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Transformation of the General Administrative Procedure Model Under the Influence of the Pragmatisation, Automation, and Europeanisation of Administrative Jurisdiction

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Abstract
The model of the general administrative procedure in Poland is governed by the Code of Administrative Procedure of 14 June 1960. This act has undergone numerous amendments aimed at adapting the administrative procedure to the requirements of a democratic state governed by law and providing appropriate procedural guarantees to individuals. Despite the phenomena of decodification and atomisation of the administrative procedure resulting from specific regulations, the code model of administrative procedure remains the fundamental formal and procedural framework for the jurisdictional activities of administrative bodies. Contemporary trends in modernisation are characterised by several development directions, including: pragmatisation, which involves the de-formalisation of activities towards third-generation procedures; automation, which relies on electronic data processing systems and Europeanisation, encompassing the development of procedures integrated with European Union law. These trends lead to new institutions and legal regulations being introduced into the model of the general administrative procedure, such as simplified procedures, the tacit settlement of cases, electronic deliveries, the handling of cases using automatically generated documents and European administrative cooperation. With this in mind, the study focuses on the analysis and assessment of the impact of pragmatisation, automation and Europeanisation on code regulations governing administrative jurisdiction. It aims to formulate conclusions regarding the appropriateness of current amendments and propose recommendations for future changes.

Keywords
pragmatisation; automation; europeanisation; administrative procedure

1. Introduction

Poland is one of those countries with a codified administrative procedure. The Code of Administrative Procedure of 14 June 1960 (the CAP)[1] currently governs jurisdictional proceedings before public administration bodies in individual cases falling within the competence of these bodies (referred to as bodies in the organisational sense), which are resolved through administrative decisions or settled tacitly. It also applies to proceedings before other state bodies or entities appointed by law or agreements (bodies in the functional sense) to settle such cases. Additionally, it covers simplified proceedings for issuing certificates, handling complaints and applications, resolving competence disputes to some extent and procedures for European administrative cooperation (Articles 1 and 2). The CAP also includes substantive regulations concerning the imposition of administrative fines or granting relief in their execution.

Despite the phenomena of decodification and atomisation resulting from specific provisions that exclude, limit or modify the application of the CAP in certain cases, the code model of administrative procedure remains the fundamental formal and procedural framework for the jurisdictional activities of the administration. Therefore, in examining the transformation of the administrative procedure model in Poland, it is pertinent to focus on the normative changes affecting this legal act, particularly concerning the general administrative procedure.

When characterising this model, it is justified to adopt a dynamic perspective that emphasises changes in legal regulations and developmental trends, along with their impact on the scope of procedural guarantees, rather than a static approach that only considers the current legal state. The CAP has undergone numerous amendments in the past, aimed at aligning it with the requirements of a democratic rule of law, as stipulated in Article 2 of the Constitution of the Republic of Poland of 2 April 1997. These amendments have been instrumental in evolving the CAP to meet contemporary standards of administrative justice and procedural fairness.[2] The political transformation did not, however, end the process of development of the Polish administrative procedure. A particularly extensive amendment of the CAP was made in 2017[3] as a result of the work by an expert team,[4] although not all the changes postulated at that time were implemented. Therefore, this study pays particular attention to the current development trends manifested in the normative changes made in recent years. The examples cited, due to the limited framework of the publication, will be an exemplification of the dynamics of the development of the general administrative procedure, rather than an analytical characterisation of all the amendments to the CAP.

The development of legal institutions and procedures is always influenced by specific phenomena affecting the legal environment, legislative activity and the application of the law in practice. This impact is difficult to study due to its coupled and multidirectional nature. However, if specific phenomena are singled out as research patterns (criteria), it is possible to analyse and assess their

1 Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego [Act of 14 June 1960 Code of Administrative Procedure] [2024] JoL 572.

2 Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483 as amended.

3 Ustawa z dnia 7 kwietnia 2017 r. o zmianie ustawy – Kodeks postępowania administracyjnego oraz niektórych innych ustaw [Act of 7 April 2017 Amending the Act – Code of Administrative Procedure and Certain Other Acts] [2017] JoL 935.

4 See Z Kmieciak (ed), *Raport zespołu eksperckiego z prac w latach 2012–2016: Reforma prawa o postępowaniu administracyjnym* [Report of the Expert Team on the Work in the Years 2012–2016: Reform of the Law on Administrative Procedure] (Naczelny Sąd Administracyjny 2017).

impact on legal regulations. I consider the following to be particularly important contemporary trends in the development of administrative procedure: pragmatisation, associated with the deformalisation of activities towards third generation procedures;[5] automation, based on electronic data processing systems; and Europeanisation, involving the formation of proceedings integrated with European Union law.[6] These trends have resulted in the introduction of new institutions and legal regulations, such as: simplified proceedings, the tacit handling of cases, electronic delivery, the handling cases with automatically generated letters and European administrative cooperation. Therefore, the subject of this study is the analysis and evaluation, based on the dogmatic-legal method, of the impact of these phenomena on the regulation of the model of general administrative proceedings in Poland, together with the formulation of conclusions concerning the appropriateness of the current amendments and postulates for future changes.

