EU MEMBER STATE ADMINISTRATIVE PROCEDURE AND IMPACT OF INTERNATIONAL AND EU RULES: THE CASE OF POLAND

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Introduction
Traditionally, administrative procedure in the EU Member states is far from any level of unification. To some extent it is a consequence of the different approaches between the distinctions of public and private law and a lack of such a distinction in the states belonging to the common law legal tradition. A certain degree of convergence occurs mostly in the Member states’ laws concerning sectors heavily regulated by the Union. Further convergence may become a result of the action taken by European Parliament and private actions following concept of American restatements. This is a draft of ReNEUAL Model Rules on EU Administrative Procedure.

Poland codified administrative procedure long before entering, or even the creation of the European Union. From that perspective it may serve as an example of a country with a developed administrative procedure which in some instances should be adjusted to meet the procedural requirements set up by the European Union. However, the principle of procedural autonomy makes those instances relatively rare. Nevertheless idea of unification of administrative in EU has many in Poland supporters in Poland.

In the states following the German legal tradition, administrative procedure applies to so called administrative decisions affecting individually addressed parties, even if they contain

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1 Carol Harlow and Richard Rawlings: National Administrative Procedure in European Perspective: Pathways to Slow Convergence, Italian Journal of Public Law, Vol. 2 No 2/2010; Jean- Bernard Auby The Impact of EU law on domestic Administrative Litigation; a paper for the seminar organized by ACA Europe in 2013; Paul Craig: Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity, paper for the seminar organized by ACA Europe in 2013; also Christian Timmermans calls such convergence "imposed uniformity" (Natural convergence or imposed uniformity - paper of ACA Europe conference in 2013) the same name uses Rob J.G.M. Widdershoven in his paper for the same seminar.

2 EP Resolution of 15 January 2013 with recommendations to the Commission on Law of Administrative Procedure of EU (2012/2024(INI))

3 Research Network on EU Administrative Law. Part of Model Rules have been designated for EU administrative procedure only, part also for member states legislation.

some provisions concerning some agreements or larger groups of addressees. In France, the notion of an administrative act encompasses agreements and contracts entered by public administration as well as regulatory acts (decrees, ministerial regulations etc).\textsuperscript{5} The American APA of 1946 is often treated like a model law and covers adjudication – making decisions in individual cases, rule making – rules of general application, as well as access to the records and documents kept by public administration. The lack of common understanding of administrative procedure is an obstacle to unification attempts, in spite of the evident need for such unification,

Only some EU Member states have codified administrative procedures. There are substantial differences in the contents of such codes. In countries of un-codified administrative procedures laws relating to different areas of administrative law contain rules concerning some procedural aspects of the exercise of powers by administrative authorities.

**Polish Code of Administrative Procedure\textsuperscript{6}**

Poland has had a codified administrative procedure since 1928. To some extent this was done following the Austrian pattern – Austria codified its administrative procedure in 1925. A few countries influenced by Austrian legal heritage also adopted laws on administrative procedure, following the Austrian pattern. Czechoslovakia in 1928 and two years later Yugoslavia codified administrative procedure with Hungary following in 1957\textsuperscript{7}. Poland replaced its 1928 Regulation on Administrative Procedure with a Code of Administrative Procedure adopted in 1960 and it has been substantially amended several times over the years. Nevertheless when reading it you can still feel the influence of the old Austrian statute.

The Polish Code governs adjudication only – meaning it relates to issuing individual acts and measures (decision individuelle, Verwaltungsakt etc). It is applicable to every proceeding before administrative authorities, except tax matters which are governed by another act of Parliament, the Tax Order Act [Ordynacja Podatkowa].

The Code covers the entire procedure including appeals within public administration. It governs also complaints and petitions.

The Code does not govern the judicial remedies, which are governed by a separate statute on proceedings before administrative courts.

Also the Code does not govern rule making. The power of administrative authorities to issue rules is very restricted in Poland. Only the Council of Ministers, the Prime Minister and ministers can be authorized by statute to issue rules. The statute must give specific, detailed authorization specifying subject of the rules. In practice some administrative authorities give and publish interpretation letters or give recommendations, which formally are considered to

\begin{itemize}
  \item see ReNEUAL Model Rules... Book I page 13
  \item English translation of the Polish code called the Code of Administrative Proceedings Kodeks postępowania administracyjnego has been published by CH Beck in 2010. Since that time there were several minor amendments to this act
  \item all these acts have been later replaced by newer legislation.
\end{itemize}
be soft law, but in reality they often are treated as almost binding rules. Matters such as the re-use of public sector information are regulated by a separate statute. The Code grants full access to the dossiers of the case to the parties of the proceedings. It does not cover general access to public records and documents being in the possession of public authorities. There is a separate statute governing this.

