SPIS TREŚCI

MATERIAŁY Z OBRAD DOROCZNEGO ZGROMADZENIA OGÓLNEGO
SĘDZIÓW NACZELNEGO SĄDU ADMINISTRACYJNEGO
W DNIU 18 KWIETNIA 2011 ROKU W WARSZAWIE

Wystąpienie Prezesa NSA profesora Romana Hausera 9
Sprawozdanie (*Przemysław Florjanowicz-Błachut*) 17
Report from the annual General Meeting of Judges of the Supreme Administrative Court held on 18 April 2011 (tłumaczenie: *Michał Mróz*) 23

STUDIA I ARTYKUŁY

Prof. dr hab. Janusz Trzciński (Uniwersytet Warszawski, Uniwersytet Wrocławski)
Bezpośrednie stosowanie zasad naczelnych konstytucji przez sądy administracyjne 29
Summary 41

Dr Wojciech Kręcisz (adiunkt, Uniwersytet Marii Curie-Skłodowskiej w Lublinie)
Kilka uwag w dyskusji o prawotwórczym znaczeniu orzecznictwa Trybunału Konstytucyjnego, Naczelnego Sądu Administracyjnego i Sądu Najwyższego 43
Summary 60

Dr hab. Joanna Sieńczyło-Chlabicz (profesor, Uniwersytet w Białymstoku)
Przesłanki zdolności rejestrowej wzoru przemysłowego 62
Summary 76

Mgr Marta Kulikowska (asystent, Biuro Orzecznictwa NSA)
Zgłoszenie znaku towarowego w złej wierze w prawie Unii Europejskiej 78
Summary 87

Dr Tomasz Czech (Uniwersytet Warszawski)
Zarządzenie pokontrolne organów Inspekcji Ochrony Środowiska 89
Summary 100

ORZECZNICTWO

I. **Europejski Trybunał Sprawiedliwości** (wybór i opracowanie: *Agnieszka Wilk-Ilewicz)*
Wyrok ETS z dnia 5 maja 2011 r., sprawa C-434/09 *Shirley McCarthy przeciwko Secretary of State for the Home Departament* [dot. statusu obywatela UE w świetle prawa do swobodnego przemieszczania się] 101

II. **Europejski Trybunał Praw Człowieka** (wybór i opracowanie: *Agnieszka Wilk-Ilewicz*)
Wyrok ETPC z dnia 7 grudnia 2010 r. w sprawie *Tarnawczyk przeciwko Polsce* (skarga nr 27480/02) [dot. naruszenia prawa własności przez wywłaszczenie bez odszkodowania] 107

III. **Trybunał Konstytucyjny** (wybór: *Irena Chojnacka,* opracowanie: *Mieszko Nowicki)*
Sport kwalifikowany – odmowa wydania licencji przez PZPN
(wyrok TK z dnia 19 października 2010 r. sygn. akt P 10/10) 113

IV. Sąd Najwyższy (wybór: *Andrzej Wróbel*, opracowanie: *Dawid Miąsik*)
Wyrok Sądu Najwyższego z dnia 5 stycznia 2011 r. (sygn. akt III SK 32/10) [dot. zasad sądowej weryfikacji prawidłowości orzeczenia organu regulacji w zakresie kar pieniężnych] 121

V. Naczelny Sąd Administracyjny i wojewódzkie sądy administracyjne
A. Orzecznictwo Naczelnego Sądu Administracyjnego (wybór: *Stefan Babiarz*, opracowanie: *Marcin Wiącek*)
1. Uchwała składu siedmiu sędziów NSA z dnia 10 stycznia 2011 r. sygn. akt II OPS 2/10 [dot. obowiązku złożenia oświadczenia o prawie do dysponowania nieruchomością w postępowaniu legalizującym wykonane roboty budowlane] 126
2. Uchwała składu siedmiu sędziów NSA z dnia 14 marca 2011 r. sygn. akt II FPS 8/10 [dot. opodatkowania wniesienia do spółki osobowej wkładu w postaci udziałów w spółce kapitałowej] 133
B. Orzecznictwo wojewódzkich sądów administracyjnych (wybór: *Bogusław Gruszczyński*, opracowanie: *Marcin Wiącek*)
1. Wyrok WSA w Warszawie z dnia 8 maja 2009 r. sygn. akt IV SA/Wa 157/09 [dot. dostępu terenu do drogi publicznej jako przesłanki wydania decyzji o warunkach zabudowy] 138
2. Wyrok WSA w Białymstoku z dnia 24 lutego 2010 r. sygn. akt I SA/Bk 3/10 [dot. zwolnienia z należności celnych mienia osobistego przywożonego do UE przez osoby przesiedlające się z państw trzecich] 141
3. Wyrok WSA w Warszawie z dnia 11 czerwca 2010 r. sygn. akt III SA/Wa 99/10 [dot. przejścia praw wynikających z indywidualnej interpretacji podatkowej na następcę prawnego podatnika] 145
4. Wyrok WSA w Bydgoszczy z dnia 21 września 2010 r. sygn. akt II SA/Bd 672/10 [dot. rozumienia pojęcia „deportacja" w ustawie o kombatantach oraz niektórych osobach będących ofiarami represji wojennych i okresu powojennego] 149
5. Wyrok WSA w Szczecinie z dnia 6 października 2010 r. sygn. akt II SA/Sz 637/10 [dot. dopuszczalnej zawartości gminnego regulaminu dostarczania wody i odprowadzania ścieków] 152

