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THE EFFICIENCY OF ADMINISTRATIVE COURTS (IN THE LIGHT OF EUROPEAN AND POLISH EXPERIENCES)

Abstract

In the cassation-type model of administrative jurisdiction, administrative courts in principle only investigate the administrative body's compliance with the law. The main weakness of this adjudication model is that the same case is consecutively heard by administrative authorities and administrative courts (of various instances), without a final decision being issued. However, the stereotype of a court coined in another epoch as a purely cassation-type body must not obscure the challenges of our times. A lot has changed in the world since then, and the ever-growing dependence of the individual on administration (public service) is its visible symptom. Effective protection of the interests of the former now requires the use of more diversified control tools affording a remedy sooner and at a lower cost, and, in specific situations, also allowing administrative courts to decide cases on their merits.

Keywords

Judicial review of administration – efficiency of administrative justice – proceedings before administrative courts – cassation-type model of administrative jurisdiction – merits review

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I.

One of the four basic requirements considered by the European Committee on Legal Cooperation of the Council of Europe to be an element of the right to judicial control of public administration is affording an effective remedy. Other requirements that the Committee has placed in this group of standards are: 1) an independent and impartial court established by an act of parliament, which reviews at least the lawfulness of the administrative act, 2) a fair hearing within a reasonable time, 3) fair and public proceedings during which the dispute between a natural person and an administrative authority is heard¹. The list above, reflecting the principles derived by the European Court of Human Rights in Strasbourg (ECHR) from Article 6 sec. 1 of the European Convention on Human Rights and Fundamental Freedoms (EC), has taken shape through the provisions of the recommendation Rec(2004)20 of the Committee of Ministers to Member States of the Council of Europe on the judicial review of administrative acts. It links the effectiveness of judicial review with the standards of providing the court with appropriate means of redress, including the quashing of the disputed administrative act and referring it back to the administrative authority to take a new decision that complies with the judgement and, where appropriate, decide about compensation and ensure effective execution of the court's judgement, in compliance with the Committee's recommendation Rec(2003)16 on the execution of administrative and judicial decisions in the field of administrative law².

According to the second of the recommendations referred to above, the efficiency of judicial review is identified with both, achieving the appropriate result of the review of the act (omission) of an administrative authority and getting to a lawful state of affairs, following a court judgement arising from the lodged plaint. From the point of view of the former aspect, the review is efficient if the court, respecting the

¹ Cf. Council of Europe's Project Group on Administrative Law, *Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons*, Strasbourg: Council of Europe Pub. 1996, p. 29.

² More on this in: J. Chlebny, *Standardy Rady Europy i Europejskiego Trybunału Praw Człowieka w procedurze administracyjnej i sądowej administracyjnej* [Standards of the Council of Europe and of the European Court of Human Rights in Administrative and Administrative Court Procedure], [in:] Z. Kmieciak (ed.), *Postępowanie administracyjne w Europie* [Administrative Procedure in Europe], Warszawa: Wolters Kluwer Polska 2010, pp. 31–42.

procedural rules, applies a remedy that is proportionate to the breach of law that has occurred, or – if no such breach has been found – dismisses the plaintiff as ungrounded. Depending on the formula of the remedy afforded, the judgement may finally decide the case, e.g., by awarding the plaintiff compensation, acknowledging the existence of a right or obligation, or by injunction stopping the administrative authority from a specified act (full remedy action also referred to as *contentieux de pleine juridiction*). It may, however, create premises only for the case to be resolved by the relevant administrative authority (action for annulment or *contentieux de l'annulation*)³. In a situation that is typical of the Polish system of administrative courts, where a judgment acknowledging the legitimacy of the plaintiff creates an interim legal situation (effecting the purpose of the review requires a new administrative act) the basic problem is prompt and full execution of the judgment. Only if this condition is met, can we talk about the external efficiency of the review. This should be distinguished from the internal efficiency, associated with satisfying a number of standards of court proceedings, set out by the constitution and conventions ratified by Poland, before the judgment is passed⁴. Judgments of the Polish Constitutional Tribunal do not explicitly treat the efficiency of protection as constituent of the right to have one's case heard by an independent court, yet – as highlighted in the literature of the subject – it may be seen as derived from one of the constituents of this right, namely the right to appropriate court proceedings⁵.

