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CONTENTS

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THE IMPACT OF EUROPEANISATION OF CRIMINAL ENVIRONMENTAL PROTECTION ON CRIMINAL LAW IN THE CZECH REPUBLIC

JANA TLAPÁK NAVRÁTILOVÁ*

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Abstract

This article focuses on the influence of EU legal instruments on the criminal law of the Czech Republic in the field of environmental protection. The aim of the article is to analyse this influence and examine individual legal definitions of environmental crimes in the Czech legal system. For this purpose, descriptive, comparative, analytical, and logical methods are employed. The author first assesses the state of environmental protection in the Czech Republic, not only through criminal law. This is followed by a list of legal definitions of individual criminal offences, with an explanation of their basic features and specific differences. Each is referenced with the specific EU or public international law regulation on which the offence was based when introduced into the Czech legal system. The article also presents recent case law from the Supreme Court and the Constitutional Court of the Czech Republic concerning this issue. In conclusion, the author evaluates the level of environmental protection provided by criminal law and concludes that the Czech Republic is active in this area, fulfilling its obligations arising from European regulations governing environmental protection.

Keywords: environmental protection, criminal law, European Union, Czech Republic, facts

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INTRODUCTION

This article is a follow-up to the article 'Europeanisation of Criminal Environmental Protection', published in *Ius Novum*, 2024, No. 3. It aims to analyse environmental protection through criminal law from the perspective of the Czech Republic as a Member State of the European Union.

Criminal law protection of the environment in the Czech Republic is significantly influenced by international environmental policy and in particular that of the European Union, which, through its legal instruments, obliges Member States to implement certain legislative amendments. Another aim of this article is to provide an overview of individual offences defined in Czech legislation to protect the environment and to outline their legal definitions and specific characteristics.

In order to achieve these objectives, the logical method, abstraction, and concretisation will be employed, along with analytical, synthetic, comparative, and descriptive methods.

LEGAL STATUS OF ENVIRONMENTAL PROTECTION IN THE CZECH REPUBLIC

The Czech Republic has largely incorporated the provisions of the Environmental Protection Directive[1] (hereinafter referred to as the '2008 Directive') into its legal order. In 2008, the Environmental Damage Act No. 167/2008 Coll. was adopted.

This Act defines environmental damage as any measurable adverse change that has serious effects on selected natural resources (protected species of wildlife and wild plants, natural habitats, groundwater and surface water, including natural medicinal and mineral water sources, and soil). The obligation to prevent or remedy environmental damage is based on the principle of strict liability (i.e., liability for the outcome), with possible exoneration through reference to events or activities not expressly covered by the Act (Article 1(3) of Act No. 167/2008 Coll.). A significant change introduced by this Act, compared to previous legislation, is that the condition for implementing preventive or corrective measures by the operator of selected activities listed in Annex 1 to the Act is not dependent on unlawful conduct. Establishing liability or the obligation to take preventive or corrective measures only requires proof of a causal link between an operational activity listed in Annex 1 and the occurrence of environmental damage (Article 4 of Act No. 167/2008 Coll.); therefore, proof of illegality or fault in the form of intent or negligence is not required.

Criminal Act No. 140/1961 Coll. protected the environment primarily under the chapter on generally dangerous crimes, which included crimes against the

[1] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (OJ L 328, 6.12.2008, p. 28), available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0099 [accessed on 18 January 2024].

environment. Its amendment by Act No. 134/2002 Coll., adopted during the accession negotiations of the Czech Republic, anticipated positive changes in the forthcoming EU legislation in this area, namely 2008 Directive.

The amendment clarified and specified certain statutory elements of criminal offences against the environment, both in the general provisions for damaging and endangering the environment (Section 181a) and for damaging and endangering the environment through negligence (Section 181b). It introduced the possibility of criminal punishment for damaging or endangering not only the environment as a whole but also its individual components (Section 181f). Furthermore, it enabled the punishment of particularly harmful specific interventions into the environment, especially in the form of illegal logging in forests (Section 181c).

The new Criminal Code of 2009 (No. 40/2009 Coll.) adopted most of the environmental crime provisions from the previous Code and emphasised the importance of criminal protection of the environment by introducing a separate chapter (eighth) 'Criminal Offences against the Environment'.

The Czech Republic has fulfilled not only the requirements of EU law but also certain international obligations, particularly those arising from the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (see Communication No. 100/1994 Coll.) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (see Communication No. 572/1992 Coll.).

Due to the necessity to implement the current version of the 2008 Directive into Czech law, the 'Green Amendment' to the Criminal Code was adopted after 18 months, implemented by Act No. 330/2011 Coll.[2] This Act came into force on 1 December 2011 and brought Chapter VIII of the Czech Criminal Code (Criminal Offences against the Environment) into line with the current version of the 2008 Directive, after a delay of almost one year compared to the transposition deadline.[3]

As stated in recital 12 of the preamble to the 2008 Directive, the Directive sets out minimum rules, and Member States are free to adopt or maintain more stringent protection measures than those provided for in the 2008 Directive in the field of criminal law. The current Czech legislation as a whole goes beyond the requirements of the 2008 Directive. In addition to Chapter VIII, which contains special regulations in line with the Directive, provisions applicable to environmental protection can be found in other chapters of the Criminal Code. These include misappropriation of property (Section 229), illegal production and possession of radioactive and highly dangerous substances (Section 281), and illegal production and possession of nuclear material and special fissile material (Section 282). Conversely, in the case of criminal offences related to animal protection, criminal liability was only deepened by Act No. 114/2020 Coll., which introduced a new type of criminal sanction – the prohibition of keeping and breeding animals, in the following terms:

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[2] Amendments Nos. 28 to 34 of Act No. 330/2011 Coll. concern criminal offences against the environment.

[3] Under Article 8 of Directive 2008/99/EC, it became necessary to transpose the content and objectives of the Directive by 26 December 2010. However, the Commission did not take the Czech Republic to the EU Court of Justice despite the delay.

Section 74a – Prohibition of Keeping and Breeding Animals

(1) The court may impose the punishment of prohibition of keeping and breeding animals for up to ten years if an offender has committed an offence in connection with the keeping, breeding or care of an animal.

(2) The court may impose the punishment of a prohibition on keeping and breeding animals as a separate punishment only if the nature and gravity of the offence committed and the person and circumstances of the offender make it unnecessary to impose another punishment.

(3) The punishment of prohibition of keeping and breeding animals consists in prohibiting the convicted person from keeping, breeding and caring for an animal for the duration of the sentence.

As noted in the explanatory memorandum to the amendment, the introduction of this punishment addresses legal gaps in the imposition of penalties, such as the prohibition of activity under Section 73 and the forfeiture of property under Section 70, which were not sufficiently specific for the particular facts of the case and raised concerns regarding the constitutional principle of *nulla poena sine lege*.

The following section examines specific crimes aimed at protecting the environment, including the impact of Europeanisation on criminal law.

CRIMES AGAINST THE ENVIRONMENT

The current Criminal Code of the Czech Republic (No. 40/2009 Coll.) contains the following offences aimed at protecting the environment in a broader sense.

Section 293 – Environmental Damage and Environmental Hazard

(1) Whoever, in contravention of any other legal regulation, intentionally damages or endangers land, water, air or any other component of the environment on a large scale or over a larger area, or in such a way that it may cause serious injury to health or death, or where the cost of remedying the consequences of such conduct is substantial, or who intentionally increases such damage or threat to a component of the environment or makes it more difficult to avert or mitigate, will be punished with up to three years of imprisonment or a ban on activity.

(2) An offender shall be sentenced to imprisonment for one to five years,

(a) if he or she commits an act referred to in Subsection (1) repeatedly,

(b) if he commits such an act because he has breached an important duty arising out of his employment, profession, position or office or imposed on him by law,

(c) if such act causes permanent or long-term damage to a component of the environment,

(d) where the cost of remedying the consequences of such an act is on a large scale; or

(e) if he/she commits such an act with the intention to obtain a substantial benefit for himself/herself or for another.

(3) An offender shall be sentenced to imprisonment for two to eight years if he/she commits such an act with the intention to obtain a large-scale benefit for himself/herself or for another.

The object of the offence in question is the interest in protecting the environment as the basic habitat of humans, animals, and other organisms. The purpose of the protection is to safeguard the environment as a whole, and it is therefore not decisive which component of the environment the offender's actions are directed against. A perpetrator of this offence may be any criminally liable natural or legal

person.[4] The conduct must be intentional, and indirect intention is sufficient in this regard. For such an offence, the offender is liable to imprisonment or a prohibition on activity.

> ***Section 294 – Negligent Environmental Damage and Environmental Hazard***
> *(1) Whoever contrary to another legal act, intentionally damages or endangers soil, water, air, forest or another component of the environment to a larger extent or within a larger area, or in such a way that it may cause serious detriment to health or death, or if it is necessary to expend considerable costs in removing the effects of such conduct, or whosoever intentionally increases such damage or threat to a component of the environment or aggravates its aversion or mitigation, will be sentenced to a term of imprisonment of up to three years or to the prohibition of a specific activity.*
> *(2) An offender will be sentenced to a term of imprisonment of up to two years or to the prohibition of a specific activity if*
> *(a) he commits the act referred to in Subsection (1) because he breached an important duty arising from his occupation, profession, position or function, or a duty imposed on him by law,*
> *(b) he causes permanent or long-term damage to a component of the environment, or*
> *(c) removal of the effects of such an act requires considerable expenditure.*

This offence differs from the previous one in that it can only be committed through gross negligence.[5] Other differences can be seen in the level of punishment and in some of the circumstances that condition its application. In contrast to the intentional variant, only half of the qualified offences are set out in an exhaustive list, which includes the commission of an offence by breaching an important duty arising from the offender's employment, profession, position, or function, or imposed on him by law. Additionally, if the act causes permanent or long-term damage to a component of the environment or if it is necessary to incur significant costs to eliminate the consequences of such an act, these circumstances will also affect the punishment.

Due to the accession of the Czech Republic to the European Union, it was necessary to reflect in the provisions of Section 293 and Section 294 a high level of protection not only for specially protected areas, but also, to an equal extent, for European sites of European importance and bird areas, which together form part of the pan-European system of protected areas designated as 'Natura 2000'. The necessary terms are not contained in the Criminal Code but are defined under

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[4] The Czech legal system allows for the a criminal liability of legal persons under Act No. 418/2011 Coll. on Criminal Liability of Legal Persons and Proceedings against Them.

[5] Section 16 of the Czech Criminal Code:
(1) A criminal offence is committed out of negligence if an offender
(a) was aware that he/she may violate or endanger an interest protected by the Criminal Code in the manner stipulated in this Code, but without adequate reasons he/she believed that he/she would not cause such violation or endangering, or
(b) was unaware that his/her conduct may cause such violation or endangering although he/she could and should have been aware of it considering the circumstances and the personal relations.
(2) A criminal offence is committed out of gross negligence if an offender's approach to the requirements for due diligence shows evident irresponsibility of the offender for the interests protected by the Criminal Code.

blanket provisions[6] in Section 3(1)(q), (r) and Section 45e of Act No. 114/1992 Coll. on the Protection of Nature and Landscape, as amended. The obligation to designate and protect these sites derives from Council Directive 92/43/EEC on the conservation of natural habitats, wild fauna and flora[7] and Council Directive 2009/147/EC on the conservation of wild birds.[8]

The Czech Republic faces sanctions from the European Union for damaging Natura 2000 sites. The conditions contained in Sections 293 and 294 of the Criminal Code were rephrased by Amendment No. 330/2011 Coll. to ensure that these provisions apply not only to the environment as a whole but also to all its components, not just flora and fauna, as had previously been the case. This ensured compliance with EU requirements. The new regulation has also been consistently applied to several subsequent provisions of the Criminal Code:

> ***Section 294a – Damage to a Water Source***
> *Whoever, even through gross negligence, causes damage to a water source for which a protection zone has been established in such a way that the reason for the special protection of the water source ceases to exist or is considerably weakened shall be sentenced by imprisonment for up to two years.*

The offence in question is a specific offence in relation to the general offence of damaging and endangering the environment. Its object is the interest in protecting water resources as a specific part of the environment from any damaging action that would result in the loss of their importance and the reason for special protection. The objective is fulfilled in the case of any damaging act by the perpetrator directed against a water source for which a protection zone has been established. In such a case, it does not matter how the water source is damaged (e.g., by pollution, limiting its yield, etc.). A perpetrator may be any natural or legal person, and the offence may be committed either intentionally or through gross negligence. The perpetrator is liable to imprisonment for committing the offence.

> ***Section 295 – Damage of Forest***
> *(1) Whoever, even negligently, causes by harvesting forest crop or other activity contrary to another legal regulation creation of a cleared cutting, even by joining to an existing cleared are, or causes serious damage to forest on larger forest area or thins the forest crop below the crop density limit stipulated by another legal regulation on larger forest area, shall be sentenced to imprisonment for up to two years or to prohibition of activity.*
> *(2) An offender shall be sentenced to imprisonment for six months to four years or to prohibition of activity, if he/she*
> *(a) commits the act referred to in Subsection (1) repeatedly, or*
> *(b) creates by harvesting or another activity referred to in Subsection (1) a clear cutting or thinning of forest crop on considerable forest area.*

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[6] For environmental crimes, a number of blanket provisions are used, as well as national administrative regulations or the content of relevant European directives. The provisions in Section 296 of the Criminal Code therefore include only a few quantitative elements, namely those relating to the area of the territory or the length of a watercourse, with individual areas affected and lengths of the watercourses being aggregated.

[7] OJ L 206, 22.7.1992, p. 7. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01992L0043-20130701 [accessed on 22 October 2024].

[8] OJ L 20, 26.1.2010, p. 7–25. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0147 [accessed on 22 October 2024].

The offence in question is also a specific offence in relation to the general offence of damaging and endangering the environment, the object of which is the protection of forests as a specific part of the environment against arbitrary harmful logging on a larger scale or other negative interference with forest stands. A perpetrator may be any natural or legal person, and both intentional and negligent culpability are considered. A perpetrator of this offence is liable to imprisonment. Two circumstances justify the application of a higher penalty: when an offender commits the offence repeatedly or when, as a result of his/her conduct, he/she causes 'a clear-cutting or thinning'[9] of a significant area of forest, which is defined as an area of more than three hectares.

The provisions of the previous Penal Code did not cover all cases of serious damage to forests, and there were frequent cases of legal circumvention. Therefore, in accordance with the principle of *nullum crimen sine lege*, the facts have been supplemented in a somewhat casuistic manner, such that serious damage to a forest can be caused by unauthorised logging just below the established limit of 1.5 hectares, whereby several such areas may be located close to each other (e.g., in the forest of the same owner, in the same forest management district, etc.).

Section 297 – Wrongful Discharge of Polluting Substances

(1) Whoever, even out of gross negligence, discharges or fails to prevent discharge of petroleum, poisonous liquid or similar polluting substance from a boat or other navy marine vessel contrary to an international treaty, shall be sentenced to imprisonment for six months to three years, to prohibition of activity or forfeiture of a thing or other asset value.

(2) An offender shall be sentenced to imprisonment for one year to five years, if he/she commits the act referred to in Subsection (1)
(a) as a member of an organised group,
(b) repeatedly.

(3) An offender shall be sentenced to imprisonment for two to eight years, if by the act referred to in Subsection (1) he/she causes
(a) grievous bodily harm,
(b) serious and extensive harm to quality of water, animal or herbal species or parts thereof, or
(c) damage to the environment for removing of which is necessary to expend costs in large extent.

*(4) An offende*r shall be sentenced to imprisonment for three to ten years if he/she causes *death by the act referred to in Subsection (1).*

The objective is to protect the sea as a large body of water and specific parts of the Earth's surface, not only from the deterioration of sea water quality but also from ecological damage to marine fauna and flora caused by the release of pollutants into the sea. A perpetrator may be any natural or legal person, and the offence allows for both intentional and negligent fault. For such an offence, an offender is liable to imprisonment or a prohibition on activity.

This offence was introduced into the Criminal Code based on Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source

[9] Cf. footnote 6.

pollution and on the introduction of penalties for infringements,[10] and EU Council Framework Decision 2005/667/JHA of 12 July 2005 on the strengthening of the criminal law framework to combat ship-source pollution.[11]

Both documents stem from the implementation of the 1973 International Convention for the Prevention of Pollution from Ships[12] and the 1978 Protocol to that Convention, as amended (hereinafter referred to as 'MARPOL 73/78'),[13] which needed to be harmonised at the Community level. The purpose of the modification was to ensure that persons responsible for discharges become subject to appropriate criminal penalties, as set out in the Directive and the Framework Decision, thereby improving maritime safety and enhancing the protection of the marine environment against pollution from ships.

'Pollutants' mean substances included in Annexes I (oil) and II (toxic liquid bulk substances) of MARPOL 73/78.

'Discharge' means any discharge from a ship or other seagoing vessel, irrespective of its flag, in accordance with Article 2 of MARPOL 73/78.

'Marine craft' includes, in addition to ships of any type operating in the marine environment, hydrofoils, hovercraft, submarines, and floating equipment.

With the above-mentioned 'Green Amendment' to the Criminal Code, the offence of gross negligence has been expanded to include simple negligence, whether in the form of conscious or unconscious negligence.

Section 298 – Unauthorised Waste Disposal

(1) Whoever, even negligently, breaches another legal regulation on disposal with waste by transporting waste across state border without a notification or request for consent or states false or grossly distorted information or conceals substantial information, shall be sentenced to imprisonment for up to one year or to prohibition of activity.

(2) Anyone who, even negligently, contrary to another legal regulation stores waste or deposits, transits or otherwise disposes therewith and thus causes environmental damage or hazard, for removing of which is necessary to expend costs in considerable extent, shall be sentenced to imprisonment for up to two years or to prohibition of activity.

(3) An offender shall be sentenced to imprisonment for six months to three years or to prohibition of activity, if he/she

(a) commits the act referred to in Subsection (1) or (2) as a member of an organised group,

(b) gains substantial profit for him-/herself or for another by such an act, or

(c) commits such an act repeatedly.

(4) An offender shall be sentenced to imprisonment for one year to five years, if

(a) he/she gains for him-/herself or for another extensive profit by the act referred to in Subsection (1) or (2), or

(b) such an offence concerns dangerous waste.

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[10] OJ L 255, 30.9.2005, p. 11. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02005L0035-20091116 [accessed on 22 October 2024].

[11] OJ L 255, 30.9.2005, p. 164. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32005F0667 [accessed on 22 October 2024]. The Framework Decision was still in force at the time the amendment was adopted (later annulled by a judgment of the Court of Justice).

[12] No. 52/2015 Coll.

[13] Communication of the Ministry of Foreign Affairs No. 71/1995 Coll. concerning the negotiation of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships (MARPOL).

The objective is to protect the environment from unlawful waste management that could lead to environmental damage or endangerment. The perpetrator may be any natural or legal person, and the offence allows for both intentional and negligent fault. The offender is liable to imprisonment or prohibition of activity for this offence.

The Criminal Code now punishes the handling of all types of waste, as opposed to previous legislation, which only referred to 'dangerous' waste. The specifically dangerous nature of certain waste, which obviously poses a more significant threat to the environment, has been expressed as a factor justifying the application of a higher penalty under subsection 4. Given that such crimes are often committed within organised groups, the circumstance of committing the offence as a member of an organised group has been added to subsection 3 as a condition for the application of a higher penalty.

Section 298a – Production and Other Disposal of Ozone-Depleting Substances

(1) Whoever, in violation of another legal regulation, even if through gross negligence, produces, imports, exports, places on the market or otherwise handles an ozone-depleting substance shall be sentenced to imprisonment for up to one year, prohibition of activity or forfeiture of property.

(2) An offender shall be sentenced to imprisonment for six months to three years,

(a) if he/she commits the act referred to in Subsection (1) repeatedly,

(b) if he/she commits such an act with intent to obtain for himself/herself or for another a substantial benefit, or

(c) commits such an act on a substantial scale.

Due to the transposition of the 2008 Directive, the 'Green Amendment' introduced a completely new criminal offence into the Czech Criminal Code, which criminalises the illegal production, import, export, marketing, or use of ozone-depleting substances.

Section 299 – Unauthorised Disposing with Protected Wild Animals and Herbs

(1) Whoever contrary to another legal regulation kills, destroys, processes, imports, exports, transits, handles, offers, mediates, obtains for him-/herself or for another a subject of an especially protected animal or herbal species or an exemplar of a protected species and commits such an act on more than twenty five subjects of animals, herbs or exemplars, shall be sentenced to imprisonment for up to three years, to prohibition of activity or to confiscation of a thing or other asset value.

(2) The same sentence shall be imposed to anyone who to another legal regulation kills, destroys, processes, imports, exports, transits, handles, offers, mediates, obtains for him-/herself or for another a subject of a critically endangered animal or herbal species or an exemplar of a species directly endangered by extinction or extermination.

(3) An offender shall be sentenced to imprisonment for six months to five years or to a pecuniary penalty, if he/she commits the act referred to in Subsection (1) or (2)

(a) as a member of an organised group, or

(b) with the intention to gain for himself/herself or for another substantial profit, or

(c) if such an act causes long-term or irreversible damage to a population of wild animals or herbs or to a local population or habitat of a specially protected species of animals or herbs.

(4) An offender shall be sentenced to imprisonment for two to eight years, if he/she commits the act referred to in Subsection (1) or (2)

(a) in connection to an organised group operating in several states, or

(b) with the intention to gain for himself/herself or for another extensive profit, or

(c) if the act causes long-term or irreversible damage to the local population or habitat of a critically endangered species of animals or herbs.

The offence can be committed not only by an offender who has procured live specimens, but also by one who has procured dead (prepared) specimens of an animal belonging to a highly endangered species, which he/she subsequently kept and offered to other persons without authorisation.[14] The law explicitly places the burden of proof on the possessor or owner of specimens to prove their origin.[15]

The provisions of Section 299 originally provided protection for two types of objects: firstly, Czech specially protected species under Act No. 114/1992 Coll. on the Protection of Nature and Landscape, as amended, and secondly, CITES specimens[16] used in international trade, which are mostly protected species of plants and animals from other countries (parrots, large felines, orchids, etc.).

Under Section 299 of the Criminal Code, the unlawful disposal of more than twenty-five animals, plants or specimens is punishable. This number was determined to meet the need for increased protection of these exceptional species of animals and plants.

In addition, Section 299(2) of the Criminal Code protects the most strictly protected categories, criminalising tampering with even a single individual or specimen.

The protected object under Section 299(2) is, first and foremost, a plant or animal species classified as a specially protected species, and within that, falling into the category of critically endangered. This follows from Section 48 of Act No. 114/1992 Coll. on the Protection of Nature and Landscape, as amended, and from the lists in Annex III to Decree No. 395/1992 Coll.

In the second case, the specimen is a species directly threatened with extinction or extermination, as defined in Article 2(t) and Article 3(1) of Council Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora by regulating the trade therein[17] (defined in Annex A of this Regulation). The protection of wildlife populations, including their habitats, has been added to Section 299, and the unlawful action involving even a single individual of a critically endangered species of animals or plants is also punishable (whereas, before 1 December 2011, only individuals of critically endangered species were protected).

> ***Section 300 – Negligent Unauthorised Disposal with Protected Wild Animals and Herbs***
> *Whoever negligently breaches another legal regulation by killing, destroying, repeatedly importing, exporting or transiting, or obtaining for him/herself subject of an especially protected animal or herbal species or an exemplar of a protected species and commits such an act on more than twenty five subjects of animals, herbs or exemplars, shall be sentenced to imprisonment for up to one year, to prohibition of activity or to forfeiture of a thing or other asset value.*

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[14] Resolution of the Supreme Court of 18 March 2020, Case No. 7 Tdo 196/2020.

[15] Resolution of the Constitutional Court of 19 July 2019, Case No. II ÚS 4149/18; similarly, resolution of the Constitutional Court of 9 May 2023, Case No. IV ÚS 2352/22-2.

[16] The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was negotiated in 1973 in Washington, Communication No. 572/1992 Coll.

[17] OJ L 61, 3.3.1997, p. 1. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01997R0338-20230520 [accessed on 22 October 2024].

Section 300 refers to a negligent aspect of some provisions in Section 299, where, as with other provisions of the Criminal Code, the law requires a form of gross negligence for the provisions to apply. The interpretation and rationale of this provision correspond with Section 299 of the Criminal Code.

Section 301 – Damage to Protected Parts of Nature
Whosoever, even with gross negligence, violates another legal regulation by damaging or destroying a monument tree, a significant landscape element, a cave, a specially protected area, a European site or a bird area in such a way that the reason for the protection of such a part of nature ceases to exist or is considerably weakened, shall be sentenced to imprisonment for up to three years, prohibition of activities or forfeiture of property.

This offence was introduced into the Criminal Code by Amendment No. 330/2011 Coll.

The objective aspect of this criminal offence consists of the violation of a legal regulation, specifically Act No. 114/1992 Coll. on the Protection of Nature and Landscape, whereby the perpetrator, who may be either a natural or a legal person, damages or destroys a protected tree, a significant landscape element, a cave, a specially protected area, a site of European importance, or a bird area. The consequence required is the disappearance or substantial weakening of the reason for the protection of such parts of nature. The objective is the interest of society in providing specially enhanced protection to the parts of nature listed in the law. The offence occurs in the case of both intentional and grossly negligent conduct. For damaging protected parts of nature, a perpetrator is liable to imprisonment, prohibition of activity, or confiscation of property.

The main reason for adopting this provision was the requirements of the 1992 Convention on Biological Diversity (No. 134/1999 Coll.). In addition to the current legislation, and in line with the needs of the Czech Republic's national legislation, this act includes not only 'removing' but also 'destruction', and the relevant penalty rate has been adjusted in relation to other environmental offences.

Section 302 – Maltreatment of Animals
(1) Whoever maltreats an animal in an especially cruel or agonising manner shall be sentenced to imprisonment for six months to three years, prohibition of activity or forfeiture of property.
(2) An offender shall be sentenced to imprisonment for one to five years or by prohibition of activity,
(a) if he/she commits such an act in public or in a place open to the public,
(b) if he/she commits such an act as a member of an organised group, or
(c) if he/she or she continues to commit such an act for a longer period of time.
(3) An offender shall be sentenced to imprisonment for two to six years,
(a) if he/she commits the act referred to in Subsection (1) on a large number of animals,
(b) if the act causes permanent damage to the health of the abused animal or death thereof,
(c) if he/she commits the act referred to in Subsection (1) in a particularly brutal or torturous manner; or
(d) if he/she commits such an act repeatedly.

The offence of animal maltreatment has been transferred to this chapter from another part of the Criminal Code due to the object it protects. This is the interest in protecting animals, as living creatures capable of experiencing pain and suffering,

from unjustified killing and harm to their health. Both natural and legal persons may commit this offence if they intentionally abuse an animal in a cruel or torturous manner. An offender may be sentenced to imprisonment, prohibition of activity, or confiscation of property.

Due to extensive criticism, the construction of this offence has been reworked to distinguish it from a misdemeanour, define the most dangerous forms of conduct, and ensure that perpetrators of this offence are punished appropriately. In response to repeated criticism of low penalty rates, the penalties for both the basic offence and the particularly aggravating circumstances have been increased. Furthermore, subsection 3 now includes a condition that allows for the imposition of a higher penalty where the offence involves a larger number of animals. According to case law, a larger number of animals means at least seven animals.[18]

The notion of permanent consequences to health within the meaning of this provision is not further specified in the Criminal Code. To fulfil this criterion, an insignificant, albeit permanent, injury to an animal's health, such as minor deformation of the earlobe through so-called cupping, loss of a small amount of hair, or the loss of a tooth, is insufficient. The health consequences must be substantial and must constitute a serious interference with the animal's well-being. This particularly aggravating circumstance is considered by the legislator to be more serious than, for example, the prolonged brutal abuse of animals by a member of an organised group. At the same time, permanent damage to health is equated with the death of an animal.[19]

This offence was amended by Act No.114/2020 Coll., which increased the penalty of imprisonment for both the basic offence and the two qualified offences.

Section 302a – Keeping Animals in Unsuitable Conditions

(1) Whoever keeps a large number of animals in unsuitable conditions and thereby endangers their life or causes them considerable suffering shall be sentenced to imprisonment for up to one year or to prohibition of activity.

(2) Whoever breeds animals in unsuitable conditions for the purpose of trade, or whoever preys on such breeding and thereby endangers their life or causes them considerable distress, shall be sentenced to imprisonment for six months to four years or to prohibition of activity.

(3) An offender shall be sentenced to imprisonment for two to eight years,

(a) if he/she commits the act referred to in Subsection (2) with the intention of obtaining a substantial benefit for himself/herself or for another,

(b) where the act referred to in Subsection (1) or (2) causes permanent damage or death to an animal; or

(c) if he/she commits such an act as a member of an organised group.

(4) An offender shall be sentenced to imprisonment for five to ten years,

(a) if he/she commits the act referred to in Subsection (2) with the intention of obtaining for himself/herself or for another a benefit of a large amount,

(b) where the act referred to in Subsection (1) or (2) causes permanent damage or death to a large number of animals; or

(c) if he/she commits such an act in association with an organised group operating in more than one State.

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[18] Resolution of the Supreme Court of 15 June 2011, Case No. 8 Tdo 657/2011.

[19] Resolution of the Supreme Court of 8 March 2023, Case No. 7 Tdo 55/2023.

The amendment to the Criminal Code by Act No. 114/2020 Coll. introduced an entirely new offence. As with the offence of animal maltreatment, the object of this offence is the interest in protecting animals as living creatures capable of experiencing pain and suffering. The impetus for the introduction of this regulation was the problem of so-called breeding farms, where animals are bred solely for resale, often in completely unsatisfactory conditions. However, the offence applies generally to all forms of animal breeding.[20] In this context, animals are protected from being kept in unsuitable conditions that endanger their lives and health or cause them considerable distress.

Any natural or legal person may commit the offence of keeping animals in unsuitable conditions. As for the subjective aspect, intentional culpability is required. An offender may be sentenced to imprisonment or prohibition of activity for this offence.

The intention of introducing this new criminal offence was to strengthen the protection of animals. The protected entity, the animal, is no longer viewed as a mere object but, in accordance with private law, as a living being (Section 496 of the Civil Code). This recognition merits an even greater degree of protection than the existing offences of animal maltreatment or neglect of care.