2. Pragmatisation of the General Administrative Procedure

Pragmatisation is the process of shaping the legal framework of procedural institutions as well as the practical application of the law by administrative authorities in the spirit of pragmatism. However, this trend, developed especially in American doctrine, is sometimes understood in other ways.[7] Most often, *legal pragmatism* is combined with a theory of judicial adjudication that emphasises the practical aspects of applying the law, radically questioning the primacy of formalism.[8] In this view, the adjudication process should produce a decision with the most legitimate consequences, be mindful of its impact on the present and the future, adjudicate on the basis of all the facts relevant to the case, take into account that adjudication is situational or use practical reasoning, limiting the use of formalism as much as possible.[9] The pragmatic approach is also well illustrated by the trend of the reformation (and later counter-reformation) of administrative procedure, related to the participation of various interest groups in the proceedings and the limitation of discretionary actions of the administration.[10] "Pragmatism unstiffens all our theories, limbers them up, and sets each one to work."[11]

Procedural pragmatism is treated as a certain principle of administrative proceedings, according to which they are to be conducted efficiently, quickly and economically, with activities limited to the necessary minimum, with a clear focus on achieving a certain effect.[12] It is an attitude consist-

5 See J Barnes, *Transforming Administrative Procedure. Towards a Third Generation of Administrative Procedures* (Conference on Comparative Administrative Law 2016) 4, <https://law.yale.edu/sites/default/files/area/conference/compadmin/compadmin16_barnes_towards.pdf> accessed 5 Aug 2024.

6 See M Wilbrandt-Gotowicz, *Zintegrowane z prawem Unii Europejskiej postępowania administracyjne* [Administrative Proceedings Integrated with European Union Law] (Wolters Kluwer 2017).

7 See Ch Barzun, 'Three Forms of Legal Pragmatism' (2018) Washington University Law Review 95(5), 1003–1034.

8 See R Posner, 'Legal Pragmatism Defended' (2004) University of Chicago Law Review vol. 71, 683–690.

9 See K Łuczak, 'Zasady stosowania prawa przez sądy administracyjne a pragmatyzm prawny' [Principles of Application of Law by Administrative Courts and Legal Pragmatism] in Z Duniewska, M Stahl, A Krakała (eds), *Zasady w prawie administracyjnym. Teoria, praktyka, orzecznictwo* [Principles in Administrative Law. Theory, Practice, Case Law] (Wolters Kluwer 2018) 742.

10 S Shapiro, 'Pragmatic Administrative Law' (2005) Wake Forest University Legal Studies Research Paper Series 05-02, 22.

11 W James, *Pragmatism: A New Name for some Old Ways of Thinking* (The Floating Press 2010) 22.

12 J Wegner-Kowalska, 'Idea pragmatyzmu w postępowaniu administracyjnym' [The Idea of Pragmatism in Administrative Proceedings] in J Zimmermann (ed), *Aksjologia prawa administracyjnego* [Axiology of Administrative Law] (Wolters Kluwer 2017) 969.

ing in "striving for the selection of such tools for the implementation of the goals and objectives of the proceedings that take into account, to the greatest extent possible, the requirements of efficiency of action, considered through the prism of its basic components: effectiveness, efficiency and cost-effectiveness."[13]

The pragmatisation of administrative proceedings may manifest itself not only in a specific approach to the application of the law, but also in normative changes, leading to the development not only of administrative proceedings based on issuing individual acts (first-generation procedures) or general acts (second-generation procedures), but also of third-generation procedures related to the establishment of a permanent system of communication between agencies and between agencies and citizens, as well as the use of tools for the implementation of what is termed *good governance* – efficient management within the framework of public policies.[14]

The effect of pragmatisation is the contemporary shape of the general principles of administrative procedure. In particular, it is worth signalling the 2017 inclusion in the CAP of:

(1) the principle of resolving doubts about a rule of law in favour of a party in proceedings concerning the imposition of an obligation on a party or the restriction or withdrawal of a right from a party (Article 7a);
(2) the principles of cooperation between public administration bodies in the course of proceedings to the extent necessary to clarify thoroughly the factual and legal state of the case, taking into account the public interest and the legitimate interest of citizens and the efficiency of the proceedings, using measures that are appropriate to the nature, circumstances and complexity of the case (Article 7b);
(3) the principle of not deviating, without good cause, from the established practice of the administrative authority when resolving cases in the same factual and legal situation (Article 8 § 2);
(4) the principle of seeking an amicable settlement of disputes using not only administrative settlements but also mediation (Article 13).

Also important for the efficiency of the proceedings is the principle of speed and thoroughness, imposing an obligation on the authorities to use the simplest possible means to resolve the case (Article 12). In 2017, the relative nature of the principle of two-instance administrative proceedings was introduced, exempting this standard if a specific provision so provides (Article 15). Pragmatic considerations also support a possible derogation from ensuring that the parties are actively involved in every stage of the proceedings and that, before a decision is issued, they are given the opportunity to express their views on the evidence and materials collected and the demands made, as long as the handling of the case is not urgent due to a danger to human life or health, or due to irreparable material damage (Article 10 § 2).