³ The two co-existing and complementary jurisdiction models are studied especially by French and British writers – cf. e.g., R. Chapus, *Droit du contentieux administratif*, Paris: Montchrestien 2001, p. 187 et seq.; J.-C. Ricci, *Contentieux administratif*, Paris: Hachette 2007, p. 41 et seq.; A. Carroll, *Constitutional and Administrative Law*, Edinburgh 2002, p. 269 et seq., 329 et seq.; W. Wade, C. Forsyth, *Administrative Law*, Oxford, New York: Oxford University Press 2009, p. 473 et seq. In the context of *recours objectif* and *recours subjectif* it is discussed by A. J. Bok, *Judicial Review of Administrative Decisions by the Dutch Administrative Courts: Recours Objectif or Recours Subjectif? A Survey Including French and German Law*, [in:] F. Stroink, E. van der Linden (eds), *Judicial Lawmaking and Administrative Law*, Antwerp: Intersentia 2005, p. 153 et seq. A survey of solutions applied in Europe is to be found in: Council of Europe's Project Group on Administrative Law, *supra* note 1, pp. 173–198.

⁴ More on this distinction – cf. Z. Kmiecik, *Efektywność sądowej kontroli administracji publicznej* [The Efficiency of the Judicial Control over Public Administration], Państwo i Prawo [State and Law] 2010, no. 11, p. 22.

⁵ Similarly in, among others: A. Kubiak, *Konstytucyjna zasada prawa do sądu w świetle orzecznictwa Trybunału Konstytucyjnego* [Constitutional Principle of the Right to Court in the Light

II.

Ensuring the appropriate level of external efficiency of judicial control of public administration is, basically, about actions for annulment, and decisions are made on the premises of an annulment type of jurisdiction. This is a model now prevailing in Europe, which should not obscure the fact that the application of protection measures typical of full remedial action is on the increase. This can be illustrated by the powers granted to Dutch administrative courts under Articles 8.72, 8.73 § 4 and 8.86 of the General Administrative Law (*Algemene wet bestuursrecht*), in force since 1 January 1994. They may, in justified cases in which the disputed act is *ex tunc* annulled, issue 1) substitute decisions, 2) the so-called accessory judgments on compensation related to the loss caused by the challenged administrative act, and 3) immediate judgments on the merits of the case⁶. The introduction of these measures has been described as furnishing the courts with additional powers of redress, raising no doubts whatsoever about their connection with judicial review commenced by a plaint for annulment of an administrative act⁷.

Quite another issue is that the lawmakers of many states have allowed courts reviewing administrative acts to hear and examine evidence to supplement the factual information in the files or to establish relevant facts "from scratch". Evidence from the testimony of the parties, witnesses and expert witnesses and from visual inspection is provided for, by among

of the Constitutional Court's Case Law], Łódź: Wydawnictwo Uniwersytetu Łódzkiego 2006, pp. 70-71. Representative of the trend is the judgment of the Constitutional Tribunal of 24.02.2003 (K 28/02) in which it acknowledges that "it is the task of the lawmaker to create a normative situation ensuring not only the right to have one's case heard by an independent court but also to have its judgment executed".

⁶ Bok, supra note 3, p. 176. In the Polish literature – cf. Z. Kmiecik, *Postępowanie administracyjne i sądwooadministracyjne a prawo europejskie* [Administrative and Administrative Court Proceedings v. European Law], Warszawa: Wolters Kluwer Polska 2010, p. 106. A decision mentioned in (1) is possible when there is only one lawful alternative to the disputed act or when because of a factual dispute the court conducts proceedings to establish facts; as to the Italian system of administrative jurisdiction – see V. Parisio, *Concentrazione, garanzia e pregiudiziale di annullamento: cenni*, [in:] V. Parisio (ed.), *I processi amministrativi in Europa tra celerità e garanzia*, Milano: Giuffrè 2009, p. 181 et seq. After the enforcement of Law No. 2005/2000, one may notice the concentration of legal claims and actions towards administrative courts, while before that time the applicant had to address two different judges: the administrative court in order to quash the illegal administrative decision and, after that, the civil one, in order to obtain the demanded indemnity.

⁷ Bok, supra note 3, p. 176.

others, the legislation of Germany, Finland, Sweden and the Netherlands⁸. Another instrument used in the course of the review to provide the court with necessary knowledge is additional clarification that the court requires from the administrative authority or an entity independent from the administration, for instance in the form of an expert's report. The latter, as a form of unbiased position on the case, may be a motive for the parties to seek an amicable resolution of their dispute (alternative dispute resolution measures) – a fact observed in many countries⁹.

III.

