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Legal Position and Organisation of Independent Regulatory Authorities in Poland

dr Piotr Lissoń
Adam Mickiewicz University in Poznań, Poland
ORCID: 0000-0003-4568-3637
email: piotr.lisson@amu.edu.pl

Abstract
The article discusses the emergence and role of independent regulatory bodies in Poland, which were not part of the country's administrative law during the Second Republic (1918–1939) or the People's Republic of Poland (1945–1989). These bodies began to develop in the 1990s, influenced by European Union regulations designed to foster an internal market. The article examines how Poland, transitioning to a democratic state with a market economy after 1989, restructured its administrative apparatus to incorporate these bodies.

The concept of national regulatory authorities (NRAs) is explored, with a focus on their role in regulating specific sectors of the economy, such as infrastructure, financial services and competition protection. Regulatory authorities are defined as bodies that intervene in markets to promote competition, prevent monopolies and ensure the provision of essential public services. The article also addresses the flexibility in how EU law defines and shapes NRAs, allowing each Member State to adapt these bodies to its specific needs. The Polish legal system is analysed to identify whether a distinct 'Polish model' of an NRA exists, and this is compared to the approaches of other EU countries.

Keywords
independent regulatory authorities; Polish administrative law; public economic law; market economy; European Union regulations; sectoral regulation

1. Introduction

Independent regulatory bodies are not among the traditional institutions of Polish administrative law. They were not present in Poland during the Second Republic (1918–1939), when the country regained its independence after 123 years of non-existence on the map of Europe. In the reconstituted Polish state, public administration was structured similarly to that in other European countries of the time, consisting of government (state) administration and local government, which included municipal (rural and urban) and district (*powiat*) self-governments.

Additionally, in certain regions, such as the Pomeranian and Greater Poland Voivodeships, there was also a third type of self-government, the voivodeship self-government.[1] Still different solutions were envisaged for the Silesian Voivodeship, giving it a largely autonomous character.

The government administration of the Second Republic had a multi-level (multi-instance) structure, based on the principle of hierarchy, which precluded the existence of independent bodies. As Stanisław Kasznica, a leading figure in the field of administrative law in Poland, explained, "[h]ierarchy is an organisational system in which the personnel of an organisation are grouped according to levels. Those on lower levels – subordinates – are unconditionally subject to those on higher levels. This subordination is both direct to the immediate superior and indirect to those on further higher levels".[2] The institution of an independent regulatory body was also alien to the administration of the People's Republic of Poland (1945–1989), as the administration during that period was highly centralised, in accordance with the principle of "democratic centralism",[3] which was in force at the time and typical of a state with a socialist system. The emergence of independent regulatory bodies began in Poland, as in other European countries, in the last decade of the 20th century, under the influence of the European Union regulations aimed at establishing an internal market in particular spheres of the economy. Independent regulatory bodies were to play a key role in this process. It took place in Poland when the new democratic state system was being formed (formally adopted as a result of changes to the constitution made in 1989[4]), which resulted in the necessity to reorganise the administrative apparatus in order to adapt it to the new constitutional and legal situation and to functioning under a market economy.

As argued by Marek Szydło, the provisions of EU law on NRAs are largely framework in nature, and Member States have a relatively large degree of freedom in shaping important elements comprising the regime and status of these bodies.[5] As will be shown, some recurring, characteristic solutions can be observed in the provisions of Polish law relating to individual regulatory bodies. At the same time, there are differences between the system and status of Polish regulatory bodies and solutions and their counterparts in other EU Member States.[6] Thus,

1 For more on local self-government in Poland in the period 1918–1939 and the evolution of legal provisions in this regard, see M Kallas, I Lipowicz, Z Niewiadomski, G Szpor, *Prawo administracyjne. Część ustrojowa* [Administrative Law. Systematic Part] (LexisNexis 2002) 45 et seq.; B Dolnicki, *Samorząd terytorialny* [Local Government] (Wolters Kluwer 2009) 41 et seq.

2 See S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Księgarnia Akademicka 1947) 46.

3 For more on this principle and the scope of decentralisation permissible within its framework, see T Rabska, 'Podstawowe pojęcie organizacji administracji' [Basic Concept of Administration Organization] in J Starościak (ed), *System prawa administracyjnego* [Administrative Law System] (Ossolineum 1977) 320 et seq.

4 Ustawa z dnia 29 grudnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej [Act of 29 December 1989 amending the Constitution of the People's Republic of Poland] [1989] JoL 75, 444 as amended.

5 See M Szydło, *Krajowy parlament jako regulator sektorów sieciowych* [The National Parliament as a Regulator of Network Sectors] (Wolters Kluwer 2013) 26.

6 A broad overview of the differentiated legal position and system of regulatory authorities of the European Union Member States is presented by Waldemar Hoff in his study W Hoff, *Prawny model regulacji sektorowej* [Legal Model of Sector Regulation] (Difin 2008) 167 et seq. As can be seen from this overview, in many cases these are collegiate bodies, but also single-member bodies, whose executive apparatus is organised in the form of an entity without legal personality or with legal personality (including those taking the form of commercial law companies). These are bodies appointed for a term of office (of varying lengths) or without a term of office; they are appointed by the prime minister, the president of a given country, the monarch, or other bodies e.g. by ministers; and some have advisory and consultative bodies, whilst others do not. The scope of jurisdiction of the various bodies also varies. In many cases, the jurisdiction covers matters concerning several sectors of the economy.

the question arises whether there is a "Polish model" of an independent regulatory authority. In order to answer this question, it is first necessary to determine which public administration bodies in Poland can be classified as regulatory bodies, and then to list and characterise the most important elements defining their legal status and system.

