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The right to file a complaint by environmental organisations in administrative court proceedings as an example of the Europeanisation of national legal systems

ABSTRACT

In this study, the author attempts to raise the issue of Europeanisation of national procedural law as exemplified by the right to file a complaint by environmental organizations in administrative court proceedings under Polish and German law. The process of Europeanisation takes place in all areas of national law, also in the absence of a clear competence for the European Union to establish a specific type of legislation. The right to file a complaint by environmental organisations is objective in nature. The implementation of EU regulations in German law resulted from the necessity to introduce a completely different model of the right to file a complaint than the right that has already been in force, i.e. the subjective right. The Polish legislator also had to reshape the form of the right to file a complaint by environmental organisations, which, in essence, differs significantly from the form of the right of social organisation, despite classification of environmental organisations into a group of social organisations.

KEYWORDS

Europeanisation, procedural law, European Union, Polish right to file a complaint, German right to file a complaint, Article 50 of the Law on Proceedings before Administrative Courts, § 42 VwGO

Introduction

The right to file a complaint is one of the basic procedural institutions in all jurisdictions. However, depending on the analysed legal framework or even the specific procedure in a particular legal system, the right to file a complaint may take a different form. EU regulations also have a significant impact on the form of the right to file a complaint. Although the European Union authorities are deprived of explicit power to create procedural rules, they also influence the shape of the procedural institutions in national legal systems by introducing requirements for Member States to comply with certain legal standards.

One of the best examples showing the impact of the EU law on procedural provisions in all Member States of the European Union is the form of the right to file a complaint by non-governmental organisations in environmental matters, i.e. environmental organisations. The right to file a complaint by environmental organisations is an interesting issue, as it is intended to be an objective right in every Member State, which is certainly at variance with the basic principles of the aforesaid right in jurisdictions where the concept of a subjective right is adopted, for instance, in Germany. However, also in the systems of national law, where the concepts of objective or mixed rights are in force, the right to file a complaint by environmental organisations, despite the classification of the organisations in question into social organisations, is characterised by numerous differences resulting from the requirements formulated in EU legislation, as is the case of Polish law.

The aim of this article is to bring closer the essence of the process of Europeanisation of procedural provisions in national legal systems by analysing the ways in which EU directives defining the form of the right to file a complaint by environmental organisations in EU Member States are implemented. A thorough analysis of a given issue implies the need to refer to European, national jurisdictions. However, the considerations shall be limited only to the form of regulations in Polish and German law and their transposition of the EU directive 2011/92/EU, known as the EIA Directive. The analysis shall also cover the question of the correct implementation of a given directive in Polish law. Apart from the key dogmatic-legal method, the article also uses a comparative method, which makes it possible to analyse the regulations from different legal systems.

The essence of the Europeanisation of national law systems

The Europeanisation of law is the entirety of all changes in the Union's legal system, which give rise to the processes of adaptation and alignment of national laws, and thus lead to the transposition of the features of the Union's legal system into the national systems.¹ The essence of Europeanisation is to strive for a convergent system of values considered to be fundamental in various European countries and to introduce certain quality standards of law in Member States². The structural Europeanisation of court proceedings, including administrative court proceedings, has three dimensions: the instrumentalization of national court proceedings as a means of proper application of the EU provisions in national law,³ the need to adapt the content of national procedural provisions to the requirements of EU

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- 1 T. Biernat, *Europeizacja prawa – zjawisko wielowymiarowe. Wprowadzenie*, in: *Europeizacja prawa*, T. Biernat (ed.), Kraków 2008, pp. 8, 10; under German law, the term is considered *façon de parler* not really reflecting the essence of the phenomenon, see V. Götz, *Europarechtliche Vorgaben für das Verwaltungsprozessrecht*, "Deutsches Verwaltungsbblatt" 2002, no. 117, p. 1.
 - 2 S. Jaśkiewicz, *Europejski Kodeks Dobrej Administracji jako element europeizacji standardów funkcjonowania administracji publicznej*, Warszawa 2015, p. 298.
 - 3 F. Schoch, *Die Europäisierung des Verwaltungsprozessrechts*, in: *Festgabe 50 Jahre Bundesverwaltungsgericht*, E. Schmidt-Aßmann, D. Sellner, G. Hirsch, G.H. Kemper, H. Lehmann-Grube (eds.), Berlin 2003, p. 513; see case CJEU C-6/90 and C-9/90 *Andrea Francovich przeciwko Repubblica Włoska, i Danila Bonifaci et al. Przeciwko Repubblica Włoska*, ECLI:EU:C:1991:428.

law,⁴ and the need to interpret existing procedural provisions in accordance with the pro-EU ideas and the application of EU-conformist (*unionrechtskonforme Auslegung*) interpretative rules.⁵