In the context of the observations above, the proposition that it is possible to maintain a uniform (pure) cassation-type jurisdiction model in Europe, like the classic Austro-Hungarian model of the late 19th century, cannot hold up to criticism¹⁰. Even in Austria itself, the idea seemed to be contradicted first by the establishment of independent administrative tribunals (*Unabhängige Verwaltungssenate in den Ländern*), which in a form that was typical of administration, performed some of the judicial review tasks. At the same time, the Administrative Court (*Verwaltungsgerichtshof*) might decide a complaint about the omission to act by an administrative authority on its merits¹¹. As a result of the reform of May 2012 the Austrian

⁸ Cf. Kmiecik, *supra* note 6, pp. 158–159; see also A. Skoczylas, *Modele uprawnień orzeczniczych sądów administracyjnych w Europie* [Models of the Adjudicatory Powers of Administrative Courts in Europe], Państwo i Prawo [State and Law] 2012, no. 10, p. 25.

⁹ To realise the importance of this measure in the French system – especially useful for the determination of the appropriate remedy – cf. Chapus, *supra* note 3, pp. 880–881 and O. Gohin, *Contentieux administratif*, Paris: Litec 2009, pp. 272–273. The alternative dispute resolution concept and typology of its implementation are presented by T. Sourdin, *Alternative Dispute Resolution*, Sydney: Lawbook Co. 2002; for disputes between an individual and an administrative authority – cf. Z. Kmiecik, *Mediacja i koncyliacja w prawie administracyjnym* [Mediation and Conciliation in Administrative Law], Kraków: Zakamycze 2004, p. 129 et seq.

¹⁰ As to the Austrian, cassation-type model of administrative jurisdiction – cf. A. Merkl, *Allgemeines Verwaltungsrecht*, Wien, Berlin: Verlag von Julius Springer 1927, p. 375; W. Antonioli, E. Koja, *Allgemeines Verwaltungsrecht*, Wien: Manz 1996, p. 833; C. Grabenwarter, *Verwaltungsverfahrensrecht und Verwaltungsgerichtsbarkeit*, Wien: Springer 2011, p. 178.

¹¹ Cf. D. R. Kijowski, *Austria [Austria]*, [in:] Kmiecik (ed.), *supra* note 2, pp. 70–76 and 80–81; K. Sobierski, *Z problematyki sądownictwa administracyjnego w Austrii* [Issues of Administrative Judiciary in Austria], *Zeszyty Naukowe Sądownictwa Administracyjnego* [Administrative Courts Scientific Review] 2006, no. 1, p. 173 and J. Łętowski, *Austria [Austria]*,

lawmaker introduced a two-tier system of administrative judiciary and empowered the courts to adjudicate on the merits of a case. Besides *Verwaltungsgerichtshof* which has existed since 1876, administrative courts of first instance on the states (*Länder*) level and two administrative courts of first instance on federal level: Federal Administrative Court (*Bundesverwaltungsgericht*) and Federal Finance Court (*Bundesfinanzgericht*) have been established (so called 9+2 model)¹².

The discussion highlights the need for some of the views on the function of judicial review of administrative acts, well-established in the tradition of the system, to be revised. This is now given the name of *Überprüfung* and is gaining significance. Judicial control of the administration of today - if it is to be efficient - should, apart from removing the unlawful act and giving the administrative authority a binding instruction on further action to be taken (a clear formulation of the necessary and methodologically appropriate instructions), offer a greater range of remedies that are suitable for the circumstances of the specific case. The shortcomings of the cassation-type model of administrative jurisdiction were already seen in Poland many years ago and various proposals for its improvement were made¹³. The concept of the right to have one's case heard by an independent court, which has

[in:] L. Garlicki (ed.), *Sądownictwo administracyjne w Europie Zachodniej* [Administrative Courts in Western Europe], Warszawa: Państwowe Wydawnictwo Naukowe 1990, pp. 170-171. The latter of the authors deciding a case on its merits when the plaint, which is about the omission to act by an administrative authority, goes beyond the limits of sequentiality and cassationality of court judgments and may be *tout court* qualified as "co-administration"; as to interpretative competences of the Administrative Court in this kind of cases (*Säumnissbeschwerde*) - F. Dolp, R. Dolp, *Die Verwaltungsgerichtsbarkeit*, Wien: Österreichische Staatsdruckerei 1987, p. 55.

¹² Cf. *Verwaltungsgerichtsbarkeits-Novelle* 2012 (BGBI. I Nr. 51/2012) - the Act adopted by one of the two houses of the Austrian parliament (National Council, *Nationalrat*) has abolished previous independent administrative senates and i.a. several other administrative bodies that exercised quasi-judicial functions, hearing cases concerning issues such as environment (Independent Environment Tribunal, *Unabhängiger Umweltsenat*), taxes and customs (Independent Financial Tribunal, *Unabhängiger Finanzsenat*) and awards of public contracts (Federal Procurement Authority, *Bundesvergabeamt*) and also a separate Court for Asylum Affairs (*Asylgerichtshof*).