2. The concept of regulatory authority

Although numerous legal provisions, at both the EU and national levels, use the term "regulatory authority" or "national regulatory authority" – and sometimes even the term "regulation" is included in the name of the institution – there is no universal definition for a *regulatory authority*. Different ways of distinguishing this type of body have been adopted in the literature on the subject. The most common assumption is that a body which performs a so-called "regulatory function", which is a particular way of intervening in the economy, can be called a regulatory authority. This is because this body applies legal measures primarily of an *ex ante* nature (i.e. anticipating the actions of companies), its decisions are characterised by a significant degree of discretion and it pursues specific objectives which the interference is intended to serve.[7] The objectives of regulation (also referred to as "sectoral regulation") include, on the one hand, creating effective competition on the market and, on the other hand, compensating for its absence in those areas where market competition is not possible, as well as achieving social objectives such as ensuring uninterrupted provision of certain public services.[8] It is pointed out that regulation is a consequence of demonopolisation and privatisation, processes understood as a departure from the state directly providing public services, when private entities take the place of the state and the state, whilst still responsible for the provision of these services, decides to exert a particular influence on the conditions of their provision.[9]

The objectives of regulation are also characterised in a similar way in German legal science, where they are assumed to include "the creation and maintenance of conditions of market competition and, at the same time, the guarantee of access to certain public goods instead of their provision by the state".[10] The legal provisions relevant in this respect are referred to as "regulatory law" (*Regulierungsrecht*), "regulatory administration law" (*Regulierungsverwaltungsrecht*) or "law of the consequences of privatisation" (*Privatisierungsfolgenrecht*).[11]

It should be noted that the notion of regulatory authority in Polish legal science is most often understood to refer to authorities specialised in matters of strictly specified sectors (fields of economic activity). Most often the term *regulatory authority* is used to refer to authorities competent in matters of the so-called infrastructure or network sectors (such as the energy sector).[12]

7 For more on the regulatory function, see K Jaroszyński, M Wierzbowski, 'Organy regulacyjne' [Regulatory Authorities] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Podmioty administrujące* System Prawa Administracyjnego [Entities Administering, Administrative Law System] (CH Beck 2011) 316 et seq.; T Długosz, 'Funkcja regulacyjna' [Regulatory Function] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Publiczne prawo gospodarcze* System Prawa Administracyjnego [Public Economic Law, Administrative Law System] (CH Beck 2013) 697 et seq.

8 Cf W Hoff (2008) 22.

9 So T Długosz (2013) 704.

10 See M Ruffert, 'Begriff' in M Fehling, M Ruffert (eds), *Regulierungsrecht* (Mohr Siebeck 2010) 359.

11 So R Stober, *Besonderes Wirtschaftsverwaltungsrecht. Gewerbe – und Regulierungsrecht, Produkt – und Subventionsrecht* (Kohlhammer 2007) 177 et seq.

12 See T Skoczny, 'Stan i tendencje rozwojowe prawa administracji regulacyjnej w Polsce' [The State and Development Trends of Regulatory Administration Law in Poland] in H Bauer, PM Huber, Z Niewiadomski (eds), *Ius Publicum*

Sometimes the term is also used to refer to authorities competent for the financial services sector.[13] The concept can also be understood in a broader way to include all authorities that perform specialised functions in the economic sphere, including authorities whose jurisdiction is "horizontal" (not relating to strictly defined sectors). On this basis, especially in Western European legal science, the concept of a regulatory authority also includes authorities with jurisdiction over, *inter alia*, environmental protection, product safety, consumer protection and competition protection.[14] The classification of regulatory authorities proposed by Krzysztof Jaroszyński and Marek Wierzbowski combines the above-mentioned approaches. It distinguishes three categories of regulatory authorities functioning in Poland:[15] firstly, authorities whose jurisdiction relates to infrastructure sectors; secondly, authorities whose jurisdiction relates to financial services sectors (banking, insurance and stock exchange services); and thirdly, those competent in matters of competition protection.

The competent authorities for infrastructure sectors in Poland include the President of the Energy Regulatory Office (ERO; for the electricity, gas fuel, heat energy and liquid fuel sectors), the President of the Office of Electronic Communications (OEC; for the postal and telecommunications sector, now referred to as the electronic communications sector), the President of the Railway Transport Office (RTO; for the railway transport sector), the President of the Civil Aviation Office (CAO; for the air transport sector) and the Regional Director of the Water Management Board of the State Water Management Authority (Wody Polskie; for the water supply services sector). The competent authority for the financial services sectors (banking services, insurance services and stock exchange services) is the Financial Supervision Commission (FSC), and for competition protection matters it is the President of the Office of Competition and Consumer Protection (OCCP). It is debatable whether the National Broadcasting Council is a regulatory authority; its task is primarily to protect freedom of speech in radio and television, and not to promote market competition or ensure access to certain services.[16]

It is also accepted in legal science that the category of regulatory authorities does not include competition authorities. It is recognised that the competition protection function is of a different nature to the regulatory function. The differences particularly concern the objectives being pursued. As

Europeum. Dwunaste polsko-niemieckie kolokwium prawników administratywistów, Warszawa 20–22 września 2001. Referaty i głosy w dyskusji [Ius Publicum Europeum. Twelfth Polish-German Colloquium of Administrative Lawyers, Warsaw, September 20–22, 2001. Papers and Voices in the Discussion] (Wydawnictwo Prawo i Praktyka Gospodarcza 2003) 155; M Szydło, *Regulacja sektorów infrastrukturalnych jako rodzaj funkcji państwa wobec gospodarki* [Regulation of Infrastructure Sectors as a Type of State Function Towards the Economy] (Wydawnictwo Prawo i Praktyka Gospodarcza 2005) 289; W Hoff (2008) 153; E Kosiński, 'Regulacja sektorowa. Stałość czy zmienność pojęcia?' [Sector Regulation. Stability or Changeability of the Concept?] in A Powałowski (ed), *Prawne instrumenty oddziaływania na gospodarkę* [Legal Instruments of Influencing the Economy] (CH Beck 2016) 117.

