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DISQUALIFICATION OF AN EMPLOYEE OF A PUBLIC ADMINISTRATION AUTHORITY IN THE EUROPEAN UNION MEMBER STATES

WYŁĄCZENIE PRACOWNIKA ORGANU ADMINISTRACJI PUBLICZNEJ W PAŃSTWACH UNII EUROPEJSKIEJ

One of the rules contained in the Code of Good Administrative Behavior adopted in 2001 by the European Parliament is the principle of impartiality and independence (Article 8). The presence of this rule, despite its non-binding nature, prompted the author to examine – using the method of comparative law analysis – whether the EU Member States have regulated this issue in their legal systems – and if so, to what extent and how. The basic institution serving the implementation of this principle is the disqualification of an employee of the authority from participation in the proceedings in situations where their impartiality seems to be at risk. Not all EU countries explicitly provide for such an institution. Among the legal systems that contain it, only some regulate the entirety of issues related to it: the grounds for disqualification, the procedure for disqualification and the consequences of it, as well as the appealability of orders taken in this matter and the consequences of violating the provisions on disqualification. Regulations of individual issues differ in the degree of detail. This applies primarily to the reasons for the disqualification of an employee of the authority. The most important reason for the disqualification of employees (except when they or their spouse are a party to the proceedings) is the consanguinity or affinity between them and the party. However, the ranges of such ties resulting in automatic disqualification of an employee, adopted in EU member states, differ significantly. The second area of significant difference is the consequences of the potentially biased employee's participation in the proceedings. The solutions adopted in this regard in legislation and jurisprudence depend on how the main purpose of the provisions concerning the disqualification of an employee is perceived: as strengthening the public's trust in the executive, or as a fair settlement of the matter.

Keywords: administrative proceedings; impartiality; bias; close persons; consanguinity; affinity

Jedną z reguł zawartych w Kodeksie dobrej praktyki administracyjnej, uchwalonym w 2001 r. przez Parlament Europejski, jest zasada bezstronności i niezależności (art. 8). Głosi ona m.in., że urzędnik w swoim postępowaniu nie powinien kierować się interesem osobistym, rodzinnym bądź narodowym ani naciskami politycznymi. Obecność tej reguły, mimo jej niewiążącego charakteru, skłoniła autora do zbadania, metodą analizy prawnoporównawczej, czy, a jeśli tak, to w jakim

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zakresie, i w jaki sposób kraje UE unormowały to zagadnienie w swoich porządkach prawnych. Podstawową instytucją służącą realizacji tej zasady jest wyłączenie pracownika organu od udziału w postępowaniu w sytuacjach, w których jego bezstronność wydaje się zagrożona. Nie wszystkie państwa UE wyraźnie przewidują istnienie takiej instytucji. Spośród tych porządków prawnych, które ją zawierają, tylko część reguluje całokształt związanych z nią kwestii: przesłanki wyłączenia pracownika organu, tryb wyłączenia i skutki wyłączenia, a także zaskarżalność rozstrzygnięć podejmowanych w tej sprawie oraz konsekwencje naruszenia przepisów o wyłączeniu. Regulacje poszczególnych zagadnień różnią się z kolei stopniem uszczegółowienia. Dotyczy to przede wszystkim przyczyn wyłączenia pracownika organu. Większość ustaw regulujących instytucję wyłączenia wymienia mniej lub więcej konkretnych okoliczności stanowiących takie przyczyny, posiłkując się dodatkowo klauzulami generalnymi, mającymi obejmować przypadki wyłączenia nieprzewidziane wyraźnie przez ustawodawcę. W niektórych ustawach zasadniczą podstawą wyłączenia pracownika jest klauzula generalna, a pojedyncze, konkretnie określone przypadki stanowią jej uzupełnienie lub doprecyzowanie. Najważniejszym powodem wyłączenia pracownika (oprócz sytuacji gdy on sam lub jego małżonek jest stroną w postępowaniu) jest pokrewieństwo lub powinowactwo łączące go ze stroną. Jednak zakresy tego rodzaju więzów skutkujących bezwzględnym wyłączeniem pracownika, przyjęte w poszczególnych państwach, znacznie się różnią. Drugim obszarem istotnych różnic są konsekwencje udziału potencjalnie stronniczego pracownika w postępowaniu. Rozwiązania przyjmowane w tym zakresie w ustawodawstwie i orzecznictwie uzależnione są od tego, jak postrzegany jest główny cel przepisów dotyczących wyłączenia pracownika: czy jest nim wzmocnienie zaufania społeczeństwa do władzy wykonawcze, czy sprawiedliwe załatwienie sprawy.

Słowa kluczowe: postępowanie administracyjne; bezstronność; stronniczość; osoby bliskie; pokrewieństwo; powinowactwo

I. INTRODUCTION

The institution of excluding public officials applying the law from dealing with a specific case has its source in the *nemo iudex in causa sua* principle. The roots of this maxim, first formulated in the works of the Swiss theologian Huldrych Zwingli (1484–1531)[1] and wrongly attributed to the English jurist Edward Coke (1552–1634), go back to Roman times.

In the Code of Justinian under the heading *Ne quis in sua causa iudicet vel sibi ius dicat*[2] we can read the content of the decree of Valens, Gratian and Valentinian II from 376, according to which: *Generali lege decernimus neminem sibi esse iudicem vel ius sibi dicere debere. In re enim propria iniquum admodum est alicui licentiam tribuere sententiae.*[3] In the Digests we find a quote from Ulpian: *Qui iurisdictioni praeest, neque sibi ius dicere debet neque uxori vel liberis suis neque libertis vel ceteris, quos secum habet.*[4]

[1] Zwingli (1544): 91.