Furthermore, the form of the Europeanisation of judicial proceedings, including administrative court proceedings, is directly linked to the principle of integrity of the sovereignty of the Member States within the framework of their competence to make procedural regulations, which determines the degree of possible interference of Union law in legislative solutions in procedural law, including the structures selected on the basis of national law. The Member States may shape the structure of judicial proceedings by laying down procedural standards governing the course of proceedings and organise the structure of the judiciary at their sole discretion, yet while taking into account the requirements of the protection of procedural rights as required by *acquis*.⁶

As mentioned in the introduction, EU bodies have no clear competence to create purely procedural rules at national level.⁷ Nevertheless, the creation of standards which shall be met by national procedural provisions is mainly achieved through the implementation of secondary EU law in the national legal systems, an example of which is the form of the right to justice in cases concerning environmental protection.

4 As an example in German law, it is possible to invoke the form of the right to file a complaint pursuant to § 42 II of the VwGO, which is understood very narrowly in comparison to most European Union countries. Furthermore, the German regulation does not fully comply with the requirements of EU law, as it does not allow popular complaints, which should be allowed in justified cases under the European law, see F. Schoch, op. cit., p. 516; A. Epiney, K. Sollberger, *Zugang zu Gerichten und gerichtliche Kontrolle im Umweltrecht-Rechtsvergleich, völker- und europäische Vorgaben und Perspektiven*, Berlin 2002, p. 299 et seq.; T. Groß, *Konvergenzen des Verwaltungsrechtsschutzes in der Europäischen Union*, “Die Verwaltung” 2000, no. 33, p. 426; V. Götz, op. cit., p. 4.

5 O. Dörr, Ch. Lenz, *Europäischer Verwaltungsrechtsschutz*, Baden-Baden 2019, p. 273.

6 V. Götz, op. cit., p. 2.

7 J. Schwarze, *Europäische Rahmenbedingungen für die Verwaltungsgerichtsbarkeit*, “Neue Zeitschrift für Verwaltungsrecht” 2000, pp. 241, 244; V. Götz, op. cit., p. 1; O. Dörr, *Grundstrukturen eines europäischen Verwaltungsprozessrechts*, “Deutsches Verwaltungsblatt” 2008, no. 128, p. 1407; it is now assumed in EU law that the competence of Member States to regulate procedural rules is vested therein unless there is secondary legislation on the matter, as is the case, for example, with customs law, which has been codified in the EU Customs Code (Regulation (EU) no. 952/2013 of the European Parliament and of the Council of 9 October 2013 establishing the EU Customs Code, Official Journal L 296/1, 10/10/2013), previously, before the Treaty of Lisbon, the regulations in question were rare, thus, they did not directly regulate procedural issues, but only indirectly influenced the form of procedural rules; an example could be the Council Directive of 25 February 1964 concerning the coordination of special measures relating to the entry and residence of foreign nationals which is no longer in force, justified on grounds of public policy, public security, and public health, no. 64/221/EEC, of 25 February 1964, concerning migration of people between the countries of the Community, which must be in the form of guaranteed certain minimum standards of protection (i.e. legal remedies), requiring the adaptation of national procedural rules, otherwise, in accordance with Article 9 of the said Directive, these were the procedural rules of the Directive that were applied, see also Case C-500/15 P *TVR Italia Srl v Office of the European Union for Intellectual Property*, ECLI:EU:C:2016:345; Case C-297/88, and C-197/89 *Massam Dziodzi v Belgischer Staat*, ECLI:EU:C:1990:360.

The form of the right to a fair trial in environmental matters

The environment as an objective value and common good is protected at all multicentric level of the legal systems⁸ in Poland and Germany. The objective, which is the environmental protection, in the EU Member States is specified, *inter alia*, in Article 3(3) TEU.⁹ The articulation of the above objective in the Treaty, which is part of the primary law of the European Union, clearly shows that the public interest is above the individual interest in environmental matters that are one of the fundamental legal values, with a strong axiological load associated therewith.¹⁰

However, the sources of law for judicial authorities in environmental cases at international level should be found in Article 9 sec. 2 of the Convention of the United Nations Economic Commission for Europe, hereinafter referred to as the Aarhus Convention.¹¹ One of the main objectives of the Convention was to introduce into national legal systems certain guarantees allowing social control of actions undertaken by public authorities in environmental cases.¹² The European Union and all Member States are parties to the Aarhus Convention. At this point, it is worth stressing that the European Union is not a Member of the United Nations, but was given the status of permanent observer. However, all Member States of the European Union are members of the United Nations, which the European Union should assist in adapting national legislation to the requirements laid down in international law, in compliance with the principles of the Common Foreign and Security Policy, for example, by introducing EU directives.¹³

The European Union, using its competences under the Common Foreign and Security Policy, based on the content of the Aarhus Convention, and in particular Article 9, drew up EU Directive 85/337/EC,¹⁴ amended by Directive 2003/35/EC,¹⁵ and finally replaced by Directive 2011/92/EU, EIA Directive.¹⁶ The aforesaid acts set out the criteria to be met by na-

8 B. Iwańska, M. Baran, *Ochrona interesu prawnego w prawie ochrony środowiska*, in: *Partycypacja w postępowaniu administracyjnym. W kierunku uspołecznienia interesu prawnego*, in: Z. Kmiecik (ed.), Warszawa 2017, p. 193.