13 See T Nieborak, 'Prawo rynku finansowego Unii Europejskiej' in D Kornobis-Romanowska (ed), *Prawo rynku wewnętrznego* System Prawa Unii Europejskiej [Internal Market Law, The European Union Law System] (CH Beck 2020) 742.

14 See G Majone, 'The Rise of Statutory Regulation in Europe' in G Majone (ed), *Regulating Europe* (Routledge 1996) 47 et seq.; M Fehling, M Ruffert (eds), *Regulierungsrecht* (Mohr Siebeck 2010) 363 et seq.

15 See K Jaroszyński, M Wierzbowski (2011) 312 et seq.

16 Krzysztof Jaroszyński and Marek Wierzbowski recognise that among the competences of the National Broadcasting Council there is a preponderance of those which cannot be regarded as regulatory – see ibid., 313. A different position is presented by Zbigniew Kmieciak, who recognises the aforementioned organ as a regulatory body, primarily due to its specific forms of activity (the possibility to issue general acts and a constitutionally guaranteed independent position – see Z Kmieciak, 'Niezależne organy regulacyjne (aspekt prawnoporównawczy)' [Independent Regulatory Authorities (Comparative Law Aspect)] in J Boć, A Chajbowicz (eds), *Nowe problemy badawcze w teorii prawa administracyjnego* [New Research Problems in the Theory of Administrative Law] (Kolonia Limited 2009) 19.

mentioned above, regulation not only serves the development of market competition, but also pursues certain social objectives by ensuring wide access to certain services. These are public services, and they should therefore be affordable, of sound quality and provided to their users on a strictly defined basis. There are also differences in the way competition law and regulatory law are applied.[17] The protection of competition (counteracting restrictive practices) is implemented primarily on the basis of follow-up actions to the actions of companies. Indeed, the competition authorities' rulings are assessments of actions that have already taken place (infringements). However, it should be added that, to a certain extent, the protection of competition also requires pre-emptive (*ex ante*) actions, particularly in cases of controlling concentrations of businesses.[18] In the case of regulation, as mentioned above, its essence is to produce a specific effect in future, and therefore the regulator takes actions (including issuing decisions) that precede and define the desired behaviour of companies.

3. Construction of the "independence" of the regulator

According to Zbigniew Kmieciak, the construction of an independent regulatory body excludes the existence of any subordination of organisational and official type. Such bodies are supposed to perform the tasks entrusted to them independently of the entities which made the act of appointment as the head of a given body or as a member of a collegial body heading a given body.[19] However, an independent regulatory body is not an autonomous body. In the light of the legal provisions in force in Poland, it may be subject to certain supervisory powers from the Prime Minister or certain ministers, serving to coordinate its activities with the government's economic policy and maintaining consistency with it.[20] It is debated in the German literature whether the EU requirements for the independence of certain bodies should result in their exclusion from the ministerial right to issue orders, which is considered an integral part of the constitutional principle of democracy. Eberhard Schmidt-Aβmann, however, considers that although the democratic principle requires that all administrative hubs have a sufficient level of (democratic) legitimacy, the right to issue instructions is only one of many means to ensure it.[21] Other means may also be used, provided they have similar steering effects (e.g. parliamentary control). In the author's opinion, it should therefore – on the basis of German constitutional law – be considered permissible to have bodies that are not subject to instructions.[22] By way of comparison, the regulations in force in Poland provide that certain regulatory bodies may be the addressees of instructions and guidelines in order to adapt their principles and courses of action to the policy set by the Council of Ministers,

17 For more on the differences between competition protection and sectoral regulation, see T Skoczny, 'Ochrona konkurencji a prokonkurencyjna regulacja sektorowa' [Competition Protection and Pro-competitive Sector Regulation] (2004) Problemy Zarządzania vol. 3, 16 et seq.; M Szydło, *Prawo konkurencji a regulacja sektorowa* [Competition Law and Sector Regulation] (Wolters Kluwer 2010).

18 For an extensive overview on this topic, see M Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców* [The System of Antitrust Proceedings in Matters of Control of Concentration of Entrepreneurs] (Urząd Ochrony Konkurencji i Konsumentów 2012).

19 Z Kmieciak (2009) 17.

20 For more on this topic with regard to the President of the ERO, see M Swora, 'Organ do spraw regulacji gospodarki paliwami i energią' [Fuel and Energy Management Regulatory Body] in M Swora, Z Muras (eds), *Prawo energetyczne. Tom II: Komentarz do art. 12–72* [Energy Law. Volume II: Commentary to Articles 12–72] (Wolters Kluwer 2016) 180.

21 See E Schmidt-Aβmann, *Dogmatyka prawa administracyjnego. Bilans rozwoju, reformy i przyszłych zadań* [Dogmatics of Administrative Law: A Balance Sheet of Development, Reform and Future Tasks] (Wolters Kluwer 2022) 231.

22 Ibid.

but these guidelines and instructions may not concern "decisions on the merits of the case being settled by means of an administrative decision".[23]

In many cases, the authority concerned must be independent according to European Union law. The requirement of independence has been extended by EU law to national authorities responsible for electricity,[24] natural gas,[25] electronic communications,[26] post,[27] rail transport[28] and competition authorities.[29] The exclusion of certain authorities from the ties of hierarchical dependence may also result from a decision of a given country resulting from the fact that such a solution is standard in EU countries.[30] One example is the Financial Supervision Authority (FSA): this body's high degree of independence from the government and government administration has also been confirmed in the jurisprudence of the Constitutional Court.[31] On the other hand, EU regulations do not impose an obligation to create independent regulatory bodies in the water sector (the aforementioned Wody Polskie is such a body), whilst limited independence requirements are in force for the body competent for the aviation sector.[32] As a result, Polish regulations have not given the President of the CAO the status of an independent regulatory authority (they do not include the principle of appointing this authority for a specific term of office).