To summarize the matters regulated by the Code are not much different than in case of the German Verwaltungsverfahrensgesetz, or Austrian Allgemeines Verwaltungsverfahrensgesetz. However the similarities between individual rules of the Code and between the two mentioned statutes are smaller.

**EU Administrative Procedure**

Within the EU, laws and rules concerning administrative procedure are dispersed throughout the entire legislation and an enormous number of judicial decisions. There are few documents of general application like TFEU, Charter of Fundamental Rights of the EU, European Code of Good Administrative Behaviour. The importance of the steps taken towards codification of the EU administrative procedure cannot be disregarded, in particular the EP Resolution of 15 January 2013 with recommendations to the Commission on the Law of Administrative Procedure of the EU. Currently EU administrative procedure can be characterized by significant fragmentation into sector specific and issue specific rules and procedures. Each act (Regulation, Directive) regulating activity in some sector contains some procedural rules, often different than in acts concerning other sectors. In the case of directives, their implementation assumes the adoption by Member states of procedural rules contained in the directive, unless they are already present in local legislation.

**Administrative Procedure in International Law**

Concerning international law, both customary law and treaty law, have very little to do with administrative procedure, being internal procedure for administrative authorities in each country. The examples of treaties containing some rules concerning administrative procedure are: The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25th June 1998 (art. 6, 7, 8), European Convention on Human Rights, especially art. 6, number resolutions of Committee of Ministers of Council of Europe like Resolution (77) 31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities.

**Similarities and Differences in Administrative Procedure Worldwide**

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8 Access to Public Information Act [ustawa o dostępie do informacji publicznej, t.j. Dz. U. z 2014 r. poz. 782, 1662]
9 ReNEUAL page 8
In spite of all the differences between legal systems concerning the understanding of administrative procedure, we may find a number of similarities. It seems to be more common to expand the notion of administrative procedure to include not only adjudication, as it was in the Germanic tradition, but also rule making and access to public records as it is in American APA. Also some include agreements and contracts entered by public administration. Such a broad understanding of administrative procedure was taken by the ReNEUAL Group.

The European Parliament's idea on the codification of administrative procedure in the EU is focused on adjudication – deciding individual cases. Therefore I will concentrate on this.

Many European lawyers do not consider rule making as belonging to administrative procedure. ReNEUAL has faced some criticism for including rule making and contracts into administrative procedure. Regardless the regulation of procedure for rule making is very simple and generally follows the familiar pattern of notice and comment by the general public.

Looking to adjudication we find that in spite of all the differences there are a number of rights recognized as a “must” for administrative procedure. They include:

- the right to be heard,
- the right to have the matter handled impartially, fairly and within a reasonable time,
- the right to be given reasons,
- the right to access to the file,
- the right to be notified about decision,
- the right to be informed about remedies.

However we should remember the recognition of the same principles does not mean that they are understood in the same way and provide the same protection. As raised by Paul Craig "there is nonetheless still significant divergence between systems concerning more detailed meaning of some such precepts". The Charter imposes a minimum standard - however a member state's legislation can go further. Also, the principle of "procedural autonomy" which gives a lot of room for local legislators to to shape local law, providing that principles of equivalence and effectiveness are respected. Generally, a local legislator faces conflict between offering maximum protection to the individuals/entities whose interests are at stake and need for fast and effective public administration.

Let us look how the principles listed above have been regulated in the Polish Code of Administrative Procedure

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Jacques Ziller wrote "... I would like to underline that there is nothing common between EU law and so called "global law". Thinking that there is something in common between EU administrative law and "global administrative law" can only be wishfull thinking" The Convergence of National Administrative Procedure: Comment on the European Perspective. Italian Journal of Public Law Vol. 2 No 2/2010


ibidem page 3

Timmermans page 4.
The Right to Be Heard
The right to be heard is very widely recognized – see Art. 41 of the Charter of Fundamental Rights of the EU. Also it is often understood as a consequence of the requirement of “due process of law” or “right to fair trial” as put forward in some human rights conventions or constitutions - however referring mostly to deprivation of liberty or property. Traditionally it was understood as involving some form of oral participation in the proceedings by a party directly affected by it. Currently it is rather understood as a right to put forward facts, arguments, call for evidence to be taken into account by the administrative authority – either orally or in writing. This right assumes other rights – notification about commenced or pending proceedings, access to files, etc. This right may be given to the prospective addressee of the administrative decision, or more broadly to every person or entity affected, or at least adversely affected. Sometimes it may be given even to third parties.

