Dr Mateusz Błachucki*

# Procedural safeguards at the evidence stage of administrative proceedings in the light of the legal standards of the European Convention on Human Rights

## 1. Introduction

Administrative proceedings provide a procedural framework for the adjudication of cases entrusted to public administrative authorities. Since the cases handled by them are diverse and they are adjudicated on a mass scale, the fundamental procedural administrative regulation, i.e. the Code of Administrative Procedure,[1] is very general, and can be supplemented and in some situations modified by specific acts. Despite being general, CAP lays down a whole set of procedural safeguards for the parties and other participants of the proceedings which should prevent the potential abuse of rights on the part of administrative authorities. Of particular importance are the procedural safeguards at the evidence stage, since they ensure that the proceedings are conducted properly and make it possible to appropriately determine the facts of the case.

The subject of this article is the analysis of procedural safeguards existing at the evidence stage of the Polish administrative procedure in the context of the requirements arising from the latest interpretation of Article 6 ECHR.[2] The judicial decisions of the European Court of Human Rights (ECtHR) which are based on this provision set a standard to be

* Ph.D., Institute of Legal Studies of the Polish Academy of Sciences.

[1] The Act of 14 June 1960 – Code of Administrative Procedure, OJ 2000 No. 98, item 1071, as amended, hereinafter referred to as the "CAP".

[2] The Convention for the Protection of Human Rights and Fundamental Freedoms, OJ 1993 No. 61, item 284, as amended, hereinafter referred to as the "European Convention on Human Rights" or the "ECHR".

met by the procedures that involve the application of criminal sanctions or cases concerning civil obligations or rights. This standard is of key importance to international administrative co-operation, since one of basic forms of such co-operation is the exchange of evidence gathered in administrative proceedings. However, such exchange depends on how and in what proceedings the evidence was gathered and will be used. On the one hand, the administrative authority that gathered evidence did it adhering to the safeguards existing in its legal system and when submitting the evidence it has to be certain that the evidence will be used in the case and in the proceedings involving the application of at least the same procedural safeguards. On the other hand, in order for the authority that obtained the evidence through international co-operation to be able to use it in its domestic proceedings, it has to demonstrate that the evidence was obtained adhering to at least the same procedural safeguards as those existing in its domestic legal order. Such situation occurs when evidence is exchanged in cases concerning infringements affecting the financial interests of the EU.

The article is divided into several parts. Firstly, it presents the concept of administrative procedure in Polish law. Next, the concept of an administrative case and its various forms are discussed. Thirdly, it presents conclusions from the judicial decisions of the ECtHR that make it possible to classify certain administrative cases as criminal cases within the meaning of Article 6 ECHR. Based on this, an analysis is made of the procedural safeguards that are common to CAP and ECHR, as well as of Convention guarantees that do not have their equivalents in Polish administrative procedure. The article ends with conclusions concerning the consequences of differences in procedural standards and with *de lege ferenda* proposals.

## 2. The concept of administrative procedure

The proceedings defined in CAP are the proceedings whose objective scope arises from the provisions of "universal" administrative law which provides that in clearly defined categories of cases handled under that law state administrative authorities can issue administrative decisions, i.e. singular norms that regulate individual rights or obligations of those to whom they are addressed in that sphere. The legal basis of administrative procedure may only be found in applicable law. Hence, the internal regulations of public administration may never constitute the legal basis for admin-





istrative proceedings.[3] Formal administrative law has also been presented simply as the proceedings of administrative authorities aimed at issuing an administrative act.[4] Thus, administrative proceedings regulate the behaviour of administrative authorities by showing the way for them to follow when they aim at issuing an administrative act and, at the same time, define how the persons concerned may influence the shape of the act.[5] The purpose of formal administrative law is twofold: 1) to provide an administrative act with fundamental properties that are necessary for its validity, i.e. legality and expediency; 2) to protect the rights of persons whom the act concerns.[6] Another important thing is that administrative proceedings are, in principle, oral, free from any formalism and generally open.[7]

The system of regulations on administrative proceedings can be presented in different ways: in more broadly defined terms, as all the provisions that regulate administrative activities undertaken in any area and in any form or, more precisely, as a set of provisions that lay down norms only for the mode of operations of an administrative authority in the area of administrative law. The broad definition includes provisions that regulate (a) the procedure for issuing norm-creating acts by administrative authorities, (b) the mode of procedure followed by the authorities in "internal" relations between them, and (c) the mode of operation of administrative authorities in connection with issuing a specific administrative act addressed to entities that are not officially subordinate to the authority issuing such act. Only the norms covered by item (c) should be regarded as the norms of administrative proceedings presented in the narrowest, appropriate way. However, apart from the course of proceedings, they also regulate the conditions for the existence of the administrative acts mentioned above and the issues of their interchangeability.[8] All the procedural provisions of administrative law under which state administrative authorities operate can be defined as administrative proceedings in the broad

[3] M. Zimmermann, *Z rozważań nad postępowaniem jurysdykcyjnym i pojęciem strony w kodeksie postępowania administracyjnego* [in:] *Księga pamiątkowa ku czci Kamila Stefki*, Warszawa–Wrocław 1967, p. 445.