9 Treaty of Maastricht on European Union of 7 February 1992, Official Journal C 191, 29/7/1992, pp. 1-112.

10 B. Iwańska, M. Baran, op. cit., p. 193.

11 The Convention on access to information, public participation in decision-making and access to justice in environmental matters, drawn up in Aarhus on 25 June 1998, Dz.U. (Journal of Laws) of 2003, no. 78, item 706.

12 A. Knade-Plaskacz, *Dostęp do wymiaru sprawiedliwości w sprawach dotyczących ochrony środowiska – bezpośredni skutek art. 9 ust. 3 konwencji z Aarhus – wprowadzenie i wyrok TS z 8.03.2011 r. w sprawie C-240/09 Lesoochranárske zoskupenie VLK przeciwko Ministerstvo životného prostredia Slovenskej republiky*, "European Judiciary Review" 2015, no. 4, p. 46.

13 See i.a. Case T-306/01 Ahmed Ali Yusuf, Al. Barakaat International Foundation v Council of the European Union and Commission of the European Communities, ECLI:EU:T:2005:331.

14 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, Official Journal L 175, 5/07/1985, p. 40.

15 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, Official Journal L 156, 25/06/2003, p. 17.

16 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, Official Journal L 26/1, 28/1/2012, which has been subject to some modifications by Directive 2014/52/EU (Directive 2014/52/EU of the European Parliament and of the

tional legislation guaranteeing the non-governmental organisations dealing with environmental protection the right to a fair trial, to the extent enabling them to effectively exercise their powers stemming from international law conventions and EU secondary legislation.¹⁷

In compliance with Article 11 sec. 1 of the EIA Directive, Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned having a sufficient interest or possibly claiming infringement of law, where administrative procedural law of a Member State requires such a prerequisite, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, actions or omissions.

By virtue of Article 11 sec. 2 and 3 of the EIA Directive, Member States shall determine at what stage of the proceedings, the decisions, actions or omissions may be challenged and when the public concerned has a sufficient interest or may claim infringement of law in a way that ensures the widest possible right to a fair trial of the public concerned. However, it should be noted here that, according to the legal definition in Article 1 sec. 2(e) of the EIA Directive, the concept of the public concerned also includes non-governmental organisations promoting environmental protection and meeting the requirements under the national law. The above-mentioned organisations always have a legal interest in lodging appeals in environmental protection cases, as stipulated in both the definition in Article 1 sec. 2(e) and Article 11 sec. 3 of the analysed EIA Directive. Therefore, in compliance with the requirements of Union law, it seems appropriate to state that the right to file a complaint by environmental NGOs should be objective in nature.

However, it should be noted at this point that the concept of an environmental NGO is not uniformly understood under national legislation. The non-governmental organisations promoting environmental protection should be interpreted differently depending on the national legal system. Pursuant to the EIA Directive, the national legislators may define the conditions that must be met to recognise certain organisations as environmental NGOs, at their sole discretion. However, the Court of Justice of the European Union has indicated in its judicial decisions that national legislation laying down requirements to be met by an environmental NGO must guarantee extensive right to a fair trial and effectiveness of the EU Directive by providing certain organisations with the right of action before competent courts.¹⁸

Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, Official Journal L 124/1, 25/4/2014).

17 See A. Knade-Plaskacz, *Legitymacja procesowa organizacji pozarządowych w sprawach dotyczących ochrony środowiska – art. 9 ust. 2 konwencji z Aarhus – wprowadzenie i wyrok TS z 12.05.2011 r. w sprawie C-115/09 Bund für Umwelt und Naturschutz Deutschland*, “European Judiciary Review” 2015, no. 5, p. 42.

18 See Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsörening v Stockholms kommun dess marknämnd*, ECLI:EU:C:2009:631; Case C-137/14 *European Commission v Federal Republic of Germany*, ECLI:EU:C:2015:683.

***In genere* right to file a complaint in administrative court proceedings**

In anticipation of the analysis of the form of the right to file a complaint by environmental organisations under national law, it is necessary to give an overview of the form and concept of such right in administrative court proceedings in national legal systems, in particular in the Polish and German jurisdictions. Under Polish law, the right to file a complaint by social organisations shall be analysed in detail, since, in accordance with the definition in Article 3, point 10 of the Environmental Impact Assessment,¹⁹ an environmental organisation is a social organisation whose statutory objective is to protect the environment. The aforesaid analysis shall allow further considerations *strictly* concerning the right to file complaint by the environmental organisation. However, a preliminary analysis of German regulations shall concern the form of the subjective *in genere* right to file a complaint pursuant to § 42 II VwGO,²⁰ making it possible to show differences in relation to the right to file a complaint of environmental organisations.