Section 303 – Negligent Omission of Animal Care

(1) Whoever, out of gross negligence, omits necessary care of an animal he/she owns or that he/she is obliged to take care of for another reason, and thus causes permanent consequences to health or death, shall be sentenced to imprisonment for up to six months, to prohibition of activity or confiscation of a thing or other asset value.

(2) An offender shall be sentenced to imprisonment for up to two years, if he/she causes death or permanent consequences to health to larger amount of animals by the act referred to in Subsection (1).

As in the previous offence, the objective of the offence of negligent omission of animal care is to protect animals, as living creatures capable of feeling pain, from being kept in unsuitable conditions that endanger their health or cause them considerable suffering.

The Criminal Code provides for imprisonment, prohibition of activity, or forfeiture of property for the offence of negligent omission of animal care. If the offence causes death or permanent damage to the health of a large number of animals, this constitutes a circumstance that justifies the application of a higher penalty.

The above mentioned offence was included in the current Criminal Code in response to some cases of negligent and harmful treatment of animals that were previously treated as misdemeanours under Act No. 246/1996 Coll. on the Protection of Animals against Cruelty.

The essence of an offender's conduct consists of neglecting necessary care for an animal, usually through omission (Section 112 of the Criminal Code). In practice,

[20] Kořínek, Š., 'Strengthening animal protection in reflection of the crime of "breeding animals in unsuitable conditions"', *Criminal Law Review*, 2022, No. 2, p. 85.

these cases often involve failure to provide food and water, or leaving the animal in environments with extreme temperatures, such as high heat or severe frost, etc.[21]

Section 304 – Poaching

(1) Whoever hunts game or fish of a value not insignificant or conceals, transfers to him/herself or to another or handles hunted game or fish of not insignificant value without an authorisation, shall be sentenced to imprisonment for up to two years, to prohibition of activity or to confiscation of a thing or other asset value.

(2) An offender shall be sentenced to imprisonment for six months to five years, to a pecuniary penalty or to confiscation of a thing or other asset value, if he/she

(a) commits the act referred to in Subsection (1) as a member of an organised group,

(b) gains for him/herself or for another larger profit by such an act,

(c) commits such an act as a person who has a special obligation to protect the environment,

(d) commits such an act in especially condemnable manner, in mass effective way or in the time of closed season, or

(e) has been sentenced or condemned for such an act in the past three years.

The object of the crime of poaching is protection of nature, specifically wildlife and fish, as well as protection of hunting rights, exercise of fishing rights, and protection of property. Both natural and legal persons may commit this offence. Intentional culpability is a prerequisite for the fulfilment of the subjective aspect. For the offence of poaching, a perpetrator is liable to imprisonment, prohibition of activity, confiscation of property, or, if necessary, a fine if the qualifying circumstances are met.

The criminal offence of poaching has been amended in the current Criminal Code compared to previous legislation by introducing the condition of causing not insignificant damage to distinguish it from the offence of lesser poaching.

The basic concept of this offence is the unauthorised[22] taking of game or fish, which includes any activity aimed at killing, catching, or otherwise acquiring game or fish.

The 'Green Amendment' to the Criminal Code also partially returned to the stricter wording of the regulation contained in the previous Criminal Act No. 140/1961 Coll., by reintroducing the imperfect form of the verb 'hunts' instead of the previous perfect form 'hunts (and kills)'.

Section 305 – Wrongful Manufacture, Possession and other Disposal with Pharmaceutics and other Substances Affecting Efficiency of Livestock

(1) Whoever manufactures, imports, exports, transits, offers, mediates, sells or otherwise obtains or handles a substance of thyreostatic, gestagenous, androgenic, estrogenic or other hormonal effects, beta-agonists or another substance designed for stimulation of efficiency of livestock or a preparatory containing such a substance without an authorisation, shall be sentenced to imprisonment for up to one year, to prohibition of activity or forfeiture of a thing or other asset value.

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[21] Púry, F., '§ 303 [Zanedbání péče o zvíře z nedbalosti]', in: Šámal, P., et al., *Trestní zákoník*, 3rd ed., Prague, 2023, p. 3889.

[22] Actions that fall outside the legal hunting conditions under Act No. 449/2001 Coll. on Hunting, as amended, are considered unauthorised.

(2) The same sentence shall be imposed to anyone who contrary to other legal regulation uses pharmaceutics for the purpose of increasing efficiency of livestock or manufactures, imports, exports, transits, offers, mediates, sells or otherwise obtains or handles such a substance for this purpose.
(3) An offender shall be sentenced to imprisonment for six months to three years, if he/she commits the act referred to in Subsection (1) or (2)
(a) as a member of an organised group,
(b) repeatedly,
(c) with the intention to gain for him-/herself or for another substantial profit, or
(d) to a significant extent.
(4) An offender shall be sentenced to imprisonment for one to five years if he/she commits an act referred to in Subsection (1) or (2)
(a) as a member of an organised group operating in more than one country,
(b) with the intention of gaining for him-/herself or for another larger profit by such an act,
(c) on a large scale.

This offence, which can be committed by either a natural or legal person, is divided into two distinct acts, addressing the interest in protecting livestock from being enhanced by drugs and artificial substances, and the protection of human health from the adverse effects of these substances.

The first act involves the unlawful manufacture, import, export, transport, offer, mediation, sale, or procurement of any of the substances or preparations referred to in the first paragraph.

The second act involves the use of pharmaceuticals for the purpose of increasing livestock performance, or the unlawful manufacture, import, export, transport, offer, mediation, sale, or possession of such substances for that purpose. As for the subjective aspect, intent is required. An offender is liable to imprisonment, prohibition of activity, or confiscation of property.

In the European Union, the misuse or abuse of medical or other substances in farm animals has long been under close scrutiny.[23] These substances are often antimicrobial, anti-inflammatory, hormonal, anti-hormonal, or beta-adrenergic, misused to enhance animal performance, ultimately ensuring a higher financial profit for the breeder.

Residues of these substances in food of animal origin can significantly impact consumer health. For this reason, the European Union has adopted a number of regulations governing the administration of such substances to animals and the subsequent monitoring of their presence in animal bodies and food products. These regulations have been incorporated into national law through the adoption of measures concerning administration of certain substances to animals whose products are intended for human consumption, as well as the monitoring of unauthorised

[23] Regulation (EC) No 1831/2003 of the European Parliament and of the Council of 22 September 2003 on additives for use in animal nutrition (OJ L 61, 3.3.1997, p. 1); most recently for example Commission Delegated Regulation (EU) 2019/2090 of 19 June 2019 supplementing Regulation (EU) 2017/625 of the European Parliament and of the Council regarding cases of suspected or established non-compliance with Union rules applicable to the use or residues of pharmacologically active substances authorised in veterinary medicinal products or as feed additives or with Union rules applicable to the use or residues of prohibited or unauthorised pharmacologically active substances (OJ L 317, 9.12.2019, p. 28).

substances, residues, and contaminants that could render animal products harmful to human health.

These European regulations are followed by Act No. 378/2007 Coll. on Pharmaceuticals and on the Amendment and Supplementation of Some Related Acts, as amended, and Act No. 166/1999 Coll. on Veterinary Care and on the Amendment of Related Acts (the Veterinary Act).

The aim of both these regulations is to protect animal health and the environment and, in particular, to protect humans (consumers) from the adverse effects of pharmaceuticals and, in the case of the Veterinary Act, from adverse effects originating from animals or food of animal origin. This philosophy has also been adopted in the Criminal Code.

Practical experience from supervision in this area shows that administrative sanctions alone are insufficient, as there have been cases of organised groups of offenders operating in this field. For these reasons, new provisions have been introduced into the Criminal Code to ensure that such conduct is properly punished, including relevant circumstances that may lead to the application of a higher penalty.[24]

Section 306 – Spread Contagious Animal Disease

(1) Whoever, even negligently, causes or increases a risk of bringing or spreading of contagious animal disease in interest stock-breeding or wild animals, shall be sentenced to imprisonment for up to one year, to prohibition of activity or to confiscation of a thing or other asset value.

(2) An offender shall be sentenced to imprisonment for six months to three years, if he/she causes spreading of such a disease by the act referred to in Subsection (1).

The objective is to protect against the spread of contagious diseases in animals, whether in pet farms, economically important livestock, or wild animals. Both intentional and negligent culpability are possible in this context. The Criminal Code provides for imprisonment, prohibition of activity, or confiscation of property for this offence.

Section 307 – Spreading of Contagious Disease and Parasites of Utility Herbs

(1) Whoever, even negligently, causes or increases a risk of bringing or spreading of contagious disease or parasite of utility herbs, shall be sentenced to imprisonment for up to one year, to prohibition of activity or to confiscation of a thing or other asset value.

(2) An offender shall be sentenced to imprisonment for six months to three years, if he/she causes spreading of such a disease or parasite by the act referred to in Subsection (1).

The objective here is to protect commercial plants against the spread of contagious diseases and pests. This offence may be committed either intentionally or negligently by a natural or legal person. In the event of committing this offence, the offender may be sentenced to imprisonment, prohibition of activity, or confiscation of property.

[24] Explanatory report to the Criminal Code.

Section 308 – Common Provisions
The government shall determine by a regulation which diseases of animals and herbs are considered as contagious within the meaning of Section 306 and 307 and to which parasites applies Section 307.

The Government of the Czech Republic has complied with this common provision by adopting Regulation No. 453/2009 Coll., which, for the purposes of the Criminal Code, establishes what is considered to be contagious human diseases, contagious animal diseases, contagious plant diseases, and pests of utility plants. The law has chosen the form of a regulation because it better meets the need for a timely legislative response to changes in the catalogue of diseases and newly identified pests.

CONCLUSION

This paper discusses the impact of the Europeanisation of criminal law on the criminal protection of the environment in the Czech Republic. Based on the gradually adopted legislation presented above, it is clear that the European Union plays an important role in the area of environmental protection, determining the direction and scope of protection through its policies and individual legal instruments. The environment is undoubtedly a crucial component for the quality of life of every human being, and its protection must therefore be a foremost priority not only for the European Union but for every Member State as well. In recent years, this trend has become increasingly evident, with greater efforts at the EU level to address environmental protection, including through criminal law.

In the past, efforts to address environmental protection through civil and administrative law were found to be inadequate. It was therefore necessary to approach environmental protection through criminal law. An important milestone in this area is the 2008 Directive. The 2008 Directive requires Member States to impose proportionate, effective, and dissuasive criminal penalties for serious infringements of Community environmental law. The criminal penalties contained in Chapter VIII of the Criminal Code correspond to the requirements of the 2008 Directive, both in terms of the types of offences and the levels of imprisonment or other punishments relevant to environmental protection, such as the prohibition of activities in sections 299, 300, 302, 303, and 304.

The 2008 Directive also calls for the introduction of criminal liability for legal persons. According to Act No. 418/2011 Coll. on Criminal Liability of Legal Persons and Proceedings against Them, a legal person is criminally liable for all environmental crimes listed in Chapter VIII of the Criminal Code, meaning the Czech Republic also meets this requirement.

The 2008 Directive is rather brief, listing only the most basic concepts. According to evaluation results, the 2008 Directive did not sufficiently fulfil its purpose, making it necessary to revise this directive and render the criminal regulation of environmental protection more comprehensive. For this reason, an entirely new

Directive 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law has been introduced, replacing Directives 2008/99/EC and 2009/123/EC. The new directive aims to address the shortcomings of the previous directive and, in particular, tightens criminal offences related to environmental protection. Additionally, new criminal offences are introduced concerning actions involving the illegal extraction of water from natural sources, ship recycling, violations of European Union regulations in the field of chemicals (especially mercury and fluorinated greenhouse gases), and, last but not least, actions resulting in the spread of invasive non-native species of animals, plants, fungi, and microorganisms that have a significant impact on the territories of individual Member States. From the wording of the new directive, there is a clear effort to maximise environmental protection.

The new directive establishes an obligation for Member States to adopt or amend legislation to ensure the objectives of the directive and its individual provisions are fulfilled by 21 May 2026. Regarding the date of adoption of the new directive, the Czech Republic is only at the beginning of discussions on how to ensure compliance. It remains to be seen how drastic these changes will be; however, elements that align with the new directive are already present within the current framework of criminal law.

Czech legislation is based on and builds upon the international obligations that the Czech Republic is required to fulfil. The Czech Republic is subject to international treaties (Article 1(2) of the Constitution) and thus also to European Union legislation (Article 10 of the Constitution). EU legislation is central to the Czech Republic's creation of laws on environmental protection through criminal law.

The Czech Republic regards crimes against the environment with utmost seriousness, addressing them in a dedicated chapter of the Criminal Code. This paper lists and analyses the individual offences concerning environmental protection and the safeguarding of fauna, flora, soil, air, and water. Czech legislation thus encompasses protection for practically all components of the environment. Certain areas have long been sufficiently effective, proportionate, and dissuasive, while others, such as animal protection, have been subject to more frequent amendments.

In conclusion, it can be observed that the Czech Republic performs well in the field of criminal environmental protection; it is proactive in this area and strives to fulfil its obligations, if not immediately, then in due course. It is hoped that, especially following the new directive on criminal environmental protection, the Czech Republic's efforts in this area will remain active and sufficient.

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THE PENALTY OF RESTRICTION OF LIBERTY – EXPECTATIONS AND REALITY

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Abstract

This study attempts to answer the question whether the assumptions and expectations of the legislators, as expressed in the 2015 amendment to criminal law concerning the penalty of restriction of liberty, have been fulfilled in judicial practice. Based on the analysis, it appears that the main goal of the reform has been achieved: namely, a significant reduction in the adjudication of the penalty of restriction of liberty with conditional suspension of execution in favour of non-custodial penalties. Consequently, the role of the penalty of restriction of liberty in criminal policy has significantly expanded; however, these changes have also had a negative outcome by increasing the use of unconditional imprisonment. This indicates that for some offenders, limiting the application of conditional suspension of penalty execution has led to a rise in the frequency of unconditional imprisonment. When analysing issues related to the adjudication and execution of the penalty of restriction of liberty, particular attention was drawn to the importance of accurately selecting this penalty in the form of an obligation to perform unpaid, supervised community service in specific cases, and the non-compliance in practice with the directive in Article 58 § 2a of the Polish Criminal Code. This led to an increase in the number of substitute imprisonment penalties ordered in place of the restriction of liberty penalty. Additionally, based on established data, serious concerns arise regarding the effectiveness of the penalty of restriction of liberty, as measured by recidivism rates. This is because it brings the penalty of restriction of liberty closer in effectiveness to unconditional imprisonment and significantly deviates from the effectiveness of other non-custodial penalties and measures.

Keywords: penalty of restriction of liberty, substitute penalty, recidivism, criminal policy, criminal law reform

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INTRODUCTION

The penalty of restriction of liberty is a crucial instrument in criminal law for addressing crimes, particularly following the amendment to the Criminal Code on 20 February 2015. This penalty is envisioned as an alternative to short-term imprisonment and difficult-to-repay fines, and as a substitute for sentences with a conditional suspension of execution – a practice that has been significantly limited due to its overuse. Based on the experience gathered in the adjudication of the penalty of restriction of liberty under the concept adopted in the Polish Criminal Code of 1997 ('CC'), the initial provisions suggested that the penalty did not sufficiently fulfil its assumed functions. The effectiveness of its execution required significant improvement. Consequently, the 2015 reform of the Criminal Code introduced substantial changes to the content, scope, and foundations for imposing this penalty, aiming to prioritise it within criminal policy. This reform raises the question: Have the intended objectives and achieved results in criminal policy been entirely satisfactory? The issues identified will be examined in the considerations below.

THE PENALTY OF RESTRICTION OF LIBERTY IN LIGHT OF THE ASSUMPTIONS OF THE CRIMINAL CODE OF 1997 IN ITS INITIAL WORDING

One of the fundamental assumptions of the criminal policy in the Criminal Code of 1997, particularly concerning minor and medium crime categories, was to create a system where imprisonment would be treated as a last resort (*ultima ratio*), giving primacy to non-custodial penalties. It was believed that fines, restriction of liberty, or possibly imprisonment with conditional suspension of execution, should be the primary measures of legal response.[1] However, the criminal policy implemented over several years following the Criminal Code enactment indicated that judicial practice significantly differed from the expectations of its authors. In particular, it was noted that it was not fines or restriction of liberty that served as primary measures of legal response to crime but rather the penalty of imprisonment with conditional suspension of execution, which dominated the structure of imposed penalties, accounting for over 55% of all convictions[2] between 1999 and 2014. Furthermore, studies indicated that the high prison population was not primarily

[1] Zoll, A., 'Założenia politycznokryminalne kodeksu karnego w świetle wyzwań współczesności', *Państwo i Prawo*, 1998, No. 9–10, pp. 47–49; Buchała, K., 'System kar, środków karnych i zabezpieczających w projekcie kodeksu karnego z 1990 r.', *Państwo i Prawo*, 1991, No. 6, pp. 20–24.

[2] Mycka, K., 'Praktyka orzecznicza sądów polskich w kontekście wykonywania kar i środków karnych', in: Jakubowska-Hara, J., Nowak, C. (eds), *Problemy na tle przeludnienia zakładów karnych*, Warszawa, 2010, pp. 44–61; Melezini, M., 'Aktualne problemy polityki karnej', in: Majewski, J. (ed.), *Nadzwyczajny wymiar kary*, Toruń, 2009, pp. 34–44; Krajewski, K., 'Przemiany polityki karnej po nowelizacji Kodeksu karnego z 2015r.', in: Grzyb, M., Krajewski, K. (eds), *Polityka kryminalna: między teorią a praktyką. Księga jubileuszowa profesor Janiny Błachut*, Kraków, 2022, pp. 190–191.

due to unconditional imprisonment sentences but rather to the orders to execute previously conditionally suspended prison sentences.[3]

Recognising the need to limit the use of imprisonment penalties with conditional suspension and to address the increasing frequency of adjudicating the penalty of restriction of liberty combined with community service, the legislator introduced significant changes in 2009 (under the Act of 5 November 2009[4]). These changes aimed to enhance the effectiveness and execution of the penalty of restriction of liberty, making it a viable alternative to imprisonment. A particularly significant change was the introduction of regulations in Article 58 § 2a CC, prohibiting the imposition of a penalty of restriction of liberty with an obligation to work if the health condition of the accused or their personal characteristics and circumstances indicate that the accused will not fulfil this obligation. In the justification for the draft law, the introduction of this directive was motivated by the fact that, in practice, cases occur where 'the penalty of restriction of liberty with the obligation to work is imposed – especially in judgments delivered at a session without the defendants' presence – on individuals incapable of performing such work.' It was noted that 'the family situation of the defendant, such as direct care of minors or seriously ill, elderly family members, preventing the provision of care during the term of work, or when 'a defendant had previously been sentenced to a restriction of liberty and had evaded its execution,' constituted obstacles that made it impractical to impose a penalty of restriction of liberty with an obligation to work.[5]

Among the various amendments introduced in the revision of the Polish Criminal Code, notable changes included the establishment of a professional probation officer as the body responsible for supervising execution of the penalty of restriction of liberty, expansion of entities where the convicts could work, and exemption of these entities from bearing social insurance costs. Additionally, measures were introduced to facilitate convicts in fulfilling their duty to work on non-working days and to establish 'social purpose' as the exclusive beneficiary of deductions in both forms of the penalty of restriction of liberty.[6]

Unfortunately, the potential of the penalty of restriction of liberty was still underutilised in practice. Between 2010 and 2014, the structure of sentences was predominantly marked by the imposition of imprisonment with conditional suspension of execution, comprising about 55–58% of all convictions. Meanwhile,

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[3] 'Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks karny' [Justification for the draft act on amending the Act – Criminal Code and Certain Other Acts], *Czasopismo Prawa Karnego i Nauk Penalnych*, 2013, No. 4, pp. 44–47.

[4] Act of the 5 November 2009 on amending the Act – Criminal Code, Act – Code of Criminal Procedure, Act – Executive Penal Code, Act – Penal and Fiscal Code and Certain Other Acts (Journal of Laws of 2009, No. 206, item 1589, as amended).

[5] *Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks karny i innych ustaw* [Justification for the draft law on amending the Act – Criminal Code and Certain Other Acts] (The Sejm print No. 1394, 6th term); Konarska-Wrzosek, V., in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, 4th ed., Warszawa, 2018, p. 450.

[6] Szewczyk, M., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część ogólna. Tom, I. Komentarz do art. 1–52*, Warszawa, 2016, pp. 719–720; Migdał, J., in: Szymanowski, T., Migdał, J., *Prawo karne wykonawcze i polityka penitencjarna,* Warszawa, 2014, pp. 134–137; Postulski, K., 'Zmiany w wykonywaniu kary ograniczenia wolności', *Probacja*, 2011, No. 3, pp. 119–120.

the penalty of restriction of liberty accounted for only 11–12%. The disparity was substantial; for instance, in 2010, 251,087 convicts received imprisonment with conditional suspension, compared to only 49,692 convicts[7] sentenced to the penalty of restriction of liberty.

Simultaneously, research conducted by A. Janus-Dębska in 2014 on the reasons for the non-enforcement of penalties of restriction of liberty revealed a concerning picture of the practice of adjudicating and executing such penalties. The most common reasons for non-execution were the suspension of enforcement proceedings due to long-term obstacles. These obstacles included the inability to locate the convict, mental illness or other chronic, serious diseases, poor health of the convict, stays in penitentiary units or addiction treatment facilities, difficulties in determining the convict's place of residence, challenging family situations (e.g., caring for children), or living circumstances (e.g., the necessity of earning a livelihood). Opinions from court probation officers indicated that such situations frequently arose, particularly in cases where 'default judgments or those issued under Article 335 of the Code of Criminal Procedure'[8] were submitted to probation teams.

The findings from a survey of 335 court probation officers reveal several reasons for convicts' reluctance to perform community service. These include the imposition of the penalty of restriction of liberty by order, which sometimes results in penalties not aligned with the perpetrator's capabilities or personal conditions; sentencing individuals with disabilities or serious somatic or mental illnesses to restriction of liberty; conflicts between work obligations and the convict's education; addictions, particularly alcohol binges, that prevent work performance; lack of facilities for weekend work and protected work establishments for persons with disabilities; evasion of work execution by convicts; multiple sentences of restriction of liberty for the same individual who has previously evaded this penalty; and sentencing homeless persons to restriction of liberty.[9]

Statistical research conducted by A. Janus-Dębska also shows a year-by-year decrease in the percentage of cases where convicts actually performed the assigned work. This percentage was 54.4% in 2011, 51.7% in 2012, 50.8% in 2013, 46% in 2014, and only 43.5% in 2015. Typically, work performance concluded with an order to execute a substitute sentence of imprisonment or limitation. For example, in 2015, probation teams handled 91,650 cases concerning the penalty of restriction of liberty. Probation officers filed applications under Article 65 § 1 and Article 66 § 1 of the Criminal Enforcement Code in 76,514 cases, of which 69,003 were considered and 49,473 were granted.[10]

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[7] Krajewski, K., 'Przemiany…', op. cit., pp. 186–187.

[8] Janus-Dębska, A., 'Uwarunkowania efektywnego wykonania kary ograniczenia wolności', *Probacja*, 2014, No. 3, pp. 118–120.

[9] Janus-Dębska, A., 'Czynniki utrudniające efektywne wykonywanie kary ograniczenia wolności', in: Kwieciński, A. (ed.), *Teoretyczne i praktyczne aspekty wykonywania kary ograniczenia wolności*, Wrocław, 2016, pp. 47–49; Janus-Dębska, A., 'Uwarunkowania efektywnego…', op. cit., pp. 128–130.

[10] Janus-Dębska, A., 'Czynniki utrudniające…', op. cit., p. 45.

In this context, the sentencing stage of the penalty of restriction of liberty emerges as a significant problem. It is at this stage that the primary and underlying causes of challenges associated with the functioning of this penalty should be sought. These are not the only causes, as it is generally difficult to predict the future behaviour of the convict or the occurrence of individual circumstances (e.g., illness) that may prevent the execution of the penalty. However, studies show that in most cases, courts lack informational material on the accused and often make decisions at a session under Article 335 of the Code of Criminal Procedure ('CCP') or by a court order (Article 500 CCP) without seeing the accused and without the means to verify or update data on the accused. Courts rarely use environmental interviews during court proceedings, and this lack of information on the accused, their health condition, characteristics, personal circumstances (including family situation), and information on prior convictions involving the penalty of restriction of liberty and evasion of its execution, affects the appropriateness of the sentence and the entire court process, which should aim to change the convict's attitude.[11] Although the 2009 Act introduced an important directive in the Criminal Code, prohibiting the use of the penalty of restriction of liberty with the obligation to work in situations specified in Article 58 § 2a CC, studies conducted in 2014 revealed that restriction of liberty is still sentenced with only sporadic use of professional pre-trial diagnostics of the accused in the form of an environmental interview, as specified in Articles 213–214 CCP[12]. This means that, in practice, the directive from Article 58 § 2a CC is often disregarded. This lack of compliance becomes a source of further issues at the enforcement stage for the penalty of restriction of liberty.

NEW LEGAL SHAPE OF THE PENALTY OF RESTRICTION OF LIBERTY FOLLOWING THE 2015 REFORM OF THE POLISH CRIMINAL LAW

In 2015, through a comprehensive reform of the Polish Criminal Code,[13] the legislator introduced significant changes to the existing model of the penalty of restriction of liberty and its adjudication principles. These changes aimed to make this penalty more appealing and encourage courts to use it more frequently, referencing the original political-criminal assumptions of the 1997 Polish Criminal Code, which had not been fully realised. The reform's primary objective was to make non-custodial penalties (fines and the penalty of restriction of liberty) the main response to minor and medium-severity crimes. The reform authors, criticising the structure of

[11] Janus-Dębska, A., 'Czynniki utrudniające…', op. cit., pp. 53–54; Stasiak, K., 'Wymiar kary ograniczenia wolności i jego wpływ na efektywne wykonywanie tej kary – na podstawie badań empirycznych', in: Kwieciński, A. (ed.), *Teoretyczne i praktyczne aspekty wykonywania kary ograniczenia wolności*, Wrocław, 2016, p. 179.

[12] Janus-Dębska, A., 'Uwarunkowania skutecznego wykonania kary ograniczenia wolności w formie prac na cele społeczne na podstawie badań własnych', in: Konopczyński, M., Kwadrans, Ł., Stasiak, K. (eds), *Polska kuratela sądowa na przełomie wieków – nadzieje, oczekiwania, dylematy*, Kraków, 2016, pp. 256–257.

[13] See Act of 20 February 2015 on amending the Act – Criminal Code and Certain Other Acts (Journal of Laws of 2015, item 396).

penalties adjudicated in relation to crime severity and characteristics – dominated by imprisonment with a conditional suspension of its execution – proposed 'the prompt adjudication of genuinely severe penalties'. This approach sought to nearly replace the penalty of imprisonment with a conditional suspension by fines and a more broadly understood penalty of restriction of liberty. Regarding the changes to the regulations on the penalty of restriction of liberty, the amendment's justification highlighted that the 'proposed changes to Articles 34 and 35 aim to intensify the hardship associated with the penalty of restriction of liberty and reduce the attractiveness of the probation regime linked to imprisonment with conditional suspension of execution.' The penalty of restriction of liberty, alongside fines, was intended to become the primary penalty for misdemeanours that are not seriously harmful to society. Additionally, the goal of altering the structure of adjudicated penalties by reducing the overuse of imprisonment with conditional suspension, in favour of more widely applied non-custodial penalties, aimed to reduce the prison population.[14]

The 2015 amendment to the Criminal Code significantly changed the legal structure of the penalty of restriction of liberty, making it a more flexible instrument for criminal law responses and enhancing the individualisation and rationalisation of penal measures. In the new model, the duration of the penalty of restriction of liberty was extended from 12 months to 2 years (Article 34 § 1 CC). The two existing forms of this penalty – performing unpaid, supervised community service (20–40 hours per month) and deducting 10% to 25% of the convict's salary – were expanded with two additional forms. These include an obligation to remain at a permanent place of residence or another designated place with electronic supervision for up to 12 months and obligations specified in Article 72 § 1(4)–(7a) CC. It is also important to add, that while under the previously applicable legal framework the two forms of the penalty of restriction of liberty were adjudicated separately and there was no possibility to accumulate hardships, under Article 34 § 1b CC, as amended, obligations and deductions can now be adjudicated either cumulatively or separately. Moreover, the 2015 amendment to the Criminal Code left unchanged the permanent, obligatory elements of the penalty of restriction of liberty, which are at the core of this penalty and are consistent across all its forms. These include the prohibition against the convict changing their place of permanent residence during the execution of the penalty without the court's consent, and the obligation to provide explanations regarding the course of penalty execution (Article 34 § 2 CC). Additionally, the possibility of imposing a monetary obligation of up to PLN 60,000 alongside the penalty of restriction of liberty was retained, as was the imposition of obligations specified in Article 72 § 1(2) and (3) CC.[15]

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[14] *Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw z projektami aktów wykonawczych z 15.05.2014* [Justification for the draft law on amending the Act – Criminal Code and Certain Other Acts, and a draft of an implementing act of 15 May 2014] (the Sejm print, No. 2393, 7th term), pp. 1–10.

[15] For more information, see Szewczyk, M., in: Melezini, M. (ed.), *System Prawa Karnego. Tom 6. Kary i inne środki reakcji prawnokarnej*, 2nd ed., Warszawa, 2016, pp. 210–226; Majewski, J., *Kodeks karny. Komentarz do zmian 2015,* Warszawa, 2015, pp. 53–82.

It should be emphasised that the 2015 amendment to the Criminal Code preserved the prohibition against adjudicating the penalty of restriction of liberty in the form of an obligation to perform unpaid, supervised community service when the health condition of the accused or their personal circumstances suggest that they will not fulfil this obligation (Article 58 § 2a CC). This directive is crucial in practice because, in 97–99% of cases, the penalty of restriction of liberty is adjudicated in this form – an obligation to work, as specified in Article 34 § 1a(1) CC.

