Ladies and Gentlemen,

The special edition of „Casus” the Quarterly of the National Representation of Local Government Appeal Boards— issued under the auspices of Grzegorz Schetyna – the Marshal of the Polish Sejm, on the occasion of the Polish Presidency in the European Union, includes articles of renowned Polish lawyers, both theorists and practitioners of administrative law. Our intention has been to present Polish achievements in building modern public administration with a particular focus on local government appeal boards. The presentation ends with an article which considers the plausible future developments in public administration.

The origin of local government appeal boards in Poland is closely connected with the 1990 reactivation of local government. In autumn 1990, local government appeal boards assumed their function as the second instance body in the administrative proceedings in individual cases regarding public administration, which cases pertain to the competence of local government units. Initially, appeal boards were attached to the local government (voivodship) councils (sejmik wojewódzki), which appointed the appeal board members and determined their internal governance regulations and operations. Subsequently, they evolved and achieved full financial and organizational autonomy from local self-government bodies, which was guaranteed by the Local Government Appeal Boards Act of 12 October 1994. Establishment of the local government units ensured that the young Polish democracy was founded on the rule of law, and it contributed, at the same time, to the reactivation of the remaining two levels of self-government in Poland.

Nowadays, local government appeal boards are an essential element of the system of public administration in Poland. Their jurisprudence guarantees protection of rights and freedoms of individuals in their relations and dealings with self-government. As any other public administration authorities, the local government appeal boards shall enforce relevant EU laws. As a consequence, their task has been also to correct the rulings of the first instance bodies (i.e. public authorities of the three-level self-government in Poland) if they prove to be incompatible with those laws.

However, local government appeal boards are not only public authorities with statutory tasks to adjudicate in individual cases in public administration and thus to reduce the administrative courts’ load in resolving cases through administrative proceedings. They are also a consolidated legal environment contributing to the development of the administrative legal concepts, which is marked with longstanding co-operation with university communities, judges of Supreme Administrative Court and Voivodship Administrative Courts as shown i.a. in „Casus” quarterly publication.

The body which consolidates the work of the whole sector is the National Representation of Local Government Appeal Boards having - since the inception of appeal boards – its seat located in Krakow. National Representation of Local Government Appeal Boards has invited professors and judges of the Supreme Administrative Court to a permanent co-operation within the Scientific Board of „Casus”. Since 2000, the Scientific Board has actively ensured a high standard of articles published in our Quarterly.

Appeal boards look after respecting the law by local government units and protect citizens of self-government communities in their relations with public authorities. Since appeal boards are very often bodies that apply new administrative laws (e.g. new acts) for the first time, they are also perceived as an important opinion-making units with strong influence on legislative procedures. In particular, we are happy with the understanding of the role of local government appeal boards expressed by the President of the Republic of Poland – Bronisław Komorowski and the Prime Minister of the Polish Government – Donald Tusk. This was confirmed by the invitation of the National Representation of Local Government Appeal Boards to a nationwide debate initiated by the Polish President as part of the forum called „Self-government for Poland”. The debate aimed at preparing reforms in order to modernize the self-government in Poland. We have also been cooperating with the Government of the Republic of Poland, which has been working for a number of years - in dialogue with self-government officials within the Joint Commission of the Government and Local Self-Government - on amendments of the Polish law with this regard. This is only an example of various forms in which our circles contribute to the better functioning of the self-government and public administration in Poland.

Last year the self-government and the local government appeal boards celebrated a jubilee of the twentieth anniversary of their existence. It was an occasion not only to celebrate, but also to recapitulate. The self-government reform is perceived to be one of the most important achievements of our systemic transformation. Also the conclusions stemming from statements of administrative law specialists with regard to the role of local government appeal boards are equivocal. At every opportunity, it is underlined that local government appeal boards are a unique achievement amongst Polish legal administrative concepts and practice.  

I hope that the English edition of the Quarterly „Casus” prepared in co-operation with the Marshal of Małopolska Voivodship Mr Marek Sowa, will contribute to the better understanding of unique achievements of the Polish legal administrative thought and practice among our partners and colleagues in the European Union.

Attorney in Law Krystyna Sieniawska,
President of the National Representation of Local Government Appeal Boards, Editor-in-Chief of „Casus” - the Quarterly of the National Representation of Local Government Appeal Boards

Marek Sowa
Marshal of the Małopolska Voivodship

Ladies and Gentlemen,

Polish Presidency in the European Union is a great challenge for our country and its institutions at every level of public authority. We would like to take advantage of that moment, when the Europe’s and the world’s eyes will be set on Poland. It is an opportunity for promotion in a wide meaning of this word. By promotion, I also understand propagation of particular solutions throughout our system, which are worth to be known and become inspiring for others. Undoubtedly, local government appeal boards are an example of these particular systemic solutions.

A year ago, municipalities and local government appeal boards celebrated a jubilee of the twentieth anniversary of their establishment. Municipalities and local government appeal boards are almost inseparable. In 1989, we shook off the communist yoke and started building an independent state. Local government was an important element of the independent state. It was obvious that without vesting essential part of public tasks to the local communities, modernization of the State would be impossible. It is equally important to note that local government units were to restore the Polish citizens’ trust to public authority, since it was local government units where citizens got in touch with public authority most often. New local government units were entrusted with important tasks and powers. They were able to substantially shape rights and obligations of local inhabitants. They were given a real power to influence everyday life of people through meeting of their collective needs. This responsibility entails the necessity to ensure that the rights of citizens are protected. With this end in view, the two-instance system of administrative proceedings was the best solution. Ever since, the local government appeal boards as the second instance in administrative proceedings have met this challenge excellently. Correctness of their decisions issued after a close scrutiny of each case is often proved by the jurisprudence of the administrative courts hearing appeals against the local government appeal boards’ rulings.

I encourage you to pay attention to the organization of local self-government in Poland, and in particular to local government appeal boards.

I am convinced that their experience is of great value and will be widely used. I wish that all those who plan amendments to Polish law would be aware of their achievements.
TABLE OF CONTENT:

2 Attorney in Law Krystyna Sieniawska, Marshal of the Malopolska Voivodship
    Marek Sowa, Introduction

LOCAL GOVERNMENT

4 Jakub Kornecki, Units of local self-government in Poland and their organs

8 Professor Jerzy Regulski, Ph.D.
    On Revival of Local Government in Poland

12 Mirosław Stec, Ph.D.
    Professor of the Jagiellonian University,
    Decentralisation and unitariness as the principles governing Poland’s territorial structure

16 Iwona Niźnik-Dobosz, Ph.D.
    Professor of the Jagiellonian University,
    The systemic model of decision issuance by authorities of local government entities

20 Irena Lipowicz, Ph.D.
    Professor of the Cardinal Stefan Wyszyński University,
    District vs. Municipality – a Comparison of Systems

LOCAL GOVERNMENT APPEAL BOARDS

23 Attorney in Law Krystyna Sieniawska,
    Local Government Appeal Boards in Numbers

25 Dariusz R. Kijowski, Ph.D.
    Professor of the University of Białystok,
    The Genesis, Evolution and Present Situation of Local Government Appeal Boards

34 Professor Zbigniew Kmieciak, Ph.D.
    Local-government appeal boards – a fortuitous experiment or the natural evolution of institutions of procedural law?

35 Paweł Smoleń, Ph.D.
    Professor of the Catholic University of Lublin,
    Zbigniew Czajka, The Scope of Financial Competences of the Local Government Appeal Boards (Selected Issues)

41 Professor Janusz Borkowski, Ph.D.
    Prospects for local-government appeal boards

43 Monika Niedźwiedź, Ph.D.
    Functioning of local government appeal boards under the conditions of Poland’s membership of the European Union

ADMINISTRATIVE PROCEEDINGS

53 Professor Paweł Sarnecki, Ph.D.
    The two-instance system of administrative proceedings in the light of the provisions of the Constitution of the Republic of Poland of 2nd April, 1997

58 Professor Jan Zimmermann, Ph.D.
    The course of instances in the Polish administrative proceedings

60 Jan Paweł Tarno, Ph.D.
    Professor of the University of Łódź,
    The Role of Local Government Appeal Boards in the Pursuance of the Principle of a Two-instance System of Proceedings

66 Agata Błahuciak, Why changes in public administration management are needed
UNITS OF LOCAL SELF-GOVERNMENT IN POLAND AND THEIR ORGS

JAKUB KORNECKI

Units of local self-government in Poland and their organs

The Constitution of the Republic of Poland as the supreme source of law states that Poland is a unitary state in which the territorial political system shall ensure the decentralization of public power. According to the Constitution the basic territorial division of the State shall be determined by statute taking into consideration social, economic and cultural ties and guaranteeing to the territorial units the capacity to perform their public duties. The Constitution provides that the unit inhabitants of basic territorial division shall form a self-governing community, which participates in the exercise of public authority. The substantial part of public duties which local government is empowered to discharge by statute shall be done in its own name and under its own responsibility. The Constitution provides that the basic unit of self-government in Poland is municipality (gmina). Other levels of local government units are regulated in the acts of a lower order – statutes. According to the relevant statutes these are: district (powiat) and province (województwo). Each of the local government units is equipped with their own tasks and is given part of the public power. Each unit is independent. It is very important, that the units at various levels are not dependent on each other, and are not hierarchically subordinated. Out of their power, organs of each unit have power to issue administrative acts in individual cases. These acts may be appealed from to the local government appeal boards (samorzędowe kolegia odwoławcze).

Municipality (Gmina)

The municipality (gmina) is the only local government level which is directly mentioned in the Constitution. This is the basicin Poland. The municipality performs all the tasks of local self-government not reserved for other local government units. Each municipality carries out two types of tasks: its own tasks, and commissioned ones. Municipality is constituted by its inhabitants. This unit has a legal personality, and its independence is under the judicial protection. The municipality’s regime is regulated by its statutory bylaw enacted by its own legislative body. The borders of the municipalities are set by the Council of Ministers. The Council of Ministers decides also on merging or dividing of the municipalities, as well as granting to them the status of the city, naming or changing their name or the seat of their authorities. Decisions taken by the Council of Ministers require the opinion of the municipal council, preceded by consultation with inhabitants. Municipalities maysolectwa, dzielnice or osiedla. Municipal council creates an auxiliary unit, by the resolution, after consultation with the inhabitants. Municipal Council municipality the consultations with the inhabitants may take place. The tasks of the municipality are all public matters of local importance, not reserved by statutes to other units. There is a presumption that the decisions on matters of local importance belong to the municipalities only. The main own task of the municipality is to satisfy the collective needs of its community inhabitants. The statute lists as own municipality tasks i.a. land use regulations, real estate management, environmental protection and nature conservation, water management, municipal roads, streets, bridges, squares, traffic management, water supply, sewerage, sewage disposal and treated utilities, maintenance of order and cleanliness and sanitation, landfill and waste disposal, supply of electricity and heat and gas, telecommunications activities, local transport, health care, social services, municipal housing, public education, culture, including libraries and other cultural institutions and the protection of monuments and heritage, sports and tourism, markets and market halls, municipal green space, municipal cemeteries, public order and public safety, fire protection and flood control, maintenance of municipal buildings and municipal utility and administrative buildings, self-government, including the creation of conditions for the operation and development of auxiliary units and implementation of programs to stimulate civic participation, promotion of community, cooperation and activities on behalf of NGOs, as well as cooperation with local and regional communities of other countries. In addition to the tasks of their own the statutes may impose on a municipality tasks delegated by the government administration, as well as preparation of organization and conduct of general elections and referendum. By agreement the municipality may take a task belonging to the various organs of government, but also other local government units - districts and provinces. Along with the tasks of the
municipality must receive the necessary funding to implement them. In order to perform their tasks, municipality may create organizational units, and also enter into agreements with other entities, including NGOs.

Public tasks of the municipality may be implemented through cooperation between different local government units. Municipalities may form and join unions or intercommunal associations of local governments to provide assistance to each other or to other units of local government.

The municipality is equipped with a property. The municipality itself manages its finances on the basis of budget resolution. Municipal revenues are defined in the statutes, but they can also be received by self-taxation from inhabitants. Alderman, mayor or president of the city (wójt, burmistrz prezident miasta) is responsible for proper financial management of the municipality. The audit of the financial management of municipalities and their associations is exercised by separate collective bodies – regional chambers of auditors (regionalne izby obrachunkowe). The power in the community may be exercised in two ways, either directly by the people by universal suffrage (through elections and referendum) or indirectly by the organs of the local government unit. These organs are - the municipal council (rada gminy) and the alderman, mayor or president of the city (wójt, burmistrz, prezident miasta).

The municipal council is a legislative body which issues resolutions. This is a collegial body elected for four-year term. Number of council members depends on the number of inhabitants in a municipality and is in the range from 15 to 45 councilors. Within the competence of the municipal council are all matters remaining in the field of the municipality, unless the statute provides otherwise. The resolutions of the council concern: the statutory bylaw, local regulations, its validity, unless the statute provides otherwise. The resolutions. This is a collegial body elected for four-year term. Number of council members depends on the number of inhabitants in a municipality and is in the range from 15 to 45 councilors. Within the competence of the municipal council are all matters remaining in the field of the municipality, unless the statute provides otherwise. The resolutions of the council concern: the statutory bylaw, local regulations, its validity, unless the statute provides otherwise. The resolutions. This is a collegial body elected for four-year term. Number of council members depends on the number of inhabitants in a municipality and is in the range from 15 to 45 councilors. Within the competence of the municipal council are all matters remaining in the field of the municipality, unless the statute provides otherwise. The resolutions of the council concern: the statutory bylaw, local regulations, its validity, unless the statute provides otherwise. The resolutions. This is a collegial body elected for four-year term. Number of council members depends on the number of inhabitants in a municipality and is in the range from 15 to 45 councilors. Within the competence of the municipal council are all matters remaining in the field of the municipality, unless the statute provides otherwise. The resolutions of the council concern: the statutory bylaw, local regulations, its validity, unless the statute provides otherwise. The resolutions. This is a collegial body elected for four-year term. Number of council members depends on the number of inhabitants in a municipality and is in the range from 15 to 45 councilors. Within the competence of the municipal council are all matters remaining in the field of the municipality, unless the statute provides otherwise. The resolutions of the council concern: the statutory bylaw, local regulations, its validity, unless the statute provides otherwise. The resolutions. This is a collegial body elected for four-year term. Number of council members depends on the number of inhabitants in a municipality and is in the range from 15 to 45 councilors. Within the competence of the municipal council are all matters remaining in the field of the municipality, unless the statute provides otherwise. The resolutions of the council concern: the statutory bylaw, local regulations, its validity, unless the statute provides otherwise. The resolutions. This is a collegial body elected for four-year term. Number of council members depends on the number of inhabitants in a municipality and is in the range from 15 to 45 councilors. Within the competence of the municipal council are all matters remaining in the field of the municipality, unless the statute provides otherwise. The resolutions of the council concern: the statutory bylaw, local regulations, its validity, unless the statute provides otherwise. The resolutions.
a legal personality, and its independence is under the judicial protection. District's regime is provided by statutory bylaws of each of the units. Another feature of the municipality-like regulations for the district, is the competence of the Council of Ministers with regard to creation, merger, division and abolition of districts and determining their borders, names, and the seat of their organs. Territorial division of the district includes the basic division of local government units based on the boundaries of municipalities. The change of its borders can be made to ensure the uniform district's territory due to the settlement and spatial arrangement, taking into account the social, economic and cultural ties as well as providing the ability to perform public tasks. In matters of importance as well as in the cases explicitly mentioned in the statutes public consultation are carried out. District performs the certain public tasks which exceed the tasks of municipalities: public education (secondary schools), the promotion and protection of health, social welfare, family policy, support for people with disabilities, public transport and public roads, protection of monuments of culture and care of monuments, sports and tourism, geodesy, cartography and cadastre, real estate management, architectural and building administration, water management, environmental and nature conservation, agriculture, forestry and inland fisheries, public order and public safety, flood protection, prevention of unemployment and activation of the local labor market, consumer protection, maintenance of district, buildings and public utility and administrative buildings, defense, promote the district, activities in the field of telecommunications. The tasks of a district are also the tasks and powers for the managers of district services, inspections and guards. The statutes may provide some tasks which belong to the scope of the district as the tasks of government, performed by the district. In practice, it is associated with the so-called concept of the district administration complex. There are a number of organs and offices that deal with various areas of public administration, whose activity has been associated with this level of organization of the local government. So the subordinated to the district governor, who leads the district, are: District Inspector of Building Control - the authority supervising the observance of the administrative construction law, the District Police Commander and District Fire Commander. In addition, there are some central governmental authorities, based only on the territorial coverage of a district, which are known as the detached administration. Detached administration in the district is formed by the National District Sanitary Inspector and District Veterinary Officer. District may enter into agreements with government agencies on the exercise of public tasks of government administration. District may enter into agreements to entrust to carry out public tasks of the other local self-government units, like municipality or the province.

Like in the case of municipality, the powery universal suffrage (through elections and referendum) or indirectly by the organs of the local government unit. These organs are - the district council (rada powiatu) and the district board (zarząd powiatu). The District Councilive body. Its term lasts four years and elections are held for at the same time as elections to the bodies of other local government units. The members of a council are the councilors whose number is between 15 and 29 depending on the number of inhabitants of the district. To the exclusive jurisdiction of the district council belongs such tasks as: local legislation, including the statutes of district election and dismissal of the board, salaries of its chairman, regulation on the directions of the district administration, resolutions on matters of local taxes and fees, resolutions on the district property, resolutions on the adoption of the public tasks from the governmental administration, determine the amount to which the board can commit itself, adopting resolutions on matters of cooperation with local communities and to join the international associations of local communities, adopting the program of crime prevention, protection of public safety and public order, the district unemployment prevention program, adopting the resolutions in other matters reserved to the jurisdiction of the district. The District Council elects the chairman and one or two Vice-Chairmen. The District Council meets in sessions convened by the Chairman as necessary, but not less frequently than quarterly. The District council may appoint permanent and ad hoc committees for specific tasks, setting the subject of their operation and composition. Councilor receives remuneration for membership of no more than two committees. Councilors may form clubs.

The executive organ of the district is the district board. The board includes a district governor (starosta), as its chairman, his deputy and other members. The District Board member may not be a person who is not a Polish citizen. The membership of the board may not be combined with the membership of the other local government units and with the employment in government administration, as well as the mandate of deputy speaker and senator. Council shall elect the district board (3 to 5 persons, including the district governor (starosta) and his deputy) within 3 months from the announcement of election results. The number of board members is determined in statutory bylaw by the district council. The district council elects a district governor with an absolute majority of the statutory composition of the council by secret ballot. Board performs a resolution of the district council and district tasks defined by the law. The tasks of the district board are, in particular: preparation of the draft resolutions, execution of resolutions of the council, the management of district property, making district budget, hiring and firing managers of district organization units. In matters of its tasks, the District board is subject only to the district council. District administration complex are such offices as the district governor's office (Starostwo), district employment office and organizational units which are called to help district services, inspections and guards. The district governor is the head of the District Office and the official supervisor of employees and managers of organizations and the supervisor of district services, inspections and guards. In individual cases concerning the public administration within the competence of District, the decisions are issued by the district governor, unless special provisions provide for the issuance of a decision by the board of the district. Such a decision may be appealed to the local government appeal board (Samorządowe Kolegium Owoławcze). District property is a property and other property
rights acquired by the district, or other district legal entities shed under separate statutes exclusively by the district. District is the subject of rights and obligations in civil law relations, which concern the district property not belonging to the other legal entities. District manages its finances independently on the basis of the budget resolution. Forwarding to the district, by the statute the new tasks, required to provide the financial resources necessary for their implementation. In order to jointly perform public tasks, including issuing decisions in individual cases in public administration, districts may create associations with other districts.

The supervision over the district activities is exercised by the Prime Minister and the governor of the province (wojewoda), and with regard to financial matters – by the Regional Chamber of Auditors. The district council's resolution or the district board's ordinance contrary to the law are invalid. About the invalidity of the resolution or ordinance in whole or in a part, the supervisory authority shall decide no later than 30 days from the date of delivery. After this period, the supervisory authority cannot annulled the resolution by itselfs. In this case, the supervisor may appeal against the resolution to the administrative court.

A special type of districts are the cities with rights of a district. Rights of the district are entitled to the cities, that on 31 December 1998 numbered more than 100 000 inhabitants, and cities, that from that date ceased to be the seats of former provincial governors and those cities which have been granted a status of district, at the time of the first administrative division of districts. The functions of the district authorities in cities with district rights are exercised by the city council and president of the city (prezydent miasta). City with district rights is a municipality engaged in the tasks of the district.

Province (Województwo)

The third level of authority refers to a specific area of jurisdiction of both local and governmental authorities. In the province operates a representative of central government – governor (Wojewoda) with his governor office (Urząd Wojewódzki). The same is also a regional self-governing community of its inhabitants. The scope of activities of province self-government are the public tasks of a provincial, not reserved by statutes to the governmental authorities. The scope of the local province does not affect district and municipality autonomy. The local province self-government bodies are not supervisors or control authorities for district and municipality and are not a higher degree in administrative procedures. As with other units of local government, inhabitants of province take the decision by popular vote (by the way of election and referendum), or via the organs of the local province. Provincial self-government carries out the public tasks defined in the statutes, in its own name and on its own responsibility. The province has the property and conduct its own financial management based on the budget. The local province has a legal personality, and its independence is under a juridical protection. The provinces are able to help each other or other units of local self-government, including a financial assistance. The provinces may form associations, including the municipalities and districts. The seat of local government authorities in province are specified by the statute. Since year 1999 there are sixteen provinces in Poland. Provincial self-government sets out a strategy for regional development, taking into account the particular objectives such as preservation of Polish culture and the development and shaping of national civic and cultural consciousness of its inhabitants, as well as nurture and develop the local identity, stimulating economic activity, improving the competitiveness and innovativeness of the regional economy, preserve the value of cultural and natural environment, taking into account the needs of future generations and also the formation and maintenance of spatial order. Regional development strategy is implemented through regional programs and regional operational program. Provincial self-government may have grant the regional programs and the regional operational program of the state budget funds and resources from the EU budget and other resources coming from foreign sources. An important task of the province self-government is performing activities related to regional development within the local province. The province self-government organs are the province council (sejmik wojewódzki) and the province board (zarząd wojewódzki). The province council is a legislative and control body of the local province self-government. In the exclusive jurisdiction of the councils, rules and procedures for the use of regional facilities and public utility, a regional development strategy, adopting the development plan, the budget of the province, the local tax and local fees, resolutions on the participation in international regional associations and other forms of regional cooperation, election and dismissal of the board members, resolutions on the formation of associations and foundations, as well as access to them, resolutions on the provincial property, resolutions on other matters reserved by statutes to the province council powers. The province council meets in sessions convened by the Chairman as necessary, but not less frequently than quarterly. The province council may appoint the permanent and ad hoc committees to perform specific tasks. Councillors can form clubs.

The executive organ of the local the province is a province board. The board, amounting to Marshal (Marszałek), as its chairman, his deputy or two deputies and other members. The province council elects the Marshal (Marszałek), as its chairman, his deputy or two deputies and other members. The province council elects the province board of election results. The province board performs the tasks of the province self-government which aren’t reserved for the province council or provincial self-governmental agencies. The tasks of the province board are in particular: executing the resolutions of execution, organizing co-operation with the regional government structures in other countries and international regional associations, directing, coordinating and controlling the activities of provincial self-government agencies, including the hiring and firing managers of the provincial self-government agencies, adopting organizational rules for marshal's office. The Marshal of the province organize the work of the board and his/her office, managesince on the outside. The province board performs tasks with a help of the marshal’s office (Urząd Marszałkowskiego) and provincial are issued by the Marshal of province. The decision issued by the marshal may be appealed to the local government appeal board (Samorządowe Kolegium Odwoławcze).
The province board for the local province activities is exercised by the Prime Minister and the governor of the province (wojewoda), and regarding financial matters – by the Regional Chamber of Auditors. The province council's resolution or the province board's ordinance contrary to the law are invalid. About the invalidity of the resolution or ordinance in whole or in part, the supervisory authority shall decide no later than 30 days from the date of delivery. After this period, the supervisory authority cannot annul the resolution by itself. In this case, the supervisor may appeal against the resolution to the administrative court.

Conclusion

The three levels of local government are operating in Poland since year 1999. Consistently the number of tasks passed by the legislature to the self-governmental units has increased. In matters of individual cases, handled by issuing the administrative decisions, the common appeal body for all levels of self-government, are the local government appeal boards.

Local government is a lasting element of the present system and its revival and reform is commonly considered as one of the most fruitful ones that have been implemented in Poland. Its current shape stems from a number of factors which contributed to the fact that Poland is the most decentralized country in Easter Europe. There are many reasons for that.

Local government in Poland has a long tradition, even though its development was affected by all the turmoil which this country has never been spared. The beginnings of local government should be sought in the privileges awarded to towns and cities given charters based on Magdeburg Law, in the 13th century. However, the later transformations were not beneficial for towns and cities. The war damage and the system transitions limited the local government dramatically. Only the town and city act passed on the eve of the Constitution of May 3rd, 1791, offered some hope. Unfortunately, it vanished almost immediately after the final loss of independence.

Further history of local governance, until 1918, varied in different areas of each of the countries between which Poland was split. As a result of that the new state was faced with a complex problem of unifying the state system with which it had to cope in the years to follow. The German invasion of 1939 put a stop to the local government evolution process, yet the local government played an important role in the Polish Underground State.

Year 1944, along with the entry of the Red Army, brought about a new system. The new authorities introduced it gradually. In the first years after the war, the co-operation with the society was necessary in order to organize the state, so the communist authorities were forced to accept the initiatives of the citizens. This situation, however, would change in the course of eliminating the opposition and strengthening the control over the society. While the authorities were strengthened, any form of self-organization of the society could have constituted a threat to the totalitarian system. Consideration for the society was no longer shown. The law of March 20th, 1950 abolished the local government for good, replacing it with a system of national councils, which, with only some changes, survived till 1989. It deserves a couple of words, since the reforms had to be commenced from that inherited starting point.

The communist system in Poland, modeled on the soviet one, was internally logical, yet based on premises entirely strange to the models of any democratic state. The preamble...
to the Constitution of 1976 included the statement that the implementation of the ‘great ideals of socialism’ was the obligation of the State. Thus the authorities of the communist party became the decision-making body and the state was treated as an executive body. The will of the society was ignored, since the rulers took it for granted that it would oppose the system. That is why the state had to be constructed in a manner enabling the control of the citizens and their submission to its decisions against their will.

In practice, this meant that the central bodies decided about everything, reducing any social control of their activities to mere appearances and the elections to a farce. The whole machine was just concerned with passing the orders ‘downwards’ and with making sure that they were complied with.

The organization of the state was based on a system of economic sectors. Each minister was a body responsible for the policy of the state in a given field, on the one hand, and on the other, at the same time, he was at the top of the hierarchy-based pyramid organizing the entire economic activity in a given sector. All state enterprises were subordinated to him. There was no private business. In the existing enterprises the basic party organizations had the upper hand and they decided not only about the functioning of the enterprises, but also about the career and living conditions of the employees. There were also trade unions which awarded various privileges. The authorities wanted to create bonds between people and their places of employment in order to control them effectively. However, there were no forms of social organization focusing on the dwelling place. The ruling party was afraid of any spontaneous and uncontrolled local initiatives.

At this point, it has to be emphasized that these two forms of organization of the society, around the workplace and around the dwelling place, are antagonistic towards each other. The strengthening of one of them results in the weakening of the other. Totalitarian systems favor the first of the two, democratic ones – the other. Thus the transformation of the country involves not only the system changes but also the change of the society organization model. However, such a change comes across a number of obstacles and it takes time to change the mentality and to overcome the resistance of these forces which suffer losses as a result of that change.

All structures of the state administration were organized in the form of hierarchy-based pyramids. This was also true about the state administration itself. The local councils were subordinated to the regional ones and those, in turn, to the State Council elected by the Parliament. The councils were elected in general elections, but for each position there was only one candidate nominated by the communist party. The heads of the local state administration were responsible to the heads of regional administration and those to the Minister of Administration. The heads of particular departments in the local offices were also responsible to relevant directors in the regional office, who, in turn, were supervised by particular ministries. So organized local authorities could not represent the interests of the population, but they served the implementation of central directives.

At the same time the system rejected Montesquieu’s principle of division of powers and it awarded the whole power to the state, and in consequence to its administration.

This model of state functioned till the political break-through of 1989. We could only observe some periods of certain decentralization tendencies which always followed the occurring political crises. After each of them, usually within a period of two years, the new law on local authorities would be passed which manifested the will to meet the demands of the people. This willingness, however, was only ostensible and several years later the authorities would abolish the once conferred local powers.

In 1980, the deepening social and economic crisis contributed to the outbreak of protests and to the birth of the national ‘Solidarity’ movement. Discussions concerning the necessary reforms of the state were taken up in a number of circles, as it was commonly believed that the existing system constituted the basic barrier hindering the economic development.

The centralized and party-controlled administration was unable to solve the key problems generated by the poor living conditions, the scarcity of lodgings, the underdeveloped technical infrastructure and the pollution of the environment, which led to social protests threatening the economic growth. The lack of that growth, in turn, rendered the solving of the original problems impossible since there were no means for that. In this way the vicious circle of inability would close. Decentralization of the state and developing local governance seemed to be the best way for that.

The first document containing the premises of reviving the local government in Poland, was presented on June 12th, 1981 at the “Experience and Future” Seminar. The seminar was an informal, civilian meeting of persons seeking the new ways of reforming the state and opting for radical changes, yet introduced in an evolutionary manner. It functioned in Warsaw, from 1978 to 1981. That document opens the process of the studies of local government reconstruction and of the preparatory work for future reforms.

The introduction of martial law, in 1981, interfered with the possibility of legal and open discussion of the state reforms. Still, the studies of local government reconstruction were undertaken. They were carried out as the studies of regional economy, since the authorities would never have consented to any works focusing on local governance. This work went on till 1989. We aimed at developing the theory of local government which did not exist in Poland. We thought about the possibilities of implementation of reforms in practice, though under those past conditions there were no chances for that. We were therefore looking for the Polish local government traditions, analyzing the current needs and seeking system solutions which would prove good for Poland.

We implemented a wide program of international comparative research. It was obvious for us that no local government model could be automatically transferred to another country. At the same time, though, it was necessary to refer to other people’s experience in order to avoid being unrealistic, especially that in Poland we could not carry out any empirical or pilot studies. The communist authorities would never have allowed that.

International cooperation involved universities and various research teams from a dozen countries or so. Our key partners were:
- in Denmark: the Roskilde University and a group of universities cooperating with it,
- in Sweden: the University of Orebro,
- in England: the University of Birmingham and the Oxford Polytechnics,
- in Norway: the University of Trondheim,
- in the Netherlands: the University of Nijmegen,
- in Italy: the University of Catania and the La Sapienza University of Rome,

These almost ten-year long studies allowed us to develop a model of a local government system which was put into life within a year after the political break-through in Poland.
However, the very will to introduce the reform does not suffice. The implementation of the reform has to involve a number of various activities. There are four conditions which have to be fulfilled in order to make any reform effective. There must be a reform program, the political will of the leaders to implement it, the support of the society and the human resources capable of implementing it. The program, worked out in the course of many years of studies, did exist. So did the political will to introduce changes. Yet the former democratic opposition whose representatives created the government was not prepared to exercise power in the state and there was also no general transformation program. At that time the leaders did not appreciate the significance of local government and therefore its reconstruction was, in a way, taking place with only marginal interest on the part of the politicians. This imposed a number of limitations. The society, likewise, did not understand the local government and it was not prepared to face its challenges, even though everybody wanted to reject the old system. The generation which participated in local governance before 1989 belonged already to the past and in the communist period no one had a chance to learn local government. There was also no administrative staff prepared to implement the reform. For these reasons, the activities aimed at implementing the reform had to involve a wide range of tasks.

We were leaving communism behind, but the entire state apparatus was in the hands of the people belonging to the old regime. The greatest enemy of the reform was the local administration. Those people were afraid of any changes because they were bringing about the end of the system which had brought them to power. Therefore they were doing everything to prevent these changes or to minimize them. The society was the only force capable of overcoming this resistance. That is why we decided to decentralize the state as far as possible, giving the widest possible scope of authorization to the local authorities. The objective of the 1990 reform was to create municipalities which would be autonomous enough to execute their own development policy and to make use of local resources in compliance with the needs of their own inhabitants.

Our program, which was implemented, involved the liquidation of five basic monopolies of the communist state. The first of them was a political monopoly. The elections of 1990 were the first free and fully democratic elections. They put an end to the political monopoly of the communist party.

The second monopoly was that of public authority. Municipalities were considered the obligatory organizations of their inhabitants. Their authorities were granted the constitutional right to exercise a number of public functions on their own behalf, not solely on behalf of the state as it had been before. Thus the principle of unitary state authority, which was the cornerstone of the communist system, was rejected. The area of public affairs, excluded from the responsibility of the central government, was thus created.

The third monopoly was that of public property. In the past, the local authorities were the units of state administration, they did not enjoy the status of legal entities, and therefore they had no right to have any property of their own. They only administered the selected elements of the state property. In 1990, the municipalities were awarded the status of legal entities and took over a considerable part of the state property.

The fourth monopoly was that of public finance. In the past, the municipal budgets were constituent parts of the state budget. From then on, they were separated and the local finance became the exclusive responsibility of the local authorities. This was also the beginning of generating own sources of income.

The fifth monopoly was that of public administration. In the past, the employees of the municipalities were the state officials. Then, a new professional group of local government employees, distinct and independent from the state administration, came into being.