Within the framework of the models of the right to file a complaint in administrative court proceedings in the legal systems of European countries, two main concepts have developed, one of which is based on the assumption of the protection of public subjective rights and the other on the assumption of the protection of an objective legal order.²¹

The first of these, i.e. the concept of subjective right to file a complaint was mainly developed by German thinkers and it was the model of such right that was adopted by the German legislator. The above concept has also been appreciated in the Austrian and Italian legal systems.²² The second model, referred to as the objective right to file a complaint, has been implemented, in its purest form, into the French legal system, with an intention to *strictly* protect the objective legal order. The model does not require the complainant to demonstrate any individual or public interest in the subjective right, *a fortiori* any infringement, thus, the complainant may lodge a complaint on the basis of a potential interest only.²³ Similar solutions have been adopted in Belgium, Luxembourg, Portugal, and Greece.

Sometimes clear categorisation of the model of the right to file a complaint may pose considerable difficulties, especially in the case of legal systems in which the chosen models of the right to file a complaint are based on both the premises characteristic for the subjective and objective complaint model. For example, the subjective premise for the right to file a complaint in the form of the requirement to demonstrate an individual legal inter-

19 Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessment, Dz.U. (Journal of Laws) of 2020, item 283, as amended.

20 Act of 19 March 1991 *Verwaltungsgerichtsordnung*, BGBl. I S. 686 i.e., as amended.

21 J. Parchomiuk, *Granice rozpoznania i orzekania sądu administracyjnego w sprawach kontroli uchwał organów jednostek samorządu terytorialnego*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2013, no. 6, p. 54.

22 Examples of countries where the subjective, objective or mixed model of the right to file a complaint have been adopted: Ch. Sennekamp, in: *Verwaltungsrecht*, M. Fehling, B. Kastner, R. Störmer (eds.), beck-online 2016, § 42 VwGO.

23 *Ibidem*, § 42 VwGO.

est, which does not always have to be violated, is part of the regulation that the Dutch and Spanish legislators have adopted. In the *common law* area, the mixed concept also prevails.²⁴

When considering the issue of the model of the right to file a complaint chosen by the Polish legislator, it is possible to get the impression that the legislator has also decided to implement the mixed model. However, by conducting a more in-depth analysis, a clear categorisation is not possible. In compliance with Article 50 § 1 of the Law on Proceedings before Administrative Courts,²⁵ any party having a legal interest in lodging a complaint shall be entitled to do so. The essence of the legal interest is to request the administrative court to assess the conformity of the contested act or activity of a public authority with the objective legal order.²⁶ However, the legal interest under Article 50 § 1 of the Law on Proceedings before Administrative Courts must result from a generally applicable legal norm, and not only from the subjective belief of the complainant.²⁷ Moreover, in Article 50 § 1 of the Law on Proceedings before Administrative Courts, apart from the entity having legal interest, the Polish legislature also mentions the following persons: the prosecutor, the Ombudsman, the Children's Rights Ombudsman, and social organisations.

Social organisations constitute a separate group of entities entitled to initiate administrative court proceedings,²⁸ whose right to file a complaint is based on the protection of the social interest.²⁹ Pursuant to the content of Article 50 § 1 the Law on Proceedings before Administrative Courts, the social organisation may file a complaint to the administrative court in a case concerning the legal interest of other persons, if the case falls within the scope of its statutory activity and if the organisation in question has participated in previous administrative proceedings as a party.³⁰ The aforementioned conditions should be fulfilled in a cumulative manner.³¹ Failure to fulfil any of the aforesaid conditions shall be tantamount to the lack of right to file a complaint by the social organisation³² and result in the rejection of the complaint by the administrative court.³³ However, the social organisa-

24 Ibidem, § 42 VwGO.

25 Act of 30 August 2002 Law on Proceedings before Administrative Courts, Dz.U. (Journal of Laws) of 2019, item 2325, as amended.

26 T. Woś, in: *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, T. Woś (ed.), Warszawa 2016, p. 403; Judgment of the Supreme Administrative Court of 17 March 2015, II OSK 1955/13, LEX no. 166572.

27 Judgment of the Voivodeship Administrative Court in Poznan of 10 August 2017, case file no. II SA/Po 444/17, LEX no. 2348837.