The EU's requirements for the independence of regulatory and competition authorities are designed to ensure that their decisions are independent of day-to-day political interests as well as the possible influence of the entities (businesses) they regulate, both private and public.[33] It should be noted here that in many sectors, state-owned companies and enterprises still hold a significant position, and sometimes even a monopoly. The independence of the authority is therefore also intended to limit the risk of favouring state sector entities at the expense of the private sector. As Teresa Rabska put it, the monopolistic

23 This is provided for in Article 34a of the ustawa z dnia 8 sierpnia 1996 r. o Radzie Ministrów [Act of 8 August 1996 on the Council of Ministers] [2022] JoL 1188.

24 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market in electricity and amending Directive 2012/27/EU [2019] OJ L 158, 125).

25 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L 211, 94.

26 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L 321, 36.

27 Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1997] OJ L 115, 71.

28 Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area [2012] OJ L 343, 32.

29 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to enforce the law more effectively and to ensure the proper functioning of the internal market [2018] OJ L 11, 3.

30 See Explanatory Memorandum to the Draft Law on Financial Market Supervision of 7 June 2006, Parliamentary Print No. 654, 1, <https://orka.sejm.gov.pl/Druki5ka.nsf/0/86174E62FCBBFD0CC1257187004C4DC0/$file/654.pdf> accessed 19 Aug 2024.

31 See Judgment of the Polish Constitutional Tribunal of 15 June 2011, K 2/09 (2011) OTK-A 42.

32 See Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency; Aviation Safety and amending Regulations of the European Parliament and of the Council (EC) No. 2111/2005, (EC) No. 1008/2008, (EU) No. 996/2010, (EU) No. 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council and repealing Regulations (EC) No. 552/2004 and (EC) No. 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No. 3922/91 [2018] OJ L 212, 1.

33 Cf M Swora, *Niezależne organy administracji* [Independent Administrative Bodies] (Polskie Wydawnictwo Ekonomiczne 2012) 167.

structure of the economy is usually linked to the centralist arrangement of the state administration. The democratisation of the economy consequently requires the democratisation and decentralisation of management, whilst the sovereign and ownership powers of the state should be separated.[34]

EU requirements for the independence of regulators have evolved as liberalisation has progressed and competition has developed in regulated areas, as evidenced in particular by the rules for the electricity and natural gas sectors.[35] Initially, there was only the requirement that Member States delegate tasks related to the implementation of the internal market rules for electricity and natural gas to "designated authorities". Later on, there was the requirement for these bodies to be "completely independent from the interests of the electricity industry" and "the gas industry". It was not until subsequent directives specific to the aforementioned sectors were introduced that the competent authorities in these matters were required to act not only independently of "any market interest", but also for their decisions to be "independent of any political entity". Consequently, these directives and directives relating to other regulated sectors adopt specific legal solutions to guarantee such independence. They concern the rules for appointing and dismissing persons in charge of the regulator (the EU rules most often require that they be appointed for a specific term) and for the regulator and its staff to operate independently of any public or private entity. The directives further require that the independent regulatory authority is equipped with adequate human and financial resources to fulfil its tasks and competences effectively, has separate resources in its annual budget and is independent in the execution of its allocated budget.[36]

An extremely important issue, however, is the accountability of independent administrative bodies. Mateusz Błachucki, analysing the example of a competition authority, notes that this issue is often not properly exposed.[37] Meanwhile, accountability should be seen as an indispensable complement to independence. This may imply the imposition of specific requirements as regards the qualifications of the person holding the authority as well as the staff of the authority subordinated to it, guarantees for preventing conflicts of interest, various forms of control over actions, including the obligation to regularly report on actions taken. The independence of the authority in question also does not exempt it from the control exercised by the Supreme Chamber of Control, the State Labour Inspectorate or the Public Finance Discipline Commission.[38]

An issue closely related to the independence of regulatory and competition authorities is their increasing interconnection with decision-making processes involving other Member States, the

34 Cf T Rabska, 'Gospodarka rynkowa i jej zasady' [Market Economy and its Principles] in P Kaczkowski (ed), *Konstytucja i gospodarka* [Constitution and Economy] (Societas 1995) 88 et seq. Under European Union law, the principle of separation of sovereign and proprietary powers is expressed in the directives concerning infrastructure sectors. See in particular Article 6(1) of Directive 2018/1972, according to which Member States that retain ownership or control of undertakings providing electronic communications networks or services are required to ensure effective structural separation of regulatory functions from activities associated with the exercise of ownership or control.

35 For a more detailed discussion, see P Lissoń, 'Rynek energetyczny' [Energy Market] in D Kornobis-Romanowska (ed), *Prawo rynku wewnętrznego* System Prawa Unii Europejskiej [Internal Market Law, The European Union Legal System] (CH Beck 2020) 596 et seq.

36 This is now specifically provided for in Article 9(1) and (2) of Directive 2018/1972 and Article 57(5) of Directive 2019/944.

37 See M Błachucki, 'Niezależność organów administracji publicznej na przykładzie ewolucji statusu prawnego Prezesa UOKiK' [Independence of Public Administration Bodies as Exemplified by the Evolution of the Legal Status of the President of the Office of Competition and Consumer Protection] (2019) Acta Universitatis Wratislaviensis. Prawo vol. 329, 271.