However, a reform does not only consist in passing the basic laws. Decentralization of the state and introducing local governance affect practically all areas of life, which involved the need to change the law governing these areas. In 1990, when setting up of the local government was being, the Parliament amended almost 100 laws and in 1998, in the course of the reform of regional authorities – nearly 150. Still, the implementation of the reform does not truly begin until after passing of the laws. It is then that institutions have to be reorganized and new procedures introduced. And this requires both training the proper administrative staff and teaching people how to make use of the new opportunities.

In 1990, while introducing the local government, we had to answer a number of questions two of which were of particular significance. The first one focused on the issue whether the elections should be held immediately in order to remove the communist administration from power, or whether the elections should be postponed in time and the reform of the system should first take place. The society demanded quick changes and therefore also quick elections. Still we opted for the second, much more difficult solution which guaranteed real changes. Had we introduced new people to the old system, this would have meant its petrifying and inhibiting the deeper reforms. The people from the democratic opposition had no experience in administration and they knew no system other than the one existing in Poland. They would have been condemned to the old system because they had no knowledge which would have allowed them to participate in building a new system and in reforming the state. And since the old legal system made local activity impossible, they would have been very quickly discouraged and the reform could have been compromised.

We followed a different, more difficult path which, however, allowed us to achieve success. In the first place, the law was changed and the new people entered already a new system which provided for their full and unrestricted activity. It was possible because of the existing knowledge acquired by us in the course of many years of studies, which promoted fully conscious decisions. Adopting this sequence of events had a key significance for the Polish success. In other countries of the former Soviet block the situation was, in general, handled differently and therefore no reforms as thorough as the ones in Poland have been implemented there.

The second question concerned the scope of that first stage of reforms. It was decided that democratic local government would initially be introduced only on the municipal level while on the regional level the state administration should prevail. Carrying out reforms on all levels at the same time was considered too dangerous for the efficient functioning of the state and upsetting that functioning would, in the eyes of the society, undermine the sense of the reform. The reforms on the higher levels were therefore postponed till the next stage. It turned out that they had to wait for eight more years.

As a result of the reform, the local authorities found themselves under quite different circumstances. Their activities transformed the country in a number of social and economic aspects. They have got access to bank credits because they became legal entities and they have enjoyed financial auton-
omy and having own property. Thanks to this they have developed a wide-scale investment activity. Its scale is well illustrated by the comparison of the investments of the local authorities in the field of water pipelines and sewerage systems in the decades before and after the reform.

INVESTMENTS OF THE LOCAL AUTHORITIES IN THE FIELD OF WATER PIPELINES AND SEWERAGE SYSTEMS:

These figures are the evidence of success

<table>
<thead>
<tr>
<th>Kind of investment</th>
<th>Unit</th>
<th>Period 1980-1989 (a)</th>
<th>Period 1990 – 999 (b)</th>
<th>b:a ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Water pipelines:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Main network</td>
<td>thousand</td>
<td>2.2</td>
<td>33.5</td>
<td>15</td>
</tr>
<tr>
<td>Distribution network</td>
<td>km</td>
<td>40.0</td>
<td>110.5</td>
<td>2.7</td>
</tr>
<tr>
<td>Residential buildings connections</td>
<td>thousand</td>
<td>328</td>
<td>2192</td>
<td>6.7</td>
</tr>
<tr>
<td>Sewerage system:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Network</td>
<td>thousand</td>
<td>2.6</td>
<td>23.7</td>
<td>9.1</td>
</tr>
<tr>
<td>Residential buildings connections</td>
<td>km</td>
<td>51</td>
<td>524</td>
<td>10.3</td>
</tr>
</tbody>
</table>

But not everybody was happy with the reconstruction of the local government and with the decentralization of the state. Just the opposite, considerable resistance was encountered. The changes were blocked by the circles which were afraid of the changes and they were numerous. The protests against decentralization were especially notable in particular ministries because it limited their competences and in consequence their budgets and employment. Also many politicians were afraid of it, since local autonomy did not allow them to influence the decisions of the local authorities. The trade unions which were interested in maintaining the centralized management in the system of economic sectors also opposed the increased powers of the local government. There were numerous opponents and soon a number of conflicts emerged. One of the most spectacular ones, which dragged on for many years, was the dispute focusing on the management of schools. According to the premises of the reform their management should have been handed over to the local authorities. Yet this intention met with the opposition of the central administration, trade unions and of a large number of teachers. Everybody wanted to be state employees not municipal ones.

Overcoming such resistance required a lot of effort and the results of these struggles varied. In more than twenty years of existence of the local government there have been periods of progressing decentralization, but unfortunately also periods when for political reasons the governing of the country was centralized and the transformation process was reversed. The experience of twenty years confirmed the rightness of our path. The activity of the local authorities has considerably contributed to the development of the country. It is obvious, however, that the decentralization process has not been completed, as it is not enough to change the law – it is also necessary to change people’s mentality in order to take full advantage of the possibilities offered by local autonomy.

Professor JERZY REGULSKI, Ph.D.

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NOTES:


2. These studies were conducted in the Institute of Economic Sciences at the Polish Academy of Sciences under the supervision of Jerzy Regulski, at the University of Lodz, also under the supervision of J. Regulski and at the University of Warsaw under the supervision of Michał Kulesza.

DECENTRALISATION AND UNITARINESS AS THE PRINCIPLES GOVERNING POLAND’S TERRITORIAL STRUCTURE

MIROSŁAW STEC, Ph.D., Professor of the Jagiellonian University

Twenty years of existence of local government provide a sufficient basis to make assessments and draw conclusions on what has been achieved. Indeed, now is an excellent time to assess where we are and where we should be heading. Questions are often raised – both in the doctrine and during numerous conferences – regarding the system of local government in Poland. The first issue concerns the question of whether the existence of districts (powiats) is required within the local government framework. It is often asserted that districts are unnecessary or even redundant. The second issue refers to a higher level of authority and concerns the question of whether it is necessary to create two types of public authority at the voivodship (regional) level. On the one hand, there is voivodship self-government (samorząd wojewódzki) headed by the marshal of the voivodship (marszałek), the voivodship board (zarząd), the voivodship assembly (sejmik) and the office of the marshal of the voivodship (urząd marszałkowski), and on the other there is the voivod (wojewoda) and the voivodship office (urząd wojewódzki) together with its ancillary services, inspection offices and guards. Does this framework actually stem from certain fundamental or structural principles or does it reflect certain past arrangements or individual views that have been passed into law at the will of the Parliament? In the latter case, this particular framework could be subject to far-reaching change since it would appear from a praxeological standpoint that tasks are being duplicated at the voivodship level.

Our further analysis can be based on no other than the following proposition: the territorial structure of a state is governed according to a set of fundamental principles and values shared at a given point in history by a nation – society – and codified in a constitution, which is the highest legal act of every state, adopted by elected representatives and approved in a general referendum. It was exactly the case in our instance: discussions on how to enshrine a territorial structure in the Constitution commenced with the birth of the Third Republic of Poland in 1989. In consequence, certain fundamental propositions were included in the Constitution. And, once the Constitution had been adopted, these general principles were translated into specific normative acts.

Overall, it can be claimed that our territorial structure as it stands now stems from two fundamental principles. The first of these principles – which underpins not only our territorial system – was adopted as early as 1990 as a universally applicable directive, although it was not legally codified at the time. This principle was explicitly stated in the Preamble to the Constitution of 1997: “[We] hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities”. Universal in nature, the principle of subsidiarity has an overwhelming impact on determining the territorial organisation of the state. From it follows a directive that the activities of the state must be aimed at individuals or citizens and that all the structures created by the state are to serve people and their interests. Accordingly, the state’s political or institutional system for managing public affairs must operate on the basis that public matters and tasks are to be handled wherever the best results are likely to be achieved, that is at the highest possible proximity to a target beneficiary, a consumer of services or, in other words, an inhabitant or citizen. This is the idea behind the structural concept of decentralisation of public authority, which stems from the principle of subsidiarity.

There are two aspects to the principle of decentralisation. The first aspect, already mentioned above, is that public tasks must be carried out at the lowest reasonable level of territorial division by public bodies operating at that level. But there is also the other aspect. Decentralisation is, simply speaking, the allocation of tasks among different levels of government and public administration in which none of the bodies is subordinate to any other in any way: personally (subjectively) or materially (objectively). Accordingly, public bodies carry out tasks on their own behalf and for their own account. In consequence, there must be a structural institution for creating independent bodies to carry out the tasks prescribed by law. The idea of decentralisation is best embodied by local government. Today, it is not possible to build a territorial system unless there is local government in place, equipped with all
neccessary tools, as is the case in all member states of the European Union or more broadly speaking, in all democratic states. It is a universally acknowledged fact today that local government forms the core of a decentralised territorial structure. This was codified in the Constitution, paving the way for the adoption of specific legal arrangements. Particularly important in this respect is Article 16 of the Constitution, in which it explicitly stated that the inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law. It explicitly follows from the wording of that article that inhabitants become members to this community by virtue of law and not through an act of accession or a personal declaration of intent. Furthermore, they are members to as many communities as are established by the law-maker to perform public tasks.

In accordance with the Parliament’s decision based on the government’s proposals presented in 1998, local government has a three-level structure. Here I would like to draw your attention to a very important matter. It follows from the aforementioned article of the Constitution that the number of local government units must equal the number of levels of basic territorial division; no situation can arise where no local government exists at a certain level of basic territorial division. It follows from the article in question that the inhabitants of each unit of basic territorial division form a self-governing community in accordance with law. In consequence, every such community must be subject to statutory regulation. Of course, it could be just one statute provided that it would explicitly determine and govern the three levels of local government. This means that it would be unconstitutional to propose, for example, the abolition of voivodship government if voivodship continued to exist as a unit of territorial division. And this is exactly what happened in the early 2000s when some would ask: “Do we really need voivodship government? It is so weak, it has no sources of income to speak of and its budget is often lower than that of the capital city of the voivodship. A voivod is all we need.” This kind of thinking betrays complete ignorance of the constitutional principles governing the territorial structure.

Apart from the regional component represented by voivodship government, there is also the local component designed for the performance of local tasks. This component consists of municipalities (gmina), which are the basic units of local government, and districts. In accordance with the principle of decentralisation, local tasks must be allocated between these two levels of government according to the basic criterion of proximity to an addressee, that is a citizen or inhabitant. If a task can be performed at the level of a municipality, it must be allocated to that municipality. If a task is beyond the capacity of a municipality to perform it, it must be allocated to a district. What does „the capacity to perform” mean? It comprises a number of aspects: firstly – a genuinely universal nature, which means that actions are intended for a significant portion of the local community (e.g. keeping registry office records, welfare assistance), secondly – logistical feasibility (e.g. availability of specific equipment), and thirdly – cost effectiveness (lower costs). Districts were created exactly for this purpose: to allow tasks to be performed further up the ladder of local government in the situation where a municipality cannot be reasonably expected to be able to perform a specific task (for the simple reason that it is too small, in various ways). That is why primary and lower secondary schools fall within the responsibility of municipalities while upper secondary schools are managed by districts, why basic health care facilities are the responsibility of districts, as are many institutions of culture, but libraries are managed by municipalities, districts and voivodships, depending on the purpose they serve. This provides a clear answer to the other question frequently raised both at the time the structural statutes were adopted in 1998 and now: do we need districts? Yes, districts are necessary for the operation of the principle of decentralisation. Were it not for districts, decentralisation would be compromised as there would be a gap between the municipal level (nearly 2,500 municipalities) and the voivodship level (16 voivodships), with no local government structure in between to carry out public tasks. In that case, voivodship local government would need to take over the tasks municipalities were unable to carry out. Given the volume of matters handled by districts, such situation would be unacceptable. There is, of course, the question concerning the number of districts and hence their capacity to carry out public tasks: the higher the number, the smaller the district and the lower its capacity in all respects. This is why it is so important to strengthen districts through, among others, creation of instruments to stimulate their consolidation. However, this avenue has not yet been properly explored by the government. Nevertheless, while not enshrined in the Constitution (a result of the political conflict within the National Assembly which adopted the Constitution), districts must be considered an absolutely indispensable element of Poland’s territorial structure. Apart from municipalities, there must be another level of local public authority to carry out tasks which, while local in nature, go beyond the capacity of individual municipalities. The solution whereby those tasks would be assigned to large voivodships would be impossible to accept.

However, the Constitution lays down another principle governing the territorial regime, the one whose importance is reflected by the fact that it is mentioned in Article 3. Yet this particular article is rarely referred to; it did not even provoke a proper debate at the Constitutional Committee. What is more, it was copied from the Stalinist-era constitution of 1950. Why has it not caused any doubts? Because after the World War II there has been a far-reaching public consent on this particular issue and not even our peaceful revolution of 1989 did bring about any change in this respect. Article 3 of the Constitution states that „The Republic of Poland shall be a uniform State”. What does a „uniform state” mean? The Polish word jednolite – „uniform” – comes from the colloquial language but has a different meaning in the doctrine, which refers to the concept of unitariness. In other words, it is a concept with a clearly defined doctrinal meaning. A unitary state is a sovereign state governed as one single unit in which none of the territorial units has attributes of sovereignty. Territorial units are, of course, intended to mean primarily the structures existing at the highest level of territorial division; in Poland, these are voivodships. It follows from the above-mentioned principle that none of them is endowed with any attribute of sovereignty. Accordingly, there are no territorial structures of legislative
power, unlike in non-unitary states where these structures are called national parliaments, own constitutions, own government with executive, and often also judiciary, power. All these arrangements cannot exist in a unitary state but are typical for a federal state. In a federal state, sovereignty is shared between the central and local government. Both these options have an equal standing in democratic states, such as the European Union states. The European Union is composed of both typical unitary states, such as France or Poland, and classic federal states, such as Germany, Austria or Belgium. An answer to the question of whether Poland could soon be moving towards federalism must be negative: no conditions currently exists for such an evolution even to begin. The reasons are manifold, ranging from historical and geographical through cultural and linguistic to economic (federalism would deepen regional differences, which are already quite pronounced in Poland).

Poland is hence a unitary state, one in which the central government has full sovereignty. In this connection, a very important role must be ascribed to the legality of the operation of all structures of the state, which is the fundamental goal of the state as a whole. A well-designed system of review is therefore required to guarantee the achievement of that goal. This applies particularly to the state’s structures falling within the executive branch of government. In accordance with our Constitution and the doctrine, local government is part of the executive branch. This is evidenced by the very location of provisions on local government within the Constitution: local government is positioned after the Council of Ministers and government administration but before courts and tribunals. It was, therefore, necessary to create bodies responsible for reviewing the legality of actions of decentralised public authority, in particular local government. In Poland, these are the following bodies: the President of the Council of Ministers, voivods together with their ancillary services in the form of voivodship offices, and regional audit chambers responsible for overseeing the legality of actions in the area of public finance. The criteria and procedures for the exercise of review by these bodies are specified in structural statutes. In consequence, the tasks of voivodship government and that of a voivod are completely different or even contradictory: the former is responsible for the provision of services (broadly understood), regional development and the creation of tangible and intangible infrastructure, while the latter is responsible for review and control. This is the reason why the merging of these two structures into a single office of „Marshal-Cum-Voivod” would be – contrary to what some propose – unacceptable. Such thinking betrays a misunderstanding of our state’s structural organisation and would in fact mark a return to the communist-era model of national councils, which embodied the socialist idea of a uniform system of central and local government. Clearly, such model would leave no room for the principle of subsidiarity and hence also that of decentralisation.

These two principles lead to the conclusion that a structural formula in which full-scale decentralisation must be reconciled with the demands of unitariness requires the creation of a very accurate mechanism that, on the one hand, will ensure conditions for local communities to develop in accordance with their aspirations and, on the other, will guarantee the legality of the operation of local government. This is not an easy task and the twenty years of local government stand to show that there are issues that need to be discussed within the doctrine and then incorporated as amendments to existing laws.

However, all proposed changes will have to be consistent with the constitutional model of Poland’s territorial structure based on the two fundamental principles of decentralisation and unitariness.

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I.

Are local government entities the addressees of administrative power-exercising capacity with regard to administrative law application and detailing

According to Art. 15 of the Constitution of the Republic of Poland of 2 April 1997, the basic principle of the public administration system is the principle of decentralisation. This principle means that a state institution, which is essentially a public-law association, establishes, pursuant to constitutional and statutory standards, public-law associations other than the state (local government communities: municipalities, districts (powiaty), voivodship local government) for these communities to independently execute public tasks: 1) of local and regional nature (own tasks); of nation-wide nature, commissioned to them by the state under a statute (charged tasks commissioned under a statute); 3) also public tasks taken over by these decentralised entities by way of agreements voluntarily made with state government administrative organs (e.g. a voivod or the competent minister) or with the authorities of other local government entities.

It should be emphasised that the principle of independence of local government entities is connected with the concept of public task execution in the sense that a local government entity executes these public tasks on its own behalf and on its own responsibility. Local government entities therefore have been granted legal personality and provided with public assets. Public tasks have the nature of certain ventures which permanently satisfy the needs of members of local government communities. These include inter alia the provision of basic healthcare and welfare to those needing it, ensuring that the environment and nature are protected, the organisation of a system of crèches, pre-schools, schooling, cultural institutions, organising local or regional public transport, organising the system for operating the energy and water supply infrastructure.

The administrative power-exercise capability of the competent authorities of local government entities associated with executing these public tasks – namely the competence to pass regulations implementing the statutes, issue administrative decisions or enforcement rulings – is principally free of the feature of independent action, as the execution of the power-exercise competences by local government authorities consists in enforcing the legal order established by the state, and not the legal order independently established by these decentralised entities.

Thus, when establishing local government entities (i.e. the municipality, the district and the voivodship local government), the Polish legislature had to, by passing the appropriate statutes, settle the issue of assigning administrative (public) power to these entities to apply (detail) the law by issuing administrative decisions and rulings. Administrative decisions are associated with the notion of an individual case falling within the scope of public administration and constitute the fundamental form of developing legal relations between an institution of the state and the administered entities. Rulings are of a procedural, auxiliary nature and are issued as part of an administrative procedure aimed at resolving the essence of the case by a decision.

The legislative technique adopted by the legislature on the subject of the direct addressee of the power to apply the administrative law in the local government is the legislature’s “avoidance” of directly presenting its position on the fundamental issues of the systemic law, namely the question who is the subject of this power when authorities of local government entities issue administrative decisions.

In order to clarify this problem it should be mentioned that local government entities are secondary public-law associations established by the primary public-law association (the state) to execute public tasks of a local, higher than local and regional nature. For the purpose of executing these public tasks, i.e. for the purpose of effecting public administration, the state provides these entities with public-law power and legal personality. The public-law power of a local government entity is thus derived from the state power, which in turn stems from the social accord creating that state. A public-law association, just like any legal person, acts through its authorities.

For the situation in which local government entities pass mandatory law (local laws), the legislature explicitly and generally granted these entities the right and the duty to pass local laws, and then distributed the legislative competence between the authorities of these entities. When local government enti-
ties make law, it is clearly stated who the subject of the local law-making right and duty is, and which authority of the entity has legislative competence in this regard.

In the case of the power to issue law application enactments (administrative decisions), the issue is not so simple any more. Systemic acts on the local government contain no standards assigning the right and the duty to apply (by exercising power) and detail the administrative law to local government entities. In systemic statutes on the local government, the legislature only laid down competence standards addressed to broadly-understood authorities of local government entities. At the same time, a reservation should be made that there is a qualitative, ontological difference between the right and the duty to apply the law by exercising power, which the subject, i.e. a public authority/a public-law association has, and the right and duty of the authority to exercise its competence, which according to the doctrine consists in the authority’s ability to actually exercise in detail the potential duty to act defined in the law. What is particularly significant is that the standards of systemic statutes on local government concerning the competence of authorities of local government entities to issue administrative decision are not of an independent nature. These standards in their essence constitute specific program standards for a substantive-law legislature when it assigns, pursuant to detailed/substantive-law statutes, the competence to apply administrative law (by their power) to local government authorities. Competence standards contained in statutes concerning the legal system do not have independent legal existence and cannot constitute the legal grounds for the specific authority to interfere with the sphere of subjective rights of a person/entity. The primary texts suitable for defining the competence of authorities to issue administrative decisions are the appropriate provisions of substantive-law statutes (i.e. special statutes, such as the act on welfare, the act on spatial planning and development).

If one wants to comment on the above method of regulating subjects related to the issuance of administrative enactments, mention must be made of the assumptions of the method of operation/application of administrative law in the context of principles of the system of public administration.

Just as in the case of the law-making power exercised under the rules appropriate for the method of law making, and not to the method of administration structuring (decentralisation fits the system of administration, but not the decentralisation of the law; standards are not decentralised: the lower one is not decentralised in relation to the higher one), in the case of the power to apply the law, the decentralisation, i.e. the system/structure of public administration authorities, does not determine the process of applying the law. The application of the administrative law is governed by the rules and institutions laid down in the Administrative Procedure Code, hereinafter represented by the Polish abbreviation k.p.a. and in the Act of 29 August 1997 – the Tax Ordinance, hereinafter represented by the Polish abbreviation u.ord.pod. Consequently, the systemically decentralised entity/authority of public administration is not systemically independent when issuing a decision, as issuing an administrative enactment represents the unilateral application (by exercising power) of a hierarchical, mandatory legal order coming from the state or created under the authority from the state in relation to an individual addressee, in the context of specific facts, as part of a formalised administrative procedure governed, inter alia, by the rule of the course of instances.

The k.p.a. defines the concept of public administration authorities for its purposes. If the concept of public administration is analysed in the context of this definition, it can be said to consist of: ministers, central authorities of the central government administration, voivods, other field units of central government administration (consolidated and unconsolidated) acting on voivods’ or on their own behalf, authorities of local government entities as well as other state authorities and other entities if they are established by the force of law or under agreements to settle individual cases falling within the scope of public administration by way of decisions. Pursuant to Art. 5.2.6 of the k.p.a., the legislature uses the term ‘local government authorities’ to encompass: authorities of a municipality, of a powiat, of a voivodship, of associations of municipalities, of associations of powiats; a starost; a voivodship marshal; heads of services, inspectorates and guards acting on behalf of an alderman, of a mayor, of a voivodship marshal, as well as local government boards of appeal.

When analysing the distribution, made in systemic statutes on the local government, of decision-making competencies not only and exclusively to authorities of local government entities in the strict sense of this term, one can risk the claim that the only subject with the power to apply administrative law is the state, which exercises its rights and duties associated with applying this law not only using state government administrative authorities, but according to the subsidiarity rule which plays a huge role in this topic, also using authorities which systemically belong to local government entities, but which have been granted the appropriate competence by the state. These authorities are undoubtedly part of the local government system, but at the same time, in the functional sense, they are state authorities which the state uses to exercise the power of applying the law reserved only for itself. Local government authorities in the sense of public administration authorities referred to in Art. 5.2.3 of the k.p.a. exercise their competence acting on their own behalf and not on behalf of the municipality, powiat or voivodship local government. Continuing this way of thinking it can only be said that functionally, as the administrative authorities of the state, they act on its behalf and for its benefit, as the state is the basic subject of public rule/the basic public-law association. This way of interpreting the power to apply the law within the system of local government emphasises the lack of independence of local government entities when they apply administrative law by their power. Generally, the local government is not granted the right and the duty to apply the administrative law. The administrative law is applied by authorities included in its system exercising their power, which authorities are identified by the legislature and provided with the appropriate competence under substantive-law statutes combined with the appropriate standards of systemic statutes concerning local government.

The opposite way of reasoning, based on the purpose-of-law interpretation – which I believe to be largely unjustified as it is does not have a complete systemic basis in legal regulations –
is based on the assumption that the legislature has by default granted local government authorities the power, in the meaning of the right and the obligation, to unilaterally apply the administrative law since local government authorities have the competence in this domain. An argument supporting this way of reasoning is provided by the legislature’s words in Art. 38.1 of the Act of 5 June 1998 on the district local government, hereinafter represented by the Polish abbreviation u.s.p. where, in the program competence standards for the district governor and the district board there is talk of individual cases from the public administration scope belonging to the district’s jurisdiction. Individual cases from the scope of public administration belonging to the competencies of local government entities are also referred to in Art. 1.1. of the Act of 12 October 1994 on local government boards of appeal, hereinafter represented by the Polish abbreviation u.s.k.o. in the wording amended by Art. 1.1. of the Act of 18 December 1998 changing the act on local government boards of appeal. According to the cited provision, local government boards of appeal constitute higher level authorities, in the meaning of the provisions of the k.p.a. and the u.ord.pod., in individual cases within the public administration scope belonging to the competencies of local government entities, unless specific regulations provide otherwise.

If we take into account the doctrinal understanding of the concept of competence according to which competence is the process and the practical dimension of the administrative competence, we can state that when talking of individual cases from the scope of public administration falling within the competence of local government entities, the legislature meant individual cases from the public administration scope belonging to the jurisdiction of local government entities, unless specific regulations provide otherwise.

Regardless of the comments above, it should be noted that in the court judicature it is assumed that in the light of the law in force, local government entities are independent addressees of the power to apply administrative law. In my opinion this position is taken in line with the purpose-of-law interpretation, assuming that the Polish legislature intended to provide local government authorities with all forms of administrative power, thus fulfilling the doctrinal concept of complete public-law subjectivity of local government. I believe that an analysis of the legal status does not lead to an unambiguous answer in this case.

II

Rules concerning the decision-making competence of authorities of local government entities.

Rules of systemic statutes on local government govern, by way of certain rules, matters of the issuance of administrative decisions by authorities of a municipality, a powiat, the voivodship local government as well as the course of instances in individual cases from the public administration scope.

These rules are complicated to name when confronted with the fundamental assumption in teaching administrative law, namely that competences to apply administrative law by exercising power must not be inferred.

So we have to consider what is said and in what context by the standards of systemic statutes on the local government about the decision-making competencies of authorities of local government entities.

According to Art. 39. 1 of the Act of 8 March 1990 on the municipal local government, hereinafter referred to by the Polish abbreviation u.s.g., unless otherwise provided in special regulations, decisions in individual cases from the public administration scope are issued by the head of rural commune (woj.). Under Art. 39. 4. of the u.s.g. in connection with Art. 9. 1 of the u.s.g., the municipal council may also authorise an executive authority of an ancillary unit and authorities of organisational units established by the municipality to execute public tasks, as well as entities, including NGOs, with which it has concluded agreements to execute public tasks - to resolve individual cases belonging to the scope of public administration.

Art. 38. 1 of the u.s.p. states that in individual cases from the public administration scope belonging to the jurisdiction of a district, the decisions are issued by the district governor unless special regulations call for the decision to be issued by the district board. In Art. 38. 2a of the u.s.p., the legislature details the issue of signing decisions issued by the district council, regulating that decisions issued by the district council within the scope of public administration are signed by the district governor. The decision must contain the given names and surnames of members of the council participating in issuing the decision.

Art. 46. 1 of the Act of 5 June 1998 on voivodship local government, hereinafter represented by the Polish abbreviation u.s.w. states that unless special regulations provide otherwise, decisions on individual cases from the public administration scope are issued by the voivodship marshal.

According to Art. 46. 2a of the u.s.w., decisions issued by the voivodship board in cases from the public administration scope are signed by the marshal. The decision must contain the given names and surnames of members of the board participating in issuing the decision.

An analysis of the regulations cited above shows that they contain program standards addressed to the substantive-law legislature, requiring it, when it assigns competencies to issue administrative decisions associated with public tasks executed by local government entities, to take into account the authorities of local government entities indicated in these standards as predestined, according to the subsidiarity principle, to issue administrative decisions. These norms do not rule out the issuance of a decision by an authority other than the head of rural commune (woj.), selected by the legislator pursuant to special regulations, as part of the municipal organisation system. With regard to the district, the legislature regulating the system principally calls for decisions to be issued by the district governor, unless special regulations provide for decision issuance by the district board. A question arises what made the legislature regulating the system close the list of district authorities capable of issuing administrative decisions an exclusive one, in the standard program arrangements. In the case of the voivodship local government, the legislature establishing the system, just as in the case of a municipality, does not exclude the situation that if the provision of a special statute provides for this, the decision can be issued by an authority other than the voivodship marshal.
Here it should be noted that apart from the above program function of the analysed provisions of systemic local government statutes, these regulations play a significant auxiliary function allowing the provisions of a special statute to be interpreted if this statute clearly defines competences to issue a decision within the public administration scope belonging to a local government entity, but says nothing of the authority having the jurisdiction to issue that decision. In this case, the text of Art. 39. 1. of the u.s.g., Art. 38. 1. of the u.s.p., Art. 46. 1 of the u.s.w. shall be treated as the missing element of the competence standard to establish, and not conjecture, the competencies of the authority having the jurisdiction to issue an administrative decision. The analysed provisions thus express a rule enabling the determination of the addressee of the competence to issue a decision within the scope of tasks belonging to local government entities if this is not regulated by the special statute.

With regard to an individual case falling within the public administration scope belonging to the competencies of the municipality, the district or the voivodship local government, the jurisdiction of the alderman, district governor or voivodship marshal as the entity competent to issue the decision has to be unambiguously determined, and not conjectured, if the special statute does not indicate the entity authorised to issue the decision. However, just formulating a general rule, derived from systemic statutes on the local government, of conjecturing the competencies of the above authorities of local government entities to issue decisions is misleading, and this is the reason for the proposed name of a rule supporting the determination of the addressee of the competencies to issue decisions within the scope of tasks belonging to local government entities if this is not regulated by a special statute.

If the scope of activity of a municipality, a district, a voivodship local government is extended to include charged tasks (commissioned under a special statute) or entrusted tasks (commissioned under an agreement), which public tasks are associated with the competencies to issue administrative decisions and rulings, which competencies must be unambiguously stated in the text of the special statute or the agreement, then if the special statute or the agreement does not specify the authority with jurisdiction to issue the decision or agreement, the above rule should be used to establish the right of the alderman, the starost or the voivodship marshal to issue the decision.

III. Course of instance in cases resolved by decisions of authorities of local government entities.

If the systemic and substantive-law legislation grants the authorities of local government entities, in the broad meaning of the term, competencies to issue administrative decisions in their role of the authority of the 1st instance, the problem arises of indicating the authority of a higher level superior to the authorities of local government entities which have the characteristics of public administration authorities issuing administrative decisions. This problem is due to the confrontation of the constitutional and the code rule of two instance administrative proceedings with the systemic peculiarity of local government entities, namely the mutual complementarity of these levels accompanied by no organisational ties, and the systemic assumption, broken by the provisions of the substantive law, that there should be no obligatory functional ties between these entities. Consequently, principally indicating that the higher level authority, even in the meaning of the k.p.a., is e.g. the voivod - i.e. an authority belonging to the hierarchically structured central government administration and exercising limited supervision over the local government excluding administrative enactments issued within the system of local government, - would contravene the idea of subsidiarity and in a sense also the idea of decentralisation, although, as I have hinted above, the systemic position of an authority applying the law by exercising its power does not have primary significance for the rules and institutions of applying that law.

In order to fulfill the assumptions of the due course of instances in cases resolved by authorities belonging to the local government system acting as authorities of the 2nd instance, the legislature established boards of appeal of voivodship assemblies, then transformed into local government appeal board.

According to Art. 39. 5 of the u.s.g., a decision issued in an individual case belonging to the scope of public administration by a head of rural commune (wojft) or by an authority to which the decision-making competence has been transferred can be appealed to the local government appeal board, unless a special regulation stipulates otherwise. Under Art. 38. 3 of the u.s.p., a decision in an individual case within the scope of public administration belonging to the jurisdiction of a powiat can be appealed to the local government appeal board unless a special regulation stipulates otherwise. Art. 46. 3 of the u.s.w. provides that, unless special regulations stipulate otherwise, decisions issued by the voivodship marshal can be appealed to the local government appeal board, and in cases entrusted under an agreement with the voivod - to the minister having jurisdiction.

In systemic statutes concerning the local government, the legislature formulated a rule that the competencies of an appeal authority belong to the local government appeal board in the case of decisions issued by local government authorities in individual cases from the public administration scope belonging to the jurisdiction of a municipality, a district or a voivodship local government, unless a special regulation provides otherwise. In the light of the systemic interpretation (see Art. 46. 3 of the u.s.w.), the jurisdiction of a municipality, a district or a voivodship local government should be understood as including: own tasks, charged ones commissioned under a statute and tasks entrusted under an agreement made with local government entities. This rule is consistent with the general competence clause of local government appeal boards found in Art. 1.1 of the u.s.k.o. in the wording amended by Art. 1.1 of the Act of 18 December 1998 changing the u.s.k.o.: „Local government appeal boards, hereinafter referred to as ‘boards’ constitute higher level authorities, in the meaning of the provisions of the Administrative Procedure Code and the Act of 29 August 1997 – Tax Ordinance, in individual cases within the public administration scope belonging to the com-
The wording of Art. 3.1.5 and Art. 3.1.7 of the Act of 23 January 2009 on the voivod and the central government administration in the voivodship\(^{12}\) corresponds to the above statutory provisions otherwise. According to Art. 1.5 of the Act on the voivod, the voivod is an authority of the central government administration in the voivodship, whose jurisdiction includes all cases within the scope of public administration falling within the jurisdiction of local government entities belong to local government appeal boards unless special regulations provide otherwise. According to Art. 3.1.5 of the Act on the voivod, the voivod is an authority of the central government administration in the voivodship not reserved under separate statutes for the jurisdiction of other authorities of this administration. Under Art. 3. 1.5 of the act on the voivod, the voivod is the higher level authority in the meaning of the Act of 14 June 1960 – Administrative Procedure Code.

The issuance of administrative decisions by authorities of local government entities has contributed to bringing to light a whole range of problems both within the doctrine and the court judicature. The most important of them are: 1) the issue associated with the correct application by these authorities of EU law (the problem of the ability to apply a multi-centric system of administrative law sources); 2) the systemic/procedural/substantive-law issue that a local government entity is a party in administrative proceedings conducted by its ‘own’ authority if the individual case within the public administration scope concerns the legal interest of a given local government entity; 3) the restriction under Art. 233.3 of the u.ord.pod\(^{13}\) of the ruling competencies of a higher level authority in individual cases within the public administration scope, which cases fall within the jurisdiction of authorities of local government entities when legal regulations leave the method of resolving it to the administrative discretion. An in-depth analysis of the above issues exceeds the limits of this text, but omitting them would take away the systemic nature from the presented model of decision issuance by local government authorities.