At the same time, the grounds for adjudicating non-custodial penalties (fines and restrictions of liberty) were significantly expanded by introducing these penalties to all statutory offences punishable by imprisonment not exceeding 8 years, where they were previously not included (Article 37a CC).[16] The amendment to Article 58 § 1 CC also facilitated more frequent adjudication of fines and restrictions of liberty, as it replaced the previous *ultima ratio* principle of unconditional imprisonment with the *ultima ratio* principle of imprisonment, including conditional suspension of its execution for crimes punishable by imprisonment not exceeding 5 years. Furthermore, the possibility of joint adjudication of short-term imprisonment and restriction of liberty was introduced within the framework of the so-called 'mixed' penalty for misdemeanours punishable by imprisonment (Article 37b CC). The legislator introduced a new solution: the possibility to impose a penalty of restriction of liberty in the form of an obligation to perform unpaid, supervised community service if the probation period is negatively verified during the conditional suspension of the execution of the imprisonment penalty. In such cases, the court, in accordance with Article 75a CC, could replace the imprisonment penalty with a restriction of liberty. Additionally, the 2015 amendment to the Criminal Code excluded the possibility of applying a conditional suspension of executing the penalties of restriction of liberty and fines, as these measures had not found widespread application in judicial practice.

The solutions adopted regarding the forms of the penalty of restriction of liberty were in effect only for a short time. The Act of 11 March 2016 amending the Act – Criminal Code and the Act – Criminal Enforcement Code[17] removed the new form of executing the penalty of restriction of liberty specified in Article 34 § 1a (3) CC, which allowed for the use of an electronic supervision system and restored electronic supervision as a form of executing the penalty of imprisonment. Moreover, the Act of the same date, amending the Code of Criminal Procedure and Certain Other Acts[18] removed another new form of the penalty of restriction of liberty specified in

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[16] A different position has also been expressed regarding the legal nature of the institution covered in Article 37a CC, suggesting that this provision constitutes a special directive for sentencing misdemeanours punishable solely by imprisonment. See in particular: Konarska-Wrzosek, V., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, pp. 225–226. As a result of the amendment to the Criminal Code by the Act of 19 June 2020 on Surcharges to the Interest Rate of Bank Loans Granted to Entrepreneurs Affected by the effects of COVID-19 and on Simplified Proceedings for the Approval of the Arrangement in Connection with the Occurrence of COVID-19 (Journal of Laws of 2020, item 1086), Article 37a CC was given the character of a special directive of judicial sentencing. See Grześkowiak, A., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, 7th ed., Warszawa, 2021, pp. 407–409.

[17] Journal of Laws of 2016, item 428.

[18] Journal of Laws of 2016, item 437.

Article 34 § 1a(3) CC, involving obligations specified in Article 72 § 1(4)–(7a) CC.[19] These changes significantly diminished the scope of the penalty of restriction of liberty and limited the possibilities to tailor the degree of hardship of the penalty to the requirements of each case.

It is necessary to emphasise that the authors of the 2015 criminal law reform stressed the need for a profound change in the flawed structure of sentencing towards more frequent adjudication of non-custodial sentences, at the cost of adjudicating the penalty of imprisonment with conditional suspension of its execution. This shift corresponded with a radical limitation on the application of suspended imprisonment. For example, the amended Article 69 CC significantly reduced the upper limit of a prison sentence eligible for conditional suspension from 2 years to 1 year. Additionally, the application of conditional suspension of the execution of the imprisonment penalty was restricted exclusively to perpetrators who, at the time of committing the crime, had not previously been sentenced to imprisonment, either unconditionally or with conditional suspension of execution. As before, a positive criminological prognosis remained a prerequisite for applying suspended imprisonment. Furthermore, Article 69 § 4 CC stipulated that only in particularly justified cases could the execution of the sentence be conditionally suspended for perpetrators of hooligan misdemeanours and crimes specified in Article 178a § 4 CC.[20] Such a drastic limitation on the scope of conditionally suspended imprisonment was almost universally evaluated negatively in the doctrine. It was noted that reducing the limit to one year for the imposed prison sentence eligible for suspension might lead to an increase in the number of unconditional imprisonment sentences and, as a result, undermine the reform objectives.[21]

Considering this, one might reflect on whether the primary goal of the 2015 Criminal Code reform has been achieved and whether the structure of adjudicated penalties aligns with the expectations of the reform's authors.

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[19] For more on this topic, see Melezini, M., 'Zmienione przepisy o karze ograniczenia wolności (wstępne wyniki badań praktyki)', in: Majewski, J. (ed.), *Środki reakcji na czyn zabroniony po reformie Kodeksu karnego z lutego 2015r. Pierwsze doświadczenia*, Warszawa, 2017, pp. 123–124.

[20] For more on this topic, see. Zoll, A., 'Środki związane z poddaniem sprawcy próbie i zamiana kary', in: Wróbel, W. (ed.), *Nowelizacja prawa karnego z 2015 r. Komentarz*, Kraków, 2015, pp. 436–447; Majewski, J., *Kodeks karny*…, op. cit., pp. 237–282.

[21] Zoll, A., 'Regulacja warunkowego zawieszenia wykonania kary pozbawienia wolności w ustawie z 20 lutego 2015 r.', in: Bojarski, M., Brzezińska, J., Łucarz, K. (eds), *Problemy współczesnego prawa karnego i polityki kryminalnej. Księga jubileuszowa Profesor Zofii Sienkiewicz*, Wrocław, 2015, pp. 410–413; Burzyński, P., 'Zmiany normatywne w zakresie instytucji warunkowego zawieszenia wykonania kary pozbawienia wolności – uwagi praktyczne', in: Adamski, A., Berent, M., Leciak, M. (eds), *Warunkowe zawieszenie wykonania kary w założeniach nowej polityki karnej*, Warszawa, 2016, pp. 60–63; Konarska-Wrzosek, V., 'Ustawowe przesłanki stosowania warunkowego zawieszenia wykonania kary po nowelizacji kodeksu karnego', in: Adamski, A., Berent, M., Leciak, M. (eds), *Warunkowe zawieszenie*…, op. cit., pp. 167–181.

CHANGES IN THE STRUCTURE OF ADJUDICATED SENTENCES AFTER THE 2015 CRIMINAL CODE AMENDMENT AND THEIR CONSEQUENCES – INTENDED AND UNINTENDED

Table 1. The structure of lawfully adjudicated penalties by courts in 2014 and 2020

Specification	2014		2020	
	No.	%	**No.**	%
Total number of convicts	295,353	100.0	251,369	100.0
Autonomous fine	63,078	21.3	84,081	33.4
Including suspended	998	1.6	26	0.0
Penalty of restriction of liberty	33,009	11.2	74,012	29.4
Including suspended	897	2.7	15	0.0
Immediate custodial sentence	35,633	12.1	48,550	19.3
Custodial sentence with a suspended execution	163,534	55.4	41,974	16.7
Mixed penalties	X	X	2,619	1.0

Source: 'Prawomocne skazania i warunkowe umorzenia osób dorosłych w latach 2001–2020 – czyn główny', published by Wydział Statystyczny Informacji Zarządczej Ministerstwa Sprawiedliwości [Lawful convictions and conditional discontinuation of proceedings against adults in the years 2001–2020 – main act, published by the Statistical Department of Managerial Information of the Ministry of Justice] [http://isw.ms.gov.pl/pl/bazastatystyczna/opracowaniawieloletnie; accessed on: 25 August 2023].

Statistical data indicates that in 2020, compared to 2014, there were significant changes in the structure of adjudicated penalties. After many years of widespread criticism regarding the mass application of conditional suspension of imprisonment, the share of this measure in adjudicated penalties has significantly decreased – from 55.4% to 16.7%. The penalty of restriction of liberty with conditional suspension of its execution has been effectively marginalised in practice, occupying the lowest position among measures of criminal response. In alignment with the 2015 criminal law reform, there was a notable increase in the role of non-custodial sentences. Specifically, the share of the penalty of restriction of liberty rose from 11.2% to 29.4%, with the number of such penalties more than doubling from 33,009 in 2014 to 74,012 in 2020. Notably, the number of imposed liberty restriction penalties abruptly increased in 2016 (from 31,096 in 2015 to 61,542 in 2016), continuing to grow, though less dynamically, in subsequent years.[22]

[22] See more in: Krajewski, K., 'Przemiany polityki karnej…', op. cit., pp. 186–187; Melezini, M., 'Tendencje w polityce karnej po reformie prawa karnego z 2015 r.', in: Góralski, P., Muszyńska, A. (eds), *Racjonalna sankcja karna w systemie prawa*, Warszawa, 2019, pp. 128–132.

Positive changes were also observed in the application of autonomous fines, whose share in the structure of imposed penalties increased from 21.3% to 33.4%. In 2020, the number of convictions to autonomous fines was 84,081, making it the most frequently adjudicated penalty that year.

These changes were expected and aligned with the assumptions of the 2015 reform, although not all expectations were fulfilled. Due to the excessively radical limitation on the application of conditional suspension of imprisonment, there was a significant increase in the share of unconditional imprisonment (from 12.1% to 19.3%). It turns out that in some cases, the penalty of imprisonment with conditional suspension was not replaced by non-custodial penalties; instead, unconditional imprisonment was used as an alternative. The number of adjudicated unconditional imprisonment penalties increased from 35,633 in 2014 to 48,550 in 2020, despite a significantly lower total number of convictions.

Considering the criminal policy context following the 2015 criminal law reform, one might question the rationality of pursuing such a drastic limitation on the scope of conditional suspension of imprisonment while significantly increasing the role of the penalty of restriction of liberty in judicial practice. This is particularly relevant given the extensive research conducted by A. Janus-Dębska in 2014, as previously mentioned, which highlighted numerous obstacles that made it difficult to complete the execution of the penalty of restriction of liberty adjudicated in the form of unpaid, supervised community service. Additionally, research by K. Krajewski shows that the drastic decrease in the number of convictions for imprisonment with conditional suspension resulted in a significant reduction in orders to execute conditionally suspended imprisonment penalties (from 50,904 in 2012 to 9,200 in 2020), which, however, did not contribute to reducing the prison population. In this respect, the expectations of the 2015 reform's authors were, unfortunately, not met.[23]

It seems that this is because along with the increasing number of adjudicated liberty restriction penalties, the number of substitute imprisonment sentences ordered due to convicts evading the execution of the restriction of liberty (and fines) is also rising year by year. As of 30 December, the number of substitute imprisonment sentences being executed was as follows: 1,418 in 2002; 3,259 in 2016; 4,803 in 2018; 6,178 in 2020; 8,126 in 2021; and 10,174 as of 30 June 2023.

At the same time, the number of substitute sentences waiting to be executed is alarmingly high. As of 31 December 2022, there were 33,405 such sentences (out of a total of 52,946 sentences with a court-appointed deadline for serving the sentence), composed of 11,248 substitute imprisonment sentences imposed instead of restriction of liberty, 8,025 such sentences imposed instead of an autonomous fine, and 14,132 substitute arrest penalties instead of a fine or restriction of liberty for minor offences.[24] Therefore, the total number of substitute penalties adjudicated in

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[23] Krajewski, K., 'Przemiany polityki karnej…', op. cit., pp. 188–189 and 197. See also Stańdo-Kawecka, B., 'Niepożądane skutki fragmentarycznych reform systemu karania na przykładzie kary zastępczej za ograniczenie wolności', in: Grzyb, M., Krajewski, K. (eds), *Polityka kryminalna: między teorią a praktyką. Księga jubileuszowa profesor Janiny Błachut*, Kraków, 2022, pp. 306–307.

[24] See www.sw.gov.pl/dział/statystyka [accessed on 20 July 2023].

place of the penalties of restriction of liberty, currently being executed and pending execution, fluctuates around 20,000.

Additionally, it turns out that the effectiveness of the penalty of restriction of liberty, in comparison to other penalties, is unsatisfactory when measured by recidivism within five years of a lawful conviction. This is indicated by the data presented in Table 2.

Table 2. Recidivism in the years 2009–2015 within 5 years from conviction to a specific type of a penalty

Specification	Reporting period		
	2009–2013	2010–2014	2011–2015
Penalty of unconditional imprisonment	36.2%	35.4%	33.7%
Penalty of restriction of liberty (unconditional)	35.6%	35.1%	32.7%
Penalty of restriction of liberty with conditional suspension	23.5%	24.4%	25.1%
Autonomous fine (unconditional)	22.9%	22.1%	20.6%
Penalty of restriction of liberty with suspension	16.1%	14.4%	14.4%
Autonomous fine with suspension	10.7%	10.9%	9.0%

Source: 'Powrotność do przestępstwa w latach 2009–2015' [Recidivism in the years 2009–2015]; Wydział Statystyczny Informacji Zarządczej Ministerstwa Sprawiedliwości [www.ms.gov.pl/pl/baza-statystyczna/publikacje-archiwum; accessed on: 10 August 2023].

The results of the research, titled 'Powrotność do przestępstwa w latach 2009–2014 – I edycja' [Recidivism in the Years 2009–2014 – First Edition] and 'Powrotność do przestępstwa w latach 2009–2014 – II edycja' [Recidivism in the Years 2009–2015 – Second Edition], developed by the Wydział Statystyczny Informacji Zarządczej Ministerstwa Sprawiedliwości [Department of Strategy and European Funds, Statistical Information Management Department] and published on the Ministry of Justice[25] website, covering three reporting periods (2009–2013, 2010–2014, and 2011–2015), indicate that in each of these periods, the largest number of people who reoffended had initially been convicted to unconditional imprisonment (36.2%, 35.4%, 33.7%) or to restriction of liberty (unconditional) (35.6%, 35.1%, 32.7%). It is important to note that the ineffectiveness of both these types of penalties was

[25] Departament Strategii i Funduszy Europejskich, Wydział Statystycznej Informacji Zarządczej, Ministerstwo Sprawiedliwości, *Powrotność do przestępstwa w latach 2009–2014 – I edycja*, Warszawa, 19 October 2015; Departament Strategii i Funduszy Europejskich, Wydział Statystycznej Informacji Zarządczej, Ministerstwo Sprawiedliwości, *Powrotność do przestępstwa w latach 2009–2015 – II edycja*, Warszawa, May 2017 (http://isw.ms.gov.pl/pl/bazastatystyczna/publikacje-archiwum [accessed on 10 August 2023]).

high, with similar recidivism rates. Significantly lower recidivism rates were recorded for imprisonment with a conditional suspension of its execution (23.5%, 24.4%, 25.1%) and for an autonomous fine (unconditional) (22.9%, 22.1%, 20.6%). The lowest recidivism rates were observed for restriction of liberty with suspension (16.1%, 14.4%, 14.4%) and for an autonomous fine with suspension (10.7%, 10.9%, 9.0%), although these measures were removed from the Criminal Code by the 2015 amendment.

It appears that the imprisonment penalty with a conditional suspension of execution is characterised by relatively high effectiveness in preventing recidivism. It is considerably more effective than the penalty of restriction of liberty (unconditional), which, in turn, is only marginally less effective than unconditional imprisonment.

CONCLUSION

In conclusion, it should be stated that, on the one hand, the main goal of the 2015 reform of the Criminal Code has been achieved. The radical limitation in the scope of adjudicating imprisonment sentences with conditional suspension of execution and the significant expansion of the basis for sentencing non-custodial penalties have created opportunities for the penalty of restriction of liberty to assume its rightful position within the structure of sentenced penalties. On the other hand, a serious issue arises concerning proper selection of a criminal response measure appropriate to the specific offence and its perpetrator. The accuracy of the court's selection of the penalty of restriction of liberty, which, in turn, affects the course of enforcement proceedings, depends on the application of the directive provided in Article 58 § 2a CC. However, this directive is sporadically applied due to the lack of information as regards the health, personal conditions and characteristics of the accused. This is particularly relevant given that the penalty of restriction of liberty, with an obligation to perform unpaid, supervised community service, is very often adjudicated in judgments issued at a session or in summary judgments without direct contact with the accused. This impacts the effectiveness of the execution of the penalty of restriction of liberty, which still requires significant improvement.

Undoubtedly, the new, extremely specific principle for determining the penalty of restriction of liberty, which mechanically increases the lower limit of this type of penalty, implemented under the Act of 7 July 2022,[26] does not contribute to the rational development of sentencing practices. According to Article 34 § 1aa CC, the term of the penalty of restriction of liberty and the penalty of imprisonment cannot be lower than:

- 2 months if the act is punishable by imprisonment not exceeding 1 year;
- 3 months if the act is punishable by imprisonment not exceeding 2 years;
- 4 months if the act is punishable by imprisonment exceeding 2 years.

[26] Journal of Laws of 7 July 2022 on amending the Act – Criminal Code and Certain Other Acts (Journal of Laws, item 2600, as amended).

This change has significantly limited judges' discretion in determining the penalty of restriction of liberty. Granting the court a wide latitude in setting the term of the penalty of restriction of liberty stems from the need to implement the principle of individualisation of criminal responsibility.

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SPECIAL RIGHTS OF SOLDIERS, AND OFFICERS OF THE POLICE AND THE BORDER GUARD WITH REGARD TO THE USE OF THE ASSISTANCE OF COUNSEL FOR THE DEFENCE

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Abstract

This article is scientific and research-oriented, analysing the right, granted by the Act of 26 July 2024,[1] which amends certain acts to improve the functioning of the Armed Forces of the Republic of Poland, the Police, and the Border Guard in the event of a threat to state security. The right concerns a request for the appointment of public counsel for the defence by a soldier, a police officer, or a Border Guard officer accused of a crime committed as a result of the use of direct coercive measures, weapons, or other armaments, or the application or use of coercive measures or firearms in connection with the performance of specific official activities or tasks (Article 78a of the Code of Criminal Procedure). The article also examines the broader possibilities of providing financial support to soldiers for covering the costs of legal assistance incurred in cases concerning crimes committed in connection with the performance of official tasks and activities (Article 296(5) and Article 316(5) of the Act on the Defence of the Homeland). Additionally, provisions authorising the reimbursement of legal assistance costs to officers of certain other services are analysed. The main scientific objective is to assess the justification for introducing these amendments to criminal procedure law, as well as existing solutions that privilege soldiers and officers of certain services in terms of access to counsel for the defence. The main research theses aim to demonstrate that these changes result in

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[1] Journal of Laws of 2024, item 1248, hereinafter referred to as the '2024 Amendment'.

a violation of the principle of equality before the law. The results of the study are original, as they highlight the need for legislative intervention. The study holds significant value for both academia, as it offers a dogmatic analysis and substantial theoretical insights, and for practical application, as it suggests directions for interpretating the criteria for applying the new provisions, potentially contributing to their uniform application.

Keywords: police officer, Border Guard officer, costs of appointing counsel for the defence, public defence counsel, defence counsel of choice, reimbursement of costs, soldier

INTRODUCTION

The right to defence (*ius defensionis*) encompasses all procedural actions aimed at proving the innocence of the accused or limiting or mitigating their liability.[2] The essence of this right is to afford the accused the opportunity to conduct a personal defence against charges and their legal consequences, as well as to utilise the assistance of counsel for the defence.[3] The Supreme Court *expressis verbis* emphasises that

> 'The principle of the accused's right to defence is a directive derived not only from the provisions of the Constitution (Article 42). Two aspects of the principle should be considered: formal defence, which entails the procedural activity of counsel for the defence, and material defence, i.e., the defence activities undertaken by the accused personally. These two elements interpenetrate and complement each other, as only then can it be said that the right to defence in criminal proceedings is something real and effective.'[4]

The real possibility of using defence counsel is essential for the accused to fully exercise their right to defence, and it is one of the most important manifestations of this right.[5] It may be implemented by appointing a defence counsel through the authorisation of the accused, in accordance with Article 81 of the Code of Criminal Procedure (CCP), by selecting a specific lawyer or legal advisor to act as their defence counsel (defence counsel of choice – Article 83(1) CCP), or through the appointment of a defence counsel by a court president's ruling or a court's decision (public counsel for the defence – Article 81(1) CCP). Originally, public defence counsel was appointed at the request of an accused who did not have a defence counsel of their choice, provided they adequately demonstrated that they were unable to cover the costs of defence without detriment to the necessary maintenance of themselves and

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[2] Dąb, A., Cincio, K., 'Prawo do obrony', in: *Zagadnienia prawne Konstytucji PRL*, Vol. III, Warszawa, 1954, p. 244; Kalinowski, S., *Postępowanie karne. Zarys części ogólnej*, Warszawa, 1963, p. 267.

[3] Murzynowski, A., *Istota i zasady procesu karnego*, Warszawa, 1976, p. 272; Kruszyński, P., *Stanowisko prawne obrońcy w procesie karanym*, Białystok, 1991, p. 13; Kruszyński, P., in: Bieńkowska, B., Kruszyński, P. (ed.), Kulesza, C., Piszczek, P., Pawelec, P., *Wykład prawa karnego procesowego*, Białystok, 2003, p. 69; Stefański, R.A., *Obrona obligatoryjna w polskim procesie karnym*, Warszawa, 2012, p. 25.

[4] Supreme Court judgment of 1 December 1997, III KKN 168/97, *Prokuratura i Prawo*, 1998 supplement, No. 4, item 7.

[5] Cieślak, M., *Polska ‚procedura karna. Podstawowe założenia teoretyczne*, Warszawa, 1971, p. 302; Wiliński, P., *Zasada prawa do obrony w polskim procesie karnym*, Kraków, 2006, p. 295.

their family (Article 78(1) CCP). In cases of mandatory defence (Article 79(1) and (2) and Article 80 CCP), if the accused did not have counsel of their choice, public defence counsel would be appointed (Article 81(1) CCP).

The 2024 Amendment introduced the following regulations:

– granting the right to request the appointment of public defence counsel for a soldier, police officer, or Border Guard officer accused of a crime committed as a result of the use of direct coercive measures, weapons, or other armaments, or the application or use of direct coercive measures or firearms in connection with the performance of specific official activities or tasks (Article 78a CCP);
– broadening the possibilities for providing financial support to soldiers in relation to legal assistance costs incurred in cases concerning crimes committed in connection with the performance of official activities and tasks (Article 296(5) and Article 316(5) of the Act of 11 March 2022 on the Defence of the Homeland).[6]

APPOINTMENT OF PUBLIC DEFENCE COUNSEL FOR SOLDIERS, POLICE OFFICERS AND BORDER GUARD OFFICERS

In accordance with Article 78a(1) CCP, a soldier, police officer, or Border Guard officer accused of a crime committed as a result of the use of direct coercive measures, weapons, or other armaments, or the application or use of direct coercive measures or firearms in connection with the performance of specific official activities or tasks, who does not have defence counsel, may request the appointment of public counsel for the defence. This concerns the performance of official activities or tasks:

(1) by Border Guard officers or soldiers of units or subunits of the Armed Forces of the Republic of Poland in response to state security concerns, ensuring the inviolability of the state border, a threat to public security, or the disruption of public order within the territorial scope of border crossings, the border zone, or Polish maritime areas. This includes: (1) a direct threat of an attack on the inviolability of the state border or its actual commission; (2) creating a direct danger to the life, health, or freedom of citizens; (3) a direct threat of an attack on premises or facilities used by the Border Guard; (4) a threat of a terrorist act or its actual commission against premises or facilities used by the Border Guard, or any act that may endanger human life (Article 78a(1) CCP in conjunction with Article 11b of the Act of 12 October 1990 on the Border Guard);[7]
(2) by soldiers of units and subunits of the Armed Forces acting independently in counteractions required for state security reasons, ensuring the inviolability of the state border, or addressing threats to public security within the territorial scope of border crossings, the border zone, or Polish maritime areas (Article 78a(1)(1) CCP in conjunction with Article 11c (1) ABG);
   – by officers of Police units or subunits and soldiers of units and subunits of the Armed Forces of the Republic of Poland in the event of a threat to public

[6] Journal of Laws of 2024, item 248, as amended, hereinafter 'ADH'.
[7] Journal of Laws of 2024, item 915, as amended, hereinafter 'ABG'.

security or disruption of public order, including: (1) creating a common danger to life, health or freedom of citizens; (2) a direct threat to property of significant value; (3) a direct threat to premises or facilities important for the security or defence of the state, the seats of central state authorities or the justice system, the facilities of the national economy or culture, and diplomatic missions and consular offices of foreign countries or international organisations, as well as facilities under the supervision of armed security formations established in accordance with separate provisions; (4) a threat of a terrorist act that may endanger the life or health of participants in cultural, sports or religious events, including mass events or gatherings (Article 78a(1)(1) CCP in conjunction with Article 18(1) of the Act of 6 April 1990 on the Police).[8]

Their scope also includes official activities or tasks performed during a military operation conducted within the territory of the Republic of Poland in peacetime, as defined by: (a) an organised action by the Armed Forces carried out to ensure the external security of the state, which does not constitute training or exercise; (b) an action involving foreign troops as part of the military reinforcement of the Armed Forces of the Republic of Poland or the forces of the States Parties to the North Atlantic Treaty, drawn up in Washington on 4 April 1949[9] – provided that the circumstances require an immediate response, particularly in situations involving a threat to the state border, critical infrastructure, or the safety of people and property of significant value, including instances where the forces and resources of the Ministry of the Interior or those under its supervision may prove insufficient due to the nature of the actual threat (Article 87a(1)(1) *in fine* in conjunction with Article 2(18a) of the Act of 11 March 2022 on the Defence of the Homeland);[10]

(3) in the event that there is a need to repel a direct, unlawful attack on one's own or another person's life, health, or freedom, or the inviolability of the state border, or to counteract actions directly aimed at carrying out these attacks, or to perform counter-terrorist activities – defined as actions against perpetrators, persons preparing, or assisting in the commission of terrorist crimes (Article 115(20) CC) – carried out to eliminate a direct threat to the life, health, or freedom of individuals or property, using specialist forces and measures, as well as specialist tactics (Article 87a(1)(1) CCP in conjunction with Article 2(2) of the Act of 10 June 2016 on Counter Terrorist Activities).[11]

The request for the appointment of public counsel for the defence is limited to soldiers, police officers, and Border Guard officers (subjective limitation), and it applies only in situations where they are accused of committing any of the abovementioned crimes (objective limitation).

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[8] Journal of Laws of 2024, item 145, as amended, hereinafter 'AP'.
[9] Journal of Laws of 2000, No. 87, item 970.
[10] Journal of Laws of 2024, item 248, as amended.
[11] Journal of Laws of 2024, item 92.

According to the statutory definition in Article 115(17) CC, a soldier is defined as a person performing full-time military service, excluding territorial military service performed on the basis of availability.

There are two types of military service: (a) full-time military service, and (b) reserve service (Article 129 ADH).

Full-time military service consists of:

(1) basic national military service, which can be: (a) voluntary basic national military service, or (b) compulsory basic national military service (Article 130 ADH);
(2) territorial military service, carried out: (a) on the basis of availability, where aźsoldier of the Territorial Defence remains outside a military unit but is prepared to report for duty at the location and time determined by the military unit commander; (b) on the basis of a shift system, in which a soldier serves at a military unit or another location determined by the commander of the military unit , on service days scheduled by the commander, at least once a month during the soldier's two days off. On other days, the TD soldier is on availability status and may also perform shifts on other days as required by the Armed Forces, as agreed with the soldier or at the soldier's request. Due to the explicit exclusion of soldiers in territorial military service on availability status, as set out in Article 115(17) CC, these individuals are not considered soldiers within the meaning of the provisions of the Criminal Code;
(3) full-time reserve service on service days and military exercises within the part-time reserve, which consists of: (a) full-time reserve, composed of individuals who volunteered to serve in the full-time reserve, have sworn a military oath, are not serving in another military formation, and are still under the age of 60, or in the case of non-commissioned or commissioned officers, under the age of 60; (b) part-time reserve, composed of individuals whose relationship with military service has been regularised, are not serving in any other military formation, are not subject to militarisation, and are still under the age of 60, or in the case of non-commissioned and commissioned officers, under the age of 63 (Article 131 ADH);
(4) professional military service, where professional soldiers are appointed through a personal order calling them up for professional military service based on voluntary recruitment (ex Article 185(2) and Article 186(1) ADH). A professional soldier performs professional military service: (a) in an official position; (b) at a military college, a non-commissioned officer's school, or a training centre where they receive education; and (c) on the basis of availability (Article 191 ADH);
(5) service in the event of mobilisation and during wartime.

In the context of the definition of a soldier in Article 115(17) CC, doubts may arise regarding the meaning of this term in Article 78a(1) CCP, due to the fact that the Act on the Defence of the Homeland distinguishes between a soldier and a professional soldier. The statute defines a soldier as a person performing full-time military service (Article 2(40) ADH), and a professional soldier as one carrying out professional military service (Article 32(29) ADH). Therefore, considering the distinction between these two types of soldiers, it may appear that the term used in Article 78a(1) CCP does not include a professional soldier. This interpretation could be supported by the absence of a definition of the term in the Code of Criminal Procedure, which

may lead to applying a definition from a statute that is fundamental in the relevant field.[12] It can be assumed that, with regard to the definition of a soldier, the Act on the Defence of the Homeland serves as such a statute. However, such a conclusion leads to *reductio ad absurdum*, as there are no rational grounds to deprive professional soldiers of this right. Due to their role in performing the tasks assigned to them, they should be among the foremost to exercise this right. When interpreting the term, it is essential to remember that the interpretation of the word 'soldier' in the Code of Criminal Procedure serves to implement the norms of substantive criminal law. This is an argument for referring to the definition provided in the Criminal Code. Similar reasoning, focusing on interpreting a concept in the Criminal Code as specified in the Code of Criminal Procedure, was adopted by the Supreme Court, which held that:

> 'Since the Criminal Code does not contain its own definition of the entities listed in Article 245, the correct determination of the semantic scope of these concepts must be based on the legal act closest to it, which is the Code of Criminal Procedure. Pursuant to Article 245 CC, logical and teleological interpretation supports using the term "accused" in a general sense and, in accordance with Article 71(3) CCP, applying relevant provisions concerning the accused also to a suspect.'[13]

The definition in Article 115(17) CC clearly implies that a person performing territorial military service on the basis of availability is not a soldier within the meaning of the Criminal Code, despite holding such status under the Act on the Defence of the Homeland.[14]

A soldier, police officer, or Border Guard officer, regardless of their financial status, is entitled to request the appointment of public counsel for the defence. It is sufficient that the suspect or accused is charged with committing a crime resulting from the use of direct coercive measures, weapons, or other armaments, or the application of direct coercive measures or firearms in connection with performing the above-mentioned official activities or tasks.

Although Article 78a(1) CCP refers to the 'accused', in accordance with Article 71(3) CCP, the term 'accused' in the Code of Criminal Procedure also generally covers a suspect.

The suspicion or accusation must concern a crime committed: (a) as a result of the use of direct coercive measures, weapons, or other armaments, or the application or use of direct coercive measures or firearms; (b) in connection with the performance of the above-mentioned official activities or tasks. It does not need to be a crime that inherently involves the application of direct coercive measures, the use of weapons or other armaments, or the application or use of direct coercive

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[12] Zieliński, M., *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa, 2010, p. 212.