¹³ Cf. e.g., J. P. Langrod, *Kontrola administracji. Studja* [Administrative Control. Studies], Warszawa-Kraków: nakładem Księgarni J. Czerneckiego 1929, p. 160 et seq. and P. Kasznica, *Polskie prawo administracyjne* [Polish Administrative Law], Poznań: Księgarnia Akademicka 1946, p. 198.

for years been developing in European case law, provides not only for the appropriate proceedings before a judicial body with "full jurisdiction"¹⁴, but also for the proper execution of the delivered judgment. This gives rise to understandable questions about the institution of judicial control of administration. If we assume that the fulfilment of the latter obligation is but a phase of a process that has only seemingly been concluded, the problems of securing the protection envisaged in the legislation still remain¹⁵, not to mention the legal consequences of defaulting on the directive of "reasonable time" within which the case should be decided, should a plaint be lodged with the ECHR.

IV.

The development of the Polish law on judicial control proceedings shows that the lawmakers, aware of the difficulties in ensuring the appropriate efficiency of the reviews, have gradually enlarged the range of available measures, which are meant to curtail or mitigate the deficiencies of the cassation-type jurisdiction. Examining the situation before the Second World War, W. Sawczyn recalls that "there was fairly common awareness of the inefficiency of judicial control of administrative acts, and consequently, various efforts were made to remedy the situation"¹⁶. The ideas then advanced, also by representatives of the legal

¹⁴ This term and the notion of an "effective judicial review", were used by the ECHR in its judgment of 28.06.1990 (application no. 11761/85) on the widely-known *Obermeier v. Austria* case.

¹⁵ This is the case with many ECHR judgments, among others of 16.12.2008 (application no. 42619/04) *Vlahović v. Serbia* and of 6.04.2010 (application no. 35852/04) *Ursan v. Romania*. The Court expressed its stance that the execution of a binding court judgment should be viewed as "an integral part of the trial" under Article 6 of EC. Also in the literature of the subject, acts of an administrative authority pursuant to a judgment recognising the claim as legitimate are regarded as "a phase of the process" – cf. e.g., B. J. Schueler, *Settling of Disputes in Administrative Law in the Netherlands*, [in:] Y. Zhang (ed.), *Comparative Studies on the Judicial Review System in East and Southeast Asia*, The Hague–London–Boston: Kluwer Law International 1997, p. 234; Ch. P. Moukiou, *European Convention of Human Rights and Greek Public Law*, [in:] V. Parisio (ed.), *Diritti interni, diritto comunitario e principi sovrnazionali*, Milano: Giuffrè 2009, p. 230 and D. J. Harris, M. O'Boyle, E. P. Bates, C. M. Buckley, *Law of the European Convention on Human Rights*, Oxford–New York: Oxford University Press 2009, pp. 228–229.

¹⁶ W. Sawczyn, *Środki dyscyplinowania administracji publicznej w prawie o postępowaniu przed sądami administracyjnymi* [The Disciplinary Measures of Public Administration in Law on Proceedings before Administrative Courts], Warszawa: Wydawnictwo C. H. Beck 2010, p. 60.

doctrine, failed to materialise. The young democracy, for pragmatic reasons using available legal solutions, did not have the right conditions to make that happen. The meeting of other standards, today associated with internal efficiency requirements, was then considered to be a problem of greater importance – in particular finding a way to deal with the lengthiness of proceedings before the Supreme Administrative Tribunal¹⁷.

When administrative jurisdiction was restored in 1980, there was only one measure available to them in response to administrative malfunction or omission – that of signalling the fact that an administrative act on which the decision had been based was inconsistent with or in breach of the relevant law. The 11 May 1995 – Law on the Supreme Administrative Court¹⁸ introduced a system of sanctions to discipline the administration as a way of ensuring that administrative authorities would perform the duties specified in the course of judicial review or resulting from court judgments. The sanctions were also to have a preventive and compensatory function. The system, with some minor modifications, was taken over by the provisions of the 30 August 2002 – Law on Proceedings before Administrative Courts (p.a.c.)¹⁹.