[4] M. Zimmermann [in:] M. Jaroszyński (ed.), *Prawo administracyjne*, Warszawa 1952, p. 110.

[5] S. Kasznica, *Polskie prawo administracyjne. Pojęcia i instytucje zasadnicze*, Poznań 1946, p. 106.

[6] *Ibid*, p. 107.

[7] *Ibid*, p. 108. However, it seems that currently in the majority of the sections of administrative law this approach has become out-of-date.

[8] J. Starościak [in:] E. Iserzon, J. Starościak, W. Dawidowicz, *Podstawowe zagadnienia postępowania administracyjnego*, Warszawa 1955, p. 30.

meaning of that term.[9] However, such a concept would be too broad and it would cover too many various procedures. Therefore, it can be assumed that the concept includes the procedure connected with the issue of an administrative decision that lays down norms for the rights and obligations of individual entities.[10]

It is pointed out that administrative proceedings are a set of norms defining the rules to be followed by administrative authorities and parties in handling administrative cases. In other words, they are a set of norms defining the legal relation between the authority and the party or parties and, in certain cases, also between the parties. The set lists the subsequent formal acts or norms relevant for the individual stages of the case.[11] This view is developed also in our times, when it is stressed that administrative proceedings represent the sequence of the actions of legal procedure which are regulated by the rules of procedure and performed by administrative authorities and other entities participating in the proceedings in order to determine the administrative case in the form of an administrative decision, and the sequence of the acts of legal procedure performed in order to verify an administrative decision.[12] Having gathered the above definitions, it can be assumed that administrative proceedings are the proceedings involving administrative cases as their main and independent subject, and whose functions, settlement authority, structure and key principles are shaped in a manner that takes the specific characteristics of administrative cases into account.[13]

## 3. The nature of administrative cases examined in the course of administrative proceedings

Unlike with the concept of civil case, there is no definition (even a formal one, based on the code) of an administrative case, as a result of which that concept is interpreted with reference to a whole set of legal provisions,

[9] W. Dawidowicz, *Ogólne postępowanie administracyjne. Zarys systemu*, Warszawa 1962, p. 9.

[10] *Ibid*, p. 10.

[11] J. Pokrzywnicki, *Postępowanie administracyjne. Komentarz – Podręcznik*, Warszawa 1948, p. 14.

[12] J. Borkowski [in:] B. Adamiak, J. Borkowski, *Polskie postępowanie administracyjne i sądowo-administracyjne*, Warszawa 1999, p. 64.

[13] W. Dawidowicz, *Zarys procesu …, op. cit.*, p. 9.





in close connection with substantive administrative law.[14] When looking for a definition of an administrative case, the doctrine generally uses four criteria: the legal relation, the type of legal norm, the regulation method and the type of effect of the legal relation.[15] When one analyses them to a greater extent, it can be said that the criteria overlap, since the legal relation is determined by the legal norm from which it arises, whereas the legal effect results from the occurrence of the legal relation.[16] When describing an administrative case, one can point out that it is a certain specific life situation in which the individual interest and the public interest are to be expressed, under administrative law, in the form of an authoritative decision upon conducting the proceedings prescribed by law.[17] In the light of another presentation, an administrative case represents a possibility for specifying the mutual rights and obligations of the parties being in a relation governed by administrative law, such as an administrative authority and an individual that is not subordinate to such authority in organisational terms, as provided for in the provisions of substantive administrative law.[18] The legal relation criterion is also decisive for another definition in which it is stressed that an administrative case is the exponent of a relation governed by substantive law. It arises when substantive law requires its own specification through a decision and where there is a need for such specification by virtue of the actual state of affairs. Thus, it is a certain unique coincidence of law and circumstance involving two entities: the authority and the party.[19] In abstract terms, an administrative case can be defined as a question of the existence of the actual state of affairs described in the hypothesis of the legal norm which, in order to release its binding force, needs to be specified in authoritative terms in the form of an act issued by the competent administrative authority.[20] In my

[14] K. Tybur, *Sprawa administracyjna a sprawa cywilna*, AUWr No 2770, Prawo CCXCV, Wrocław 2005, p. 428.

[15] A. Wilczyńska, *Sprawa z zakresu administracji publicznej na tle pojęć sprawy administracyjnej i sprawy cywilnej – zagadnienia teoretycznoprawne*, Zeszyty Naukowe NSA 2008, No. 5 pp. 75–76.

[16] *Ibid*, p. 77.

[17] K. Jandy-Jendrośka, J. Jendrośka, *System jurysdykcyjnego postępowania administracyjnego* [in:] T. Rabska, J. Łętowski (eds.), *System prawa administracyjnego*, vol. III, Wrocław–Warszawa–Kraków–Gdańsk 1978, pp. 195–196.

[18] T. Woś, *Pojęcie „sprawy" w przepisach kodeksu postępowania administracyjnego*, AUWr, No. 1022, Prawo CLXVIII, Wrocław 1990, p. 334.

[19] J. Zimmermann, *Administracyjny tok instancji*, Kraków 1986, p. 13.