In the justification of the draft of the extensive 2017 amendment of the Code, explicit reference was made to pragmatic ideas, pointing to the need to provide "a legal framework for a partnership approach of public administration to citizens through a less restrictive and formalistic use of power and the possibility to resolve cases contrary to the legitimate interests of the parties."[15]

13 Z Kmieciak, 'Pragmatyzm postępowania administracyjnego' [Pragmatism of Administrative Procedure] in W Jakimowicz, M Krawczyk, I Niżnik-Dobosz (eds), *Fenomen prawa administracyjnego. Księga jubileuszowa Profesora Jana Zimmermanna* [The Phenomenon of Administrative Law. Professor Jan Zimmermann's Anniversary Book] (Wolters Kluwer 2019) 499.

14 See J Barnes (2016) 4.

15 Explanatory Memorandum to the Government Bill of 7 April 2017 on amendments to the Code of Administrative Procedure and certain other acts, Parliamentary Print No. 1183, <https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1183> accessed 1 Aug 2024.

These demands were to be realised through the introduction of a simplified procedure of jurisdictional proceedings (Articles 163b-163g) and a form of settlement alternative to a decision through the tacit settlement of a case (Articles 122a-122h). Despite the experts' demands, neither the regulation of the administrative agreement nor the procedure for issuing general decisions was included in the CAP, which should be assessed critically.

The established model of the simplified procedure is mainly characterised by:

- being applicable only where this procedure is referred to by a specific provision;
- in principle the appearance of only one party to the proceedings;
- as a general rule, ending the proceedings tacitly;
- the possibility of initiating proceedings following an application by a party using the official form;
- restrictions on a party submitting new claims and evidence beyond the application initiating the proceedings;
- limited to evidence submitted by a party in conjunction with a request to initiate proceedings and evidence that is ascertainable on the basis of the data available to the authority conducting the proceedings, in the scope of the inquiry;
- a simplified statement of reasons for the decision, if it concludes the simplified procedure;
- exclusion of the contestability of most orders made during the proceedings;
- the possibility for the authority to proceed to a normal hearing if required in order to take into account new circumstances invoked by a party in the course of the proceedings.[16]

Alternatively, when the competent authority fully accepts the party's request, a case is tacitly settled by not issuing a decision, including a decision terminating the proceedings, within the statutory deadline (tacit termination of proceedings), or by not objecting via a decision (tacit consent). This implicit acceptance constitutes a positive decision for the party due to the administrative body's failure to act within the specified timeframe. In cases of tacit settlement, the party can request a certificate confirming the tacit settlement in the form of a decision, which is then subject to appeal. This alternative method of resolving an administrative case, compared to issuing a formal decision, is permissible only if specifically provided for by relevant provisions.[17]

The introduction of the above institutions into the model of general administrative procedure should be assessed positively, though the regulations on this subject are not without shortcomings and the lack of broader references in special provisions limits their application to a small category of cases. At the same time, the code model still does not explicitly take into account administrative proceedings of a hybrid nature, which are shaped in special provisions and constitute an expression of the regulatory diversification of administrative procedure. This is because selected areas of administrative proceedings have solutions based on the crossing of elements characteristic of different legal institutions and mechanisms. This diversification of procedural models and solutions may take, for example, the form of proceedings, in which the settlement in the form of a decision will take place only if it is not possible to settle the case in a non-jurisdictional mode through a material and technical activity (e.g. in cases of access to public information). This argues for a redefinition of the classical concept of administrative proceedings towards

16 See for example L Klat-Wertelecka, H Knysiak-Sudyka, 'Model administracyjnego postępowania uproszczonego' [Model of Simplified Administrative Proceedings] (2016) Państwo i Prawo vol. 7, 93–108; M Jaskowska, 'Postępowanie uproszczone w kodeksie postępowania administracyjnego i w prawie o postępowaniu przed sądami administracyjnymi' (2018) Zeszyty Naukowe Sądownictwa Administracyjnego vol. 4, 9–24.

17 See for example Z Kmieciak, M Gajda-Durlik, *Milczące załatwienie sprawy przez organ administracji publicznej* [Silent Handling of the Matter by a Public Administration Body] (Wolters Kluwer 2019).

a dynamic approach, encompassing actions aimed at settling a specific administrative matter in the form of a binding, external act (most often an individual administrative decision), as well as (in a broader sense) procedural complexes of a hybrid nature (mixed modes of administrative proceedings), one element of which may be a jurisdictional procedure, with the decision being an alternative form to a material-technical act or an administrative agreement.[18] The pragmatisation of administrative jurisdiction should therefore serve to open up legal regulations to the application of elements characteristic of third-generation procedures, if this serves to modernise administrative activity while guaranteeing procedural rights, which is not sufficiently emphasised in the current version of the CAP.

3. Automation of General Administrative Proceedings

Another phenomenon affecting the administrative procedure model is technological progress. Due to the speed of development and the extent of its impact, this process has been called the *digital tornado*.[19] It brings many unexpected effects related to the *endless spiral of connectivity*[20] between the administering and administered entities.