38 Ibid., 272.

European Commission and specialised EU bodies and agencies. This interconnected framework is commonly referred to as the "network administration". Although these bodies maintain their independence within the national system, their national authority – as Irena Lipowicz observes – is becoming increasingly subordinate to European authority. This shift can be seen as part of the erosion of state sovereignty, as states cede some of their executive power to broader European structures.[39] There is also a risk of blurring accountability for decisions taken within the network administration.[40]

4. Features of independent regulatory authorities in Poland

A detailed analysis of the legal provisions concerning the status and regulatory framework of independent regulatory authorities in Poland is presented below. Since similar solutions are applied to the body responsible for competition protection – the OCCP, which is sometimes classified as a regulator in a broader sense – the provisions concerning this body are also examined. For the sake of clarity and simplicity in the discussion, the OCCP will be referred to as a regulatory body.

4.1. Predominance of single-person authorities

Polish regulatory authorities are overwhelmingly one-person (monocratic) bodies, appointed through open and competitive recruitment by the Prime Minister. This applies to the Presidents of the ERO,[41] the RTO[42] and the OCCP.[43] The President of the OEC is appointed in a special way, namely by the Sejm following nomination by the Prime Minister.[44] Again, the appointment is made by way of open and competitive recruitment. Against this background, the authority competent for financial services sectors, the FSA, stands out. This is because it is the only collegiate regulatory body in Poland; it is composed of 13 persons, including the Chairman and three Deputy Chairmen appointed by the Prime Minister.[45] The other members of the FSA represent the supreme and central state authorities specified in the Act.[46] The dissimilarity of the FSC from

39 See Irena Lipowicz, 'Europeizacja i modernizacja. Administracyjnoprawne aspekty zmian polskiej administracji publicznej' [Europeanization and Modernization: Administrative and Legal Aspects of Changes in Polish Administration] in I Lipowicz (ed), *Europeizacja administracji publicznej* (Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego 2008) 27.

40 See I Lipowicz, 'Europeizacja administracji publicznej' [Europeanization of Public Administration] (2008) Ruch Prawniczy, Ekonomiczny i Socjologiczny vol. 1, 6 et seq.

41 Article 21(2a) of the ustawa z dnia 10 kwietnia 1997 r. – Prawo energetyczne [Act of 10 April 1997 – Energy Law] [2022] JoL 1385 as amended (hereinafter "EP Act").

42 Article 11(1) of the ustawa z dnia 28 marca 2003 r. o transporcie kolejowym [Act of 28 March 2003 on Railway Transport] [2023] JoL 602 (hereinafter "u.t.k.").

43 Article 29(3) of the ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów [Act of 16 February 2007 on the Protection of Competition and Consumers] [2021] JoL 275 as amended (hereinafter "u.o.k.ik.").

44 Article 190(4) of the ustawa z dnia 16 lipca 2004 r. Prawo telekomunikacyjne [Act of 16 July 2004 Telecommunications Law] [2022] JoL 1648, as amended (hereinafter "PT Act").

45 This is provided for in Articles 7(1) and 9 of the ustawa z dnia 21 lipca 2006 r. o nadzorze nad rynkiem finansowym [Act of 21 July 2006 on Financial Market Supervision] [2022] JoL 660 as amended (hereinafter "UNF").

46 Pursuant to Article 5(2) UNF, the members of the FSC include representatives of the President of the Republic of Poland, the Prime Minister, the Bank Guarantee Fund, the President of the OCCP, the minister in charge of coordinating special services (or, when such has not been designated, the Prime Minister) and ministers or representatives of ministers in charge of financial institutions, the economy, social security and the President of the National Bank of Poland (NBP) or a member of the NBP Management Board delegated by him.

the other regulatory bodies can be explained by the historical origins of this institution, which took over the tasks and competences previously held by three separate bodies, each of which was also a collegiate body. Established by the 2006 Act. Indeed, the FSC replaced the seven-member Banking Supervision Commission,[47] the five-member Insurance and Pension Funds Supervision Commission[48] and the nine-member Securities and Exchange Commission.[49]

The powers vested in the regulatory authority may also be exercised by vice-presidents or deputies, who act on behalf of and on the authority of the regulatory body. These individuals are appointed through an open and competitive recruitment process, similar to the appointment of the regulatory authority itself. In three instances, these appointments are made by the Prime Minister. For example, the President of the RTO has two Vice-Presidents, who are appointed by the Prime Minister upon the nomination from the President of the RTO.[50] The Vice-Presidents of the OCCP are appointed in a similar manner, namely by the Prime Minister upon the nomination from the President of the OCCP. The legislation does not specify the number of Vice-Presidents.[51] Currently, the OCCP does not have any, although previously there were two (one responsible for competition protection matters and the other for consumer protection matters). The same rules apply to Deputy Chairpersons of the OCC, who are appointed by the Prime Minister upon the proposal of the Chairperson of the OCC.[52] Different rules of appointment apply to the deputies of the President of the OEC and the Vice-President of the ERO, as they are not appointed by the Prime Minister. The deputies of the President of the OEC (for telecommunications matters and for postal matters) are appointed by the minister in charge of informatisation upon a motion by the President of the OEC.[53] Against the background of these solutions, the Vice-President of the ERO is appointed in an exceptional way, not by the Prime Minister nor by any minister, but by the President of the ERO.[54] The competence of the ERO President in this respect is stronger than that of any of the other regulatory authorities.

4.2. Tenure

The Polish regulators are appointed for a term of office, and the legislature adopted the principle that the term of office is five years (the issue of renewing the term of office is presented later in the discussion). This applies to the Presidents of the ERO, the OEC and the RTO, and legislation is currently under way to extend this principle to the President of the OCCP as well.[55]

47 The composition of the FSC is determined by Article 26(1) of the ustawa z dnia 29 sierpnia 1997 r. o Narodowym Banku Polskim [Act of 29 August 1997 on the National Bank of Poland] [2022] JoL 2025 as amended.