[20] T. Kiełkowski, *Sprawa administracyjna*, Kraków 2004, p. 35.

opinion, the most operative definition is one that defines an administrative case as a set of factual and legal circumstances in which an administrative authority applies a norm of administrative law in order to settle the legal situation of a specific entity by granting (refusing to grant) the claimed right or imposing a certain obligation *ex officio*.[21]

## 4. Administrative cases as civil or criminal cases within the meaning of Article 6 ECHR

For some time, it has been visible that the judicial decisions of the ECtHR have been shifting towards allowing the classification of administrative cases as civil or criminal cases within the meaning of Article 6 ECtHR. Pursuant to that provision, "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Despite the wording of that provision which implies that it refers to judicial proceedings, it is stressed in the literature of the subject that it also extends to proceedings that do not involve direct decisions concerning civil rights and obligations but are decisive for them.[22] For this reason, some administrative cases, too, may be regarded as criminal or civil cases within the meaning of Article 6 ECHR. However, it should be clearly stressed that this applies only to selected administrative cases of public law nature.[23]

From the point of view of the main subject of the book, it is worth focusing primarily on those administrative cases that can be regarded as criminal cases. This will apply primarily to those administrative cases that will involve the imposition of sanctions. The nature of the sanction will determine whether a case is administrative or criminal. The ECtHR has specified three criteria that are decisive for classifying a given case as criminal: 1. statutory classification of the case in national law, 2. criminal nature of the act, and 3. the type and severity of the sanction provided for by law.[24] The

[21] W. Dawidowicz, *Zarys procesu administracyjnego*, Warszawa 1989, pp. 7–8.

[22] M. A. Nowicki, *Wokół Konwencji Europejskiej. Krótki komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2006, p. 151.

[23] E. Frankiewicz, *Gwarancje procesowe strony w postępowaniu przed konsulem*, Częstochowa 2003, p. 33.

[24] Judgment of the ECtHR of 8 June 1976, Engel et al. v the Netherlands, Application No. 5100/71.





criteria shaped in this way mean that the formal classification of the case does not determine its nature. Cases falling under Polish administrative law can, therefore, be treated as criminal cases if one of the other two criteria is met.[25] Under Polish administrative law, the latter criterion, i.e. the type and intensity of the sanction, will be of particular importance. Among administrative sanctions provided for by Polish law, it is primarily the financial sanctions that can be criminal in their nature. For example, the amount of financial penalties provided for under the Antitrust Act may convince one to regard them as criminal sanctions.[26]

As a consequence of recognising that certain administrative cases can constitute criminal cases within the meaning of Article 6 ECHR and the fact that cases concerning infringements affecting the financial interests of the EU are classified as criminal cases in many European legal systems, it seems necessary that the procedural guarantees provided for in Article 6 should be observed. Only such an approach will ensure the appropriate level of legal protection for the parties to the proceedings on the one hand, and make the international exchange of gathered evidence effective on the other.

## 5. Procedural safeguards arising from CAP which coincide with the Convention standard

The analysis of the provisions of CAP and their comparison with the requirements of Article 6 ECHR make it possible to distinguish eight identical procedural safeguards at the evidence stage which are applicable under the provisions mentioned above. They are as follows:

1. The party's right to be actively involved in administrative proceedings.
2. The right of access to the case file.
3. The right to information.
4. The right of evidentiary initiative.
5. The right to appoint an attorney.

[25] A. Błachnio-Parzych, *Sankcja administracyjna a sankcja karna w orzecznictwie Trybunału Konstytucyjnego oraz Europejskiego Trybunału Praw Człowieka* [in:] M. Stahl, R. Lewicka, M. Lewicki, *Sankcje administracyjne*, Warszawa 2011, p. 671.

[26] A. Błachnio-Parzych, *The nature of responsibility of an undertaking in antitrust proceedings and the concept of 'criminal charge' in the jurisprudence of the European Court of Human Rights*, Yearbook of Antitrust and Regulatory Studies Vol. 2012, 5 (6), p. 54.

6. The right to privacy.
7. The right to protect business secrets and other information protected by law.
8. Freedom from self-incrimination.

## 5.1. The party's right to be actively involved in administrative proceedings

The party's right to be actively involved in proceedings is the fundamental right of the party that serves the purpose of protecting its rights in the course of administrative proceedings. The right to be actively involved in proceedings, which is referred to as the right to defence under criminal proceedings, exists in all the procedures including the administrative one and in the majority of legal orders, including European law, as shown above. Under the Polish CAP, that principle is presented in very broad terms. Pursuant to Article 10 Section 1, public administration authorities are required to ensure that parties are actively involved in each stage of proceedings and they allow the parties to express an opinion on the evidence and materials collected and the claims filed, before any decision is issued. This right is of superior importance in relation to other procedural safeguards that may be presented as the elaboration of the law. Active involvement in proceedings is the party's right and not its obligation, and the administrative authority cannot force the party to exercise that right. In the doctrine it is stressed that this right arises from the implementation of the principle of a democratic state under the rule of law and consists in granting an individual the right to defend his or her legal interest in proceedings regulated by the provisions of law with a guaranteed right to defence through remedies at law.[27]