[2] Codex Iustinianus [*Cod. Iust.*] 3.5 pr.: 'No one shall decide his own case or interpret the law for himself' (transl. Scott).

[3] *Cod. Iust.* 3.5.1: 'We decree by this general law that no one shall act as judge in his own case, or interpret the law for himself, as it would be very unjust to give anyone the right to render a decision in an affair which is his own' (transl. Scott).

[4] Iustiniani Augusti Digesta seu Pandectae 2.1.10: 'He who presides over the administration of justice ought not to render judgment in his own case, or in that of his wife or children, or of his freedmen, or of any others whom he has with him' (transl. Scott).

Similar regulations are included in the earlier collection of laws – the Theodosian Code: *Promiscua generalitate decernimus neminem sibi esse iudicem debere. Cum enim omnibus in re propria dicendi testimonii facultatem iura submoverint, iniquum ammodum est licentiam tribuere sententiae*.[5]

The raison d'être of the institution of disqualification of employees applying administrative law is to minimize the impact of non-substantive factors on the manner of disposing of the matter. The point here is to ensure the neutrality of the authority not only when making a decision concluding the proceedings, but also when determining the facts of the case. The disqualification an employee of the authority is perceived as one of the most important 'guarantees' for establishing the objective truth, next to the solutions providing for the evidence initiative of the authority conducting the proceedings, an open catalogue of evidence, free assessment of the collected evidence, responsibility for false testimony or the possibility of submitting appeals.[6]

II. REASONS FOR DISQUALIFICATION

1. Self-interest in the disposal of the matter

Among the reasons for disqualification, the most important is, of course, the case when the employee of the authority is himself/herself a party to the proceedings or is otherwise interested in its outcome. This case is directly provided for in the legal orders of all European Union countries, which base the disqualification mainly on enumerated reasons, as well as in a few of those in which the specification of some reasons for disqualification is an addition to the general clause.

In the British legal order, which also distinguishes between the irrefutable presumption of bias, resulting in automatic disqualification, and the suspicion (fear) of bias, which must be specifically established, a personal economic (pecuniary or property) interest of a holder of authority (decision-maker) is the only circumstance associated with the presumption of bias.[7] What's more, the slightest financial interest, even just the payment of tax, is sufficient. However, it is emphasized that the mere possibility of obtaining a financial benefit as a result of the case is not a sufficient reason for disqualification, nor is an indirect benefit. In the latter two cases, on the other hand, disqualification due to fear of bias may come into question.[8]

Similarly, in Ireland, bias resulting from self-interest of an economic nature is seen as particularly severe and is dealt with accordingly.[9]

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[5] Codex Theodosianus II.2.1: 'We decree with sweeping generalization that no person shall act as judge for himself. For since the law has deprived all persons of the right to testify in their own case, it is entirely unfair to grant to them the license to pronounce sentences' (transl. Pharr).

[6] Alekseev (1982): 321–322, 325–326; Chekalina (2004): 185–186.

[7] Groves (2009): 485 ff.

[8] Maier (2001): 104.

[9] Maier (2001): 119.

2. Close relationship with a party

An almost equally strong position among the reasons for the disqualification of an employee is the circumstance when a party to the proceedings or a person interested in its outcome for other causes is a person belonging to the family of the employee of the authority. Among the countries that do not limit themselves to the general clause when determining the grounds for disqualification, only the Dutch act[10] does not mention it directly.

On the other hand, significant differences concern the circle of persons treated as close ones in the context of disqualifying an employee of the authority. A clear mention (by name or degree of consanguinity or affinity) of a specific category of close persons is important, because the law links it with the presumption of bias. This means that the mere fact of the existence of a given relationship (defined by the legislator) results in the obligation to disqualify an employee (or even disqualification by law), without the need to examine whether such a relationship is actually accompanied by a strong emotional bond in a particular case or not.

In all legal systems that list persons close to the employee, the spouse is listed as such a person. Despite the obviousness of this solution, it was not provided for in the Spanish Act of 1992 on the Legal Regime of Public Administrations and General Administrative Procedure that was in force until recently.[11] The fact that the spouse was not included *expressis verbis* was all the more surprising, as this act defined the circle of persons close to the employee of the authority relatively broadly when compared to other European regulations. In the event of such a relationship between an employee of the authority and the party, the provision providing grounds for disqualification on the basis of close friendship (*amistad íntima*) between the employee and the party should have been used (Article 28(2)(c) LRJ-PAC). The Act on the Legal Regime of the Public Sector,[12] which currently regulates the issue of disqualification of an employee of an administration authority, has corrected this oversight.

A person who is not the spouse of an employee but is living together with him or her is explicitly covered by the disqualification provisions

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[10] Act of 4 July 1992, containing general rules of administrative law, a.k.a. General Administrative Law Act (Algemene wet bestuursrecht, Awb). The issue of bias (*vooringenommenheid*) of persons belonging to or acting on behalf of the authority (*tot het bestuursorgaan behorende of daarvoor werkzame personen*) is regulated by Article 2:4.

[11] Act of 26 November 1992, no. 30/1992, on the Legal Regime of Public Administrations and General Administrative Procedure (Ley de Régimen Jurídico de las Administraciones Públicas y de Procedimiento Administrativo Común, LRJ-PAC), Official State Gazette (Boletin Oficial del Estado, BOE) no. 285. The circle of the nearest persons in the considered context was regulated by Article 28(2)(b).