[13] Supreme Court judgment of 8 April 2002,V KKN 281/00, *Orzecznictwo Sądu Najwyższego Izba Karna i Izba Wojskowa* (*OSNKW*), 2002, No. 7–8, item 56 with a gloss of approval by Murzynowski, A., *Orzecznictwo Sądów Polskich* (*OSP*), 2002, No. 12, pp. 650–653.

[14] Jastrzębski, W., Wnorowski, K., 'Status żołnierzy terytorialnej służby wojskowej w świetle polskiego prawa karnego materialnego i procesowego', *Wojskowy Przegląd Prawniczy*, 2023, No. 1, p. 20.

measures or firearms. It is also not required that the crime involves failure to fulfil or exceeding the powers related to the performance of official activities or tasks.

The accused soldier, police officer, or Border Guard officer may also request the appointment of public counsel for the defence in order to perform a specific procedural activity (Article 78a(2) CCP). The court may withdraw the appointment of defence counsel if it is found that the circumstances upon which the appointment was based no longer exist. The decision to withdraw the appointment of defence counsel may be appealed to an equivalent bench of the court (Article 78a(3) CCP). These regulations mirror those provided for the appointment of public defence counsel on the grounds of poverty (Article 78(1a) and (2) CCP).

Article 78a CCP also applies to soldiers, police officers, and Border Guard officers accused, before the 2024 Amendment came into force, of committing a crime as a result of the use of direct coercive measures, weapons, or other armaments, or the application or use of direct coercive measures or firearms in connection with the performance of the above-mentioned official activities or tasks, in cases initiated but not concluded before the amendment's entry into force (Article 11(1) of the 2024 Amendment).

FINANCIAL SUPPORT FOR PROVIDING OF LEGAL ASSISTANCE TO PROFESSIONAL SOLDIERS AND SOLDIERS AFTER THE CONCLUSION OF CRIMINAL PROCEEDINGS

In accordance with Article 296(1) ADH, a professional soldier is entitled to reimbursement of costs incurred for legal assistance, provided that the criminal proceedings initiated against them for an offence committed in connection with the performance of official tasks and activities were concluded with a final ruling discontinuing the proceedings due to the absence of statutory features of a prohibited act or the non-commission of a crime, or with an acquittal.

The 2024 Amendment introduced identical provisions for soldiers performing full-time military service (Article 316(1) ADH). Prior to this amendment, soldiers were entitled to reimbursement of legal assistance costs, provided that the preparatory proceedings initiated against them for an offence committed in connection with the performance of official duties were concluded with a final ruling of discontinuation (Article 316(1) ADH). The 2024 Amendment clarified that this condition applies specifically to the discontinuation of proceedings due to the absence of statutory features of a prohibited act, the non-commission of a crime, or an acquittal.

Costs shall be reimbursed in an amount corresponding to the remuneration of one defence lawyer for activities specified in the provisions of the Regulation of the Minister of Justice of 22 October 2015 on fees for solicitor's activities,[15] and the Regulation of the Minister of Justice of 22 October 2015 on fees for legal advisors' activities[16] (Article 296(2) ADH).

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[15] Journal of Laws of 2023, item 1964, as amended.
[16] Journal of Laws of 2023, item 1935, as amended.

Determining the reimbursement of costs based on the type of final judgment that concludes the proceedings leaves no doubt that reimbursement can only occur after the final conclusion of the proceedings. This means that, pursuant to these provisions, costs will not be reimbursed during an ongoing criminal proceeding.

It is noted in the literature that the terms 'official task' and 'official activity' are used interchangeably in the Act on the Defence of the Homeland (e.g., in Article 105(1), Article 170(5), Article 225(1)–(5) and (7)–(8), Article 266(4), Article 296(1), Article 297(1), Article 333(1)–(2), Article 353(2)(4), etc.). It is therefore rightly concluded that a professional soldier performs official tasks (official activities) when fulfilling any obligation arising from military service (the professional military service relationship). This includes a professional soldier's duties arising from: (1) the official position held; (2) duties assigned during the period of secondment to perform official tasks outside the military unit; (3) conducting internal, garrison, patrol, convoy, and other services; (4) participation in disaster relief, counter-terrorist activities, property protection, search and rescue operations, protection of human health and life, protection and defence of cyberspace, clearing areas of military-origin explosives and hazardous materials, and crisis management tasks (Article 11(3) ADH); (5) orders and commands issued by superiors authorised by law (Article 353(1) ADH); and (6) legal provisions concerning military service.[17]

Reimbursement of the costs of legal assistance is made upon a professional soldier's written request, which must include: (1) the soldier's full name; (2) military rank; (3) the soldier's address and telephone number; (4) a brief presentation of the circumstances of the case.

The application must be accompanied by the following attachments: (1) a document confirming the soldier's payment for the legal assistance provided; (2) a declaration that the soldier did not exercise the right to the appointment of public counsel for the defence due to their inability to cover the defence costs without detriment to their own and their family's necessary maintenance (Article 78(1) CCP) and that no other sources of assistance were obtained; (3) a final and binding decision on the discontinuation of the proceeding due to the absence of statutory features of a prohibited act, non-commission of a crime, or an acquittal; (4) a statement concerning the form of payment of the amount due. A professional soldier must submit the application for reimbursement of legal assistance costs, along with the required documents, to the commander of their military unit. Upon receiving the application with all necessary documents and obtaining the consent of the immediate superior, the commander must, without delay and no later than 14 days, decide on the reimbursement of legal assistance costs, taking into account the actual costs incurred by the soldier and the decision on the costs of the proceedings (§ 3 of the Regulation of the Minister of National Defence of 26 May 2022 on the reimbursement of costs and financing legal assistance for professional soldiers).[18]

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[17] Krempeć, E., in: Królikowski, H. (ed.), *Obrona Ojczyzny*, Warszawa, 2023, pp. 590–591.

[18] Journal of Laws of 2022, item 1242. The Regulation shall remain in force until the entry into force of the implementing provisions issued on the basis of Article 297(4) ADH, as determined by the Amendment of 26 July 2024. However, it shall be in force for no longer than six

Officers of the Police, Border Guard, Prison Guard, Protection Service, and Fiscal and Customs Service have the same rights. However, they are required to submit an application, and the actual costs incurred, which are subject to reimbursement, cannot exceed four times the average remuneration of the officer in the year preceding the application's submission date (Article 66a(1)–(2) of the Act on the Police, Article 71a(1)–(2) of the Act on the Border Guard, Article 164(2)–(3) of the Act of 9 April 2010 on the Prison Guard, Journal of Laws of 2023, item 1683, as amended; Article 142a(1)–(2) of the Act of 8 December 2017 on the State Protection Service, Journal of Laws of 2024, item 325;[19] Article 211(1)–(2) of the Act of 16 November 2016 on the National Fiscal Administration).[20]

Officers of the Central Anticorruption Bureau, the Internal Security Agency, and the Intelligence Agency are also entitled to reimbursement of costs incurred for legal assistance, but no limit has been set (Article 76(1) Act of 9 June 2006 on the Central Anticorruption Bureau,[21] Article 84(1) Act of 24 May 2002 on the Internal Security Agency and the Intelligence Agency).[22]

FINANCIAL SUPPORT FOR THE PROVISION OF LEGAL ASSISTANCE TO PROFESSIONAL SOLDIERS AND SOLDIERS BEFORE THE CONCLUSION OF THE CRIMINAL PROCEEDING

In particularly justified cases, and for the benefit of the service, financial support for legal assistance may be granted to a professional soldier when a criminal proceeding has been instigated against them for an offence committed in connection with the performance of official tasks and activities, even before the conclusion of the proceeding. The costs incurred for legal assistance are not subject to repayment by the professional soldier, regardless of the outcome of the criminal proceeding (Article 296(4) ADH). As a result of the 2024 Amendment, any soldier performing full-time military service may be granted such support (Article 316(4) ADH). The amount of costs subject to reimbursement is the same as after the conclusion of the criminal proceeding (Article 296(4) *in fine*, Article 319(4) *in fine* ADH).

The support is granted upon a professional soldier's written request. The application must include: (1) the soldier's full name; (2) military rank; (3) the soldier's address and telephone number; (4) a brief presentation of the circumstances of the case along with justification for the request for assistance. The application must be accompanied by: (1) a document confirming that the soldier

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months from the date the Amendment entered into force, and it may be amended based on the provisions that were previously in force (Article 12(3) of this Amendment).

[19] The provisions were introduced by the Act of 14 August 2020 on Special Solutions Concerning Support for Uniform Services Supervised by the Minister Responsible for Internal Affairs amending the Act on the Prison Guard and Certain Other Acts (Journal of Laws of 2020, item 1610).

[20] Journal of Laws of 2023, item 615, as amended.

[21] Journal of Laws of 2024, item 184.

[22] Journal of Laws of 2024, item 812.

has entered into an agreement for the provision of legal assistance; (2) an opinion from the commander of the military unit, or a body representing professional soldiers, regarding the soldier's extraordinary situation and the benefit to the service; (3) a declaration that the soldier does not benefit from the appointment of public counsel for the defence because they cannot cover the costs of defence without detriment to their own and their family's necessary maintenance (Article 78(1) CCP) and that no support for this purpose has been obtained from another source; (4) documents confirming the soldier's extraordinary situation, including personal, family, and financial circumstances; (5) a statement on the preferred method of payment for the amount due. A professional soldier must submit the application for financial support for legal assistance, along with the required documents, to the commander of their military unit. After receiving the application and complete set of documents, and having obtained consent from the immediate superior, the commander shall, without delay and no later than within 14 days, decide on granting financial support for legal assistance, taking into account the actual costs incurred by the soldier (§ 4 of the Regulation of 26 May 2022). The same rights are granted to police officers (Article 66a(3) of the Act on the Police), officers of the Border Guard (Article 71a(3) of the Act on the Border Guard), officers of the Prison Guard (Article 164(4) of the Act on the Prison Guard), and officers of the State Protection Service (Article 142a(3) of the Act on the State Protection Service). Other officers are not entitled to financial support for the provision of legal defence during a criminal proceeding against them when accused of an offence in connection with the performance of official duties; they must bear these costs themselves.[23]

The mode and method of documenting costs incurred for legal protection by an officer, as well as by entities involved in the reimbursement of legal protection costs, are determined by the following regulations:

– Regulation of the Minister of the Interior and Administration of 30 September 2020 on the mode and methods of documenting costs incurred for the legal protection of police officers, as well as entities authorised to reimburse these costs;[24]
– Regulation of the Minister of the Interior and Administration of 28 September 2020 on the mode and methods of documenting costs incurred by an officer of the Border Guard for legal protection, as well as entities authorised to reimburse these costs;[25]
– Regulation of the Minister of Justice of 7 July 2023 on the reimbursement of costs incurred for the legal protection of officers of the Prison Guard;[26]
– Regulation of the Minister of the Interior and Administration of 30 September 2020 on the costs incurred for the legal protection of officers of the State Protection Service.[27]

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[23] Musolf, G., in: Melezini, A., Teszner, K. (eds), *Ustawa o Krajowej Administracji Skarbowej. Komentarz*, Warszawa, 2024, p. 1140.

[24] Journal of Laws of 2024, item 522.

[25] Journal of Laws of 2020, item 1671.

[26] Journal of Laws of 2023, item 1409.

[27] Journal of Laws of 2020, item 1684.

The assistance granted to soldiers performing full-time military service was extended by the 2024 Amendment, which provided obligatory support in the form of reimbursement of trial costs to professional soldiers against whom criminal proceedings were initiated for an offence committed as a result of the use of direct coercive measures, weapons, or other armaments in connection with the performance of official tasks and activities, and who do not exercise the right to public counsel for the defence, even before the conclusion of the proceedings (Article 296(5) ADH). The support is granted in the amount specified in the legal assistance agreement, corresponding to the remuneration of one defence lawyer, but not exceeding 20 times the rates for activities specified in the above-mentioned regulations of the Minister of Justice on fees for solicitors' activities and the Regulation of the Minister of Justice on fees for legal advisors' activities.[28] The costs of legal assistance incurred are not subject to repayment by the professional soldier, regardless of the outcome of the criminal proceeding (Article 296(5) *in fine* ADH). The same rights were granted to soldiers performing full-time military service (Article 316(5) ADH).

LEGAL ASSISTANCE FOR SOLDIERS WHO ARE VICTIMS OF CERTAIN CRIMES

A professional soldier, or a soldier performing full-time military service, who is a victim of a crime involving a violation of the bodily integrity of an officer (Article 222 CC) or active assault on a public official (Article 223 CC) in connection with the performance of official activities or tasks, is entitled, upon request, to free legal assistance in a criminal proceeding in which they participate as the aggrieved party or as an auxiliary prosecutor. The assistance is provided by the Armed Forces. If the Armed Forces are unable to provide legal assistance, the victim is entitled to reimbursement of legal assistance costs (Article 297(1)–(3), Article 316a ADH).

This right is also granted to:

– the Police organisational unit where the aggrieved police officer serves shall provide this assistance. If this unit does not have legal services provided by legal advisors or solicitors, legal protection shall be provided by the appropriate provincial police headquarters or the Metropolitan Police Force. If a Police organisational unit is unable to provide legal protection, the officer is entitled to reimbursement of the actual costs incurred, but not exceeding four times the police officer's average remuneration paid in the year preceding the submission of the application (Article 66b(1)–(3) ADH);
– officers of the Border Guard: the assistance is provided by the Border Guard organisational unit where the aggrieved officer serves. If the unit does not have legal services provided by legal advisors or solicitors, legal protection shall be provided by the relevant command of the Border Guard division or the General Command of the Border Guard. If the Border Guard unit or command is unable to provide legal protection, the officer is entitled to reimbursement of the actual

[28] Journal of Laws of 2023, item 1935, as amended.

costs incurred, but not exceeding four times the officer's average remuneration paid in the year preceding the submission of the application (Article 71a ABG);
– officers of the Prison Guard: in a slightly different manner, the organisational unit of the Prison Guard where the aggrieved officer serves shall provide legal protection. If it does not have legal services provided by legal advisors or solicitors, legal protection shall be provided by the district inspectorate of the Prison Guard or the Central Directorate of the Prison Guard (Article 164(1 and 2) APG);
– officers of the State Protection Service: legal protection is provided by the State Protection Service (SPS). If the SPS is unable to provide legal protection, the officer is entitled to reimbursement of legal protection costs in the amount of the actual costs incurred, not exceeding four times the officer's average remuneration paid in the year preceding the submission of the application (Article 142b(3) ASPS).

ASSESSMENT OF THE REGULATION

The regulation in Article 78a CCP violates the principle of equality for the accused in exercising the right to defence. Therefore, it contradicts the constitutional principle of equality before the law (Article 32(1) of the Constitution of the Republic of Poland), which implies that:

> 'all legal entities (addressees of legal norms), characterised by a given essential (relevant) feature, shall be treated equally, i.e., according to the same measure, without discrimination or favouritism. (…) Differentiating citizens in such situations should align with the values cherished in society, moral attitudes, or ideological assumptions. The basic criterion for assessing the classification of entities (addressees of norms) in law is that these classifications, apart from compliance with other pragmatic criteria, must be socially just.'[29]

This principle requires 'equal treatment of citizens in the same legal situation'.[30] Entities that share the same relevant feature to the same extent must be treated equally. However, the relevant feature that distinguishes a group of people must always relate to the purpose and essential content of the statute.[31] As the Constitutional Tribunal has emphasised, these criteria refer to: (1) the relevance of the differentiation – the introduced distinctions must 'be directly related to the purpose and essential content of the provisions in which the controlled norm is contained and must serve to achieve this purpose and content. In other words, the distinctions must be rationally justified and cannot be made according to any arbitrarily established criterion'; (2) proportionality of the arguments for introducing differentiation – 'the weight of the interest to be served by differentiating the situation of the addressees of the norm must be in appropriate proportion to the weight of the interest that will be violated as a result of unequal treatment of similar entities'; (3) the constitutional importance of arguments for introducing differentiation – 'the arguments must

[29] Constitutional Tribunal ruling of 9 March 1988, U 7/87, *Orzecznictwo Trybunału Konstytucyjnego* (*OTK*), 1988, No. 1, item 1.
[30] Supreme Court resolution of 16 March 2000, I KZP 56/99, *OSNKW*, 2000, No. 3–4, item 19.
[31] Constitutional Tribunal judgment of 28 March 2007, K 40/04, *OTK-A*, 2007, No. 3, item 33.

be connected in some way with other values, principles, or constitutional norms justifying different treatment of similar entities. (…) The principle of social justice is one of these constitutional principles'.[32] This differentiation cannot be made based on an arbitrary criterion.[33] In light of constitutional principles and values, the criterion should be justified with appropriately convincing arguments.[34] The weight of the interest to be served by differentiating the situation of the addressees of the norm must be in proportion to the weight of the interests that will be violated as a result of unequal treatment of similar entities. Furthermore, this criterion must be connected to constitutional principles, values, and norms justifying the different treatment of similar entities.[35] The principle of equality constitutes a systemic and a general principle that is important for the entire catalogue of constitutional rights and public subjective right to equal treatment.[36] The Constitutional Tribunal recognises this right as a second-degree right because it most often determines the legal situation of an individual in conjunction with other freedoms or constitutional rights.[37]

In the context of this principle, every accused person should have equal access to the assistance of a defence lawyer. Compliance with this principle is ensured by the possibility for the accused to request the appointment of public counsel for the defence if they are unable to bear the costs of defence without detriment to their own and their family's necessary maintenance (Article 78(1) CCP). Based on this provision, only the difficult financial circumstances of the accused constitute the criterion for appointing public counsel for the defence, and this criterion is an important one that distinguishes such accused persons from others.

The accused who holds the status of a soldier, police officer, or Border Guard officer, and the manner of committing an offence as specified in Article 78a(1) CCP, are difficult to recognise as valid criteria. They are not of this nature because they concern, firstly, officers who are required to have special ethical and moral values and should not commit offences; and secondly, acts committed by them as a result

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[32] Constitutional Tribunal ruling of 3 September 1996, K 10/96, *OTK*, 1996, No. 4, item 33; Constitutional Tribunal judgment of 16 December 1997, K 8/97, *OTK*, 1997/5-6/70; Constitutional Tribunal judgment of 24 March 1998, K 40/97, *OTK*, 1998, No. 2, item 12; Constitutional Tribunal judgment of 9 June 1998, K 28/97, *OTK*, 1998/4/50; Constitutional Tribunal judgment of 21 September 1999, K 6/98, *OTK*, 1999, No. 6, item 117; Constitutional Tribunal judgment of 5 December 2000, K 35/99, OTK, 2000, No. 8, item 295; Constitutional Tribunal judgment of 18 December 2000, K 10/00, *OTK*, 2000, No. 8, item 298; Constitutional Tribunal judgment of 6 March 2001, K 30/00, *OTK*, 2001, No. 2, item 34; Constitutional Tribunal judgment of 24 October 2001, SK 22/01, *OTK*, 2001, No. 7, item 216; Constitutional Tribunal judgment of 16 October 2006, K 25/05, *OTK-A*, 2006, No. 9, item 122; Constitutional Tribunal judgment of 25 May 2009, SK 54/08, *OTK-A*, 2009, No. 5, item 69; Constitutional Tribunal judgment of 5 July 2011, P 14/10, *OTK-A*, 2011, No. 6, item 49; Constitutional Tribunal judgment of 2 October 2012, K 27/11, *OTK-A*, 2012, No. 9, item 102; Constitutional Tribunal judgment of 18 March 2014, SK 53/12, *OTK-A*, 2014, No. 3, item 32.

[33] Constitutional Tribunal ruling of 12 December 1994, K 3/94, *OTK*, 1994, Part II, item 42.

[34] Constitutional Tribunal judgment of 16 December 1997, K 8/97, *OTK ZU*, 1997, No. 5–6, item 70; Constitutional Tribunal judgment of 24 February 1999, SK 4/98, *OTK ZU*, 1999, No. 2, item 24.

[35] Constitutional Tribunal ruling of 23 October 1995, K 4/95, *OTK*, 1995, Part II, p. 93.

[36] Tuleja, P., in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2023, p. 127.

[37] Constitutional Tribunal decision of 24 October 2001, SK 10/01, *OTK*, 2001, No. 7, item 225.

of abuse of power. These offences result from violations of the principles governing the use of direct coercive measures and weapons, as specified in Articles 5–9, Articles 14–25, and Article 48 of the Act on Coercive Measures and Firearms, and in relation to soldiers, also Article 11a ADH. Such behaviour is reprehensible, and there are no valid arguments for privileging them in criminal proceedings. It cannot be ignored that, in criminal procedural law, the principle of equality is one of the elements that define the content of the right to defence and co-determine the standard of a fair trial.[38] Access to a defence lawyer is a key element that directly influences the course of proceedings and often determines the use of other guarantees falling within the framework of the right to a fair criminal proceeding.[39] This access should be equal for every accused person, regardless of their social status or the type of crime.

The legislator should not have introduced this provision because equality before the law also entails the obligation to enact laws in a way that ensures equal treatment of entities belonging to the same category.[40]

There is no justification for granting financial support for legal assistance to a professional soldier or a person performing full-time military service, against whom criminal proceedings have been initiated for a crime committed in connection with the performance of official tasks and activities, before the conclusion of those proceedings. This is because it is not yet known whether the final judgment will result in a conviction or acquittal, and from this perspective, it may be that the support granted was undeserved. This is especially concerning as the legal assistance costs incurred are not subject to repayment, regardless of the outcome of the criminal proceedings (Article 296(4) and Article 316(4) ADH). While it is true that such support may be granted in particularly justified cases and when it is for the benefit of the service, this does not exclude the possibility of a conviction. Such a condition is not included in the provisions concerning obligatory assistance for a professional soldier and a soldier performing full-time military service under Article 296(5) and Article 316(5) ADH, respectively. Given that the crime may have been committed through the use of direct coercive measures, weapons, or other armaments in connection with the performance of official tasks or activities, these could involve serious crimes, such as murder (Article 148(1) CC), for which the perpetrator may face a severe penalty.

Therefore, the provisions granting the right to reimbursement of defence costs incurred during criminal proceedings, as contained in the Act on the Defence of the Homeland and other acts concerning other services, should be repealed. Compensation for defence expenses could be awarded by introducing the possibility of claiming damages and redress from the State Treasury for harm suffered as a result of an undoubtedly unjust accusation or the general filing of charges against

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[38] Kardas, A., Kardas, P., 'Zasada równości w prawie karnym (zarys problematyki)', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2019, No. 1, p. 34.

[39] Koncewicz, T.T., Podolska, A., 'Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim', *Palestra*, 2017, No. 9, p. 11.

[40] Kardas, A., Kardas, P., 'Zasada równości…', op. cit., p. 20.

all accused or suspects,[41] not just officers of certain services, and not only officers of certain services.

Financial support for legal assistance for professional soldiers, soldiers performing full-time military service, and the above-mentioned officers of other services after the conclusion of criminal proceedings raises no concerns. The final conclusion of the proceeding, in the form of its discontinuation due to the absence of statutory features of a prohibited act, non-commission of a crime, or acquittal, demonstrates that the charges or accusations were wrongly brought. In such cases, reimbursement of legal assistance costs is just, as the suspicion or accusation was related to the performance of official duties.

The provision of free legal assistance in criminal proceedings in which a professional soldier, a soldier performing full-time military service, or an officer of other services participates as a victim or auxiliary prosecutor in cases concerning certain crimes committed against them in connection with the performance of official activities or tasks should be assessed in the same way.

CONCLUSION

The 2024 Amendment granted the possibility of appointing a public counsel for the defence for soldiers, police officers, or Border Guard officers accused of an offence committed as a result of the use of direct coercive measures, weapons, or other armaments, or the application or use of direct coercive measures or firearms in connection with the performance of official activities or tasks (Article 78a(1) CCP). This regulation violates the constitutional principle of equality before the law because it favours this group of defendants in terms of access to a defence lawyer, despite the fact that they share the same relevant characteristics to the same extent as others and should therefore be treated equally.

The concept of granting reimbursement of legal assistance costs to soldiers, including those performing active military service, and officers of other services after the conclusion of a criminal proceeding concerning an offence committed in connection with the performance of official tasks or activities – when such proceedings result in a final ruling discontinuing the case due to the lack of statutory features of a prohibited act, non-commission of a crime, or acquittal – should be approved. It serves to compensate for the harm suffered by a soldier or officer unjustly suspected or accused of committing a crime in connection with the performance of official tasks and activities.

The possibility of granting financial support for legal assistance to a soldier, or a soldier performing full-time military service, or an officer of certain services, against

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[41] For more see Stefański, R.A., 'Odpowiedzialność za niesłuszne skazanie, niewątpliwie niesłuszne oskarżenie, przedstawienie zarzutów lub zastosowanie nieizolacyjnego środka zapobiegawczego', *Prokuratura i Prawo*, 2012, No. 12, pp. 31–50; Mik, B., 'O potrzebie dodatkowego, szczególnego unormowania odpowiedzialności odszkodowawczej Skarbu Państwa za niesłuszne skazanie oraz niewątpliwie niesłuszne oskarżenie, przedstawienie zarzutów lub zastosowanie nieizolacyjnego środka zapobiegawczego', *Prokuratura i Prawo*, 2012, No. 12, pp. 50–72.

whom criminal proceedings were initiated for a crime committed in connection with the performance of official tasks and activities before the conclusion of the proceedings should be assessed negatively. Granting such support is questionable because it is not known how the proceedings will conclude, and it cannot be ruled out that the defendant may be sentenced to a severe penalty.

There is no axiological justification for the 2024 Amendment granting obligatory support in the form of reimbursement of trial costs to a soldier, or a soldier performing full-time military service, against whom criminal proceedings were initiated for a crime committed as a result of the use of direct coercive measures, weapons, or other armaments in connection with the performance of official tasks or activities, and who does not exercise the right to public defence counsel before the conclusion of the proceedings (Article 296(5), Article 317(5) ADH). It should be remembered that this concerns a crime committed as a result of the use of direct coercive measures, weapons, or other armaments in connection with the performance of official tasks or activities, which may constitute a serious crime, such as murder (Article 148(1) CC), the gravity of which is an argument for the imposition of a severe penalty.

The provision of free legal assistance in criminal proceedings involving a professional soldier, a soldier performing full-time military service, or an officer of other services who is a victim or an auxiliary prosecutor in cases concerning certain crimes committed against them in connection with the performance of official activities or tasks should be assessed positively.

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LIABILITY OF A COURT ENFORCEMENT OFFICER AND THE STATE TREASURY FOR DAMAGE CAUSED IN THE PERFORMANCE OF A COURT ENFORCEMENT OFFICER DUTIES

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Abstract

The purpose of this article is to clarify doubts surrounding the liability of the court enforcement officer and the State Treasury for damages under Article 36 of the Act on Court Enforcement Officers. It considers the constitutional model of liability for damages caused by unlawful actions of a public authority, as well as civil law regulations concerning the general rules for compensating damage. The conclusions drawn from the discussion in this article include, *inter alia*, the following findings: (i) Article 36 CEOA provides an independent basis for the tort liability of a court enforcement officer, premised on the unlawfulness of the court enforcement officer's conduct, regardless of fault; (ii) damage subject to compensation under Article 36 CEOA includes any damage to the legally protected goods of the affected entity, encompassing both material and non-material damage (i.e., compensation for harm suffered); (iii) in relation to this liability, a narrow interpretation of unlawfulness should be applied, one that references the constitutional approach to the sources of law (Articles 87–94 of the Constitution).

Keywords: tort liability for damages, liability of a body of public authority, liability of a court enforcement officer

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INTRODUCTION

The model of liability for damages caused by a court enforcement officer, as set out in Article 36 of the Act of 22 March 2018 on Court Enforcement Officers (CEOA)[1] along with the joint and several liability of the State Treasury covers damages caused by unlawful actions or omissions during the performance of a court enforcement officer's duties. The current legal framework for this liability concretises the constitutional norm set forth in Article 77(1) of the Constitution,[2] which serves as the basis for the liability of public authorities for unlawful actions.

Article 23 of the Act on Court Enforcement Officers and Execution (CEOEA) of 29 August 1997 was a predecessor of Article 36 CEOA.[3] It should be noted that from the entry into force of the 1997 Act until 27 January 2004, a dual regulation regarding the liability of court enforcement officers for damages was in place. This issue was governed both by Article 23 CEOEA and by Article 769 of the Code of Civil Procedure (CCP),[4] which in subsection 1 required the court enforcement officer to remedy damage caused intentionally or through negligence if the injured party could not, during the course of proceedings, prevent the damage by measures outlined in the Code of Civil Procedure. Furthermore, Article 769(2) CCP provided for the joint and several liability of the State Treasury and the court enforcement officer for damage caused by the court enforcement officer. This state of affairs remained in force until Article 769 CCP lost its legal force. This provision was declared unconstitutional by the judgment of the Constitutional Tribunal of 20 January 2004,[5] because it established the court enforcement officer's liability for damages by reliance on the principle of guilt ('intentionally or through negligence'), which, in the light of Article 77(1) of the Constitution, is inadmissible. The solution adopted in statutory regulations cannot narrow down the liability of public authorities compared to the measures laid down in constitutional provisions. In response, the Act of 24 September 2004, which amended the 1997 Act on Court Enforcement Officers and Execution,[6] reinstated the legal construct of joint and several liability of the State Treasury, which had been previously codified under Article 769 CCP. Article 23 CEOEA was supplemented with subsection 3, which stated: 'The State Treasury shall bear joint and several liability for damages together with the court enforcement officer.' This provision of Article 23 CEOEA remained unchanged until the law was repealed on 1 January 2019.

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1 Consolidated text, Journal of Laws of 2022, item 1168; hereinafter 'CEOA'.

2 Pursuant to Article 77(1) of the Constitution, '[e]veryone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.'

3 Consolidated text, Journal of Laws of 2018, item 1309; hereinafter 'CEOEA'. Pursuant to Article 23(1), '[t]he court enforcement officer is obliged to repair the damage caused by act or omission contrary to Act in his performing of activities,' whereas pursuant to Article 23(2), '[t]he substitute of the court enforcement officer shall bear liability as the court enforcement officer for activities they have performed.'