In the light of such an interpretation of that provision, in order for the party to become familiar with and take a position on the charges brought against it, it has to be provided with access to the evidence underlying the charges. The meaning of Article 10 Section 1 CAP can be clearly seen in the judgment of the Supreme Administrative Court, which stated as follows: "the general principle of the party's active involvement in proceedings is implemented by making a condition the fulfilment of which determines whether the public administration authority recognises that the factual circumstance has been proved. The condition is the creation of prerequisites by the public administration authority for the exercise of the party's right to express its opinion about the evidence heard. The hearing of evidence makes the factual circumstance reliable only if the party was able to express its opinion about the evidence."[28] What is important is that the right to express one's opinion about the evidence gathered extends to evidence gathered during a self-audit following the decision. Here one can draw an analogy to appellate proceedings under general administrative proceedings, where it is also possible to conduct supplementary proceedings to take evidence. As the Supreme Administrative Court points out, "if the appeal authority conducts supplementary proceedings concerning the case, pursuant to Article 10 Section 1 CAP in conjunction with Article 140 CAP, prior to issuing its decision it is obliged to enable the parties to express their opinions about the evidence and materials that are additionally collected".[29]

The party's right to become familiar with evidence includes the right to become familiar with the facts that are known to the authority *ex officio*. As the Supreme Administrative Court points out, "pursuant to Article 77 Section 4 CAP, universally accepted facts and facts known to the authority *ex officio* do not require proof. Facts known to the authority *ex officio* should be communicated to the party. Therefore, if the authority intends to invoke the facts that are known to it *ex officio* (e.g. tax returns), it should inform the party's attorney about it so that the latter can express his or her opinion about such facts under Article 10 Section 1 CAP."[30] This is confirmed by another judgment of the Supreme Administrative Court in which it is pointed out that it is admissible to recognise the facts arising from the authority's documentation as being known to that authority *ex officio* (Article 77 Section 4 CAP). However, "the authority should comply with the obligation referred to in Article 77 Section 4 CAP within a time limit that enables the party to present its position also regarding the facts that are known to the authority *ex officio*, prior to the authority's decision, as part

[27] B. Adamiak, *Prawo do procesu na drodze administracyjnej jako gwarancja realizacji zasady demokratycznego państwa prawnego* [in:] J. Posłuszny, Z. Czarnik, R. Sawuła (eds), *Instytucje procesu administracyjnego i sądowo administracyjnego. Księga jubileuszowa dedykowana prof. nadzw. dr. hab. Ludwikowi Żukowskiemu*, Przemyśl–Rzeszów 2009, p. 29.

[28] Judgment of the Supreme Administrative Court of 5 April 2001, II SA 1095/00, unpublished.

[29] Judgment of the Supreme Administrative Court of 25 April 1996, SA/Wr 2294/95, unpublished.

[30] Judgment of the Supreme Administrative Court of 27 May 1998, I SA/Kr 827/97, unpublished.

of the party's right to express its opinion about the evidence and materials collected and the claims filed (Article 10 Section 1 CAP)".[31]

Whether an administrative authority is obliged to notify the party of the completion of evidentiary proceedings or not is an open issue. There is a conflict between the views presented in the doctrine and in judicial decisions in this regard. On the one hand, the Supreme Administrative Court assumes that "the authority conducting the proceedings is obliged to inform the party of its right to view the case file and make the final declaration. If the case file lacks the party's final declaration and the proof that the authority conducting the proceedings informed the party on its right, this justifies the conclusion that the authority conducting the proceedings has breached its duty laid down in Article 10 Section 1 CAP."[32] Continuing this line of judicial decisions, the Supreme Administrative Court stated that "the party's right to express its opinion about the evidence collected is accompanied by a duty of the authority conducting the proceedings to inform the party of its right to view the file and make the final declaration, as well as the obligation to refrain from issuing a decision until such declaration is made within a fixed time limit".[33] However, in another decision, the same court acknowledged that Article 10 CAP did not put an obligation onto an administrative authority to summon the party to become familiar with the evidence collected. The party has the statutory right to inspect the case file and whether it will exercise that right or not depends only on its will.[34]

## 5.2. The right of access to the case file

The right of access to the case file is one of the party's fundamental rights and it guarantees the existence of the party's right to be actively involved in administrative proceedings. In judicial proceedings, where the majority of the acts of legal procedure are performed in the course of a trial, the importance of access to the case file may be relatively smaller. Unlike judicial procedures, administrative proceedings are based primarily on the inquisitorial principle, opened internally only and proceedings in chambers are the basic form of conducting evidentiary proceedings. In such circumstances, the party's ensured access to the administrative case file is of key importance to ensuring procedural fairness and justice. Preventing the party from gaining access to the case file represents a flagrant infringement of the law of procedure and as a qualified defect it may justify the plea of nullity of the proceedings as is the case with the civil or judicial administrative procedure.[35]

Articles 73 and 74 fully regulate the party's rights of access to the file. The right of access to the case file consists of the following specific rights of the party to administrative proceedings:

1. Viewing the file.
2. Making notes and copies.
3. Authentication of notes and copies.

## 5.3. The right to information

The Polish Code of Administrative Procedure also grants the right to information. Pursuant to Article 9 CAP, "public administration authorities are required to provide full and proper information to the parties regarding the factual and legal circumstances which may affect the establishment of their rights and the obligations that are the subject of the administrative proceedings. The authorities shall take care to ensure that parties and other persons involved in proceedings do not suffer any loss owing to ignorance of the law and shall therefore provide the necessary clarifications and advice". As it is pointed out in judicial decisions, the duty to inform the parties is incumbent on administrative authorities, in particular as regards cases in which the circumstances lend themselves to the conclusion that the party has encountered such factual and legal problems for the first time, being not prepared to understand them.[36] Moreover, as the Supreme Court has pointed out, "the duty of the authority conducting the proceedings to inform and provide clarifications to the parties with regard

[31] Judgment of the Supreme Administrative Court of 11 May 1993, V SA 2360/92, ONSA 1994, No. 2, item 82.