28 W. Piątek, *Ustrój oraz postępowanie przed sądami administracyjnymi*, in: *Postępowanie administracyjne i sądowniczoadministracyjne z kasami*, R. Hauser, A. Skoczylas (eds.), Warszawa 2016, p. 408; Judgement of the Voivodeship Administrative Court in Warszawa of 2 July 2008, II SA/Wa 254/08, LEX no. 519024.

29 A. Nędzarek, *Znaczenie udziału organizacji społecznej w postępowaniu przed sądem administracyjnym w sprawach dotyczących interesów prawnych innych osób*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2014, no. 4, p. 33.

30 Judgment of the Supreme Administrative Court of 22 March 2006, II FSK 536/05, LEX no. 197531; M. Jagielska, A. Wiktorowska, P. Wajda, in: *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, R. Hauser, M. Wierzbowski (eds.), Warszawa 2017, p. 329.

31 Judgment of the Voivodeship Administrative Court in Łódź of 5 October 2017, II SA/Łd 226/17, LEX no. 2365036.

32 Judgment of the Voivodeship Administrative Court in Bydgoszcz of 7 October 2008, I SA/Bd 285/08, LEX no. 1029392.

33 W. Chróścielewski, *Legitymacja skargowa w postępowaniu sądowniczoadministracyjnym*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2010, no. 5/6, p. 89.

tion may apply to take part in administrative court proceedings as a participant.³⁴ The right to file a complaint by the social organisation or an individual is subject to judicial review at every stage of the administrative court proceedings.³⁵

The condition for participation of the social organisation in the previous administrative proceedings is closely linked to whether the social organisation may act as legal subject to court administrative proceedings.³⁶ The capacity of the social organisation to be a party to court proceedings in matters concerning the legal interests of other persons depends on whether the organisation is capable of being a party to administrative proceedings,³⁷ which is a specific consequence of its participation in the proceedings before a public administration body.³⁸

The entities, whose capacity to participate in administrative proceedings in cases involving the legal interests of other persons was restricted by the legislator, may not demand to be a party to administrative court proceedings, hence, they do not have the right to file a complaint.³⁹ The aforementioned issue is reflected in the regulation on the grant of a water permit. Article 402 of the Water Law⁴⁰ excludes the application of Article 31 of the Code of Administrative Procedure,⁴¹ thus, prevents the social organisation from participating in the administrative proceedings to protect the legal interest of other entities that get involved in the proceedings as a party. Therefore, the condition included in Article 50 § 1 of the Law on Proceedings before Administrative Courts shall not be met, the organisation shall not have the capacity to be a party in court proceedings, hence, shall not have the right to appeal to the court against the act issued by an administrative authority in specific proceedings. A similar regulation may be found in Article 28 sec. 3 of the Building Law.⁴²

Turning to the issue of the form of the subjective right to file a complaint under German law, pursuant to § 42 II VwGO,⁴³ anyone who claims that their subjective rights have been infringed by issuing or refusing or failing to issue an administrative act is entitled to lodge an administrative complaint unless the law provides otherwise. An action or omission of a public administration body must, in consequence, violate the public subjective right of a particular person; the act itself contrary to the applicable legal norms of the body does not

34 J.P. Tarno, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Warszawa 2012, p. 158.

35 Sz. Łajszczak, *Legitymacja skargowa a przedmiot postępowania sądowniczoadministracyjnego*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2010, no. 5, p. 70.

36 See J.P. Tarno, op. cit., p. 164.

37 Judgment of the Supreme Administrative Court of 20 March 2008, II OSK 265/07, LEX no. 468730.

38 A. Nędzarek, op. cit., p. 30.

39 See ibidem, p. 32.

40 Act of 20 July 2017 Water Law, Dz.U. (Journal of Laws) of 2020, item 310, as amended.

41 Act of 14 June 1960 Code of Administrative Procedure, Dz.U. (Journal of Laws) of 2020, item 256, as amended.

42 Act of 7 July 1994 Building Law, Dz.U. (Journal of Laws) of 2020, item 1333, as amended; see A. Nędzarek, op. cit., p. 30; W. Chróścielewski, op. cit., p. 89.

43 Act of 19 March 1991, *Verwaltungsgerichtsordnung*, BGBl. I S. 686, as amended, § 42 II VwGO: "Soweit gesetzlich nichts anderes bestimmt ist, ist die Klage nur zulässig, wenn der Kläger geltend macht, durch den Verwaltungsakt oder seine Ablehnung oder Unterlassung in seinen Rechten verletzt zu sein".

meet the requirements of the right to file a complaint.⁴⁴ § 42 II of the VwGO does not enumerate entitled entities, but only sets out in a general way the conditions which must exist to lodge an administrative complaint.⁴⁵ The concept of the right to file a complaint under § 42 of the VwGO is based on violation of public subjective law.