[12] Act of 1 October 2015, no. 40/2015, on the Legal Regime of the Public Sector (Ley de Régimen Jurídico del Sector Público, LRJ-SP), Official State Gazette (Boletin Oficial del Estado, BOE) no. 236. The issue of disqualifying holders of an authority (*las autoridades*) and employees of administration authorities (*personal al servicio de las Administracones*) from participation in the proceedings (*intervención en el procedimiento*) is regulated by Article 23 and 24 LRJ-SP.

in the laws of Finland,[13] Germany,[14] Austria,[15] Slovenia,[16] Croatia,[17] Spain and Portugal.[18] Less explicitly, the provisions on the disqualification of an employee of the authority include such persons in the legal systems of Sweden[19] and Denmark[20] (which refer – respectively – to close persons and persons closely associated with the employee), Estonia[21] and Italy[22] (which

[13] Law on Administration (Hallintolaki), Finnish Legal Collection (Suomen säädöskokoelma, SDK) 434/2003. The issue of disqualification of an official (*virkamies*) is regulated in § 28–30.

[14] Act on Administrative Procedure (Verwaltungsverfahrensgesetz, VwVfG) of 25 May 1976, consolidated text: Federal Law Gazette (Bundesgesetzblatt, BGBl.) I of 2003, p. 102, as amended. The issues of disqualification of an employee (*Tätiger für eine Behörde*, *Bediensteter*) from participation in the proceedings (*Mitwirkung*) and exclusion of a member of a collective authority (*Mitglied eines Ausschusses*) from participation in the meeting and decision-making (*Beratung und Beschlussfassung*) are regulated by § 20, § 21 and § 71(3) VwVfG.

[15] Federal Act of 21 July 1925 on General Administrative Procedure (Allgemeines Verwaltungsverfahrensgesetz, AVG), consolidated text: Federal Law Gazette (Bundesgesetzblatt, BGBl.) no. 51/1991, as amended. The issues of disqualifying holders of an authority or persons acting under their authority (*Verwaltungsorgane*) from taking official actions (*Ausübung ihres Amtes*) are regulated in § 7 AVG.

[16] Act on General Administrative Procedure (Zakon o splošnem upravnem postopku, ZUP), Official Gazette of the Republic of Slovenia (Uradni list RS) no. 80/99. The issue of disqualifying the head (*predstojnik*) or authorized employee of the authority (*pooblaščena uradna oseba organa*) from making decisions (*odločanje*) and taking other individual actions in the proceedings (*opravljanje posameznih dejanj v postopku*) is regulated by Article 35–41 ZUP.

[17] Act of 27 March 2009 on General Administrative Procedure (Zakon o općem upravnom postupku, ZUP). The issue of disqualification of an official (*službena osoba*) from conducting administrative proceedings (*vođenje postupka*) is regulated by Article 24 ZUP.

[18] Decree-Law of 7 January 2015, no. 4/2015 – Code of Administrative Procedure (Código do Procedimento Administrativo, CPA). The issue of disqualifying the holder of the functions of a public administration authority (*titular do órgão da Administração Pública*), an employee of an authority acting on its behalf (*agente*) and any other entity exercising public authority (*outra qualquer entidade no exercício de poderes públicos*) from participation in administrative proceedings, issuing an act or entering into a contract (*intervenção em procedimento administrativo ou em ato ou contrato*) are governed by Articles 69–75 CPA.

[19] Law on Administration (Förvaltningslag, FL), Swedish Legal Collection (Svensk författningssamling, SFS) 2017:900. The issue of disqualifying a person who acts in administrative proceedings on behalf of the authority (*för en myndighets räkning*) in such a way that he can influence its decision (*på ett sätt som kan påverka myndighetens beslut*) from participating in the proceedings in the matter (*del i handläggningen av ärendet*) and in concluding the matter (*närvaro när ärendet avgörs*) are regulated by §§ 16–18.

[20] Act no. 571 of 19 December 1985 – Law on Administration (Forvaltningslov, FVL). The issue of disqualification of a public administration employee (*den, der virker inden for den offentlige forvaltning*) from decision-making (*træffe afgørelse*), participation in decision-making (*deltagelse i afgørelsen*) and other participation in the consideration of the case (*medvirke ved behandlingen af den sag*) is regulated by § 3 FVL.

[21] Law on Administrative Procedure (Haldusmenetluse seadus, HMS), adopted 6 June 2001, State Gazette (Riigi Teataja, RT) I 2001, 58, 354. The issue of disqualifying a person acting on behalf of an administrative authority (*haldusorgani nimel tegutsev isik*) from participation in administrative proceedings (*osalemine haldusmenetluses*) is regulated in § 10 HMS.

[22] Decree of the President of the Republic 62/2013 of 16 April 2013 – Code of Conduct for Civil Servants (Codice di comportamento dei dipendenti pubblici). The issue of disqualifying an official (*dipendente*) from participation in decision-making (*partecipazione all'adozione di decisioni*) and other activities (*attività*) in administrative proceedings is regulated by Article 6(2) and Article 7(1).

refer to persons running a common household), and Greece[23] (which refer to persons with a 'special relationship' or 'exceptional bond' with an employee of the authority). In other countries, the general clause will apply to a non-married civil partner.

Far-reaching differences in legal solutions concerning the circle of close persons occur at the level of consanguinity and affinity. This applies especially to blood relatives and in-laws in the collateral line.

Admittedly, the assumed degree of lineal consanguinity is also differentiated in different European Union countries (from the second degree – as in the Polish code[24] – to indefiniteness), but when it comes to the direct line, such differences in legal regulations are not of much practical importance. Even if lineal consanguinity with the party (interested person), as the basis for disqualification of an employee of the authority, is not subject to any legal limitation as to the degree, the limitation results from a person's lifespan. The point is that the ancestor of an adult authority employee of a degree higher than the second (i.e. great-grandfather or great-great-grandfather) is generally already dead, and the descendant of an authority employee of a degree higher than the second (i.e. great-grandson or great-great-grandson) has not yet been born before the employee reaches retirement age.