[32] Judgment of the Supreme Administrative Court of 5 April 2001, II SA 1095/00, unpublished.

[33] Judgment of the Supreme Administrative Court of 6 October 2000, V SA 316/00, unpublished.

[34] Judgment of the Supreme Administrative Court of 14 March 1996, SA/Po 932/95, unpublished.

[35] G. Rząsa, *Nieważność postępowania sądowoadministracyjnego jako podstawa skargi kasacyjnej*, Warszawa 2011, p. 310.

[36] Judgment of the Supreme Administrative Court of 7 December 1984, III SA 729/84, ONSA 1984, No. 2, item 117.

to all the factual and legal circumstances of the pending proceedings (...) should be understood in its broadest possible meaning".[37]

The right to information is presented in more detail in Article 11 CAP, which points out that public administration authorities should explain to the parties the grounds for the their decisions on the matter so as to enable the parties to execute the decision, as far as possible, without the need for coercive measures. The administrative authority will violate that principle if "it generally fails to take a stance on the statements that the party regards as crucial for the manner in which the case is decided. The party may become convinced that the authority disregards its statements and decides cases without taking all their circumstances into account, is biased and unfair."[38]

It should be stressed that one cannot infer the right to be familiar with the position of the authority prior to determining the case from the general right to be informed about the course of the proceedings referred to in section one.[39] It clearly appears from judicial decisions that the right to view the case file and the charges does not include the right to become familiar with the draft decision. As it is stressed by the Supreme Administrative Court, the applicable provisions of administrative proceedings do not create an obligation for the tax authority to provide the party with access to the draft decision.[40] Such regulatory environment can be justified by the fact that "Article 10 Section 1 CAP does not provide grounds for creating the institution of accessing draft decisions to be issued in future, since this would undermine the essence of another institution such as the remedies at law".[41]

## 5.4. The right of evidentiary initiative

As regards evidentiary proceedings, the party's fundamental right is the right of evidentiary initiative. Up until the decision is issued by the administrative authority, the party is entitled to put forward motions as to

[37] Judgment of the Supreme Court of 23 July 1992, III ARN 40/92, *Państwo i Prawo* 1993, No. 3.

[38] Judgment of the Supreme Administrative Court of 6 August 1984, II SA 742/84, ONSA 1984, No. 2, item 67.

[39] J. Pokrzywnicki, *Postępowanie administracyjne. Komentarz – Podręcznik*, Warszawa 1948, p. 84.

[40] Judgment of the Supreme Administrative Court of 3 September 1997, SA/Sz 1764/96, unpublished.

[41] Judgment of the Supreme Administrative Court of 8 May 1997, I SA/Gd 10/96, unpublished.





evidence. Such co-operation is in the party's best interest. As the Supreme Administrative Court points out, the party "is entitled to co-operate with the authority in order to clarify the objective truth. If the taxpayer does not exercise this right and despite the tax authority's summons does not show up to testify and submit the evidence or employs another person to do so, whose knowledge of the facts disputed by the parties is not sufficient, it cannot invoke a violation of Article 10 CAP in the subsequent proceedings."[42] It should be stressed that the public administration authority is not bound by the party's motions as to evidence and it should take them into account to the extent that they are aimed at explaining the facts of the case that cannot be determined on the basis of the evidence heard so far. However, as it is pointed out in judicial decisions, "a refusal to hear evidence and the reasons for it should be clearly reflected in the case file".[43]

## 5.5. The right to appoint an attorney

As it is pointed out in Article 32 CAP, the party may act through an attorney, unless the nature of the act requires that it should act in person. Any natural person having capacity to enter into legal transactions may act as the party's attorney. In administrative proceedings, the power of attorney can be granted in writing or it can be submitted to the minutes. The attorney can be appointed for all or only some of the acts in court proceedings.

Once the attorney is appointed, the administrative authority is obliged to contact him or her directly. Serving writs directly on the party to legal proceedings if the party has appointed an attorney is ineffective and has no legal effect. If the authority ignores the attorney, it is tantamount to an infringement of the party's right to be actively involved in the proceedings. As it is pointed out by the Supreme Court, "the party to the administrative proceedings which appoints an attorney protects itself against the consequences of its ignorance of the law, and if the administrative authority ignores the attorney in performing acts in the course of administrative proceedings, it overrides the diligence displayed by the party in striving

[42] Judgment of the Supreme Administrative Court of 27 September 1996, SA/Lu 1490/95, unpublished.