The premise of infringement of public subjective rights under § 42 II of the VwGO constitutes a significant difference in relation to the general regulation of the right to file a complaint under Art. 50 § 1 of the Law on Proceedings before Administrative Courts, according to which the Polish legislator does not require any proof of infringement of the legal interest of the entitled entity. The German legislator decided to adopt a different method of codification, since it wanted to eliminate the possibility of lodging common complaints in the general interest⁴⁶ and to prevent an entity from appealing against an administrative act to the court, if the entity has its own, material and current interest in repealing a given act, even though there has been no infringement of the entity's public rights.⁴⁷

However, at this point, it is worth noting that the nature and type of the legal norm which the complainant sees as the source of its own legal interest or the infringement of which it challenges is significant under both Polish and German law. The entity may not demand audit of the activities of the public administration body if it does not have the right which is the source of the legal interest or infringement of which the entity challenges. By way of example, social organisations are not entities entitled to lodge a complaint with an administrative court in cases related to the provision of public information, since the right to public information is not granted to social organisations at all. This is the right vested to natural persons only, hence, the complaints lodged by social organisations against the decisions to refuse to provide public information are not subject to judicial review, since the organisations may not request such information anyway, unlike their members.⁴⁸

The right to file a complaint by environmental organisations under Polish and German law

The right to file a complaint by environmental organisations, regardless of the model of such right that has been chosen in the system of national law, should be objective in nature pursuant to the EIA Directive based on the Aarhus Convention. The separate character of the rights granted to environmental organisations results from the guarantee of public

44 Ch. Sennekamp, op. cit., § 42 VwGO, it should be noted that there are often situations when an unlawful act of an authority (based on objective evaluation) entails violation of the subjective rights of an individual.

45 At the language level, this structure is similar to the Polish part of the provision of Article 50 § 1 of the Law on Proceedings before Administrative Courts, i.e. "everyone, whose legal interest is at stake".

46 P.J. Tettinger, V. Wahrendorf, *Verwaltungsprozeßrecht*, Köln 2005, p. 165.

47 R. Kintz, *Öffentliches Recht im Assessorexamen, Klausurtypen, wiederkehrende Probleme und Formulierungshilfen*, München 2015, p. 89.

48 Decision of the Supreme Court of 2 December 2015, SK 36/14, OTK-A 2015/11/189.

participation in matters regarding environmental protection.⁴⁹ The question arises as to whether the way in which the EU directive is implemented under Polish and German law meets the objectives of the directive, providing the environmental organisations with the broadest possible right to a fair trial.

Turning to German law, it should be noted that the solution included in the EIA Directive is a kind of *novum* compared to the German regulation and as opposed to the Polish legal system. The German legislator, in the European spirit, has decided to introduce the regulation, in compliance with which the environmental protection organisation⁵⁰ (*eine Vereinigung*) does not have to prove any infringement of its own individual rights to be able to bring an action before an administrative court,⁵¹ as follows from § 64 sec. 1 BNatSchG.⁵² The UmwRG Act,⁵³ which is implementation of the EU Directive 2003/35/EC (called Öffentlichkeitsbeteiligung-Richtlinie, which, as previously indicated, was in force prior to the EIA Directive),⁵⁴ includes in § 2 the prerequisites for a court administrative complaint⁵⁵ that may only be made by entities that are recognised (*die Anerkennung*) under § 3 of the UmwRG by state authorities or Land authorities as environmental organisations.⁵⁶

It should be noted that the form of the current regulation was largely influenced by the judicial decisions of the European Court of Justice, due to the fact that the UmwRG Act, in its 2006 version, in § 2, required the ecological organisation to designate a third party having subjective right, which was affected by the contested decisions of a public administration body in the field of environmental protection, thus, a given premise significantly limited the right to file a complaint by ecological organisations.⁵⁷ The CJEU ruled in the *Trainel-Urteil*⁵⁸ judgment that the German legislator wrongly implemented the EU direc-

49 B. Rakoczy, *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz*, LEX/ el. 2010, Article 44.

50 The German term *die Umweltvereinigung* (in numerous studies also *the Umweltverein, der Umweltverband*) in the BNatSchG and the UmwRG corresponds, in essence, to the Polish institution which is an environmental organisation according to EU Directive 2003/35/EC.

51 M. Lothar, M. Morlok, *Grundrechte*, Baden-Baden 2016, p. 414.

52 Act of 29 July 2009, Bundesnaturschutzgesetz, BGBl. I S. 2542, as amended.

53 Act of 7 December 2006 Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz), BGBl. I S. 3290, as amended.

54 See Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, Official Journal L 156, 25/06/2003, p. 17.

55 R. Schmidt, *Verwaltungsprozessrecht, Sachentscheidungs voraussetzungen und Begründet wichtiger Klage- und Verfahrensarten, Normenkontrollverfahren, Vorläufiger und vorübergehender Rechtsschutz, Widerspruchsverfahren*, Grasberg bei Bremen 2016, p. 70.