The situation is different in the case of collateral consanguinity and collateral affinity. The range of persons considered by the legislator to be close in this sphere of relationship is of significant practical importance because, unlike in a lineal relationship, there is no dependence such that the higher the degree of consanguinity or affinity, the lower the probability that a further relative is alive or has already been born (in other words: that the degree of consanguinity or affinity is inversely proportional to the probability of the existence of a related person).

Most European Union countries which clearly define the circle of persons close to the employee of the authority – in the law on general administrative procedure or in municipal law – adopt the third (Germany, Luxembourg[25]) or even the fourth degree of collateral consanguinity (Austria, Croatia, Slovenia,

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[23] Act no. 2690 of 8/9 March 1999 – Code of Administrative Procedure (Κώδικας Διοικητικής Διαδικασίας, ΚΔΔ), Government Gazette (Εφημερίς της Κυβερνήσεως, ΦΕΚ) A' 45. The issue of disqualifying single-person authorities (*μονομελή όργανα*) and members of collective bodies (*μέλη των συλλογικών οργάνων*) from any actions or procedures (*κάθε ενέργεια ή διαδικασία*) which are involved in making decisions (*συμμετοχή σε λήψη απόφασης*) or in formulating opinions or proposals (*διατύπωση γνώμης ή πρότασης*) is regulated by Article 7 and 8 ΚΔΔ.

[24] Act of 14 June 1960 – Code of Administrative Procedure (Kodeks postępowania administracyjnego, k.p.a.), Journal of Laws of the Republic of Poland of 2022, item 2000, as amended. The issue of disqualification of an employee of the authority and a member of the collective body from participation in the proceedings is regulated by Article 24, Article 26 § 1 and 3, and Article 27 k.p.a.

[25] Municipal law (Loi communale) of 13 December 1988, consolidated text: Official Journal of the Grand Duchy of Luxembourg (Memorial) A no. 30/2011. The issue of disqualifying a member of a commune body (*membre du corps communal*), a secretary (*secrétaire*) and a tax collector (*receveur*) from participation in deliberations (*délibérations*) of commune authorities is regulated by Article 20 sentence 1(1).

Belgium,[26] Denmark, Greece, Spain) as the upper limit of closeness between an employee of an administration authority and a party, resulting in disqualification of the employee from participation in the proceedings. Therefore, the issue here is the kinship (of an employee or his/her spouse) reaching children of siblings and siblings of parents (third degree) or cousins (fourth degree). Such regulations were also contained in the old Dutch[27] and Italian[28] acts regulating municipal law.

Luxembourg, Belgium, Denmark, Greece and Spain similarly define the limit of closeness when it comes to collateral affinity. The remaining of the above-mentioned countries (Germany, Austria, Croatia and Slovenia) adopt the second degree of such affinity as the limit of legally relevant closeness between an employee of an administration authority and a party.

The Finnish Law on Administration distinguishes two categories of close persons in the context of the disqualification of an employee of the authority. The first category consists of persons considered close by the legislator himself. These include – in addition to blood relatives and in-laws in a straight line up to the second degree – collateral blood relatives up to the third degree, collateral in-laws of the second degree and some collateral in-laws of the third degree (children of the spouse's siblings). Finnish law also includes in this group of close persons the spouses of the spouse's blood relatives up to the second degree, which is unique in European legislation. By 'spouses' (*puolisot*), the Finnish law designates both 'married spouses' (*aviopuolisot*), as well as persons living in paramarital relations ('as in marriage') and persons living in registered partnerships. The second category – of an evaluative nature – consists of persons who are in any other way particularly close (*muuten erityisen läheiset henkilöt*) to the official, as well as their spouses. An official is subject to disqualification if one of the above-mentioned persons (belonging to the first or second group) is a party to the matter, or if this person may gain a particular advantage or disadvantage as a result of the proceedings.

The Portuguese Code of Administrative Procedure provides for the disqualification of an employee by operation of law[29] in cases where he is related by consanguinity or affinity up to the second degree in the collateral line (and without restrictions in the direct line) to a person having an interest in the proceedings.

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[26] Act of 24 June 1988 – New Municipal Law (Nouvelle Loi communale), Belgian Official Journal (Moniteur belge, M.B.), p. 12482. The issue of disqualifying a member of the council (*membre du conseil*), the mayor (*bourgmestre*) and the secretary (*secrétaire*) from participating in the deliberations (*délibération*) is regulated by Article 92 sentence 1(1) and sentence 2.

[27] Act of 5 July 1851 – Municipal Law (Gemeentewet). Article 52 regulated the issue of abstention of a member of the council from voting on matters (*zaken*) concerning persons listed in the act, including their appointment (*benoeming*), suspension (*schorsing*) and dismissal (*ontslag*).

[28] Royal decree of 3 March 1934, no. 383 – Approval of the consolidated text of the Municipal and Provincial Law (Legge comunale e provinciale). Article 279 regulated the issue of the abstention of certain officials of the local administration from participating in deliberations (*deliberazioni*) concerning the interest (*interesse*), disputes (*liti*) and accounting (*contabilità*) of the persons listed in these provisions.

[29] Rebordão Montalvo (1992): 85; Maier (2001): 174.

Polish legislation adopts the second degree of consanguinity and affinity between the employee of the authority and the party as the limit of automatic disqualification from participation in the proceedings – the lowest among all European Union countries that clearly define the circle of persons close to the employee of the authority in the context under consideration.

