions by a majority of two-thirds of the statutory number of members, which is set at five. With this mechanism for adopting resolutions, and considering that the KRRiT members are often politicians (as this is how the authority is formed), and assuming that each member adopts a resolution independently of any pressure from the President of the KRRiT, adopting a resolution on the concession may prove difficult and time-consuming. In such legal circumstances, a fundamental concern arises regarding the protection of the rights of applicants if their concession issue is not resolved. A genuine problem of inaction then emerges. The key question is: who is responsible for the inaction in this arrangement, and who should be held accountable? It seems weakly justified to attribute the inaction to the President of the KRRiT, as he cannot issue a concession decision without a resolution.

³⁶ Act on Administrative Court Proceedings – the Act of 30 August 2002 – Act on Proceedings before Administrative Courts (Journal of Laws of 2023, item 1634).

Therefore, this circumstance alone should support the assumption of the parity of decisions by both authorities acting in the concession procedure. Such a solution would not be entirely novel in the Polish legal system. A similar arrangement exists in geological and mining law,³⁷ where the granting of a concession for the extraction of certain minerals (e.g., coal, gas) is conditional on a decision in an environmental case.³⁸ The difference between a mining concession and an environmental concession lies in the fact that mining law explicitly regulates the separateness of the two proceedings, whereas in the Act on Radio and Television Broadcasting, this separation must be construed by interpreting the scope of the decisions made by the authorities in a single proceeding. It does not appear to be a significant difference that would justify treating the KRRiT's resolution as an internal act, yet deciding on the content of the concession for broadcasting radio and television programmes.

CONCLUSION

The analysis presented leads to the conclusion that the structure of concession proceedings for granting concessions for broadcasting radio and television programmes has been addressed by the legislator in a unique manner. It differs from the classical concession proceedings, to which the provisions of the Administrative Procedure Code apply. This distinction concerns the specific formation of the material competence of the authority deciding on the concession. In this respect, a solution was adopted whereby the decision on a concession was entrusted to two bodies: the KRRiT and the President of the KRRiT. Each body decides within a different scope. However, the absence of statutory and clear prerequisites for these actions has led to numerous procedural uncertainties related to the nature of the acts undertaken in these proceedings and the potential mechanisms for their control. The lack of clear statutory solutions in this area has resulted in doctrinal and jurisprudential opinions that lean towards 'classical' concession proceedings, which has led to the interpretation of the KRRiT's resolutions as internal acts not subject to direct control. Such an approach does not consider many systemic aspects related to the standards of control of public administration in judicial proceedings and the clear delineation of legal liability. Therefore, *de lege ferenda*, it would be appropriate to aim for legislative changes that more clearly define the scope of the authorities' actions in the concession proceedings. Based on the current law, it seems justified to reconsider the structure of these proceedings and assume that they involve self-contained decisions made by two authorities.

³⁷ Act of 9 June 2011 – Geological and Mining Law (Journal of Laws of 2023, item 633, as amended).

³⁸ Article 86(2) of the Act of 3 October 2008 on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments, (Journal of Laws of 2023, item 1094, as amended). This provision regulates the binding nature of the environmental decision on the authority issuing the mining concession for mineral extraction, which is issued in a separate procedure. This means that the concession authority cannot grant a concession if the environmental decision is negative.

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