Among others, the system includes: 1) a fine for not executing the judgement acknowledging the legitimacy of the plaint about refusal to act by administrative authority, or if the authority refuses to act after the court annuls an administrative act or declares it null and void, 2) the ruling – in addition to the fine – on the existence or non-existence of a right or obligation, if this is allowed by the nature of the case and non-litigious circumstances of its factual and legal status, 3) notification of the relevant body about the qualified breach of law discovered by the court, including gross neglect of not making the complaint, the relevant documentation and the authority's reply available to the court and about the circumstances affecting such breach of law.

Provisions of Article 154 § 4–5 of p.a.c. stipulate that the person aggrieved by the non-execution of the judgment may claim compensation

¹⁷ Ibid., p. 63.

¹⁸ Dz. U. [Journal of Laws] No. 74, item 368, lapsed – Dz. U. [Journal of Laws] 2002, No. 153, item 1271.

¹⁹ Dz. U. [Journal of Laws] No. 153, item 1270, with changes.

from the authority guilty of omission under the rules defined in the Civil Code. This is supplemented by the possibility of seeking compensation, provided for by Article 287 of p.a.c., if the court: 1) has overruled the decision appealed against and the authority to whom the case is referred back dismisses it, 2) has declared the act invalid or found a legal impediment to declaring such invalidity. Compensation is payable by the authority that issued the decision (act). Under the former regime, compensation may be claimed if a loss has occurred as a result of the nonfeasance of the administrative authority in the form of non-execution of the judgment of the court. The regulation introduced by Article 287 of p.a.c. applies when the loss is related to the legal status arising from declaring a decision invalid by the court or finding an impediment to making the sanction work. The liability of the administrative authority in this case does not depend on its unlawful conduct, which can always be assigned to it should it have failed to execute the decision of the court²⁰. The protection extended by Article 287 of p.a.c. is meant to offset the effects of the cassation-type judgment of the administrative court, which for objective reasons cannot be executed.

V.

Of the measures mentioned above and designed to strengthen the effectiveness of judicial control of public administration it is the possibility of deciding a case on its merits stipulated by Article 154 § 2 of p.a.c., that arouses the greatest controversies. An opinion is frequently voiced that a ruling about the existence or non-existence of a right or an obligation stipulated by the said article "remains a ruling about the effects of breaching the law by an administrative authority". This is because the court passes its ruling "in a situation which, in a way, is the recidivism of the administrative authority - its first breach caused the plaint to be filed with the court, while the second breach was in ignoring the administrative court judgment"²¹. It should also be remembered that the subjective scope for the court to decide a case "on its merits" is relatively narrow. According to the judgment of the Regional

²⁰ Kmieciak, supra note 4, p. 27.

²¹ Sawczyn, supra note 16, p. 177.

Administrative Court in Warsaw of 5 August 2010 (I SA/Wa 38/10), "In principle, the administrative court may not take over an administrative matter and decide it directly". The opinion of this particular court is that Article 154 § 2 of p.a.c., which is an exception to this rule, only applies when instead of an administrative decision or ruling, an act or action concerning the right or obligations ensuing from provisions of the law has been taken. This is a position shared by many representatives of the legal doctrine. Unfortunately, the stipulation discussed here remains "dead" (is hardly used in practice).

The judgment issued under Article 146 § 2 of p.a.c. can be classified as a variant of "deciding a case on its merits". This provision is sporadically applied by administrative courts. Under this article, if the case has been brought not against an administrative decision or ruling, but against an act or action concerning the right or obligations ensuing from provisions of the law (often referred to as *physical act*), the court in its judgment may acknowledge the legitimacy of such right or obligation. For instance, the judgment of the Regional Administrative Court in Białystok of 26 January 2010 (II SA/Bk 699/09) pronounces the invalidity of the refusal to return part of the fee for the issue of a vehicle ID and recognises the right of the plaintiff to recover the money. In the judgments on identical cases heard by Polish regional administrative courts in Olsztyn – 26 August 2010 (II SA/01 450/09) and in Gdańsk – 9 September 2010 (III SA/Gd 289/10), the invalidity of disputed administrative acts was tied to the acknowledgment of the obligation of the administrative authorities to return the sums unduly charged. The acknowledgment in the judgment quashing an act or pronouncing its invalidity as to the rights or obligations ensuing from provisions of the law may be interpreted as affording the plaintiff an effective remedy by a ruling of a declaratory nature, similar to declaratory judgment in the systems of common law²². Using this remedy is meant to describe (confirm as binding) the legal status of the plaintiff, however without direct sanction against the defendant –

²² Z. Kmiecik, *Czy sądy administracyjne stosują przepisy prawa materialnego? [Do Administrative Courts Apply Material Law?]*, *Zeszyty Naukowe Sądownictwa Administracyjnego [Administrative Courts Scientific Review]* 2011, no. 2, p. 14.

a public authority²³. On the basis of such court judgment, the plaintiff may effectively exercise his/her rights or obligations within strictly defined legal boundaries.