48 The composition of the OCCP is determined by Article 9(1) of the ustawa z dnia 22 maja 2003 r. o nadzorze ubezpieczeniowym i emerytalnym [Act of 22 May 2003 on Insurance and Pension Supervision] [2024] JoL 583 as amended.

49 The composition of the SEC is determined by Article 14(1) of the ustawa z dnia 21 sierpnia 1997 r. – Prawo o publicznym obrocie papierami wartościowymi [Act of 21 August 1997 – Law on Public Trading in Securities] [1997] JoL 118, 754 as amended.

50 Article 11(9) u.t.k.

51 Article 30(1) u.o.k.ik.

52 Article 9 UNF.

53 Article 190(8) PT Act.

54 Article 21(5) EP Act.

55 This refers to Article 1(8)(a) of the Draft Act amending the Competition and Consumer Protection Act and certain other Acts of 31 January 2023, Parliamentary Print No. 2990, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/DADF58847536C14EC125894800411FF0/%24File/2990.pdf> accessed 19 Aug 2024 (hereinafter "Act amending the u.o.k.ik.").

The situation is different with regard to the FSA, as it is a collegial body whose members are not appointed for a specific term of office. However, analogies can be found to the rules applicable to other regulatory bodies, as the Chairman of the FSA is also appointed for a five-year term.[56] On the other hand, different rules have been adopted with regard to renewing the term of office. In the case of the President of the ERO, the term of office may be renewed once.[57] An analogous principle is soon to be extended to the President of the OCCP.[58] In the case of the President of the RTO, the term of office may also be renewed once, but the regulations do not stipulate that this may be done *only* once.[59] It can therefore be assumed that multiple renewals of the term of office are possible for this body. The situation is different for the President of the OEC[60] and the Chairman of the PFSA,[61] for whom the legislature did not provide for the possibility of renewing their five-year term of office. The Prime Minister is entitled to dismiss the aforementioned authorities (the Presidents of the ERO, the OEC, the RTO and the FSA) before the end of their term of office. Such a situation may occur only for strictly defined, exceptional reasons (such as gross violation of the law, conviction by a final court judgement for an intentional crime or fiscal crime, circumstances that affect the independent performance of functions, illness that permanently prevents the performance of tasks or the submission of resignation). The amended provisions will also specify the prerequisites for premature dismissal of the President of the OCCP.[62] With regard to the President of the OEC and of the OCCP, the legislature has also provided that the person performing this function may be dismissed if facts are disclosed indicating that they do not fulfil the conditions set when they were appointed to the position of a regulatory authority.[63] As a rule, however, no term of office is provided for vice-presidents and deputies of regulatory bodies (this applies to Vice-Presidents of the RTO and the OCCP and to Deputies of the Presidents of the OEC and of the FSA). A Vice-President of the ERO has an exceptional status, as they are appointed (by the President of the ERO) for a five-year term and may be reappointed once more.[64] In contrast, the EP Act provides that the ERO President may dismiss the ERO Vice-President before the end of their term. However, the provisions do not specify any reasons for such dismissal.[65]

The Polish legislature is consistent as regards the length of the term of office of regulatory bodies (five years). Meanwhile, the EU legislature has defined the permissible term of office of individual regulators in different ways. Thus, Directive 2019/944, concerning the electricity sector, provides for the possibility to appoint members of the board of the regulatory authority or, in the absence of a board, the top management of the regulatory authority, for a fixed term of five to seven years, with the possibility of one renewal.[66] An analogous solution is provided for in Directive 2009/73/EC, concerning the natural gas sector.[67] Directive 2018/1972, on the electronic communications sector, on the other hand, stipulates that the head of the national regulatory authority – or, where applicable, the members of the collegiate body exercising that function in the national regulatory authority or their alternates – shall be

56 Article 7(1) UNF.
57 Article 21(2l) EP Act.
58 Article 1(8)(a) Act amending the u.o.k.ik.
59 Article 11b(1) and (2) u.t.k.
60 Article 190(4) PT Act.
61 Article 7(1) UNF.
62 Article 1(8)(d) Act amending the u.o.k.ik.
63 With regard to the President of the OEC, this is provided for in Article 190(4ac) PT Act, and with regard to the President of the RTO in Article 11b(4) u.t.k.
64 Article 21(5b) EP Act.
65 Article 21(5) EP Act.
66 Article 57(5d) Directive 2019/944.
67 Article 39(5)(b) Directive 2009/73/EC.

appointed for a minimum term of three years. By contrast, Directive 2012/34/EU, on the rail transport sector, addresses the issue of tenure in a rather general manner. Indeed, it provides that Member States shall decide whether the regulatory body is appointed for a fixed term with the possibility of renewal or for a permanent term.[68] Directive 2019/1, concerning the competition authorities of the Member States, also addresses the issue of tenure in very general terms. It stipulates that the heads of the national administrative competition authorities may be appointed for a term of office or (non-permanently) employed.[69] In contrast, Directive 97/67/EC, concerning the postal sector, does not address the issue of the tenure of the regulator at all.[70]

4.3. Multisectionality

The Polish legislature has generally allocated the tasks and competences of regulatory authorities in a manner that reflects a multisectoral approach. This means that these authorities are assigned responsibilities across multiple sectors rather than focussing on just one. The principle involves assigning tasks and competences to authorities that oversee sectors with interrelated functions or similar characteristics. For example, the President of the OEC oversees both the postal and telecommunications sectors, whilst the President of the ERO is responsible for the gas, electricity, heat and liquid fuel sectors. Similarly, the FSA covers the banking, insurance and securities sectors. In contrast, the President of the RTO has jurisdiction limited to a single sector: rail transport. The OCCP, by nature, operates as a multisectoral body, given its broad mandate to oversee competition and consumer protection across various sectors.