NOTES:

2. According to Art. 104 of the Administrative Procedure Code: “1. A public administrative authority resolves a case by issuing a decision, unless this Code provides otherwise. 2. Decisions resolve the essence of the case entirely or partly or otherwise exhaust the case at the given instance”. In the doctrine, the notion of an administrative case is defined as “a set of actual and legal circumstances in which the state administrative authority applies the standard of the administrative law to create a legal situation for a specific entity (entities) by granting (refusing to grant) the demanded right or by charging it, ex officio, with a specific duty” [W. Dawidowicz, Zarys procesu administracyjnego (Outline of the administrative process), Warszawa 1988, pp. 7-8]. From a different perspective, an administrative case is: „a possibility, provided for in the substantive administrative law, to detail mutual rights and duties of the parties of an administrative-law relationship, which are the administrative authority and the individual entity not organizationally subordinate to that authority [T. Wosi, Pojęcie sprawy w przepisach kodeksu postępowania administracyjnego (The concept of a case in the administrative procedure code), Acta Universitatis Wratislaviensis No 1022, Prawo CLXVIII, Wrocław 1990, p. 333]. In still other words: “It is a certain unique combination of the law and facts in which two entities are involved: an administrative authority and the party. So an administrative case is not just a dispute occurring under an already detailed legal relationship, it is not a case following from a legal relationship, but is a case of the legal relationship” [J. Zimmermann, Administracyjny tok instancji (The administrative course of instance), Kraków 1986, p. 13].
10. Ie. of 2001, No. 142, item 1590 as amended.
11. Ie. of 2001, No. 142, item 1590 as amended.
13. According to Art. 233.3. of the u.ord.pod.: “A local government appeal board is authorised to issue a decision to abolish and resolve the case as to its content only if the legal regulations do not leave the method of resolving it to the discretion of the tax authority of the first instance. In the remaining cases the local government appeal board, when accepting the appeal, restricts itself to abolishing the appealed decision”.

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In essence, the changes introduced to the local government system consist in the establishment of more local government levels, which, however, are neither endowed with powers superior to that of the basic level (the municipality [gmina]) nor exercise supervision over that level.

The district and voivodship levels provide a „closure” to the local government system, since they include communities of another kind, encompassing larger areas where the territorial bond, although still present, no longer results from neighbourhood or similar relationships. On the other hand, the district and the voivodship are genuine legal persons that exercise public governance. This governance includes territorial governance, which is, however, exercised on a plane other than that of the municipality, and which is therefore of a different nature and limited to certain powers; financial governance, which is linked to a certain independence in terms of income enjoyed by districts and voivodships; and finally governance over people, which is related to a certain independence in terms of income enjoyed by districts and voivodships; and finally governance over people, which is related to the administrative policing (local policing) powers exercised by the district and the voivodship. Social bonds within the district and the voivodship, albeit less intense, assume a sense of identity but of a different nature and at a different development stage. The district system is one of a community-based local government unit endowed with the attributes of a legal person and a public authority body at the same time.

A district is a supra-municipal unit, and this led to some resistance during legislative work, since it was feared that the very notion of „supra-municipal” might compound the municipalities’ fears concerning a certain superiority of the powiat vis-à-vis the municipality. This superiority per se would not actually be contrary to the very idea of self-government, but owing to the specific Polish circumstances (the gradual and delayed extension of the local government framework), the superiority of other local government bodies over the municipality became harder to accept for municipalities than the consequently relatively weak supervision by central government administration.

As the work progressed, however, it turned out that the association of rural municipalities itself requested that the „supra-municipal” notion be introduced in order to properly separate the planes on which the municipality and the district operate. Within this framework, everything that exceeds the capabilities of a municipality, and only that, falls within the remit of the district. The relatively broad range of the responsibilities entrusted to districts may lead one to think that their own tasks are quite important, but this importance has unfortunately been limited by the Competence Act. Interestingly, despite the fact that a systemic alternative existed (a collective municipality and districts and voivodships as associations of municipalities), it was not really present in the public debate and legislative work. This was despite – or perhaps because of – the experience gained by the earlier local government assemblies that were similar in their role as the municipalities’ representatives, and the experience of the system in place in Warsaw. As demonstrated in practice, the coherent framework of local government bodies may lead one to think that their own tasks are quite important, but this importance has unfortunately been limited by the Competence Act. Interestingly, despite the fact that a systemic alternative existed (a collective municipality and districts and voivodships as associations of municipalities), it was not really present in the public debate and legislative work. This was despite – or perhaps because of – the experience gained by the earlier local government assemblies that were similar in their role as the municipalities’ representatives, and the experience of the system in place in Warsaw. As demonstrated in practice, the coherent framework of local government bodies made it easier to offset the decentralist tendencies that were clearly present e.g. in municipal associations, leading to the desired balance between the democratic legitimacy of local government bodies and the relatively efficient (though imperfect) executive branch.

Finding the optimum solution that is most suited to local circumstances is always of paramount importance. On the one hand, e.g. creating districts as associations of municipalities does not appear to be the right way to go, since given the strong position of the municipality as a body that is already stable and aware of its powers vis-à-vis the new and still weak district, the chances of proper representation of the distinct interests of the new legal person would be slim – a district would remain a loose confederation of municipalities. On the other hand, however, direct elections for the district governor’s office would make the district council a body of secondary importance. With a single-person authority, governance would clearly become more efficient and decisions would be made quickly, but many contradictory interests or conflicts within the powiat would remain hidden or suppressed. After some time, such suppressed interests would come to light outside the local government framework in the form of direct social conflicts and pressure exerted through referendums and demonstrations. Moreover, there would also be an increased risk of voters making a mistake and electing a clearly incompetent official; in the current framework, this can be easily corrected by e.g. the municipal council, which can remove an elected alderman by a two-thirds majority.
Within a district, areas with varying degrees of development, unemployment and internal conflicts are often present. The clashing of conflicting interests in the influential district council and its collegial board is to some extent „programmed" and should ultimately lead to rational decisions, preventing any part of the district from being privileged. We often forget that conflicts in this sense of the word restore the balance (homeostasis) of the entire system in the final analysis and serve to clear things up.

The downside of the systemic solution adopted by the Polish legislator is the elimination of outstanding, charismatic leaders; instead, chairpersons of collegial boards are usually non-confrontational, average coalition leaders. On the plus side, this makes it less probable for a district to be taken over by a mafia or by extreme, undemocratic groupings as a result of a leader's costly and expansive electoral campaign. In the current powiat framework, political parties play a greater role, which also has its good and bad points, but prevents a powiat or voivodship from gaining autonomy against the legislator's will and serves as an additional corrective mechanism nationwide. This solution also conserves the unitary nature of the Polish state.

Speaking in terms of the „ship of state" metaphor, the district and the voivodship serve as bulkheads alongside municipalities. Their own election calendars and democratic legitimacy ensure that potential nationwide political crises — struggles for power on the bridge — do not throw the entire ship of state out of balance and do not threaten its fundamental stability. Local authorities must have a sense of independence and security and know that they cannot be removed against the voters' will as a result of political harassment. This legally protected independence includes the independence of local authorities' decisions (already at the administrative stage and not just at the court one), which is currently ensured — though it may be threatened by the changes drafted — by local government appeal boards, and the statutorily limited scope of supervision on part of the voivod. The purpose of supervision is to correct the actions of local government bodies in accordance with applicable laws, but without crippling the independent decision-making powers of the local government.

The relationship between the district and the municipality is a complex one. These two levels operate on different planes but also inevitably overlap. What, then, is the primary criterion for telling them apart? It is specialisation and scale; these two basic criteria make it possible to decide whether the tasks of the unit in question are defined in a proper manner. As opposed to the municipality, the district should perform specialist tasks, e.g. related to sanitary supervision, running artistic schools and specialist healthcare; these are tasks that require special professional qualifications, exceed typical needs of a municipality inhabitant and go beyond the typical professional qualifications of a municipal public administration official. In accordance with the scale criterion, powiat bodies may manage the phenomena that are sufficiently rare within a municipality, making the supra-municipal plane the right one to deal with them. A typical example here is support for disabled (e.g. blind) people. Apart from major cities, the scale criterion clearly dictates that such competences should be vested in the supra-municipal level.

To the two criteria discussed above, a third one should be added — that of organisational distance. This means that where owing to the insufficient distance between the official who makes the decision and the recipient of that decision as well as due to the significant impact of the decision individual matters may be treated too leniently, which would be detrimental to the public good, the relevant powers should be located above the municipality level. It appears that the distance criterion, which has been the decisive factor in ceding many powers to the central government administration so far, has become relevant again in connection with the creation of powiats and voivodships. According to the subsidiarity principle, which is laid down in the Constitution, administration should be primarily entrusted to those communities that can handle it, and only later to the central government (and its separate administrative bodies). From this point of view, central government administration has been significantly overloaded until now, even taking into account the specialisation and scale criteria, which also apply to the division of tasks between the central and local government administrations. If the local government is able — without adversely impacting the interests of the state and taking the above criteria into account — to perform the task in question, then it would be unconstitutional for the central government to take over this task.

In relationships between the municipality and the district, the primacy of municipal powers is assumed. According to the subsidiarity principle, the basic unit is the municipality, so the powiat system is entirely „municipality-oriented". The compatibility principle goes so far that in order to ensure coherence and minimise the costs of the reform, certain bolder systemic solutions were given up where they were inconsistent or difficult to understand. The issue of delegated tasks within the powiat remains the main problem. In the light of the Constitution, these are only admissible under exceptional circumstances where the public interest demands it. In practice, delegated tasks, instead of being marginal, have often become the focus of the tasks performed by municipalities. Therefore the central position of own tasks should be restored. The attempt at fully consolidating special administration has so far only resulted in partial change, which has not proven successful yet. In accordance with the Act, the district board performs its tasks with the help of the district's office and the managers of various district inspection, firefighting and other services. Pursuant to Article 4, para. 2 of the Act on the Powiat Local Government, the performance of these tasks is included in the ordinary scope of responsibilities of the former special administration as its own tasks; certain matters may be designated central government administration tasks and be handled by the district. The district governor remains the head of all powiat inspection, firefighting and other services, but he or she is not fully in control.

It is clear that the Act has preserved a certain truce in the battle for the decentralisation of special administration — the appointment and removal of managers of the aforementioned units entails co-decision with the voivod, which is designed in a controversial manner. Although the starost can still influence the organisation and programmes of former special administration units, and can even lead joint action in contingencies, his or her control remains only partial. This is also confirmed
by the provision of Article 4 of the Act on Central Government Administration in Voivodships. In general, it can be said that compared to the original design, a large part of special administration remains outside local government powers. Many agencies and funds have not beenliquidated. „Ministerial Poland” has not fully become „local Poland”, which is detrimental to the coherence of the entire framework and the growth in the amount of responsibilities assumed by the local government. This is also reflected in the unfavourable structure of local government finances, and most clearly observed in the fields of environmental protection (powiats have lost 50% of funding), education (the local government has lost artistic schools that were originally earmarked for it; these will still be managed by the relevant ministry) and agricultural advisory services, which have been taken away from voivodship level local government as a result of ministerial lobbying.

The district reform includes several elements. It begins with the creation of a new community by operation of law; this community covers the entire area of several adjacent municipalities in the territory in question. The community in question becomes a legal person endowed with property and powers. The role of the district as a fundamental territorial division unit is to constitute an intermediate link between the municipality understood as the basic unit and the voivodship understood as a regional policy actor. The district has certain features in common with the municipality: providing services to inhabitants, performing tasks related to the provision of services or benefits and supplementing the municipality in looking after the needs of a community larger than the municipal one.

As concerns the three types of governance discussed above – concerning people, space and financial resources – the powiat focuses mostly on the first type, satisfying the „specialised” needs of people as opposed to the universal needs of municipality inhabitants. A typical example of such district role would be looking after the needs of disabled persons, fighting unemployment (pursuing active employment policy), running secondary schools and the provision of healthcare at a level higher than the basic one as well as of specialised welfare services.

It would be difficult to distinguish the tasks that are performed exclusively by powiats by their very nature, since – as it has been pointed out – the scale, efficiency and specialisation criteria determine that. In this sense, welfare is present at all three administration levels just as other tasks with varying scales and complexity levels. When designing the concept of districts, we had to deal with two basic boundaries: the role of the municipality and the guarantee of its protection as the basic local government unit, which pre-determined the shape of many articles.

The basic legislative body elected in general elections is the powiat board. It also has certain audit powers and additional means (mostly committees) of exerting impact apart from the budget and the granting of discharge. At the time of the first attempt at introducing powiats, there were heated discussions concerning the transition from collegial boards to the single-person authority of a district governor. The board was finally retained, primarily in order to ensure a diversified representation of inhabitants, also in territorial terms.

District territory is not a homogeneous one. The most important territories are „rural” and „urban” districts, i.e. districts and towns/cities with district status. The existence of these two categories is justified by two basic criteria – the intensity of social and economic bonds that make it possible to distinguish an urban entity and at the same time the presence of sufficient infrastructure for the surrounding district. A district in the form of a town/city with powiat status is similar to a municipality with extended powers – it obtains more competences without a major change in its structure.

Districts are established and abolished by way of a Council of Ministers regulation, which must take into account the criteria set forth in Article 3 of the Act. The district area is to be „relatively” homogeneous – on the one hand with respect to its settlement pattern and spatial features, and on the other hand with respect to its social and economic bonds, which should in any case enable the performance of public tasks. In practice, this very criterion is to become a constraint regarding the establishment of towns/cities with a powiat status if this would prove detrimental to their surroundings. The number of districts, which is around 380, while the consensus is that the optimum number from the economic point of view would be around 200, clearly indicates future prospects and the danger of progressing fragmentation. The basic dilemma was whether district boundaries should be determined by way of parliamentary acts.

Constitutional regulations in this respect may be construed in two ways. The manner in which the fundamental territorial division of the country is regulated in the constitution may mean that the relevant act should lay down the criteria for district establishment or it may mean that specific district boundaries should be stipulated in this act. The advantage of the latter solution would be the strong democratic legitimacy of the detailed territorial division of the country, while disadvantages would be the practical impossibility of voting on detailed boundaries of over 300 districts without coming to a certain understanding on avoiding contradictions, and the „freezing” of the territorial division for many years. The experience so far demonstrates that the determination of district boundaries by the Parliament has led to a significant increase in the number of districts. From this point of view, it appears that the optimum solution would involve stipulating substantive law conditions in the act so that substantive district establishment criteria would go beyond a general clause concerning social bonds, while specific districts would be established by way of Council of Ministers regulations.

Therefore, when comparing the district and municipality systems, we see both structural similarities and functional dissimilarities.

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1. The legal basis of the functioning of the local government appeal boards is an act of 12 October 1994 on local government appeal boards (consolidated text in Dz. U. of 2001 No. 79, item 856, as amended) and ordinances adopted on the basis of this act, i.a. ordinance of the Prime Minister of 8 September 2005 on detailed procedure of the supervision of administrative activity of local government appeal boards (Dz.U. of 2005 No. 175, item 1463). The local government appeal board consists of the President, Vice President, full-time members and non-employee members. The organs of the local government appeal board are President and General Assembly. President, Vice President and members of the appeal boards are appointed by the Prime Minister. Members of the appeal boards decide cases in the panels of three members and they are independent in their adjudicating function. The supervision over the adjudicating function of the appeal boards is exercised by the administrative courts (Voivodship Administrative Courts and Supreme Administrative Court).

2. The members of local government appeal boards are well-educated administrative lawyers with a great experience in application and interpretation of law. Currently there are nearly 600 full-time and nearly 600 non-employee members in 49 local government appeal boards. Majority of the members have a university degree in law or administration and - as far as non-employee members are concerned – also possessing specialist qualifications e.g. in architecture or geodesy. Administrative service is provided for by the bureau of the appeal board.

1. LGAB staff levels 2008-2010:

<table>
<thead>
<tr>
<th>Year</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of full-time members – max. 940 pursuant to the Ordinance</td>
<td>516</td>
<td>586</td>
<td>592</td>
</tr>
<tr>
<td>Number of non-employee members</td>
<td>628</td>
<td>639</td>
<td>592</td>
</tr>
<tr>
<td>Number of staff at LGAB offices</td>
<td>397</td>
<td>443,5</td>
<td>446</td>
</tr>
<tr>
<td>Number of full-time members holding a degree in Law</td>
<td>440</td>
<td>515</td>
<td>513</td>
</tr>
<tr>
<td>Number of full-time members holding a degree in Administration</td>
<td>76</td>
<td>89</td>
<td>79</td>
</tr>
<tr>
<td>Number of members holding a licence of legal counsel, solicitor, judge and notary public</td>
<td>296</td>
<td>362</td>
<td>366</td>
</tr>
<tr>
<td>Number of members holding a doctoral (dr) and post-doctoral (dr hab.) degree, and a professor’s title</td>
<td>58</td>
<td>82</td>
<td>75</td>
</tr>
<tr>
<td>Number of non-employee members holding a degree in Law</td>
<td>367</td>
<td>383</td>
<td>366</td>
</tr>
<tr>
<td>Number of non-employee members holding a degree in Administration</td>
<td>107</td>
<td>96</td>
<td>99</td>
</tr>
<tr>
<td>Number of non-employee members holding a university degree in other fields</td>
<td>154</td>
<td>157</td>
<td>132</td>
</tr>
</tbody>
</table>

3. On the basis of article 3 of the Act on local government appeal boards the appeal boards are state budget units financed from the State budget. Their financial activity is controlled by the National Audit Office.
4. The cost of deciding a single case
- in 2008 – 533 PLN
- in 2009 – 509 PLN
- in 2010 – 454 PLN

5. Statistics of come in and resolving cases by the members of local government appeal boards

<table>
<thead>
<tr>
<th>Number of cases registered in all 49 local government appeal boards in the years 2001-2010</th>
</tr>
</thead>
<tbody>
<tr>
<td><img src="image" alt="Graph of cases registered" /></td>
</tr>
</tbody>
</table>

Local government appeal boards adjudicate on the basis of approximately 200 laws and ordinances and their instance control encompasses 2,873 local government units. Annual come in of cases has grown systematically and in 2010 there were more than 230,000 cases registered. The complexity of cases has also increased recently, and the administrative files frequently require that they should be sorted out, bound and completed. These are factors that affect the timeliness of resolving the cases by the local government appeal boards.

The number of administrative cases decided in a given year including cases regarding perpetual usufruct in the years 2008-2010

<table>
<thead>
<tr>
<th>Overall number of decided administrative cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><img src="image" alt="Graph of decided cases" /></td>
</tr>
</tbody>
</table>

In 2010 local government appeal boards decided in total 178,637 cases, including 17,000 cases regarding annual fees for perpetual usufruct decided after obligatory public hearing.

In 2010 in all 49 local government appeal boards in three-person panels adjudicated 1,184 members, which means that each adjudicating panel decided 587 cases per year, which results in 196 cases per member per year. In addition the members of local government appeal boards conduct public hearings in cases regarding annual fees for perpetual usufruct, represent the appeal boards before voivodship administrative courts and Supreme Administrative Court. They also take part in closed sessions in order to decide the cases of other members of the panel.

6. Local government appeal boards in performing their adjudicating functions apply the standards that ensure protection of an individual’s rights in a democratic state ruled by law, which are as follows:
- cases decided in a collegial manner;
- proximity of the office to the citizens who often make themselves acquainted with the cases in the course of the proceedings as well as participate in administrative trials, in particular in cases related to payments for perpetual usufruct of land;
- the adjudicating functions by the local government appeal boards shall be executed under the provisions of the Code of Administrative Proceedings, and therefore with the full respect for the procedural guarantees of the parties to the administrative proceedings such as the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, the obligation of the administration to give reasons for its decisions.

Moreover, local government appeal boards are the first authorities that verify an interpretation of new laws adopted by the Polish legislator. Upon suggestions of National Representation of Local Government Appeal Boards some provisions have been amended.

7. The future of the Local Government Appeal Boards

In the Polish law and administration system, the role played by the Boards cannot be overestimated as the decisions issued by them are of immense importance for the protection of human rights and freedoms. Today, the Boards serve not only as administrative bodies performing their responsibilities provided for in the relevant Acts, but also as a consolidated and active lawyers’ community engaged in a development of concepts related to administrative law. Recognised authorities in the field of administrative law do not call into question the legitimacy of existence in Poland of the second instance to appeal to in the administrative proceedings, and the current model of positioning of the Local Government Appeal Boards has gained full acceptance on their part. The quasi-jurisdictional nature of the Boards is emphasised in the legal literature when it is noted that while examining an appeal against a decision, they in fact resolve a dispute between a local government authority and the addressee of the decision.
Therefore, the concept of transformation of the Local Government Appeal Boards into first-instance Administrative Tribunals, which perfectly corresponds with the principle of a two-stage system of administrative courts and a democratic state ruled by law, as laid down in the Constitution of the Republic of Poland, developed by Professors Zbigniew Kmieciak and Wojciech Chróścielewski, and presented for the first time as early as in 2005 (W. Chróścielewski, Z. Kmieciak: Niezależny organ kontroli w postępowaniu administracyjnym (raport badawczy) [An Independent Control Body in Administrative Proceedings (a Survey Report)], „Samorząd Terytorialny” 2005, No. 11), appears to be fully justified.

KRYSTYNA SIENIAWSKA

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THE GENESIS, EVOLUTION AND PRESENT SITUATION OF LOCAL GOVERNMENT APPEAL BOARDS

DARIUSZ R. KIJOWSKI, Ph.D., Professor of the University of Białystok

The year of 2010 saw the twentieth anniversary of the establishment of special bodies created to fulfill the role of higher-level institutions for cases tried in administrative proceedings by local government units that have been active in the Polish legal environment and public administration structures. After this period it is worth going back to the roots of these institutions, observe their evolution and consider whether these bodies and the law regulating them „proved successful” or whether some modifications are necessary.

The genesis of local government appeal boards

Initially, there was an appeal board at each of the 49 regional assemblies gathering the representatives of cities and municipalities in this region. They were established under art. 39 (4) of the Local Government Act of 8 March 1990 to enable appeals against the administrative decisions issued by an alderman (wójt) or a mayor (burmistrz) with regard to the municipality’s own responsibilities to the local government appeal board (appeals against commissioned tasks could be made to the provincial governor)1.

Adopting the doctrinal approach to the concept of a public administration body which maintains that a given organizational unit (separated both in the organizational and personal terms) becomes a public administration body when it is awarded by the law the competencies within this administration and their performance becomes the main aim of its activities, one may claim without a doubt that the appeal boards established by the above regulation were public administration units, completely novel bodies in the Polish administration system.

What is more, it should be indicated that at the same time the amended Code of Administrative Procedure extended the competencies of appeal boards, which became „higher-level bodies” in the meaning of the provisions of this Code with regard to municipality bodies (also with regard to performing their own responsibilities)2. Those familiar with the Code at the time need not be explained that the functions of a higher-level body in general administrative proceedings are fulfilled not only through hearing appeals against the decisions and complaints issued in the proceedings. Additionally, the following were also included as part of the board responsibilities (according to the regulatory environment in place at the time of their establishment):

- Setting competence disputes between municipality bodies with regard to their own responsibilities (art. 22 (1) and (2));
- Examining questions as a result of excluding the competent body under art. 26 § 2 of the Code of Administrative Procedure;
- Delegating cases related to the exclusion of the competent body to be handled by the body of another municipality, in relation to art. 25 and 27a of the Code of Administrative Procedure;
- Trying complaints for not handling cases within a time limit (art. 37 § 2 of the Code of Administrative Procedure);
- Determining the reopening of proceedings if the reason for reopening is the activity of the body in relation to art. 150 § 2 of the Code of Administrative Procedure;
- Conducting the proceedings concerning the declaration of invalidity of a decision in relation to art. 157 § 1 of the Code of Administrative Procedure;
- Adjudicating damages for the loss suffered as a result of the decision issued in breach of art. 156 § 1 or the declaration of invalidity of such a decision in relation to art. 160 § 4 of the Code of Administrative Procedure.

Having regard to the scale of the municipality’s own responsibilities carried out by means of administrative decisions and orders, it may be claimed that as a result of the above-mentioned regulations entering into force, public administration bodies, independent of national administration, were established, which, under art. 5 § 2 (6) of the Code of Administrative Procedure were considered local government bodies with a large and varied scope of responsibilities and extremely important competencies from the perspective of an individual and public interest.

First of all, it should be noted that at the beginning of their existence appeal boards adjudicated on taxes and local fees, the agricultural tax, the location of investments, the allotments of flats, municipal land management, joint land properties, the management of non-national forests, social aid, the management of local roads, permits to remove trees and bushes, reducing the impact of machinery on the environment, changes in water relations, deprivation of the right of use of the municipality property. Endowed with unlimited, except for the law, rights to issue reforming decisions in appeal proceedings, they became the bodies that may adjudicate on the issues of fundamental importance for the living conditions and business activity of the province citizens.

The idea of establishing appeal boards at regional assemblies was coined as late as during the work on the Local Government Act at the lower house of the Polish parliament. Initially, there were other suggestions as to how to resolve the issue of appeals against the decisions of local government bodies issued at the first instance such as an appeal to the alderman (mayor, president of the city), the municipality board or to the appeal body established in each municipality by its constituting body. After these proposals had been criticized by experts proving that this appeal procedure would not ensure the fulfilment of the core of the appeal procedure and which is characteristic of a state based on the rule of law, of the individual’s right to appeal against the decision to a separate, independent body, the concept suggested by one expert (J. Borkowski) was adopted and the appeal body was placed at the regional assembly.

The Local Government Act, providing for appeals to appeal boards to exercise full public rights, not convicted by a valid sentence for a crime committed because of an intentional fault and, primarily, to demonstrate „a high level of legal expertise in public administration and professional experience” (art. 7 (1) in relation to art. 5 (1) of the Act on SKOs). Since then, in the same province, no panel member has been allowed to combine this function with:

1) the mandate of a councillor or the position of a member of an executive body of the local government;
2) employment at the municipality office;
3) membership in the regional board of the chamber of auditors (art. 9 (1) of the Act on SKOs).

This was an attempt to ensure that the position of an SKO member would be held by highly educated persons who were prepared to fulfill the role of an adjudicator in administrative cases but, what is more, do it in a way free of dependency on other public institutions (the state and the local government) in order to examine the cases in the most objective way.

Although local assemblies maintained their entitlement to staff board panels and determine the number of members, the competition mechanism introduced enabled the selection of candidates while maintaining the majority of board representatives in the competition commission (art. 8 (1-3) of the Act on SKOs). Because the final decision on the presentation of the candidates to the assembly was to be made by the competition commission headed by the board president, the assemblies practically lost any influence upon the composition of boards. Even if a particular assembly did not take into account the motion of the board president to appoint new members, the board could continue its work because under the same legislative act the members of the appeal board at the assembly would become the members of the SKOs and the boards at assemblies – the local government appeal boards (art. 29 of the Act on SKOs).

Assemblies elected the SKO’s president by secret ballot out of all candidates who announced their candidacy by means of a public announcement made by the Prime Minister determining the mode and date of entering their candidacies for the president of the board to the local government assembly (art. 5 (2) and (4) of the Act on SKOs). The election of board presidents was thus similar to the procedure of an open competition although the act did not use such a term or provide for the rules of such an election. In order to prevent the election of the president turning into a political game, the legislator imposed a deadline for this decision upon assemblies (30 days counting from the day when the deadline for entering candidacies expires). Until the election of a new president, this position would be held by the president of the board at the assembly (art. 32 (1) of the Act on SKOs).

The act defined not only the requirements for candidates but also an exhaustive catalogue of grounds for dismissing the president and the remaining members of the board (art. 6 (1) and art. 7 (6) of the Act on SKOs) and guaranteed them the right of appeal against the dismissals to the administrative court (with the effect of the complaint suspending the execution of this decision – art. 6 (4)). The circumstances justifying the dismissal had to be stated in the explanatory proceedings conducted by the presidium of the assembly board and attended by the interested person. The dismissal by the assembly was held by secret ballot, through an ordinary majority, after the opinions of the board general meeting were heard. In these circumstances even not very rigorous criterion for the dismissal for reasons related to the fulfillment of responsibilities (the confirmation of the repeated evasion or improper performance of one’s obligations (art. 5 (1) point 3 and art. 7 (6) of the Act on SKOs) was not a threat to the independence of boards, their presidents and the remaining members.

The independence of board decisions and their professionalism definitely benefited from the provisions of art. 15 (2) and (3) of the act. Board presidents became the employer of permanent members and office staff and the basis for the employment relationship of the latter was their appointment (paragraph (2)). Unlike in a typical employment relationship based on appointment, board members could not be dismissed by the body that appointed them at their discretion. First of all, it was contrary to the provisions of art. 15 (3) providing that the termination of the employment relationship could only occur if the person was dismissed according to the rules specified in art. 7 (6) of the Act on SKOs. Secondly, the body entitled to dissolve the employment relationship was the president of the board and not the assembly or its bodies.

The most important regulations determining the status of appeal boards at that time were the provisions of art. 21 and 22 of the Act on SKOs. According to the first article, the board members determining the board composition were to be bound exclusively by the legal regulations and this activity was to be controlled only by the administrative court from the moment the law entered into force. In this way it was clear that the SKO members were not bound by any guidelines. The right of the board president to manage the work of the board (following from art. 11 of the act) did not include the area of adjudication. Thus the status of a board member became similar to the status held only by the judges of common courts and the Supreme Administrative Court. The difference was that board members were (and are) bound by the legal regulations in force included in the ordinances and acts of the local law.

Art. 22 empowers the board acting in its full composition (and in fact when 3/5 of its all members are present at the meeting) to ask, subject to the rules specified in legislative acts, the Supreme Administrative Court or the Constitutional Tribunal to answer a legal question, which determines the decision on the case examined as well as to ask this Tribunal to state whether a legislative act is compliant with the constitution or other prescriptive act is compliant with the constitution or a legislative act. The initiators of such motions could only be the panels adjudicating on a specific case.

The SKO achieved one more extremely important change in the status of appeal boards. In 1995 they became state budget units, but were awarded a very special status. They were included in the group of organizational units financed from the state budget but because they were not assigned to any institution with access to a part of the state budget (e.g. a minister or a provincial governor), it was necessary to consider appeal boards as independent with regard to the access to their parts of the budget, which resulted in the full independence of appeal boards with regard to the funds earmarked for their expenses (of course, within the law binding all entities with access to public funds, which is to be controlled by the National Audit Office).

It was assumed under the act that appeal boards will be represented before the state authorities by the National Representation of the Local Government Appeal Boards (hereinafter referred to as „KRSKO”).

To conclude what happened when the Act on SKOs was adopted, it is necessary to quote and accept an opinion expressed by Z. Janowicz. According to this author, „local government appeal boards – in the form shaped by the relevant act – are a completely new situation in our legal system.
The evolution of local government appeal boards

Over the course of several years after the Act on SKOs entered into force, a number of law that were adopted extended the scope of board competencies by several dozen new kinds of matters. It is especially related to the amended Land Management and Property Expropriation Act, the Property Management Act of 21 April 1997, because only in this case there was a change not only in material jurisdiction but also the nature of proceedings before the board.

Initially, under art. 1 (6) of the act of 21 October 1994 (O. J. no 123, item 601) amending this act as of 8 December 1994 (that is two days after the Act on SKOs entered into force), the Land Management and Property Expropriation Act was extended by the provisions in art. 43 a - 44 f regulating the rules and form of raising the annual fees for the perpetual usufruct of land owned by the State Treasury or a municipal authority. According to the wording of art. 43 a (2) of this act, the perpetual usufructuary who received a notice of termination with regard to the fees he/she had paid so far could submit a motion to the local government appeal board, competent with regard to the property location, to determine that the rise of fees was unjustified or a smaller rise was justified. The board would make a decision with regard to this issue unless it was able to get the parties to reach a settlement and each party could raise an objection to this decision, which resulted in the decision losing its binding force and the transfer of the case to the common court to examine its subject matter. Fundamentally similar rules were introduced in the next act regulating the rules of public property management but the board competences were extended by a similar procedure of adjudication on contentious matters with regard to the percentage of the annual fee.

As follows from the above, appeal boards became the bodies that examined civil cases in pre-court litigious proceedings. Depending on the year and the activity of property owners in the fee updating process, this kind of cases on average account for 10 to 40% of the overall number of cases filed to these bodies.

The first change in the Act on SKOs that should be noted concerned the addition of the provision banning the board president and its members to join a political party or conduct political activity. It was introduced under art. 58 of the Political Party Act of 27 June 1997 (O. J. no 98, item 604). Subsequent changes were related to the so-called anti-corruption law that entered into force. Permanent board members had to comply with bans introduced under this law, the obligation to submit a property statement and, moreover, barristers and legal advisors were forbidden to combine membership in the SKO with the representation of parties before the board if they worked for, respectively, a lawyer’s office and a legal advisor’s office, a law firm, a registered or private partnership with the sole participation of barristers or advisors or - barristers and legal advisors – or in a limited partnership in which general partners were only barristers (advisors) or barristers and legal advisors and the sole activity of such companies was to provide legal assistance. This final change only appears to be rational with an aim to prevent the unacceptable practice of membership abuse or even the combination of board management with “independent” legal practice in one of the above legal professions. Because the bans of representation applied only to these barristers and advisors who practiced their profession in one of the above forms, which definitely did not include all organizational forms of legal practice, these bans were (and still are) rather easy to evade. The same was true for the bans imposed upon the SKO members by art. 4 of the anti-corruption law with regard to starting and conducting profit-oriented activity outside the board. Also in this case the legislator used a detailed list of functions and activities that were forbidden but failed to consider that these were not all possible forms of conducting profit-oriented activity, which in general should not be combined with the activity in the SKO, just like all the activities listed by the legislator.