The technological revolution is influencing the integration of modern information and communication technologies (ICTs) into administrative activities. These can be used for a wide range of procedural activities, such as filing applications, making decisions, accessing case files, giving explanations, paying fees, serving letters, informing about a case, issuing orders, making settlements, presenting summonses or serving copies of files.[21] The conduct of proceedings with the use of ICT, although it may cover all phases of the proceedings, does not, however, support the need to distinguish a separate type of electronic administrative proceedings, because the essence of the jurisdictional activity remains the same as in proceedings conducted exclusively "on paper". Secondly, the automation of the execution of public tasks may not be limited only to the use of modern means of communication, but may also lead to a significant reduction or replacement of human labour by pre-programmed actions performed by machine (algorithmically) on data sets.[22] This process may involve what is known as algorithmic decision-making (ADM).[23]

18 M Wilbrandt-Gotowicz (2017) 54–55. More extensively M Wilbrandt-Gotowicz, 'O fenomenie postępowania hybrydowego' [On the Phenomenon of Hybrid Procedure] in W Jakimowicz, M Krawczyk, I Niżnik-Dobosz (eds), *Fenomen prawa administracyjnego. Księga jubileuszowa Profesora Jana Zimmermanna* [The Phenomenon of Administrative Law. Professor Jan Zimmermann's Anniversary Book] (Wolters Kluwer 2019) 930–948.

19 See K Werbach, 'Digital Tornado: The Internet and Telecommunications Policy' (1997) OSP Working Paper vol. 29, <https://www.fcc.gov/reports-research/working-papers/digital-tornado-internet-and-telecommunications-policy> accessed 5 Aug 2024.

20 See K Werbach, 'Introduction: An Endless Spiral of Connecitivity?' in K Werbach (ed), *After the Digital Tornado. Networks, Algorithms, Humanity* (Cambridge University Press 2020) 1.

21 See J Gołaczyński, K Tomaszewska, 'Informatyzacja postępowania administracyjnego i sądowoadministracyjnego' [Computerization of Administrative and Court-administrative Proceedings] in K Flaga-Gieruszyńska, J Gołaczyński (eds), *Prawo nowych technologii* [New Technologies Law] (Wolters Kluwer 2021) 53–88.

22 P Geburczyk, 'Automatyzacja załatwiania spraw w administracji samorządowej a gwarancje procesowe jednostek. Uwagi de lege ferenda w kontekście ogólnego rozporządzenia o ochronie danych (RODO)' [Automation of Handling Matters in Local Government Administration and Procedural Guarantees of Units. De Lege Ferenda Remarks in the Context of the General Regulation on Data Protection] (2021) Samorząd Terytorialny vol. 5, 21–22. See M Zalnieriute, L Moses, G Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) Modern Law Review 82(3), 432–433.

23 See more extensively R Koulu, 'Human Control over Automation: EU Policy and AI Ethics' (2020) European Journal of Legal Studies 12(1), 9.

The issues of computerisation, including automation, are among those that are the subject of numerous CAP amendments. This demonstrates the difficulty for the legislator to define a legal framework for a matter characterised by constant development and technical changes. The first provision that dealt explicitly with the use of information technology was introduced into the CAP on 1 January 1999 and provided for the possibility to submit applications to the authority by email.[24] In the subsequent years, the code provisions on this subject were amended several times. Of particular importance were the amendments of 2005, 2010 and 2014, connected with the enactment and later amendment of the Act on the Computerisation of the Activity of Entities Performing Public Tasks of 17 February 2005.[25] In 2005, the CAP regulated the issues of filing an electronic application and the initiation of administrative proceedings as a result of such a filing (Article 63 § 1 and 3a), the service of letters by an authority in the form of an electronic document (Article 39[1] and Article 46 § 3) and the observance of a time limit when filing electronic documents (Article 57 § 5 point 1). Then, with the amendment of 2010,[26] comprehensive solutions were introduced, creating the basis for conducting the entire procedure in electronic form, from the electronic application to the electronic delivery of the decision. Further procedural actions were computerised, such as the online inspection of case files (Article 73) or the issue of electronic certificates (Article 217). The extension of the use of IT techniques and the streamlining of actions taken with the use of these techniques were made with the 2014 amendment.[27] The electronic address of the applicant became a mandatory element of an application submitted in the form of an electronic document, and in the absence of such an address, the authority assumed that the electronic address from which the application was sent was the correct one. It was up to the participant of the proceedings to decide whether letters were to be served by electronic means, or whether they could opt out of such service. Such consent could cover specific proceedings or take the form of a general consent for matters handled by a given authority (Article 391). Threads related to electronification also appeared in the extensive 2017 amendment of the CAP. At that time, a solution was introduced that, if the addressee of a letter is a public entity that is a party or other participant in the proceedings, the electronic document is delivered to its electronic delivery box (Article 392). Provision was also made for the possibility of issuing certificates of tacit settlement of a case in the form of an electronic document or initiating simplified proceedings on the basis of an application made using an electronic form. The 2018 amendment[28] introduced the possibility of settling a case as an exception to the written form, not only orally, but also by telephone, electronic or other means of communication (Article 14 § 2).

24 Cf Article 63 § 1 of the CAP in the wording adopted by ustawa z dnia 29 grudnia 1998 r. o zmianie niektórych ustaw w związku z wdrożeniem reformy ustrojowej państwa [Act of 29 December 1998 Amending Certain Acts in Connection with the Implementation of the State Political Reform] [1998] JoL 1126.

