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**Gloss to the Judgment of the Supreme Administrative
Court of February 23, 2021 (act sign. I OSK 2371/20)**

I.

In a case, the Supreme Administrative Court dismissed the president of the Civil Aviation Office's (CAO) cassation appeal to the judgment of the Voivodship Administrative Court of January 28, 2020, act sign. VII SA/Wa 1855/19. The appealed judgment was a result of complaints to the CAO president's decision about infringing by an air carrier provisions of Regulation (WE) No. 261/2004 of the European Parliament and Council of February 11, 2004 that establishes joint rules for compensating and helping passengers in case of refusing entry to the board, cancelling, or delaying flights, and repeals Regulation (EWG) No. 295/91², which canceled proceedings concerning establishing a date of compensating infringement by a carrier Art. 7 sec. 1(b) related to Art. 6 of the same regulation toward complainants.

II.

The commented judgment was delivered in the following factual state. In the original decision, the CAO president found a violation of Art. 7 sec. 1(b) re-

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² Dz.Urz. UE L of February 17, 2004, p. 1 et seq.

lated to Art. 6 sec. 1 of the Regulation by an air carrier through neglecting a duty to pay passengers 400 EUR compensation for delaying a flight. However, the unit dismissed a proceeding concerning establishing the date of paying the compensation to the complainants. Then, in result of the case re-examination, the CAO president upheld his decision. The unit indicated that the cause of dismissal was *res iudicata* principle because the District Court had dismissed the complainants' appeals against an airline for receiving the compensations with judgments, based on the claims' limitation period. Discontinuing the proceeding for establishing the date of compensating the complainants' loss by an air carrier that delayed a flight, *de facto* deprived them of an opportunity to efficiently execute the claim under the legal protection of infringed law.

The complainants appealed the CAO president's decision to the Voivodship Administrative Court, which, dismissing the decision, underlined that the problem's core is to explain whether the common court's judgment dismissing the complainants' suit against the carrier due to the claim's limitation period is a justification for dismissing by the CAO president the proceeding to establish the date of compensation resulting from the infringement of Art. 7 sec. 1 (b) of the Regulation. The Voivodship Administrative Court took the position that the CAO president was not bound by the common court's recognition of crossing the claim's limitation period. A basis for the Voivodship Administrative Court's justification was Point 22 of the Regulation indicating that the Member States should guarantee and supervise following its provisions by the carriers, and designate a unit responsible for executing them.

Analyzing the case, the Supreme Administrative Court did not find a basis for dismissing the appealed judgment. However, it indicated that despite a part of the justification is faulty, the appealed judgment corresponds to the letter of law. The Supreme Administrative Court referred to the resolution of the Supreme Court of February 7, 2014, act sign. III CZP 113/13³. The Supreme Court judged that in a case, in which a passenger claims a compensation from a carrier due to a delayed flight based on Art. 7 of the Resolution, occurs alternation of proceedings before common courts or the CAO president. The Supreme Administrative Court agreed with that judgment. It means that

³ "Biuletyn Sądu Najwyższego" 2014, No. 2, p. 8.

the compensation case resulting from the same legal and economic basis – in this case Art. 7 sec. 1(b) related to Art. 6 of the Resolution – and between the same parties, cannot be a subject of two judgments issued by units operating withing the alternation. The alternation of proceeding is a feature of processes, but it concerns the material and economic basis of judgment. A legal result of the alternation of civil court and administrative unit in a case, in which there are the same parties, i.e., a complainant and an air carrier, is the admissibility of a final and binding case settlement only by one of these authorities.

III.

The commented judgment regards a significant procedural issue at the verge of civil and administrative law, namely the competence of administration and cognition of common court. Nevertheless, the case is grounded in the regulations of EU law and concerns the constitutional matter, omitted in the commented judgment. Its analysis could influence on another assessment of the case, particularly the argumentation included into the appealed judgment of the Voivodship Administrative Court.

Undoubtedly, to the constitutional definition of consumer⁴ included in Art. 76 of the Constitution of the Republic of Poland should be ascribed a broader and more general scope than the statutory definition; at the same time, a claim of harmed passenger for compensation has a property character while Art. 64 of the Constitution of Poland guarantees the protection of property rights, making it equal for all⁵. Furthermore, it uses terms “passenger” and “traveler”⁶ inconsistently in the Polish legal system, which causes confusion in the domestic system of the legal protection of airlines’ passengers.

⁴ More: J. Węgrzyn, *Ochrona praw konsumentów i innych osób przed nieuczciwymi praktykami rynkowymi*, [in:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014, p. 780.