The Polish Code requires notification about commencement of the proceedings, access to files, etc. The notion of a "party" is broadly defined, encompassing not only the addressees of the decision but any entity or individual whose legal situation may be affected by the decision. Therefore in standard construction law cases there are often more than 10 parties taking part in the proceedings. Concerning the situation of the party, we should mention the right of access to the file, duty of the administrative authority to take evidence requested by a party, party's right to comment, to present arguments, being present during searches, examination of evidence including hearing of witnesses or witness experts, and the right to question to witnesses. The decision may be issued only after a party has been informed about the end of taking evidence and given time to comment on evidence collected. Such broadly set rights to the parties result in the long duration of the proceedings.

In a few rare types of cases (i.e., telecommunication decisions) the administrative authority shall publish a draft of the decision, and a party may comment on it. This is a consequence of the implementation of the Framework Directive.

The Right to Have the Matter Handled Impartially, Fairly and within a Reasonable Time.
The impartiality of the administrative officers handling the matter is a generally recognized standard. It is also recognized as an element of "due process of law". The Charter of Fundamental Rights puts impartiality as an element of the right to good administration, EP Resolution of 15 January 2013 with recommendations to the Commission on Law of Administrative Procedure of EU recommend the principle of impartiality among general

14 sec. 1 of the Appendix to Resolution (77)31 of the Council of Europe Committee of Ministers on the Protection of the Individual in Relation to the Acts of Administrative Authorities
15 see Art. 16 of the Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings – OJEU L 133/1 – provides that third parties may apply in writing to be heard
16 Prawo Telekomunikacyjne Art. 15; Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services as amended by Directiv 2009/140/EC
principles which should govern the Union's administration. Polish Code disqualifies officers from handling matters in a list of instances indicating a conflict of interest. It provides also for the disqualification of the entire administrative authority - then another authority shall be appointed to handle the matter. Disqualification of an authority takes place in cases of some conflicts of interest concerning the chief officer or a chief officer in superior authority. In the situation a case has been decided by the officer or authority which should be disqualified, then the entire matter shall be processed again by impartial officers.

The independence of the administrative authority is in reality not always secured - which contrasts public administration from courts. There is no such requirement in the Code. In practice within public administration it is common that the officer handling the matter is a subordinate to a superior officer. Often the authority handling the matter may be more or less subordinated to a superior authority, such as the Prime Minister.

Concerning fair treatment of the party to the proceedings, the Polish Code requires, as a general principle, building trust in public administration and providing necessary information and safeguard the parties to avoid any losses by the party due to its limited competence.

The time between application and delivery of the decision may be crucial in administrative matters. Therefore in sector specific laws and regulations often we may find time limits for the processing of a matter. The Polish Code sets up a general standard. Matters shall be processed without delay, with a standard time limit of one month, and for complex matters two months. Matters in the appellate stage shall be processed within one month. In comparison to time limits in other countries or before EU bodies and institutions, Polish limits are shorter. In some cases, sector specific Polish legislation provides different time limits.

The problem occurs in cases of proceedings lasting longer than the time limit. National legislation and EU sector specific legislation provide a variety of consequences for the violation of time limits, including for example a disciplinary penalty for the responsible officer, payment of damages or even so called tacit authorization, also called implied decision.

Polish law provides the possibility for an extension of the time limit. A violation can be grounds for disciplinary liability of the responsible officer. The matter may be brought to the administrative court, which may order the issuance of the decision. A separate statute on business activity provides tacit authorization in matters of applications of business entities. In reality many administrative proceedings last much longer than foreseen in the Code.