25 Ustawa z dnia 17 lutego 2005 r. o informatyzacji działalności podmiotów realizujących zadania publiczne [Act of 17 February 2005 on Computerization of Activities of Entities Performing Public Tasks] [2005] JoL 565 as amended, unified text [2024] JoL 37.

26 Ustawa z dnia 12 lutego 2010 r. o zmianie ustawy o informatyzacji działalności podmiotów realizujących zadania publiczne oraz niektórych innych ustaw [Act of 12 February 2010 on Amending the Act on the Informatisation of the Activity of Entities Performing Public Tasks and Certain Other Acts] [2010] JoL 230.

27 Ustawa z dnia 10 stycznia 2014 r. o zmianie ustawy o informatyzacji działalności podmiotów realizujących zadania publiczne oraz niektórych innych ustaw [Act of 10 January 2014 on Amending the Act on the Informatisation of the Activities of Entities Performing Public Tasks and Certain Other Acts] [2014] JoL 183 as amended.

28 Ustawa z dnia 6 marca 2018 r. – Przepisy wprowadzające ustawę – Prawo przedsiębiorców oraz inne ustawy dotyczące działalności gospodarczej [Act of 6 March 2018 – Provisions Introducing the Act – Entrepreneurs' Law and Other Acts Relating to Business Activity] [2018] JoL 650.

Several amendments from 2010 to 2021 related to laws on issues of electronic identification and authentication in ICT systems, including the application of the EU eIDAS Regulation[29] and personal identity cards. They have led to the introduction of several equivalent methods of authentication, including, in particular, the binding force of letters in the form of an electronic document – a qualified electronic signature, a trusted signature or a personal signature,[30] as well as the electronic seal of the authority.

Today, the issue of the broadly understood automation of administrative proceedings in Poland boils down to two main issues – the reform of the electronic delivery system and the handling of cases using automatically generated letters.

By the Act on Electronic Delivery of 18 November 2020 (EDA),[31] the foundations were laid for a new electronic delivery system that is intended to be universal, covering a range of legal procedures, including administrative, tax, criminal, civil and administrative court proceedings. The system is currently undergoing implementation during a transition period lasting until 30 September 2029, at the end of which the current method of delivery based on electronic delivery boxes on the electronic platform of public administration services (ePUAP) will be completely replaced by new services, including the public registered electronic delivery service and the public hybrid service. The former is a service provided by a designated operator that enables data to be sent electronically between third parties and provides evidence relating to the handling of the data sent, including proof of sending and receiving the data. It protects the data sent against the risk of loss, theft, damage or any unauthorised alteration (cf Article 2(8) of the EDA in conjunction with Article 3(36) of the eIDAS Regulation). Under it, the public entity serves correspondence requiring proof of sending or receipt to the electronic delivery address specially created for this type of service and entered in the electronic address database or, if there is no such address, to the electronic delivery address from which the non-public entity sent the correspondence (Article 4 EDA). Only if it is not possible to serve the correspondence via this service is a public hybrid service used for this purpose (cf Article 5 EDA), which consists in converting the letter from electronic to paper form and serving it in this form on anyone who does not use an electronic delivery address.

With the Electronic Service Act, a number of provisions of the CAP were amended with effect from 5 October 2021, including those relating to methods of service, applications, summonses, powers of attorney, administrative settlements or certificates recorded in electronic form. The existing wording of the principle of writtenness has also been modified, indicating, among other things, that "Cases must be conducted and settled in writing recorded in paper or electronic form. (...)" (Article 14 § 1a CAP).

Unexpectedly, a regulation was also introduced into the CAP whereby "Matters may be handled using letters automatically generated and bearing a qualified electronic seal of the public administration body" (Article 14 § 1b CAP). In the absence of a legal definition of an automatically generated letter, it can be treated as a special type of letter in electronic form – a document that is created without direct participation or with minimal human involvement in the creation of its content and is a consequence

29 Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 Jul 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L 257, 73.

30 See more extensively G Sibiga, *Stosowanie technik informatycznych w postępowaniu administracyjnym ogólnym* [Application of IT Techniques in General Administrative Proceedings] (CH Beck 2019) 47.

31 Ustawa z dnia 18 listopada 2020 r. o doręczeniach elektronicznych [Act of 18 November 2020 on Electronic Delivery] [2024] JoL 1045.

of the retrieval and appropriate compilation of data by an ICT system, in particular on the basis of data contained in public registers or provided by the applicant.[32] Significant doubts arise here as to whether the legislator's intention was to introduce into the general model of administrative proceedings the possibility of settling cases in the form of automatically generated decisions, i.e. algorithmic decisions. It seems that the widespread use of processes of automatically issuing decisions should be associated with the establishment of legal bases broader than those contained in Article 14 of the CAP, together with the definition of types of cases in which this manner of issuing an administrative act is allowed and adequate procedural guarantees related to matters such as the scope of participation of parties in the proceedings, the course of the investigation procedure, justification of decisions or appropriate instance control, taking into account the specific nature of resolving cases with the use of IT tools. The regulation on this subject should furthermore correspond to the exceptions indicated in Article 22(2) of the GDPR.[33] This is because, as a general rule, any person to whom personal data is processed has the right not to be subject to a decision that is based solely on the automated processing of personal data, including profiling, and which produces legal effects in relation to that person or significantly affects them in a similar manner. Exceptions may only apply where the decision taken by automated means: is necessary for the conclusion or performance of a contract between the data subject and the controller; is authorised by Union law or by the law of a Member State to which the controller is subject and which provides for suitable measures to protect the rights, freedoms and legitimate interests of the data subject; or is based on the data subject's explicit consent. Indeed, it is important to ensure human oversight so that "the AI system does not undermine human autonomy or cause other negative consequences."[34] This oversight can be exercised through governance mechanisms such as the human-in-the-loop (HITL) principle, the human-on-the-loop (HOTL) principle or the human-in-command (HIC) principle.[35] The existing code regulations in this respect are so questionable that they should be considered far from sufficient to handle cases in the form of an automatically generated decision in a way that meets the requirements for proper supervision and compliance with the GDPR.