⁵ The Constitutional Tribunal judgment of 2 December 2008, act sign. K 37/07, OTK-A 2008/10/172.

⁶ More: M. Wróblewski, *Ochrona praw pasażerów/podróżnych w orzecznictwie Trybunału Konstytucyjnego (wybrane zagadnienia)*, [in:] *Prawne aspekty podróży i turystyki – historia i współczesność: prace poświęcone pamięci profesora Janusza Sondla*, ed. P. Cybuła, Kraków 2018, pp. 593–608.

The protection of passengers in the European Union has become more important than ever before, especially during the COVID-19 pandemic when passengers' rights in the EU were not appropriately secured. Such conclusions result from the special report presented by the European Court of Auditors⁷ under Art. 287 sec. 2 (2) of the Treaty on the Functioning of the European Union. For these reasons, ensuring the efficient mechanisms for protecting these rights is indispensable in domestic legal systems.

Better efficiency of responding to claims due to airline passengers under the Regulation may be achieved if domestic procedures are created under which a passenger – as a consumer – will be able to travel without a necessity for knowing competitive measures for legal protection. Then, it would be unnecessary to analyze which measure is efficient in protecting a passenger's rights in a given situation, e.g., crossing a claim's limitation period. In such a situation, there will not be a need to decide by the Supreme Administrative Court or the Supreme Court procedural issues regarding the alternation of proceedings before common courts or administrative organs under Art. 365 sec. 1 Civil Code, and assess whether in a given case a rightful judgment is binding not only for the parties and the issuing court but also other courts, state authorities, and public administration authorities. In the legal order, in which the Supreme Administrative Court controlled the legality of the CAO president's decision, granting the binding judgment of common court *res iudicata* should be considered faulty. That is because when a basis for dismissing an appeal would be only crossing a claim's limitation period (one year in the case of transportation agreements⁸, so exceptionally short), then it would contradict the protection of consumer fights guaranteed by the Constitution and aims for which the mechanisms included in the Regulation were created by the European Union. Narrowing down the case solely to the procedural layer caused that the justification of the commented judgment completely ignores the essence and guarantee of airline passengers' property rights.

IV.

⁷ Special report No. 15/2021: Air passenger rights during the COVID-19 pandemic: Key rights not protected despite Commission efforts, https://www.eca.europa.eu/Lists/ECADocuments/SR21_15/SR_passenger-rights_covid_EN.pdf (10.07.2021).

⁸ Art. 778 Criminal Code.

According to the provision of the Regulation (Point 22), under Art. 205a sec. 1 (1) of the Aviation Law Act of July 3, 2022⁹ (in the legal condition under which the first instance decision was made¹⁰), the domestic legislator judged that the CAO president supervises the execution of the Regulation, especially the examination of complaints indicated by its Art. 16 sec. 2.

One of results of amending the Act of April 1, 2019¹¹, the Passengers' Rights Ombudsman was appointed at the CAO president and granted competences to conduct proceedings for solving disputes between passengers and air carriers out-of-courts – mainly in terms of property claims resulting from the Regulation's provisions. That legislative movement led to the illusionary removal of dualism in possibilities for seeking claim protection by airline passengers, enabling them two-fold realization: through the Ombudsman (following the procedures provided by the Act of September 23, 2016 on out-of-court dispute resolution¹²) or before the common court (then, the Ombudsman refuses to conduct a proceeding – Art. 17 sec. 2 of the Act).

Literature

- Węgrzyn J., *Ochrona praw konsumentów i innych osób przed nieuczciwymi praktykami rynkowymi*, [in:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014.
- Wróblewski M., *Ochrona praw pasażerów/podróżnych w orzecznictwie Trybunału Konstytucyjnego (wybrane zagadnienia)*, [in:] *Prawne aspekty podróży i turystyki – historia i współczesność: prace poświęcone pamięci profesora Janusza Sondla*, ed. P. Cybula, Kraków 2018.

⁹ Dz.U. 2020, item 1970 as amend.

¹⁰ In the actual legal circumstances and according to that provision, at the CAO president operates the Passenger's Rights Ombudsman who conducts out-of-courts proceedings for resolving disputes between passengers and air carriers in terms of property claims resulting from the provisions of the Regulation.

¹¹ The Act of December 14, 2018 Amending the Act – Aviation Law and several other acts (Dz.U. 2019, item 235 as amend.).

¹² Dz.U. of 2016, item 1823.