The Tight to Access to the File

The right to access to the file is listed in the Charter of Fundamental Right - Art. 41(1), EP Resolution of 15 January 2013 with recommendations to the Commission on Law of Administrative Procedure of EU in recommendation 4.5 stipulates the right to have access to

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17 Art. 26 et seq. and art. 145 of the Code
18 ReNEUAL book III page 109; see for instance Art. 11(4) of the Regulation of the EP and the Council (EC) 1829/2003 on genetically modified food and feed [2003 OJ L268/ as amended
one's file. It is hard to imagine exercising other rights, in particular the right to be heard without access to the file. Access to the file is linked to the issue of confidentiality of some information in the files, like business secrets. On the other hand, lack of access to information concerning businesses, made confidential by the responsible authority, sometimes makes participation a bit illusory. Polish law not only grants constant access to the file during the entire period of the proceedings (Art. 73 of the Code), but also requires notification to the party concerning the end of an investigation and collection of documents – then the party may comment on the matter after having access to the file containing all the collected evidence.(Art. 10 par. 1 of the Code).

**The Right to Be Notified about Decision**

The right to be notified about the decision is closely linked with two other rights, but sometimes treated separately - the right to be given reasons and right to be informed about remedies. This is often because the reasons and indications of the remedies available are in the same document.

The right to be notified about a decision is not directly listed in the Charter of Fundamental Rights, but the Charter speaks about giving reasons, which implies notification about a decision. The right to be notified is covered by Recommendation 4.9 of the EP Resolution of 15 January 2013 with recommendations to the Commission on Law of Administrative Procedure of EU. Generally the issue of notification is regulated in the national acts on administrative procedure. There are some discrepancies nevertheless. The decision shall be notified to the addressee, however it may also be required to notify the another interested parties or parties affected by the decision - there is no common standard. Sometimes national law provides for the notification through public announcement, in particular when the number of parties affected is large.

Polish Code provides upon issuing a decision, every party to the proceedings shall be notified. Taking under consideration that the notion of a "party" is very broad in Poland, a copy of the decision shall be delivered to each party.

At the moment of delivery, the time period for an appeal or claim for judicial review starts to run. The moment of notification is important also from the perspective of execution - performance of the duty or privilege stemming from the decision.

**The Right to Be Given Reasons**

The right to be given reasons is directly listed in the Charter's Art. 41; it is also expressly granted by art. 296 (2) TFEU which states very broadly that "Legal acts shall state reasons on which they are based...". It is also listed in EP resolution of 15 January 2013 as recommendation 4.8. This recommendation provides that reasons shall include relevant facts and their legal basis. Also it provides for right to individual statement of reasons even in cases where there is a large number of persons concerned by similar decisions.
Sometimes the duty to give reasons may be restricted to some kind of decisions. Art. 18(1) of the European Code of Good Administrative Behaviour states: "Every decision of the institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis for the decision".

The Polish Code provides that every decision shall contain reasons stating relevant facts and giving legal grounds of the decision. The only exception is decisions fully granting a right or privilege requested. However this exception does not apply to cases of the conflicting interests of different parties or decisions issued as a result of an appeal.

**The Right to Be Informed About Remedies**

The duty of administrative authority to inform about remedies is provided in Art. 19 of the European Code of Good Administrative Behaviour: "A decision of the institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, and the time-limits for exercising them". Also Recommendation 4.10 attached to, in detail states what information on remedies shall be provided, including starting judicial proceedings and lodging complaints with the European Ombudsman. The right to be informed about remedies is widely recognized by national legislation on administrative procedure. Polish Code also provides for such a duty - in the art. 107 concerning contents of the administrative decisions.

Talking about remedies available in Polish law we should mention the very broad system of reviewing decisions. As a standard such a decision may be appealed to a superior administrative authority, or to a specially established review board. Then a claim can be brought to the administrative court. Against the decision of the administrative court, cassation can be brought to the Supreme Administrative Court. Administrative courts do not decide the case on the merits, but may set administrative decisions aside or invalidate them.

**Examples of Direct Impact in Polish Procedural Law**

Looking for direct impact of EU and international standards on the contents of the Polish Code of Administrative Procedure we find it rather small. This would include the introduction of electronic communications – delivery of applications via e-mail. The same can be said about delivery of documents by registered postal operator due to implementation of the Directive 97/67/EC, instead of the monopoly of the Polish Post.