VI. Wnioski Prezesa NSA i pytania prawne sądów administracyjnych skierowane do Trybunału Konstytucyjnego (wybór i opracowanie: *Irena Chojnacka*)
1. Pytanie prawne WSA w Gdańsku, postanowienie z dnia 18 stycznia 2011 r. sygn. akt II SA/Gd 562/10 [dot. odmowy zwrotu części wywłaszczonej nieruchomości niewykorzystanej dla celu wywłaszczenia] 158
2. Pytanie prawne WSA w Krakowie, postanowienie z dnia 16 listopada 2010 r. sygn. akt I SA/Kr 1387/10 [dot. zasady amortyzacji podatkowej prawa użytkowania na udziale w nieruchomości] 159

VII. Glosy
Dr hab. Patrycja Joanna Suwaj (adiunkt, Uniwersytet w Białymstoku)
Glosa do wyroku NSA z dnia 26 listopada 2009 r. sygn. akt II FSK 1016/08 [dot. ustalenia przeciwnej strony w razie zaskarżenia do sądu administracyjnego indywidualnej interpretacji podatkowej] 161

Mgr Tomasz Grzybowski (asystent sędziego, Naczelny Sąd Administracyjny)
Glosa do postanowienia NSA z dnia 23 lutego 2011 r. sygn. akt II FZ 86/11 [dot. rozciągnięcia nakazu ściągnięcia należnej opłaty sądowej na wszystkie przypadki jej nieuiszczenia] 170

SĄDOWNICTWO ADMINISTRACYJNE W EUROPIE

Mgr Monika Kmieciak (aplikant radcowski w OIRP w Łodzi)
Trybunały administracyjne w Zjednoczonym Królestwie (system jur**ysdykcji po zmianach ustawodawstwa z 2007 r.)** 175

KRONIKA

Kalendarium sądownictwa administracyjnego (marzec–kwiecień 2011 r.)
(opracował *Przemysław Florjanowicz-Błachut*) 185
Uzupełnienie (styczeń–luty 2011 r.) 196

BIBLIOGRAFIA

I. Recenzje
Marta Kłopocka-Jasińska, *Skarga konstytucyjna w Królestwie Hiszpanii*, Warszawa 2010 (rec. Bo*gusław Gruszczyński*) 197

II. Publikacje z zakresu postępowania administracyjnego i sądowoadministracyjnego (marzec–kwiecień 2011 r.) (opracowała *Marta Jaszczukowa*) 199

TABLE OF CONTENTS

MATERIALS FROM THE SESSION OF THE ANNUAL GENERAL MEETING OF JUDGES OF THE SUPREME ADMINISTRATIVE COURT HELD ON 18 APRIL 2011 IN WARSAW

Speech by professor Roman Hauser – the Presiding Judge of the SAC 9
Report from the Annual General Meeting of Judges of the Supreme Administrative Court held on 18 April 2010 (*Przemysław Florjanowicz-Błachut;* translation by *Michał Mróz*) 23

STUDIES AND ARTICLES

Professor Janusz Trzciński, Ph.D. (Warsaw University, Wrocław University)
The direct application of the primary principles of the Constitution by the Administrative Courts 29
Summary 42

Wojciech Kręcisz, Ph.D. (assistant professor at the Maria Curie-Skłodowska in Lublin)
A few comments on the law-making role of the judicial decisions made by the Constitutional Tribunal, the Supreme Administrative Court and the Supreme Court 43
Summary 60

Joanna Sieńczyło-Chlabicz, Ph.D. (professor, Białystok University)
The conditions of registrability of an industrial design 62
Summary 76

Marta Kulikowska, M.Sc. (assistant, Judicial Decisions Bureau of the SAC)
Making an application to register a trade mark in bad faith in the judicial decisions of the European Court of Justice 78
Summary 87

Tomasz Czech, M.Sc. (Warsaw University)
The post-inspection instruction of the Environmental Protection Inspection 89
Summary 100

JUDICIAL DECISIONS

I. **The European Court of Justice** (selected and prepared by *Agnieszka Wilk-Ilewicz*)
Judgement of the ECJ dated 5 May 2011, Case C-434/09: *Shirley McCarthy v Secretary of State for the Home Department, p. 03045* [re. the status of an EUR citizen and the freedom of movement for persons]; 101

II. **The European Court of Human Rights** (selected and prepared by *Agnieszka Wilk-Ilewicz*)
Judgement of the ECHR of 7 December 2010, application No. 27480/02, *Case of Tarnawczyk v. Poland* [re. breach of the right to the peaceful enjoyment of real property by expropriation without compensation] 107