With regard to the professionalism of appeal boards, the ban of political activity for its members is definitely more beneficial and deserves a positive evaluation. Because it is a statutory ban, aimed directly at the SKO president and members, its breach may be treated as a failure to perform their responsibilities (neglect) and become the grounds for dismissal.

The next amendment of the Act on SKOs has a more serious impact and a broader material scope. It was related to the Public Administration Reform of 1998 whose important part was to establish the district and provincial local government. It was introduced under the act of 18 December 1998 (O. J. no 162, item 1124), whose draft, prepared in its fundamental version, just like in 1992, by the Public Administration Reform Team Office including primarily the representatives of the SKO environment, was submitted to the parliament by the government. This change was directly connected with the local government reform but included not only the solutions it covered (following from the need to include in the procedure and scope of board competencies the fact of creating two additional elements of the local-government system and the need to find another place for appeal boards whose composition could no longer be decided by assemblies because they were to examine the decisions made by provincial local government bodies).

The first problem that had to be solved by the 1998 SKO reform was the number of members and the territorial scope of the board activity. The government project assumed that the number of boards would be the same as the number of provinces. But the parliament in its work decided that the boards acting in the cities that were provincial capitals under the previous system would not be closed down. It must have been determined by a businesslike argumentation presented by the representatives of the KRSKO before Polish MPs, in which they stated that the most important aspect in the structure of boards should be the availability of these bodies to citizens and that there were no serious reasons for the closedown of 33 of these organizational units. It was also
demonstrated that the centralization of boards would have no influence whatsoever upon the improvement of their decision making process but might be a real threat to the effective functioning of boards, in particular in those provinces where “new” boards would substitute the activity of four to even seven “old” boards. This would result in the creation of adjudicating bodies having even more than two hundred staff members. The concept preferred by the government in this regard was rejected in favour of a temporary solution providing that the territorial jurisdiction of the board would be equivalent to the territorial jurisdiction of the first-instance administrative court (the addition of art. 2a (1)). In this way it was anticipated that the reform of administrative courts should determine the future structure of SKOs and considered that the creation of a similarly numerous network of administrative courts, just like appeal boards, should not be excluded. In the transition period, until the jurisdiction areas of the first-instance administrative courts were defined, the jurisdiction of local government appeal boards would be defined, by 31 December 1998, by the Prime Minister, by way of an ordinance, as requested by KRSKO, having regard to the fundamental territorial division of the state (see art. 2 of the aforementioned act of 18 December 1998). As it turned out later, this temporary solution became more vital than the concept of combining the jurisdiction area of appeal boards and the first-instance administrative courts that was abandoned in 2002 by changing the wording of art. 2a of the Act on SKOs and establishing that the Prime Minister would determine the territorial jurisdiction of boards at the request of KRSKO, which would become a permanent rule of the Appeal Board Act.

Another modification was awarding the general meeting of the board the competence to determine the number of its members, while at the same time the Prime Minister would continue to be entitled to determine the maximum number of permanent members (art. 4 (4) and (5) of the Act on SKOs in its new wording). The same body – and this change is of fundamental importance for the system – became competent with regard to the appointing and dismissing of the head of this body (referred to as „president”), his deputies and the remaining members (the provisions of art. 5-8 of this act acquired a completely new form).

In this way the body whose composition so far had been at least formally shaped by the institution of the local government, lost its systemic relationship with the local government but maintained the term of “local government” in its name. Was it and is it still justified to preserve this name? Is the fact that the cases examined belong to the statutory jurisdiction of the local government units the only relationship between appeal boards and the local government? One might, of course, try to find the answer to this question in the verbal wording of the legal provisions but the result of such search would be excessively simplified. The arguments used by the Constitutional Tribunal in its discussion of the Civil Service Act providing that the employees of board offices should become the staff of this service, should definitely be much more convincing. According to the Tribunal, such a change would be against the constitution which guarantees independence for local government units and appeal boards should be treated as an element of the local government system – a guarantee of its constitutional independence of the national administration. This nature of appeal boards is confirmed in art. 5 § 2 (6) of the Code of Administrative Procedure which included SKOs among the bodies of the local government units. Indeed, the Prime Minister is competent to staff appeal boards, but this competence is closely related to the law in force and his position with regard to appeal boards may not be considered as similar to his position with regard to the bodies and government administration institutions which directly report to him.

The shape of the new regulation with regard to the appointing and dismissing of the SKO members does not change considerably as compared with the original version. First of all, it was provided that the candidates for the president of a particular board would be elected (and presented to the Prime Minister) by the general meeting, which would indicate two candidates that acquired an absolute majority at the presence of 3/5 of the members. A candidates may be any permanent member of SKO from the entire country who was informed about the possibility to enter his/her candidacy by the president of KRSKO indicating the date and the form of submitting the application, subject to the rules and regulations of a particular board. The candidates should be selected within 30 days after the expiry of the term of the previous president who is to perform this function until the next president is effectively appointed (art. 5 of the Act on SKOs). This regulation ensures the continuous management of the appeal body office, making it independent of potential „whims” of persons in the Prime Minister’s position or those around him or her. The act applied in practice confirmed the effectiveness of these solutions.

Secondly, the way of appointing board members is still to be based on a competition, but the competition commissions are formed by the general meeting of this body and practically it is impossible not to take into account the request to appoint a given person made by the board president.

This solution even gave rise to the view that „What raises doubts (...) is the point of examining whether the form and requirements concerning the selection of candidates for the position of the board president and the positions of board members are observed because even if irregularities in these procedures are established, they may not become the reason for the refusal to appoint or dismiss the board president or the refusal to appoint or dismiss a board member”11. This view is definitely far-fetched. Each state body is obliged to comply with the law, act under it and in line with it. It means that by appointing or dismissing a SKO president or another member on the basis of unlawful procedural acts, the Prime Minister himself/herself would be breaking the law and his/her act would qualify for a reversal by the administrative court as a result of the examination of the complaint filed by the person who would have a legal interest in it (a rejected candidate or a dismissed president or member) or by the prosecutor.

Thirdly, by awarding the Prime Minister the competence to dismiss the SKO president, it was assumed that his/her dismissal for the reason of „a repeated breach of law while performing responsibilities or evading the performance of responsibilities” may occur only after the explanatory proceedings, which established the occurrence of the above circumstances, had
been conducted. Such proceedings must be conducted with the participation of the interested person and the dismissal decision must be made after the general meeting of a particular board had expressed its opinion (art. 6 (1-3) of the Act on SKOs). The legislator failed to mention one very important issue in these regulations – there is no indication of the competent body to conduct explanatory proceedings. Because the same act provides for the institution of explanatory proceedings conducted by the disciplinary proceedings representative (elected by KRKSO to conduct these proceedings, as may be predicted, with regard to the persons holding the position of the board president – art 16 d (2)), in practice the dismissal of the board president because of the cited reason may occur only when the disciplinary proceedings representative of KRKSO establishes certain facts that the Prime Minister will be able to qualify as a „repeated breach of law while performing responsibilities” or „evading the performance of responsibilities”. This complex procedure, difficult to manipulate from top down, provides appeal boards with very effective possibilities”. This complex procedure, difficult to manipulate from top down, provides appeal boards with very effective possibilities. It could be predicted, with regard to the persons holding the position of the board president – art 16 d (2)), in practice the dismissal of the board president because of the cited reason may occur only when the disciplinary proceedings representative of KRKSO establishes certain facts that the Prime Minister will be able to qualify as a „repeated breach of law while performing responsibilities” or „evading the performance of responsibilities”. This complex procedure, difficult to manipulate from top down, provides appeal boards with very effective possibilities.

Due to the level of protection of persons holding the position of the SKO president, vice-president and member, there are proposals to award the Prime Minister or the competent minister in charge of public administration the competence to suspend persons in their functions in the event of doubts as to the lawful performance of their responsibilities. This is a very dangerous solution with regard to board independence as boards serve to protect local government units and private persons from unlawful interference into their rights. If the board president is charged with a crime, the criminal procedure provides for the adequate prevention measures applied under the control of the court which, among others, allow the prosecutor to suspend this person in his/her rights to hold a public position („in on-duty acts” – art. 276 of the Code of Criminal Procedure). These instruments should be considered necessary and sufficient.

Another change introduced in 1999 was the statutory guarantee of a certain level of remuneration for permanent board members for their work. The new regulations (art. 15 (6)) provide that the basic remuneration of the board president, vice-president and permanent board members is the multiple of the average remuneration forecast in the state sector and its level depends on the years of work experience and the position held. The next regulation obliges the Prime Minister to specify, by way of an ordinance, the multiple of the average remuneration forecast referred to above with the reservation that this multiple may not be lower than 3.0. It was yet another example of making the professional status of the SKO adjudicating staff similar to the status of the judge, but it should be noted that there is an element which differs the two groups remunerated according to the „multiple system”. The remuneration of judges on a particular level is equal while the remuneration of SKO members was to differ with regard to the position held. This is why the ordinance issued provides for separate basic remuneration rates and bonuses for individual positions; moreover, the presidents are entitled to grant special bonuses. The relevance of the years of work experience was guaranteed by the adequate application of the provisions on bonuses for the years of work experience paid following the rules valid for the local government employees.

Undoubtedly, the legal position of SKO members was influenced to a great extent by the introduction of the provisions on the disciplinary liability of board members to the act in 1999 (art. 16 a-16 e). It should be borne in mind that the establishment of this form of liability implemented in the proceedings before disciplinary bodies, independent of bosses and superiors, is not a threat to or interference into the legal sphere of persons who are to be subject to it; to the contrary, it provides additional protection of their rights and liberties. Since that moment superiors are no longer entitled to a binding evaluation whether a given employee (member of corporation, etc.), subject to such a liability, committed the act defined as a failure to perform or a breach of work duties. For appeal board members, it means that the president of the board and the Prime Minister, as the bodies entitled to, respectively, move for a dismissal and dismiss them from the positions held in the event of „the confirmation of a repeated breach of law while performing responsibilities or evading the performance of responsibilities” lost these competencies.
When the amended Act on SKOs entered into force in December 1998, this premise of dismissing a board member was replaced by the premise of a “valid decision of excluding from the board panel by an adequate disciplinary committee” (art. 8 (6) in its new wording). This sanction is the most severe penalty for the “negligence of professional responsibilities or dignity” of a board member (art. 16 a and 16 b (1) in the Act on SKOs. Disciplinary proceedings are to be conducted by the committees selected from the permanent members at the general meeting of the board and, in the second instance, by KRSKO.

In line with art. 16 c (4) of the act, disciplinary committees are independent with regard to disciplinary decisions and are not bound by the decisions of other bodies applying the law, except for a valid convicting judgment of the court, and independently determine any factual and legal issues. Explanatory proceedings as to the existence of the circumstances justifying the disciplinary liability of a member are to be conducted by the disciplinary proceedings representative appointed by the SKO president or by KRSKO (art. 16 d (2)). Under the act, the accused have the right to be heard, to defend and to appeal against the decision of the disciplinary committee of the first instance (art. 16 d (4-6)) with the reservation that disciplinary proceedings may not be instigated after the expiry of 4 months from the day when the relevant body received information on the act committed that would justify the penalty and 3 years after this act was committed (art. 16 e (1)).

Indeed, the act includes no provisions on the possibility of appeal against disciplinary decisions to the court, but it should be clear that the interpretation of the civil procedure provisions, in line with the constitution (especially its art. 45 and 77), should lead to the conclusion that disciplinary decisions may be controlled by common courts, which follows from the abovementioned constitutional rules as well as from art. 177 of the constitution of the Republic of Poland which adopts the presumption about the jurisdiction of these courts. The solutions adopted make it possible to state that the formula of the board member’s disciplinary liability guarantees full protection of his/her rights, which is expected from a democratic state of law, and hardly anything should be corrected here.

The changes in the Act on SKOs, introduced under the act of December 1998, were not the ones which changed the position of boards within the public administration structure to the largest extent. Much more important were the changes caused by the amendment of the Code of Administrative Procedure, the Municipality Act and the new District and Provincial Local Government Acts. Each of them introduced the solutions which had been the case so far, with regard to the matters falling within the own responsibilities of the bodies of the local government units, but also with regard to all matters within the competence of these bodies except for the cases when the jurisdiction of another body would be reserved by a specific provision. This, of course, concerned the examination of appeals and complaints against the decisions and orders of local government units, issues in general and fiscal jurisdiction proceedings as well as the performance of other tasks of the higher-level body with regard to such cases and, what is more, the assumption of the role of a body supervising the course of administrative execution and compliance with the provisions of the Act on Executive Proceedings in Administration (see art. 23 of this act). This meant that appeal boards assumed for examination the matters regulated by about one hundred acts of law and, moreover, the closed cases where final decisions were taken by national or government (after 26 May 1990) administration bodies provided that after the Public Administration Reform of 1998 these matters were “transferred” to the competence of the bodies of local government units. As a result, soon the number of cases handled by appeal boards doubled.

Adjusting the provisions of the Code of Administrative Procedure (and the Tax Ordinance Act) in relation to the Public Administration Reform, yet another modification of the legal status of boards as appeal bodies was introduced. It was done by adding new paragraphs to art. 138 of the Code of Administrative Procedure and art. 233 of the Tax Ordinance Act which entitled the local government appeal board to issue a revoking and final decision on the case with regard to its subject matter only in the event when legal provisions did not leave any space for resolving it after it was recognized by the first-instance board. In other cases the board, having regard to the appeal, was to limit itself only to the annulment of the decision appealed against.

The next change concerned exclusively the employee status of the permanent board members and their presidents and was introduced together with the comprehensive reform of the public sector employee remuneration system. The state abandoned the concept of guaranteed remuneration for these employees which would be the derivative (multiplier) of an average remuneration received in the national economy or one of its sectors and replaced the provisions of seven acts based on this principle with the regulations providing for the multiple of the “basic amount which was established by the National Budget Act, under separate rules”. In view of the above, the contents of the provisions of art. 15 (6) and (7) of the Act on SKOs was changed. What was achieved as a result was the impact of the expense level upon remuneration, which so far could have only been forecast but not planned, and at the same time a considerable reduction of the remuneration level for all professional groups influenced by this change. In the face of the state of public finance, this solution is little surprising and the restoration of the previous rules should not be expected.

Another amendment was related to the fact that the reform of administrative judiciary entered into force. As a result, as has been mentioned before, there was a change with regard to the territorial jurisdiction of boards, which was to be permanently determined by the Prime Minister replacing the previous temporary nature of determination and their original rights in the appeal procedure were restored. Moreover, art. 22 of the Act on SKOs providing for asking legal questions to the Supreme Administrative Court was deleted (appeal boards lost the right to ask questions to the Constitutional Tribunal and submit motions to examine the constitutionality of legal acts and the compliance with executive acts before, due to the fact that the Constitution of the Republic of Poland and the new Constitutional Tribunal Act, which did not have space to include such rights, entered into force).

The most recent change of the Act on SKOs was introduced over 6 years ago. Despite insignificant material framework...
should be considered as the second important with regard to its impact on the position of boards and their staff. Under art. 1 of the act of 25 November 2004 amending the Local Government Appeal Board Act, the Act on Government Administration Departments and the Act on Government Administration within the Province (O. J. no 33, item 288) “administrative activity” of boards was to be supervised by the Prime Minister. To prevent potential accusations of the invasion of the sphere which should not be explored by the government administration bodies, art. 3 a (3) of the Act on SKOs provides that in the ordinance specifying the „special mode of supervision” the Prime Minister has to take it into account that this supervision „should not infringe the rights of the administrative court which supervises the decisions made by the board”. At the same time, it explains the aim of this supervision stating that it should facilitate „fast and effective performance of the responsibilities assigned to appeal boards”.

This construction of the Prime Minister’s statutory authority with regard to appeal boards (under art. 3 a (2) of the Act on SKOs the Prime Minister could delegate the execution of supervision to the competent minister in charge of public administration) may raise fundamental doubts of legal and constitutional nature. First of all, in order to be able to implement the act by means of the ordinance, to establish the „special mode of supervision”, the act must include general statutory rules that are subject to implementation, the fundamental rules of conduct. Nothing of this kind can be found in the amending act.

Secondly, supervising „the administrative activity of the board” in the situation when the entire activity of this body involves administration means extending supervision over all activities of this body. All doubts in this regard are dispelled by the contents of the ordinance issued. Although it does not provide for the examination of the correctness of the ordinances issued, it does enable the assessment of the compliance with the procedure. Following the provision in § 2 (2) b of the Prime Minister’s ordinance of 8 September 2005 on the special mode of supervision over the administrative activity of local government appeal boards (O. J. no 175, item 1473), the supervision of the administrative activity of appeal boards involves in particular the „examination of handling cases in due time and the amount of backlog”. The evaluation whether in a given situation there was a breach of deadline to handle the case or the deadline was observed, involves the assessment of the compliance with the procedure. It is the obligation of the administrative court. Although it may be decided that the indicated provision does not infringe the authority of the administrative court to declare a valid opinion on this issue with regard to any case, nevertheless, by providing for the issuance of post-control recommendations whose execution is obligatory for the board president, the same ordinance introduces a two-track process of control in public administration, which runs against the provisions of the administrative law. What is more, the use of the authority to issue an ordinance in this way infringes art. 21 (2) of the Act on SKOs, which reserves that the jurisdiction of the board is controlled only by administrative courts. This control also includes the evaluation of the compliance with the provisions related to the way of handling cases.

Thirdly, which might have been expected, the ordinance based on such a limited statutory regulation included in its contents the issues falling not only within the scope of authorization (specific mode of supervision) but in fact all elements of the legal regulation of this kind with regard to the activity of a public administration body – the material scope and the instruments (measures) to achieve its aims. The fact that until today the compliance of this ordinance and all provisions of art. 3 a with the constitution of the Republic of Poland have not been questioned can only be justified because this is prescriptive matter which is difficult to be used as the basis for the implementation of an administrative act that would remain in power as a result of the control by the administrative court. As it has already been pointed out in literature, using the name of „supervision” with regard to the activity provided for in art. 3 a of the act is just littering the legal order because, in fact, this provision makes it possible only to control the management and administration activity of board presidents. In the situation when the professional control of such activity based on statutory rules is exercised by the National Audit Office, the „improvement” of the legal order in this regard should be considered a waste of public funds.

Conclusions

The evolution of the legal regulation shaping the status of SKOs, which was presented here, shows that the institution of appeal boards has achieved remarkable success. As compared with the state in 1990, the current situation should definitely be considered more beneficial, both from the perspective of an individual expecting the appeal board to protect him or her from the breach of his or her rights and desisting from exercising them, and from the perspective of the postulates of modern science about good administration. It is evident that since 1994 the Act on SKOs has undergone insignificant changes, which do not upset its main „core” and even these amendments that aimed to strain board independence did not bring the expected results. It may even be said that the SKOs legal status should be taken into account when other bodies protecting the individual’s rights and liberties are constructed. Any subsequent amendment of this act should be carefully considered before it is implemented. Instead, more attention should be devoted to the thorough interpretation of its provisions.

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NOTES:

1. O. J. no 16, item 95. This act entered into force on 27 May 1990.
2. See. art. 17 (1) of the Code of Administrative Procedure in the wording established as a result of the act of 24 May 1990 amending the Code of Administrative Procedure entering into force (O. J. no 34, item 201).
3. When the local government was reactivated, its bodies were authorized to settle administrative issues by way of decisions regulated by 21 legislative acts – see art. 1 and 2 of the Act of 17 May 1990 on the division of responsibilities and competencies defined in specific acts between municipality bodies and national administration bodies and on the amendment of certain legislative acts (O. J. no 34, item 198 with later amendments). Moreover, the acts extending the scope of adjudicating competencies of municipalities and, which follows, appeal boards, entered into force in 1990. One specific example is the Welfare Act.
4. Under art. 30 (1) of the Local Government Appeal Board Act, the members of the regional assembly appeal boards functioning so far, who performed these functions under contracts of employment became, when the act entered into force, the permanent members of relevant territorial boards, unless they did not meet the criteria referred to in art. 5 (1).
6. See art. 73 (6) and art. 77-81 of the Property Management Act of 21 August 1997 (O. J. of 2010 no 102, item 651, with later amendments)
7. This is confirmed by annual information submitted by all SKOs, initially to regional assemblies and since 1999 – to the Prime Minister.
9. This happened under art. 34 of the act of 30 August 2002 r. – regulations introducing the Administrative Court System Act and the Act on the Proceedings Before Administrative Courts (O. J. no153, item 1271), which entered into force on 1 January 2004.
10. According to the Constitutional Tribunal, „SKOs are (…) to ensure two-tier administrative proceedings within the structures of the local government and their activity is independent of national administration”. See the Constitutional Tribunal judgment of 28 April 1999 K 3/99, OTK 1999/4/73.
13. See the provisions of art. 17 (1) of the Code of Administrative Procedure, art. 39 (4) of the Municipal Local Government Act, art. 38 (3) of the Powiat Local Government Act and art. 46 (3) of the Provincial Local Government Act– in the versions enforced as of 1 January 1999. Although the latter provides for a different exception from the abovementioned rule, it should still be assumed that it was not and is not of significant importance for the material jurisdiction of SKOs. Whenever the later specific provision establishes another body for the matters within the jurisdiction of provincial local government bodies than the legislator in art. 17 (1) of the Code of Administrative Procedure, this regulation will have a priority of application over the regulation in art. 46 (3) of the Provincial Local Government Act.
14. See art. 5 of the Act of 21 December 2001 on the changes in the rates of renumeration in the public sector and the amendments of certain laws (O. J. no 154, item 1799).
15. Art. 34 of the act referred to in footnote 17.
The 1990 reactivation of local government in Poland brought about the necessity of adjusting the institutions responsible for administrative proceedings at the time to the new legal and political situation. These proceedings had been codified as early as 1928, based on Austrian models and experience. However, it was obvious that the old legal solutions needed to be modified in order to protect the autonomy of bodies of local government.

The Polish legislators decided not to introduce the ‘recours de tutelle’ construct (i.e. the right to demand that the representative of the state in a given department – the prefect, in this case – refer an act issued by a body of local government to an administrative court). Nor did they consider it necessary to provide a separate mechanism in which legislation issued by bodies of local government would be challenged through administrative proceedings (this type of protection is known as ‘recurso tutelar’ in Portuguese law). Finally, they did not deprive the interested parties of the right to appeal against the decisions made by these institutions (i.e. the right to seek justice at the level of the second administrative instance). This right is presently of constitutional rank in Poland.

Local-government appeal boards were formed as an institution that would provide control over lower instances, and one that would be competent to examine the appeals lodged against the decisions of the previously mentioned group of bodies. These boards were to adjudicate with joint authority and to fully respect the idea of a fair trial. It is believed that they are a wholly original and unique institution in Europe.

They differ from institutions known as administrative tribunals, which function in common law systems, in that they operate in an inquisitorial system. Local-government appeal boards are thus hosts of the trial, with the same adjudicative powers as bodies of local government (the bodies which examine cases in the first administrative instance). They examine individual cases within the full scope of their subject matter. As a result of their proceedings, they may adjudicate as to the substance matter, or – overruling the decision that was appealed against – they may forward the case to an institution of first instance for another hearing.

In proceedings involving local-government appeal boards, the audi alteram partem principle is followed. The set of rights equated with the trial constructs of right to a hearing and right of defence, also applicable in appeal proceedings, derives from the first Polish codification of administrative proceedings, which was carried out in 1928. The party lodging the appeal has the right to file any and all complaints against rulings, make declarations and motions for evidence, partake in the discovery, inspect case files, and to be acquainted with the motives behind the ruling. In appeal proceedings reformatio in peius is forbidden – with some reservations. Local-government appeal boards are therefore a higher-level body than institutions of local government adjudicating individual cases; their position is similar to that of the Upper Tribunal in the recently reformed British system. The decision made by a local-government appeal board may be referred to the administrative court to consider its lawfulness (as a point of law).

The experience and knowledge gained during the years in which local-government appeal boards have been active have provided scholars working in the fields of law and administrative proceedings with a basis for preparing a theoretical concept of an autonomous adjudicating body that would have a similar position to a quasi-judicial body when making substantive decisions. It would assume the duty of adjudication at the stage of controlling rulings, including in cases handled by institutions of central government. This concept was born due to the flaws and weaknesses of adjudication of annulment by administrative courts, observed widely across Europe and prominent in many documents of the Council of Europe, among others. Putting this idea into practice is not an easy task, and would require the revision of many traditionalist views on administrative appeal proceedings. The British Tribunals, Courts and Enforcement Act of 2007 provides strong arguments in favour of taking this direction in the development of institutions controlling the activity of civil service. It seems that an adjudicating body independent from the executive (i.e. civil service) that would ensure the impartiality and objectivity of rulings may and should become the first component of a system controlling the actions of this executive.

The second component of this system would be the administrative judiciary, which would nonetheless only investigate the lawfulness of acts that are appealed against.

Professor ZBIGNIEW KMIECIK, Ph.D.
The Scope of Financial Competences of the Local Government Appeal Boards
(Selected Issues)

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I

The establishment of local government appeal boards can undoubtedly be considered one of the major successes of the extensive and difficult process of systemic reform of Poland’s public administration. Apparently also, the experience to date supports the conclusion that the appeal boards have become a permanent feature of the public administrative structure. Such a statement seems to be justified, above all, by the high opinion as to the merits of the effects of the operations of the appeal boards, formulated especially through the perspective of constitutional, substantive and procedural rules for the awards in individual administrative cases. This does not mean, however, that the appeal boards have reached the stage of ultimate systemic and organisational perfection where they are not subject to formal or legal review. On the contrary, a process of evolution of this institution is noticeable in many aspects, and in particular as regards the issue of their financial and legal competence.

As we know, local government appeal boards are higher-degree authorities within the meaning of the provisions of the Code of Administrative Procedure and the Act of 29 August 1997 on Tax Law, in individual cases of public administration within the competence of local government units unless special regulations stipulate otherwise. Also, under the terms set out in separate acts of law, appeal boards may adjudicate in matters other than specified above.

A considerable number of decisions reached by appeal boards concern matters relating to the sources of income, broadly understood, of local government units; namely the income of municipalities, poviatas and voivodships. Thus, the role and importance of appeal boards in financial matters which affect the financial management of local government units cannot be underestimated. This includes, but is not limited to the municipalities where the appeal boards are the bodies with which appeals are to be filed concerning fiscal matters, against decisions made by heads of local government authorities in villages (wójt), smaller towns (burmistrz) or bigger cities (prezydent miasta) concerning taxes and local dues. All these public dues are fully governed by the regulations of the Tax Act and, consequently, the meaning of this piece of legislation for cases also adjudicated on in appeal (complaint) proceedings by appeal boards, through administrative decisions (rulings), is significant. This Act came into force essentially as of 1 January 1998 and at the time it replaced the provisions of the Code of Administrative Procedure (CAP) with respect to procedural regulations, including jurisdiction-related administrative proceedings. As regards issues under substantive law, on the other hand, its provisions apply in lieu of the Act on Tax Obligations.

It is to be emphasised that financial matters resolved by appeal boards may not be limited to the aforementioned taxes and local dues. Many special statutes provide for the payment of various charges under public law which contribute to the budgets of local government units at all levels, either directly or through various forms of redistribution. Also the Tax Act provisions, even though not always to the full extent, apply when cases concerning such levies are adjudicated before appeal boards.

Clearly, there are also levies under public law which are a source of income for local government units, in matters within the competence of the appeal boards, which are not subject to the tax law regime to any extent, and the payment of which is governed by the regulations of the acts of law which pertain to such levies. Considering, however, that the Tax Act comprehensively regulates (or, at least, is intended to contain) the shared issues of various dues under public law, it is worthwhile noting the levies to the collection of which it applies and which may be the subject-matter of decisions taken by appeal boards.

II

The local dues which form the revenues of the National Environmental Protection and Water Management Fund, regional environmental protection and water management funds and contribute to the budgets of the poviatas and municipalities, are the charges for using the environment in the form of levies paid for the emissions of particles or gases into the air, the discharge of effluents and sewage or water into the ground, consumption of water and waste disposal. The environmental charges are governed by the provisions of Section III (tax obligations) of the Tax Act. The powers of the tax authorities are vested with the head of the poviat authority (marszałek) or the voivodship environmental protection inspector. Appeals against decisions made by the former are heard by the appeal boards in the city which is the seat of the local government authorities. As already mentioned, the reference made in the Environmental Protection Act applies only to the legal concepts contained in Section III of the Tax Act, and thus not all regulations of this act of law will apply (accordingly) to proceedings on environmental charges. The doctrine points out that the Environmental Protection Act contains...
a number of procedural regulations. It cannot be concluded, however, that there exists a certain separate procedure in environmental protection cases. Because of this, and to the extent not regulated by the Environmental Protection Act, the provisions of the CAP should apply to administrative proceedings on environmental charges. Considering, however, that the aforementioned charges constitute financial resources whose nature is very similar to tax obligations, the legislature has taken account of this specificity by making a relevant reference to Section III of the Tax Act. It is to be noted that proceedings on environmental charges should be governed jointly by procedural concepts derived from the CAP, the Tax Act and the Environmental Protection Act. As a consequence, it is legitimate to conclude that the procedure relating to these charges is one of the most complex in the Polish legal system. This observation is also valid as regards the application of substantive law provisions. To make the picture complete, it should also be emphasised that there are certain exemptions too regarding the reference to Section III of the Tax Act. This is true of the Tax Act provisions on the setting of the extension charge and also, but only for so-called increased environmental charges, on the postponement of the term of payment of the dues and the cancellation of overdue liabilities, and interest for the delay. All this is a serious complication to the proceedings and requires the appeal board staff to hold special professional qualifications.

Another charge, the earnings from which also support the local government budget at the voivodship level, is the product fee (opłata produktowa) and the increased product fee (podwyższona opłata produktowa). This fee relates to the special obligations imposed on undertakings which import into Poland products listed in the Nature Protection Act (e.g. lube oils, waste oils and tyres) and products in the packaging listed in the Nature Protection Act (e.g. plastic packaging). What is important amongst these obligations is to ensure recovery (recycling in particular), at a certain level, of packaging and post-use waste. An absence of the required level of recycling or recovery results in the undertakings’ obligation to pay the product fee. If the fee is not paid without a call upon an undertaking (or recovery organisation) by 31 March of the year following the year for which it is due, or is paid in an amount lower than that due, the head of the voivodship self-government authorities (marszałek) issues a decision which sets the overdue product fee amount. Failure to pay the overdue amount within 14 days from the date on which the decision became final is the premise for imposing a so-called additional product fee of 50% of the unpaid fee. This additional fee is also set by administrative decision. An appeal may be filed against this decision with the appeal board. Also, the Nature Protection Act stipulates that the payment of product fees shall be governed by the provisions of Section III of the Tax Act, accordingly.

Another type of product fee relates to the limiting of the negative impact of used batteries and power cells and the efficient collection and recycling of the resulting waste, including through supporting a high collection rate of portable batteries and used portable power cells. This fee is governed by concepts corresponding to those provided for in the Nature Protection Act. Here, too, an additional product fee may be imposed. As concerns the product fee on batteries and power cells, the head of the self-government authorities in the voivodship (marszałek) is entrusted with the powers of the tax authorities and the fee is governed by the provisions of Section III of the Tax Act. Characteristically, appeal boards are here partly in the capacity of a form of „state financial authority”. Indeed, the earnings from this fee constitute 5% of the income of the voivodship’s self-government, whilst the remaining portion of the fee goes to the national budget.

The dues which constitute a significant item in the budgets of municipalities, especially so-called „mining” municipalities, are the ones regulated by the Geological and Mining Act. There are several types of them, relating to special use of the environment and depending on the type of operations the undertaking pursues. These include: the exploitation charge paid by undertakings extracting minerals from deposits, charges for exploration/prospecting rights and identifying deposits of minerals, and charges for free storage of substances and depositing of waste in the orogen, including in the underground workings of mines. The Geological and Mining Act provisions also introduce qualified (increased) forms of the aforementioned fees. Without getting into a detailed analysis of the legal concepts adopted in the Geological and Mining Act, it is to be concluded that administrative decisions pertaining to these charges, subject to review by the appeal board as a higher-instance authority, may be issued by the head of the self-government in voivodships (marszałek), poviat (starosta), villages (wójt), smaller towns (burmistrz) and bigger cities (prezydent miasta). As in the case of the applicable regulations on the charges for using the environment or the product fees, the Geological and Mining Act makes a reference to the application of the provisions of the Tax Act on tax obligations, which equals the application to these charges of Section III of the Tax Act.

The charges which make up the income of the budgets of local government units (municipalities), and which are also governed by the provisions of Section III of the Tax Act, include the charges for keeping the municipalities clean and orderly. This is provided for in Art. 6 para. 12 of the Act on Keeping Municipalities Clean and Orderly (Clean Municipalities Act), which, at the same time, as regards the application of these regulations, grants the powers of tax authorities to the heads of local governments at different levels (wójt, burmistrz or prezydent miasta). This regulation excludes the application of Article 67. of the Tax Act. This Article has since been repealed and replaced by Article 67a. In view of the foregoing, a concern has been voiced in writings on the subject as to whether the charges for keeping municipalities clean and orderly can be governed by regulations which apply to preferential forms of repaying tax liabilities. It seems that if in the current legal situation, the Clean Municipalities Act does not provide for such an exemption through the exemption from application of the aforementioned Article 67a of the Tax Act, the said provision can then also apply to the charges in question.