Sporadic opinions expressing doubts about the wisdom of granting administrative courts the powers (very limited indeed) to decide the case on its merits seem to be evidence of a rigid clinging to the idea that the judiciary and the administration are separate powers. According to S. Jansen, the balance between the two would actually be upset if the judiciary were deprived of a greater influence on the other power. Hence, in his opinion, in order to afford full protection to those who need it, the administrative courts must get more involved in administrative action and engage in effective and conclusive dispute settlement²⁴.

VI.

While appreciating the importance of the additional, multi-function remedies outlined above, we must remember that the external effectiveness of the judicial control of administration exercised as an action for annulment mainly depends on the mode adopted to settle the dispute, including the formula of judgements and instructions for further action, provided in the written justification of the judgment allowing the complaint. The solutions presented in section (2) above, shaped by the Dutch General Administrative Law, undoubtedly indicate the efforts to harmonise the requirements of cassation-type judgements made by administrative courts with the need to afford an effective remedy to the plaintiff, devoid of excessive burden and respecting the directive on "reasonable time" of the settlement of the dispute, derived from Article 6 sec. 1 of EC.

The Dutch lawmaker, for a long time trying hard to greatly reform the rather complex system of administrative courts, gave the competences

²³ Cf. Z. Kmiecik, *Zjednoczone Królestwo [United Kingdom]*, [in:] Kmiecik (ed.), *supra* note 2, p. 433.

²⁴ S. Jansen, *Towards an Adjustment of the Trias Politica: The Administrative Courts as (Procedural) Lawmaker; A Study of the Influence of the European Human Rights Convention and the Case Law by the European Court of Human Rights on the Trias Politica, in Particular the Position of Dutch Administrative Courts in Relation to the Administration*, [in:] Stroink, van der Linden (eds), *supra* note 3, p. 54. The author underlined, "that Article 6 ECHR not only prescribes effective access to a court, but also access to an effective court!" (p. 55).

to the courts to apply the construction of “administrative loop” (*bestuurlijke lus*) in some types of disputes. Technically speaking, the use of this construction means that the court issues an interlocutory judgment. It has its equivalents in other legal systems, e.g. in France (*jugement d'avant dire droit*) and in Germany (*Zwischenurteil*). The issue of an “administrative loop”, or the power to rectify the legality of an administrative decision was considered in detail in the seminar organised by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union with the collaboration of the Council of State of Belgium (Brussels, 1–2 March 2012). The two following issues were the subject of the seminar as well: 1) power to award compensation and action for annulment, 2) the effectiveness of enforcement of the rulings of administrative courts (power of injunction)²⁵.

Without going into details of individual varieties of “administrative loop”, we can say that using this measure assumes the suspension of judicial procedure until a competent administrative body submits a modified draft decision taken with due regard to the findings of the court thus far²⁶. The interlocutory judgment indicates insofar as possible how to rectify the infringement. In this case, the administrative body must inform the court as soon as possible whether it intends to take up the option, offered by the court, of rectifying the infringement or having it rectified. Where the administrative body accedes to the request to rectify the infringement, it shall indicate in writing as soon as possible how it is going to rectify it. The parties may, within a set period following said written notification being sent, indicate their attitude to rectification of the infringement. A final judgment shall be handed down upon the first appeal against the flawed administrative decision that has been (or has not been) rectified²⁷. The prerequisite for starting the procedure in question,

²⁵ Cf. Y. Kreins, *From the Secretary-General's Desk*, [in:] ACA-Europe – Newsletter, 09.2012, no. 28, p. 3, see also statement of J.-M. Sauvé, *Introduction*, p. 5: “the aims of this seminar are to better understand the powers possessed by European administrative courts, to compare them, and to draw conclusions from this study as to the effectiveness of court rulings”.

²⁶ Bok, *supra* note 3, p. 177 and Jansen, *supra* note 24, p. 47.

²⁷ *Increasing the Efficiency of the Supreme Administrative Court's Powers – Questionnaire*, ACA-Europe, 1–2.03.2012, Brussels, p. 1; see also Polish report – Z. Kmiecik, *Wzmocnienie kompetencji najwyższych sądów administracyjnych i jego wpływ na efektywność orzecznictwa* [*The Strengthening of the Competences of the Highest Administrative Courts and Its Influence*

giving greater certainty about the result of the proceedings and speeding up the settlement of the case, is the court's statement that the disputed decision is voidable. It is useful when there is no possibility of making factual findings within judicial procedure (e.g. making calculations relevant for the content of future settlement), as well as the fact that courts are reluctant to interfere with administrative policies²⁸.