III. The Constitutional Tribunal (selected by *Irena Chojnacka*, prepared by *Mieszko Nowicki*)
Judgement of the Constitutional Tribunal dated 19 October 2010, files No. P 10/10 [re. qualified sport – the Polish Football Association's refusal to grant a licence) 113

IV. The Supreme Court (selected by *Andrzej Wróbel,* prepared by *Dawid Miąsik*)
Judgement of the Supreme Court of 5 January 2010 (files No. III SK 32/10) [re. the principles of judicial verification of the correctness of a decision made by a regulatory authority concerning cash penalties] 121

V. The Supreme Administrative Court and the Voivodship Administrative Courts
A. The judicial decisions of the Supreme Administrative Court (selected by *Stefan Babiarz*, prepared by *Marcin Wiącek)*
1. Resolution of seven judges of the Supreme Administrative Court of 10 January 2011 (files No. II OPS 2/10) [re. the obligation to make the declaration on the right to dispose of real property in the proceedings to legalise the construction works] 126
2. Resolution of seven judges of the Supreme Administrative Court of 14 March 2011 (files No. II FPS 8/10) [re. taxation of a contribution to a partnership in the form of shares in a company] 133
B. The judicial decisions of the Voivodship Administrative Courts (selected by *Bogusław Gruszczyński*, prepared by *Marcin Wiącek*):
1. Judgement of the Voivodship Administrative Court in Warsaw of 8 May 2009 (files No. IV SA/Wa 157/09) [re. the access of land to a public road as the premise of issuing the decision on the terms and conditions of land development] 138
2. Judgement of the Voivodship Administrative Court in Białystok of 24 February 2010 (files No. I SA/Bk 3/10) [re. the exemption from the customs duties of personal assets carried into the EU by persons migrating from third countries] 141
3. Judgement of the Voivodship Administrative Court in Warsaw of 11 June 2010 (files No. III SA/Wa 99/10) [re. the passing of the rights under an individual tax interpretation to a taxpayer's legal successors] 145
4. Judgement of the Voivodship Administrative Court in Bydgoszcz of 21 September 2010 (files No. II SA/Bd 672/10) [re. the meaning of "deportation" in the Act on Veterans and Certain Victims of the War and Post-War Era Repressions] 149
5. Judgement of the Voivodship Administrative Court in Szczecin of 6 October 2010 (files No. II SA/Sz 637/10) [re. the admissible contents of the communal water supply and sewage discharge regulations] 152

VI. The applications of the President of the SAC and the legal questions of the administrative courts to the Constitutional Tribunal (prepared by *Irena Chojnacka*)
1. The legal question of the Voivodship Administrative Court in Gdańsk, decision of 18 January 2011 (files No. II SA/Gd 562/10) [re. the refusal to re-transfer the ownership of a part of the expropriated real property not used for the purpose of the expropriation] 158
2. The legal question of the Voivodship Administrative Court in Kraków, decision of 16 November 2010 (files No. I SA/Kr 1387/10) [re. the tax amortisation of the right of usufruct of a share in a real property] 159

VII. Glosses
1. *Patrycja Suwaj, Ph.D. (assistant professor at the Białystok University*
Gloss to the judgement of the SAC of 26 November 2009 (files No. II FSK 1016/08)
[re. the determination of a counterparty in the case of appealing against an individual tax interpretation to an administrative court] 161

Tomasz Grzybowski, M.Sc. (assitant to a judge, the SAC)
2. **Gloss to the decision of the SAC of 23 February 2011 (files No. II FZ 86/11)**
[re. expanding the order to collect a due and payable court fee to all the events of its non-payment] 170

ADMINISTRATIVE COURTS IN EUROPE

Monika Kmieciak, M.Sc. (the legal advisor trainee at the Regional Bar of Legal Advisors in Łódź)
The administrative law jurisdiction in the United Kingdom following the 2007 legislative reform 175

CHRONICLE

The schedule of events in the administrative jurisdiction (March – April 2011)
(prepared by *Przemysław Florjanowicz-Błachut*) 185

BIBLIOGRAPHY

I. Reviews
Marta Kłopocka-Jasińska, ?????
(????? *Bogusław Gruszczyński*) 197

II. Publications in the area of the administrative procedure and the proceedings before administrative courts (March – April 2011)
(prepared by *Marta Jaszczukowa*) 199

Report

The Annual General Meeting of Judges of the SAC was held on 18 April 2011 in the Meeting Hall at the seat of the Supreme Administrative Court at ul. Gabriela Piotra Boduena 3/5 in Warsaw. The General Meeting adopted, by way of a resolution, the "*Information on activities of the administrative courts in the year 2010*" presented by professor Roman Hauser, the President of the SAC.