56 See the official website of *Umwelt Bundesamt*, <http://www.umweltbundesamt.de/themen/nachhaltigkeit-strategien-internationales/anerkennung-von-umwelt-naturschutzvereinigungen>. Accessed 27.07.2020, the list of organisations recognised as environmentally friendly has also been published on the website of the Federal Office for the Environment.

57 R. Schmidt, op. cit., p. 71.

58 Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband NordrheinWestfalen e. V. against Bezirksregierung Arnsberg*, ECLI. EU C 2011/289; see more: Schlacke, S., *Recht von Umweltverbänden auf Zugang zu einem Überprüfungsverfahren*, Neue Zeitschrift für Verwaltungsrecht 2011, no. 13, p. 801.

tive in the UmwRG Act, as a consequence of which the environmental organisation had the right to directly invoke the EU directive within the scope of its right to file a complaint.

At the same time, the CJEU has obliged the German legislative authorities to amend § 2 of the UmwRG by deleting the restrictions on complaints against environmental organisations. The changes in line with the European and conformist interpretation took place in 2013, and in 2015, §5 of the UmwRG was also amended in response to the “*Altrip-Urteil*” CJEU.⁵⁹

The EU environmental protection regulations were smoothly incorporated into the Polish system of law.⁶⁰ In Article 44 § 3 of the Environmental Impact Assessment,⁶¹ the Polish legislator granted ecological organisations the right to lodge an administrative court complaint, if justified by the statutory objectives of the organisation in question, also in the event when the organisation did not participate in the proceedings requiring public participation. Therefore, the source of the right to file a complaint by the environmental organisation does not constitute the general regulation under Article 50 § 1 of the Law on Proceedings before Administrative Courts, but Article 50 § 2 of the Law on Proceedings before Administrative Courts in conjunction with Article 44 § 3 of the Environmental Impact Assessment, despite the fact that according to the legal definition under Article 3 sec. 1 point 10 of the Environmental Impact Assessment, the environmental organisation is a social organisation whose statutory objective is to protect the environment, therefore, it acts within the framework of the protection of social interest.

In addition, with reference to previous issues concerning the limitation of the possibility for the social organisation to participate in administrative proceedings for the issuance of a building permit, the environmental organisation is entitled to participate in the said proceedings in pursuant to Article 28 § 4 of the Building Law.⁶² However, such authorisation is irrevocable with regard to the right to file a complaint by the environmental organisation, since, as indicated earlier, it is not based on Article 50 § 1 of the Law on Proceedings

59 Case C-72/12 *Gemeinde Altrip, Gebrüder Hörst GbR, Willi Schneider v. Land Rheinland-Pfalz*, ECLI. EU 2013/712 Schmidt, R., op. cit., p. 71; The CJEU, in the above mentioned judgment, ordered amendment to § 5 of the UmwRG in the wording of the 2006 Act, which allowed environmental organisations to lodge a complaint only against administrative decisions, which, after 15 December 2006, i.e. the date of entry into force of the provisions in the UmwRG, were final. In 2015, the German legislator abandoned the aforementioned restriction in response to the “*Altrip-Urteil*”. The Polish legislator has not introduced any time limits concerning the right to file a complaint by ecological organisations in the Environmental Impact Assessment.

60 It is worth noting that at the time the Directive 2003/35/EC was announced, Poland was not yet a Member State, and when it joined the European Union on 1 May 2004, it undertook to adopt the Community *acquis* in its entirety (*acquis communautaire*), thus, the deadline for implementation of the above Directive was the same as for “older” Member States, i.e. by 25 June 2005; see more: M. Führ, J. Schenten, M. Schreiber, F. Schulze, S. Schütte, *Evaluation von Gebrauch und Wirkung der Verbandsklagemöglichkeiten nach dem Umwelt-Rechtsbehelfsgesetz (UmwRG)*, Dessau-Roßlau 2014, p. 108.

61 Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessment 2020, item 283.

62 Although the Polish legislator has created the possibility for the environmental organisation to participate in administrative proceedings in the field of construction law, the environmental organisations shall be entitled to lodge a complaint with the administrative court only in the proceedings including the environmental impact assessment of a given projector against the decision delivered in such proceedings (see P. Daniel, *Udział organizacji ekologicznej w postępowaniu w przedmiocie wydania decyzji o pozwoleniu na budowę*, “Przegląd Prawa Ochrony Środowiska” 2012, no. 4, pp. 9-29.

before Administrative Courts, so it does not have to meet the condition of participation in previous administrative proceedings. However, in this case, it is not possible to speak of inconsistency or clear contradiction on the part of the legislator within the framework of the regulation on the participation of the social organisation, i.e. the ecological organisation, in the context of the entire legal system,⁶³ as Article 44 § 3 of the Environmental Impact Assessment should be qualified as *lex specialis* in relation to Article 50 § 1 of the Law on Proceedings before Administrative Courts.⁶⁴