Article 145b of the Code of Administrative Procedure, which refers to the possibility to reopen the administrative proceeding in case of violation of equal treatment, has been introduced to the statute as a result of the implementation of the several directives of Council of the European Union.
In the provisions of Code of Administrative Procedure it is difficult to find articles having direct origin in the EU legislation. Also in the decisions of Polish administrative courts references to procedural issues in EU law or decisions of CJEU on procedural issues are very rare\textsuperscript{19}. This is probably because Polish Code sets up high procedural standards, which meet requirements set up by EU

However in sector specific laws we find wider impact of European and International law. This relates in particular to issues of refugees\textsuperscript{20}. In this area Polish statutes introduce several exceptions to general provisions of the Code of Administrative Procedure while implementing EU and International law. Also in the statutes concerning other sectors like concentration, telecommunication or pharmaceutics law we find procedural rules introduced under influence of EU. To lesser extent this is true in regulation of other sectors.

**Conclusion**

It is possible to make a list of basic procedural rights in administrative proceedings which are widely recognized. If - like in many states, including Poland - administrative procedure is codified, then we can find a list of such rights in the code of administrative procedure or the other acts of Parliament, serving to that end. There is no such list made in an international scale, however there are several international documents of great authority which list some of these rights or adequate duties of public administration. We may say, that there is a deep conviction that the listing in international documents or judgments of tribunals of some procedural rights has had a substantial impact on national legislation and establishment of international standards. Concerning the impact of the EU, part of the impact can be named as "imposed uniformity" - member states have to adopt certain rules as a part of their domestic legislation. Part of it may be voluntary adoption as a well-known migration of legal ideas, coping with the laws of other countries or EU. This may also relate to the judicial decisions, in the literature there are plenty of examples of the impact of CJEU decisions on purely domestics cases. Therefore convergence may have vertical dimension and horizontal dimension\textsuperscript{21}.

Also it cannot be forgotten that such impact may work in the other direction by coping member states legal ideas on the level of the Union. In case of member states legislation being older than membership of the Union, impact of the Union may be also found. This is true concerning Poland where legal reform adjusting to EU standards took place before membership.\textsuperscript{22}

This brings us to two observations. First - public administration and rules of administrative procedure are generally recognized as a purely domestic matter of every state. Only some

\textsuperscript{20} Jacek Chlebny, Postępowanie w sprawie o nadanie statusu uchodźcy, s. 4, C.H. Beck 2011
\textsuperscript{21} Paul Craig ibidem page 3.
\textsuperscript{22} Zbigniew Kmieciak Europejskie standarty prawa i postępowania administracyjnego a ustalenia orzecznictwa Naczelnego Sudu Administracyjnego (European Standards of Administrative law and Administrative Procedure and decisions of the Supreme Administrative Court) RPEiS 1998 vol. 1.
Procedural rights have been elevated to international law mainly through some human right documents. EU law has a much broader impact on domestic laws, but still leaves a lot of room for local lawmakers.

The second observation relates to the fact of a conflict between fast, effective administration and the guarantee of procedural rights to the parties. In particular, standards taken from judicial proceedings make administration more costly and slower. Nevertheless, recognition of a need for procedural guarantees of individuals/entities is considered in Poland to be superior to other features of modern public administration. Due to the long duration of administrative cases in Poland, it was necessary to introduce special legislation concerning some investment matters to enable the realization of important construction projects sooner, at the expense of procedural rights of the parties. Such legislation regulates the proceedings in cases of the construction of highways, airports, telecommunication infrastructure etc.

EU does not have a codified administrative procedure. However, there is a question—how far the protection of all parties having some interest in the matter should go on at the expense of the applicant and the speed of the proceedings? The Polish Code demonstrates that sometimes it may go too far.

The European Union has played an important role in the development of standards of administrative procedure, in spite of the fact that it does not have a codified administrative procedure, and procedural provisions or principles which can be found in primary law, case-law developed by the Court of Justice, secondary legislation, soft law or commitments by EU institutions. Codification of EU administrative procedure as proscribed by EP resolution of 15 January 2013 with recommendations to the Commission on Law of Administrative Procedure of EU, and such codification would be a great step towards the unification of administrative procedure in the EU.

Currently, the differences in the procedure have an impact on the exercise of rights or imposition of duties in different states—this relates in particular to matters which have been regulated by the EU. The need for a common procedure comes also by the growing number of cases decided at the level of EU, or in the procedures involving both state and EU authorities (composite procedure).

ReNEUAL Model Rules on EU Administrative Procedure is a good pattern to be used for such legislation. These Model Rules correspond well with EP Resolution of 15 January 2013 with recommendations to the Commission on Law of Administrative Procedure of EU, concerning single case decision making.