The Annual General Meeting of Judges of the SAC was attended by the President of the SAC and four Vice-Presidents: professor Janusz Trzciński, professor Marek Zirk-Sadowski, Andrzej Kisielewicz, Ph.D. and Mr Włodzimierz Ryms, as well as judges of the SAC and the Presidents the VACs and the official guests – the representatives of the constitutional authorities of the state and the representatives of the associations of members of the legal professions: Mr Marek Kuchciński – the Deputy Speaker of the Sejm, Mr Krzysztof Łaszkiewicz – the Secretary of State at the Chancellery of the President of the Republic of Poland representing Mr Bronisław Komorowski – the President of the Republic of Poland, professor Andrzej Rzepliński - the President of the Constitutional Tribunal, Mr Stanisław Dąbrowski – judge of the Supreme Court and the First President of the Supreme Court, Mr Antoni Górski - the President of the National Judicial Council, Mr Krzysztof Kwiatkowski – the Minister of Justice, Mr Stanisław Piotrowicz – the Chairman of the Senate Commission for Human Rights, Rule of Law and Petitions, Mr Leon Kieres – senator and a member of the National Judicial Council, Mr Andrzej Seremet – Attorney General, professor Irena Lipowicz – the Civil Rights Commissioner, Mr Stefan Jaworski – judge and the Head of the State Election Committee, Mr Maciej Berek – the President of the Government Legislation Centre, Mr Józef Górny - the Vice-President of the Supreme Audit Office, Mr Andrzej Lewiński - the Deputy Inspector General for the Protection of Personal Data, Mr Maciej Graniecki – the Head of the Office of the Constitutional Tribunal, Mr Antoni Cyran – the Head of the Chancellery of the First President of the Supreme Court, Mr Kazimierz Czaplicki – the Head of the National Election Office, Mr Jan Węgrzyn – the Deputy Head of the Chancellery of the Sejm, Mr Andrzej Dorsz – the Director of the Bureau of Law and Political System at the Chancellery of the President of the Republic of Poland, Mr Andrzej Zwara – the President of the National Bar Association, Mr Maciej Bobrowicz - the President of the National Council of Legal Advisors, Mr Tomasz Michalik – the President of the National Council of Tax Advisros and Ms Anna Korbela – the President of the National Chamber of Patent Attorneys.

Upon official opening of the Annual General Meeting and greeting those gathered professor Roman Hauser, the President of the SAC, presented information on the activities of the Supreme Administrative Court and the Voivodship Administrative Courts in the year 2010, emphasising that its presentation was aimed at assessing the last year's activities and determining the directions for the years to come.

At the beginning he reminded those gathered that the year 2010 saw the 30th anniversary of reactivating the administrative jurisdiction after the absence of this branch of the judiciary in the Polish system of administration of justice since the end of World War II. Professor Hauser presented the outline of its history from the foundation of the Supreme Administrative Tribunal in 1922 to the adoption of the 1997

Constitution revolutionary for this branch of the judiciary whose implementation brought about the two-instance administrative courts in 2004.

Then the President of the SAC presented to those gathered the selected statistical data reflecting the scale of activities of the administrative judiciary in the year 2010. He pointed that during that period of time the number of complaints filed with the Voivodship Administrative Courts increased by 15% compared to the preceding year. He emphasised that in 2010 the VACs heard more than half of all the cases in not more than 3 months which was an excellent result for the Polish administrative courts compared to the other European courts.

As far as the SAC was concerned the number of cassation appeals also increased by 10% compared to 2009 and the SAC considered more than 50% of all the pending cases between 12 and 24 months.

Then the President of the SAC presented the distribution of the individual types of cases heard by the VACs and the SAC. In the VACs 31.5% of the cases were tax disputes, while the other categories represented app. 10% of the cases heard. The President of the SAC mentioned that the VACs eliminated from the legal relations app. 23% of the decisions and other rulings of the administrative authorities emphasising that compared to the preceding years this number decreased as far as the tax cases were concerned (VAT, PIT, CIT and excise duty). In the SAC the issues of taxes and other pecuniary performances represented 47% of decisions and the other categories, alike in the case of the VACS, did not exceed 10%. He also emphasised that in the categories of complaints concerning the excessive duration of court proceedings the percentage of the complaints allowed was low and in the event of the complaint to declare invalid a final court decision introduced in 2010 none of the complaints brought were allowed.

In the further part of his speech professor Hauser focused on the following detailed issues: the application of the EU law and the Constitution by the courts and the resolution-adopting activity and its influence on the coherence of judicial decisions.

The President of the SAC noticed that last year the administrative courts made 9 references for a preliminary ruling (out of which the SAC made 5) to the European Court of Justice under Art. 267 of the Treaty on the Functioning of the European Union and most of them were made in tax cases. He emphasised that the courts treated the ECJ's judgements as guidelines in the cases similar to those in respect of which the references for a preliminary ruling were made.

He also noted, illustrating his observation with many examples, that the administrative courts in the cases they heard both applied the provisions of the Constitution and their detailed contents derived by the doctrine and the judicial decisions (e.g. in respect of the clause of the democratic state of law) and reached directly to the decisions of the Constitutional Tribunal. In the event of serious constitutional doubts they employed the institution of a legal question to the Constitutional Tribunal – in 2010 the courts used this opportunity in 13 cases. Professor Hauser emphasised that when the Constitutional Tribunal responded to the legal questions in may instances it turned out that the courts' doubts were unjustified and they were able to decide these cases on their own. The President of the SAC reminded that the procedure of asking a legal question considerably expands the time of waiting for the case to be decided.