Consequently, in proceedings on the aforementioned charges, we deal with the parallel application of the provisions of acts of law which regulate the charge in question, the provisions of the CAP and the Tax Act. While endorsing the views, expressed before, on the considerable degree of complexity of the procedure relating to the payment of these charges, one can ponder, on the one hand, on the pur-
posefulness of such a manner of regulating the dues under public law but, on the other hand, voice some reservations as to the scope of reference to only Section III of the Tax Act. It is worth noting that in the Tax Act, appeal boards have been deprived of the possibility to adjudicate on a reformatory basis (i.e. issuing a repealing decision which resolves the case on its merits), in matters in which the law leaves the manner of resolution to the discretion of the first-instance tax authority (i.e. decisions made as part of administrative discretion). This is of particular importance as regards decisions on preferential forms of repayment of tax liabilities and, above all, with regard to decisions which concern possible cancellation, in whole or in part, of overdue tax payments, interest for the delay or the extension charge. Where an overdue tax is cancelled, the tax liability expires and the taxpayer is released from the obligation to perform a service for the local government unit which is then deprived of an item of its budget income. The exclusion of the possibility, amongst other things, for appeal boards to cancel overdue tax liabilities is substantiated by the prior granting to this body of the power to adjudicate, on their merits, in matters based on administrative discretion, which therefore gives „local government appeal boards an important say in the generation of income by local government units. A reduction in this income as a result of decisions made by a local government appeal board may have an impact on the completion of tasks funded from the budgets of local government units. It is to be noted, at the same time, that it is the heads of local government authorities (wojt, burmistrz and prezydent miasta), and the executive boards (zarząd) of poviat and voivodship, and not local government appeal boards, who are responsible for the generation of the local government unit’s budget. Being the tax authority at first instance, in generating the unit’s budget, the chairman of the executive board of the local government is also strictly bound by the provisions of the budget resolution which pertain, amongst other things, to the planned income. In such a situation, it seems reasonable to consider the introduction of corresponding regulations in normative acts which concern the aforementioned charges or directly in the acts of law which regulate the different charges, or by reference to the due application of the provision of the Tax Act. Even though the said charges are not the sole income component of the budgets of local government units (this is sometimes a only small percentage), it does not seem to be a serious enough argument which would speak in favour of the application, as regards their cancellation, of concepts other than those which govern the taxes forming the income of local government units. After all, these charges (or at least a certain portion thereof) constitute an item of the budgetary income of these units to carry out the tasks of the municipality, poviat or voivodship and is taken into account when planning the budget.

In the Polish legal system, reference can be made also to charges which make up the income of local government units, and which concerns have existed or still exist which relate to the application to them of the Tax Act regulations. Without getting into a more detailed analysis of the nature of these concerns and their possible resolution in the case-law of administrative courts, it is appropriate to note that cases relating to these charges form a major area of the adjudication activities of appeal boards. What is meant here is the planning fee, improvement fee, the fee for using licenses to trade in alcohol beverages, the fee for occupying a road lane and the fee for issuing a vehicle registration card.

A major component in the income of municipal budgets are the charges levied for removing trees and bushes, regulated in the Act on Nature Protection. However, as regards these charges, there is no reference to the application of the provisions of Section III of the Tax Act; the applicable regulations on their amounts and collection are included in the Nature Protection Act itself.

The charges which are not governed by the provisions of the Tax Act and which are imposed by heads of local governments at different levels, also include the charges set on the basis of the regulations of the Act on Social Assistance. This may be, for instance, the charge for staying in a nursing home, for a child in a foster family or for care or specialist care services.

In the adjudicating activities of the appeal boards, reference can also be made to matters relating to the charges collected in connection with enforcement proceedings in administration. Charges for enforcement activities and handling fees also constitute a source of income for local government units.

The reference to the examples provided above, which is not meant to form a comprehensive presentation of the themes involved in the proceedings before appeal boards, aims at illustrating the variety and high degree of complexity of the financial cases resolved by these bodies. This is, at the same time, a confirmation of the statement on the important role played by appeal boards as financial adjudicating bodies making awards in cases of levies under public law which constitute the income of, amongst other things, local government units.

In the context of the conclusion that the appeal boards are now playing an important role as regards adjudication in broadly understood financial matters, reference can also be made to the Public Finance Act. This Act regulates, inter alia, the issues of refund of subsidies granted from the budget of a local government unit. This pertains to the obligation to return subsidies not spent within the time limit, dispensed contrary to their intended use or collected erroneously or in an undue amount. This confirms that the activities of the appeal boards are not confined to adjudication on local government taxes and charges but also cover other non-tax budgetary dues under public law (not only subsidies). It is noteworthy also that the non-tax dues, to the extent not regulated in the Public Finance Act, are governed by the provisions of Section III of the Tax Act accordingly. It is to be mentioned that the Public Finance Act regulates individually the rules on the cancellation, splitting into instalments or deferral of non-tax budgetary dues. Thus, the provisions of the Tax Act will not apply. The decisions in this regard are made by the first-instance administrative body as part of its discretionary administrative power. However, the Public Finance Act does not contain an equivalent of Article 233 § 3 of the Tax Act and, in that connection, the concern can be repeated which was already voiced as regards these charges, as to whether the absence of such a regulation will not cause an intervention by the appeal boards compromising the financial independence of local government units.
It is appropriate to add, at this point, that the adjudicating activities of the appeal boards in financial matters are not limited to taxes and charges only or the non-tax budgetary dues, that is the levies which are imposed under public law. The appeal boards also adjudicate on matters of updating the annual fees for perpetual usufruct of land properties even though these are fees charged under civil law.

**III.** In light of the provisions of the Act of 1994 on Appeal Boards and the 1997 Tax Act, the appeal boards effectively play the role of a tax authority. However, the appeal boards stand out compared with the other tax authorities. Being one of a number of public administration authorities, they perform, at the same time, the tasks of a tax authority of a specific structure. This concept seems to be a natural complement to the tasks of other public administration bodies for which the appeal boards are higher-instance authorities.

Whilst emphasizing the characteristic position of the appeal boards compared with other tax authorities, it is appropriate to point primarily to two basic elements which determine their exceptional nature. The first is the entire package of regulations setting out the legal position and organisational rules for the appeal boards. The other is the scope of the fiscal competences entrusted to the appeal boards.

**A. As regards the first of these aspects,** emphasis should be placed, above all, on the far reaching guarantees of independence of both the central and local government administrations. Unlike, for instance, the director of the fiscal chamber, the president of the appeal board is not a tax authority. The tax authority is constituted by the appeal board whilst the president manages its work and represents it in dealings with third parties. Furthermore, the director of the tax chamber reports to the minister competent in matters of public finance who, as a rule, appoints the director from amongst the candidates identified in a competition, although the possibility to depart from this procedure is provided for. Reference, in this case, to the ambiguous premise of „objective fulfillment of responsibilities” necessarily involves a high risk of political influence on the functioning of this tax authority, especially as we are dealing here with a direct relationship between a superior and a subordinate.

There are no grounds for raising such concerns as regards the supervision by the Prime Minister of the administrative activities of the appeal boards. It follows directly from both the provisions of the Appeal Boards Act and from the applicable regulation of the Council of Ministers, in that what is meant is the organisational and not substantive aspect of the appeal boards’ activities. In the current state of affairs, it is hardly possible to imagine from even the practical point of view, how central government administration could effectively intervene in the subject-matter of the cases handled by appeal boards where their presidents, appointed by the Prime Minister, are not tax authorities and the decisions of appeal boards are made after a hearing or an in-camera session – before panels of three.

**B. In the other aspect,** it is worth emphasizing that the local government appeal boards are very often termed in the writings on the subject as the local government tax authority. This is appropriate in the sense that it reflects the position of the appeal boards in the sphere of fiscal administration, as the authorities competent in matters concerning local taxes and charges. This term, however, is not entirely precise as regards the actual scope of competence of the appeal boards. Above all (leaving aside, at this point, the complications resulting from the definition of the tax authority or tax administration), contrary to the aforementioned terminology, concerning at least three local taxes, the competence of both municipal tax authorities and the appeal boards, is excluded.

The income from taxes on inheritance and donations, fixed-amount taxes and the tax on transactions under civil law is collected via the central government’s tax division. The argument that the current status is justified by better professional preparation of the staff of tax offices and fiscal chambers and the transfer of these responsibilities to the municipalities and appeal boards would worsen the quality of services to taxpayers, has failed. Nowadays, such a position seems not only anachronistic but it presumes, in a way, an intrinsically contradictory division of substantive and procedural guarantees within the fundamental level of central government – being the object of particular attention, and the peripheral level of local government. The time of systemic transformation seems to be a period of far-reaching improvement of the qualifications of local government staff who, after all, deal with the problems of the other municipal taxes. It is to be accepted that the reflection in this regard should be directed towards the systemic aspects and issues of efficiency of tax proceedings. From the viewpoint of constitutional foundations and independence of the local government, it is hard to justify such far-reaching intervention into the process of gathering municipal tax income. Undoubtedly, the current regulations also extend considerably, the proceedings as regards optional preferential treatment in the payment of the three aforementioned taxes. It also leads directly to a variety of interpretative concerns in that regard. The transfer of the competence to the municipal level will eliminate the necessity for the tax office to wait for the position of the head of the local government authorities in such cases. Besides, one cannot fail to notice that municipal tax authorities provide the taxpayers – owing to their location on the administrative map of the country – with the comfort of accessibility and, hence, reduction of costs of travel to tax offices. Favourable conditions in this aspect are also offered by local government appeal boards being evenly distributed throughout the country.

The specificity of the appeal boards as local government tax authorities stems also from the fact that their competences are confined to reviewing the decisions of lower-degree tax authorities. This is true of both the procedures at the successive instances and in the extraordinary courses of tax proceedings. It is to be noted at this point that the limits of such a review are sometimes much more narrow than in the case of the director of the fiscal chamber for instance. This is the case, particularly in matters of the aforementioned discretionary preferences. In the current legal situation, when hearing an appeal in such cases, the local government appeal boards may not change the provisions of the decision taken by the authority at first instance. Additionally, serious controversies come to light in practice as regards the current shape of the provisions of the Tax Act which are applied in such matters. Being competent to repeal a decision and resolve the
case on its merits, as in the case of so-called discretionary preferences, when hearing an appeal, the appeal boards should restrict themselves to repealing only the decision appealed. It is noted in writings on the subject, that in actual fact the limitation of the competences of the appeal boards is aimed against the rights of the party. Clearly, there are reasons in support of such a position, but one must not forget at the same time, the constitutional standards of self-governance and independence of local government units and their right to stable policy for generating budgetary income.

Oftentimes, an impression is given that the problems of the functioning of tax authorities at the local government level (including the appeal boards) have not always been taken into account with due accuracy or thoroughness, either upon the introduction of new or modification of existing tax regulations. By way of example, it suffices to mention the confusion concerning tax interpretations (the dimension of the difficulties is much broader, of course, and is not confined to the local government level only). In the current legal situation, the idea has already been abandoned, of the appeal boards being involved in the process of review of the interpretation made by heads of local government authorities (wojt, burmistrz, prezydent miasta), even though until recently, as the second-instance authority, the appeal board could change the decision of the first-instance body. Regrettably, the concepts adopted then were rather imprecise, conflicted with the legal order adopted in Poland and distorted the meaning of the institution. From this point of view, and having regard to the rationality of the application of interpretation, it was a positive development that an appeal filed with the local government appeal board has now been replaced with the appeal filed with the regional administrative court, even though such a change does diminish the rank of the appeal boards as tax authorities.

IV. In conclusion to this brief reflection on the variety of (selected) aspects concerning the specificity of the financial competences of the appeal boards, it is appropriate to emphasize the exceptional dynamics of the process of extending their competence in this regard. At the initial stage of their activities, this was reduced mainly to tax matters resolved in accordance with the Code of Administrative Procedure. The coming into force of the Tax Act (1998), marked another noticeable tendency to the extension of the financial competences of appeal boards, which, however, manifests itself not only in financial matters ever since they were established, should be the stimulus for a profound reflection on their important role in the functioning of the Polish local government system. Consequently, any possible reforms which touch, directly or indirectly, upon the systemic or procedural function of appeal boards, should enhance and not weaken this position. Because of this, it is appropriate to rely again, in this context, on the postulation to qualify local government appeal boards as constitutional bodies. This would confirm the direction of the reform of the state from a centrally managed system towards increased authority for local government. This would guarantee and confirm, at the same time, the significance of appeal boards as bodies protecting citizens in their relationships with first-instance local government authorities, which is quite important particularly in financial matters.

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NOTE:
2 Act of 29 August 1997 on Tax Law (c.t. in Dz. U. of 2005 No. 8, item 60, as amended – hereinafter referred to as the Tax Act).
3 See Article 1 para. 2 of the Appeal Boards Act.
4 See Article 1 para. 1 of the Act of 12 October 1994 on Local Government Appeal Boards (c.t. in Dz. U. of 2001, No. 79, item 856, as amended – hereinafter referred to as Appeal Boards Act).
5 See Act of 11 November 2003 on the Income of Local Government Units (c.t. in Dz. U. of 2010, No. 80, item 526, as amended).
7 See Article 273 para. 1 and Article 277 para. 4 of the Act of 27 April 2001 on Environmental Protection Act (c.t. in Dz. U. of 2008 No. 25, item 150, as amended – hereinafter referred to as the Environmental Protection Act).
8 Cf. Article 281 para. 1 of the Environmental Protection Act.
9 See Article 2a para. 2 of the Appeal Boards Act.
10 Cf. Komentarz do art. 281 ustawy z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska, [inc.] K. Gruszczyński, Prawo ochrony środowiska. Komentarz, LEX, 2008, ed. II. (SIP LEX). A view has been expressed in the writings on the subject that a position is justified that includes the environmental charges among taxes.
12 See K. Gruszczki, J. P. Tarno, Opłaty za korzystanie ze środowiska i kary pieniężne za jego zanieczyszczenie jako instrumenty ograniczające swobodę prowadzenia działalności gospodarczej, „Studia Prawno-Ekonomiczne” 2004, No. 70, p. 95 et seq.

13 See Article 281 para. 1a and para. 2 of the Environmental Protection Act.

14 See Act of 11 May 2001 on the Obligations of Undertakings as regards the Management of Certain Waste and concerning the Product Fee (c.t. in Dz. U. No. 90, item 607, as amended – hereinafter referred to as Waste Management Act). The income from product fees in the amount of 2% generates income for local government at the voivodship level, whilst most of the money goes to the National Fund for Environmental Protection and Water Management (Article 27 para. 2 and para. 3 of the Waste Management Act). In turn, the National Fund transfers 70% of the income from the fees on the packaging listed in the Annex to the Waste Management Act to the regional funds who in turn pass these funds on to municipalities in proportion to the amount of the packaging waste submitted for recovery and recycling.

15 See Article 19 of the Waste Management Act.

16 See Article 2 point 1 of the Act of 24 April 2009 on Batteries and Power Cells (Dz. U. No. 79, item 666 – hereinafter referred to as Batteries Act).

17 Cf. Art. 43, Batteries Act and Article 65 para. 2 and para. 3, Batteries Act.

18 See the Act of 4 February 1994 on Geological and Mining Law (consolidated text in Dz. U. of 2005, No. 228, item 1947, as amended – hereinafter referred to as Geological and Mining Act). As much as 60% of these fees go, as a rule, to the budget of the municipality in which the operations are pursued, and 40% makes up the income of the National Fund Environmental Protection and Water Management (Article 86 para. 1 of the Batteries Act.)

19 See K. Gruszecki, J. P. Tarno, Opłaty za korzystanie ze środowiska i kary pieniężne za jego zanieczyszczenie jako instrumenty ograniczające swobodę prowadzenia działalności gospodarczej, „Studia Prawno-Ekonomiczne” 2004, No. 70, p. 95 et seq.


21 See Article 233 § 3 of the Tax Act.


23 See in more detail concerning the nature of these charges and the possibility to apply or exclude application thereto of the Tax Act: G. Liszewski (ed.), op.cit.

24 See Article 5 para. 4 of the Act of 23 March 2003 on Land Development Planning and Management (Dz. U. No. 80, item 717, as amended).

25 See Article 144 of the Act of 21 August 1997 on Property Management (c.t. in Dz. U. of 2010, No. 102, item 651, as amended – hereinafter referred to as Property Management Act).

26 See the Act of 26 October 1982 Ubringing in Sobriety and Counteracting Alcoholism (c.t. in Dz. U. of 2007, No. 70, item 473, as amended).


28 See Article 402 para. 5 of the Environmental Protection Act.

29 See Article 84 of the Act of 16 April 2004 on Nature Protection (c.t. in Dz. U. of 2009, No. 151, item 1220, as amended – hereinafter referred to as Nature Protection Act).

30 Act of 12 March 2004 on Social Assistance (c.t. in Dz. U. of 2009, No. 175, item 1362, as amended).

31 See the Act of 17 June 1986 on Enforcement Proceedings in Administration (c.t. in Dz. U. of 2005, No. 229, item 1954, as amended).

32 Act of 27 August 2009 on Public Finance (Dz. U. No. 157, item 1240, as amended – hereinafter referred to as the Public Finance Act).

33 See Article 77 et seq. of the Property Management Act.

34 Art. 3a of the Act of 1994 and Regulation of the Prime Minister of 8 Sep-

Polish Presidency 2011
PROSPECTS FOR LOCAL-GOVERNMENT APPEAL BOARDS

Professor JANUSZ BORKOWSKI, Ph.D.

1. Local-government appeal boards (Polish: samorządowe kolegia odwoławcze, hereafter also referred to using the abbreviated form SKOs) have now been around for over 20 years, and this period may be used to evaluate the durability of this institution, which came into existence when local government and, consequently, the duality of local authority were restored. The evolution of SKOs and their current position and function in the system of civil service provide a basis for a discussion on the persistence of legal solutions tested in practice.

It might seem optimistic to say that predicting invariability has a very good (up to 75%) chance of success. However, there are obviously certain limits outside which this type of prediction fails; it is successful in relatively constant or slowly changing conditions. The answer to the question whether this type of predictions may apply to socially-significant public institutions would probably be affirmative, since it should be borne in mind that the legal awareness of a society cannot itself be directly regulated by means of law, but instead it is to a great degree shaped through real-life, direct or indirect contact with public-life institutions. This occurs mainly, but by no means exclusively, when law is applied in individual cases. Where organization-related and legal solutions are stable the state of legal consciousness, which significantly affects the acceptance of the role, place and position of public institutions, becomes established. That is why such a prediction corresponds to social expectations, since the stabilization of the structure and principles of operation of local authority facilitates the creation of the right atmosphere for cooperation between local communities and the authority, resulting in suitable conditions for the populace to make use of the services provided by its bodies.

2. In the first phase of forming the legal bases for local government at the level of the gmina in 1990, there emerged two tendencies concerning the way bodies of local government were supposed to exercise their executive function, especially with respect to individual administrative decisions. Namely, the question was whether these authorities should operate according to the same principles applying to central-government bodies, or function according to a separate set of rules. This issue was particularly relevant with regard to the right to appeal against individual administrative decisions of bodies representing gminas in matters classified as own tasks. The general two-tier principle, which was introduced into the Code of Administrative Proceedings (k.p.a) in 1980 through an amendment (article 15) could not be discarded; likewise, the principle of impartiality, which was ensured by precluding persons who had given the ruling in the first instance from appeal proceedings, needed to be preserved. The solution of this problem was not so much the introduction of joint appeal bodies, because such had always existed in the administration, as their specific relation with the local government assembly-council (Polish: sejmik). The appeal board was attached to this assembly, which appointed its members and determined its internal rules of operation. Such a solution permitted supervision in the frame of the structure of local government and within the boundaries of its autonomy, through administrative proceedings and on the legal bases set in k.p.a, as in the case of central government. The same legal position and process guarantees were provided to the individual in proceedings concerning individual administrative cases involving both kinds of bodies of the civil service.

3. The first period of SKO activity brought with it a number of observations, which were then taken into account when a separate act regulating the structure, tasks, and function of appeal boards as bodies of local government was being formulated. The subsequent reform of local government was carried out with the assumption that the structure of local government would feature three independent levels, each with a different range of tasks and functions. As a result, a separate, vertical line of administrative instances comprised of bodies of local government was not formed, and appeal boards functionally assigned to local government were preserved in the structure of the dualistic civil service, albeit with a legal position that was in some respects different. One of the consequences of this reform was a significant change in the range of competence of SKOs. Another result was that in terms of function, as joint bodies adjudicating in individual administrative cases, appeal boards combined distinct areas of competence of bodies on different levels of local government. SKOs based in voivodeship capitals started to adjudicate in individual administrative cases examined by bodies on three levels of local government, whereas SKOs based elsewhere adjudicated in cases falling under subject matter jurisdiction of those gminas and powiats, which were under territorial jurisdiction of these SKOs, as determined by an executive order to the SKO Act. Two areas where administrative judicature could be standardized through the activity of two types of appeal centres emerged.
If the significance of the legal circumstances in which local-government appeal courtsboards adjudicate pursuant to many regulations of substantive law, including over 200 acts and orders, is considered in the context of the 169,786 cases submitted in 2009, then it may be said that moving towards the standardization of law applied in individual administrative cases has important consequences for law as it is put into practice. The fact that in the said year 2009 only 12,503 complaints were filed to the administrative voivodeship courts, of which a mere 2844 were considered, is an especially noteworthy indicator of the quality of SKO judicature. When interpreting these numbers, which only give a very general idea about the judicature of SKOs, it is necessary to take into account the specific type of competence they exercise, which should be described as joint subject matter, territorial and functional jurisdiction. Most cases are examined by way of appeal, but there are also cases handled in the first instance or in one of the modes of extraordinary administrative proceedings. Peculiar cases such as disputes over fees for perpetual usufruct, which are heard in a mode which should be considered 'prejudicial', are also included under SKO jurisdiction. There are few bodies of central government that would be able to adjudicate in such a wide variety of cases without introducing special measures with regard to their organization and personnel.

4. A factor that is undoubtedly very important in handling judicature to an exceptionally large extent both in terms of subject matter and participating entities is the peculiar 'panel system', in which a number of SKO members who are not employed in the institution itself are appointed by competition for a statutory term. These part-time SKO members, who had completed higher education in various fields and have extensive knowledge of law and public administration, contribute their expertise in the different fields of the constantly expanding activity of local-government bodies to judicature. Such a structure of local-government appeal boards makes it possible to form highly professional adjudication panels fully capable of adapting to the subject matter of administrative cases in both legal and factual respects. It should also be mentioned that the SKO Act introduced a system whereby half of the panel comprising these special members is replaced, ensuring both the continuity of judicature and adjudicating qualifications appropriate for the ever-changing scope of SKO jurisdiction and the predominance of appeals in cases of certain types. This is also included among the statutory principles of SKO operation, in particular in the regulation pertaining to the appointment of adjudicating panels.

5. The quality of SKO judicature is affected by regulations concerning their operating principles, applied together with regulations of the Code of Administrative Procedure and the Tax Code. The main focus should be on the regulation laid down in article 21 section 1 of the SKO Act, which says that when adjudicating, the members of adjudicating panels are constrained only by regulations of generally applicable law; this should of course be interpreted solely in the context of the constitutional regulation of sources of law. Since adjudication is limited exclusively by regulations of law of this rank, there are no doubts when various cases of particularistic understanding and application of law emerge during the adjudication of administrative cases in the first instance. Such definite legal regulation precludes the direct dependence of SKO judicature on the current activity of local-government bodies, and it makes it possible to maintain appropriate distance in relation to those tenets of administrative politics on different levels of local government that would affect adjudication in individual administrative cases.

Also of importance is the introduction of a statutory basis for holding meetings and voting not only on the panel's ruling itself, but, simultaneously, also on the fundamental motives behind it (cf. the first sentence in article 17 section 2 of the SKO Act). This regulation is not very precise, since it refers to fundamental motives, i.e. those facts which have normative significance in a given case, as well as the understanding of the applied legal regulations. How exactly they are presented in the justification of the ruling is left to the rapporteur and their preparation regarding the substance matter of the adjudicated case. The meetings involving members of the adjudicating panel provide the opportunity to discuss the motives behind rulings, exchange views, and to reach a final consensus, and should prevent routine and schematic/conventional rulings from making judicature overly shallow.

6. In the course of the evolution of the original principles of SKO operation, they have become decentralized bodies of the civil service with an array of tasks and functions connected with the activity of local government. In terms of function, the status of SKOs is that of quasi-judicial bodies, since they are appointed to exercise administrative judicature in joint panels, and are bound exclusively by the regulations of generally applicable law. The essential autonomy of adjudication is ensured by statutory, regulated process guarantees and principles of operation to be followed when examining cases. Increasing the scope of tasks of some SKOs, which have become competent in cases dealt with by bodies of the voivodeship local government, did not change their position; they remain competent in cases of appeal against rulings made by bodies of powiats and gminas. What has changed, however, is the extent of adjudicating tasks and administrative duties, which has increased together with the number of submitted cases; in addition, the scope of actions aimed at preserving the uniformity of applied law has also grown wider, which was bound to result in personnel reinforcement. This type of changes in the operation of SKOs based in voivodeship capitals cannot, nonetheless, be equated with their removal from the structure of local-government appeal bodies as a whole, as they are still quasi-judicial adjudicating bodies that are subject to the control of administrative courts in terms of judicature, in the same instance and to the same extent as all local-government appeal courtsboards.

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FUNCTIONING OF LOCAL GOVERNMENT APPEAL BOARDS UNDER THE CONDITIONS OF POLAND’S MEMBERSHIP OF THE EUROPEAN UNION

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1. Introduction

Last year marked the twentieth anniversary of the establishment of local government appeal boards. The jubilee celebrations were accompanied by numerous conferences and meetings, which discussed the matter of changes of local government appeal boards over these years. In the course of their twenty year activity, the pivotal historical event took place, which substantially influenced the national legal order and the application of the rules of law in Poland; namely as of 1st of May 2004, the Republic of Poland became a Member State of the European Union. It seems only natural to complete these jubilee reflections with those related to the direct influence of Poland’s accession to the European Union as regards the functioning of local government appeal boards.

2. Local self government appeal boards as bodies obliged to apply EU law

As distinct from the common international agreements, the Treaties established their own legal order, which was included in the legal system of Member States and which is binding for national authorities. Thus, from the day of Poland’s accession to the European Union a new legal environment emerged, within which coexist legal norms of different origin; namely: national norms and those related to the EU. Consequently, new aspects have also been applied to the fundamental rules of operation of public administration authorities; namely, the rule of law and legalism.

According to the provisions of article 7 of the Constitution of the Republic of Poland, public administration authorities act on this basis and within the limits of the law. The activities of the public administrative authorities may not therefore be contradictory to any of the elements of the Polish legal order, and therefore both the legal norms of national origin and those of the EU. Each activity undertaken by public administration authorities should have a legal foundation, which is to be found within the standards encapsulated within the national and EU related norms. The use of EU law is obligatory for these public administrative authorities, including local government appeal boards who as bodies of the public administration are obliged to apply EU law.

As bodies applying EU law, they obtain competence to judge and compare national legal norms with those of EU law. Consequently, in order to ensure the full force and effect of EU law, the local government appeal boards are not obliged to apply national norms in case it conflicts with the requirement (the principle of primacy of the European Union Law), to directly apply the norm of EU law, or to carry out an interpretation of national law in conformity with EU law (obligation to apply the pro-EU interpretation of the national law). As a result, Poland’s membership in the EU is connected with the enlargement of competences of the local government appeal boards, following the obligation to apply EU law, due to the competence resulting from this said law. Local self-government boards can assess the conformity of a public administrative act to EU law, or to carry out an assessment of conformity of the national acts of law (acts of law, executive acts of secondary legislation) to those of EU law, whereas usually public administration institutions in national law – as being bound by the legal acts and executive acts – do not enjoy such a competence (for their assessment).

A further consequence of Poland’s membership in the European Union is the fact that the review of the adjudicating decisions of the local government appeal boards, performed by
an administrative court have also been carried out with respect to the conformity of its rulings with the EU law. The consequence of infringing upon EU law as a result of rendering a verdict in an individual case related to the public administration, which is contrary to UE law, might result in a liability for the state for damages inflicted on an individual. European Court of Justice concluded, that the state is perceived as a unity and shall be held responsible for the infringement on obligations resulting from EU law, regardless of the fact whether, the infringement causing the damage should be attributed the respective regulatory, executive or judicial authorities. It should be underlined, that the EU law generally leaves the member states a great deal of liberty as regards the structure of the public authorities which execute EU law, which is in a doctrine referred to as institutional autonomy of Member States. As a consequence EU law does not influence the constitutional position of local government appeal boards, stipulated by the provisions of an Act of 12 October 1994 on the local government appeal boards.

3. The influence of EU law for the ruling in individual cases within the scope of the public administration

The influence of EU law on the ruling by local government appeal boards in individual cases, within the scope of the public administration, pertains to both the substantial and procedural law. The influence can be direct or indirect. The regulations of EU law either directly constitute the basis for a judgment issued by public administrative authorities or EU law determines the contents of national acts of law, which form the basis for judgments issued by a public administration authority or constitutes a pattern for the interpretation of national law in order to ensure the judgment is conformant to EU law. Moreover, the meaning of the general rules of EU law should be kept in mind, such as: prohibition of discrimination on grounds on nationality, which also binds institutions of public administration applying the law. Prohibition of discrimination on grounds of nationality includes also the right of equal treatment as regards procedural guarantees and available legal measures within the scope of national procedures. It should be noted, that the examples discussed below concerning the influence of EU law on the adjudicating activity of the local government appeal boards, are only of an illustrative character and are not exhaustive.

3.1. Social welfare and family allowance

Exercising by the EU citizens, including Polish, of the right of free movement and residence on the territory of other EU Member States has influenced the application of regulations pertaining to social welfare and family allowances. Public administration institutions are increasingly stipulating rights to these benefits in a situation when part of the family members reside (work, conduct economic activity, furnish services) outside of the territory of Poland or in the situation, when a family member of the Polish citizen is an EU citizen. Following Poland’s accession to the European Union changes have been made to the subjective scope of the Act, of 12 March, 2004 on the social welfare and Act of 28 November 2003 covering the family allowances, so as to include within the scope of these regulations those EU citizens benefiting from the freedom to move to and stay (and therefore having a place of domicile) in Poland. In the event, when the family member eligible for the family allowance resides outside of the territory of the Republic of Poland (benefits from the right of residence under article 21 of the Treaty on the Functioning of the European Union) in a state, where applicable are regulations concerning the coordination of social security systems, the competent authority transfers a petition together with the documents to the province marshall. In such a situation the adjudication of the proper institution shall be executed after considering EU provisions pertaining to the coordination of the social security systems. In the case-law decisions issued by public administration institutions competent for matters related to family allowances, there were incidents of an improper interpretation of regulations pertaining to the coordination of these social protection systems. In particular, these provisions were construed as having influence over the determination of eligibility for benefits (the grounds for granting of allowance). Also, applications for family allowance were sometimes groundlessly rejected in a situation, where a family member commenced employment in other EU Member State, the rationale being that the state principally obliged to pay the allowance is the country where this family member is employed. Consequently, within the scope of appeal proceedings or court proceedings, such adjudications were repealed on the grounds of infringement of these coordination regulations. There have been cases in the judicial practice of determining by local self government appeal boards, of the invalidity of the administrative decisions due to the manifest infringement of the EU regulations.

Also worthy of attention is the requirement of place of residence as a prerequisite to granting the allowance in the Member State, in the context of a judgment by the European Court of Justice, of 22 May 2008 in case C-499/06 H. Nerkowska vs. ZUS in Koszalin. In the said case, the national regulations conditioned the payment of a disability benefit due to the incapacity for work, in connection with a stay in places of isolation upon the eligible person’s residing on the territory of Poland. In the referenced judgment the European Court of Justice declared that „national regulation, which puts in an aggravated situation some of the citizens of this country, only because they benefited from the freedom of movement and stay in other Member State, constitutes a restriction of freedoms guaranteed under the article 18 EC [currently article 21 of the Treaty on the Functioning of the European Union] to each member of the European Union”17. A question arises concerning the possibility to challenge the requirement of a place of residence on the territory of the Republic of Poland, as a prerequisite for the granting of benefits within the scope of social welfare. In the judgment of 20 November 2006 the Voivodship Administrative Court declared, that the social welfare system with regard to the welfare benefit for a surrogate family, stipulated in the Act of 12 March 2004 on the social welfare (Journal of Laws 2004 No 64, item 593 with amendments), shall be subject to derogation from the EU system of coordination of social protection, since benefits for the surrogate family do not fulfill the prerequisite of „family benefit” necessary to apply these regulations.
In the assessment of the Voivodship Administrative Court in Warsaw, the requirement to have a place of residence and presence on the territory of the Republic of Poland, laid down in the provisions of article 5 item 1 of the Act on social welfare, does not conflict with EU law. Whereas, in view of the judgment of the Voivodship Administrative Court in Warsaw referenced above in case C-499/06 Nerkowska, it clearly follows that such a requirement constitutes a restriction on the right vested also upon the citizens of the Republic of Poland for free movement and residence on the territory of EU Member States. It has to be underlined, however, in view of the same judgment that national regulation, which imposes such restrictions in the use of freedoms by its citizens, might from the perspective of the Community law [currently EU law – M.N.] only be justified, when it is based on the independent reasons of general interest of individuals not bound by citizenship, to whom it pertains and is proportional to the reasonable, well justified aim, which is executed by the national regulations. Consequently, it is not possible to unequivocally state, that the requirement to possess a place of residence as a prerequisite for the granting of benefit shall be always contrary to EU law. Such non-conformance shall be decided to a great extend by the fact that in considering the character of benefit, is the introduction of such a requirement justified. As regards benefits granted under the Act on social welfare, the requirement of place of residence being the prerequisite for granting of this benefit seems well justified, as regards benefits for the surrogate family. In general, such a requirement would be justified, when eligibility for the granting and payment of benefit is connected with the ongoing monitoring of the family situation, professional and material status of the eligible individual.