[43] Judgement of the Supreme Administrative Court of 10 December 1997, I SA/Gd 409/96, *Biuletyn Skarbowy* 1998, No. 2, p. 16.

to protect its rights and interests and receiving such legal protection as it should receive in a state under the rule of law".[44]

It should be noted that the party may appoint an attorney only on its own and cannot demand that the attorney be appointed *ex officio*. In administrative proceedings, there is no right to free legal assistance for people who are in a difficult financial situation. Such right only applies to judicial procedures.

## 5.6. The right to privacy

The right to privacy does not arise directly from any provision of the Code of Administrative Procedure, but it can be reconstructed on the basis of many existing regulations. This shortcoming may be frowned upon, but it seems that the right to privacy is nevertheless well protected under administrative proceedings. Firstly, it should be pointed out that administrative proceedings are based on the principle of internal openness. According to that principle, administrative proceedings are open only to the parties to the proceedings and, to some extent, to other stakeholders. The procedural safeguards discussed above, i.e. the right to be actively involved in the proceedings, the right of access to the file or the right to information, have their limitations in terms of the subject of rights and apply only to the parties to the proceedings. This means that, in principle, third parties have no access to detailed information about the course of the proceedings or to the case file. One exception here can be made under the Act on Access to Public Information.[45] However, that act does not infringe upon the safeguards arising from the Act on the Protection of Personal Data.[46] For this reason, the public administration authority is obliged to protect the personal data of natural persons who are parties to or participants of administrative proceedings.

However, the Code of Administrative Procedure does not regulate the issue of the international exchange of evidence and the application of police methods in gathering evidence, in particular the search of persons and

[44] Decision of the Supreme Court of 9 September 1993, III ARN 45/93, OSNC 1994, No. 5, item 112

[45] The Act on Access to Public Information of 6 September 2001, OJ of 2001 No. 112, item 1198, as amended.

[46] The Act on the Protection of Personal Data of 29 August 1997, OJ of 2007, No. 176, item 1238, as amended.





property. This means that both issues of the exchange of evidence and the search are fully regulated by the acts of international or European law or by Polish statutes concerning special matters. For example, it can be pointed out that the Act on Competition and Consumer Protection[47] contains provisions that enable the international exchange of evidence concerning pooling agreements and it also contains norms that enable the authorised employees of the Office of Competition and Consumer Protection to search premises and persons. However, the Act on Competition and Consumer Protection is rather unique under Polish administrative law, and the vast majority of the acts of Polish administrative law provide no legal grounds for the international exchange of evidence or for the search of premises and persons.

## 5.7. The right to protect business secrets and other information protected by law

Apart from the protection of the right to privacy, the provisions of CAP and other statutes of administrative law also make it possible to protect business secrets and other secrets protected by law, e.g. banking, statistic or treasury secrets. Procedurally, that protection is provided by limiting the right of access to the case file. The restricted access to the case file is an institution that may cause many problems both in theory and practice, since there is a conflict between two values that the law of procedure strives to protect. On the one hand, it is supposed to serve the purpose of protecting business secrets and other secrets protected by law. However, on the other, it also has to protect the right of other parties to the proceedings to defend their rights. When deciding to limit or fully exclude access to the case file, the public administrative authority has to balance those values very carefully in each case. It should also be emphasized that all the possible access restrictions to the case file apply to the party, the stakeholders and third parties, but the scope of limitation has to be determined individually each time.

[47] The Act on Competition and Consumer Protection of 16 February 2007, OJ No. 50, item 331, as amended.

### 5.8. Freedom from self-incrimination

The procedural safeguard in question is not fully based on CAP and its application varies slightly as regards its subject and object. Firstly, the safeguard can be used only by natural persons who appear in administrative proceedings as witnesses or parties to the proceedings. Secondly, it applies only to a situation where one gives evidence or makes a statement. Thirdly, as regards the parties to the proceedings, it extends to include every hearing. However, not every witness will be able to invoke the safeguard in question. Article 83 Section 1 CAP clearly points out that "no person may refuse to give evidence as a witness unless they are the party's spouse, ancestors, descendants, siblings or first-degree in-laws, or have a connection with the party by way of adoption, care or guardianship". Moreover, "a witness may refuse to answer a question if such answer could expose him or the persons referred to in Section 1 to criminal liability, disgrace or direct damage to property or result in a breach of the obligation to maintain professional confidentiality protected by law".

The principles concerning the refusal to give evidence or answer questions are applicable to the hearing of the parties (Article 86 CAP). In addition, a party is treated in a privileged way as regards the prospective hearing, even if it refuses to answer questions without good reason. Pursuant to Article 86 CAP, coercive measures provided for in specific regulations, which are applied to an obstructive witness, cannot be applied to a party that refuses to give evidence or answer questions without providing a reason. This means that in fact the procedural safeguard in question has an even greater scope than it appears from the requirements of Article 6 ECHR, since it extends to any situation involving the hearing of a party and concerns all evidence given, whether incriminating or neutral.

However, the procedural safeguard in question does not apply to any potential demands of a public administration authority concerning the surrender of any documents or other evidence held by specified persons. In such situation, the party or other entities are obliged to submit to the demand of the administrative authority even if the required documents or other evidence are incriminating.