The President of the SAC stressed that the pro-Constitutional line of adjudicating strengthens the role and position of the administrative courts not only as

the courts of law but also as the courts protecting the individual rights and freedoms.

He informed that in 2010 the SAC adopted a number of resolutions both in the specific mode on the initiative of the adjudicating panels and in the abstract mode at the request of the President of the SAC and the Civil Rights Commissioner and most of them concerned the procedural provisions included both in the Law on Proceedings Before Administrative Courts and the other acts, including the sub-statutory ones.

The last issue presented by the President of the SAC was controlling the activities of the public administration by monitoring the enforceability, making the signalling decisions and imposing fines – the means aimed at protecting the individual rights.

The President of the SAC exhaustively presented the means available in the proceedings before administrative courts aimed at enforcing the court judgements. He stated that the analysis of the above previsions leads to the conclusion that there is no symmetry between the legal capacity of enforcing a judgement against a citizen (the complete regulations) and enforcing a judgement by a citizen against a public authority. The latter depends – as he explained – on the legal culture in the public administration. Presenting the problem of imposing on the public authorities the fines for defaulting on the time limit to transfer a complaint with the file of the case and the authority's response to a court, professor Hauser emphasised that their number keeps increasing every year. Then he stated that the activities of the public authorities in the area controlled by the courts give rise to objections. The public authorities make mistakes and do not respect the courts' guidelines which protracts the period of waiting for the court decision. The President of the SAC emphasised that amendments to the laws and regulations aimed at vesting the courts with the power to impose fines by virtue of law and not only at the request of a party and the new Act on Public Officials' Liability for Gross Violations of Law will positively affect the functioning of the public administration which is supposed to serve the society, also thanks to the high legal culture of the public officials.

The President of the SAC announced amendments to the laws and regulations concerning proceedings before the administrative courts and their costs. He emphasised that looking from the perspective of the few years that passed from the introduction of the administrative courts system reform the then adopted solutions might be once again evaluated as appropriate.

At the end of his speech the President of the SAC thanked the judges for their input in creating the judicial decisions and building the authority of the administrative courts and the court administration employees for their efforts in ensuring the good working conditions for the effective functioning of the SAC. He also thanked those court officials who prepared "*Information on activities of the administrative courts in the year 2010*"

Then Mr Krzysztof Łaszkiewicz, the Secretary of State in the Chancellery of the President of the Republic of Poland took the floor. He read the letter from Mr Bronisław Komorowski, the President of the Republic of Poland. At the outset of his letter the President emphasised the SAC's role as one of the top constitutional judicial authorities. He declared he would share with the judges a few comments on certain aspects of strengthening the rule of law in the state the President is also responsible for as the guardian of the Constitution.

He reminded those gathered that the year 2010 saw the 30th anniversary of creating the SAC which from the very beginning supported the evolution of the Polish

administrative machinery on its way to the high standards of the European culture of law and always consisted of experienced lawyers devoted to the idea of the state of law serving its citizens. He pointed to the following landmarks: 1989, 1997 – the new Constitution and 2004 – the reform of the administrative jurisdiction.

The President accentuated the importance of the civic rights enforceable before the administrative courts and stressed that the public institutions, expecting the citizens to respect the law, should themselves meticulously observe it.

Referring to the analysis of the judgements passed by the administrative courts, the President hoped the pressure exerted by the administrative courts of the public authorities guilty of inaction would result in the clear reduction of this phenomenon.

In the President's opinion the resolution-adopting of the SAC and the discussion on the enforceability of the administrative courts' judgements initiated by the SAC deserve recognition. He noted that, contrary to the expectations, the mediatory proceedings were not widely used in the administrative jurisdiction. He drew the judges' attention to the "European element" in the administrative courts' decisions. He pointed that analysing the doubts arising in this sphere of adjudication one should simultaneously take into consideration the two basic premises: the unchanging desire of the sovereign Poland to fully and permanently integrate with the European Union and the awareness of the current directions of the ongoing changes in the European law.

The President evaluated the signalling activity of the administrative courts as an extremely useful tool of imposing discipline on the public administration authorities. He noticed with satisfaction the positive effect of the administrative courts' decisions on the legislation.

Concluding the President hoped that achieving the order demonstrating itself in the reliable and diligently functioning state institutions as well as effective and friendly administration will be possible also thanks to the professionalism and personal involvement of the SAC's judges. The President wished the judges many successes and satisfaction from their service to the Homeland.

Then professor A n d r z e j R z e p l i ń s k i , the President of the Constitutional Tribunal, took over. He praised the work of the administrative courts and thanked for their input in popularising the direct application of the Constitution. He emphasised that the SAC had a long practice in the direct application of the Constitution as it based its judgements on the provisions of the Basic Law as early as in the mid-1980s i.e. before the Constitutional Tribunal was created, at the time when not everybody shared the opinion that the Constitution might be the basis for a judicial decision in an individual case.