3.2. Environment protection

The Act of 3 October 2008 on making available information on the environment and its protection, means that a society’s participation in environmental protection and the environmental impact assessment has now became the basis for adjudicating in individual cases within the scope of the public administration, and is included in the appeal proceedings heard by the local government appeal boards. The referenced Act incorporates into the Polish legal regulations as many as six EU directives. Considering the influence of European law for the adjudicating activity of local government appeal boards, it is well worth noting, that the existing obligation within the scope of the investment process to carry out, in some of the cases, an assessment of the influence/impact of the undertaking on the natural environment and the requirement to obtain a decision on the environmental constraints of the investment, stems from EU law (EU directives).

The regulation of the Council of Ministers covering those undertakings which might substantially affect the natural environment, came into force on 9 November 2010, and, repealed the previously binding regulation of the Council of Ministers of 9 November 2004, which incorrectly implemented directive 85/337 stipulating the types of undertakings which might substantially influence the natural environment. This indicates that before the entering into force of the regulation of 9 November 2010, the public administration institutions were obliged to adjudicate on the basis of provisions of directive 85/337 and, in particular, require that the investor obtain a decision regarding environmental constraints, even if the undertaking had not been included within those entities which might substantially influence the natural environment covered by the resolution of the Council of Ministers of 9 November 2004, and was included into such undertakings in the directive. One should also pay attention to the fact that the far reaching powers of the ecological organizations in the administrative proceedings, result from the implementation into the Polish legal order of the provisions of directive 85/337.

3.3. Transport-related issues

The implementation of an internal market within the European Union results in the necessity of reciprocal recognition of the administrative acts of Member States pertaining to various issues, such as confirmation of particular qualifications (professional, licenses to drive vehicles etc.) or documents indispensable to determine in the Member State a place of residence in the individual case, within the scope of public administration (e.g. registration of vehicle, obtaining permits to drive mechanical vehicle or obtaining a duplicate of the lost driving license). The Traffic Law Act of 20 June 1997 executes the implementation of as many as twelve EU directives. Regulations of this Act pertaining to e.g. registration of mechanical vehicles and obtaining permits to drive mechanical vehicles, have been formulated under the influence of EU directives.

By way of an example, directive 91/439 (Article 8 item 5) pertaining to the driving license, stipulates the institution competent to issue a driving license duplicate. According to the referenced regulation, the authority competent is the institution of the Member State, where the holder of the driving license has his place of residence. Under the article 9 of the directive 91/439, the place of residence is the one where an individual usually resides, i.e. for at least 185 days in a calendar year as a result of personal or occupational ties. As a consequence for the review of a petition filed by German citizen, who owns a Polish driving license, but has his place of residence in Germany, the provisions of article 21§ 1 point 3 of the Code of administrative proceedings do not apply (i.e. we do not examine the place of residence or last place of residence or stay of such an individual with an aim to determine the jurisdiction of a Polish authority). Therefore should such an individual apply to the starost [district governor] for the issue of a duplicate document, the latter will give a negative decision due to the lack of jurisdiction of the said Polish authority to issue a duplicate driving license. Also the deadline had lapsed regarding the implementation of an important EU directive, from the point of view of individuals – i.e. directive 2006/126/EC of the European Parliament and Council of 20 December 2006 on driving licences, which constitutes a transformation of directive 91/439/EEC of 29 July 1991 on the driving licenses (Journal of Law EC L 237 of 24 August 1991, with later amendments). Considering the character of this directive (it constitutes a transformation of the so called “old” directive 91/439 on driving licenses) and the complicated method of determining the efficiency of its provisions in the national legal or-
ders, one should expect difficulties in the practical application of this directive, the more so given that the national regulations, which implement this directive in Poland, will only enter into force on 11 February 2012, despite the fact that the deadline for the implementation of this directive lapsed on 19 January 2011. The implementation deadline has been included due to the specific provisions of the directive, which constitute new solutions in comparison with the "old" directive 91/439 or amend certain provisions thereof. These regulations, however are enumerated in Article 16 item 1 of the directive 2006/126, and shall only be applied as of 19 January 2013 (i.e. from that moment they will constitute grounds for adjudicating in individual matters within the scope of the public administration). Part of the provisions of the directive 2006/126 is to apply as from 19 January 2009 (this pertains to the provisions regarding the proper authority to issue duplicate documents or to specify minimal requirements regarding examination of individuals applying for driving licenses). In the remaining areas (i.e. as regards provisions not enumerated in Article 16 and 18 of the directive 2006/126), and due to the lapsed time of implementation, as of 19 January 2011 it could be that the directive might have been directly applied by the authorities of public administration.

3.4. Spatial development and planning

As regards the influence of EU law on spatial development and planning, apart from the environmental constrains of the investment process (see notes pertaining to the protection of natural environment), the following examples are worth mentioning regarding the indirect influence of EU law for spatial development and planning. Firstly, the introduction in the Act of 27 March 2003 on the spatial development and planning, of the requirement to consult with a local institution (director of the regional water management) regarding the areas included in the flood hazard maps (Article 53 item 4 point 11 letter b of an Act on spatial development and planning) entails the obligation to implement in the national legal order, directive 2007/60/EC of the European Parliament and Council of 23 October 2007, concerning the assessment of a flood hazard and its management. This directive has been implemented in the Polish legal order under the act dated 5 January 2011 amending the Water Resources Law and some other legal acts. The referenced directive results in the obligation to develop maps of a flood hazard. Therefore, Article 53 item 4 point 11 introduced as of 21 October 2010 that initially stipulated the obligation to hold consultations with the competent institution regarding the areas exposed to flooding, incorporated in the study of protection against flooding, has been updated based on the amendment of 5 January 2011, following the necessity to introduce changes in the classification of areas exposed to the hazard of flooding. The obligation of holding consultations however, did not pertain to the areas included in the flood hazard maps, whilst such a term is used in directive 2007/60/EC. In Article 7 item 3 of directive 2007/60/EC, Member States have also been obliged to include in the flood hazard management plans aspects such as land management and spatial development, which also implies the necessity to institute control in respect of flood hazards in the land development schemes included in flood hazard maps.

At times, the execution of EU policy requires the creation of the appropriate legal frameworks, to ensure the execution of obligations imposed on the Member States by the EU law. The experiences resulting from the execution of capital projects in the scope of the renewable energy sources indicate, that the existing national regulations of law do not always allow for such possibilities. Therefore, particularly important is the obligation of Member States institutions to ensure the full effectiveness of EU law. As regards the renewable energy sources, the directive 2009/28/EC binding in this respect, stipulates that in the year 2020 the target share in Poland for renewable sources of energy, should amount to 15% of total energy needs. In order to reach this target considerable investment in renewable energy sources is required. The existing investments have been made within the framework of legal regulations determining the legal constraints of the investment process in Poland. In practice problems have appeared that reveal the lack of sufficient legal norms for the execution of such specific type of targets. For example the problems related to the execution of investments in the building of wind farms testify to this. Where the local land development plans are binding it is important that the capital projects of this type be included in these local development plans. Whereas, where a local development plan has not been developed it would seem legitimate to categorise the latter as a public purpose capital project, referred to in the Article 6 of the Act of 21 August 1997 on land management, due to the fact that they are – under the directive 2009/28/EC – undoubtedly capital projects meant for natural environment protection. However, the Supreme Administrative Court in its judgment of 3 November 2010 declared, that the wind power plant is not a public purpose capital project as understood by the provisions of Article 6 point 2 and 4 of the Act on Real Estate Management. In such a situation, the location of such a type of capital project is executed under the decision determining the conditions for development. In this manner, in turn, the obtaining of a positive decision establishing the land development constraints is generally impossible, due to the necessity to fulfill the requirements of the similarity of development under the Article 61 item 1 point 1 of the Act on Spatial Development.

3.5. EU law impact on rules of procedure

In accordance with the case law of the Court of Justice of the European Union (further referred to as Court of Justice), and in the absence of EU regulations regarding a particular field, it is the responsibility of each of the Member States’s relevant authorities to appoint the competent authorities and determine the rules of proceedings in matters, the subject of which includes the authorization of protection of entities, stemming from EU law. Therefore, for the asserting of EU claims, in general, the national procedures are used. The rules of procedures, in matters aimed at ensuring the authorized protection of entities, resulting from the EU law, may not be less favorable than in the event of similar proceedings of an internal character. The use of national procedural solutions however, may not in practice lead to the situation whereby the use of EU authorizations stemming from EU law will become impossible or unduly impeded. In view of the judicial practice of
the Court of Justice in some of the cases, the necessity to ensure full effectiveness of EU law shall require the national authorities to apply the law and restore conditions that conform to EU law, despite the fact that the judgment in the individual case has already been rendered. This entails the necessity to refrain from one of the general rules enshrined in the Code of Administrative Proceedings and Tax Ordinance Act – the rule of sustainability of administrative decisions over time. The first judgment of the Court of Justice, which pertained to this issue (i.e. challenging final administrative decisions) on the grounds of their inconformity to the EU law, was the judgment in the case C-453/00 Kühne & Heitz. In this judgment the Court of Justice from of the rule of loyal cooperation, referred to in the provisions of Article 4 item 3 of the Treaty on the European Union, derived an obligation from administrative institutions to reopen the final administrative decision, if the latter had been based on the erroneous interpretation of EU law. The existence of this obligation has been conditioned by the EU Court of Justice on the fulfillment of the following conditions:
- under the national law this authority possesses the necessary competence to challenge the final administrative decision;
- an administrative decision became final and legally valid as a result of a judgment rendered by the national court adjudicating in the last instance;
- a decision of the national court was rendered – in view of the latter Court’s decision – on the basis of erroneous interpretation of the EU law, whereas the national court has not referred a question to the Court of Justice for a preliminary ruling;
- the interested party filed a petition to reopen an administrative decision to the competent authority immediately upon learning on the judgment of the EU Court of Justice, in which it presented its interpretation of EU law.

This judgment, considering the numerous interpretative doubts it provoked, was criticized in the doctrine. It does not belong to the jurisprudence representative for this problem, whereas the later case-law of the Court of Justice confirms, that the conditions for reopening the final administrative decisions stipulated in the judgment C-453/00 Kühne & Heitz are closely related to the circumstance of this particular case. As representative, regarding the issue of reopening the final administrative decisions contrary to EU law the position assumed by the Court of Justice in the judgment on the joint cases 21 and Arcor should be considered. In the referenced judgment the Court of Justice stated, that if the national regulations pertaining to the legal measure anticipate the obligation to repeal an administrative act as it is contrary to the internal law, even if it became final, in a situation when maintaining it in force is “downright intolerable”, the same obligation of repealing should exist under the same circumstances as regards the administrative act, that is inconsistent with EU law. From the referenced judgment one should infer, that as regards issues of reopening the final administrative decisions, that are inconsistent with EU law, national procedures should be used with due observation of the rule of equivalence and effectiveness, formulated in the case-law of the Court of Justice. Such a solution complies with the rule of legal certainty, which also constitutes the general principle of EU law. Consequently, in Polish law, as a matter of principle, the limits of reopening final administrative decisions which are contrary to EU law, are set forth by the prerequisites to use an extraordinary mode of proceedings by way of departure from the rule of sustainability of administrative decisions over time. In this context it is worth stressing, that in the Tax Ordinance Act of 29 August 1997 the Polish lawmakers decided upon a direct regulation of the possibility to resume the proceedings in a situation, when the judgment of the Court of Justice has influence over the content of the decision, despite the fact that the obligation to introduce such a regulation does not stem from EU law as follows from the referenced case law. EU law has also influenced the content of some of the provisions of the Code of Administrative Proceedings and Tax Ordinance Act, thus shaping the procedural regulations constituting the base for the adjudicating of local government appeal boards. The emergence in the Code of Administrative Proceedings of regulations pertaining to the possible lodging of applications, by means of electronic communication, has been connected with the execution of the EU initiative of an e-Europe Informative Society for all. According to this initiative, the various public authorities should ensure common on-line access and make it possible for the citizens and other interested subjects to settle all matters related to public administration in an interactive way, by means of teleinformatic systems.

As of 1 January 2011 in the Code of Administrative Proceedings, a new basis has emerged for the resumption of administrative proceedings connected with the obligation of the Republic of Poland as a Member State, to implement EU provisions regarding equal treatment. Under Article 145b § 1 of the Code of Administrative Proceedings, one may also demand the resumption of the proceedings in the event, when the court rendered its judgment stating the infringement of the rule of equal treatment, according to the Act of 3 December 2010 on the implementation of some of the EU law as regards the rule of equal treatment (Journal of Law No 254, item 1700), if the infringement of this rule had influenced the settlement of the case concluded with the final decision. According to the provisions of § 2 of the referenced Article 145b of the Code of Administrative Proceedings, such a complaint for the resumption shall be lodged within the deadline of one month from the day of the Court’s ruling becoming final. Also worthy of notice is the limitation in the Tax Ordinance Act of the possibility to use tax relief in the repayment of tax liabilities, by the taxpayers who are entrepreneurs. The granting of such relief is admissible only when it does not constitute public aid or constitutes de minimis aid. In the latter case, the granting of relief in the repayment of tax liabilities is admissible within the scope and under the provisions stipulated in the directly binding regulations of EU law pertaining to the granting of aid under the de minimis principle. Such a regulation is a consequence of the stipulated ban on the granting of public aid, as per Article 107 of the Treaty on the Functioning of the European Union, which disturbs or poses a threat to competition by favouring some of the enterprises or production of some of the goods, is inconsistent with the internal market in so far as it influences the trade exchange between the Member States.
Admissibility of local government appeal boards’ to refer a question to the Court of Justice of the EU for a preliminary ruling

The last but not least issue worthy of consideration is whether, local government appeal boards could – in view of the EU law and jurisprudence – refer questions to the EU Court of Justice for a preliminary ruling. According to Article 267 of the Treaty on the Functioning of the European Union, the EU Court of Justice is the proper jurisdiction to answer references for preliminary rulings on the Treaties’ interpretation and the validity and interpretation of acts of law adopted by the institutions, bodies or EU organizational units. If the issues regarding the interpretation or validity of EU law should be raised in a court of one of the Member States, this court may, should it decide that the decision in this respect is indispensable for the rendering of a judgment, refer to the Court of Justice the request for preliminary ruling. If this is a court, the judgments of which are not actionable according to national law, then this court is obliged to refer a question for a preliminary ruling. In view of the literal wording of the Treaty provision, ‘unreasonable’ would seem to raise a question regarding the right of local government appeal boards to refer a question for a preliminary ruling. However, the notion of ‘court’, as used in Article 267 of the Treaty on the Functioning of the EU is an autonomous term of the EU law, which means that its meaning should be viewed with the consideration of interpretation by the Court of Justice. The Court of Justice has through its case law developed a system of features, which should be fulfilled by the institution of the Member State, in order for the latter to be regarded as ‘court’ in the meaning of the provisions of Article 267 of the Treaty on the Functioning of the EU. In the construction of case-law these include the institution of a Member State that acts under the regulation of law, is a permanent institution, and not one appointed ad hoc, and where its jurisdiction is obligatory, and this institution settles disputes between parties (the adversarial proceedings before the institution). This institution adjudicates under the provisions of law and it is independent in rendering its judgments, which are binding. The case law of the Court of Justice as regards the term ‘court’, is characterized by the lack of consequence and casuistry in qualifying certain bodies as courts, under the provisions of Article 267 of the Treaty of the Functioning of the EU. The doctrine stipulates, however, that the administrative bodies in the classical approach may not refer questions for a preliminary ruling, but the Court of Justice does allow such questions originating from specific institutions of administration performing quasi-judicating functions. Local government appeal boards on the one hand are institutions of a higher level, under the provisions of Code of Administrative Proceedings and the Act of 29 August 1997 - the Tax Ordinance Act in the individual matters within the scope of the public administration, falling within the adjudicating competence of the local government units. There are therefore, units of public administration located in the structure of the two-level administrative proceedings. On the other hand, the local government appeal boards exercise quasi-judicating functions and in their adjudicating scope of activities are independent, being subject only to the supervision of the administrative courts. As regards the features, which should be attributed to the Member State institution, in order to be recognized as a ‘court’, under the provisions of Article 267 of the Treaty on the Functioning of the EU, local government appeal boards operate under the provisions of law, they are permanent authorities, their jurisdiction is obligatory in character, and they adjudicate under the universally binding provisions of law, whereas their judgments are binding and are considered final in the administrative course of instantion. Also there should be no reservations about the fact that local government appeal boards are independent in their adjudicating activity. The condition of independence in adjudicating decisions is interpreted in the way that the notion of independence, as an integral element of rendering judgments, requires first of all that the adjudicating institution is a third party in respect of the institution, which rendered the challenged decision. The existence of any functional or organizational link with the institution, whose judgments are subject to supervision of a higher level institution, make it impossible to recognize the latter as a subject eligible to refer a question for a preliminary ruling. The local government appeal boards as a second-instance authority, in the individual cases regarding public administration pertaining to the competence of local government units, are neither organizationally nor functionally related to bodies of the first instance, the administrative acts of which are subject to inspection by the appeal boards. The Act on the local government appeal boards clearly stipulates the rules for appointing members of the appeal boards, or ceasing to exercise their functions, including the recalling of the local government appeal boards’ members, a ban on combining functions and rules for exercising adjudicating functions. The members of the appeal boards are independent in their performance of adjudicating functions and are bound only by the universally applicable regulations of law, whilst the supervision over the adjudicating function of the appeal boards is exercised by the administrative courts. The supervision of the enforcement authority (Prime Minister) is clearly limited only to the administrative activity of the appeal boards and does not pertain to the exercising of adjudicating functions by local government appeal boards. Therefore, it should be stated that, local government appeal boards fulfill the condition of independence (independence in adjudicating).

Among the features necessary for the Member State’s institution to be recognized as a court under the provisions of art. 267 of the Treaty on the Functioning of the EU, in the case of local government appeal boards, the requirement for the adversarial character of proceedings raises doubts. Local government appeal boards as the higher level authorities, adjudicate in matters of appeal and complaints against decisions or rulings rendered by the authorities of the first instance in the administrative course of instance. Therefore, the appeal boards supervise, within the scope of their adjudicating activity, the consistency with the applicable law of administrative acts of institutions of the first instance, whereas they do not settle disputes between the parties as courts do. Some elements of adversarial character might only be found within the scope of proceedings in matters related to the revaluation of due payments under the perpetual usufruct. However, in
view of the judicial decisions of the Court of Justice, the lack of adversarial character in proceedings may not necessarily be an obstacle to referral by the particular Member State authority, on a question for a preliminary ruling. Firstly, in its several judgments, the EU Court of Justice declared, that the requirement of an adversarial character of proceedings is not peremptory in character for the particular subject to be recognized as a „court” under the provisions of Article 267 of the Treaty on the Functioning of the EU72. Moreover, in view of the judicial decisions one should point out the three facts necessary for the conditions of adversarial character to be fulfilled: namely: the unit invokes the binding law and claims the settlement of the case by the competent authority; the unit request has been precisely stated in its factual and legal respect; and thirdly, this institution exercises a system of justice with the full respect for process guarantees73. As follows from the above stated, in order for the adversarial character of the condition to be fulfilled, it seems that decisive is existence of dispute as regards the law being judged with the application of the appropriate process guarantees such as the right to be heard, accessibility of case records, possibility to lodge comments and explanations and motions for evidence, possibility of presenting one’s position during the hearing.

The fact that the institution of the first instance is not a party in the appeal procedure, does not obstruct recognition of the adversarial character of proceedings for the need to apply Article 267 of the Treaty on the Functioning of the EU74. The judgments in matters related to the competences of the local government appeal boards are issued upon proceedings being conducted or for hearings in closed session. The judgments issued in closed door hearings are rendered in the course of the in-camera meeting of the adjudicating panels, including a discussion and voting over the rendered judgment and the basic motives of the settlement. The case is presented by the member of the appeal board appointed as its rapporteur. The execution of the adjudicating functions by the local government appeal boards shall be executed under the provisions of the Code of Administrative Proceedings, and therefore, with the respect for the procedural guarantees of the parties to the administrative proceedings75. Consequently, it appears that the requirement for the adversarial character of the proceedings would not in the view the Court of Justice, constitute any substantial obstacle for recognizing local government appeal boards as the authorities duly authorized to refer a question for a preliminary ruling.

Having the above in mind, it is highly probable, that the Court of Justice would admit a question referred for a preliminary ruling, which would be submitted by the local government appeal board as the subject duly authorized under the provisions of Article 267 of the Treaty on the Functioning of the EU. However, it seems pervers, that local government appeal boards benefit from such a possibility. This would result in excessively prolonged administrative proceedings. Although the efficiency of the authority of reference for a preliminary ruling lies in the vast meaning of terms used in the wording of Article 267 of the Treaty on the Functioning of the EU76, from the point of view of guaranteeing the uniformity of application of EU law and its full effectiveness, including the protection of right of individuals resulting from EU law, it would be sufficient if the administrative courts refer questions for the preliminary ruling.

**Summary**

Polish membership of the European Union has substantially influenced the adjudicating activity of the local government appeal boards in the sense, that it considerably changed the legal environment, in which the appeal boards have to execute their adjudicating functions. In the multicaentric legal order, the appeal boards are authorities obliged to use legal norms of different origin, both national and those of the EU. EU law, as it has been proven above, influences also those fields of law, in which decisions of the appeal boards issued are in individual cases within the scope of a public administration’s competences. This influence, however, is to a great extent indirect in character and is manifested in formulating the national regulations of law under the influence of the EU directives. This means, that statistically, the basis for the appeal boards adjudicating decisions will be dictated by the provisions of the national law. Few, as of yet, adjudicating decisions of the appeal boards in matters involving elements of EU law shows, however, that these institutions are prepared to fulfill the obligations of authorities obliged to effectively apply EU law.

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**NOTES:**

1 E.g. „Samorządowe kolegia odwoławcze – przeszłość i przyszłość”, Kraków, 27 września 2010 r.; „Co można zrobić, by samorząd działał jeszcze lepiej?” Kraków, Polska Akademia Umiejętności, 27 października 2010 r. [see i.a.: „Local government appeal boards – the past and the future”, Krakow, 27 September 2010. „What can be done to make the local government work better?” Krakow, Polish Academy of Science, 27 October, 2010.]


5 Multicentricity of the modern system of law and its friendly interpretation,[in:] W. Popiołek, L. Ogiegło, M. Szpa-
See also Article 6 of the Code of Administrative Proceedings and Article 120 of the Tax Ordinance Act.


Judgment of 5 March 1996 on the joined cases C-46/93 and C-48/93 Brasserie du Pêcheur SA vs. Bundesrepublik Deutschland and The Queen vs. Secretary of State for Transport, ex parte: Factortame Ltd and others, Court Reports (1996), p. 11029, point 34.

See N. Półtorak, op.cit. p. 53.


Article 21 of the Treaty on the Functioning of the European Union.

See Article 5 point 3 of the Act dated 12 March 2004 on the social welfare (i.e. Journal of Law of 2008 No 175 item 1362) and Article 1 item 2 letter c of the Act dated 28 November 2003 on the family allowance.

Article 23a of the Act on family allowance.


Court Reports of the EU Court of Justice (2008) p. 13993.

See the already invalid Article 5 of the Act of 29 May 1974 on the allowances for the war veterans and disabled service veterans and their families with amendments (Journal of Law of 2002, No 9, item 87 with amendments).

Judgment in case C-499/06 Nerkowska, point 32.

T. Sa/Wa 1599/2006

Judgment in case C-499/06 Nerkowska, point 32


It will be the case in the event of a financial allowance for becoming independent granted under Article 88 item 1 of the Act on the social welfare. See also the judgment of EU Court of Justice of 18 June 2006 in case C-406/04 Gérard De Cuyper vs. Office national de l’emploi, Court Reports EU Court of Justice (2006) p. 16947, point 41.


any doubts. According to the referenced provision of law the Member States adopt and publish, not later than until 19 January 2011, the statutory, executory and administrative provisions of law, indispensable to ensure harmonization with Article 1 item 1, Article 3, Article 4 item 1, 2 and 3 item 4 letter b) – k), Article 6 item 1 and item 2 letter a), c), d) and e), Article 7 item 1 letter b), c) and d), item 2, 3 and 5, Article 8, 10, 13, 14, 15 and an enclosure I point 2, enclosure II point 5.2 with reference to the categories A1, A2 and A, enclosures IV, V and VI. These regulations shall only be used as of 19 January 2013.

20 See also Article 18 of the Directive 2006/126.
22 Journal of Law of 2011 No 32 item 159.
24 See Article 3 in relation to the enclosure I of the directive 2009/28/EC.
25 In practice local land use plans are prepared for the location of a particular capital project (several capital projects). See for example the resolution of the Council of Municipality of Biesiekierz of 30 October 2007 No XI/91/07 on the local land use plans for the group of windmills with the technical infrastructure indispensable for the appropriate execution of the function of intended use, in the area of Parnowo in the Municipality of Biesiekierz.
26 Consolidated text Journal of Law of 2010 No 130, item 651.
27 File number II OSK 1412/2009.
29 What has been defined in a doctrine as the procedural autonomy of the Mem- ber States. Lately, in Polish literature another term has been proposed, which better way reflects the essence of the issue – the term of rules of na- tional proceedings. See. N. Półtorak, op.cit., p. 73.
30 C-432/05 Unibet, point 43.
31 C-432/05 Unibet, point 43. See also N. Półtorak, op.cit., pp. 109-132.
34 C-453/00 Kühne &Heitz, point 28.
36 As an important fact to be noted in this issue should be the failure by the ad- ministrative court to make reference for preliminary ruling on the interpre- tation of EU law, which would have allowed the administrative court to control the administrative decision based on the misinterpreted EU law. See judgment C-392/04 and C-422/04 and -21 Germany GmbH and Arcor AG & Co. KG vs.. The Republic of Germany, EU Court of Justice Reports (2006) p. I-8559, point 53. See also N. Półtorak, op.cit. p. 402; M. Taborowski, Chicken back or leg?…op.cit. p. 241.
38 C-392/04 and C-422/04 i-21 and Arcor, point 63.
40 C-453/00 Kühne &Heitz, point 24; C-392/04 and C-422/04 i-21 and Arcor, point 51.
41 In more detail on the subject of the consequences of inconsistency with the EU law of the final administrative decisions see. ex. M. Zapata, Zasada tr-walości decyzji administracyjnych w orzecznictwie ETS, Państwo i Prawo 2007/10, p. 74 [M. Zapata The principle of stability of administrative decisions in the adjudicating procedures of the European Court of Justice, State and law 2007/10, p. 74; S. Biernat, M. Piłaszewicz-Kulikowska, A. Wilk, P. Flor- janowicz-Blachut, P. Wrobel, Consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts in Member States, Warszawa 2008; N. Półtorak, op.cit. chapter 13; M. Baran, Zasada pewności prawa a zasada legalizmu unijnego…, op.cit. [M. Baran The principle of the dependability of the application of law and the principle of the EU legalism].
42 Article 240 § 1 point 11 of the Tax Ordinance Act. See also A. Bartosiewicz, Decision by the European Court of Justice as a basis for the resuming of tax proceedings, EPS 12/2006, p. 25.
43 See Article 39a, Article 46, Article 51 § 5, Article 61 § 3a, Article 63 § 1 § 3a of the Code of Administrative Proceedings and Article 3a-3h, Article 12 § 6 point 1, Article 144a, Article 152 § 3 and Article 152 a of the Tax Ordinance Act.
44 Article 67b of the Tax Ordinance Act.
46 It is worth noting, that this issue has already been discussed in Casus. See. B. M. Blankiewicz-Woźnatska, Legitmacja samorządowego kolegium odsuwającego do składania question prawnych dotyczących wykłady prawa wspól- notowego do Europejskiego Trybunału Sprawiedliwości, „Casus” 2005 nr 37, [M. Blankiewicz-Woźnatska, The local government appeal board’s title to refer legal inquiries pertaining to the interpretation of the EU law to the European Court of Justice „Casus” 2005 No 37, p. 37.
49 Article 21 of the act on the local government appeal boards.
50 See Act of 12 October 1994 on the local government appeal boards.
51 i.e. matters falling within the competences of the appeal boards may not be alternatively adjudicated by other institution.
52 Article 21 of the Act on the local government appeal boards.
53 See however Article 80 item 1 of the act of 21 August 1997 on the real prop- erty management (i.e. Journal of Law of 2000 No 46, item 543).
LOCAL GOVERNMENT APPEAL BOARDS


Judgment in case C-516/99 Walter Schmid, point 37.

Chapter 2 of the Act on the local government appeal boards.

Article 9 of the Act on the local government appeal boards.

Chapter 3 of the Act on the local government appeal boards.

Article 21 of the Act on the local government appeal boards.

Article 3a of the Act on the local government appeal boards.

See article 78-81 of the Act on real estate management. See also B.M. Blankiewicz-Woltaniska, op.cit., pp. 40-41.


See judgment in case C-54/96 Dorsch Consult, point 31; judgment in case C-110/98 Gabalfísa, point 37; judgment in case C-17/00 de Coster, point 16; opinion of the Advocate General D. Ruiz Jarab Colomer of 5 March 2009 in case C-14/08 Roda Golf & Beach Resort SL, European Court Review (2009) p. I-5439.

See also the opinion of Advocate General A. Tizzano of 29 January 2002 in case C-516/99 Walter Schmid, point 24.

Article 17 and article 19 of the Act on the local government appeal boards.

Opinion of the Advocate General D. Ruiz Jarab Colomer of 5 March 2009 in case C-14/08 Roda Golf & Beach Resort SL, point 48.
The concept of ‘administrative proceedings’, although perhaps not directly, is embedded in the solutions adopted by the Constitution in force. Above all, the Constitution uses the concept of ‘administration’ itself, occurring always with a certain indication of ‘type’, i.e. either as ‘public administration’ (cf. Article 63, Article 184) or ‘State administration’ (cf. title of Chapter VI, Article 146 para. 3, Article 148 item 7, Article 149), along with the concept of a ‘body of administration’ (again with the indication of type, here only as ‘body of government administration’; cf. Article 94, Article 184). There is also the concept of ‘office’ of government administration and also ‘bodies’ (authorities) (again Article 153). On the other hand, Article 190 para. 4 of the Constitution tells us about the functioning of ‘administrative proceedings’ in the structure of the administrative authorities. These proceedings have their ‘manner’ and on principles specified in provisions applicable, and are characterized by taking ‘final decisions’ which, may, however, be ‘quashed’ and the proceedings themselves may be ‘reopened’, for example. All these procedural institutions are naturally governed by the ‘applicable provisions’ referred to earlier. With this number of quotes taken from the Constitution, it seems only reasonable to draw the conclusion that yet another expression used in Article 190 para. 4, namely ‘the given proceedings’ – is an expression from legal language, and not from lawyer’s language. This expression is used to denote a certain ordered manner, regulated by a statute-grade act, of operation by a body of public authority, aimed at reaching a decision addressing other entities inclusive of their legal status (rights, freedoms, and obligations), in a specific matter which constituted the subject of the proceedings. If this subject was an ‘administrative matter’ then we can talk about ‘administrative proceedings’ and in the case of a ‘court matter’ – about ‘court proceedings’, or possibly still another ‘proceedings’. The expression ‘given proceedings’ may not indicate whether this refers to (i.e. in the situation covered in Article 190 para. 4 of the Constitution) either an administrative authority or court authority or any other authority. The relevant court will be the one which issued the resolution which may now be quashed following the judicial decision by the Constitutional Tribunal Court, but how it is to operate would depend solely on that authority. Actually, it is just the opposite; it will operate in the manner specified by the provisions of law. It is perhaps worth making an additional comment that the use of legal language in the Constitution, as opposed to a lawyer’s language (in contrast to parliamentary Acts) implying a precise understanding of the expressions therein, is rather an exceptional situation, and adopting this kind of evaluation is possible only in situations not open to any doubt. In my opinion we are dealing with such a situation here.

In fact, the Constitution, through the above-quoted provisions, confirms the existence of formalized ‘proceedings’ in the sense adopted above. In fact, these proceedings had been in existence for many years prior to the Constitution entering into force. However, these provisions may also serve as an expression of constitutional directive, addressed to the legislature to develop such procedures, (if they are not yet in place), and in accordance with the assumptions stemming from the Constitution, and above all read as a prohibition to abolish them and to move to a purely voluntary manner of operation, in order to take the required decisions. We may also talk about the guarantee role played by these constitutional provisions in the aspect thus discussed; namely: the requirement to formalize the manner of operations of various powers in their relations to an individual, which has been anchored in a constitutional regulation i.e. the regulation with the highest possible legal force. Some further constitutional grounds can nevertheless be found for the existence of formalized procedures. Beyond any doubt, the constitutional principle of legalism (Article 7) contains not only material aspects, i.e. the requirement of content compatibility of decisions issued by public authorities with their material-law premises defined in legal provisions, but also the requirement to issue these decisions in the universally applied manner provided for in law (principally – in a statute) and not in a purely voluntary manner. It is also required, under another fundamental constitutional principle, namely the principle of ‘equal treatment [of all people] by public authorities’ (Article 32 para. 1). The equal treatment of all is only possible when the public authorities treat any participant in a given proceedings in the same manner, which can only be reached by defining, generally, their positions within the proceedings through relevant statutes on procedures. The constitutional grounds to draw from here, is a requirement to introduce general procedural regulations which are also undoubtedly embedded in the principle of a democratic state ruled by law (Article 2). This role should principally be seen in the requirement of the State – stemming from this principle – for the protection and enhancement of the citizens’ trust towards the proper functioning of the State. The latter pertains to the situation when the State, through the direct functions of the various authorities acts towards specific citizens, and particularly
when it determines their concrete freedoms and rights as citizens. This trust (its degree) remains in a straightforward relationship, with the fact that such citizen knows that in the course of such ‘functioning’ in his/her case, the authority will proceed according to generally established rules which the citizen can understand learn and possibly use them to his/her advantage. The formalized and commonly binding manners of proceedings are thus a very considerable guarantee of the freedoms and rights of an individual underpinned by their intrinsic association with Article 5 of the Constitution, which ‘ensure the freedoms and rights of persons and citizens’, as a fundamental aim safeguarded by the Republic of Poland. In the light of these principles and values it would be hardly admissible not to have such formalized manners of proceedings. So it is nothing strange that in the Polish and also European legal culture they assume the form underlying their special significance, i.e. the form of ‘codes’. Obviously, the aforementioned issue can also be considered from the point of view of an individual who ‘finds himself/herself’ within the proceedings carried out by a public authority in this individual’s actual case: from this viewpoint, it may be said that there is a constitutional right to conduct such individual cases in the manner of a ‘process’, or effectively a peculiar ‘right to process’. As any other right of constitutional rank, this right – in terms of its origin – is set within the requirement to protect the dignity of the person (Article 30 of the Constitution). This connection with the principle expressed in Article 30 has such a consequence, that regulations of various procedural manners have to grant an individual active and responsive in each process, while he/she may not be presented only as the subject of the proceedings.