## 6. Procedural safeguards arising from Article 6 ECHR which are non-existent under CAP

The analysis of the provisions of CAP shows that two of the legal guarantees arising from Article 6 ECHR are not met by the provisions of CAP. These are the following procedural safeguards:

1. Presumption of innocence.
2. Legal professional privilege.

### 6.1. Presumption of innocence

The principle of presuming innocence derives from criminal law and represents a directive that imposes an obligation to treat the accused as innocent until proven guilty, which should be ascertained by a valid judgment. The consequence of that principle in procedural terms is that the party must be proven guilty and any doubts that cannot be resolved should be interpreted in favour of the accused. Moreover, one cannot demand that the party prove to be innocent, since the obligation to prove it rests with the authorities that conduct the proceedings. The principle under the ECHR means that one should not apply factual presumptions or presumptions of law that would fully or excessively shift the burden of proving the facts to the party to the proceedings.

Such an understanding of the principle of presuming innocence is not expressed in any provision of CAP. The code specifies in general that the burden of proof in an administrative case rests with the administrative authority, but the party is co-responsible for the outcome of the trial. In judicial decisions it is stressed that the provisions of Article 7 and 77 Section 1 CAP stipulate that evidentiary proceedings are based on the principle of *ex officio* decisions, which means that the administrative authority is obliged to hear the evidence *ex officio* to determine the facts of the case.[48] For this reason, if the party questions the fact from which the authority derives legal consequences that are unfavourable to the former, the authority is obliged to take all the measures necessary to determine the actual state of affairs, in particular enable the party to express its opinion about the evidence gathered.[49] It should be remembered that "this

[48] Judgment of the Supreme Administrative Court of 17 April 1994, SA/Lu 1921/93, unpublished.

[49] Judgment of the Supreme Administrative Court of 5 June 1996, III SA 571/95, *Monitor Podatkowy* 1996, No. 11, p. 340.

does not mean that the party is relieved of its duty to co-operate in fulfilling this obligation, especially as failure to prove a certain factual circumstance may lead to the results that are unfavourable to the party. However, under the provisions of the Code of Administrative Procedure, it is unacceptable to adopt an understanding of the concept of conducting evidentiary proceedings where the administrative authority would remain fully passive and limit itself only to assessing whether the party has proven the facts underlying its claim or not, and in consequence shift the burden of clarifying the case to the party."[50]

However, on the other hand, as it is pointed out by the Supreme Administrative Court, "the imposition of an obligation on the authorities that conduct administrative proceedings to fully collect and examine all evidence does not relieve the party of its duty to co-operate in fulfilling that obligation. This applies in particular to a situation where failure to prove a specific actual transaction may lead to outcomes that are unfavourable to the party. In particular, it is not possible to draw a conclusion from the content of the provisions imposing the obligations mentioned above that administrative authorities are obliged to seek the means of evidence to support the party's statements, if the latter fails to produce them, despite being summoned to do so. In such case, one cannot assume that if the party adopts a passive attitude, the whole burden of proving the facts that are supposed to weigh against the findings of the administrative authorities rests with those authorities."[51] This is confirmed by another decision of the administrative court.[52]

The above considerations make it possible to conclude that in administrative proceedings the party is forced to be more active than in the case of criminal procedure. However, this does not mean that the Convention standard arising from the presumption of innocence is not followed in Polish administrative procedure. The decisions mentioned above point out rather in general to the fact that although the burden of proof rests with the administrative authority, a fully passive attitude of the party in proceedings may lead to negative consequences for the latter. For this reason, it is in the party's best interest to exercise its right of evidentiary initiative and the right to information.

[50] Judgment of the Supreme Administrative Court of 26 October 1984, II SA 1205/84, ONSA 1984, 2, item 98.

[51] Judgment of the Supreme Administrative Court of 20 May 1998, I SA/Ka 1605/96, unpublished.

[52] Judgment of the Supreme Administrative Court of 10 July 1996, SA/Ka 1171/95, unpublished.





### 6.2. Legal professional privilege

In the course of gathering evidence in administrative proceedings a problem may emerge regarding the protection of a specific type of legal professional privilege. It consists in prohibiting the disclosure of anything that the advocate has learnt as a result of performing his professional duties.[53] The use of that institution may emerge in administrative proceedings e.g. when an entrepreneur points out during a search that certain documents contain information that is covered by professional secrecy of an advocate or legal adviser (including an in-house legal adviser). In other words, it represents correspondence between the lawyer and the entrepreneur, and such claim is reasonably supported, also by other documents, as a result of which the administrative authority should leave such documents on the entrepreneur's premises without being able to include their copies in the case file.[54]

This safeguard does not apply in administrative procedure. In Polish law it applies only in judicial procedures. It means that, in principle, the administrative authority may use the evidence that emerged as a result of legal advice being given to the party to the proceedings by a professional participant of the proceedings. However, it seems that risks resulting from the lack of this procedural safeguard are not specially important. It appears from the observation of administrative practice that Polish public administration authorities use this type of evidence only occasionally. This is due to the fact that Polish public administration authorities very seldom have powers to employ investigative methods of gathering evidence. In addition, in the vast majority of cases, public administration authorities will not need this type of evidence in order to properly determine the facts of the case.