According to G. ten Berge and P. Langbroek, the main advantage of the solution under discussion is the fact that the interlocutory judgment contains "specific instructions" which in a sense determine the scope of lawful acts of an administrative authority, which must take into account the inevitable verification of the draft decision in further judicial review²⁹. They also point out that, in the present regulatory environment, an administrative authority can remove any shortcomings of the act in the course of procedures initiated by an appeal (on general terms) lodged with an administrative court only under the institution autorevision provided for in Article 6:18 of the General Administrative Law. In their opinion, the institution of autorevision would be more effective if the impulse for "repair" procedures were instructions given by the court as a result of commencing an "administrative loop"³⁰. Also A. J. Bok thought it right to introduce the construct of interlocutory judgment into the legislation, as leading to a more simple, intelligible and accessible formula for the protection of the plaintiff's interests³¹.

VII.

Solutions based on the idea of an "administrative loop" (allowing – in circumstances of appropriate factual and legal status of the case – the issue

on the Effectiveness of Jurisprudence], Zeszyty Naukowe Sądownictwa Administracyjnego [Administrative Courts Scientific Review] 2012, no. 4, pp. 165–175.

²⁸ Jansen, *supra* note 24, p. 47.

²⁹ G. ten Berge, P. Langbroek, *Towards Integrated Lawmaking by Administrative Courts and Public Authorities. On Instruments and Possibilities for Constructive Integration Between the Administration and the Administrative Courts in Relation to Administrative Decision Making, Administrative Objection and Appeal*, [in:] Stroink, van der Linden (eds), *supra* note 3, p. 263.

³⁰ *Ibid.*, pp. 263–264.

³¹ Bok, *supra* note 3, p. 177. The issue of an "administrative loop" was discussed in details by B. J. Schueler, *Vernietigen en opnieuw voorzien*, Utrecht, Zwolle: W.E.J. Tjeenk Willink 1994 and B. J. van Ettekoven, *Alternatieven van er voor de bestuursrechter*, VAR–preadviezen 2001, Den Haag: Boom Juridische uitgevers 2001.

of interlocutory judgments) could probably be applicable in Poland, too. I think using this kind of tool should be taken into consideration, particularly in cases whose settlement by public administrative authorities takes a very long time, thus exposing the plaintiffs to inconvenience and hardship, disproportionate to the scale of the problem. Obviously, the question arises whether the legislators (if they appreciate the value of the institution) will dare to give the courts enough discretion to use it. The alternative to this construction would be a court order for the competent administrative authority to issue an administrative act of a predefined content (giving specific rights or imposing specific obligations), or even the court's decision "on the merits" replacing the annulled act.

The external efficiency of control exercised by administrative courts according to classic models of cassation decisions is also – as has been mentioned before – a derivative of the way of instructing administrative authorities on further action when a complaint has been allowed. The lengthiness of judgment execution and execution inconsistent with the intent of the court (usually leading to another complaint) do not always have their source in the reluctance to accept the results of the judicial review. They can also result from faulty formulation of legal appraisal and instructions (recommendations) on further proceedings before an administrative authority, contained in the justification of the judgment, and binding – in accordance with Article 153 of p.a.c. – for the court and the authority whose act or omission to act were the subject of the plaint. Certainly, there must be a reason why cassation appeals of administrative authorities against first instance judicial review decisions often make charges about vague, too general, factually inconsistent, or unfeasible recommendations (instructions), or even lack of recommendations in judgment justifications. A survey of the decisions of the Supreme Administrative Court provides a number of instances of such errors. Its judgment of 15 July 2010 (II FSK 467/09) states that the lack of recommendations concerning further action merely created "an illusion of efficiency of the review". In its judgment of 10 January 2012 (II FSK 1308/10), the Supreme Administrative Court states that the administrative authority is given "conflicting instructions".

While drafting the provisions of Article 141 § 4 *in fine* and Article 153 of p.a.c., the lawmaker showed great restraint in defining model

instructions for administrative authorities. The instructions were simply defined as "indications", with a focus on an inseparable relationship between the instruction part and the judicial appraisal in the justification of the judgment. The judicial appraisal creates grounds for the establishment of directives for conduct of the administrative authority, which determine its obligations in the case. Naturally, there are limits to statutory formalisation of the contents of judicial instructions. In my opinion, a sensible lawmaker should allow the core of the issue to be moved from legislation to judicial practice. Only judicial practice can create optimal recommendation techniques, escaping procedural rigidity, and respecting the long-standing experience of administrative courts. It can be assumed that the instructions in the meaning of Article 141 § 4 of p.a.c. are "hidden" or weaker forms of injunction³².