Then he presented several examples of the administrative courts' decisions based on the conclusions drawn from the constitutional provisions.

In his speech the President of the Constitutional Tribunal, presenting examples, stated that the administrative courts, alike the Constitutional Tribunal, seem to share the view that the preamble to the 1997 Constitution is normative as they find there the point of reference for evaluating the constitutionality or legality of actions taken by the public authorities. He emphasised that the application of the provisions of the Basic Law by the administrative courts is the expression of their performance of the constitutional meta-norm concerning the direct application of the constitutional norms and deserves recognition. He also reminded that the adjudicating panels must remember of the limits of the direct application of the constitu-

tional provisions set by the constitutional norms of competence defining the scope of cognition of the SAC and the VACs and, on the other hand, the Constitutional Tribunal. He also commented on the way the adjudicating panels of the SAC and the VACs use the institution of the inter-court dialogue – the legal question to the Constitutional Tribunal. He pointed that he legal questions raised by these courts are a significant minority. Given that the Constitutional Tribunal also in the case of the legal questions raised by the administrative courts was forced to discontinue the proceedings, he reminded those gathered of the conditions of the substantive consideration by the Constitutional Tribunal of a legal question raised by a court. He added that may legal questions asked by the administrative courts in the recent years served as the basis of important decisions made by the Constitutional Tribunal. He stated that the Constitutional Tribunal was carefully following the judicial decisions made by the SAC and the Constitutional Tribunal treated the SAC's decisions as the basis for determining the contents of the legal norms.

At the beginning Mr Stanisław Dąbrowski, the First President of the Supreme Court, expressed his gratitude and congratulated the SAC on its achievements in 2010. He remembered that controlling the legality of the activities of the public administration is one of the pillars of the democratic state of law. He recognised the adopting the new internal operating regulations of the SAC as a particularly important event in the functioning of the SAC. He emphasised that each year in the judicature brings new challenges related to the application of the EU law. He pointed that this problem is particularly reflected in the judicial decisions of the SAC. He accentuated the separate and independent roles of the Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court as well as the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg in the Polish legal order. Neither of these authorities is superior towards the other. At the end he wished the judges further successes in their adjudicating functions.

In the next speech Mr Antoni Górski, the President of the National Judicial Council hoped the judicial decisions of the administrative courts facilitated the improvement of relations between the citizens and the state by showing the public administration authorities how to conduct the proceedings and interpret the law in favour of the citizens. He emphasised that while not focusing only on the narrowly understood legality the administrative courts became the guardians of not only a state of laws but also of justice.

Mr Krzysztof Kwiatkowski, the Minister of Justice, stated that controlling the functioning of the public administration as the basic duty of the administrative courts is one of the fundamental guarantees of the rule of law. He emphasised that the administrative courts are a specific regulator of lawfulness and their judgements are carefully analysed by the public administration authorities and treated as guidelines for taking actions consistent with the principle of legality. He pointed that the period of waiting for the case to be heard by the administrative courts is impossible to be achieved by the common courts due to their different nature and the number of incoming cases. He also stressed that the SAC and the VACs owe their position and authority in the society to their enormous judicial practice. In his opinion in almost all spheres of functioning of the public administration the administrative courts are a specific regulator of legality. He also noted that the administrative courts are the meticulous critics of law. He pointed that the references for a preliminary ruling the administrative courts sent to the European Court of

Justice, aimed at the reconciliation of Polish law with EU law illustrate the excellent familiarity of the administrative court judges with EU law and the judicial decisions of the European Court of Justice in Luxembourg. The decisions made on the basis of the response to these references for a preliminary ruling may affect not only the individual cases but also the shaping of obligations on a general level. Presenting examples the Minister of Justice commented in detail on these judgements that concerned the scope of powers of the Minister of Justice in, among others, the legal training for the legal advisors and admission to the Bar.

Professor I r e n a L i p o w i c z , the Civil Rights Commissioner, emphasised the important and yet insufficiently popular role of the administrative courts as the defenders of the civil rights. She pointed to the positive reactions of the citizens to the timely consideration of the cases before the administrative courts compared to the other sections of the administration of justice. However, she was concerned with the increasingly long period of waiting for the case to be heard in the last instance before the SAC. She requested the administrative courts to intensify their efforts in popularising the institution of the administrative courts and pointing to the importance of observing the time limits in the administrative cases. She accentuated that the general legal awareness is the common problem of the Office of the Civil Rights Commissioner and the administrative courts. She recognised strengthening the ancillary role of the public administration as a particularly important element of the judgements of the administrative courts. She was worried with the continuing discrepancies in the judicial decisions of the SAC and the VACs. At the end professor Lipowicz thanked the administrative courts for their excellent work.

Judge S t e f a n J a w o r s k i , the Head of the State Election Committee, focusing on the analysis of the SAC's decisions concerning law, including the law on elections to local government authorities, spoke highly of their professional level. He also emphasised that the judges of the SAC had played an important role in the works of the State Election Committee since its establishment.