## 7. Final remarks

The analysis of procedural safeguards applicable at the evidence stage of administrative proceedings from the point of view of their conformity with the Convention standard shows that Polish regulations follow that standard nearly to the full extent. In principle, the party to the proceed-

[53] B. Turno, *Zagadnienie tajemnicy adwokackiej na gruncie prawa konkurencji* [in:] C. Banasiński, M. Kępiński, B. Popowska, T. Rabska (eds), *Aktualne problemy polskiego i europejskiego prawa ochrony konkurencji*, Warszawa 2006, p. 172.

[54] B. Turno, *Glosa do wyroku SPI z dnia 17 września 2007 r., T-125/03 i T-253/03*, Europejski Przegląd Sądowy 2008, No. 6, p. 47.

ings is provided with all the means of protecting its rights against any potential abuse on the part of the administrative authority. The discrepancies shown between the Convention standard and the provisions of CAP concern the principle of the presumption of innocence and the legal professional privilege. It seems, however, that the existing discrepancies are not of fundamental importance and will not represent a major barrier to the international exchange of evidence. Firstly, despite the lack of an explicitly stated principle of presumption of innocence, other procedural safeguards existing in CAP eliminate any potential risks resulting from this shortage. In addition, the lack of this safeguard will not affect the correctness of the evidence heard and its admissibility from the point of view of other domestic orders. Secondly, it should be pointed out that the issue of the lack of the guarantee of respect for the legal professional privilege will appear very seldom under administrative proceedings. This is because very few public administration authorities in Poland have powers to employ police methods of gathering evidence, and in particular searching persons and premises. And it is in the latter situations that this issue appears most often. Therefore, from the point of view of the correctness of the exchange of evidence between different foreign public administration authorities, this problem does not seem to be of primary importance. Moreover, being aware of the lack of this procedural safeguard, Polish public administration authorities should refrain from providing evidence gathered in the manner that is in breach of the Convention standard.

Despite certain differences found in procedural safeguards at the evidence stage which occur under CAP and Article 6 ECHR, they should not be a major obstacle to the exchange of evidence gathered in administrative proceedings by Polish public administration authorities for OLAF or other external administrative authorities. However, one should undoubtedly demand that CAP be adjusted to the requirements of the growing international co-operation. In addition, following the example of other countries, e.g. Germany, one should consider the development of an additional legal regulation to apply in administrative cases involving the imposition of sanctions that may be regarded as criminal sanctions within the meaning of Article 6 ECHR. This would provide the appropriate level of legal protection for the parties to the proceedings and would facilitate international co-operation in the provision of evidence gathered in such proceedings.



Adam Pęśko, Krzysztof Kot*

# Irregularities detrimental to the financial interests of the Republic of Poland and the European Union – the role of Police in fighting crime in that area

## 1. Introductory remarks

The availability of EU funds offers an opportunity for Poland and how that opportunity is used will depend on the resourcefulness of Polish entrepreneurs, local governments, and – to a certain extent – the professionalism and honesty of the beneficiaries.

There is no doubt that reliance on support funding is accompanied by certain threats that need to be exposed, identified, countered, and – as far as possible – contained. The point is for the maximum level of funding to be used deliberately for the intended purpose, with the approval of EU officials. Otherwise, Poland will be required to return these funds.

A particular threat, accompanied by the risk of financial problems, is posed by irregularities and fraud against the interests of the European Union. Exposure of misappropriation of funds, even as part of a single project within a programme, coupled with an insufficient number and/or effectiveness of checks may not only result in a demand to return the funds, but also trigger severe financial penalties.

Poland is under an obligation to disclose any irregularities identified by a public service or institution in the course of pursuing their statutory duties, including a reasonable suspicion of any:

- fraud;
- irregularity which may be of a novel, previously unknown nature;
- irregularities which may occur outside Poland.

* Police inspectors, Police Headquarters, Warsaw, Poland.

# EVIDENCE IN EU FRAUD CASES

Edited by
Celina Nowak

Translated by
Marek Albigowski
Agata Małecka
Celina Nowak

LEX
a Wolters Kluwer business

Warszawa 2013

This publication has been made possible thanks to the European Commission's funding through the HERCULE II Programme. The European Law Research Association is solely responsible for this publication. It does not represent the opinion of the European Union; the European Union is not responsible for any that may be made of the data herein provided.


Reviewer
*Prof. nadzw. dr hab. Jolanta Jakubowska-Hara*

Publisher
*Joanna Dzwonnik*

Senior Editor
*Ewa Fonkowicz*

Editor
*Magdalena Duffy*

Typesetting
*Sławomir Sobczyk*

Text design
*Marta Baranowska*



ISBN 978-83-264-4447-0
ISSN 1897-4392

Published by:
Wolters Kluwer Polska SA

Redakcja Książek
01-231 Warszawa, ul. Płocka 5a
tel. 22 535 82 00, fax 22 535 81 35
e-mail: ksiazki@wolterskluwer.pl

www.wolterskluwer.pl
internet bookstore www.profinfo.pl

# Contents