The Estonian Law on Administrative Procedure sees grounds for disqualification of an employee due to consanguinity or affinity ties between him/her and a participant in the proceedings in the same cases as the Polish act, that is, when the participant is a parent, child, grandparent, grandson, brother or sister, or an in-law in the same (second) degree of both lines. Moreover, regardless of the existence of the above-mentioned ties, a person acting on behalf of an administrative authority must not participate in administrative proceedings if he/she is a family member (*perekonnaliige*) of the participant in the proceedings (i.e. lives with him/her and runs a common household).

The identically analysed issue of blood relatives and in-laws was regulated by the Italian Code of Conduct of Civil Servants. It provides for the employee's obligation to refrain from participating in decisions and other activities that may concern any interests of his/her blood relatives (*parenti*) or in-laws (*affini*) up to the second degree, as well as persons running a common household with him/her (*conviventi*).

The Swedish Law on Administration generally refers to 'close persons' (*närstående*), without specifying either the degree or the source of closeness. An official of the authority is considered to be biased (*jävig*) when any person close to him/her is a party to the matter or may be expected to be otherwise (i.e. not necessarily in relation to his or her rights and obligations) affected by the decision in a significant way. In no case, however, is the disqualification made by virtue of the law itself, and what is more, it is in no case absolutely obligatory.

The Slovak Act on Administrative Procedure[30] does not mention consanguinity or affinity at all as circumstances that disqualify an employee of the authority from participation in the procedure when they are related to a party or an interested person. When it comes to personal reasons for disqualification, it uses only the general clause, according to which '[an] employee of an administrative authority is disqualified from considering and concluding a matter if, due to his attitude towards the matter, the parties or their representatives, there are doubts as to his impartiality'. A person who participated in the proceedings as an employee of an administrative authority of another instance is also disqualified (from the questioning and decision-making).

The issue of disqualification of an employee of the authority is regulated almost identically by the Czech Administrative Procedure.[31]

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[30] Act of 29 June 1967 on Administrative Procedure (správny poriadok), no. 71/1967 of Collection of Laws of Slovak Republic (Zbierka zákonov Slovenskej republiky, Zb.). The issue of disqualification of an employee of the administrative authority (*pracovník správneho orgánu*) and a member of the administrative commission (*člen správnej komisie*) from considering and concluding the matter (*prejednávanie a rozhodovanie veci*) is governed by § 9.

[31] Act of 24 June 2004 – Administrative Procedure (správní řád, s.ř.), no. 500/2004 of Collection of Laws (Sbírka zákonů, Sb.). The issue of disqualification of an official (*úřední osoba*) from

An even more generally formulated general clause is contained in the Dutch General Administrative Law Act. It provides that the '[a]dministration authority shall carry out its tasks without prejudice'. In the literature, it is assumed that the grounds for disqualifying an employee of the authority will be, among others, when a member of his or her close family may expect to gain or disadvantage as a result of the proceedings. Also, the official's personal resentments towards a participant in the proceedings justify his or her disqualification.[32]

According to the Bulgarian Code of Administrative Procedure,[33] no employees may participate in the proceedings if they have an interest in its outcome or are in a relationship with any of the interested persons that raises reasonable doubts as to their impartiality.

The Hungarian Act on General Administrative Regulations[34] establishes a general rule of disqualification stating that 'any person considered to be biased may not participate in the proceedings' (§ 22 Ákr.). Regardless of this, it clearly states two reasons for disqualification of an employee: 1) when the matter being the subject of the proceedings directly concerns his or her right or legal interest; 2) when he or she participated in the proceedings in the first instance (§ 23(1) and (2) Ákr.).

In the United Kingdom, it is generally recognized that the family ties between an official and a person who is a party to the proceedings or otherwise has an interest in its outcome may give rise to doubts about his or her impartiality. Where those ties are sufficiently close to make the official's bias appear possible or likely, they lead to his or her disqualification from the proceedings.[35] This is the case where the person concerned is the spouse, child, parent, brother or sister of an official. Whether further family ties result in the official being barred from participating in the proceedings depends on the circumstances of the particular case.[36]

In Ireland, as in United Kingdom, the principle of administrative impartiality is one of the two basic principles of natural justice, along with the right to be heard, and thus one of the common law principles.[37] Hence, the principle of impartiality is assigned, at least in certain cases, a constitutional rank, finding its anchor in Article 40(3) sentence 1 of the Constitution of Ireland

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any actions through which he could influence the outcome of the proceedings (*výsledek řízení ovlivnit*) is governed by § 14 s.ř.

[32] de Waard (1987): 344–345, as cited in Maier (2001): 185.

[33] Code of Administrative Procedure (Административнопроцесуален кодекс, АПК), State Journal (Държавен вестник, ДВ.), vol. 30 of 11 April 2006 as amended. The issue of disqualifying an official (*длъжностно лице*) from participation in administrative proceedings (*участие в производството*) is regulated by Article 10(2).

[34] Act CL of 2016 on General Administrative Regulations (Általános közigazgatási rendtartás, Ákr.). The issue of disqualifying an official (*ügyintéző*) from disposing of the matter (*ügy elintézésé*) in administrative proceedings is regulated by Article 22, Article 23 sec. 1 and 2 and Article 24(1)(2)(3).

[35] De Smith, Woolf, Jowell (1995): 536; as cited in Maier (2001): 106.

[36] Alexis (1979): 155, as cited in Maier (2001): 106.

[37] Hogan, Morgan (1991): 412.