Mr M a c i e j B o b r o w i c z , the President of the National Council of Legal Advisors, positively evaluated the work of the administrative courts. He emphasised the need to introduce new solutions concerning mediation in the proceedings before administrative courts and to build the system of legal assistance.

Mr A n d r z e j Z w a r a , the President of the National Bar Association, spoke as the last of the invited guests. He emphasised the important role of the administrative court judges in implementing the idea of the democratic state of law thanking them for their highly praised professionalism.

After the break that followed the official part the meeting was reopened. When the quorum required under the Law on Proceedings Before Administrative Court was confirmed the General Meeting of Judges of SAC unanimously resolved to approve the "*Information on activities of the administrative courts in the year 2010*" presented by the President of the SAC. Professor Roman Hauser, the President of the SAC, thanked those gathered for their participation and closed the General Meeting of Judges of the SAC.

Prepared by: *Przemysław Florjanowicz-Błachut*
(Judicial Decisions Bureau of the SAC)

Summary

of the article: **The direct application of the primary principles of the Constitution by the Administrative Courts**

The article analyses the judicial decisions of the Polish administrative courts from the perspective of the court application of the primary principles of the 1997 Constitution to the consideration of the court cases. It is a part of a wider issue i.e. the application of the Constitution in the practice of the administrative courts. In his article the author focused on the problems of the application of the primary principles of the Constitution (i.e. the provisions of Chapters I and II) such as the principle of the state of law (Art. 2), the principle of legality (Art. 7), the principle of protection of ownership (Art. 21), the principle of equality (Art. 32), the principle formulating the right to a trial before a court (Art. 45) and others. The author did not analyse the application by courts of these general principles of the Constitution included in its introduction.

Discussing the application of the Constitution by the courts the author distinguishes the four forms of its application. To the analysed extent:

1) founding a judgement directly on a provision of the Constitution;

2) founding a judgement on the pro-constitutional interpretation of a statutory provision.

3) founding a judgement on a decision of the Constitutional Tribunal;

4) founding a judgement on a response to a legal question; and

The proposed division is different from these proposed so far when analysing the application of the Constitution by courts.

The named forms of application of the Constitution are illustrated with the examples of the decisions made by the Voivodship Administrative Courts and the Supreme Administrative Court.

The author points to the circumstances that the practice of applying the primary principles of the Constitution full of humanistic axiology elevates the protection of individual rights to a higher level and demands more from the administrative authorities when deciding the administrative cases.

Summary

of the article: **A few comments on the law-making role of the judicial decisions made by the Constitutional Tribunal, the Supreme Administrative Court and the Supreme Court**

The prevailing principles of judiciarisation and judicialisation of the Basic Law (the Constitution) and the principles of its openness and favourable treatment of the systems of international law and the EU law and the consequences of the integration processes which brought about the creation of the multi-element (multicentre) system of law affected the systemic status of the judiciary and the practice of the judicial administration of justice.

They constitutionally strengthened the powers of judges. The direction and the contents of a court (judicial) decision, as the form of their exercising, are determined by the prevailing Constitution being the direct (or co-creating) source of reconstruction of a normative basic of a judicial decision.

These days it makes current the issue of this attribute of a judge's authority which also seems to be (may be) the judicial law-making (the judge-made law) with its role subsidiary towards the statutory law and its function of the axiological improvement and correction performed with regard to the principle of judicial self-restraint and neutrality, free from the political arbitrariness.

The judicial law-making is promoted by many factors. When the Basic Law was attributed a fully normative character the decision-making strategies of courts changed too – the constitutional context and the European context, often complementary with the former, are of crucial importance. The judicial law-making is also promoted by the unsatisfying quality of the statutory law demonstrating itself in, generally speaking, its deficiencies and the imperfection of the legislation reflected in the decisions of the Constitutional Tribunal. To this extent the role of the decisions made by the Constitutional Tribunal may not be disregarded. Their consequences for the cases decided by the courts demonstrate in many contexts and dimensions, which applies to both positive and, to a far larger extent, negative judgements. The Constitutional Tribunal's derogation of the challenged provision serving as the basis for a court's decision, and in the case of the partial judgement – its parts, due to the lack of the grounds to apply it in the case (in full, in part or in the specific meaning) poses the question of the legal basis of the decision made. In confrontation with the imperative to decide the case pending before the court and given the lack of intervention from a positive legislator, the court is not released from the obligation to specify the legal basis of its decision and in this respect it may not be excluded that the performance of this obligation will not result in any normative novelty and that the source of the reconstruction of the basis of the decision will not be a negative judgement of the Constitutional Tribunal. Furthermore, in the context of the purpose for which the courts of the highest instances adopt abstract resolutions, their function and binding force, it is necessary to emphasise the direct influence of the contents of the decision on the application of law in the specific cases being particularly important when such a resolution-making intervention results in an element of normative novelty.