4 The Act of 17 December 1964, consolidated text, Journal of Laws of 2021, item 1805; hereinafter 'CCP'.

5 SK 26/03, *OTK-A*, 2007, No. 1, item 3.

6 Journal of Laws, No. 236, item 2356.

Following the recognition of the unconstitutionality of Article 769 CCP, the legal scholarship and judicial decisions developed under that provision became obsolete. However, a comparison between the provisions of Article 36 CEOA and Article 23 CEOEA that is no longer in force reveals significant differences in essential aspects of the nature and premises of the liability of court enforcement officers and the State Treasury for damages. This observation supports the claim that the views of legal scholars and commentators and judicial decisions regarding the former Article 23 CEOEA remain valid.

Given the above, the purpose of this study is to clarify certain doubts regarding the court enforcement officer's and the State Treasury's liability for damages under Article 36 CEOA. The discussion will focus on the legal nature and premises of this liability, as well as its material scope.

In line with the fundamental thesis adopted in this text, the court enforcement officer's liability, along with the joint and several liability of the State Treasury under Article 36 CEOA, fits within the model of tort liability for damages. In addition to Article 36 CEOA, when specifying the normative framework of this liability, reference must also be made to constitutional provisions that address public authority's liability for damages, as well as to provisions of the Civil Code concerning general rules for compensation.

LEGAL STATUS OF A COURT ENFORCEMENT OFFICER

From the perspective of determining the legal nature of a court enforcement officer's liability for damages, the key lies in defining his legal status under the 2018 Act on Court Enforcement Officers. As was the case under the Act on Court Enforcement Officers and Execution of 29 August 1997, it is beyond doubt that a court enforcement officer holds the status of a public official in all spheres of his activity (Article 2(1) CEOA). Moreover, *de lege lata*, unlike in the 1997 Act on Court Enforcement Officers and Execution, the court enforcement officer is also considered a body of public authority when performing activities in enforcement and injunction proceedings, except where provided otherwise by separate provisions (Article 3(1) CEOA).[7] This is because the legislator has endowed the officer with specific, authority-bearing competences characteristic of public authority. A court enforcement officer, as part of his duties and functions, exercises authority-bearing powers over other subjects of legal relations, despite not being part of the judiciary. When performing the activities stipulated by the Act, the court enforcement officer is not bound by a private law relationship (e.g., mandate) with the parties to the enforcement proceedings, but rather by a relationship governed by public law.

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[7] See Jabłoński, M., 'Rozdział 2. Komornik sądowy – funkcjonariusz publiczny czy "trójkształtny fenomen polskiego systemu prawa"', in: Marciniak, A. (ed.), *Analiza i ocena ustawy o komornikach sądowych oraz ustawy o kosztach komorniczych*, Sopot, 2018, p. 51 *et seq*.; Staszewska, E., 'Rozdział 3. Charakter prawny służby komorniczej', in: Marciniak, A. (ed.), *Analiza i ocena*…, op. cit., Sopot, p. 69 *et seq*.

The legislator's designation of the court enforcement officer as a body of public authority justifies consideration of his systemic position in light of constitutional provisions, particularly Articles 7 and 77(1) of the Constitution. Article 7 of the Constitution, which expresses the principle of legalism, provides that '[t]he organs of public authority shall function on the basis of, and within the limits of, the law.' Meanwhile, Article 77(1) of the Constitution states that '[e]veryone shall have the right to compensation for any harm done to them by any action of an organ of public authority contrary to law.' It is worth noting that the constitutional provision in Article 77(1) of the Constitution belongs to the group of constitutional norms that hold a superior position in the internal hierarchy of constitutional norms due to its placement in the systemic organisation of the basic law (Chapter II of the Constitution, entitled 'Freedoms, Rights and Obligations of Persons and Citizens.' This provision not only serves as a constitutional safeguard for individual freedoms and rights, but also establishes a personal right to compensation for damage caused by the unlawful actions of public authorities.[8]

The recognition of the court enforcement officer as a body of public authority implies that statutory regulations must take into account the content of Article 77(1) of the Constitution, which outlines the constitutional model of public authority's liability for damages. This model is not simply a confirmation or declaration of the idea of liability; rather, it possesses its own normative significance. The correct interpretation of Article 77(1) of the Constitution should, therefore, aim for such reading of the sense of the analysed provision that will consider its specific legal weight.[9] Given the hierarchical structure of legal norms, and the fact that Article 77(1) of the Constitution is not merely a reflection of general rules, its content must be considered when interpreting Article 36 CEOA.[10]

Liability for damages under Article 77(1) of the Constitution is based on an objective assessment of the injuring party's conduct, specifically the failure to comply with the law, regardless of whether fault is present.[11] The established line of judicial decisions by the Constitutional Tribunal and the Supreme Court emphasises that the stricter conditions for liability of public authorities in Article 77(1) of the Constitution (as opposed to general fault-based liability) are justified by the special,

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[8] See judgment of the Constitutional Tribunal of 20 January 2004, SK 26/03, *OTK-A*, 2007, No. 1, item 3; Garlicki, L., *Polskie prawo konstytucyjne: zarys wykładu*, Warszawa, 2019, p. 45; Garlicki, L., 'Normy konstytucyjne relatywnie niezmienialne', in: Trzciński, J. (ed.), *Charakter i struktura norm konstytucyjnych*, Warszawa, 1997, pp. 137–155; Działocha, K., 'Hierarchia norm konstytucyjnych i jej rola w rozstrzyganiu kolizji norm', in: Trzciński, J. (ed.), *Charakter i struktura norm konstytucyjnych*, Warszawa, 1997, pp. 79–92.

[9] A slightly different view was expressed by the Constitutional Tribunal in its judgment of 24 February 2009, SK 34/07, *OTK ZU*, 2009, No. 37, item 296.

[10] As seen aptly in the judgment of the Constitutional Tribunal of 4 December 2001, SK 18/00, *OTK ZU*, 2001, No. 8, item 256.

[11] See judgments of the Constitutional Tribunal: of 4 December 2001, SK 18/00, *OTK*, 2001, No. 8, item 256; of 7 October 2003, K 4/02, *OTK-A*, 2003, No. 8, item 80; of 20 January 2004, SK 26/03, *OTK-A*, 2004, No. 1, item 3; of 24 February 2009, SK 34/07, *OTK-A*, 2009, No. 2, item 10; Bagińska, E., Bień-Kacała, A., 'Glosa do wyroku Trybunału Konstytucyjnego z dnia 20 stycznia 2004, SK 26/03', *Przegląd Sejmowy*, 2004, No. 4, p. 120; Zembrzuski, T., in: Jagieła, J. (ed.), *Sądowe postępowanie egzekucyjne. Nowe wyzwania i perspektywy*, Warszawa, 2020, p. 155.

service-oriented role of these authorities in safeguarding the rights and values of individuals and citizens. Any attempt to introduce a statutory requirement of fault as an additional condition for liability would lead to a limitation of the constitutional framework for the protection of these rights and freedoms.[12] Furthermore, the provision discussed has a guarantee function, reinforcing the principle of legalism enshrined in Article 7 of the Constitution.

OBJECTIVE NATURE OF LIABILITY OF THE COURT ENFORCEMENT OFFICER

Both the judiciary and legal literature emphasise that the liability of the court enforcement officer under Article 36 CEOA, for damages caused while performing activities vested in him under public law, constitutes tort liability.[13] This view is justified by the following: first, the court enforcement officer is appointed to enforce judicial rulings through the compulsory execution of monetary and non-monetary performances, as well as other activities specified in statutes; second, in a rule of law, the compulsory execution of sentences in civil matters is not conducted through individual actions of the creditor or persons to whom the creditor commissions the execution of the judgment. The tortious nature of this liability does not undermine the normative status of the court enforcement officer as a public official and a body of public authority.

The liability of the court enforcement officer under Article 36 CEOA is based on the premise of the unlawfulness of his conduct and is independent of fault.

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[12] See judgment of the Constitutional Tribunal of 4 December 2001, SK 18/00, *OTK*, 2001, No. 8, item 256; judgments of the Supreme Court: of 8 January 2002, I CKN 581/99, *OSNC*, 2002, No. 10, item 128; of 27 March 2003, V CKN 41/01, *OSNC*, 2004, No. 6, item 96.

[13] See judgment of the Constitutional Tribunal of 20 January 2004, SK 26/03, *OTK-A*, 2004 No. 1, item 3; Resolution of the Supreme Court of 13 October 2004, III CZP 54/04, *OSNC*, 2005, No. 10, item 168; judgments of the Supreme Court: of 3 March 2005, II CK 634/04, Legalis, No. 246052; of 27 March 2009, III CSK 376/07, Legalis, No. 140138; of 10 February 2010, V CSK 279/09, Legalis, No. 350666; of 13 December 2012, V CSK 7/12, Legalis, No. 667429; of 5 February 2014, V CSK 172/13, Legalis, No. 993314; of 9 November 2016, II CSK 39/16, Legalis, No. 1550005; of 9 November 2016, II CSK 775/15, Legalis, No. 1565014; judgments of the Administrative Court: in Gdańsk of 5 November 2019, V ACa 153/18, Legalis, No. 1886915; in Warsaw of 28 August 2018, V ACa 758/17, Legalis, No. 1852313; in Szczecin of 7 June 2018, I ACa 103/17, Legalis, No. 2177446; in Białystok of 15 September 2017, I ACa 522/16, Legalis, No. 1674195; in Szczecin of 20 November 2014, I ACa 467/14, Legalis, No. 1241607; in Szczecin of 11 July 2013, I ACa 103/13, Legalis, No. 776432; in Białystok of 26 June 2013, I ACa 284/13, Legalis, No. 736057; in Szczecin of 23 April 2013, I ACa 12/13, Legalis, No. 687922; Bieluk, J., 'Rozdział 9. Odpowiedzialność odszkodowawcza komornika w nowej regulacji prawnej', in: Marciniak, A. (ed.), *Analiza i ocena ustawy o komornikach sądowych oraz ustawy o kosztach komorniczych*, Sopot, 2018, p. 205; Marciniak A., *Odpowiedzialność odszkodowawcza komornika sądowego w prawie polskim*, Sopot, 2020, p. 36; Knypl, Z., 'Jeszcze o odpowiedzialności odszkodowawczej komornika', *Problemy Egzekucji*, 2001, No. 18, pp. 67–68; Rząsa, G., 'Odpowiedzialność odszkodowawcza komornika – suplement (po wyroku Trybunału Konstytucyjnego z 20 stycznia 2004 r.)', *Radca Prawny*, 2004, No. 2, p. 87; Kuczyński, G., in: Świeczkowski, J. (ed.), *Ustawa o komornikach sądowych i egzekucji*, Warszawa, 2012, p. 139; Simbierowicz, M., in: Simbierowicz, M., Świtkowski, M. (eds), *Ustawa o komornikach sądowych. Ustawa o kosztach komorniczych. Komentarz*, LEX 2020, commentary to Article 36(2).

This form of liability arises, on the one hand, from the legal status of the court enforcement officer as a body of public authority and, on the other, from the need to align Article 36 CEOA with constitutional norms, particularly Article 77 of the Constitution.

It should be noted that not all inappropriate behaviours by court enforcement officers will be deemed contrary to law. The concept of 'being contrary to law' must be understood as behaviour that violates orders or prohibitions stemming from a legal norm. According to the prevailing views among legal scholars, commentators, and the judiciary, unlawfulness, as a premise for the liability of a public authority, must be interpreted strictly, with reference to the constitutional approach to sources of law (Articles 87–94 of the Constitution). Thus, actions or omissions that violate provisions of the Constitution, statutes, ratified international agreements, regulations, acts of local law, or universally binding provisions of European law will be deemed unlawful. Under Article 36 CEOA, this narrow interpretation of unlawfulness must be applied, rather than the broader understanding traditionally adopted in civil law, which includes breaches of moral and customary norms, referred to as 'principles of social coexistence' or 'good mores'.[14]

ARTICLE 36 CEOA AS A BASIS OF LIABILITY

An analysis of Article 36 CEOA leads to the conclusion that this provision meets the statutory requirements to qualify as an independent basis for the liability of a court enforcement officer.[15] This article sets out both the personal and material premises that underpin the court enforcement officer's liability for damages. However, this does not mean that the provision in question offers a comprehensive regulation of such liability. Article 36 CEOA does not define, as the legislator intended, the

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[14] E.g., Constitutional Tribunal in judgments: of 4 December 2001, SK 18/00, *OTK*, 2001, No. 8, item 256; of 23 September 2003, K 20/02, *OTK-A*, 2003, No. 7, item 76; and the Supreme Court in judgment of 8 January 2002, I CKN 581/99, *OSP*, 2002, No. 11, item 143; Administrative Court in Warsaw in its judgment of 19 March 2014, VI ACa 1178/13, Legalis, No. 993843; Radwański, Z., Olejniczak, A., Grykiel, J., *Zobowiązania – część ogólna*, Warszawa, 2022, pp. 233–234; Ciepła, H., Skibińska-Adamowicz, J., 'Status prawny komornika i podstawy jego odpowiedzialności odszkodowawczej po uchyleniu art. 769 k.p.c.', *Przegląd Prawa Egzekucyjnego*, 2006, No. 4–6, p. 17; Bieluk, J., 'Rozdział 9…', op. cit., p. 208; Pytel, A., '"Czyj zysk, tego ryzyko" – czy istnieją określone granice odpowiedzialności komornika sądowego?', *Przegląd Prawa Egzekucyjnego*, 2017, No. 10, pp. 49 and 56; Kuczyński, G., in: Świeczkowski, J. (ed.), *Ustawa…*, op. cit., p. 140; Marciniak, A., *Ustawa o komornikach sądowych i egzekucji. Komentarz*, Warszawa, 2014, p. 158; Knypl, Z., Merchel, Z., *Komentarz do ustawy o komornikach sądowych i egzekucji*, Sopot, 2015, pp. 221 and 222; Simbierowicz, M., in: Simbierowicz, M., Świtkowski, M. (eds), *Ustawa…*, op. cit., commentary to Article 36(3); Rybicka-Pakuła, M., in: Świeczkowska-Wójcikowska, M., Świeczkowski, J. (eds), *Ustawa o komornikach sądowych. Ustawa o kosztach komorniczych. Kodeks Etyki Zawodowej Komornika Sądowego. Komentarz*, LEX, 2020, commentary to Article 36(12).

[15] Such a view was also expressed under Article 23 CEOEA and remains valid for Article 36 CEOA – see judgments of the Supreme Court: of 30 October 2014, II CSK 60/14, *OSNC*, 2015, No. 10, item 123; of 24 June 2015, II CSK 544/14, *OSNC*, 2016, No. 6, item 76; a different stance in, e.g., judgment of the Administrative Court in Poznań of 11 August 2017, I ACa 1568/16, Legalis, No. 1714493; Marciniak, A., *Ustawa…*, op. cit., p. 158; Bieluk, J., 'Rozdział 9…', op. cit., p. 206.

fundamental concepts involved in the legal construct of liability for damages. For these, one must refer to the provisions of the Civil Code, which establish the general rules governing this liability (such as the concept of damage, causation, and the injured party's contribution to the emergence of the damage, etc.).

The principle of full compensation for damage, as expressed in Article 361(2) of the Civil Code, applies to liability for damages under Article 36 CEOA. This means that the court enforcement officer's obligation to provide compensation includes both the losses actually suffered by the aggrieved party (*damnum emergens*) and the benefits that would have been achieved if the damage had not occurred (*lucrum cessans*).[16] The damage referred to in Article 36 CEOA encompasses all harm caused to the legally protected interests of the affected entity, covering both material and non-material losses (i.e., compensation for the harm suffered). This broad interpretation of damage under Article 36 CEOA is consistent with the constitutional model of liability for damages caused by unlawful actions of a public authority.[17]

However, the court enforcement officer's liability for damages under Article 36 CEOA does not extend to the costs associated with the court enforcement officer's activities or obligations arising from the employment of personnel necessary to operate his office, protect his property, or assist in field activities, whether under employment contracts or civil law agreements (Article 153(1) CEOA). The aggrieved parties may include not only the parties to the proceedings and participants in enforcement proceedings but also individuals who have suffered losses as a result of the activities carried out by the court enforcement officer.[18]

An essential element shaping the court enforcement officer's liability for damages under Article 36 CEOA is the requirement that his action or omission occurs 'while performing his activities'. The formula applied in Article 36 CEOA is found in provisions of the Civil Code regulating tort liability of persons who entrust the performance of activities to third persons (Articles 429 and 430 CC), as well as in provisions concerning liability for damage caused while exercising public authority (Article 417(1) CC). The phrase 'while performing activities' signifies that there is a functional link between the activity performed and the resulting damage.[19] It is important to bear in mind that, according to Article 3 CEOA, the court enforcement officer performs activities in execution and injunction proceedings, as well as other

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[16] See Warkałło, W., *Odpowiedzialność. Funkcje, rodzaje, granice*, Warszawa, 1972, p. 123; Kaliński, M., 'Odpowiedzialność odszkodowawcza', in: Olejniczak, A. (ed.), *System Prawa Prywatnego. Tom 6. Prawo zobowiązań – część ogólna*, Warszawa, 2018, p. 18.

[17] The same also in Górski, A., 'Odpowiedzialność Skarbu Państwa za szkodę wyrządzoną przez komornika działającego w charakterze organu egzekucyjnego', *Palestra*, 2003, No. 11–12, p. 93; Zembrzuski, T., op. cit., p. 156; Marciniak, A., *Ustawa…*, p. 158; Marciniak, A., *Odpowiedzialność…*, op. cit., p. 42; Ciepła, H., Skibińska-Adamowicz, J., 'Status prawny…', op. cit., p. 21; Bieluk, J., 'Rozdział 9…', op. cit., p. 210; Kuczyński, G., in: Świeczkowski, J. (ed.), *Ustawa…*, op. cit., p. 140; Knypl, Z., Merchel, Z., *Komentarz…*, op. cit., pp. 224–225; Simbierowicz, M., in: Simbierowicz, M., Świtkowski, M. (eds), *Ustawa…*, op. cit., commentary to Article 36(5). See also judgment of the Constitutional Tribunal of 4 December 2001, SK 18/00, *OTK*, 2001 No. 8, item 256.

[18] Judgment of the Administrative Court in Poznań of 11 August 2017, I ACa 1568/16, LEX No. 1714493.

[19] E.g., Radwański, Z., Olejniczak, A., Grykiel, J., *Zobowiązania…*, op. cit., pp. 224–225.

activities assigned to him by the legislator. In Article 36 CEOA, when referring to 'activities', the legislator does not use a detailed qualifier, which supports the argument that the court enforcement officer's liability for damages arises during the performance of any activity. Therefore, this liability is not limited to execution proceedings in the 'narrow sense that includes only compulsory activities directly aimed at satisfying the creditor'.[20]

In situations where the court enforcement officer causes damage 'while' performing his activities, the court enforcement officer's liability for damages is based on general rules set out in the Civil Code,[21] such as in the case of damage to the debtor's property during the attachment of movable property.

The qualification of the court enforcement officer's liability under Article 36 CEOA as liability for damages leads to the conclusion that an adequate causal link is a necessary premise for its emergence. The existence of a causal link is not negated by the possibility of a supervening cause (hypothetical *causa superveniens*), which refers to a hypothetical event occurring after the actual cause of the damage.[22] Therefore, it is inadmissible for the court enforcement officer to invoke a supervening cause, such as the claim that a legally conducted execution would have achieved the same result in satisfying the creditor.

A court enforcement officer cannot release himself from liability to the aggrieved party for damages under Article 36 CEOA by arguing that he performed the activities in compliance with court orders intended to ensure the proper conduct of enforcement under judicial supervision (Article 759(2) CCP). The fact that the court enforcement officer is entitled to seek recourse against the State Treasury (under the third sentence of Article 36(2) CEOA) when the damage was caused solely as a result of the court enforcement officer's compliance with court orders or administrative supervisory bodies does not alter the rules of joint and several liability of the court enforcement officer and the State Treasury towards the aggrieved party.

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[20] E.g., the Supreme Court, under the previous provision of Article 23 CEOEA (now Article 36 CEOA), in its judgment of 24 June 2015, II CSK 544/14, *OSNC*, 2016, No. 6, item 76. Similarly, also Bagińska, E., *Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej*, Warszawa, 2006, pp. 451–452; Górski, A., *Odpowiedzialność…*, op. cit., p. 92; Bieluk, J., 'Rozdział 9…', op. cit., p. 209; Pytel, A., '"Czyj zysk, tego ryzyko"…', op. cit., p. 48; Marciniak, A., *Ustawa…*, pp. 158–159; Knypl, Z., Merchel, Z., *Komentarz…*, op. cit., p. 224; Świtkowski, M., in: Simbierowicz, M. (ed.), *Ustawa o komornikach sądowych. Ustawa o kosztach komorniczych. Komentarz*, 2023, LEX/el., commentary to Article 36(3). See also Supreme Court judgment of 30 October 2014 (II CSK 60/14, *OSNC*, 2015, No. 10, item 123), in which the Court expressed an apt assessment that in the light of Article 36 CEOA a behaviour contrary to the Act may include an activity that involves establishment and collection of execution charges.

[21] See Marciniak, A., *Odpowiedzialność…*, op. cit., pp. 48 and 49; Ciepła, H., Skibińska-Adamowicz, J., 'Status prawny…', op. cit., p. 22; Tomalak, W., *Status ustrojowy i procesowy komornika sądowego*, Warszawa, 2014, p. 175; Bieluk, J., 'Rozdział 9…', op. cit., p. 210; Rybicka-Pakuła, M., in: Świeczkowska-Wójcikowska, M., Świeczkowski, J. (eds), *Ustawa…*, op. cit., commentary to Article 36(7).

[22] See more in Koch, A., in: Gutowski, M. (ed.), *Kodeks cywilny. Vol. II. Komentarz. Art. 353–626*, Legalis, 2022, commentary to Article 361 CC, nb. 31–36; Machnikowski, P., in: Machnikowski, P. (ed.), *Zobowiązania. Przepisy ogólne i powiązane przepisy Księgi I KC. Tom I. Komentarz*, Legalis, 2022, commentary to Article 361 CC, nb. 73–139.

The dismissal of a complaint against the court enforcement officer's actions that caused damage does not constitute a circumstance excluding the officer's liability (Article 767 CCP).[23] In a case ruled on by the Supreme Court on 16 March 2007 (III CSK 381/06), the plaintiff's claim against the court enforcement officer concerned the fact that a public auction was held before the description and appraisal of the property became final and non-revisable (Article 952 CCP). Although the complaint against the description and appraisal was dismissed, this occurred after the court enforcement officer had conducted the public auction. The Supreme Court, disagreeing with the legal assessment of the lower courts, unequivocally held that conducting a public auction in violation of Article 952 CCP, before the description and appraisal became final and non-revisable, could not be characterised as a mere 'minor failure on the part of the court enforcement officer'. The officer's conduct was unlawful, and once the remaining premises (existence of damage and a causal link) were met, it gave rise to liability for damages. What is particularly noteworthy is the Supreme Court's observation that under current law, filing complaints against a court enforcement officer's flawed actions does not determine the emergence of liability for damages. In the main thesis of its explanatory memorandum, the Supreme Court aptly stated that 'the court's erroneous dismissal of the complaint against the court enforcement officer's actions that caused the damage does not exclude the court enforcement officer's liability for damages under Article 23 of the Act of 29 August 1997 on Court Enforcement Officers and Execution (now Article 36 CEOA).'

JOINT AND SEVERAL LIABILITY OF THE STATE TREASURY

The guarantee provided by Article 77(1) of the Constitution, as discussed earlier, and the statutory obligation of supervision over court enforcement officers carried out by the court as an organ of the judiciary, justify the existence of joint and several liability of the State Treasury alongside the court enforcement officer. Article 36(2) CEOA is an independent basis for the joint and several liability of the court enforcement officer and the State Treasury, constituting *lex specialis* – within the meaning of Article 421 CC – in relation to Articles 417–417[2] CC, application of which is then excluded.

The State Treasury's liability under Article 36 CEOA is for a third person's act. The State Treasury is liable for damages once the conditions determining the liability of the court enforcement officer are met. This means that liability arises when damage is caused as a result of the court enforcement officer's unlawful action or omission while performing his duties, and when there is a direct causal link between the incident and the damage. The aggrieved party may then – at their discretion – sue either or both debtors who bear joint and several liability for the damage. The State Treasury's liability does not replace the liability of the court enforcement officer but

[23] Cf. judgment of the Supreme Court of 22 February 2006, III CSK 381/06, *OSNC*, 2008, No. 2, item 28 – which, despite being issued under Article 23 CEOEA, is still valid *de lege lata*.

exists alongside it, meaning that the court enforcement officer is not released from liability by the existence of the State Treasury's liability.[24]

The court enforcement officer's and the State Treasury's joint and several liability for damages also extends to the actions or omissions of assessors, including an assessor acting as a substitute court enforcement officer, and individuals employed by the court enforcement officer under a contract of employment or civil law agreement to carry out activities related to enforcement proceedings. Moreover, this liability covers the actions of a substitute court enforcement officer appointed under Article 43(1) CEOA (Article 36(3) CEOA). However, the substituted court enforcement officer and the State Treasury are not liable for the actions or omissions of a substitute court enforcement officer if the substitute is another court enforcement officer.[25]

The approach adopted by the legislator concerning the liability of a substitute court enforcement officer who is an assessor is justified by two considerations. Firstly, the substitute acts on behalf of the substituted court enforcement officer. Secondly, the court enforcement officer, rather than the assessor, is covered by mandatory third-party insurance for damages that may be caused in connection with activities attributed to the court enforcement officer by statute. Additionally, the insurance period for which the court enforcement officer is covered also extends to the actions or omissions of assessors (Article 37(1) CEOA).

However, it must be noted that the liability of the State Treasury does not cover the court enforcement officer's obligations arising from the employment of persons necessary to run his office, or from entities required to protect his property or assist him in field activities under an employment contract, specific work contract, mandate contract, or service contract, nor does it cover the costs of his operations (Article 153(4) CEOA).

The current regulations, in contrast to the 1997 Act on Court Enforcement Officers and Execution, set out rules for settling recourse claims between the court enforcement officer and the State Treasury. Pursuant to the second sentence of Article 36(2) CEOA, the existence of recourse claims is determined by whether 'the damage was caused solely as a result of the court enforcement officer's compliance with court orders or orders of administrative supervision.' A positive finding on this point means that the court enforcement officer who has compensated for the damage is entitled to a recourse claim against the State Treasury. However, if the damage was remedied by the State Treasury, it is not entitled to a recourse claim against the court enforcement officer. Therefore, other factors, such as fault and the degree to which each party

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[24] Bagińska, E., 'Istota i przesłanki solidarnej odpowiedzialności Skarbu Państwa za szkody wyrządzone przez komornika sądowego', *Przegląd Prawa Egzekucyjnego*, 2009, No. 11, p. 17; Bagińska, E., *Odpowiedzialność…*, p. 458; judgment of the Supreme Court of 27 October 1971, I CR 427/71, *OSNCP*, 1972, No. 5, item 88.

[25] Under previous regulations, liability for damages caused by the actions of a substitute court enforcement officer was based on uniform rules, regardless of who acted as the substitute court enforcement officer while performing activities. Under Article 23(2) CEOEA, the substitute court enforcement officer bore 'liability as a court enforcement officer for activities that they performed'. This liability was based on the same premises and governed by the same principle of liability that formed the basis of a court enforcement officer's liability.

contributed to the damage, are irrelevant to the allocation of the burden to remedy the damage in the internal relationship between the court enforcement officer and the State Treasury.

The principles governing recourse claims between the court enforcement officer and the State Treasury, as laid down in Article 36(2), do not affect the joint and several nature of their liability for damages, nor the premises that establish this liability.[26] This means that in a case for compensation under Article 36(1) CEOA, the court does not examine whether the damage was caused as a result of carrying out court orders or orders of administrative supervision.

The structure of the court enforcement officer's and the State Treasury's recourse claims, as adopted by the legislator, is fully justified by the court enforcement officer's complex legal status and the current scope of judicial and administrative supervision over the court enforcement officer.[27] On the one hand, as a public official and a body of public authority, the court enforcement officer exercises state authority in the compulsory execution of rulings; on the other hand, he conducts his activities independently and at his own risk, bearing the costs of running his office.

CONCLUSION

The analysis above has clarified several doubts that may arise regarding the liability for damages under Article 36 CEOA. The central conclusion of this analysis is that this provision constitutes an independent basis for the liability of a court enforcement officer. It is a form of tort liability, based on the premise of the unlawfulness of the officer's actions, meaning that it is independent of fault. The damages to be compensated include all harm to an entity's legally protected interests, encompassing both material and non-material losses (compensation for the harm suffered).

A narrow interpretation of unlawfulness should be adopted in the context of Article 36 CEOA, one that aligns with the constitutional approach to sources of law (Articles 87–94 of the Constitution), rather than the traditional broader understanding, which also includes violations of moral and customary norms, referred to as 'principles of social coexistence' or 'good mores'. The court enforcement officer's

[26] Therefore, it is justified to say that 'given such wording (Article 36(3) CEOA – authors' (Z.K., A.T.) note), the State Treasure shall be liable only where the damage was caused solely as a result of the court enforcement officer's compliance with court orders or orders of bodies of administrative supervision' – see Bieluk, J., 'Rozdział 9…', op. cit., p. 215.

[27] Under judicial supervision, the court enforcement officer, when performing activities, is bound by the court's rulings, including those issued under Article 759(2) CCP (Article 166(1) CEOA). This provision obligates the court to issue *ex officio* orders to ensure the proper performance of execution, and removes any observed deficiencies. It needs to be noted, however, that the legal assessment expressed in these orders is binding on the court enforcement officer (the second sentence of Article 759(2) CEOA). As regards administrative supervision, the court enforcement officer is subject to supervisory orders from the president of the competent district court, regional court and court of appeals and also orders from the Minster of Justice (Article 168(3) in connection with Article 167(1) CEOA). These orders cannot concern provisions for which the application falls under the court's jurisdiction exercised within the scope of judicial supervision (Article 168(4) CEOA).

liability arises when his action or omission occurs 'while performing activities'. This indicates that his liability is not confined solely to execution proceedings in the narrow sense, which only covers compulsory actions directly aimed at satisfying the creditor.

Under the current provisions of the Act on Court Enforcement Officers, the substituted court enforcement officer bears liability for the actions of a substitute court enforcement officer who is an assessor appointed under Article 43(1) CEOA (Article 36(3) CEOA). However, the substituted court enforcement officer does not bear liability for the actions or omissions of the substitute court enforcement officer if he is another court enforcement officer.