Beyond any doubt ‘the right to appeal against judgments and decisions made at the first instance (Article 78), should be seen as one of the elements of this ‘process’ within the meaning adopted here as an institution anchored in the Constitution. The requirements of a democratic state ruled by law indisputably also consist of – situations when citizens (private entities) are effected by becoming addressees of individual decisions in particular cases – admitting the right of such entities to demand: carrying out a review of these decisions in particular cases – admitting the right of such entities to demand: carrying out a review of these decisions primarily issued on certain matters should not have been in place to allow the possibility of ‘appealing against’ decisions primarily issued on certain matters should not have been in place to allow the possibility of ‘appealing against’ decisions other than the one which issued the decision, would not meet the expectations resulting from Article 2 of the Constitution. The individual must have the right to prompt a review of a decision of this nature, as expressed in Article 78 of the Constitution. Even in the case when any procedural provisions in certain matters should not have been in place to allow the possibility of ‘appealing against’ decisions primarily issued on the particular matter, there is a possibility of applying directly Article 78 of the Constitution. The second sentence of this constitutional provision has to be taken into account, as it concerns ‘exceptions’ made by statute from the right to appeal. The essence of ‘exception’ necessitates, however, formulating it in a manner not open to any doubt, and pertaining to rare situations (in terms of their scope), and its interpretation must be a narrow one. With the statutory provisions being ambiguous, the possibility of direct application of Article 78 should be presumed.

In my opinion, in the case of this provision, we have to deal with phrases derived from lawyers’ language which makes for a somewhat ‘normal’ situation when analyzing the Constitution. Firstly, regarding the words used there: ‘judgment’ and ‘decision’ – they should not be related only to those proceedings, whose decisions – following the relevant procedural provisions (‘codes’) – would assume just this name, and therefore give citizens the right to ‘appeal against’ rulings only in these
cases. These words include also ‘sentences’, ‘decrees’, ‘resolutions’ or also other expressions applied in the situations regulated by statutes when decisions are taken in concrete cases. Secondly, an even more general meaning should be ascribed to the word ‘appeal’, which should be construed as the possibility of causing, by the actions of a citizen acting alone, the review, evaluation or correcting reaction (within the meaning outlined above) undertaken by another authority than the one which issued the original decision. Thus it pertains not only to the situations when statutes confer on a citizen the right to lodge a ‘complaint’ sensu stricto, but also to all other situations when he/she has the possibility to initiate the above-described review/assessment actions, e.g. through an ‘appeal’, ‘appellation’, ‘revision’, ‘grievance’, ‘application to reopen proceedings’, ‘request of declaration of nullity’ or ‘cassation’. It includes also complaints under Article 221 CAP which occur, as it is known, independently of formal appeal procedures provided by the Code. In my opinion, this situation, however, does not cover the so-called ‘application to reconsider the matter’, to which citizens have a right only in exceptional situations, when the CAP, in its Article 127 § 3 excludes the application of a formal appeal.

Then the term ‘first instance’ of the quoted constitutional provision should by analyzed. In a fairly obvious manner it refers to the issue of the ‘instance-based’ system. If this provision refers to the ‘first instance’, it seems to silently suggest the existence of the ‘second’ instance (and perhaps even further ones, cf. Article 176 para. 1 and the phrase ‘at least’ there) as the word ‘first’ would not make sense otherwise. What is conspicuous, however, is the absence of this second phrase in Article 78 of the Constitution, where it does not stipulate of ‘the appeal to the second instance’ but only mentions ‘appeal’. Hence, one may not state simply that this provision always and exclusively calls into existence two-instance (at least) proceedings of each kind. The two-instance system clearly refers only to ‘court proceedings’, although it does not arise from Article 78. It may not necessarily pertain to other types of proceedings, although the ‘right to appeal’ provided in this Article has always to be contained in these proceedings.

Above all it seems that the postulate of implementing the ‘right to appeal’ is met through the ‘right...to... hearing by/re-course to (the courts)’; appearing in Article 45 and Article 77 para. 2 of the Constitution. The conditions from Article 78 are undoubtedly met when the decision of any non-judicial authority can be appealed against one way or another, to a judicial authority in order for the latter to issue – after reviewing the matter – a certain decision. This provision covers e.g. the situation where there is a ‘right to complain’ to a district court against the decision of the Minister of Justice (taken ‘in the first instance’) on suspending an enforcement officer from office, or when there is a ‘right to appeal’ to the Supreme Court against the resolution of the National Council of the Judiciary in individual cases. The issue where, in such a situation the right to ‘two-instance’ court proceedings occurs per se, need not to be analyzed here. Thus it should by assumed that the ‘exception’ reserved in Article 78 – i.e. the situation where such a ‘right to appeal’ would not be present – may not actually happen since the right to court is unlimited (without exception). The same holds for situations regulated by Article 127 § 3 CAP (cf. above), obviously after a repeat decision is issued by the authority. The right to recourse to court does not eliminate the more general ‘right to appeal’, in as much that the Constitution may allow making it (i.e. the right of recourse to court) provisional upon earlier use of other guarantee procedures (e.g. the appeal in administrative proceedings), obviously in a relevant regulation by a statute.

It would thus be difficult to assume that Article 78 provides a constitutional positioning of the ‘two-instance system’ of all proceedings carried out by a public authority, where a decision is made with respect to rights and freedom vested on an individual. This provision is of a guarantee nature, and this type of provision tries, as a rule, to set a minimum level of guarantee which may obviously be elevated by relevant statutory provisions. For this reason, the two instance system of court proceedings is a result of a particular provision of the Constitution (Article 176 para. 1). The two-instance system of administrative proceedings could, in conformity with the Constitution, be declared in Article 15 CAP. The two-instance nature of other types of proceedings (carried out by public prosecutors, or by state inspection authorities) is still an issue left open to the decision of the legislature. The above discussion make sense only in as much as one can prove that the ‘two-instance’ proceeding differs in any significant way from other proceedings which, although being ‘two-level’ (or two-stage), are not effectively ‘two-instance’ proceedings. In other words, the concept of a ‘two-instance system’ should be defined since – in my opinion – it is not equivalent to the situation where the same specific matter concerning an individual entity is considered twice. According to the textbook approach, it ‘means that the matter resolved by a decision in the proceedings carried out by one authority will have, upon a request from an eligible entity, to be considered and resolved in the second proceedings, carried out in the second instance i.e. by an authority of higher level or other authority identified by a statute’.

Personally I consider that approach to be too broad. It seems that, on the one hand, that we can only talk about a ‘two-instance system’ situation only when a given, specific matter is then considered, for the second time by another authority, different in terms of separate organizational/hierarchical position as well as of its personal composition. On the other hand, when this ‘second’ authority is the same legal body, or the same public authority entity, even with the panel of different persons – in my opinion it cannot be described as ‘second instance’, and it is even doubtful whether, using the terminology of the CAP (Article 17), one can talk about an ‘authority of a higher level’. For example, I do not think that in the proceedings on a subject of constitutional responsibility, the Tribunal of State deciding on the same matter for the second time, although with a different panel, should be considered as a ‘second instance’ even if Article 18 of the Act of 26 March 1982 on the Tribunal of State containing this provision, uses the expression ‘in the second instance’. Besides, it should be added, that the ‘Tribunal of State is not a ‘court’ (this notion is also supported by Article 10 and by a systemic interpretation of Chapter VIII of the Constitution), although it is a ‘body of judicial authority and as such a provision of Article 176 para. 1 does not apply to it. It is also difficult to regard as ‘two-instance’
the proceedings on the admissibility of a constitutional complaint, since it is the same authority deciding on this admissibility twice, although again with different compositions (Article 49 in connection with Article 36 of the Act of the Tribunal of State). Obviously the proceedings referred to in Article 127 § 3 CAP, are not ‘two-instance’ proceedings despite the reservation that the provisions governing appeals shall apply to it ‘accordingly’. It holds also and vice versa: the body even when an utterly different one in its structural aspect but considering the matter using the same personal composition, cannot be seen as the second instance (hence the provisions about disqualifying persons who consider the same matter set out earlier).

Secondly, it should be considered that a system is to be recognized as ‘two-instance’ only when both bodies considering the matter are of the same ‘power’ (among those listed in Article 10 of the Constitution, but also in Chapters IX and X) and, in the case when a given ‘power’ is constitutionally divided into certain sub-groups of different kinds (cf. internal systematics in Chapter VIII, listings in Chapters VI and VII) – or when both bodies are within the same sub-groups. Therefore, in my opinion, a ‘system of instances’ does not include the aforementioned examples of ‘hybrid’ proceedings, where the body issuing the first decision is a certain type of public authority, whereas the body which performs – as a result of an appeal – the review and evaluation of that decision – is one with a different type of power. Another example of this kind of solution can be found in Article 149 of the Act of 23 January 2003 regarding the national healthcare insurance in the National Health Fund, under which a citizen could appeal against the decision on matters in the field of the services rendered by the national healthcare system, issued by the Chairperson of the National Health Fund (in the first and the last administrative instance) directly to a common court of law. It should be, however, noted that because of the constitutional independance of judicial power (Article 173 of the Constitution), it would be inadmissible to formulate appeals against decisions of judicial bodies to administrative bodies, prosecutors’ authorities or others. I think also that referring to Article 176 para. 1 of the Constitution also enhances the legitimacy of such an understanding of the concept of ‘instance’: after all, it regards the proceedings within the same ‘power’.

Also in the situation where the ‘first’ and ‘second’ authorities considering the same matter are administrative authorities, and those presiding over the ‘third’ and ‘fourth’ hearings are administrative courts, no-one would describe them as ‘four-in-instance proceedings’, but as ‘two-instance administrative proceedings’ (Article 15 CAP) and ‘two-instance administrative court proceedings’ (Article 176 para. 1 of the Constitution, side also Article 236 para. 2 there), because of the above-discussed separate power-system affiliation of administrative authorities and administrative courts. From this perspective, it would be difficult to view the local government appeal boards, undoubtedly being one of the essential elements of implementing Article 78 of the Constitution, as the ‘second instance’ even though they operate under the Code of Administrative Proceedings and its declaration of the ‘two-instance’ administrative proceedings. These boards are not units of local government authorities but they consider the appeals against the decisions of the latter.

Thirdly, it seems in the end that the ‘two-instance system’ pertains to the situation where competences of the first authority are subsequently substituted by a second, higher authority, i.e. the situation when the authority of higher level ‘introduces itself’ into the place of the authority considering the matter as the first authority, takes over its competences primarily the competences to issue the decision as to the merits, perhaps different that the first one. This is a consequence of the principle that the ‘appeal’ is just to be considered by a separate authority, but of identical nature within the system and performing the same function. If the second authority is given solely cassation type competences i.e. when it can only quash a decision of the first authority and remand the matter for reconsideration, or it has authority over the re-opening of proceedings, or declare proceedings nullified, this cannot, in my opinion be sufficient to recognize such situations as a ‘two-instance system’. Of course, the authority of the ‘second instance’ may also have such competences but may have others in addition. These may also occur as sole competences, possibly when the matter is considered for the third time but – in my opinion - such a situation may not be regarded as the case of a ‘three-instance system’, because the competence to decide independently and certainly as to the substance of the case, is not in place. For this reason, the presence of cassation proceedings is not generally regarded as creating a third instance in a given proceedings. The proceedings conducted by the ‘second’ authority in a two-instance proceeding does not thus solve the peculiar dispute between the first authority and an entity interested in a corrected decision. It is rather a situation where the said second authority has, in principle, the same substantive competences, but definitely with the possibility to relate itself to and use of the actions and findings of the first authority and therefore, to exercise control over the first authority. Certain deviations from this principle may occur in criminal proceedings and might be justified by its specific nature. It is also from this viewpoint that local government appeal boards (samorządowe kolegia odwoławcze) which have very limited competence to decide on the substance of the administrative matter in merito (cf. Article 138 CAP), may not be treated as the second instance. It is on purpose that the definition of a ‘two-instance system’ given above, points at the necessity for the ‘authority of second instance’ to have competence ‘to resolve’ matters. I think that Article 138 CAP does not even give an answer as to whether views expressed in the reasons of the decision of the SKO are binding on the local government unit, after the decision of the latter was quashed by the SKO. On the other hand, when the authority of the second instance is at the same time the authority from the ‘same branch of power’ exercising supervision over the first, such as a minister over a voivod, then such binding is so obvious that there is no need for the CAP to stipulate it. Such a provision has to be included in court proceedings because of the principle of the independence of the judiciary (cf. e.g. Article 386 § 6 of the Code of Civil Procedure). The local government appeal boards are the ‘second instance’ in a functional sense rather than systemic. They seem to be a part of what the Constitution defines as power (or bodies) ‘for defence of rights’ (cf. Title of Chapter IX), including constitutional authorities – the Commissioner for Civil Rights Protection, and the Com-
missioner for Children’s Rights, and other authorities not listed in the Constitution, such as the Public Prosecutor’s Office, and the Inspector General for Personal Data Protection.

It seems that the expression ‘first instance’ in Article 78 of the Constitution has been taken from lawyers’ language (i.e. commonly used), meaning simply the ‘the body that adjudicated first’ on a given matter or concerning a citizen’s right or freedom. A citizen may then effectively demand that such an act be reviewed again by a ‘second’ body, and in connection with the first act, another statement given regarding the same particular right (freedom) in a given situation. If this ‘second’ body specified in the provisions of law is a body of the same nature (judicial, administrative, or exercising control, etc.), which is able to revise the earlier decision with one of his own, and which has different personal composition, we may talk about a second instance and describe these proceedings as ‘two-instance’ and _vice versa_. Each two-instance proceedings are a ‘two-stage proceeding’ but not the other way round.

In my opinion, however, Article 78 of the Constitution pertains only to a ‘two-stage’ proceeding and requires that at least such a construction be created. In line with its nature, as a guarantee provision, it requires only a certain minimum but obviously does not prevent this minimum bar being exceeded. It should be thus recognized that a ‘two-instance’ proceeding constitutes a greater guarantee of a correct ruling on the status of an individual in a particular situation than ‘only’ two-stage proceedings, which is not a two-instance proceeding. If the body adjudicating in the ‘second stage’ is at the same time the body of ‘second instance’ within the meaning adopted here, this body is better acquainted with the specific use of power in a given sphere of public life, has more extensive experience in applying certain parts of the legislation (also in deciding on appeals), operates in the same system of dependent (or independent) authorities, and usually it is also ‘more convenient’ for a citizen accustomed to the manner of operation of a given ‘power’ or its sub-group. The two-instance proceeding should be the prevailing form in the legal regulation undertaken in implementation of Article 78, although not necessarily always. In my opinion, the Constitution does not pronounce the principle of a two-instance system of administrative proceedings or of any other proceedings except for judicial proceedings (in Article 176 para. 1). The guarantee character of Article 78 and the meaning adopted in this text does not preclude, however, that in specific legislative solutions, the competences of the body of the ‘second stage’ could cover to the same extent the competences of the body of ‘second instance’. However, although it may seem that it does hold _vice versa_, it is difficult to regard as admissible, the situation where a particular competence of a body of second stage would go beyond that of any known competence of a body of the second instance.

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**NOTES:**

1. This issue is so treated by B. Adamiak: Konstytucyjna zasada dwuinastan-
   cyjności postępowania administracyjnego in: C. Martysz i A. Matan (ed): Po-
   zycja samorządowych kolegiów odwoławczych w postępowaniu administra-
   cyjnym, Zakamycze 2005 p. 20 et seq.

2. Cf. Article 74 para. 4 of the Act of 29 August 1997 on court enforcement of-
    ficers and the court enforcement (Dz. U. /Journal of Laws/ of 2006 No. 167,
    item 1191; nota bene it is hard to regard the investigation made by the min-
    ister in the ‘inquisitive’ model as the ‘proceedings’ within the meaning of the
    ‘right to trial’ as established above.

3. Cf. Article 13 of the Act of 27 July 2001 on KRS (Dz. U. No. 100, item 1082
    as amended)

4. Cf. E. Bojanowski, Z. Cieslak, J. Lang: Postępowanie administracyjne i post-
    (emphasis supplied by me, P. S.)


6. Dz. U. No. 45, item 391 as amended; this statute is no longer in force but
   neither the Constitutional Tribunal which considered its conformity with
   the Constitution nor the applicants who brought the case before the Tribu-
   nal did not question the constitutionality of Article 149 (cf. judgment of Con-
   stitutional Tribunal of 7 January 2004, sygn. K. 14/03).

7. Cf. B. Dolnicki: Pozycja samorządowych kolegiów odwoławczych w syste-
    mie samorządu terytorialnego in the book cited above in the footnote 1.

8. Cf. Article 56 of the Act of 23 December 1994 of the Supreme Chamber of
   Control, applicable also to the control measures in private business entities,
   or Article 9 par. 3, 18 par. 1 item 5a and 25b of the Act of 7 October 1992
   on the regional audit chambers, but also its Article 15 par. 7.
1. The concept of instance is not a value unto itself. It takes on a value only when law envisages the functioning of at least two instances, their sequence and their mode of operation. In the simplest terms, the course of instances should be understood as operation of two instances considered jointly. The word 'course' at the same time assumes both certain dynamism (moving, transforming) and draws attention to everything which constitutes the transfer from one instance to another. The subject matter of this transfer is not administrative competence (each instance retains its set of competences and may not transfer it elsewhere) nor to the capacity to implement certain action or conduct a proceeding. It is the administrative matter itself which is transferred between instances. This means that both the body of the first instance and the body of the second instance consider the same matter which, by definition, situates the body of the second instance not only in the position of reviewing authority (checking how the matter has been resolved by the first instance) but also in the position of considering the merits (resolving the matter). These two roles of the appeal authority are complementary and the proportion between them determines the nature of a given administrative proceeding, particularly the appellate one.

The duality indicated thereby is coupled with the observation that the purpose of the administrative course of instance is of complex nature or at least twofold. This nature is determined primarily by the need to obtained either annulment or change of the decision issued at the first instance which leads to obtaining a change in the state of law created by the decision. This need is declared by a party (an addressee of the decision) in the appeal, therefore the course of instances serves primarily the protection of an individual entity situated outside the public administration. The review of the decision issued is only the secondary objective of the course of instances.

2. The basic legal means which sets the administrative course of instances in motion is an appeal (or possibly – an application to re-open the proceedings by the same authority, which is equivalent to appeal). It is an ordinary legal means, totally non-formalized, which facilitates its lodging and makes the public legal right to lodge it easy to exercise. The appeal does not require justification, and on the side of merits there are no requirements regarding its lodging. On the procedural side, it is enough to observe a 14-day time limit set for presenting the appeal but there are no require-ments to adhere to the form provided for a pleading. From the provisions of the Code of Administrative Proceedings, hereinafter CAP a principle can derived saying that the form of appeal is free, and the only principal condition is that the appeal must be delivered to the addressee. The appeal is, however, an ‘application’ therefore it should retain a in written or electronic form, identify the author and the addressee, express the demand and, obviously, should have a signature affixed.

The right to lodge an appeal is a formal public legal right but is available only to a ‘party’ i.e. an entity which has a legal interest in the administrative matter. The same legal interest which confers the capacity to be a party, grants the given entity a capacity to lodge an appeal. It may, however, happen that the addressee of the decision issued in the first instance will be an entity which does not have features of party to the proceedings in question. Since the decision was addressed to such an entity it should be assumed that this was a way by which it acquired the legal interest to defend itself therefore starting the right to appeal with regard to such party.

3. The Polish system of administrative proceedings is based on the principle of the vertical course of instances. The appellate bodies are therefore the ‘higher level bodies’ most often actually situated on the higher organisational level in the public administration hierarchy. The special bodies called local government appeal boards represent a remarkable exception. They are also termed as ‘higher level bodies’ but they situated next to (independently from) the structures of local government and they consider appeals against the decisions issued by all categories of units of that local government – i.e. gmina authorities, powiat authorities and the authorities of self-governing voivodships.

This ‘vertical’ arrangement of the course of instances does not mean at all that the course results from any supervisory competences of the ‘higher’ body towards the ‘lower’ one or from any other connections between the bodies at different levels. The only thing that matters here is their location against each other in the organisational network of administration apparatus and the ‘instance-related superiority’ constitutes a special form of superiority not connected with other types.

4. The system of the administrative course of instances is actually complete, i.e. it has been based on the concept of the competence of the body of the second instance as to the merits of the case. The appeal
body thus resolves the administrative matter transferred to it by way of appeal, and only additionally performs the function of controlling the decision issued at the first instance. Therefore the CAP provisions stipulate primarily that the appellate authority issues a decision in which it: ‘shall affirm the decision appealed against’ (Article 138 § 1 item 1) or ‘quash the decision appealed against in whole or in part and within that scope (...) shall rule as to the merits’ (Article 138 § 1 item 2). The expressions used here, are liable to incorrect interpretation where one can be influenced by the idea that each of them refers – its wording – to the decision of the first instance which may, in turn, suggest that it primarily means checking on that decision. Actually it is quite different. The expression: ‘affirms the decision’ is a conventional phrase (a sort of mental shortcut) expressing an idea that the resolution of the administrative matter adopted by the appellate body is identical to the resolution adopted by the first-instance body. Then, particularly for reasons of the procedural efficiency, there is no point in issuing the second decision with identical content, therefore the legislators allowed the previously issued decision to retain its force. On the other hand, the expression: „shall quash the decision (...) and shall rule as to the merits” is a similar mental shortcut, meaning that the second-instance body arrived to a different conclusion than that of the first-instance body. In this situation, only quashing of the first decision is merely a tidying up measure, introduced only to prevent the existence of two different decisions on the same matter. From the theoretical standpoint this action is unnecessary because it should be presumed that with this arrangement of the course of instances, lodging an appeal automatically eliminates the decision issued at the first instance from legal relations. It is only for practical and procedural reasons that the first decision continues in force until the body of second instance issues its decision.

5. The second role of the appellate body – a controlling role in discharging of which this body uses its cassation competence, has been established as an exception to the rule. Although the wording of this exception has been changed recently, but the amendment has not changed the prevailing proportions. Article 138 § 2 CAP now stipulates that ‘the appellate body shall quash the decision appealed against in whole and may remand the matter for reconsideration to the body of the first instance, if the decision was infringing on the procedural provisions, and scope of the matter needed to explain the matter has an essential bearing on the resolution of the matter’. The scope of this paper does not allow to provide detailed interpretation of this provision which may give some reasons to doubts. Anyway, the controlling role of the appellate body can be seen clearly. On the basis of this provision, the appellate body is under obligation to review the proceeding which has led to the decision issued at the first instance, particularly the hearing of evidence, and under obligation to check whether procedural provisions have not been breached in the proceedings. On the other hand, the quoted provision shows evidently the exceptional nature of the situation envisaged there. The provisions gives the appellate body only one possibility to use its cassation competence narrowed to the situation where in a certain scope – with ‘essential bearing’ to the resolution, the proceedings need to be repeated from the beginning.

The aforementioned ‘exceptional nature’ of the cassation competence of the appellate body compared with its reformatory competence, in practice is, unfortunately, blurred to a fairly great extent. The bodies of the second instance use this competence too often, which is caused both by objective factors (e.g. lack of qualified personnel in the body of the second instance) or by subjective ones (usual, although bad, habit to get rid of difficult cases).

6. The controlling function of the appeal body is also manifested in an institution borrowed from court proceedings. It refers to the prohibition of reformationis in peius, contained in Article 139 CAP which stipulates that an appeal body may not issue a decision adverse to the appealing party unless the decision appealed against grossly infringes on the law or is grossly contrary to the public interest. The legislators have, on purpose, narrowed the possibility to consider a case on merit, in order to provide additional protection to the party. For the purpose of this additional protection, this there is a break of another principle (discussed earlier) which says that the appeal body adjudicates on the matter, i.e. that to say, ‘lays hands on the matter’. In some ways, the very essence of appeal is thereby obscured. Even more, this institution contradicts yet another principle of administrative law under which the administrative authorities act always in accordance with the facts of the case as well as with the legal situation at the time the decision is taken. Being prohibited from worsening the legal situation of the appealing party, the appeal body is partly bound by the facts of the case and the legal situation. Hence, the competence of the appealing body is thus limited which allows statement that the prohibition reformationis in peius is principally an institution of substantive law.

The features of the legal institution in question are usually used as arguments by its opponents. For the sake of even-handed treatment it is befitting to cite also the key arguments of its supporters who are equally numerous. The legal institution prohibiting reformationis in peius is thus seen as a special measure for protecting the citizen’s rights which should be an absolute priority in administrative proceedings. When lodging an appeal against an administrative decision should not run the risk of worsening his/her legal position.

7. The two-instance system of the Polish administrative proceeding is above all guaranteed by the Constitution which in its Article 78 stipulates that each party shall have the right to appeal against judgments and decisions made at first stage. This provision endows
each citizen with just a formal, public legal right to appeal and hence to achieve reconsideration of a given matter by a body of higher instance. The fact that the aforementioned Article uses expression ‘made at first instance’ is an emphatic confirmation that it is not the case of recourse to administrative court (this right is guaranteed by the constitutional right to be heard by court) but the cases of appeal lodged to a body of second instance.

The constitutional rule thereby expressed was specified in Article 15 of the Code of Administrative Proceedings providing for the principle of two-instance system of administrative proceedings by the use of succinct statement: ‘Administrative proceedings shall be two levels of instances’. This provision is complemented by Article 127 § 1 CAP under which ‘A party may appeal against a decision issued in the first instance only to one instance’. By the way, this phrase shows yet another aspect of the administrative course of instances, saying that the entitlement to appeal may be exercised only once and that in no case the administrative proceeding may have three or more instances.

The principle of two instances has also a special role: it is this principle which introduces the general rule of the right of appeal against each administrative decision and excludes any elimination of the course of instances.

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1. Local government appeal boards provide a systemic guarantee that the principle of a two-instance system of administrative proceedings is followed in a situation where such proceedings are conducted by local government bodies. I put forward this statement in 2002 and the following years of the functioning of the appeal boards only fortified that belief in me. What I mean, of course, is the principle of a two-instance system of proceedings, which in classical terms means the right of a party to have its case heard twice by two different bodies. Only then is the observance of one of the fundamental standards of democratic rule of law ensured, namely the right to defend a violated legal interest through the entitlement to appeal against the administrative decision. It is only the principle of a two-instance system of proceedings, understood in such a manner, that plays the role of an important guarantee enabling the repair of possible violations of law, errors, omissions and mistakes made by the authority issuing the decision at first instance. Its nature as a guarantee follows from the presumption, that since it is impossible in practice to reach a condition whereby any decisions issued by public administration authorities are in conformity with the law, there should be an effective means to rectify the same. This, does not, after all, raise any doubts in the case-law of the Constitutional Court. In the statement of reasons for its judgment of 16 November 1999, SK 11/99, referring to this matter, the Court explained that the model of procedure in which an appeal against a decision has a devolutive effect, meaning that it results in the opening of the procedure before a higher-instance body, favours more the pursuance of this principle. „Indeed, it contributes to the making of the review of judgments or decisions more objective and realistic which is undoubtedly a premise underlying the right guaranteed in Article 78 sentence 1 of the Constitution of the Republic of Poland”.

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THE ROLE OF LOCAL GOVERNMENT APPEAL BOARDS
IN THE PURSUANCE OF THE PRINCIPLE OF A TWO-INSTANCE SYSTEM OF PROCEEDINGS

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It seems necessary to demonstrate the advantages of this model of adhering to the principle of the two-instance system of proceedings, particularly nowadays when departure from the devolutive character of appeals as regards administrative decisions is increasingly being approved of by the legislators and introduced without any reasonable grounds for so doing. For instance, as a result of its successive amendments⁶, the provision of Article 221 of the Tax Law now reads as follows: „Where a decision is made at first instance by the minister competent in matters of public finance, the director of the fiscal chamber, the director of the customs chamber or by a local government appeal board, an appeal from such decision shall be heard by the same tax office, applying the regulations on appeal proceedings accordingly“. In turn, Article 81 paras. 1 – 2 of the Act of 24 July 1999 on the Customs Service⁷ stipulates that „Where a decision is made on dismissing, transferring or setting other tasks for a customs officer; transferring to a lower post or suspending such an officer; such an officer may, within 14 days, file an application to have the case re-examined“. The application for re-examination of the case is then a means of appeal against the decision made at first instance in administrative proceedings, regulated by the provisions of the Code of Administrative Procedure (k.p.a.), regardless of whether the decision was made by the minister or a local body of the central government’s administration. Departure from the devolutive character of the means of appeal as regards decisions made by such bodies is not substantiated by any reasonable arguments. Neither are there any structural reasons (absence of higher-instance bodies) or any other material grounds which would justify depriving the party of one of fundamental procedural guarantees. It is to be borne in mind that both the director of the fiscal chamber and the director of the customs chamber are higher-degree bodies in the systemic meaning of the term. There were no reasons of a systemic nature then which would substantiate the introduction of a special legal regulation departing from the principle of the two-instance system⁸.

As a result, slowly and imperceptibly but consistently, the application for re-examination of the case, the introduction of which was intended to alleviate the absence of procedural guarantees caused by the departure from the principle of a two-instance system, is becoming a means of appeal against non-final administrative decisions, equivalent to appeal even though its filing does not have a devolutive effect. Thus, the legislators are increasingly abandoning the observation of the principle of formal justice. Indeed, measures are not being taken which would serve the purpose of guaranteeing procedural certainty and predictability; on the contrary, the legislators are increasingly abandoning the establishment of effective mechanisms for controlling the activities of public officials¹⁰.

2. No doubts have essentially been raised, either in the doctrine or in the case-law of administrative courts, by the view that the law makes local government units one of the elements of the state, which is best evidenced by the fact that they are entrusted with tasks within the competence of central government administration. This can be explained by the general systemic principle under the law that „the idea of the local government is, in essence, for it to perform the functions of central government administration as part of the administration of the state (even though local government differs from the other bodies of the state administration and does not report to it)“¹⁰. Even where it pursues its own tasks, its activities ultimately serve the state. Because of this, the independence of such an entity is determined not only by its having a legal personality and the ability to perform public tasks in its own name, but it is also limited by the possibility of acting only within the framework of the statutes. In other words, the activities of local government bodies deserve protection within the limits of their conformity with the law.

Currently, it is rather indisputable that the local government has a state dimension to it. State authorities (the Parliament) establish the local government and entrusts it with executive powers¹¹, thus determining a form of division of public executive power between central government administration and bodies separate from it, including local government units. A consequence of the regulations adopted under Polish legislation is a solution whereby bodies of local government units have a double character. They are legal entities on the one hand and public administration bodies on the other. In principle, for bodies acting in the first of these capacities, activities of a non-executive nature undertaken in accordance with the provisions of civil law will be appropriate. For the latter, legal forms of administrative activities based on the imperium will be characteristic¹². Of interest to me here is that this fact sets the limits within which a local government unit may use court protection, including that offered by an administrative court, and to what extent it is an element of the public administration system whose acts or activities are subject to court review.

In my opinion, this is the following relationship. Whenever the regulations of positive law cast any of the local government units as a public administration body which conducts administrative or fiscal proceedings in an individual case, at any stage thereof, the possibility for the unit to assert the protection of its legal interest in court is excluded. At the same time, I perceive the notion of legal interest in objective terms. It exists when it is possible to identify a provision of substantive law from which specific rights and obligations can be inferred for a particular entity¹³. In matters in which a local government unit acts within the domain (imperium) entrusted to it, it does not appear as a separate legal person, and hence it does not represent its legal interest. As a body exercising the competences allocated to it in the area of public administration it is an entity subject to court review and not an entity entitled to demand court protection. For this reason, entrusting a department of local government with the power to adjudicate in an individual case in the form of an administrative decision, excludes the possibility for this unit to assert its legal interest under an administrative procedure or administrative court procedure. In such cases, therefore, a local government unit is not an entity qualified to file appeals against decisions with the administrative
court, due to the absence of fulfilment of the premise set out in Article 50 of the Act of 30 August 2002 on the Law of Procedure before Administrative Courts, in the form of holding a legal interest in filing the complaint.  

It seems that this position has been fully accepted in the case-law of the administrative courts. In situations where the aforementioned regulations of positive law set for the municipal body a role as a public administration body within the meaning of Article 5 § 2 point 3 k.p.a., such a body acts and defends the interest of the local government unit – in the forms appropriate for the authority in charge of the procedure, i.e. through the undertaking of administrative acts which resolve, on an executive and unilateral basis, the case of an individually identified addressee in a specifically identified matter. The interest so understood does not equal, however, the notion of legal interest under Article 28 k.p.a. and Article 50 § 1 of the Law of Procedure before the Administrative Courts, which set the legal capacity of a party in terms of administrative proceedings and its capacity to file a complaint with the administrative court.