Summary

of the article: **The conditions of registrability of an industrial design**

In order for an asset to be recognised as an industrial design two conditions must be satisfied i.e. novelty and individual character, and they must be satisfied jointly. The Polish legislator included the conditions of registrability – unlike in the directive – in the definition of an industrial design. Both the condition of novelty and the condition of individual character of a design have stirred up many controversies in the Polish and foreign doctrine and judicature. It must be considered how to evaluate the condition of novelty of an industrial design and it is necessary to specify a personal standard to evaluate this condition as well as interpret the term "insignificant differences". The analysis of the requirement of an individual character of an industrial design has caused many controversies and discussions, in particular as regards the interpretation of the model of an "informed user" making the evaluation on the basis of unclear criteria: the difference in overall impression or the degree of freedom of the designer in developing the design. The evaluation of novelty of an industrial design consists in verifying the submitted design for its sameness with any earlier industrial designs. Both under Polish and EU law, novelty includes the objective non-identicalness of a design with other designs exceeding the insignificant details. In the judicial practice of the administrative courts the established method of verification of novelty is the usual comparing of the designs where the decisive role is played by the impression made on the recipient

directly and not the analysis of the pictures that may potentially remain in his memory. The next condition of protection is the criterion of individual character of a design coming from the German judicial practice. Its evaluation should be in particular based on: 1) the criterion of the degree of freedom of the designer in developing the design and 2) the criterion of difference in overall impression. The conditions of novelty and individual nature should not be included in the definition of an industrial design as it leads to the mixing of the conditions of obtaining a right under a design registration with the definition of an industrial design. The present form of the term "industrial design" in the prevailing part of the EU Member States reflects the definition in EU law where novelty and individual character were not included in the definition present in both the directive and the regulation.

Summary

of the article: **Making an application to register a trade mark in bad faith in the judicial decisions of the European Court of Justice**

Although EU law prohibits making applications to register trademarks in bad faith, there is no European definition of making an application to register a trade mark in bad faith. Such definition is present neither in Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks nor in Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark whose provisions specify only that "a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where and to the extent that (…) the application for registration of the trade mark was made in bad faith by the applicant" (Art. 3.2(d) of the Directive) or "Community trade mark shall be declared invalid on application to the Office or on the basis of a counterclaim in infringement proceedings (…) where the applicant was acting in bad faith when he filed the application for the trade mark" (Art. 52.1 of the Regulation). Given their similarity, it would be worth developing one concept of bad faith in EU law applicable when interpreting the provisions of both the Regulation and the Directive.

Attempting to create such a definition one should pay attention to the decisions of the Office for Harmonization of Internal Market (OHIM). In the OHIM's opinion bad faith can be considered to mean "dishonesty which would fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men". Acting in bad faith may imply or involve actual or constructive fraud, or a design to mislead or deceive another or unfair practices involving lack of honest intention. For the OHIM such definition is the

point of departure for deciding whether in a given case the application for registration of the trade mark was made in bad faith or not – having carefully analysed all the circumstances of the case.

The postulate to analyse all the circumstances of the case is strongly emphasised in the judgements of the European Court of Justice. Although the European Court of Justice has not developed a general definition of making an application to register a trade mark in bad faith, but a reference to the OHIM's definition may be noticed in its decision in the case of *Lindt & Sprüngli v Frans Hauswirth (Case C-529/07)* where the ECJ noted that "40. However, the fact that the applicant knows or must know that a third party has long been using, in at least one Member State, an identical or similar sign for an identical or similar product capable of being confused with the sign for which registration is sought is not sufficient, in itself, to permit the conclusion that the applicant was acting in bad faith. Consequently, in order to determine whether there was bad faith, consideration must also be given to the applicant's intention at the time when he files the application for registration. 41. Consequently, in order to determine whether there was bad faith, consideration must also be given to the applicant's intention at the time when he files the application for registration." Therefore it seems that, alike the OHIM, the ECJ verified both the subjective criterion (the applicant's intention) and the objective criterion (the applicant's knowledge).

Summary

of the article: **The post-inspection instruction of the Environmental Protection Inspection**

The basic duties of the Environmental Protection Inspection include, among others, controlling the compliance with the environmental protection regulations and decisions. Based on the inspection findings the Environmental Protection Inspection may issue the post-inspections instruction to the manager of the controlled organisational unit or natural person.

A post-inspection instruction is an administrative ruling. It is not an administrative decision but may be appealed against to an administrative court.

Issuing a post-inspection instruction creates an administrative-law relationship between the Environmental Protection Inspection and the addressee of the post-inspection instruction. This relationship is a source of an information covenant for the addressee who must, in the period of time specified in the post-inspection instruction, notify the Environmental Protection Inspection of the scope of actions taken and completed in order to eliminate the violations specified in the post-inspection instruction. Defaulting on this covenant is subject to punishment as a petty offence.

In the post-inspection instruction the Environmental Protection Inspection may not impose on the controlled entity or its manager a direct obligation to take any specific actions in order to eliminate the identified violations. This is achieved by using other legal instruments such as an administrative decision.