(Bunreacht na hÉireann). It is assumed that this provision guarantees not only basic civil rights, but also compliance with the fundamental requirements of fair proceedings: *nemo iudex in sua causa* and *audi alteram partem*.[38] The consequence of this is, unlike in UK law, that it is inadmissible to restrict this principle by ordinary legislation.[39] Suspicion of bias due to personal reasons may stem from family, financial or close friendship relationships between an employee of the authority and a party involved in the proceedings or a person interested in its outcome.[40] In the same way, bias is considered when an employee is hostile to a party or an interested person.[41]

In France, according to the general legal principle of impartiality an official is considered to be potentially biased if he or she is a close family member of a party or person who may benefit from the proceedings.[42] For this reason, for example, in matters of appointment to public service positions, the candidate's brother-in-law cannot sit on the selection committee as its member.[43] Whether a certain degree of consanguinity or affinity suffices to justify the assumption of potential bias of an official depends on the circumstances of the particular case. However, the French Council of State (Conseil d'État) avoids strict, rigorous jurisprudence on these issues.[44]

3. Representing a party

The fact that an employee of the authority acts as a party's representative is not as common a reason for disqualification, formulated *expressis verbis*, as the two above-mentioned ones. It is expressly provided for by the legislation of Sweden, Finland, Denmark, Estonia, Germany, Poland, the Czech Republic, Slovakia, Austria, Hungary, Croatia, Slovenia, Italy, Spain and Portugal. This circumstance is not included among the reasons for disqualification of an employee in Greece and Bulgaria, but it can be included in the general clause. Also in countries where the shape of the principle of impartiality is left to judicial decisions and the doctrine, this circumstance – with the exception of the Netherlands[45] – is not one of the most strongly emphasized cases of suspected bias.[46] In United Kingdom, the fact that the official is a close family member of the attorney of the person interested in the conclusion of the matter does not constitute a reason to disqualify him from participation in the proceedings.[47]

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[38] O'Reilly, Redmond (1980): 322, as cited in Maier (2001): 118.
[39] Hogan, Morgan (1991): 412.
[40] Grimes, Horgan (1981): 102, as cited in Maier (2001): 120.
[41] Hogan, Morgan (1991): 422 ff.
[42] Isaac (1968): 433, as cited in Maier (2001): 125.
[43] Judgement of the State Council (Conseil d'Etat) of 5 October 1955, Bernard, Rec. 1955, p. 463.
[44] Maier (2001): 126.
[45] de Waard (1987): 345, as cited in Maier (2001): 243.
[46] Maier (2001): 243.
[47] Hogan, Morgan (1991): 422 ff.

The fact that a person close to the employee is a representative of the party is not included among the reasons for the disqualification of the employee – besides Greece and Bulgaria, which is understandable in the light of the above comments – by the laws of Italy (despite a relatively wide catalog of *expressis verbis* formulated reasons for disqualification of the employee), Hungary and Estonia. In the cases of Greece and Bulgaria, such a circumstance cannot be included even under the general clauses, since they concern only the relationship between the employee and, respectively, the party or any interested person, and not the relationship between the persons close to the employee and such interested persons.

4. Official reasons for disqualification

Among the circumstances that can be defined, in contrast to the above, as official reasons for disqualification of an employee, the most common in the laws of the European Union member states is the prior participation of an official in proceedings concerning the same matter, conducted by another administrative authority, in the appeal or supervisory mode. Such a situation is expressly provided for by the legislation of Sweden, Denmark, Poland, the Czech Republic, Slovakia, Austria, Hungary, Croatia, Slovenia and Portugal. Also in United Kingdom, Ireland and France, the prohibition of an official's participation in different phases of the same, multi-stage procedure in a given matter is stipulated. This prohibition is particularly emphasized in relation to disciplinary proceedings. For example, it is strongly argued that the holder of the authority cannot participate in the decision-making if he or she has previously submitted a report initiating the proceedings in the matter, or participated in the explanatory proceedings.[48] Among the countries whose laws on administrative procedure do not identify the employee's participation in the same matter at a different level as grounds for his disqualification, this lack must be felt most 'severely' in countries whose general clauses do not allow this case to be covered (Greece, Bulgaria) and in Spain, whose law – as already mentioned – does not have a general clause at all.

It is much less common in the analysed legislative area to explicitly include, as a reason for disqualifying an employee, the employee's function as a source of evidence in the proceedings. Only in the light of the laws of Poland, Germany, Croatia, Slovenia, Spain and Portugal, does the appearance of an employee of the authority as a witness or expert disqualify him or her as an entity disposing of the matter.

5. Other reasons for disqualification

The relevant laws of some countries clearly specify a number of other circumstances that should lead to the disqualification of an employee.

For example, the Italian, Spanish and Portuguese laws explicitly mention open hostility of an employee towards a party. The Spanish and Portuguese

[48] Maier (2001): 247.

laws also mention close friendship (familiarity) towards the party, and the Italian law – the fact that the employee is a frequent visitor to the party. In addition, the Italian and Portuguese laws cover situations in which an employee or a person close to him/her is a debtor or creditor of a party, as well as those in which an employee or a person close to him/her is suing a party or a person close to him/her, and the Portuguese law mentions circumstances in which the employee or person close to him/her has accepted the gifts (*dádivas*) from the party before or after the initiation of proceedings (Article 7(1) of the Codice, Article 23(2) LRJ-SP, Article 73(1) CPA).

On the other hand, the Croatian law mentions the situation in which the employee acts in a discriminatory manner towards the party (Article 24(3)(3) ZUP).

III. LIMITATIONS ON THE APPLICATION OF THE INSTITUTION OF DISQUALIFICATION

Some countries provide for explicit restrictions on the application of the institution of disqualifying an employee of the authority from participation in the proceedings. They are caused primarily by competence considerations.