Article 36 CEOA, which is the subject of this analysis, serves not only as a basis for the liability of the court enforcement officer but also as a basis for the joint and several liability of the State Treasury alongside the officer. The principles of making recourse claims between the court enforcement officer and the State Treasury (Article 36(2) CEOA) do not alter the joint and several nature of their liability for damages, nor the premises that determine the emergence of this liability. Furthermore, the court enforcement officer cannot release himself from liability to the aggrieved party for damages under Article 36 CEOA by arguing that he carried out his activities in compliance with court orders intended to ensure the proper conduct of enforcement under judicial supervision (Article 759(2) CCP).

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CARE BENEFIT AND SUPPORT BENEFIT – ASSESSMENT OF INTERTEMPORAL LAW

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Abstract
On 1 January 2024, a new support scheme for persons with disabilities and their carers entered into force. New solutions in this regard were included in the Act of 7 July 2023 on the Support Benefit, which introduced a new benefit directly for persons with disabilities and significantly modified the catalogue of benefits available to their carers. The provisions of this Act also altered the nature of the care benefit, which, until that time, had provided compensation to carers of persons with disabilities for not being able to undertake gainful activity. At the same time the legislator, subject to certain conditions, allowed for the possibility of establishing the right to the care benefit under the terms in force until 31 December 2023. This study analyses the normative regulations applicable to acquiring the right to the care benefit after 1 January 2024, based on the regulations in force until 31 December 2023.

Keywords: care benefit, support benefit, confluence of rights to care-related allowances

INTRODUCTION

On 1 January 2024, the regulations of the Act of 7 July 2023 on the Support Benefit[1] came into effect. They introduced crucial changes to the support scheme for persons with disabilities and their carers. The provisions of this Act introduced a new benefit, specifically designed for persons with disabilities, into legal transactions.

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1 Journal of Laws of 2023, item 1429, as amended (hereinafter 'SBA').

They also significantly altered the regulations (as outlined in the Family Benefits Act of 28 November 2003)[2] that apply to the carers of such persons. Consequently, as of 1 January 2024, a new mechanism aimed directly at persons with disabilities was implemented: the support benefit. The legislator intended this benefit to partially cover the costs associated with meeting the individual life needs of persons with disabilities. Alongside the introduction of this benefit into the legal system, significant changes were made to the existing benefits directed at carers of persons with disabilities. Article 16a FBA, which provided the basis for establishing the right to the special care allowance, became ineffective at the end of 2023.[3] Meanwhile, the amendment to Article 17 FBA (which regulated the care benefit) took effect after the last day of 2023. By introducing these amendments, the legislator altered the character of the care benefit. In its new wording, Article 17 FBA stipulates that the care benefit is, in contrast to its previous form, directed solely at carers of persons with disabilities who have not yet reached the age of 18. Moreover, the granting of this benefit is no longer contingent upon the carer refraining from gainful employment.[4]

A defining feature of these new normative solutions is the redirection of financial support directly to persons with disabilities aged 18 or older who require such support. The drafters of the amendment believe that this approach aims to empower persons with disabilities. A person with disabilities who receives financial aid in the form of this benefit will be able to decide for themselves how to allocate the funds, unlike when support is directed to their carers. Given this rationale, it was determined that financial support would only be provided to the carer until the person with disabilities reaches the age of 18, following the establishment of the right to the care benefit (which is no longer dependent on the carer refraining from gainful employment).[5]

When implementing this amendment to the support scheme for persons with disabilities and their carers, the legislator opted to retain the provisions in force until 31 December 2023, alongside the new normative regulations introduced on 1 January 2024, provided that certain conditions are met.[6] In explaining this, the drafters clarified that the new criteria for granting benefits to carers of persons with disabilities apply to all first-time applicants from 1 January 2024. However, carers who acquired the right to care benefits 'for the period preceding the entry into force of the Act will be allowed to retain their right to those benefits under the principle of the protection of acquired rights pursuant to intertemporal laws, as

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2 Journal of Laws of 2024, item 323, as amended (hereinafter 'FBA').

3 For more on the special care allowance, see Małysa-Sulińska, K., Kawecka, A., 'Komentarz do art. 16a u.ś.r.', in: Małysa-Sulińska, K. (ed.), *Świadczenia rodzinne. Komentarz*, Warszawa, 2023 (in print).

4 For more see Małysa-Sulińska, K., Kawecka, A., 'Komentarz do art. 17 u.ś.r.', in: op. cit.

5 More on this subject: Explanatory memorandum to the Support Benefit Act, Sejm Document No. 3130, https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=3130 [accessed on 13 November 2024].

6 For more, see Małysa-Sulińska, K., Kawecka, A., 'Komentarz do art. 16a u.ś.r.' and 'Komentarz do art. 17 u.ś.r.', in: op. cit.

long as the person with disabilities for whom they care does not opt for their own support benefit.'[7]

Thus, it is necessary to analyse the intertemporal provisions expressed in the text of the SBA, which refer to the possibility of acquiring, after 1 January 2024, the right to a care benefit under the regulations in force until 31 December 2023. In many cases, the right to this care benefit was established to support the care of an adult person with disabilities, who, under the regulations in force until 1 January 2012, may request that the right to the support benefit be established for them. It is also essential to determine how to interpret care benefit cases (as referred to by the legislator) where the right arose before 31 December 2023.

It should be noted that the discussion in this study excludes other care benefits, as there has been a trend in judicial decisions where carers who hold an established right to one type of care benefit request an additional benefit. This issue was addressed in the judgment of the Constitutional Tribunal of 21 October 2014, K 38/13,[8] which declared that Article 17(1b) FBA is unconstitutional in the way it differentiates between the right to the care benefit for persons caring for someone with disabilities, based on the time the disability arose. It appears that those who request the establishment of the right to the care benefit while receiving another benefit for caring for an adult person may be motivated by the desire to receive a higher amount. This is because the care benefit is currently paid at an amount nearly five times higher than the special care allowance and the carer's allowance.[9]

THE RELATION OF THE SUPPORT BENEFIT TO THE CARE BENEFIT GRANTED UNDER PROVISIONS IN FORCE UNTIL 31 DECEMBER 2023

As mentioned earlier, the legislator, through the SBA, introduced a new type of benefit linked to the degree of disability: the support benefit. The recipients of this benefit are persons with disabilities who have not yet reached the age of 18.[10] The support benefit, therefore, acts as an alternative to carer's allowances, including the care benefit, as if

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[7] See Explanatory memorandum to the draft Support Benefit Act, Sejm Document No. 3130, https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=3130 [accessed on 13 November 2024].

[8] Journal of Laws of 2014, item 1443.

[9] For more see Małysa-Sulińska, K., *Ekspertyza prawna dotycząca rozwiązań normatywnych w zakresie przesłanki ustalenia prawa do świadczenia dla opiekuna osoby z niepełnosprawnością odnoszącej się do niepodejmowania albo rezygnacji z zatrudnienia lub innej pracy zarobkowej*, Chancellery of the Senate, 2022, https://www.senat.gov.pl/gfx/senat/pl/senateksperty z/6501/plik/oe-420.pdf [accessed on 13 November 2024]; Małysa-Sulińska, K., Kawecka, A., 'Mnogość świadczeń dla opiekunów osób z niepełnosprawnościami a praktyka orzecznicza w zakresie ustalania prawa do świadczenia pielęgnacyjnego', in: Stec, M., Małysa-Sulińska, K. (eds), *Wspólnotowy wymiar samorządu terytorialnego – rzeczywistość a oczekiwania*, Warszawa, 2022, p. 147 *et seq.*; Małysa-Sulińska, K., 'Praca zarobkowa a prawo do świadczenia dla opiekunów osoby z niepełnosprawnością. Rzeczywistość a oczekiwania', in: Stec, M., Małysa-Sulińska, K. (eds), *Odpowiedzialność samorządu terytorialnego w sferze socjalnej*, Warszawa, 2023, p. 105 *et seq.*

[10] See Article 3 SBA.

the support benefit is granted to the person with disabilities, their carer is not entitled to a carer's allowance.[11] It is important to emphasise that the overlap of entitlement to the support benefit is only possible with the care benefit established under the provisions in force until 31 December 2023. However, it is impossible for the support benefit to collide with the care benefit established under the laws in force from 1 January 2024, as these new provisions stipulate that the former is granted to persons with disabilities aged 18 or older, while the latter is directed at carers of persons with disabilities who are under 18.[12]

The provisions of Article 63(7)–(10) SBA regulate the impact of proceedings for establishing the right to the support benefit on pending proceedings for granting the care benefit, as well as on cases where such proceedings have already been successfully concluded, and the benefit is being paid.

The legislator has adopted a solution whereby a request from an entitled person for the grant of the right to the support benefit results in the suspension – until the resolution of the case initiated by the request for establishing the right to the support benefit – of the pending proceedings concerning the establishment of the right to the care benefit.[13] In such a case, the reinstatement of suspended proceedings and the adjudication on establishing the right to the care benefit require a prior decision in the case for establishing the right to the support benefit.[14]

The legislator also addressed the scenario where a request for the establishment of the right to the support benefit is made during the period in which the care benefit is being received, with the right to the care benefit having been established under the regulations in force until 31 December 2023. If a person with disabilities makes such a request, the payment of the care benefit, as established under the pre-2024 regulations, will be withheld.[15] However, it is important to note that, should the request for the support benefit be refused or dismissed, the care benefit will be paid from the month in which the payment was withheld until the end of the period for which the care benefit was granted, provided that the conditions outlined in the FBA, in the wording in force until 31 December 2023, are still met.[16] Expanding on the above, it should be explained that, as highlighted in the introduction, the legislator allowed the application of Article 17 FBA, in its form as it stood before 31 December 2023, to continue after this date. In the case of individuals who receive the care benefit after 31 December 2023, granted under the existing provisions, the following regulations must be applied: the FBA in its existing form and the provisions of the Act of 20 December 1990 on Social Insurance of Farmers,[17] also in its existing wording.[18] This means that, unlike those who receive the care benefit established under the provisions in force as of 1 January 2024, recipients of the pre-2024 care

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11 See Article 63(6) SBA.
12 For more see Małysa-Sulińska, K., Kawecka, A., 'Komentarz do art. 17 u.ś.r.', in: op. cit.
13 See Article 63(7) SBA.
14 See Article 63(8) SBA.
15 See Article 63(9) SBA.
16 See Article 63(10) SBA.
17 Journal of Laws of 2024, item 90, as amended.
18 See Article 63(15) SBA.

benefit are not permitted, in particular, to take up employment. However, at the same time, the benefit granted to them will not expire when the person with disabilities they care for reaches the age of 18.[19]

POSSIBILITY OF ESTABLISHING THE RIGHT TO THE CARE BENEFIT AFTER 31 DECEMBER 2023 BASED ON REGULATIONS IN FORCE UP TO THAT DATE

Given the volume of decisions issued in Poland for granting the care benefit, the consistently high number of pending proceedings in this regard, and the judgment of the Constitutional Tribunal of 5 December 2013, K 27/13,[20] which declared Article 11(1) and (3) of the Act of 7 December 2012 on amending the Family Benefits Act and Certain Other Acts[21] unconstitutional (as regards violating acquired rights), resulting in the expiration by operation of law on 30 June 2013 of previously issued decisions regarding the care benefit – often for an indefinite period – the SBA regulation, in Chapter 7,[22] included transitional provisions applicable to intertemporal situations.[23] Legal scholars and commentators emphasise that one of the typical and essential matters that should be resolved in intertemporal regulations is how to finalise proceedings initiated while the provisions being repealed were still in force, as well as proceedings that were not concluded by the time these provisions were repealed. It is highlighted that the legislator must, in such cases, stipulate, *inter alia*, which entities are competent to finalise pending proceedings, the procedure to follow in such closures, whether and to what extent steps taken so far should be considered valid, and whether and what steps need to be repeated. The legislator may, in particular, establish norms solely regulating the closure of such cases.[24]

Referring the above solely to the care benefit, it should be noted that in Article 63(1) SBA, the legislator established that in cases concerning the care benefit referred to in the FBA provisions in its previous wording, for which the right was established by 31 December 2023, the previous provisions shall apply.

In Article 63(2) SBA, the legislator further stipulated that persons who, prior to the entry into force of this Act, or from the date of its entry into force under the rules effective until 31 December 2023, were granted the right to the care benefit, as referred to in the FBA in its previous wording, at least until 31 December 2023, retain the right to the care benefit under the rules effective until 31 December 2023. However, this

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19 For more see Małysa-Sulińska, K., Kawecka, A., 'Komentarz do art. 17 u.ś.r.', in: op. cit.

20 Journal of Laws of 2013, item 1557.

21 Journal of Laws of 2012, item 1548, as amended (hereinafter 'the Amending Act of 2012').

22 Chapter 7 'Transitional and adjusting regulations and final regulation' – Article 59–71 SBA.

23 Situations referred to as intertemporal are legal situations of certain entities that originated under 'the rule of the old laws' and continue to exist after the entry into force of a 'new law' or possibly legal situations that originated 'under the rule of the old laws' but become ineffective due to the enactment of a new law. See Wronkowska, S., in: Wronkowska, S., Zieliński, M., *Zasady techniki prawodawczej. Komentarz*, Warszawa, 2004, p. 81.

24 See Wronkowska, S., in: Wronkowska, S., Zieliński, M., *Zasady techniki…*, op. cit., p. 82.

retention is limited to the duration of the period for which the right was granted, taking into account the provisions of Article 63(3) SBA.

Article 63(3) SBA further provides that the persons referred to in Article 63(2) retain the right to the care benefit under the rules in force until 31 December 2023, even in cases where a new certificate of the degree of disability or a disability certificate is issued for the person under their care (Article 63(2) SBA). This provision also specifies that retaining the right to the care benefit under the terms described in the first sentence is conditional upon submitting a request for a new certificate of the degree of disability or a disability certificate within three months from the day following the expiration date of the previous certificate. Additionally, a request for the determination of the right to the care benefit must be submitted within three months following the issuance of the certificate of the degree of disability or a disability certificate (Article 63(3) SBA *in fine*).

CASES QUALIFIED AS THE ARISING OF THE RIGHT TO THE CARE BENEFIT UNTIL 31 DECEMBER 2023

Given the scope of this study, it is reasonable to focus primarily on the provision in Article 63(1) SBA, which addresses the typical intertemporal question raised earlier, particularly in the context of the phrase used in this provision, stating that the previous provisions of the FBA shall apply to cases concerning the care benefit 'for which the right arose by 31 December 2023'.

When analysing this phrase in the context of the rules of the Polish language – as the verb is used in the past-tense grammatical form,[25] which expresses that the 'arising of the right' should occur before the designated date (31 December 2023) – we must assume that it refers to an event that has already taken place or an action carried out before this date. Undoubtedly, in terms of the legal consequences that follow from the granting of the care benefit, this provision refers to cases where the benefit has been granted in proceedings concluded with a final decision before 31 December 2023. It must also be emphasised that granting the care benefit by way of a final decision to a carer of a person with disabilities entails a range of responsibilities associated with the execution of such a benefit and the resulting future events. For instance, in the case of a change in the place of residence of the entitled person, the competent authority is obliged to transfer the request and case file to another authority that holds territorial competence to carry out this responsibility.[26] Moreover, competent authorities are required to transfer necessary documents, including information on the case, to the governor, where provisions on the coordination of social insurance systems should be applied.[27] Authorities are also obliged to initiate proceedings in the event of an unduly received benefit.

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[25] See Sobol, E. (ed.), *Nowy słownik języka polskiego*, Warszawa, 2003, p. 788.
[26] See Article 25(4) FBA.
[27] See Article 23a(2) FBA.

With regard to the regulation of Article 63(1) SBA, it is also crucial to consider whether this provision, in the context of the expression 'the right arose', may also apply to proceedings initiated before 31 December 2023 that had not been concluded with a final decision by that date.

In fact, such a possibility, at least indirectly, is suggested by the content of the aforementioned Article 63(2) SBA. It states that persons who, before the entry into force of this Act, were granted the right to the care benefit under the terms in force until 31 December 2023 shall retain the right to this benefit on the same terms. Thus, according to this provision, it is possible to grant the care benefit after 1 January 2024 under the terms in force until 31 December 2023.

An analysis of the regulation of Article 63(1) and (2) SBA may give rise to doubts due to the lack of coherence between these two provisions. The first provision clearly reserves the condition that the 'arising of the right' must occur by 31 December 2023. The second regulation merely mentions granting the right under the terms in force until 31 December 2023 without specifying the conditions under which this should be done. It seems that the most consistent interpretation would be to assume that in both cases, whether the final decision is issued before or after 1 January 2024, the right to the care benefit should arise before 31 December 2023. However, this would imply that the decision regarding the care benefit would take the form of a declaratory decision rather than a constitutive one. In essence, the content of Article 24(2) and (2a) FBA could confirm this declaratory nature of the decision. Pursuant to these provisions, as a general rule, the right to family benefits, including the care benefit, is established from the month in which the request and correctly completed documents are submitted (Article 24(2)). However, if a request for the establishment of the right to a benefit dependent on disability is filed within three months of the issuance of a disability certificate or a certificate on the degree of disability, this right shall be established from the month in which the request for the declaration of disability or degree of disability was filed (Article 24(2a)). Thus, Article 24(2a) FBA introduces an exception to the principle of establishing the right to family benefits from the month in which the request with correctly completed documents is submitted.[28] In both cases, the provisions of Article 24(2) and (2a) FBA introduce the possibility of granting the benefit retrospectively from the date of issuing the decision in the case. These regulations, in light of the circumstances outlined within them, which provide the basis for decision-making, may further raise doubts as to when exactly the right to the care benefit arises. Specifically, does the right arise on the date of filing the request for such a benefit or on the date of issuing the decision on disability or degree of disability?

To conduct a reliable interpretation of the law, it is reasonable to refer to other regulations where the legislator used similar constructions in intertemporal provisions, and where interpretation has already been carried out in the process of applying the law. It should be noted that in Article 13 of the above-mentioned 2012 Act amending the FBA, the legislator, in the context of the solutions challenged by the Constitutional Tribunal, aimed at extinguishing decisions on care benefits, declared:

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[28] Cf. Sapeta J., in: Małysa Sulińska, K. (ed.), *Ustawa o świadczeniach rodzinnych. Komentarz*, Warszawa, 2015, p. 388.

'in cases concerning the care benefit, the right to which arose before the entry into force of this Act, when establishing this right for this period, the existing provisions shall apply.' Therefore, in terms of the object of regulation, the construction of this provision stipulates an almost identical solution to that adopted in Article 63(1) SBA. However, apart from directly invoking the content of Article 13 of the Amending Act, the explanatory memorandum to the 2012 Amending Act does not clarify the meaning and purpose of this regulation, which would make it easier to explain it.[29] In terms of practical interpretation issues, this regulation has been the subject of assessment by the Administrative Courts. In this context, the Voivodeship Administrative Court in Poznań expressed the view that Article 13 of the 2012 Amending Act must be understood to mean that, in the case of a request for the care benefit effectively submitted before the entry into force of this Act (i.e., before 1 January 2013), the administrative body (both at first and second instance) should first assess whether the applicant meets the requirements for receiving the care benefit under the provisions in force until 31 December 2012. If the answer is affirmative, as interpreted by the administrative court, a decision granting the right to the requested benefit should be issued under the existing regulations. If the answer is negative, however, Article 13 of the 2012 Amending Act, as pointed out by the administrative court, shall not apply, and the authority should proceed to examine the request under the regulations in force at the time the decision is made, i.e., after the amendment introduced by the Amending Act referred to above.[30]

The Voivodeship Administrative Court in Bydgoszcz adopted a more far-reaching interpretation of Article 13 of the 2012 Amending Act, stating that the wording of this article does not stipulate that it only provides the basis for granting the care benefit for the period up to 31 December 2012, nor only for requests filed before that date. The court, therefore, concluded that the correct interpretation of this provision must recognise that if a request for establishing the right to a benefit dependent on disability is submitted (including the right to the care benefit on existing terms) within three months from the date of the issuance of a disability certificate or a certificate on the degree of disability, the right shall be established from the month in which the request for the declaration of disability or the degree of disability was submitted. Therefore, as long as the applicant entitled to the care benefit under existing regulations, invoking a certificate of severe disability obtained upon a request submitted by 31 December 2012, files a request within these three months for establishing the care benefit under the existing provisions, he or she retains the right to this benefit in the existing amount until 30 June 2013, provided that the requirements stipulated in the existing provisions are met.[31]

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[29] Cf. Explanatory memorandum to the Act of 7 December 2012 on amending the Family Benefits Act and Certain Other Acts, Sejm Document No. 727 of 6 September 2012; https://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=724 [accessed 13 November 2024].

[30] See judgment of the Voivodship Administrative Court in Poznań of 11 September 2013, IV SA/Po 616/13, Central Database of Decisions of Administrative Courts (CBOSA), https://orzeczenia.nsa.gov.pl [accessed on 13 November 2024].

[31] See judgment of the Voivodship Administrative Court in Bydgoszcz of 18 June 2013, II SA/Po 490/13, CBOSA.

Based on the content of the explanatory memoranda of the judgments referred to above, it is reasonable to conclude that the right to the care benefit arose no later than upon the submission of the request for granting this right, subject to the applicant meeting the statutory requirements for receiving such a benefit. Furthermore, the deadline for submitting such a request, in connection with the date of issuing decisions in proceedings for declaring disability or the degree of disability, may additionally support the view that the right to the care benefit arises in certain situations even before the date of submitting such a request. Consequently, the decision on establishing the right to the care benefit possesses declaratory attributes.

As regards the almost identical construction of the provision and the general principles of administrative procedure, the rule of law, equality before the law, and deepening trust in public authorities[32] (which are key standards guiding the operation of public administration bodies), it is reasonable to assume that the interpretation of intertemporal provisions, as expressed in the judgments cited above regarding Article 13 of the 2012 Amending Act, particularly in the judgment of the Voivodeship Administrative Court in Bydgoszcz, should also apply to the regulation of Article 63(1) SBA, including its subsections 2 and 3.

However, in the practice of adjudicating cases concerning the care benefit, numerous instances have arisen where the initial date on which the right to the care benefit is established does not align with the dates stipulated in Article 24(2) and (2a) FBA. For example, it may be noted that the carer of a person with disabilities may not meet the condition of resigning from employment on the date of obtaining the disability certificate or the certificate of the degree on disability. Another, more significant example relates to the admissibility (widely accepted in judicial decisions) of granting the care benefit to individuals who already have an established right to an old-age pension, provided that the right to the old-age pension is suspended beforehand.[33] In such cases, it is assumed that the right to the care benefit will be established as of the date the right to the old-age pension is suspended, which often occurs after the date the request is filed in the course of the proceedings for granting the care benefit.[34] This raises questions about whether the right to the care benefit

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[32] See Article 6, Article 7, and Article 8(1) of the Act of 14 June 1960 – Code of Administrative Procedure (Journal of Laws of 2024, item 572). For the legal character of general principles of administrative procedure, cf. Rozmaryn, S., 'O zasadach ogólnych kodeksu postępowania administracyjnego', *Państwo i Prawo*, 1961, Vol. 12, p. 889; Adamiak B., in: Adamiak, B., Borkowski, J., *Kodeks postępowania administracyjnego*, Warszawa, 2021, pp. 58–60; Szreniawski, J., 'Rola i znaczenie zasad ogólnych Kodeksu postępowania administracyjnego w stosowaniu prawa', in: Niczyporuk, J. (ed.), *Kodyfikacja postępowania administracyjnego. Na 50-lecie K.P.A.*, Lublin, 2010, p. 813; Tarno, J.P., 'Zasady ogólne k.p.a. w orzecznictwie Naczelnego Sądu Administracyjnego', *Studia Prawno-Ekonomiczne*, 1986, Vol. XXXVI, p. 63; Martysz, Cz., in: Łaszczyca, G., Martysz, Cz., Matan, A., *Kodeks postępowania administracyjnego. Komentarz*, Vol. 1, Warszawa, 2010, pp. 100–101.

[33] Cf. Kledzik, P., 'Prawo do renty i emerytury a przyznanie świadczenia pielęgnacyjnego – w aspekcie orzecznictwa sądów administracyjnych', in: Małysa-Sulińska, K., Stec, M. (eds), *Odpowiedzialność samorządu terytorialnego*…, op. cit., pp. 155–184.

[34] See judgments of the Supreme Administrative Court of 14 June 2022, I OSK 1559/21 and of 18 November 2022, I OSK 21/22, as well as judgments of the Voivodship Administrative Court in Gorzów Wielkopolski of 30 June 2022, II SA/Go 215/22, Voivodship Administrative Court in Lublin of 26 May 2022, II SA/Lu 217/22 and Voivodship Administrative Court in Gliwice of 31 August 2022, II SA/Gl 721/22, CBOSA.

can be considered to have arisen by 31 December 2023 in cases where the request is submitted within three months of the issuance of the disability certificate, but after 1 January 2024, and where the person resigns from employment after 1 January 2024. A similar issue arises when the request for the benefit is submitted in 2023, but the suspension of the right to the old-age pension – dependent on another authority – occurs after 1 January 2024.

This interpretation of the intertemporal provisions of the SBA, which assumes that the decision on establishing the right to a care benefit is declaratory, has already been reflected in judicial decisions. It has been argued that

> 'Article 63(1) SBA must be understood to mean that in the case of an application for a care benefit successfully submitted before 1 January 2024 (i.e., before the entry into force of Article 43(4)(a) SBA amending Article 17 FBA), the authority, when examining the application after 1 January 2024, is obliged to assess whether the applicant meets the requirements for obtaining the care benefit as laid down in the FBA in the version in force up to 31 December 2023. If the applicant meets these requirements, the authority must issue a decision granting the benefit based on the provisions of the FBA in force before the amendment. If the authority finds that the requirements are not met, Article 63(1) SBA will not apply, and the authority should examine the application under the provisions in force at the time of the decision, which includes considering the amended wording of Article 17.'[35]

Also noteworthy is a position that supports the declaratory nature of decisions on care benefits and addresses the issue of whether all requirements for the recognition of the arising of the right to the benefit were met before 31 December 2023. In one case, the court held: 'Pursuant to Article 63(1), in care benefit cases (…) referred to in Article 43 of the amended Act (Family Benefit Act), in the existing wording, where the right to the benefit arose before 31 December 2023, the existing provisions shall apply.' In a case where the applicant had a right to an old-age pension that was not suspended before 31 December 2023, and this formed the basis for refusing to grant the care benefit, the court ruled:

> 'The arising of the right to the benefit can only be recognised where the applicant meets all the requirements set out in the Family Benefit Act before 31 December 2023, even if the authority was unable to issue a decision granting this right before this date. This provision allows for the granting of the benefit to individuals who submitted a complete application before the legal changes were implemented, and whose cases could not be processed by the authorities before 31 December 2023. However, this provision cannot be applied in cases where the granting of the benefit before 31 December 2023 was impossible because the applicant had not met all the requirements.'[36]

What also needs to be noted here is that there is an established line of judicial decisions presenting a different view:

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35 See judgment of the Voivodship Administrative Court in Bydgoszcz of 14 March 2024, II SA/Po 1811/23. Cf. also judgment of the Voivodship Administrative Court in Poznań of 6 March 2024, IV SA/Po 105/24 and of 17 April 2024, IV SA/Po 190/24, CBOSA.

36 See judgment of the Voivodship Administrative Court in Szczecin of 11 January 2024, II SA/Sz 961/23, CBOSA.

> 'The literal interpretation of Article 63(1) of the 2023 Support Benefit Act allows for the opinion that the regulation, in its pre-amendment wording, must be applied only to cases in which the right to the benefit arose by 31 December 2023. In other words, the "old act" may be applied where the authority issued a decision granting the applicant the right to the care benefit before the end of 2023. Consequently, negative rulings, that is, those refusing the granting of the care benefit, are subject to the provisions in force until 1 January 2024.'[37]

In the context of the present analysis of legislation, this view cannot be considered correct. However, an investigation of court rulings issued based on Article 63 SBA suggests that this is an isolated view, and the same court subsequently changed its line of decisions, as evidenced by one of the rulings referred to above.

It is essential to highlight, in line with the interpretation of Article 63 SBA presented in this paper, the purpose of this intertemporal regulation. It is pointed out that:

> 'the rules laid down in Article 63(1)–(16) of the 2023 Support Benefit Act reflect the constitutional protection of acquired rights. When assessing whether the retroactive application of this provision is contrary to the Constitution, depending on the case type, principles such as citizens' trust in the state, security and certainty of legal transactions, security of regulated relationships, and the protection of acquired rights must be taken into account. Deviation from the principle of non-retroactivity may only be made when motivated by important public interest and when it follows directly from the act. In turn, the objective of the act does not justify the adoption of retroactive effect. Since, by the legislator's will, the care benefit may be granted on existing terms, lengthy administrative proceedings cannot deprive the applicant of the opportunity to obtain this benefit under the terms effective to date.'[38]

This leads to the conclusion that a re-examination of the case, where the administrative court repeals a decision that refused to grant the applicant a care benefit in a case initiated before 1 January 2024, should not prevent the granting of the care benefit, even if a significant amount of time has passed since the repealed decision was issued. The party should not bear the negative consequences of the authority's actions in such a case, including those involving the interpretation of law, which the court later considers incorrect solely because a considerable amount of time has passed since the decision was issued, even if this time extends significantly beyond 1 January 2024. In such a situation, the authority's responsibility should be to assess whether the right to the care benefit arose before 31 December 2023. If evidence supports this, the authority should then verify – while considering the period for which the degree of disability of the person under care was declared – whether this care is still being provided or until what date it was provided.

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[37] See judgment of the Voivodship Administrative Court in Gliwice of 10 January 2024, II SA/Gl 1469/23, LEX 3662547.

[38] See judgment of the Voivodship Administrative Court in Poznań of 24 April 2024, IV SA/Po 231/24, CBOSA.