4. The Europeanisation of General Administrative Procedure

"Europeanisation consists of processes of a) construction, b) diffusion and c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, "ways of doing things" and shared beliefs and norms that are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and subnational) discourse, political structures and public policies."[36] Against the background of administrative law, Europeanisation is presented

32 M Wilbrandt-Gotowicz in M Wilbrandt-Gotowicz (ed), *Doręczenia elektroniczne. Komentarz* [Electronic Deliveries. Comment] (Wolters Kluwer 2021) 440.

33 Regulation (EU) 2016/679 of the EP and of the Council of 27 Apr 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119, 1.

34 'Ethics Guidelines for Trustworthy AI' (2019), <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai> accessed 5 Aug 2024. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 8 Apr 2019 Building Trust in Human-Centric Artificial Intelligence COM (2019) 168 final.

35 Ibid.; see also L Bygrave, 'Machine Learning, Cognitive Sovereignty and Data Protection Rights with Respect to Automated Decisions' (2020) University of Oslo Faculty of Law Legal Studies. Research Paper Series vol. 35, 21 and 25.

36 C Radaelli, 'Europeanisation: Solution or problem?' (2004) European Integration online Papers 8(16), 3, <http://ssrn.com/abstract=601163> accessed 1 Aug 2024.

as a process of "gradual assimilation by individual countries of certain models of public administration and administrative law, created by the European Union or the Council of Europe"[37] or "an adaptation, adjustment process by which features characteristic of the European system are transposed to other systems."[38] When referring to the Europeanisation of general administrative proceedings, I have in mind both the processes of changing the content of the code regulation as a consequence of European integration, as well as the formation of new models of proceedings under the influence of European law.

In the first view, the impact of Europeanisation on the design of code norms manifests itself primarily:

- in the axiological homogeneity of the general principles of administrative procedure and the principles of law recognised in European jurisprudence or expressed in the Charter of Fundamental Rights (CFR);
- in taking into account the adjudicatory competence of the CJEU as a basis for the construction of a premise for the resumption of administrative proceedings;
- in a regulation to ensure the implementation of personal data protection obligations in administrative proceedings;
- in the regulation of European administrative cooperation.

Referring briefly to each of the these manifestations of Europeanisation, one should start with the axiological identity of many of the general principles of administrative procedure with those recognised in the European order. An example of such a correlation is the current wording of Article 8 of the CAP, according to which public administration bodies will conduct proceedings in a manner that inspires its participants to have confidence in the public authority, guided by the principles of proportionality, impartiality and equal treatment, and will not deviate from the established practice of resolving cases in the same factual and legal situation without a justified reason. This axiological identity is also inherent in other principles of Polish jurisdictional proceedings – the principle of active participation of the parties in the proceedings (Article 10), persuasion (Article 11) and speed (Article 12), juxtaposed with the standards expressed in Article 41 CFR. With the 2021 amendment,[39] Article 145aa was introduced into the CAP indicating the possibility of requesting the reopening of the proceedings when a CJEU ruling has been issued that affects the content of the issued decision, within one month of the publication of the operative part of the CJEU ruling in the Official Journal of the EU. By contrast, under the influence of EU legislation, Article 2a was included in the CAP in 2019, with some regulations being modified in order to implement the enforcement by the investigating authorities of the information obligation referred to in Article 13 of the GDPR.

As part of the extensive 2017 revision of the code, Section VIIIa on European administrative cooperation was added. These provisions are accessory to EU law. They concern the provision of assistance, either ex officio or upon request, which includes, in particular, the provision of information on factual and legal circumstances and the performance of procedural acts in the context of legal aid. These framework regulations may apply to the processing of requests for assistance from the authorities of other Member States or the EU administration to the Polish

37 See G Krawiec, *Europejskie prawo administracyjne* [European Administrative Law] (Wolters Kluwer 2009) 15.

38 T Biernat, 'Europeizacja prawa – zjawisko wielowymiarowe. Wprowadzenie' [Europeanization of Law – A Multidimensional Phenomenon. Introduction] in T Biernat (ed), *Europeizacja prawa* [Europeanization of Law] (Oficyna Wydawnicza AFM 2008) 8.