VIII.

In the cassation-type model of administrative jurisdiction, administrative courts in principle only investigate the administrative body's compliance with the law. The main weakness of this adjudication model is that the same case is consecutively heard by administrative authorities and administrative courts (of various instances), without a final decision being issued³³. The discussion above makes us aware of the need to debunk certain myths that still persist in some European countries and result from an erroneous understanding of the concept of judicial review of administrative acts (or omissions), and the principle of separation of powers in a Democratic State of Law. The stereotype of a court coined in another epoch as a purely cassation-type body must not obscure the challenges of our times. A lot has changed in the world since then, and the ever-growing dependence of an individual on administration (public service) is its visible symptom. Effective protection of the interests of the

³² Cf. Kmiecik, supra note 27, p. 172; as to power of injunction - generally: B. A. Garner (ed.), *Black's Law Dictionary*, St. Paul, Minn.: Thomson/West 2004, p. 800 and *Increasing the Efficiency of the Supreme Administrative Court's Powers - Questionnaire*, ACA-Europe, 1-2.03.2012, Brussels, pp. 3-5; in English law - Wade, Forsyth, supra note 3, p. 474 et seq.; in French law (*l'injonction*) - Gohin, supra note 9, p. 359 et seq.

³³ Cf. Skoczylas, supra note 8, p. 30 and Z. Kmiecik, *Instancyjność postępowania administracyjnego w świetle Konstytucji RP [The Principle of Instances in Administrative Procedure in the Light of the Polish Constitution]*, Państwo i Prawo [State and Law] 2012, no. 5, pp. 3-5.

former now requires the use of more diversified control tools affording a remedy sooner and at a lower cost, and, in specific situations, also allowing administrative courts to decide cases on their merits³⁴. In this context we should look for an answer to the question of R. Walter: *Kassatorische oder reformatorische Entscheidung*³⁵.

In the Polish system of law the administrative courts do not possess the means to rectify a flawed decision similar to the "administrative loop" concept prescribed by Dutch law. The power to quash a decision which gives doubts to its legality is generally considered a sufficient measure of judicial review. Many scholars point out that the present system applicable in Poland is incomplete³⁶. It seems that introduction of a means similar to an "administrative loop" would be beneficial in improving the effectiveness of judicial review, especially in "hard cases". However, there is a certain plan to introduce such measure in the nearest future. The proposed modifications of the proceedings before administrative courts aim at the creation of solutions which make it possible – as long as the appeal is successful – to annul the decision appealed against or to declare it invalid and to impose a manner of handling or settling the case on the administrative authority.

³⁴ See also two reports: *Efficient, high-quality administrative justice/Une justice administrative efficace et de qualité*, and *The EU Justice Scoreboard: a Tool to Promote Effective Justice and Growth*, [in:] *Seminar held under the auspices of the Council of State of France and ACA-Europe*, Paris 26–28.05.2013, p. 1 et seq. In its Annual Growth Survey 2013 – COM(2012) 750 final, the European Commission has highlighted the importance of improving the quality, independence and efficiency of national judicial systems. The second report indicates: "Before formulating Country Specific Recommendations in this area, there is a need for a systematic overview of the functioning of justice systems in all Member States, one that takes fully into account the different national legal traditions. Objective, reliable, and comparable data are necessary to support the justice reforms engaged for a renewed growth" (p. 2).

³⁵ Cf. R. Walter, *Kassatorische oder reformatorische Entscheidung?*, [in:] F. Lehne, E. Loebenstein, B. Schimetschek (ed.), *Die Entwicklung der österreichischen Verwaltungsgerichtsbarkeit*, Wien, New York: Springer-Verlag 1976, pp. 392–393.

³⁶ Cf. e.g., Kmiecik, supra note 4, p. 34; Skoczyłas, supra note 8, p. 32 and M. Bogusz, *Uwagi na tle przepisu art. 154 § 2 – Prawo o postępowaniu przed sądami administracyjnymi* [Remarks on the Art. 154 § 2 of the Law on Procedure Before the Administrative Courts], [in:] D. R. Kijowski, A. Miruć, A. Suławko-Karetko (eds), *Jakość prawa administracyjnego* [Quality of Administrative Law], Warszawa: Lex a Wolters Kluwer business 2012, p. 160.