CONCLUSION

The examples presented above show that the expression 'the right to which arose before' cannot necessarily be equated with the universally applied formula 'for cases already initiated but not closed, existing provisions shall apply', which considers the requirements for intertemporal provisions set by the principles of legislative technique.[39]

Therefore, it may turn out in practice that the interpretation of intertemporal provisions, in the absence of transparency and clarity, will be carried out – similarly to the regulation of Article 13 of the 2012 Amending Act – by administrative courts. At the same time, it seems necessary to take into account the objective associated with the interpretation of regulations in administrative law, that is, decoding the so-called norms of administrative law, which provide the basis for the operation of administrative authorities in the course of administrative (jurisdictional) proceedings and ensure the correct creation of individual and specific norms of administrative law.[40] As a consequence of the above, it must be assumed that when interpreting the law regarding care benefits, the interpretation of Article 63(1) SBA should focus particularly on the regulations in Article 63(2) and (3) SBA. A situation where the legal position of entities referred to in Article 63(1)–(3) SBA is not differentiated should be the determinant of the correct interpretation. Consequently, individuals who apply for the care benefit for the first time before 31 December 2023, or whose right to this benefit has expired and who reapply for this right to be granted on existing terms before 31 December 2023, and where proceedings in these cases cannot be finalised before 1 January 2024, should not be left in a worse situation compared with individuals whose right to the care benefit expired after 1 January 2024 and who may still receive it on existing terms.

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[39] Cf. § 30(2)(1) of the Annex to the Regulation of the President of the Council of Ministers of 20 June 2002 on 'Rules of Legislative Technique' (Journal of Laws of 2016, item 283).

[40] See Jakimowicz, W., *Wykładnia w prawie administracyjnym*, Kraków, 2006, p. 380.

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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.

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[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 Act[3] 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]

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[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: Niewęgłowski, 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,

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[12] See Sadomski, 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 doctrine[14] and jurisprudence[15] 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

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[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., 'Glosa 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, CBOSA, judgment of the Supreme Administrative Court of 27 February 2018, II GSK 1412/16, CBOSA, judgment of the Supreme Administrative Court of 12 October 2006, II GSK 400/05, CBOSA, a different view was expressed in the judgment of the Supreme Administrative Court of 1 October 1998, II SA 916/97, CBOSA.

[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*, Przemyśl–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 character[19] 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.

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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 scholarship[23] 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 autonomous[25] 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

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[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

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[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-competence[33] 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.

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[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 us, 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

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[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 Niewęgłowski, A. (ed.), *Ustawa o radiofonii i telewizji. Komentarz*, Warszawa, 2021, p. 479, and the literature cited therein.

[35] See Lubeńczuk, G., in: Niewęgłowski, 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.

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[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.

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[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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DIRECTORS OF MARITIME OFFICES AS LOCAL MARITIME ADMINISTRATION BODIES

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Abstract
This study examines the roles of directors of maritime offices as local maritime administration bodies. The publication is divided into three thematic areas. The first concerns the placement of directors of maritime offices within the system of autonomous government administration bodies, as defined by the Act of 23 January 2009 on the Voivode and Government Administration in the Voivodeships. The second thematic area focuses on the legal position of directors of maritime offices, as specified by the Act of 21 March 1991 on Maritime Areas of the Republic of Poland and Maritime Administration. The third thematic area outlines the competences of maritime administration bodies, including those of directors of maritime offices, whose powers extend beyond the above-mentioned Act. The publication concludes with an assessment of the currently applicable legal regulations regarding the subject matter. The aim of this review article is to systematise the fundamental issues concerning directors of maritime offices as local maritime administration bodies. The main research hypothesis posited by the author is that directors of maritime offices possess extensive competences as local maritime administration bodies. The research methods employed include analysis of legal texts and dogmatic analysis. The research is national in scope.

Keywords: maritime office, directors of maritime offices, autonomous government administration, local maritime administration bodies, competences

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INTRODUCTION

The subject of directors of maritime offices as local maritime administration bodies, as presented in this article, is infrequently discussed in legal literature. Typically, this topic is addressed only in general administrative law textbooks and a limited number of academic articles. The author's objective is not to bridge this gap but rather to systematise the fundamental issues related to the topic, such as the position of directors of maritime offices within the system of autonomous government administration, their legal status, and, importantly, the scope of their competences as derived not only from the Act of 21 March 1991 on Maritime Areas of the Republic of Poland and Maritime Administration,[1] but also from the Maritime Code,[2] the Act of 5 August 2015 on Work at Sea,[3] and the Act of 16 April 2004 on the Protection of Nature.[4]

DIRECTORS OF MARITIME OFFICES IN THE SYSTEM OF AUTONOMOUS GOVERNMENTAL ADMINISTRATION BODIES

Autonomous governmental administration bodies, including directors of maritime offices, are defined in Article 56(1) of the Act of 23 January 2009 on the Voivode and Governmental Administration in the Voivodeships.[5] According to this regulation, local government administration bodies that are subordinate to a competent minister or a central government administration body, as well as the heads of state legal entities and other state organisational units performing government administration tasks within the voivodeships, are considered autonomous government administration bodies. This provision establishes a closed list of autonomous administration bodies. If a new body is to be established, an amendment to the provision is required.[6]

In the case of autonomous administration, as the name of this group of bodies suggests, there is no element of dependence or subordination to the voivode, the principal representative of the Council of Ministers in the region. The voivode is not

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[1] Consolidated text, Journal of Laws of 2024, item 1125.

[2] Act of 18 September 2001 – Maritime Code, consolidated text, Journal of Laws of 2023, item 1309.

[3] Consolidated text, Journal of Laws of 2023, item 2257.

[4] Consolidated text, Journal of Laws of 2024, item 1478.

[5] Consolidated text, Journal of Laws of 2023, item 190. In accordance with Article 56(1) of the Act of 23 January 2009 on the Voivode and Governmental Administration in the Voivodeships, apart from the directors of maritime offices, the autonomous government administration bodies include: heads of military recruitment centres, directors of fiscal administration chambers, heads of tax offices, heads of fiscal-customs offices, directors of regional mining offices, directors of regional offices of measures, directors of regional assay offices, directors of statistical offices, directors of inland navigation offices, border and county vets, Border Guard commanders, commanders of Border Guard outposts and divisions, state border sanitary inspectors, and regional directors for nature protection.

[6] Piątek, P., in: Drembkowski, P., Ślusarczyk, M. (eds), *Ustawa o wojewodzie i administracji rządowej w województwie. Komentarz*, Legalis, 2022; thesis 11 to Article 56; Zimmermann, J., *Prawo administracyjne*, Warszawa, 2022, p. 263.

the superior of this segment of the administration and, therefore, does not manage or coordinate its activities. The legislator has assigned these powers to competent ministers or central governmental administration bodies, equipping them with various means of influence. These include, *inter alia*: (1) determining the internal organisation of autonomous administration bodies by issuing statutes or rules and regulations; (2) issuing orders, internal ordinances, instructions, guidelines, recommendations, and conduct regulations; (3) carrying out comprehensive inspections, analyses, and assessments of the activities of supervised units; (4) conducting personnel policies, including the appointment and dismissal of heads of local offices; (5) the ability to receive periodic information and reports on the work of these bodies; (6) the right to inspect documents and obtain explanations; (7) providing assistance and training for staff in autonomous administration units; and (8) coordinating the activities of autonomous administration units in the region.

However, despite the lack of direct subordination, autonomous administration is not completely independent of the voivode. As the representative of the Council of Ministers in the region and a type of overseer of all tasks related to regional governmental administration, the voivode is authorised to issue binding orders to all autonomous administration bodies operating within the voivodeship. Due to the absence of subordination, the legislator has established a verification procedure. The voivode must immediately inform the competent minister, to whom a given unit reports, of the orders he has issued. In the event of a dispute between the voivode and the supervising minister, the latter is empowered to suspend the execution of the voivode's orders and submit a request to the Prime Minister for resolution, presenting his stance on the matter. It should be noted, however, that the voivode's orders cannot pertain to the resolution of individual cases handled through administrative decisions.

Beyond the power to issue the above-mentioned orders, the voivode is also entitled to request current information and explanations regarding the activities of all governmental administration bodies operating in the voivodeship, including autonomous bodies, as well as to review the progress of individual cases (considering provisions on the protection of classified information or other legally protected secrets).

In addition to providing current information and explanations, autonomous governmental administration bodies are required by law to submit annual reports on their activities to the competent voivode. If the jurisdiction of an autonomous body extends beyond a single voivodeship, the annual report must be submitted to all affected voivodes, given their equal political status.

In particularly justified cases, the activities of autonomous bodies may be supervised by the voivode in terms of legality, economy, purposefulness, and reliability.

Autonomous governmental administration bodies are established exclusively by statute. Their creation must be justified by the national scope of their tasks or by territorial jurisdiction extending beyond a single voivodeship.[7] A narrow specialisation, a specific area of operation, or management technique may render

[7] Zimmermann, J., *Prawo administracyjne…*, op. cit., p. 262.

the existing administrative division of the country inadequate for the needs of specialised public administration units. In such cases, a so-called special division is created, which may not always align with the country's basic territorial division.[8]

LEGAL AND CONSTITUTIONAL POSITION OF DIRECTORS OF MARITIME OFFICES IN THE LIGHT OF THE ACT OF 21 MARCH 1991 ON MARITIME AREAS OF THE REPUBLIC OF POLAND AND MARITIME ADMINISTRATION

Directors of maritime offices are local maritime administration bodies whose activities are supervised by the minister responsible for maritime economy (currently the Minister of Infrastructure)[9] as the supreme maritime administration body (Article 38 of the Act on Maritime Areas of the Republic of Poland and Maritime Administration). This means that these two bodies hold competences and are considered 'competence carriers' in this context. Other bodies, such as municipal councils that participate in law-making by maritime administration bodies, for example, in determining port boundaries, cannot be recognised as maritime administration bodies (Article 45(1)(2) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration). Formally, they are not part of the maritime administration structure but are municipal bodies within the local government administration framework.[10]

A principle of hierarchical subordination applies to the governmental administration, which includes the maritime administration, meaning that the director of the maritime office is obliged to comply with orders issued by a higher authority – the minister responsible for maritime economy (currently the Minister of Infrastructure) as the supreme administration body – regardless of the form of interference in the subordinate body's scope of discretion. The form of such interference (supervision, inspection, or any other type of assessment of the director's activities) is immaterial; as a subordinate body, the director must adhere to the guidelines and orders of the superior body.[11]

To align the principles and directions of the activities of subordinate or supervised central government administration bodies and other offices or organisational units

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[8] Grzywacz, M., Wiktorowska, A., Wierzbowski, M., 'Terenowe jednostki organizacyjne administracji niezespolonej', in: Jagielski, J., Wierzbowski, M. (eds), *Prawo administracyjne*, Warszawa, 2022, pp. 297–298.

[9] Regulation of the Council of Ministers of 7 October 2020 on the dissolution of the Ministry of Maritime Economy and Inland Navigation, Journal of Laws of 2020, item 1732, dissolved the Ministry of Maritime Economy and Inland Navigation, and Regulation of the President of the Council of Ministers of 6 October 2020 amending Regulation on the detailed scope of activities of the Minister of Infrastructure, Journal of Laws of 2020, item 1722, entrusted the sectors of maritime economy and inland navigation to the Ministry of Infrastructure.

[10] Buławski, J., 'O kompetencjach organów administracji morskiej z perspektywy teorii prawa administracyjnego', *Kortowski Przegląd Prawniczy*, 2018, No. 3, p. 49.

[11] Karpiuk, M., 'Niezespolona administracja morska', in: Czuryk, M., Karpiuk, M., Kostrubiec, J. (eds), *Niezespolona administracja rządowa*, Warszawa, 2011, p. 137.

lacking legal personality with the policy established by the Council of Ministers, the minister may issue binding guidelines and orders to the heads of central offices and other offices and organisational units. However, these guidelines and orders cannot pertain to the substance of a case resolved by way of an administrative decision (Article 34a(1) and (2) of the Act of 8 August 1996 on the Council of Ministers).[12] The director of the maritime office is not only supervised by the minister responsible for maritime economy (currently the Minister of Infrastructure) but is also subordinate to him (Article 39(1) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).[13]

This supervision involves verifying whether the intended state has been achieved and, in the event of a negative assessment, explaining the reasons for such an outcome and applying measures to restore the desired state, as well as determining the method for doing so.[14]

The director of the maritime office is appointed and dismissed by the minister responsible for maritime economy (currently the Minister of Infrastructure). Deputy directors of maritime offices are appointed by the minister responsible for maritime economy at the request of the directors of maritime offices (Article 39(2) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration). Only a Polish citizen who has a university education, as well as knowledge, professional qualifications, and experience in the field of maritime economy and the functioning of governmental administration, may be appointed as a director or deputy director of a maritime office (Article 39(3) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).[15] The first two conditions – Polish citizenship and higher education – are strictly defined. However, the other requirements, such as knowledge, professional qualifications, and experience in the maritime economy and governmental administration, are not precisely detailed by the legislator and, in practice, may raise doubts, potentially leading to appointments based not on objective criteria but rather on party affiliation or political expediency.[16]

Maritime offices are established and dissolved by the minister responsible for maritime economy (currently the Minister of Infrastructure) by way of regulation. The minister, after consulting the relevant voivodes, also determines by regulation the territorial scope of operation and the headquarters of directors of maritime offices (Article 40(1) and (2) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).[17]

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[12] Consolidated text, Journal of Laws of 2024, item 1050.

[13] Wagner, A., 'Dyrektorzy urzędów morskich', in: Szmulik, B., Miaskowska-Daszkiewicz, K. (eds), *Administracja publiczna. Ustrój administracji państwowej terenowej*, Vol. II, Legalis, 2012, thesis 6 to Article 38 of the Act on Maritime Areas of the Republic of Poland and Maritime Administration.

[14] Karpiuk, M., 'Niezespolona administracja…', op. cit., p. 138; Karpiuk, M., *Samorząd terytorialny a państwo. Prawne instrumenty nadzoru nad samorządem gminnym*, Lublin, 2008, p. 123. For more on the concept of supervision see: Konarski, M., Woch, M., 'Z zagadnień nadzoru i kontroli władzy publicznej w Polsce', in: Konarski, M., Woch, M. (eds), *Z zagadnień nadzoru i kontroli władzy publicznej w Polsce*, Vol. V, Warszawa, 2015, pp. 18–23.

[15] Sługocki, J., *Prawo administracyjne*, Warszawa, 2023, p. 231.

[16] Karpiuk, M., 'Niezespolona administracja…', op. cit., p. 138.

[17] Based on Article 40(1) and (2) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration, the Regulation of the Minister of Transport and Maritime Economy of

The minister responsible for maritime economy (currently the Minister of Infrastructure) also sets out, by statute, the organisation of a maritime office and the detailed scope of the director's activities (Article 40(3) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).[18]

COMPETENCES OF DIRECTORS OF MARITIME OFFICES

Directors of maritime offices exercise their competences[19] with the assistance of maritime offices, which are state budgetary units (Article 39(4) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration). Budgetary units include organisational entities within the public finance sector that do not have legal personality, cover their expenditures directly from the budget, and transfer collected revenue to the state budget or a local government unit's budget (Article 11(1) of the Act of 27 August 2009 on Public Finance).[20]

A maritime office comprises, in particular:

(1) maritime inspection, flag inspection, and port inspection, through which the director of the maritime office performs tasks related to ship inspection;
(2) the Vessel Traffic Service (VTS Service), which assists the director of the maritime office in monitoring ship traffic and providing information;
(3) harbour master's offices and harbour boatswain's offices, which enable the director of the maritime office to exercise competences in harbours and marinas;
(4) the Office for Navigation Defence, responsible for tasks related to the protection of sea harbours and maritime navigation (Article 39(5) in conjunction with Article 42(2)(1a) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).

Article 42(1) of the Act on Maritime Areas of the Republic of Poland and Maritime

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7 October 1991 on establishing Maritime Offices, Their Headquarters, and the Territorial Scope of the Activities of Directors of Maritime Offices (consolidated text, Journal of Laws of 2021, item 1339), is binding. In accordance with § 1 of the Regulation, there are two maritime offices: one in Gdańsk and one in Szczecin. The Maritime Office in Słupsk was dissolved by the Regulation of the Minister of Maritime Economy and Inland Navigation of 15 January 2020 on dissolving the Maritime Office in Słupsk (Journal of Laws of 2020, item 20).

[18] Based on Article 40(3) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration, Regulation No. 16 of the Minister of Maritime Economy and Inland Navigation of 16 March 2020 on granting a Statute to the Maritime Office in Szczecin (Official Journal of the Ministry of Maritime Economy and Inland Navigation of 2020, item 17), and Regulation No. 11 of the Minister of Maritime Economy and Inland Navigation of 4 March 2020 on granting a Statute to the Maritime Office in Gdańsk (Official Journal of the Ministry of Maritime Economy and Inland navigation of 2020, item 12), are binding.

[19] For more on the concept of competences see: Buławski, J., 'O kompetencjach organów…', op. cit., pp. 47–52; Góralczyk, W., *Podstawy prawa i administracji*, Warszawa, 2014, p. 207; Ochendowski, E., *Prawo administracyjne Część ogólna*, Toruń, 2013, p. 253; Zieliński, M., 'Dwa nurty pojmowania "kompetencji"', in: Olszewski, H., Popowska, B. (eds), *Gospodarka. Administracja. Samorząd*, Poznań, 1997, p. 596; Matczak, M., *Kompetencja organu administracji publicznej*, Kraków, 2004, p. 38.

[20] Consolidated text, Journal of Laws of 2024, item 1530.

Administration states that maritime administration bodies handle matters within governmental administration concerning the use of the sea as regulated by this Act and other laws. Paragraph 2 of the same provision provides a detailed, albeit non-exhaustive, list of the tasks of maritime administration bodies.[21] These tasks include, *inter alia*:

(1) ensuring the security of maritime navigation;
(2) protecting sea harbours and maritime navigation, including defence-related and military tasks, as well as non-military tasks, particularly the prevention of terrorist acts and mitigating the consequences of incidents;
(3) overseeing the use of sea routes, ports, and marinas;
(4) ensuring the safety of research, identification, and exploitation of seabed mineral resources;
(5) protecting the marine environment against pollution arising from the use of the sea and the dumping of waste and other substances, insofar as not regulated by geological and mining law;
(6) life-saving operations, conducting underwater work, and recovering property from the sea;
(7) fire-fighting supervision in Polish maritime areas, ports, and marinas. As part of this oversight, directors of maritime offices, considering the significance of ports to the national economy, issue regulations on fire protection through ordinances, including measures to prevent and contain fires, ensuring safe traffic and berthing of ships carrying hazardous substances, as well as transhipment of specified substances. They also inspect fire-fighting facilities and equipment on ships and floating objects in their jurisdiction and approve plans for combating pollution threats in accordance with regulations for marine pollution prevention from ships, reviewing technological instructions, technological-traffic instructions and instructions for safe ship service, organisational regulations for entities performing fire protection tasks in ports, within the scope of fire protection from the side of water (Article 50(1) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration);
(8) agreeing on decisions regarding the issuance of water permits and construction permits for structures in Polish maritime areas, the technical zone, the protective zone, and in ports and marinas;
(9) constructing, maintaining, and protecting coastal revetments, dunes, and protective forests in the technical zone;
(10) managing the use of State Treasury-owned forests located in the technical zone;
(11) supervising flood protection, including the construction, expansion, and maintenance of hydro-technical structures and coastal defences in the technical zone;
(12) designating sea routes, anchorages, and assessing their navigability conditions;
(13) performing and supervising hydrographic measurements;
(14) maintaining hydrographic data resources relevant to the jurisdiction of the territorially competent director of the maritime office;

[21] Buławski, J., 'O kompetencjach organów…', op. cit., p. 50.

(15) managing navigation markings in Polish maritime areas;
(16) imposing fines in proceedings for pecuniary penalties related to misdemeanours;
(17) issuing and agreeing on decisions pursuant to the provisions of the Act of 12 May 2022 on Harbour Facilities for the Reception of Waste from Ships;[22]
(18) preparing spatial development plans for internal sea waters,[23] the territorial sea[24] and the exclusive economic zone;[25]
(19) assigning names to ships;
(20) organising maritime piloting;
(21) planning the development of ports and marinas;
(22) monitoring and reporting on ship traffic;
(23) managing cargo and passenger records;
(24) supervising equipment introduced to the market or put into use, as well as recreational vessels and water scooters, under the provisions of the Act of 13 April 2016 on the Systems of Conformity Assessment and Market Supervision;[26]
(25) managing the territorial sea and internal sea waters, along with the land within these waters, as referred to in the provisions of the Act of 20 July 2017 – Water Law;[27]
(26) performing tasks related to marine environmental protection and flood protection under the Act of 20 July 2017 – Water Law;
(27) controlling the marine fuel delivered to and used on ships.

In analyses of Article 42(1) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration as presented in the literature, it is noted that the legislator assumed that the addressees of this Act may not be aware that the competences of governmental administration bodies cannot be defined otherwise than by statute, and that the term 'statute' does not refer to acts other than this

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[22] Consolidated text, Journal of Laws of 2022, item 1250.

[23] The maritime internal sea waters include: (1) Nowe Warpno Lake and part of Szczecin Lagoon, together with the Świna River, the Dziwna River and Kamień Lagoon, located east of the border between the Republic of Poland and the Federal Republic of Germany, as well as the Oder River between Szczecin Lagoon and the waters of the Szczecin harbour; (2) part of Gdańsk Bay enclosed by the basic line of the territorial sea; (3) part of the Vistula Lagoon located south-west of the border between the Republic of Poland and the Russian Federation on this lagoon; (4) the waters of the ports delineated by the line in the sea linking the most front-end harbour facilities in the sea, constituting integral part of the harbour system; (5) the waters between the coastline of the territorial sea, as established in accordance with the Act of 20 July 2017 – Water Law, and the basic line of the territorial sea (Article 4 of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).

[24] The territorial sea is an area of maritime waters that is 12 miles (22 224 meters) wide, measured from the basic sea coastline (Article 5(1) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).

[25] The exclusive economic zone lies outside and adjacent to the territorial sea. It includes the waters, the seabed and the interior of the earth beneath it (Article 15 of the Act on Maritime Areas of the Republic of Poland and Maritime Administration). Moreover, the internal maritime waters, the territorial sea, the adjacent zone, and the exclusive economic zone constitute maritime areas of the Republic of Poland, and the internal maritime waters and the territorial sea are part of the territory of the Republic of Poland (Article 2(1) and (2) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).

[26] Consolidated text, Journal of Laws of 2022, item 1854, as amended.

[27] Consolidated text, Journal of Laws of 2024, item 1087, as amended.

one. Furthermore, the legislator's intention was likely to emphasise that such a concise definition of the competences of governmental administration bodies in the constitutional Act is insufficient, as evidenced by the inclusion of paragraph 2, which lists these matters in thirty-five subsections. However, this list is not exhaustive, as it includes a reservation that the competences cover 'in particular' such matters. Additionally, the drafters of the Act sought to exclude 'tasks in the field of international cooperation within the scope specified in paragraphs 1 and 2', which is clarified by the addition of paragraph 3, indicating that the performance of these tasks is also the responsibility of these bodies.[28]

The two-tier system of marine administration in Poland has been criticised in the legal doctrine. Attention has been drawn to the joint determination of jurisdiction over subject matter for both first and second instance authorities.[29] The author concurs with this perspective, as such a legal structure results in 'jurisdictional chaos'.

The Act on Act on Maritime Areas of the Republic of Poland and Maritime Administration dedicates significant provisions specifically to the competences of directors of maritime offices. For instance, the director of a maritime office may, by ordinance, temporarily close an area located within internal sea waters or the territorial sea for conducting navigation and fishing tests involving autonomous (crewless) ships, and may specify the rules for such tests (Article 3b(1) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration). Additionally, the director of a maritime office may, by ordinance, establish safety zones around artificial islands, structures, and facilities, or groups thereof within the meaning of a group of artificial islands, structures or facilities located no more than 1,000 metres apart, as well as cables or pipelines or groups thereof, adapted to the type or purpose of artificial island, structures and facilities or groups thereof, and cables and pipelines extending not more than 500 metres from any point of the outer edge of the entities, unless international standards or recommendations by competent international organisations permit a different range (Article 24(1) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).

In the context of activities involving the exploration, identification, and exploitation of hydrocarbons from deposits within the maritime areas of the Republic of Poland, the director of a maritime office is authorised to establish, by ordinance, a safety zone around the plant and mining facility as defined by the Act of 9 June 2011 – Geological and Mining Law[30] (Article 24a(1) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).

The territorially competent director of the maritime office is also empowered to issue, by decision, a permit for laying and maintaining cables or pipelines within internal maritime waters and the territorial sea, specifying their location

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[28] Cf. Godecki, Z., 'Problemy prawne ustroju administracji morskiej', *Prawo morskie*, 2014, Vol. XXX, pp. 21–22.

[29] Thus Młynarczyk, J., *Prawo morskie*, Gdańsk, 2002, pp. 52–53; Koziński, M.H., *Morskie prawo publiczne*, Gdynia, 2002, p. 63.

[30] Consolidated text, Journal of Laws of 2024, item 1290.

and conditions for maintenance in these areas (Article 26(1) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).

Temporary occupation of internal maritime waters or the territorial sea for implementing projects related to transport, energy, recreation, tourism, or water sports infrastructure also requires a permit, granted by decision of the territorially competent director of the maritime office (Article 27r(1) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).

Obtaining permission from the director of the relevant maritime office is also necessary for individuals or organisational units without legal personality to engage in searching for shipwrecks or their remains (Article 35a(1) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).

Having consulted the relevant municipal councils, the director of the relevant maritime office, by means of an ordinance, determines the boundaries of the technical belt[31] in areas managed by organisational units subordinate to the Minister of National Defence; and, having obtained the opinions of these units, demarcates the boundaries of the technical belt in the area. He also determines, by means of an ordinance, the boundaries of the protective belt,[32] having agreed on this with the relevant voivode and county councils in areas managed by organisational units subordinate to the Minister of National Defence; and, having obtained the opinions of these units, demarcates the boundaries of the protective belt (Article 36(5) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).

In turn, water-related legal permits, the filing or non-filing of objections to the acceptance of a water-related legal application, water-related legal assessments, decisions on construction and land development conditions, building permits, and decisions on changes to afforestation, tree cover, and the creation of hunting districts, as well as draft general county plans, local spatial development plans, and voivodeship spatial development plans regarding the technical belt, the protective belt, and sea harbours and marinas, require agreement with the director of the relevant maritime office (Article 37(3) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).[33]

The director of the maritime office is the first-instance body that issues administrative decisions in matters within the jurisdiction of maritime administration bodies, handled in the course of administrative proceedings. Appeals against decisions issued by this body are addressed by the minister responsible for maritime

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[31] The technical belt is a zone of direct interaction between the sea and land, designated to maintain the shore in a condition that meets safety and environment protection requirements. Together with the protective belt, it forms part of the coastal belt, which is the land area adjacent to the sea coastline (Article 36(1) and (2)(1) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).

[32] The protective belt covers the area where human activity has a direct impact on the condition of the technical belt (Article 36(2) (2) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration). The minimum and maximum widths of the technical and protective belts, along with the methods for determining their boundaries, are laid down in the Regulation of the Council of Ministers of 29 April 2021 concerning the Minimum and Maximum Widths of the Technical and Protective Belts and the Methods of determining Their Boundaries, Journal of Laws of 2021, item 871.

[33] Cf. Karpiuk, M., 'Niezespolona administracja…', op. cit., p. 146.

economy (currently the Minister of Infrastructure) as the superior body in the two-tier hierarchy of maritime administration. However, specific provisions may stipulate situations where the minister responsible for maritime economy acts as the first-instance authority. In such cases, a party dissatisfied with the decision issued by this supreme first-instance authority may request that the case be re-examined by the same body.[34] Decisions of appellate bodies may be further appealed to the territorially competent Voivodeship Administrative Court, which hears the case in accordance with the provisions governing proceedings before administrative courts.[35]

After obtaining the opinions of county councils and state border protection bodies, directors of maritime offices also determine the boundaries of marinas. However, the maritime boundaries of sea harbours and their roadsteads, excluding war ports, and, after consultation with the relevant county councils, the land boundaries of sea harbours, are determined by the supreme maritime administration body, i.e., the minister responsible for maritime administration (currently the Minister of Infrastructure) (Article 45(1) and (2) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration.

As highlighted in the doctrine, the division of competences between the minister and the director of the maritime office in determining the boundaries of harbours and marinas reflects the position of these bodies within the governmental administration system. Sea harbours are of strategic importance for state security; therefore, a hierarchically higher authority is responsible for determining their boundaries. Marinas, being of lesser strategic importance, have their boundaries determined by the director of the maritime office.[36]

Directors of maritime offices may issue legal acts in the form of ordinances or order-keeping regulations. Article 47 of the Act on Maritime Areas of the Republic of Poland and Maritime Administration stipulates that, based on authorisations granted in statutes, directors of maritime offices shall issue ordinances that must be published in the voivodeship official journal relevant to the territorial scope of the ordinance. This act of local law comes into force 14 days after its announcement, unless it specifies a different date or a date laid down by the statute on which it is based. The director of the maritime office may also issue order-keeping regulations within the scope of his competences as specified in Article 42(2) of the Act, provided it is necessary for the protection of life, health, property, national defence and security, the maritime environment, sea harbours and marinas, the technical belt, and navigation. These regulations include prohibitions and obligations regarding

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[34] Article 127 § 3 Act of 14 June 1960 – Code of Administrative Procedure (consolidated text, Journal of Laws of 2024, item 572) stipulates that the decision issued in the first instance by the minister or the local government appeals board cannot be appealed against. However, the dissatisfied party may request that the decision be re-examined by the authority; the request for re-examination is subject to relevant regulations concerning appeals against decisions.

[35] For more see: Act of 30 August 2002 – Law on the Proceedings before Administrative Courts (consolidated text, Journal of Laws of 2024, item 935); Trzcińska, D., Mierzejewski, P., 'Dyrektor urzędu morskiego jako organ administracji morskiej', *Prawo Morskie*, 2006, Vol. XXII, p. 223.

[36] Karpiuk, M., 'Niezespolona administracja…', op. cit., pp. 149–150.

specific conduct. Additionally, through these regulations, the director of the maritime office may create and declare zones temporarily closed to navigation, fishing, water sports, and diving within the office's territorial jurisdiction and the boundaries of internal maritime waters and the territorial sea. Order-keeping regulations should be formalised as order-keeping ordinances, which take effect on the date specified, but not earlier than the date of their announcement, and must be published in the voivodeship official journal relevant to the territorial scope of the ordinance.