In France, the adopted rules of counteracting bias in deciding the matters apply without restriction only to individual members of collective authorities. In relation to persons holding the functions of monocratic authorities, the principle of compliance with competence plays a significant role, as a result of which the effects of the possible bias of the holder of the authority may be considered only after the end of the proceedings, as part of the control of the decision issued by him or her.[49]

Also in Greece, the principle of respect for competence is of decisive importance. The provisions on disqualification apply to the holders of the authority, but in such a way that the right to dispose of the matter remains with the competent authority. The provisions on disqualification do not apply to members of a collegiate authority if their disqualification would result in the loss of the quorum required to adopt resolutions. Therefore, the disqualification can never result in the transfer of powers to another authority (Article 7(6) ΚΔΔ).

In the Czech Republic, the provisions on disqualification of an authority employee do not apply to the managers (heads) of central administrative authorities (§ 14(7) s.ř.).

In Estonia, the provisions on the disqualification of an employee of the authority do not apply to members of the Government of the Republic of Estonia and members of local government councils (*kohaliku omavalitsuse volikogu*). In addition, an employee cannot be disqualified if he cannot be replaced (§ 10(5) and (6) HMS).

[49] Maier (2001): 128, 239, 260.

In Denmark, the provisions on the disqualification of employees of an authority do not apply in three situations: 1) when their participation in the proceedings is necessary due to the type or importance of their interest, the type of matter or their relationship with the conduct of the matter, in the sense that in their absence the risk of the impact of impermissible factors on the outcome of the matter could not be excluded (§ 3(2) FVL); 2) if it would be impossible or difficult to find a replacement for the disqualified employee (§ 4(1) FVL); and 3) if, as a result of the disqualification of members, the collective authority would lose its capacity to adopt resolutions, and the proceedings cannot be suspended without serious damage to the public or private interest (§ 4(2) FVL).

In Sweden, an employee should not be disqualified despite the existence of circumstances justifying such a step, if it is clear that the issue of impartiality is irrelevant (*saknar betydelse*) for concluding the matter (§ 16 sentence 2 FL).

IV. THE PROCEDURE FOR DISQUALIFICATION

Almost none of the European Union countries provides for the disqualification of an employee by virtue of the law itself – yet this is an institution very characteristic of the Polish and German systems. Apart from Poland and Germany, the only country providing for such a mode of disqualification – in a specific group of cases – is Portugal. However, even Portuguese law requires a declaratory decision in such cases, known as a 'declaration of impediment' (*declaração do impedimento*). In the case of disqualification by constitutive decision, it is referred to as a decision on dismissal or on suspicion of bias (*decisão da escusa ou suspeição*) – depending on whether it is made at the request of the employee or the person concerned in the case.

The initiative to disqualify is most often granted to both the employee (member) of the authority and the party (participant in the proceedings), less often only to one of the listed entities: in Spain only to the person concerned (Article 24(1) LRJ-SP), and in Denmark only to the employee (Article 6(1) FVL). Sometimes, the admissibility of disqualification by an authorized entity acting *ex officio* is also explicitly provided for, for instance in Greece (Article 7(5) ΚΔΔ).

The entity deciding on the disqualification of an employee is usually his or her superior (e.g. Denmark, the Czech Republic, Slovakia, Spain) or the head of the authority (e.g. Hungary, Italy), and on the disqualification of the head (holder) of the authority – a higher level authority, or, in the absence of such, a supervisory authority (Greece, Croatia). The disqualification of a member of a collective body is usually decided by the chairman of that body (Greece, Portugal), and the disqualification of the chairman of a collective body is decided by the same collective body, without the participation of the chairman (Portugal), or possibly by the chairman of a higher level collective body (Poland). This issue is casuistically regulated by the Slovenian law, indicating specific entities appointed to decide on the disqualification of employees and holders of the specified categories of authorities: for example the head of the

authority decides on the disqualification of an employee of the authority, the minister responsible for administration decides on the disqualification of the head of the authority, and the government decides on the disqualification of the minister; the secretary (*tajnik*) or director of administration (*direktor uprave*) of the municipality decides on the disqualification of a local government employee, the mayor (*župan*) decides on the disqualification of a secretary or director of administration, and the commune council decides on the disqualification of the mayor (Article 38 ZUP). A solution unknown to other legal systems is adopted by a Finnish law, which states that the official decides whether he or she is disqualified. However, if the issue of bias concerns members and rapporteurs in a collective authority, the authority in question decides to disqualify its member or rapporteur (§ 29 hallintolaki). A peculiar solution is also provided for by the Estonian law, according to which the decision to disqualify an employee of the authority is made by the person who appointed or selected the employee to deal with the matter (§ 10(4) HMS). The method of regulating the disqualification mode indirectly indicates the subjective scope of application of this institution in individual countries, although it does not necessarily have to reflect it strictly.

By contrast, the Greek law casuistically specifies who should be appointed to replace the disqualified monocratic authority. On a case-by-case basis, it indicates: the highest-ranking head of a subordinate organizational unit of the authority, the highest-ranking official of the authority (in the absence of sub-units) and the most senior civil servant (if there is more than one highest-ranking officials) (Article 8 ΚΔΔ).

V. APPEALABILITY OF RULING ON DISQUALIFICATION

None of the laws of the European Union Member States provide for a separate legal remedy against a ruling on the disqualification of an employee or member of an administrative authority.