In other European countries there are both regulatory bodies whose sectoral jurisdiction is comparable to that of Polish regulators (e.g. the UK Office of Gas and Electricity Markets; Ofgem[71]) and regulatory bodies whose jurisdiction is incomparably broader than that of any of the Polish regulators. An example is the German Federal Network Agency (*Bundesnetzagentur*), which has jurisdiction over regulation in the electricity, natural gas, postal, telecommunications and rail transport sectors.[72] An even more "sectorally capacious" body is the Spanish National Commission for Markets and Competition (*Comisión Nacional de los Mercados y la Competencia*) with jurisdiction over the electricity, liquid fuel, biofuel, natural gas, post, telecommunications, air transport, radio and television and competition sectors.[73] Against the background of these bodies, the method adopted by the Polish legislature of allocating tasks and competences within a single regulatory body can be considered rather cautious. In the literature, however, the thesis is put forward that one regulatory body covering a wider range of matters than a single sector may be beneficial if the legislature also creates general principles, common for all sectors within the competence of this body, on which interference in the activities of entities subject to regulation will be based.[74]

68 Article 55(3), second subparagraph Directive 2012/34/EU.
69 Recitals 18–20 Directive 2019/1.
70 See Article 22 et seq. Directive 97/67/EC.
71 'Welcome to Ofgem', <https://www.ofgem.gov.uk/> accessed 1 Feb 2023.
72 'Homepage', <https://www.bundesnetzagentur.de/cln_121/DE/Home/home_node.html> accessed 1 Feb 2023.
73 'What is the CNMC', <https://www.cnmc.es/sobre-la-cnmc/que-es-la-cnmc> accessed 1 Feb 2023.
74 So J Masing, *Soll das Recht der Regulierungsverwaltung übergreifend werden?* (CH Beck 2006) 189.

4.4. The way the enforcement apparatus is organised

The executive (clerical) apparatus of Polish regulators is organised in almost all cases in the form of a state budget unit (this refers to the Presidents of the ERO, the OEC, the RTO and the OCCP). The term denotes an organisational unit of the public finance sector without legal personality, whose expenses are paid directly from the budget and who transfers any revenues collected to the state budget revenue account.[75] A different solution has been adopted only in the case of the FSC, whose executive apparatus takes the form of a state legal entity.[76] Thus, it can be said that the Polish legislature, with regard to regulatory bodies, prefers the traditional model of organising the executive apparatus. The form of a legal entity would likely create the possibility of more flexible rules regarding the remuneration for the regulatory authority's employees. In this respect, original solutions were provided for by the EP Act in its first years. This is because the rules for the remuneration of ERO employees were determined "taking into account the remuneration in the fuel and energy sector", without applying the provisions on the formation of remuneration funds in the state budget sphere.[77] Over time, however, the legislature withdrew these solutions.[78]

4.5. The nature of proceedings before regulatory authorities and judicial review of the decisions taken by them

Another common feature of regulatory authorities in Poland is the nature of the proceedings conducted before them. In each of the analysed cases, these proceedings are single-instance administrative proceedings. This is because the laws defining the tasks and competences of individual regulatory bodies do not provide for a higher-level administrative body to which an appeal against the decisions of the regulatory bodies could be made. Additionally, there are no subordinate or lower-level bodies beneath the regulatory authorities. In other words, regulatory bodies in Poland function as central authorities, and Polish law does not establish subordinate field regulatory bodies. Appeals against the decisions of the President of the ERO, the President of the OEC, the President of the RTO and the President of the OCCP are therefore directed to the courts rather than to a second administrative instance.

Based on Article 177 of the Constitution of the Republic of Poland[79] (presumption of jurisdiction of common courts[80]) and Article 184 (jurisdiction of administrative courts[81]), it should be recognised that in the Polish legal order the function of exercising control over the activity

75 This is how state budget units are defined by Article 11(1) of the ustawa z dnia 27 sierpnia 2009 r. o finansach publicznych [Act of 27 August 2009 on Public Finances] [2022] JoL 1634 as amended.

76 Article 3(1) UNF.

77 Article 29 of the ustawa z dnia 10 kwietnia 1997 r. – Prawo energetyczne [Act of 10 April 1997 – Energy Law] [2022] JoL 1385 as amended.

78 The content of Article 29 EP Act was amended by Article 23 of the ustawa z dnia 23 grudnia 1999 r. o kształtowaniu wynagrodzeń w państwowej sferze budżetowej oraz o zmianie niektórych ustaw [Act of 23 December 1999 on the Formation of Remuneration in the State Budget Sphere and on the Amendment of Certain Acts [1999] JoL 110, 1255.

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

80 This provision states: "The ordinary courts shall administer justice in all cases, except for cases statutorily reserved for the jurisdiction of other courts."