If an order-keeping ordinance needs to come into force immediately, it may be published as announcements in places where it applies, broadcast on the radio, and disseminated in any customary way used in maritime navigation or in a given area. The publication date of an order-keeping ordinance is considered the date of its announcement. Subsequently, such an ordinance, initially announced in this manner, is also published in the relevant voivodeship official journal (Article 48 of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).[37]

As rightly noted in the doctrine, contrary to the implication of the title of Chapter III of Section III of the Act on Maritime Areas of the Republic of Poland and Maritime Administration: 'Regulations Issued by the Territorial Maritime Administration Bodies', which begins with Article 47, there are no provisions in this chapter that authorise the issuance of the ordinances referred to therein. These authorising provisions are instead found elsewhere in the Act and in other legislative acts. This means that with the use of the provision of Article 47(1) and (2) of the Act the legislator only decided that provisions issued under the relevant authorisations within this statute and other current and future acts should be termed 'ordinances'.

Among the provisions of the Act that authorise directors of maritime offices to issue appropriate legal acts, only Article 3b(1), Article 24(1), Article 24a(1), Article 36(5), and Article 50a(1) include the phrase 'by means of an ordinance'. However, for instance, Article 45(2) does not contain this phrase. In such cases, there is a statutory *superfluum*, as in general it is Article 47(2) that dictates that directors of maritime offices should issue implementing regulations in the form of ordinances. Nonetheless, it could be argued that Article 47(2) is redundant and that the phrase 'by means of an ordinance' should consistently be included in all statutory provisions authorising directors of maritime offices to issue such local legal acts, as seen in the aforementioned provisions.[38]

Under the discussed Act, directors of maritime offices are also empowered to impose fines specified in Articles 55–56c, by means of an administrative decision, which may be appealed to the competent minister for maritime economy. In principle, except for Article 56a(1) and Article 56b, the decision is immediately enforceable.

The amount of fines is determined by the director of the maritime office, taking into account the scope of the violation, the repeatability of violations, or the financial benefits obtained therefrom (Article 57 of the Act on Maritime Areas of the Republic of Poland and Maritime Administration).

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[37] Trzcińska, D., Mierzejewski, P., 'Dyrektor urzędu…', op. cit., pp. 223–224.

[38] Cf. Godecki, Z., 'Problemy prawne…', op. cit., p. 22.

The competences of directors of maritime offices extend beyond the provisions of the Act on Maritime Areas of the Republic of Poland and Maritime Administration.

In accordance with Article 12 § 2 of the Maritime Code, the name given to a ship by the owner is subject to approval by the director of the maritime office competent for the ship's home port, by means of an administrative decision (with the exception of the name of a sea ship used exclusively for sports or recreational purposes with a hull length of up to 24 metres, which is not subject to approval).[39]

In accordance with Article 39 of the Maritime Code, the director of the maritime office is authorised to maintain a register of sea vessels, commonly known as an administrative register,[40] and acts as a measurement authority responsible for measuring ships of Polish nationality and issuing measurement certificates (Article 48 § 1 of the Maritime Code).

Another significant competence of the director of the maritime office is the authority to remove a pilot from the register of pilots in the following circumstances: the pilot's death, the pilot's request, loss of the required qualifications, or loss of the right to practise as a pilot pursuant to a final and binding decision of a maritime chamber, court, or another competent authority (Article 228 § 2 of the Maritime Code).

The director of the maritime office must also be notified of the intention to recover property (a ship, cargo, or other items) sunk in Polish internal waters or the Polish territorial sea (Article 282 of the Maritime Code).[41]

In turn, Article 10 of the Act of 5 August 2015 on Work at Sea authorises the director of the maritime office to issue seaman's books.

According to Articles 34 and 35 of the Act of 16 April 2004 on the Protection of Nature, the director of the maritime office, provided that it is justified by the necessary requirements of overriding public interest and there are no alternative solutions, may consent to the implementation of a plan or project in maritime areas that may negatively impact the natural habitat and species of plants and animals for which the Natura 2000 area has been designated. This consent must ensure the implementation of nature compensation necessary to maintain the coherence and proper functioning of the Natura 2000 network. When issuing such a permit, the director of the maritime office specifies the scope, location, date, and method for performing the nature compensation.[42]

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[39] Cf. Koziński, M.H., *Kodeks morski. Konwencje międzynarodowe i akty wykonawcze*, Gdynia, 2005, pp. 37–38.

[40] Koziński, M.H., 'Rejestry okrętowe w Rzeczypospolitej Polskiej', *Prawo Morskie*, 2005, Vol. XXI, p. 259 *et seq*.

[41] For more see Łuczywek, C., Pyć, D., in: Łuczywek, C., Pyć, D., Zużewicz-Wiewiórowska, I. (eds), *Kodeks morski. Komentarz*, Warszawa, 2022, pp. 974–984; Trzcińska, D., Mierzejewski, P., 'Dyrektor urzędu…', op. cit., p. 226.

[42] Nature compensation, in accordance with Article 3(8) of the Act of 27 April 2001 – Environment Protection Law (consolidated text, Journal of Laws of 2024, item 54), as amended, means a set of activities, in particular, construction works, earthworks, soil reclamation, afforestation, tree planting or the creation of vegetation clusters. These activities aim to restore the natural balance in a given area and to compensate for the environmental damage caused by projects implementation, as well as to preserve landscape values; Trzcińska, D., Mierzejewski, P., 'Dyrektor urzędu…', op. cit., pp. 226–227.

CONCLUSIONS

The study of issues concerning directors of maritime offices as local maritime administration bodies has led to the following conclusions:

1. Directors of maritime offices are bodies of autonomous governmental administration, as specified in Article 56(1) of the Act of 23 January 2009 on the Voivodes and Governmental Administration in the Voivodeships. Being part of autonomous administration implies, as the name suggests, that there is no element of unification or subordination to a voivode, who acts as the main representative of the Council of Ministers in the region, but rather to the competent ministers or central governmental administration bodies.
2. Supervision over directors of maritime offices as local maritime administration bodies is exercised by the minister responsible for maritime economy (currently the Minister of Infrastructure), who serves as the supreme maritime administration body (Article 38 of the Act of 21 March 1991 on Maritime Areas of the Republic of Poland and Maritime Administration). Consequently, directors of maritime offices are obliged to comply with orders issued by this minister as a higher authority.
3. The supervision exercised by the minister responsible for maritime economy (currently the Minister of Infrastructure) over directors of maritime offices is further demonstrated by Article 39(2) of the Act of 21 March 1991 on Maritime Areas of the Republic of Poland and Maritime Administration, which states that directors of maritime offices are appointed and dismissed by the minister responsible for maritime economy (currently the Minister of Infrastructure). Deputies of directors of maritime offices are appointed by the minister responsible for maritime economy upon the request of the directors of maritime offices.
4. The competences of directors of maritime offices are extensive, supporting the positive verification of the research hypothesis presented in the article. These competences stem not only from the Act of 21 March 1991 on Maritime Areas of the Republic of Poland and Maritime Administration but also from other legislation, such as the Maritime Code, the Act of 5 August 2015 on Work at Sea, or the Act of 16 April 2004 on the Protection of Nature. For instance, directors of maritime offices are authorised to oversee fire protection in Polish maritime areas as well as in sea harbours and marinas (Article 50a(1) of the Act on Maritime Areas of the Republic of Poland and Maritime Administration); to impose fines stipulated in Articles 55–56c of the same Act by means of administrative decisions, which can be appealed to the minister responsible for maritime economy; to maintain a register of sea vessels, commonly referred to as an administrative register (Article 39 of the Maritime Code); and to issue seaman's books (Article 10 of the Act of 5 August 2015 on Work at Sea).

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COMMENT ON THE JUDGMENT OF THE SUPREME COURT OF 20 JUNE 2023, I KS 15/23

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Abstract

This study focuses on the issue of evidentiary proceedings before the appellate court in Polish criminal procedure. As a result of the considerations undertaken, the author expresses approval of the position of the Supreme Court, according to which the appellate court, upon finding specific content deficiencies in certain personal and non-personal evidence, is not only authorised but also obliged to conduct evidentiary proceedings autonomously. The provision of Article 452 of the Code of Criminal Procedure serves as the fundamental criterion for assessing the validity of this view. The application of the historical method in the interpretation process indicates that the repeal of the first section of Article 452 of the Code of Criminal Procedure, which previously stated that 'the appellate court may not conduct evidentiary proceedings as to the substance of the case,' contributed to establishing the principle of the appellate court conducting evidence hearings on the merits. The argumentation in this regard is enriched by the joint interpretation of Article 427 § 3 of the Code of Criminal Procedure in connection with Article 452 § 2 and 3 of the Code of Criminal Procedure.

Keywords: appellate court, evidentiary proceedings, model of appellate proceedings, evidence, principle

ARGUMENT

Upon finding specific content deficiencies in certain personal and non-personal evidence, the Court of Second Instance was both authorised and obliged to conduct the evidentiary proceedings autonomously, as the current regulations governing

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appellate proceedings, including those arising from Article 452 of the Code of Criminal Procedure, allow significant scope for the reformative court of appeal to adjudicate, based also on evidence taken exclusively at this stage of the proceedings. Changing the judgment of the court of first instance, including upholding it, is precluded only if the entire judicial process had to be conducted in the appeal proceedings, such that all the evidence had to be heard anew.

GLOSS

The thesis of the judgment under discussion concerns the issue of the appellate court conducting evidentiary proceedings on the merits of a case. It thus resolves an important issue from both theoretical and practical perspectives, warranting a more in-depth analysis. The matter raised focuses on the interpretation of Article 452 of the Code of Criminal Procedure. Applying the historical method in the interpretation process is crucial, as only through this approach can the current model of appellate proceedings in Polish criminal procedure be accurately presented. The implications of this analysis are important, as they provide a basis for endorsing the judgment's thesis.

The aforementioned historical method, applied as a priority in this analysis, relates to the normative change introduced by Article 452 of the Code of Criminal Procedure. The first section of this provision, which stated that 'the appellate court may not conduct evidentiary proceedings on the merits of the case,'[1] was repealed by Article 1(159)(a) of the Act of 27 September 2013 amending the Code of Criminal Procedure and Certain Other Acts.[2] The Supreme Court, therefore, rightly concluded, based on the change outlined above, that the appellate court is now not only authorised but also obliged to conduct evidentiary proceedings. The principle of the appellate court conducting evidentiary proceedings on the merits, established as a result of this change, was also affirmed in the Supreme Court's judgment of 4 July 2019, V KS 18/19,[3] which expressed the following view:

> '[…] the court of appeal itself hears the evidence and, not in order to hear it, sets aside the contested judgment and refers the case to the court of first instance for reconsideration.'

An analogous position, which serves as the basis for inferring the validity of the rule regarding evidence on the merits of the case by the court of second instance, arises from the use of a mandatory formula indicating an obligation. This position is also reflected in the judgment of the Supreme Court of 16 January 2024, II KS 59/23,[4] in which it was stated:

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1 Journal of Laws of 1997, No. 89, item 555.
2 Journal of Laws of 2013, item 1247.
3 Judgment of the Supreme Court of 4 July 2019, V KS 18/19, LEX No. 2691651.
4 Judgment of the Supreme Court of 16 January 2024, II KS 59/23, LEX No. 3656091.

> 'Currently, the rule is to conduct supplementary evidentiary proceedings before the court of second instance and to issue a reformatory ruling, while the setting aside of the judgment of the court of first instance, based on the premise of Article 437 § 2 *in fine* of the Code of Criminal Procedure , should only occur in exceptional circumstances, where it is impossible to issue an accurate decision without renewing all the evidence.'

In connection with the above, the question arises as to whether the normative change presented at the outset – namely, the repeal of § 1 of Article 452 of the Code of Criminal Procedure – constitutes the sole legal argument supporting the reasoning adopted in the commented judgment. Specifically, does it establish not only the possibility but, more importantly, the obligation for the appellate court to take evidence? In fact, the conclusion in this matter stems from the research focused on the legislative process, which began with the Act of 27 September 2013 amending the Code of Criminal Procedure and Certain Other Acts,[5] continued with the Act of 11 March 2016 amending the Code of Criminal Procedure and certain other acts,[6] and concluded with the Act of 19 July 2019 amending the Code of Criminal Procedure and Certain Other Acts.[7] These acts are fundamental to the question of the admissibility of evidence on the merits of the case by the appellate court, as they contain provisions crucial to the scope of evidentiary proceedings at the appellate level. They implicitly deserve consideration when analysing the issues addressed in the commented judgment. Before presenting a detailed account of the normative modifications in question, it is important to emphasise that the quantitative changes, as reflected in these three amendments, provide a basis for addressing the question posed above. The aforementioned amendments to the 1997 Code of Criminal Procedure allow for the conclusion that the obligation of the appellate court to hear evidence does not stem solely from the repeal of the prohibition against conducting evidentiary proceedings on the merits of the case by the appellate court, a change effected by the Act of 27 September 2013 amending the Act – Code of Criminal Procedure and Certain Other Acts.[8] Rather, it is also the result of the interpretation and assessment of further normative changes introduced between 2016 and 2019. Although the lifting of the ban on conducting evidentiary proceedings on the merits of the case by the appellate court is a fundamental change and justifies the thesis discussed, further analysis of subsequent normative changes is necessary for two reasons. First, it confirms the validity of the rule requiring the appellate court to conduct evidentiary proceedings and demonstrates its practical applicability, thereby assessing the second aspect not only from a theoretical legal perspective but also from the viewpoint of its practical implementation. Second, the legislative changes undertaken and subsequently made more realistic by their implementation allow for the determination of the extent to which this principle has been realised. This is connected to defining the scope of permissible evidence on the merits of the case in appellate proceedings.

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5 Journal of Laws of 2013, item 1247.

6 Journal of Laws of 2016, item 437.

7 Journal of Laws of 2019, item 1694.

8 Article 56 of the Act of 27 September 2013 amending the Act – Code of Criminal Procedure and Certain Other Acts: 'The act enters into force on 1 July 2015, with the exception of […].'

The process of deduction regarding the established principle of conducting evidentiary proceedings on the merits of the case, as confirmed by the thesis of the judgment under consideration, requires deeper analysis. This analysis should be based on an assessment of the issues through the prism of appellate proceedings models, which are fundamental in this respect. The core of the subject matter stems from a view expressed in the doctrine, according to which 'it is the scope of admissible evidence that determines the model, and not the model that determines the scope of evidence.'[9] In the context of this view, a further question arises: how have the normative changes, particularly the abolition of the ban on conducting evidentiary proceedings on the merits of the case, and subsequent modifications within Article 452 of the Code of Criminal Procedure, influenced the shape of the appellate proceedings model? A correct analysis of the legal provisions regulating evidentiary proceedings before the appellate court cannot be made without considering the normative conditions within which – according to the legislator's assumption – appellate review should occur. To answer the above question correctly, it is necessary to present the scope and meaning of the term 'appeal proceedings model', identify its types, and characterise the fundamental assumptions of these models. In this respect, the views expressed in the literature are indispensable, as they clarify the fundamental issues relevant to this analysis. The term 'model', which serves as the starting point, is defined by S. Waltoś as 'a set of basic elements of a certain system, allowing it to be distinguished from other systems'.[10] Another linguistic approach to this term offers the view that 'the concept of a (theoretical) model, in an abstract sense, should be understood as a hypothetical construction that maps a given type of reality in a simplified way, reducing its features to the most important connections […] the term model refers to both a set of important variables and specific functional connections between them.'[11] These views form the basis for distinguishing a narrower concept: the 'appeal proceedings model', defined as 'a set of statements characterising and distinguishing the essential features of a specific appeal procedure'.[12] According to Z. Doda, this constitutes the totality of the powers and limitations of the court of appeal concerning the scope of the examination and resolution of the case.[13] The basic criterion for dividing models of appeal proceedings is whether the court of appeal is entitled to

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[9] Hofmański, P., Zabłocki, S., 'Dowodzenie w postępowaniu apelacyjnym i kasacyjnym – kwestie modelowe', in: Grzegorczyk, T. (ed.), *Funkcje procesu karnego. Księga Jubileuszowa Profesora Janusza Tylmana*, Warszawa, 2011, p. 468. See also Świecki, D., *Bezpośredniość czy pośredniość w polskim procesie karnym. Analiza dogmatycznoprawna*, Warszawa, 2013, p. 254; Kwiatkowski, Z., 'Evidentiary proceedings before an appellate court in the Polish criminal trial', *Ius Novum*, 2016, No. 2, p. 112.

[10] Waltoś, S., *Model postępowania przygotowawczego na tle prawnoporównawczym*, Warszawa, 1968, p. 9.

[11] Fingas, M., *Orzekanie reformatoryjne w instancji odwoławczej w polskim procesie karnym*, Warszawa, 2016, p. 22.

[12] Kaftal, A., 'W sprawie modelu środków odwoławczych', *Państwo i Prawo*, 1973, No. 8–9, p. 181.

[13] Doda, Z., Gaberle, A., *Kontrola odwoławcza w procesie karnym. Orzecznictwo Sądu Najwyższego. Komentarz*, Warszawa, 1997, p. 58.

examine the contested judgment from a legal or factual perspective. The doctrine[14] distinguishes three basic models of appeal proceedings: appellate, cassation and revision. The essence of the appellate model lies in the assumption that the court of appeal, as a substantive court, reconsiders the case. Implicitly, within the appellate proceedings, the evidentiary proceedings are repeated in line with the model of proceedings before the court of first instance.[15] In the revision model, where the appeal proceedings are two-tiered, the court of appeal does not, in principle, conduct evidentiary proceedings on the merits of the case; only in exceptional circumstances does it supplement the judicial proceedings.[16] This model typically operates under a scheme where the prohibition on conducting evidentiary proceedings on the merits of the case by the court of appeal is the rule, with exceptions limited to the possibility of hearing individual pieces of evidence. In the literature on the cassation model, it is stated that: 'In the cassation model of appeal proceedings, the ruling is subject to review only in legal terms (substantive law and procedural law). Therefore, the court of cassation does not examine the correctness of factual findings and does not make such findings independently. Accordingly, it does not hear evidence on the merits of the case either. The court of cassation does not conduct evidentiary proceedings at all.'[17] This summary of the main assumptions of the classical models of appeal proceedings provides the foundation for drawing conclusions about the current shape of Polish criminal procedure. Such conclusions should be based on a joint analysis of Article 427 § 3 of the Code of Criminal Procedure in conjunction with Article 452 of the Code of Criminal Procedure, as these provisions are fundamental to the issue of evidentiary proceedings on the merits of the case, determining its actual scope. The first key issue concerns the abolition of the ban on conducting evidentiary proceedings on the merits of the case by the court of appeal. This represented a fundamental change. The principle in question, as can be seen from the above list, characterised the revision model. Its abolition should therefore be assessed as an expression of the desire to enhance the appellate nature of the appeal proceedings. However, this is not the only change that supports such a belief. The reasoning in this area is also based on the joint analysis of Article 427 § 3 of the Code of Criminal Procedure and Article 452 §§ 2 and 3 of the Code of Criminal Procedure. While Article 427 § 3, which establishes the institution of evidentiary preclusion, may *prima facie* impose significant limitations on the scope of conducting evidentiary proceedings *in concreto*, the interpretative rule that decodes the *ratio legis* of this provision is set out in Article 452 § 3 of the Code of Criminal Procedure.[18]

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[14] Kotowski, A., 'Skarga nadzwyczajna na tle modeli kontroli odwoławczej', *Prokuratura i Prawo*, 2018, No. 9, pp. 51–85; Świecki, D., *Apelacja w postępowaniu karnym*, Warszawa, 2012, pp. 16–17.

[15] Świecki, D., *Konstrukcja apelacji jako środka odwoławczego w procesie karnym*, Warszawa, 2023, p. 30.

[16] Ibidem, p. 31.

[17] Świecki, D., 'Zakres postępowania dowodowego w instancji odwoławczej', in: Steinborn, S. (ed.), *Postępowanie odwoławcze w procesie karnym – u progu nowych wyzwań*, Warszawa, 2016, p. 277.

[18] Article 452 § 3 added by Act of 19 July 2019 amending the Act – Code of Criminal Procedure and Certain Other Acts (Journal of Laws of 2019, item 1694).

The internal reference in Article 452 § 3 to Article 452 § 2(2) should be interpreted in such a way that, even if the condition for applying the legal consequences of evidentiary preclusion is met ('The court of appeal shall also dismiss the evidentiary motion if: […] the evidence was not adduced before the court of first instance, despite the fact that the applicant could have adduced it at that time, or the circumstance to be proven concerns a new fact that was not the subject of the proceedings before the court of first instance, and the applicant could have indicated it at that time' – Article 452 § 2(2)), the court of appeal may not dismiss the evidentiary motion 'if the circumstance to be proven, within the limits of the examination of the case by the court of appeal, is of significant importance for determining whether a prohibited act was committed, whether it constitutes an offence and what kind of offence, whether the prohibited act was committed under the conditions referred to in Article 64 or Article 65 of the Penal Code, or whether there are conditions for ordering a stay in a psychiatric facility under Article 93g of the Penal Code' (Article 452 § 3). Implicitly, this prohibition is activated in every procedural arrangement where a circumstance significant to the accused's guilt or commission of the act is subject to proof. In interpreting Article 452 § 2(2), particular attention should be drawn to the linguistic coherence and the identical approach to evidentiary preclusion based on Article 427 § 3. A joint reading of the above-quoted legal norms, enriched by reasoning based on the historical method, which lifted the prohibition of proof on the merits by the appellate court, leads to the conclusion that the Supreme Court rightly found in the commented judgment that the appellate court is currently not only authorised, but also obliged to conduct evidentiary proceedings where deficiencies in the evidence are revealed at the appellate review stage.

The content of the glossed thesis also compels us to consider the type of evidence that the appellate court is competent to conduct. The Supreme Court's distinction between the right and, at the same time, the obligation of the second-instance court to conduct both personal and non-personal evidence is correct. The issue of evidentiary proceedings before the appellate court, due to its significant importance for the practice of law application, should focus not only on the correct determination of the scope of admissible evidence as to the substance of the case but also on establishing what evidence the appellate court is competent and obliged to conduct. These elements are legally interrelated – the substantive interdependence of these two issues necessitates emphasising that, for the issue to be addressed in a manner that allows for the *in concreto* application of the principle of conducting evidentiary proceedings as to the substance of the case, it requires not only the indication of the appropriate legal basis that permits evidentiary proceedings at the appellate level and determines its extent but also a determination of whether there are any generic limitations to the scope of evidence conducted in a higher instance. These outlined issues have been subject to judicial analysis since the application of Article 452 § 2 of the Code of Criminal Procedure in its original form as given by the legislator. The clause established by Article 452 § 2 of the Code of Criminal Procedure, which at that time stated, 'The appellate court may, however, in exceptional cases, recognising the need to supplement the judicial proceedings, hear evidence at a hearing if this will contribute to the acceleration of the proceedings, and it is not necessary to

conduct the proceedings anew in whole or in significant part. Evidence may also be admitted before the hearing,'[19] served as a basis for reasoning on its application, despite the existing ban on conducting evidentiary proceedings on the merits of the case (Article 452 § 1 of the Code of Criminal Procedure).[20] Therefore, given that this subject was of significant importance under conditions where there was a ban on evidentiary proceedings on the merits of the case, alongside the clause on supplementing judicial proceedings – i.e., within a model of appeal proceedings that allowed for limited evidence-taking by the appellate court – its importance is even greater under the current rule permitting evidentiary proceedings on the merits of the case by the appellate court. The interpretative direction established in case law under the original wording of Article 452 of the Code of Criminal Procedure should, for these reasons, be adopted into the interpretation and application process of the principle of conducting evidentiary proceedings on the merits of the case, following changes to the appeal proceedings model.

The perspective presented in the thesis under discussion – that the court of appeal should, if necessary under specific procedural circumstances, hear evidence of both a personal and non-personal nature – is, in effect, a reflection of views expressed regarding the type of evidence that may be heard in appeal proceedings conducted in the spirit of revision. This assertion is supported by the Supreme Court's decision of 2 February 2006, file reference II KK 284/05,[21] wherein the Supreme Court stated:

> 'The decision of the appellate court to conduct additional evidentiary proceedings or to refrain from conducting them should always be preceded by a detailed analysis and, if necessary, verification of the premises underlying it, and an attempt to specify the circumstances to be proven by the requested evidence or evidence conducted *ex officio*. This may involve new evidence or the repetition of evidence, whether from a personal or material source.'

The relevance of the view is expressed by the idea of equality between personal and material evidence accepted on this basis, which may be conducted by the appellate court and, in this part, does not require modification for its use as an interpretative guide in the process of determining the method of realising the currently permissible scope of evidence by the appellate court. Moreover, it should be noted that 'material' evidence refers to 'non-personal' evidence, as mentioned in the glossed thesis. Verification of the position expressed in the judgment quoted above, and its adjustment to the current legal reality, requires considering that the appellate court now conducts evidentiary proceedings on the merits of the case and does not merely supplement them under conditions of a ban on such evidence.

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19 Journal of Laws of 1997, No. 89, item 555.

20 Ibidem.

21 Order of the Supreme Court of 2 February 2006, II KK 284/05, LEX No. 176040.

It should also be noted that the doctrine[22] and case law[23] recognise evidence that may be conducted in appeal proceedings, including: witness testimony, expert opinions, the explanations of the accused, and documentary evidence.

In light of the considerations presented thus far, the view expressed by the Court of Appeal in Szczecin, based on its judgment of 12 July 2018, II AKa 92/18,[24] which holds the following position, is also worthy of acceptance:

> '[…] In appeal proceedings there are no restrictions on the use of sources of evidence, and the court *ad quem*, when taking evidence at the appeal hearing, acts primarily as a substantive court.'

To conclude the above considerations, and taking into account the content of selected judgments illustrating the types of evidence that may be taken by the court of appeal, it should be noted that the Supreme Court rightly stated in the glossed judgment:

> 'In the event of finding specific content deficiencies in some of the personal and non-personal evidence, the court of second instance was both entitled and obliged to conduct evidentiary activities autonomously, since the currently applicable regulations of the appeal proceedings, including those resulting from Article 452 of the Code of Criminal Procedure, indicate significant possibilities for rulings by the reformative court of appeal, also based on evidence taken exclusively at this stage of the proceedings.'

The principle of conducting evidentiary proceedings on the merits of the case, confirmed by the thesis of the glossed judgment and the conclusion about the substantive nature of the appeal proceedings, has sparked a discussion on the compliance of the rule allowing the second-instance court to conduct evidence with the principle of two-instance proceedings, as established by normative changes. Against the background of the glossed thesis, a question arises as to whether the broad evidentiary powers granted to the appellate court by the criminal procedure act, linked with the obligation to conclude the appeal proceedings on the merits, generally reflect respect for the constitutional principle of two-instance court proceedings. This aspect relates to Article 176(1) of the Constitution of the Republic of Poland, which states, 'Court proceedings shall have at least two instances,'[25] thereby designating its source. The reasoning presented in the case law of the Constitutional Tribunal is fundamental for determining how the principle of

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[22] Marszał, K., 'Glosa do uchwały SN z dnia 24 stycznia 2001 r., I KZP 47/2000', *Państwo i Prawo*, 2001, No. 10, p. 115; Świecki, D., 'Glosa do postanowienia SN z dnia 15 października 2003 r., III KK 271/02', *Orzecznictwo Sądów Polskich*, 2004, No. 9; Klejnowska, M., 'Glosa do postanowienia SN z dnia 15 października 2003 r., III KK 271/02', *Państwo i Prawo*, 2004, No. 9; Woźniewski, K., 'Glosa do postanowienia SN z dnia 4 stycznia 2005 r., V KK 388/04', *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2005, No. 3, pp. 91–96.

[23] Judgment of the Supreme Court of 17 June 2003, V KK 162/02, Legalis No. 58097; judgment of the Supreme Court of 18 June 2003, IV KKN 272/00, LEX No. 80289.

[24] Judgment of the Administrative Court in Szczecin of 12 July 2018, II AKa 92/18, LEX No. 2544933.

[25] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended).

two-instance proceedings is respected within the appellate procedure model that predominantly features appellate elements.

In this regard, the position presented by the Constitutional Tribunal in its judgment of 13 July 2009, SK 46/08,[26] is especially noteworthy, as it provides the following interpretation of the principle of two-instance proceedings from the perspective of appeal proceedings akin to the appellate:

> 'The Constitutional Tribunal states that Article 176(1) of the Constitution establishes the principle of two-instance court proceedings, which entails: (1) access to a second instance (granting the parties a means of appeal); (2) entrusting the examination of the second-instance case to a higher court. According to the Tribunal's case law, the principle of two-instance proceedings ensures the review of the decision made by the first-instance court through a double assessment of the factual and legal state of the case and an evaluation of the correctness of the position adopted by the first-instance court.'

The acceptance of the above view by the Constitutional Tribunal is reflected in the Supreme Court's case law.[27] In the context of the view presented, the perspective offered in the doctrine of criminal procedural law is also notable,[28] in light of which:

> '[…] the principle of two-instance court proceedings is perceived formally, not substantively.'

This view deserves approval, as it aligns with the constitutional approach to the principle of two-instance proceedings. Article 176(1) of the Constitution of the Republic of Poland expresses only the obligation to create legal regulations that establish the right to appeal a judgment. However, the normative provision does not outline a specific model of appellate proceedings that would inherently implement the principle. Therefore, it can be concluded that the thesis of the glossed judgment respects both the current legal regulations of the Code of Criminal Procedure of 1997 concerning evidentiary proceedings before the appellate court in Polish criminal proceedings and the constitutional principle of two-instance proceedings.

To summarise the above considerations, it should be stated that the Supreme Court rightly indicated that the court of appeal is currently obliged to conduct evidentiary proceedings when deficiencies in the evidentiary material of the case are disclosed. This obligation is determined by the nature of the current model of appeal proceedings, which, through the absence of a ban on evidence relating to the substance of the case and significant limitations on the application of evidentiary preclusion (Article 427 § 3 and Article 452 § 2(2) of the Code of Criminal Procedure), underscores its appellate character.

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[26] Judgment of the Constitutional Tribunal of 13 July 2009, SK 46/08, OTK-A 2009, No. 7, item 109.

[27] For example, judgment of the Supreme Court of 15 November 2017, IV KS 5/17, LEX No. 2410631.

[28] Mierzejewski, Z., 'Reguły *ne peius* z art. 454 k.p.k. po zmianie modelu postępowania odwoławczego w sprawach karnych – uwagi *de lege lata* oraz *de lege ferenda*', *Przegląd Sądowy*, 2019, No. 9, p. 56.

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