39 See ustawa z dnia 18 grudnia 2020 r. o zmianie ustawy o drogach publicznych oraz niektórych innych ustaw [Act of 18 December 2020 on Amending the Act on Public Roads and Certain Other Acts] [2021] JoL 54.

administrative authorities, as well as to requests for legal assistance from the Polish authorities to the authorities of other EU Member States and the EU administration, if the provisions of EU law so provide and in accordance with the principles set out in those provisions.

Secondly, under the influence of European law, new models of administrative procedures are taking shape, deviating from the classical view of the jurisdictional procedure related to the determination of the legal situation of an individual in a given case by a single national administrative authority. As noted in the literature, the multi-stage nature of the decision-making process means that the traditional approach to administrative procedures cannot continue, requiring flexibility by taking into account the impact of Europeanisation on procedural models.[40] Consequently, there is a widespread reflection in the doctrine on different models of administrative proceedings determined by EU law, e.g. multi-stage proceedings – *mehrstufiger*,[41] complex, composite[42] (horizontal and vertical), mixed,[43] multi-jurisdictional[44] or integrated with EU law.[45] I define the latter as administrative proceedings whose procedural rules are at least partly defined by the EU legislator. The formal criterion thus distinguished makes it possible to cover three levels of procedures by this term: those before EU institutions, transnational procedures (conducted by authorities from different Member States) and proceedings conducted exclusively by national authorities taking into account procedural norms of EU origin, or whose content is conditioned by these norms. In the latter case, national authorities tend to make more complex assessments as to the applicable legal standards in specific cases than in cases not determined by Union law. The application of national and EU procedural norms by the authorities issuing administrative decisions may take place within the framework of a simple model – the appropriate application of national procedural norms to the extent not regulated by EU law (straightforward application), or of a complex model – the simultaneous co-application of national and EU law (national determined by EU law) in order to reconstruct a multicentric (pluralistic) procedural norm, corresponding to the requirements of ensuring the effectiveness of substantive law as well as procedural guarantees for individuals.

Taking into account the type of entity issuing a decision in an individual case (national or EU) and the number of administrative bodies involved in the proceedings (one or more), it is possible to distinguish several basic models of procedures integrated with EU law (the simple decentralised model – decisions are made by a national authority following proceedings conducted without the participation of authorities from other countries or the EU administration; decentralised complex – decisions made by a national authority with the participation of authorities from other Member States or the EU administration); centralised simple – decisions are made by the EU administration without the participation of national authorities; or centralised complex – decisions

40 See H Nehl, *Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung. Eine Studie gemeinschaftsrechtlicher Verfahrensgrundsätze unter besonderer Berücksichtigung 'mehrstufiger' Verwaltungsverfahren* (Duncker & Humblot 2002) 30.

41 Ibid., 29.

42 See for example H Hofmann, G Rowe, A Türk, *Administrative law and policy of the European Union* (Oxford University Press 2011) 361–362; C Franchini, 'European Principles Governing National Administrative Proceedings' (2004) Law and Contemporary Problems 68(1), 184; H Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing 1999) 90.

43 See G della Cananea, 'The European Union's Mixed Administrative Proceedings' (2004) Law and Contemporary Problems 68(1), 197.

44 See H Hofmann, 'Multi-Jurisdicional Composite Procedures. The Backbone to the EU's Single Regulatory Space' (2019) University of Luxembourg Law Working Paper vol. 3, 1.

45 See M Wilbrandt-Gotowicz (2017) 257.

made by the EU administration in proceedings with the participation of national authorities). The phenomenon of the emergence of complex proceedings based on multi-phase procedural sequences of different types of acts and actions aimed at settling a case testifies to the diversification of procedural norms and the gradual reduction, due to the activity of the EU legislator, of the procedural autonomy of Member States. It poses a challenge to the coherence of national procedural regulations and raises doubts as to the adequacy of the means of judicial review of decisions taken at the national and EU levels.[46] Against this background, the regulations on European administrative cooperation introduced so far in the CAP only regulate the provision of legal aid in a superficial way, and do not respond to a number of doubts about the subsidiary application of code norms in integrated proceedings with an intrinsically incomplete sectoral regulation of procedural norms. It seems, however, that in the field of complex proceedings, the deficit of procedural regulation will continue until these issues are at least partly regulated in a model way at an EU level.

5. Conclusions

The CAP is an act that has been subject to constant revision in recent years in order to adapt it to modern challenges. However, in view of the more than half a century of application practice and the entrenchment of the established model of general administrative procedure through the body of case law and doctrine, its imminent replacement by a new codification should not be expected.

The model of jurisdictional proceedings in Poland is being dynamically shaped under the influence of the phenomena of the pragmatisation, automatisation and Europeanisation of administrative jurisdiction. Each of these trends can be attributed to related legal solutions or institutions that have been incorporated into the legal regulation. These are not one-off modifications (such as, for example, in the case of electronic actions), they involve diverse mechanisms to improve the functioning of administration (as in the case of solutions to streamline and deformalise proceedings) but do not always reflect the complexity of contemporary procedural relations (e.g. in relation to hybrid procedures or composite proceedings). Therefore, although it is possible to speak of certain trends in the development of administrative jurisdiction, the codification of administrative procedure has a model character, in view of the requirement to take into account, in specific cases, special provisions of a procedural nature, including those of EU origin; a dynamic character, because it is subject to constant normative changes; and an open character, due to the nature of administrative-legal relations requiring the use of undefined concepts, sometimes based on administrative discretion, or values anchored in general principles of administrative procedure.