VI. CONSEQUENCES OF VIOLATION OF REGULATIONS REGARDING DISQUALIFICATION

The consequences of violating the provisions on the disqualification of an employee vary in individual legal orders of the European Union. The differences relate in particular to the situations in which (or the conditions under which) a decision of an administrative authority issued in violation of the provisions on the disqualification of an employee is quashed or invalidated in court proceedings. In fact, the question boils down to whether the impact, or at least the possibility of the influence of a potentially biased employee, on the outcome of the proceedings is examined, or whether the examination of

such influence is abandoned altogether. In the case of decisions of employees of monocratic authorities, this issue naturally plays a lesser role than in the case of decisions of collective authorities, because in the case of monocratic authorities, the possibility of such influence is usually taken as the starting point. However, even with such authorities, the impact of the participation of an employee subject to disqualification may be subject to speculation if his or her involvement in the proceedings was of a subordinate nature. In the case of collective authorities, the main issue is whether the participation of a member of the authority subject to disqualification did not affect the achievement of the quorum required to adopt a resolution, or whether his or her vote was decisive for the outcome of the vote.[50]

Whether or not the impact of a potentially biased employee's participation on the outcome of the proceedings is examined depends on how the purpose of the provisions concerning the disqualification of an employee is perceived. If the emphasis is on strengthening the public's confidence in the executive, rather than fair and just dealing with the matter, then any violation of such provisions should be 'punished' by invalidation of the decision. However, the consequence of this type of approach is the necessity of repeating also such proceedings where it is clear that they could not end otherwise, thus undermining the efficiency of the administration. This practice is enforced by the jurisprudence of the United Kingdom, Ireland, Italy and France (in cases of legally regulated grounds for disqualification, in relation to employees of monocratic authorities and members of collective authorities, with the exception of consultative bodies and municipal councils)[51].

The judiciary in Belgium and Greece rule to the contrary. It quashes the decisions of administrative authorities only if it can be proved that the circumstance constituting the ground for disqualification of the employee influenced the outcome of the proceedings (Greece), or at least that there is a concrete possibility of such influence (Belgium). This way of proceeding is based on the maxim according to which the provisions on the disqualification of an employee should guarantee the justice (fairness) of administrative decisions. According to this principle, only such measures are cancelled where justice has been shown to be lacking, or at least is seriously in doubt. This practice places the burden of proof on the party to the proceedings. Thus, it contains the risk that – if it fails to demonstrate the impact of a potentially biased employee on the outcome of the proceedings – such decisions, which were actually based on non-substantive motives, remain in force. On the other hand, it serves the efficiency of the procedure.[52]

The jurisprudence of most European Union countries (Poland, Sweden, Finland, Denmark, the Netherlands, Germany, Austria, France, Spain, Portugal and others) has chosen a middle way between the above extremes. Thus a decision made with the participation of a potentially biased employee is gen-

[50] Maier (2001): 255–256.
[51] Maier (2001): 256.
[52] Maier (2001): 256.

erally quashed; however, the administrative authority has the right to demonstrate that the potential bias in a given case did not affect the outcome of the proceedings. Where such an influence can be ruled out, the contested act remains in force. For this reason, the so-called free (discretionary) decisions, which are the opposite of bound ones, remain valid. The same is true if the court's control shows that if the proceedings were repeated, the way of disposing of the matter would be the same as before.

With regard to the decisions of collective authorities, such a position of the judiciary means that even when the vote of the disqualified member of the authority was not decisive for the outcome of the vote, the lack of influence of the member's participation on the manner of disposing of the matter was demonstrated. In addition, other influence must be excluded, for example through participation in the deliberations.

In addition to the will to achieve a balance between the principles of administrative efficiency and fairness of proceedings revealed in such a line of jurisprudence, this approach emphasizes the goal of strengthening public confidence in the executive power.[53]

There are also different positions of the judiciary as to how the actions performed by the employee subject to disqualification should be treated when the disqualification occurred in the course of the proceedings, but before the decision was issued. In some countries, this issue is regulated more or less generally by legal provisions concerning the institution of disqualification. For example, the Hungarian law provides that the head of the authority, when deciding to disqualify an employee, should at the same time decide whether the actions already taken by the disqualified employee should be repeated or not. A similar position on this issue is adopted by the Spanish law, which states that the participation of employees of the authorities in the activities of public administration, despite the existence of reasons for disqualification, does not necessarily mean that the activities in which they participated are invalid in every case.

VII. CONCLUSIONS

The issue of disqualifying employees (members) of public administration authorities from participation in general administrative proceedings varies in the European Union countries, both in terms of scope (level of detail) of regulations and basic problems related to this issue: the reasons for disqualification, the procedure for it, the consequences of disqualification, and the consequences of failure to disqualify an employee despite the existence of grounds for doing so.

Differences in the degree of detail relate primarily to the reasons for the disqualification of an employee of the authority. Most of the laws regulating the institution of disqualification list more or less specific circumstances con-

[53] Maier (2001): 256–257.

stituting such reasons, additionally using (with the exception of the Spanish law) general clauses intended to cover cases of disqualification not expressly provided for by the legislator. In some acts, the basic ground for disqualifying an employee is a general clause, and specified cases supplement or clarify it. This solution has been adopted in the legal orders of the Netherlands, the Czech Republic, Slovakia, Hungary and Bulgaria.

The most important reason for the disqualification of employees (except when they or their spouse are a party to the proceedings) is the consanguinity or affinity between them and the party. Most European Union countries whose legal systems contain such regulations – in the law on general administrative proceedings or in municipal law – adopt the third or even the fourth degree of consanguinity and affinity in the collateral line as the upper limit of closeness between an employee of an administration authority and a party, resulting in disqualification of the employee from participation in the proceedings. Therefore, it is about kinship (of an employee or his or her spouse) reaching the children of siblings and siblings of parents (third degree) or cousins (fourth degree). The lowest – second – degree of consanguinity and affinity between the employee of the authority and the party are accepted as the limit of absolute disqualification from participation in the proceedings by Polish, Italian and Estonian laws. This solution should be assessed critically, because it does not correspond to the real hierarchy of closeness felt in society (emotional attitude towards some relatives of the third or even fourth degree is generally rated higher than the emotional attitude towards relatives by affinity of second and often even first degree).[54]

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[54] Kmiecik (2020): 293–294.

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