81 This provision (first sentence) states that the Supreme Administrative Court and other administrative courts shall, to the extent specified by law, exercise control over the activities of the public administration.

of public administration belongs, as a rule, to administrative courts.[82] However, some strictly defined public administration cases have been included by the legislature in the jurisdiction of common courts. Such a solution has been applied to the decisions of the majority of regulatory bodies, which is another shared feature.[83] Pursuant to the provisions of the Code of Civil Procedure (CCP),[84] cases of appeals against decisions of the President of the OCCP and complaints against the decisions of this body (Arts 479–479[2835] CCP), appeals against decisions of the President of the ERO and complaints against the decisions of this body (Arts 479–479[4656] CCP), appeals against decisions of the President of the OEC and complaints against the decisions of this body (Arts 479–479[5767] CCP), appeals against the decisions of the President of the RTO and complaints against the decisions of this body (Arts 479–479[6878] CCP) and appeals against certain decisions of the Regional Director of Wody Polski and complaints against the decisions of this body (Arts 479–479[7988] CCP) are heard by a division of the District Court in Warsaw: Sąd Ochrony Konkurencji i Konsumentów (SOKiK). From the judgments of this court, the party to the proceedings and the administrative body (regulator), is entitled to appeal to the Court of Appeal, and then a cassation appeal to the Supreme Court. The President of the OCCP may also use a special measure to overturn a final judgment of the Court of Appeal. This is an extraordinary complaint addressed to the Supreme Court.[85] As for the FSA, its proceedings are administrative in nature, similar to those of other regulatory bodies. However, judicial review of FSA decisions is carried out by administrative courts – specifically, the Voivodeship Administrative Court in the first instance and the Supreme Administrative Court in the second instance. This procedural distinction sets the FSA apart from other regulatory bodies.

5. Conclusions

The findings presented herein lead to the conclusion that the Polish legislature has identified two models for independent regulatory authorities. The dominant model is characterised by a one-person authority appointed by the Prime Minister for a five-year term, jurisdiction spanning multiple sectors (with the RTO being an exception), an executive apparatus organised as a state budgetary unit, single-instance administrative proceedings and judicial review of decisions by the authority (with oversight by the Voivodeship Administrative Court, which can decide on the merits of the case). Currently, four authorities fit this model: the President of the ERO, the President of the OEC, the President of the RTO and, regarding appointments, the President of the OCCP.

The second model is represented by the FSA. This model features a collegiate body with jurisdiction over multiple sectors. Members of the FSA are not appointed for a fixed term (only the

82 Cf R Hauser, 'Konstytucyjny model polskiego sądownictwa administracyjnego' [The Constitutional Model of Polish Administrative Justice] in J Stelmasiak, J Niczyporuk, S Fundowicz (eds), *Polski model sądownictwa administracyjnego* [The Polish Model of Administrative Justice] (Verba 2003) 145.

83 For more on this topic, see P Lissoń, 'Polski model sądowej kontroli administracji z perspektywy publicznego prawa gospodarczego' [The Polish Model of Judicial Control of Administration from the Perspective of Public Economic Law] in P Lissoń, M Strzelbicki (eds), *Państwo a gospodarka. Zasady – instytucje – procedury. Jubilee book dedicated to Professor Bożena Popowska* [The state and the economy. Rules – institutions – procedures. Jubilee book dedicated to Professor Bożena Popowska] (Wydawnictwo Poznańskie 2020) 474 et seq.

84 Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [Act of 17 November 1964 – Code of Civil Procedure] [2021] JoL 1805 as amended.

85 This is provided for in Article 89(2) of the ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym [Act of 8 December 2017 on the Supreme Court] [2021] JoL 1904 as amended.

Chairman is appointed for a term), and its executive apparatus is organised as a state legal entity. Proceedings before the FSA are single-instance administrative proceedings, with judicial review being conducted by the administrative courts.

The upcoming provisions, which establish the term of office for the President of the OCCP and introduce detailed rules regarding the independence of the President, Vice-Presidents and employees of this body[86] – which is unprecedented in the Polish legal system –can be read as an expression of the trends of the above-described dominant model of an independent regulatory authority. It should be added, however, that the Polish legislature has already more than once repealed provisions providing for the tenure of independent regulatory bodies,[87] subsequently re-establishing such provisions. Perhaps Peter M. Huber is right in his view that independent administrative bodies are in a sense a "foreign body" in the public administration of European countries, and in any case they cannot be categorised as "traditional administrative bodies".[88] It can be asserted that Polish legislation has established a model of independent regulatory authorities and competition authorities, which has evolved over the years and is characterised by recurring features related to the legal position and structure of these bodies. This dominant model is defined by specific characteristics in terms of authority and organisation.

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86 This concerns the content of Article 1(11) Act amending the u.o.k.ik. Pursuant to this provision, the following shall be added to the SCA after Article 34: "Article 34a. (1) The President of the Office, the Vice-Presidents of the Office and the employees of the Office shall: 1) perform their duties and powers independently of political and other external influences; 2) not seek or accept instructions from government authorities or any other public or private entity in the performance of their duties and powers; 3) refrain from any action that could result in a conflict of interest. (2) The President of the Office, the Vice-Presidents of the Office and the employees of the Office who were involved in the issuance of the decision shall not, for a period of 3 years after the termination of their functions or employment with the Office, be involved in the same matter."

87 Provisions of the ustawa z dnia 24 sierpnia 2006 r. o państwowym zasobie kadrowym i wysokich stanowiskach państwowych [Act of 24 August 2006 on State Human Resources and High State Positions] [2006] JoL 170, 1217 repealed the tenure of office of the Presidents of the ERO, the OEC, the RTO, the OCCP and the FSA. When, on the basis of the provisions of the u.o.k.ik. enacted in 2007, the President of the OCCP was again to become a tenure-appointed body, the provisions of the ustawa z dnia 13 kwietnia 2007 r. o zmianie ustawy o ochronie konkurencji i konsumentów i ustawy o ochronie konkurencji i konsumentów i ustawy o państwowym zasobie kadrowym i wysokich stanowiskach państwowych [Act of 13 April 2007 on Competition and Consumer Protection and the Act on State Human Resources and High State Positions] [2007] JoL 99, 660 again repealed such provisions before they came into force.

88 See PM Huber, 'Grundzüge des Verwaltungsrecht in Europa – Problemaufriss und Synthese' in A von Bogdandy, S Cassese, PM Huber (eds), *Handbuch Ius Publicum Europaeum, Band V: Verwaltungsrecht in Europa: Grundzüge* (C.F. Müller 2014) 24.

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