The trend of incorporating regulations in the CAP framework to deform and streamline administrative proceedings should be viewed positively. The challenge in this context, however, is to choose the appropriate scope of regulation of what is to be deformed. It is necessary to avoid the paradox of over-regulating simplified proceedings, but also a situation that limits the handling of cases with the use of measures appropriate for third-generation procedures. Against this background, the solutions adopted in the CAP in the area of simplified proceedings and the tacit settlement of cases do not seem to fully realise the essence of pragmatism. Their application does not depend on the will of

46 See M Eliantonio, 'Judicial Review in an Integrated Administration: the Case of 'Composite Procedures' (2014) Review of European Administrative Law 7(2), 98; S Röttger-Wirtz, M Eliantonio, 'From Integration to Exclusion: EU Composite Administration and Gaps in Judicial Accountability in the Authorisation of Pharmaceuticals' (2019) European Journal of Risk Regulation 10(2), 396.

the authority or the party, but is limited to cases in which a specific provision expressly refers to it. A considerable shortcoming is the failure to include hybrid proceedings in the CAP, where issuing an administrative decision is only an alternative to handling the case in a non-manipulative form, e.g. through material and technical actions. There is no standardisation of the general decision and administrative agreements. It should therefore be postulated that an appropriate regulation on this subject should be included in the CAP.

As regards the phenomenon of automation, it should be pointed out that frequent normative changes are not conducive to the computerisation of administration and the expansion of the group of administration entities that use electronic document management systems. Although there are legal mechanisms in place for those interested in electronic correspondence with administration bodies, only the implementation of a new electronic delivery system can lead to a significant qualitative and quantitative change in this regard. However, the CAP modifications introduced by the e-service law do not reflect a transition period of several years, which means that, especially for citizens, the way of submitting applications or receiving decisions electronically may be completely opaque during the period when some of the authorities will already be using the public registered electronic delivery service and the public hybrid service, while some will still be using electronic letter boxes. In addition, the issue of incorporating an algorithmic mode of decision-making into the Polish administrative procedure system requires in-depth analysis and debate. The standard contained in Article 14 of the CAP, which generally refers to the possibility of settling cases through the use of automatically generated letters, is far from sufficient in terms of securing procedural guarantees of the parties to the proceedings and does not meet the requirements of the GDPR.

The model of administrative proceedings in Poland is also evolving under the influence of the country's membership in the EU. Amendments in this regard primarily address issues such as the regulation of legal assistance involving administrations of other EU Member States or EU institutions, which is supplementary to EU law. They also encompass obligations related to fulfilling information requirements regarding the processing of data for parties and other participants in proceedings, as well as the need to reopen proceedings following a ruling from the Court of Justice of the European Union (CJEU). Of significant note is the axiological consistency with general principles of administrative procedure and principles of law recognised in European case law or expressed in the Charter of Fundamental Rights (CFR).

In addition to changes of a normative nature, the phenomenon of Europeanisation affects administrative jurisdiction through the formation, as a result of sectoral regulations, of new models of administrative proceedings in which administrative authorities are obliged to apply procedural norms determined by EU law. Doubts as to the proper decoding of legal norms in specific cases and proper guarantees of judicial control concern, in particular, proceedings involving the authorities of a Member State and the EU administration, or authorities of different Member States. In this view, modifications of the model of administrative proceedings are in fact an element of the transformation of the *European Administrative Space*, co-created by legal regulations of supra-state (EU) origin and national norms shaped under the influence (e.g. as a result of implementation) of the former,[47] and national administrative bodies are part of the "administration of the European space."[48]

47 See M Wilbrandt-Gotowicz, 'Concept and Scope of the Europeanization of Administrative Proceedings Law – A Theoretical Perspective' in P Bieś-Srokosz, J Srokosz (eds), *Current Developments in Public Law in European Countries: Selected Issues* (Wydawnictwo im. S. Podobińskiego Akademii im. Jana Długosza 2016) 100–103.

48 See E Schmidt-Aßmann, *Ogólne prawo administracyjne jako idea porządku. Założenia i zadania tworzenia systemu prawnoadministracyjnego* [General Administrative Law as an Idea of Order. Assumptions and Tasks of Creating a Legal and Administrative System] (CH Beck 2011) 481.

The common thread in the transformation of the general administrative procedure model under the influence of trends like pragmatisation, automation, and Europeanisation is the potential to enhance standards of good administration. However, these trends also impact the decodification and atomisation of administrative procedures. They can lead to the development of specific procedural solutions distinct from the general model of jurisdictional proceedings. Additionally, they sometimes necessitate more intricate evaluations concerning the application of legal norms in specific cases.

These developments touch upon several critical doctrinal issues, such as the legal nature of administrative decisions, forms of public administration activities, the admissibility of legal remedies and the implementation of general principles of administrative procedure. They may require redefining fundamental concepts of administrative law or reshaping approaches to resolving administrative cases (for instance, introducing the automated issue of administrative decisions) and bolstering adjudicatory mechanisms to ensure effective judicial protection.

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