Despite the views of the case-law and the well established doctrine in this area, I would term administrative proceedings conducted at first instance by bodies of local government units as being particularly sensitive from the viewpoint of their impartiality. This follows from the fact that the practice of the functioning of local government bodies is dominated by a different position. This is evidenced by numerous complaints from local government units filed with administrative courts, against the reforming decisions of local government appeal boards made in cases in which these authorities have made first instance decisions. Frequently, these bodies cannot accept the position adopted by the regional administrative courts, who consistently deny them the capacity to file complaints, and file cassation complaints with the Supreme Administrative Court (NSA) against the judgments of these courts.

Following the contents of these complaints, one cannot resist the impression that a considerable majority of local government bodies are deeply convinced that their role as the bodies in charge of administrative proceedings is twofold. They believe that their obligation is not only to resolve an administrative case in accordance with the existing facts and the applicable law. For them, an equally important task is the protection of the “legal interest” of their own unit which, after all, is perceived very subjectively, as a broad financial interest of the municipality, poviats or voivodship concerned. They take no account of the fact that local government units have been equipped with certain funds and assets (e.g. real estate) in order to have the resources necessary to perform their tasks and not in order to enjoy the status of, and benefit from legal protection due to the owner. This is best evidenced by the statements of reasons for the means of appeal they file.

In reading these pleadings, one can come to believe that in the opinions of their authors, the decisions of heads of local governments in villages (wójt), smaller towns (bursmistrz), bigger cities (prezydent), poviats (starosta) and voivodships (marszałek) concern largely the tasks of local government units funded from their own budgets or their individual assets (e.g. real estate), and, as such, these decisions not only adjudicate on the rights and obligations of the parties but also cover the legal interest of the local government unit concerned. Thus, they accept the view whereby local government bodies adjudicate in their own matters and take it for granted. Inherently, they cannot be impartial because they need to defend their own legal interest.

3. For the reasons presented above, every effort should be made regarding the review by higher instances of the decisions and rulings of local government bodies, so that they are within the competence of independent, professional and autonomous adjudicating bodies, and that they are provided with all competences specified in the Code of Administrative Procedure (k.p.a.) applicable to appeal and higher-instance bodies.

These requirements are met by local government appeal boards and, what is more, over almost twenty years of their existence, they have demonstrated that their adjudication performs the functions which follow from the principle of a two-instance system of proceedings. It is good therefore that in the existing legal circumstances and with the "views", as presented here, of local government bodies on their adjudicating function, the review by higher instances in the system of local government bodies has been entrusted to the appeal boards.

Thanks to the systemic characteristics of the appeal boards, the principal advantages of a review by higher instances are retained with the parallel minimizing of its disadvantages. This continues to be a review which meets the postulation of swiftness of procedure (the appeal boards are bound by the administrative procedure provisions as regards the deadlines for handling cases), its simplicity (appeal proceedings before an appeal board, as any other second-instance body, are regulated by the provisions of k.p.a. or the Tax Law) and the holding by the appeal body of reformative decision-making powers.

At the same time, entrusting local government appeal boards with the competence of review by a higher instance has alleviated, if not eliminated, the shortcomings of this model. This is due to several causes.

Firstly, appeal boards can be deemed to be fully professional administrative bodies. All their members must have higher education, adequate work experience and must represent a high level of expertise in the field relevant to their education, whilst full-time appeal board members must additionally have higher education in law or administration (cf. Article 7 para. 1 and Article 7 para. 1a of the Act on Local Government Appeal Boards, „usko”). Such a composition promotes the efficient hearing of all cases within the competence of the appeal boards, regardless of their specificity or degree of complexity. Consequently, appeal boards are capable of taking on more and more new tasks, not only as regards administration, if the aims set for the public administration so require, but particularly as regards the hearing of appeals in increasingly new categories of cases, in accordance with the needs resulting from the successive local government reforms.
Secondly, appeal boards are higher-degree bodies vis a vis municipal authorities in the sense of „instances” (Article 17 point 1 k.p.a.) and not the system\(^20\). As a result, both these types of bodies remain in a procedural relationship one with another whilst retaining mutual independence. The mutual relationships between municipal authorities and appeal boards resemble more the relationship between a public administration authority and an independent review body, rather than a relationship between administrative bodies of lower and higher levels. Adjudicating at first instance, local government units are bound only by the interpretation contained in the statement of reasons for the decision of the local government appeal boards\(^23\).

And this is only as long as such a decision is not eliminated from the legal transactions. This mutual independence is underlined by the different methods of funding the activities of the appeal boards\(^22\) and those of local governments. All in all, in this organisational relationship between bodies of first instance and the appeal board, there are no interpersonal dependencies which would have an adverse effect on the objectivity of the award\(^25\).

Thirdly, local government appeal boards are collegiate bodies and of a special type. In accordance with Article 18 para. 1 usko, appeal boards adjudicate in panels of three and the award (decision or ruling) of the adjudicating panel is an award from the local government appeal board, as an administrative body. It is only an appeal board with a panel of three, presided over by its chairman or a full-time appeal board member, that is competent to make awards, in particular in the form of decisions or rulings, which are awards by a public administrative body. These represent activities the consequence of which is the shaping of external relationships under administrative law.

What needs to be emphasised at this point is the making of the composition of the adjudicating panels independent of the appeal board executives. In accordance with Article 21 para. 1 usko, and during the course of adjudication, members of the adjudicating panels are bound only by the regulations of the prevailing law. It means that the other activities in the case may be undertaken also by the chairman of the local government appeal board, but only where they are not in breach of the independence of members of adjudicating panels when they make awards\(^24\). If we add to that the collegiate mode of making decisions, we conclude that this is an administrative body within which there exist institutional and procedural guarantees for taking balanced, objective and lawful decisions.

In light of current regulations, an obvious conclusion comes to mind that local government appeal boards are neither local\(^2\) nor central government units. There is no organizational relationship between the appeal board and the Prime Minister. Neither may a reference be made to the degree of subordination of members or bodies of the appeal boards to the Prime Minister. The powers of the latter relating to appeal boards cover only certain personnel matters (appointing\(^25\) and dismissing the appeal board’s chairman and members) and are close in their character to the powers of the President of the Republic of Poland, as regards the appointment of judges and appointment of, for instance, the President of the Supreme Administrative Court — cf. Article 44 § 1 of the Law on the Administrative Court System\(^27\). Even though the Prime Minister is equipped with certain supervisory powers\(^28\) which refer solely to the legal supervision, these supervisory acts may be directed only against appeal board bodies which do not have adjudicating powers. Thus, the adjudicating activities of the appeal boards are excluded from this supervision.

This attests to the correctness of the conclusion that appeal boards are public administration bodies independent of the supreme bodies of central government administration. This, after all, is a purposeful and necessary concept considering that both the doctrine and the concepts adopted in EU legislation presume a strict separation between central and local government administration.

It is clear that despite a one-stage organisation of the local government, there must exist bodies which perform reviews by higher instances of decisions made by heads of local governments in villages (wójt), smaller towns (burszt), larger cities (prezydent), povijas (starosta) and voivodships (marszałek). It is a positive development that the function has been entrusted to local government appeal boards. It follows from the experience to-date that these are bodies capable of shaping administrative case-law whilst being, at the same time, independent of central government administration to a degree which warrants that the independence of local government units will not be compromised. Furthermore, these are professional bodies and hence they are capable of ensuring due quality and uniformity of administrative adjudication also at the first instance. At the same time, these bodies are not involved in local matters and thus meet the prerequisite for impartial adjudication in individual cases.

I would therefore dare to conclude that local government appeal boards, being administrative bodies with hybrid characteristics\(^29\), constitute a necessary and complementary element of the local government system in Poland. Without them, local governments would not be able to function properly in a very important sphere of their activities; namely the adjudication in individual cases, because the procedural guarantees which are necessary for the parties would be absent. For this reason, the „local government” part of the name is not an empty term because there is rational substantiation behind it, of not only procedural but of a systemic nature as well.

A model which consists of entrusting the hearing of appeals and complaints with local government appeal boards proves that, the essential shortcoming of a review by higher instances which is commonly considered to be the absence of objectivism of the appeal body, may be significantly limited by the concepts of positive law. In particular, the objectivism of review by higher instances may be ensured by making the appeal body independent of the first-instance body. The point is, in particular, for the former not to be able to shape the adjudication of the latter (e.g. by providing guidelines, instructions or ex ante interpretations of the regulations which are applied), and
hence not to be liable for the decisions it makes. As demonstrated explicitly by M. Sieniuc, the legal solutions applied to local government appeal boards concerning in particular the rules of adjudication (such as: adjudication in panels of three, possibility to provide a dissenting opinion (votum separatum), independence in adjudication, the adjudicating panel being bound only by the regulations of the prevailing law) and the absence of an organisational link between the appeal boards and first-instance bodies (these bodies only remain in procedural relationships), provide an effective barrier preventing so-called „adjudication solidarity”.

As a result of a review by appeal boards as a higher instance, the probability of obtaining an administrative decision which is correct and in conformity with the law, as early as at the stage of administrative procedure, without the necessity to resort to court intervention, has increased considerably. It could be even higher if appeal boards were more courageous in exercising their reformatory powers although this is a theme for a separate paper.

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NOTES:


5 OTK 1999, No. 7, item 158.

6 See Article 1 point 64 of the Act of 11 April 2001 amending the Act on Tax Law and Certain Other Acts (Dz. U. /Journal of Laws/ No. 39, item 459); Article 1 point 149 of the Act of 12 September 2002 amending the Act on Tax Law and Certain Other Acts (Dz. U. No. 169, item 1387); and Article 20 point 19 of the Act of 27 June 2003 on the Establishment of Regional Tax Appeal Bodies (Wojewódzkie Kollegium Skarbowe) and Amending Certain Acts Regulating the Tasks and Com-

petences of Authorities and the Organisation of Organisational Units Reporting to the Minister Competent in the Matters of Public Finance (Dz. U. No. 137, item 1302).

7 Dz.U. 2004 No. 156, item 1641.


11 J. Filipek, Koncepcja prawa gminy na gruncie ustawodawstwa polskiego, „Casus” 1996, No. 2, Supplement p. II.

12 It does not always have to be the case. Cf., in more detail, W. Chróścielewski, Imperium a gestia w działaniach administracji publicznej (w świetle doktryny i zmian ustawodawczych lat 90.), PIP 1995, No. 6, p. 49 et seq.; M. Maciolek, Przyczyny do zagłady kontroli gestii administracyjnej, PIP 1995, No. 11, p. 134 – 136.

13 Cf. e.g. J. Borkowski [in:] B. Adamiak, J. Borkowski, Polskie postępowanie administracyjne i sądowoadministracyjne, Warszawa 1996, p. 78 et seq.

14 Dz. U. No. 153, item 1270.

15 Cf. in more detail J. P. Tarno, Status prawny jednostki samorządu terytorialnego w postępowaniu administracyjnym i sądowym, PIP 2006, No. 2, p. 15 et seq. and the case-law referred to therein.

16 Judgment of the Regional Administrative Court (WSA) in Gliwice of 27 July 2007, II SA/GL 111/06, unpubl. I cite this judgment because the Court in Gliwice was for a long time not convinced concerning the position expressed in the resolution of the panel of 7 judges of the Supreme Administrative Court (NSA) of 19 May 2003, file No. sygn. OPS 1/03, ONSA of 2003, No. 4, item 115.

17 In the view of the head of municipal authorities (wójt) in Biskupiec „In the case concerned, the Local Government Appeal Board in Olsztyn made a reformative decision encroaching on the property rights of the municipality, because the decision about gratuitous acquisition of property pertains to the assets and finance of the municipality” – from the statement of reasons for the cassation complaint against the decision of the WSA in Olsztyn of 6 May 2004, file No. sygn. akt 2 I SA 530/03. In the opinion of the head of the poviat authorities (Starosta) in Olsztyn, its legal interest as regarding the placing of a person in a nursing home follows from Article 19 point 10 and Article 59 of the Act of 12 March 2004 on Social Assistance (Dz. U. No. 64, item 593 as amended) – and from the statement of reasons for the cassation complaint against the decision of the WSA in Olsztyn of 7 December 2005, I OSK 521/05.(The first of these regulations stipulates that „The poviat’s own tasks include the maintenance and development of the infrastructure of nursing homes of supra-municipal reach and the placing of people referred to therein”, and the other that „The decision on placing a person in a nursing home is made by the municipal body which runs the home or by the head of the authorities (Starosta) of the poviat which runs the home” – note by the author, J.P.T.). In turn, the mayor of the town and municipality of Stary Sącz argued that „we have a case here of the opposing powers of two public administration bodies; namely, that is the first-instance body „in defending” its property rights, as an individual party in transactions under civil and administrative law, and the second-instance body is depriving the municipality of its rights resulting from the property right until it is deprived of the latter. In the context of Article 45 and 64 of the Constitution of the Republic of Poland, the administrative court should review the ad-
ministrative decision made by the second-instance body” – from the statement of reasons for the cassation complaint against the decision of the WSA in Kraków of 1 February 2006, J OSK 386/05.

18 See Article 1 of the Act of 12 October 1994 on Local Government Appeal Boards (consolidated text in Dz. U. of 2001 No. 79, item 856, as amended), hereinafter termed „usko”. In accordance with this regulation, they are higher-level bodies in the meaning of the provisions of the k.p.a. and the Tax Law, and in individual cases in the area of public administration which are within the competence of local government units unless special provisions stipulate otherwise. The regulation so worded means the entrusting to the appeal boards of the role of appeal bodies both where they hear appeals against decisions made by local government bodies as part of their own tasks, and also where decisions are made in delegated cases relating to central government administration.

19 They can be, e.g. the body conducting pre-court proceedings (cf. in particular J. P. Tarno, A Wrzesińska-Nowacka, Postępowanie w sprawach opłaty za użytkowanie wieczyste, “Samorząd Terytorialny” 1995, No. 7-8, p. 115-117), which is particularly valuable if one considers that at present methods are urgently being sought to facilitate the functioning of the courts in Poland. Cf. e.g. D. Galligan, M. Matczak, Strategie orzekania sądowego, Warszawa 2005, p. 7 et seq.

20 Cf. in more detail W. Chrościelewski, Organ administracji publicznej w postępowaniu administracyjnym, Dom Wydawniczy ABC 2002, p. 16-22.


22 In accordance with Article 3 usko, the appeal boards are entities funded from the national budget.

23 In the hierarchical appeal system, employees of first-instance bodies demonstrate a natural inclination to “endear themselves” to their superiors as a result of which, they often attach more importance to the instructions they get than to the applicable legal regulations. On the other hand, these superiors demonstrate a far-reaching inclination to „defend” the appealed decisions, which goes beyond the limits set by the law because they regard the filing of an appeal as an attack against their own institution.

24 Cf. in more detail J. P. Tarno, Samorządowe kolegia odwoławcze – zasady reprezentacji, op. cit., p. 13 et seq.


26 From amongst two candidates being full-time members of the board, selected by the general assembly (Article 5(1) and Article 5(2) usko).


28 The Prime Minister may dismiss the chairman of the appeal board where the minister competent in matters of public administration finds recurring violations of law in the performance of the chairman’s obligations or evasion of their performance – Article 6 para.1a) usko.

29 This is taken to mean the administrative body which has features characteristic of both central and local government bodies. Cf. in more detail, J. P. Tarno [in:] J. P. Tamo, M. Sieniuć, J. Sulimierski, J. Wyporska, Samorząd terytorialny..., Warszawa 2004, p. 293-298.

30 Cf. B. Adamiak, odwołanie w polskim systemie postępowania administracyjnego, Wrocław 1980, AUWr No 503, Prawo XXXXVIII, p. 84.

31 Komplementarność instancyjnej i sądowej kontroli aktów organów administracji publicznej, Łódź 2006, typescript, p. 145-152.
Managers have a solution to every problem. Clerks have a problem with every solution. Günter Hartkopf – a long-serving German minister (Staatssekretär)

Why precisely do we need a change in management philosophy in public administration? In response, a quote from a popular commercial comes to the mind: am I a CUSTOMER or PETITIONER here? When I was starting work in public administration 10 years ago, the only way we would refer to the customers of the Marshal’s Office would be as a party or petitioner. The only terms I use currently are co-workers and customers. The customers in the good sense of the word, namely the persons whose needs public administration should satisfy efficiently, competently and effectively while considering the timing and cost of the decisions made, both from the point of view of the Client and of the own institution’s budget. This is what the concept of New Public Management is about – convergence of the vision of operation of the public and business sectors. Public administration in a democratic state remains, by the force of things, directly related to market economy. It should, therefore, take account of the managerial approach in its operating strategy. It is with envy that I read in the most popular business publications such as Harvard Business Review or Think Thank about improved customer service, corporate social responsibility, public and private partnership or branding. Does public administration already think about its clients and co-workers in the same way? The local government continues to be an underestimated partner in creating and implementing the new method of thinking about administration. And, still, the local governments draw the attention of most citizens on the matters most important to them because arising from the problems of daily life present in the most immediate environment of the citizen – client.

The only certain thing in organisation is change

In the evolving economic, social and political conditions, it is worthwhile to remember about the role played by public administration – work in that sector has always been a service. Nonetheless, the schematic solutions applied to date are not sufficient for the central and local government institutions to operate in a modern way corresponding to the demands of the contemporary world. The ministries, government agencies, regional, county (powiat) and communal (gmina) offices must upgrade to keep in touch with fulfilment of the needs of the citizens-clients.

Understanding the essence of the concept of the new approach to management in public administration requires a wider perspective. Let us draw the following parallel – the ocean is not only water, fish and seaweed but a complex ecosystem. The network of interdependencies is also present in the society. Over ten years after the great decentralisation reform in Poland, reliance on the feedback effect consisting in continuous analysis of the quality and effectiveness of operation of public administration from the point of view of the customers is still inadequate. Individual offices are making attempts at feedback by examining customer satisfaction, modifying procedures, shortening the decision-making process, in other words, re-orienting the organisation by embracing the principle of putting customers first. One example is the Marshal’s Office of the Malopolska Voivodship, the organisation where I have been working for many years. One could risk stating that Poland lacks an institution operating, possibly, in the non-government sector that would focus on standardisation of work of public administration while keeping in mind, first of all, the welfare of the client. Everybody would benefit from the deliverables of such institution – central and local government administration and, most importantly, the citizens.

The external conditions in which we currently operate give rise to real problems, namely the ageing society, ever growing and evolving needs of the citizens and continuously declining budget receipts due to the global economic crisis, and face each public institution with a dilemma how to provide more services of increasing quality at the lowest possible cost. Unlike the budgets,
Public demands will continue to rise. Hence, the greatest challenge for public administration for the coming years will be to effectively implement new approaches. Thus, the concept of New Public Management (NPM) is becoming even more prominent.

The innovativeness of that model consists in adapting the management methods and techniques applied in the private sector to the conditions of management of public organisations. The priorities include flexibility, performance culture, decentralised management, strategic planning and adoption of the mechanisms characteristic for operation in a free market. At first glance, a public administration office is very different from an enterprise. To identify the similarities and, possibly, to highlight the differences, it would be necessary to carry out a comparative analysis of an office and an enterprise based on the type of tasks performed. For transparency, the comparisons have been presented in the form of a table.

### Preparation of business decisions (budgeting)

<table>
<thead>
<tr>
<th></th>
<th>OFFICE</th>
<th>ENTERPRISE</th>
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<tbody>
<tr>
<td>What are the needs and which of them are most urgent?</td>
<td>Preliminary market research</td>
<td></td>
</tr>
<tr>
<td>What services do we intend to provide?</td>
<td>Development of the so-called feasibility study</td>
<td></td>
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<tr>
<td>At what level do we expect to satisfy the needs?</td>
<td>Preparation of a business plan</td>
<td></td>
</tr>
<tr>
<td>How much money would satisfaction of those needs cost?</td>
<td>Preliminary assessment of the economic ratios</td>
<td></td>
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### Opinion polling before the ultimate decision

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<th>OFFICE</th>
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<tbody>
<tr>
<td>Discussing the budget, balancing the needs and capabilities, examining alternative solutions and preparing the choice</td>
<td>Detailed study of the market situation and scenario analysis</td>
<td></td>
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</tbody>
</table>

### Making the decision

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<tr>
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<tbody>
<tr>
<td>Decision on the budget</td>
<td>The decision of the owner (supervisory board) on the allocation of resources and launch of production</td>
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</table>

### Launching production of goods and provision of services

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<tbody>
<tr>
<td>Delivery of scheduled services and covering the related expenses</td>
<td>Production of goods and services (manufacturing outlays)</td>
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</table>

### Measuring satisfaction of recipients of services and of customers

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<th>ENTERPRISE</th>
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<tbody>
<tr>
<td>Examining the recipients’ opinions (public opinion polling), assessment expressed in parameters, media monitoring</td>
<td>Successful product sales – sales volume</td>
<td></td>
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</table>

### Performance evaluation

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<th>OFFICE</th>
<th>ENTERPRISE</th>
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</thead>
<tbody>
<tr>
<td>Reporting – public presentation of the details of execution of the scheduled tasks and degree of attainment of the projected results</td>
<td>Level of generated profit</td>
<td></td>
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</table>

The similarities gathered above allow for adequate assessment of the approach to the function of public administration as postulated under New Public Management. This does not mean, however, that no differences have been identified. The extent to which those differences weaken possible involvement in implementation of the assumptions underlying the adopted growth strategy with regard to the activities of public administration goes beyond the scope of our analysis. What is evident, however, is that the following elements can be included in the basic differences between the operation of public administration and of an enterprise in the context of market economy:

- An office usually provides services as a monopolist whereas an enterprise operates in a competitive market.
- An enterprise usually collects a fee directly from the customer whereas all members of the community pay, in the form of taxes, for the official services (decisions) offered free of charge to the selected or willing (motioning) parties.
- Public administration must learn to manage its own resources and own institutional development. Otherwise, it will be no partner for the private sector. Informed decision-making and outlining of various scenarios are critical. The systemic approach shall be adopted that limits measures taken on impulse or under the media pressure exercised on individual areas.

The Marshal’s Office of the Malopolska Voivodship has embraced the challenge and aims to manage its operations in the spirit of New Public Management. At the start of the term, a strategy was defined which – through achievement of clearly formulated objectives – is to lead to further improvement of the relationship between the customer and the Marshal’s Office.

**We have ISO, we are eco**

Our Office aims to operate efficiently and, by doing so, to benefit the citizens. We have overcome the typical bureaucratic canons and we have successfully adopted multiple solutions previously reserved exclusively for the business sector. Our opening to the new technologies and implementation of ISO standards allowed for cost efficiency as well as ecological and more efficient work.

We follow a plan. Our decision-making process is project-oriented and focuses on the goals set. We have replaced distribution of the budget funds with orientation towards specific projects while considering effectiveness of the scheduled activities, their profitability and, most importantly, the interests of the citizens – our customers. We actively seek alternative sources of funding. We delegate authority and empower lower management levels. We measure our performance by the degree of customer satisfaction. We replace the government model with the co-management model. We standardise the process of execution of public tasks. Our management system is regularly assessed by independent auditors (certification). We promote market mechanisms at the expense of bureaucratic mechanisms.
Our efforts have been recognised and the Marshal’s Office won a distinction in the “public organisations” category in the 11th edition of the Polish Quality Prize competition in 2005.

**Layoffs are not enough**

The most perceptible and tangible cost-cutting method for an external observer is to reduce employment. That postulate is reiterated on a regular basis and one can notice that most of the inquiries addressed by the journalists to the head of the Marshal’s Office tend to focus on that issue. Human resources are the cornerstone of each business. Consistently with its goals, the HR policy of Marshal’s Office of the Malopolska Voivodship concentrates on proper selection of the personnel to deal with the tasks ahead. To that end, the Marshal’s Office relies on the tools applied by HR departments of the private sector’s companies, i.e. active recruitment, assessment of the employees’ growth potential, coaching, career path planning, launch of professional development schemes, professional achievements monitoring, standardisation of measurable performance indicators, performance-based payroll policy, management succession planning and talent promotion.

Reasonable employment cuts are possible only subject to prior in-depth analysis of “suitability” of each member of the personnel in the context of attainment of the goals set. It should be kept in mind that the purpose of a regional office is not only to offer administrative services to the citizens and that the performance of many persons cannot be measured by the level of customer satisfaction, for instance, by way of the direct customer interview or by means of a survey available from the Office. An overwhelming group of our clerks do not deal with customers on a daily basis. The customers of the Marshal’s Office also include institutions with whom we work, county and communal local governments, local government associations and regional unions, field central government administration, both unified and independent, parliament members, beneficiaries of operational programmes, non-government organisations, public unions and associations, partnership regions, international organisations, trade associations and citizen unions, and the media. Evaluation of the work of the clerks dealing, in broad terms, with regional development is multi-dimensional and is carried out within wider time brackets on the basis of the benefits it has generated for the Malopolska Voivodship. Performance is measured by attainment of the set strategic and operational objectives.

**Head of department as the leader**

Heads of departments play an important role in management of a large institution such as the Marshal’s Office. We would all wish that only active and creative applicants with excellent university background, thinking like leading entrepreneurs and treating their place of work as their own business come to job interviews. The reality is rather different. Like many Polish enterprises, the offices also face the problem of the persons who not only do not understand business mechanisms but tend to concentrate on the issues relating to their place of work and are interested exclusively in maintaining the status quo. They are not preoccupied with the fate of their organisation as they do not identify themselves with it. They have built their own “ecosystem”. They seem to demonstrate some sort of activeness but it is not clear what they actually do and it is hard to determine exactly how their efforts are related to the organisation’s strategy and its objectives.

The problem of shortage of pro-active employees must be resolved by heads of departments/managers. It is their responsibility to boost their personnel’s initiative and create performance culture. We are gradually abandoning the model under which the managers used to be responsible only for allocation of tasks, execution of tasks and performance control. Genuine leaders and managers support, inspire and teach their subordinates to observe and understand market mechanisms and explain the actual environment in which the organisation (office) operates and require understanding of those principles.

The experience shows that leveraging the human resources potential within the organisation generates measurable benefits. To illustrate this point, let us give an example from the US: the government agency dealing with transportation security (Transportation Security Administration) was seeking new ideas for improving its operations and did not convene any coordinating meetings for that purpose. Instead, the Idea Factory was launched in 2007, an intranet website where the members of the Agency’s personnel were able to share their ideas and thoughts. Over a period of three years, some 8,000 proposals had been submitted of which forty were ultimately implemented, reducing the organisation’s costs and improving its efficiency and performance. Similar systems have already been put in place in multiple enterprises operating in our market. Systems promoting creativity and entrepreneurship within Poland’s public administration sector continue to be fairly rare whereas the employees could contribute to the bank of new ideas and suggest beneficial solutions also in that area.

On 15 April 2011, I collected a prize in the competition for the Best Initiative of Global Entrepreneurship Week 2010 on behalf of the head of the Marshal’s Office of the Malopolska Voivodship at Copernicus Science Centre in Warsaw (Centrum Nauki Kopernik). Global Entrepreneurship Week is a unique international project designed to promote pro-entrepreneurial attitudes among the members of the society. In the year 2010, the Mal-
opolska Voivodship, as the first and only, voivodship government in Poland, became the event's official partner by coordinating the initiative at the regional level. Following up on successful co-operation in organising that type of events, the Marshal’s Office of the Malopolska Voivodship invited Kraków’s largest universities and institutions supporting entrepreneurship growth to join the project (12 Partners from the Malopolska voivodship was involved in pursuit of that initiative). The success of the Global Entrepreneurship Week in Malopolska did not go unnoticed. Extensive partnership, multitude and diversity of the events held and large public attendance and response all contributed to the Malopolska initiative being recognised as the best in Poland.

3Es’ RULE - Economy, Effectiveness and Efficiency

New Public Management competes against traditional or orthodox public management (the so-called “old” public management) which is still much alive in some countries and across some organisations. Traditional public administration lacks flexibility and can hardly be adapted to the evolving reality. The tasks and the amounts allocated for their implementation are decided at the upper levels of the organisation. The employees’ responsibilities are restricted to passive spending of public funds and observance of the imposed limits. This approach assures predictability and stability of the system but, on the other hand, the system is unable to adjust when a new need arises. The office remains passive and becomes inefficient, in the customers’ opinion.

The fundamental differences between the old and new approach to management in the public sector are based on the distinction of administration and management; administering denotes carrying out instructions, whereas management denotes achieving results (M. Hughes).

New public management means assuring public administration while primarily keeping in mind the results of the measures taken and drawing on the private sector’s vast experience in the area of management.

Nowadays, we can easily identify the characteristic features of new public management at the Marshal’s Office of the Malopolska Voivodship. Three features of new public management are found there, namely the strategy, internal component management and external component management. The strategy denotes definition of the organisation’s goals and priorities based on the projections of its external environment, the organisation’s potential and development of operational plans to enable attainment of the goals set. All those elements have been present for years within the regional policy pursued by the Voivodship’s Management with the assistance of the Marshal’s Office. Management of internal components denotes organising, recruiting employees and implementing a human resources management system with a view to identifying qualified personnel for the organisation, overseeing operations, and applying various IT systems. In that area, the Marshal’s Office also possesses extensive experience acquired in the course of adoption of systemic approaches to personnel recruitment and training and electronic communication within the Marshal’s Office, including electronic document flow system. We continuously strive to improve those solutions. The last area is called management of external components and involves managing relations with external entities that are part of a greater whole, managing relations with third-party entities whose positive attitude is critical from the point of view of attainment of the goals of a given organisation and managing relations with the press and public opinion. Here, we can boast regular cooperation with non-governmental organisations (NGOs) and a pilot programme to measure customer satisfaction associated with the Integrated Management System certificate held by the Marshal’s Office.

Under NPM, the goals set before the organisation and before its personnel are clearly outlined and the scope of their attainment can be evaluated by means of ratios. The principle of 3Es’ (economy, efficiency and effectiveness) applies to evaluation of public programmes.

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<tr>
<th>DOCTRINE</th>
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<th>JUSTIFICATION</th>
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<tbody>
<tr>
<td>Hands-on professional management of public organisation.</td>
<td>Visible managers at the top of the organisation, free to manage by use of discretionary power.</td>
<td>Accountability requires clear assignment of responsibility, not diffusion of power.</td>
</tr>
<tr>
<td>Explicit standards and measures of performance.</td>
<td>Goals and targets defined and measurable as indicators of success</td>
<td>Accountability means clearly stated aims; efficiency requires a “hard look” at objectives.</td>
</tr>
<tr>
<td>Greater emphasis on output controls.</td>
<td>Resource allocation and rewards are linked to performance.</td>
<td>Need to stress results rather than procedures.</td>
</tr>
<tr>
<td>Shift to disaggregation of units in the public sector.</td>
<td>Disaggregate public sector into corporatised units of activity, organised by products, with devolved budgets. Units dealing at arm’s length with each other.</td>
<td>Make units manageable; split provision and production, use contracts or franchises inside as well as outside the public sector.</td>
</tr>
<tr>
<td>Shift to greater competition in the public sector.</td>
<td>Move to term contracts and public tendering procedures; introduction of market disciplines in public sector.</td>
<td>Rivalry via competition as the key to lower costs and better standards.</td>
</tr>
<tr>
<td>Stress on private-sector styles of management practice.</td>
<td>Move away from traditional public service ethic to more flexible pay, hiring, rules, etc.</td>
<td>Need to apply ‘proven’ private sector management tools in the public sector.</td>
</tr>
<tr>
<td>Stress on greater discipline and economy in public sector resource use.</td>
<td>Cutting direct costs, raising labour discipline, limiting compliance</td>
<td>Need to check resource demands of the public sector, and do more with less.</td>
</tr>
</tbody>
</table>

How do the others go about it?

The British are inspired by the private sector. In 2004, the administration of Tony Blair published the so-called Gershon Report, *Releasing resources to the front line. Independent Review of Public Sector Efficiency*, a comprehensive document discussing the options for rationalisation of use of public sector resources in the United Kingdom. The report points to the need for releasing the resources that have previously been invested in administrative functions that did not directly create added value for the end user (citizen) and for shifting those resources to execution of public tasks directly contributing to added value.

The review identified the administrative “bottlenecks” and measures enabling cost savings of the range of GBP 20.0bn in the years 2007-2008. Consolidation of the Scottish government support services, comprising accounting, payroll, procurement administration, human resources and information functions, alone generated annual cost savings of GBP 800.0m! A similar change involving the accounting services implemented by the British National Health Service (the equivalent of the Polish National Health Fund or NFZ), offered cost efficiencies of nearly GBP 224.0m annually. Among others, local governments in Finland are relying on a similar approach.

The challenges of the contemporary world

Never before in the history has the economic, demographic and social context offer the European public institutions such ultimatum: either they resolve the long-standing problems or face a shock comparable to the Great Crisis of the 1920s and 1930s. Thus, there is nothing else left for public administration to do than identifying innovative methods of resolving old and irresolvable problems. Poland is already a country that can easily draw on the models and patterns worked out over the years by highly developed countries. The cost of their sourcing is negligible but this requires facing the old paradigms and habits and overcoming resistance of the bureaucratic world.

It would still be worthwhile to establish an expert institution, a think tank, at the national level that would be responsible for monitoring public administration and for developing related standards, as well as for submitting regular reports to the prime minister designating the administrative units and institutions where changes are to be made. Efficient, effective and economic management of public administration is viable only under a systemic approach, as proven by the reforms made in the UK. We cannot afford being amateurish in managing our region and the country.

AGATA BŁAHUCIAK

Author, currently the Secretary of the Malopolska Voivodship, lawyer and manager with local government administration and corporate management background
CITIES OF THE POLISH PRESIDENCY

Sopot
The Crooked House

Warszawa
The Royal Castle

Wrocław
Town Hall in the Main Market

Poznań
Town Hall in the Main Market

Kraków
Municipal Office
THE WAWEL ROYAL CASTLE