The Polish legislator has aligned the provisions with the EU directives using the instruments in the legal system; hence, the solutions in question are not exceptional like the German solutions which, in essence, have adopted a completely different concept than that which has hitherto been applied in the entire system. The German legislator has abandoned the general concept of the subjective right to file a complaint in favour of the objective right, thus, allowed for a possibility of lodging a general complaint (*die Popularklage*), also known as an altruistic complaint in the field of environmental law (*die altruistische Verbandsklage im Umweltsrecht*).⁶⁵

The German legislator initially implemented the EU directive incorrectly, which in turn necessitated changes in national legislation. When analysing the Polish implementation of the EU EIA Directive, it is possible to get the impression that it has been transposed into national law in a correct manner. Nevertheless, it is impossible to agree with the above statement, as evidenced by the content of the European Commission's opinion of 8 March 2019 concerning the incompatibility of, inter alia, the Environmental Impact Assessment with the EU EIA Directive regarding Article 11 sec. 1 and 3. The European Commission has alleged that, under Polish law, environmental organisations may not question the legality of an investment permit in the case when it does not include the results of the environmental impact assessment or the conditions contained in the environmental decision, which should be therefore considered wrong implementation of the EU directive.⁶⁶ In response to the opinion of the European Commission, the Polish Government undertook to make legislative amendments to eliminate certain irregularities in the implementation of the EIA

63 Otherwise: W. Chróścielewski, op. cit., p. 90; A. Barczak, *Partycypacja społeczna w procesie administrowania w ochronie środowiska*, in: *Internacjonalizacja administracji publicznej*, Z. Czarnik, J. Posłuszny, L. Żukowski (eds.), Warszawa 2015, pp. 27-28.

64 The decision of the Supreme Administrative Court of 19 April 2016, II OSK 2010/14, LEX no. 2065748 – the Supreme Administrative Court stated that Article 44 sec. 3 of the Environmental Impact Assessment extends the procedural rights vested to special social organisations, such environmental organisations. Non-fulfilment of the conditions contained in Article 44 sec. 3 of the Environmental Impact Assessment does not preclude the possibility to base the right to file a complaint by ecological organisations on the general provision, namely Article 50 § 1 of the Law on Proceedings before Administrative Courts.

65 R. Stüwe, in: *Öffentliches Recht und Europarecht, Staats- und Verfassungsrecht Primärrecht der Europäische Union Allgemeines Verwaltungsrecht*, H.M. Wolfgang (ed.), Hamm 2007, p. 424.

66 See the Public Information Bulletin of the Council of Ministers, Draft Act amending the Act on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessment no. UD 50, <https://bip.kprm.gov.pl/kpr/bip-rady-ministrow/prace-legislacyjne-rm-i/prace-legislacyjne-rady/wykaz-prac-legislacyjnych/r328547,Projekt-ustawy-o-zmianie-ustawy-o-udostepnianiu-informacji-0-srodowisku-i-jego-0.html>. Accessed 28.11.2020.

Directive. Currently, a draft act introducing new regulations for the Environmental Impact Assessment is under discussion.

Conclusions

The form of the right to file a complaint by environmental organisations under Polish and German law shows a significant impact of EU law on the form of procedural provisions despite the lack of clear competence of the European Union to establish such processes. The process of Europeanisation takes place in all areas of national law. The implementation of EU legislation in compliance with the EU requirements often gives rise to the need to introduce certain solutions into national legal systems, which are foreign or radically different from those that have been already in force.

The aim of the EU EIA Directive is to increase the participation of the social factor in environmental matters by guaranteeing the broadest possible right to a fair trial in environmental cases. However, when analysing the idea of the environmental non-governmental organisation (NGO), it should be remembered that the concept is subject to different interpretations depending on the national legal system, as it is up to the national legislators to lay down the conditions which a given organisation must meet to be recognised as the environmental organisation.

The German legislator had to grant the environmental organisations the objective right to file a complaint, even though the grounds therefor under § 42 II VwGO are based on the subjective right. However, the implementation of EU solutions was not correct, which gave rise to the need to introduce certain legislative changes. Under Polish law, the model of the objective right to file a complaint is applicable, which could indicate that there are no difficulties in transforming EU regulations into national legislation. Nevertheless, the Polish legislator like the German legislator has not managed to avoid the mistakes while implementing the EIA Directive, which the European Commission addressed in its opinion of 8 March 2019.

Granting the right to file a complaint in administrative court proceedings to environmental NGOs, as proposed by the European Union, has a strong axiological justification despite the fact that it raises numerous controversies both in the case-law and in the literature.⁶⁷ However, the idea of guaranteeing the protection of the social interest by allowing environmental organisations to take part in the administrative court proceedings should be welcomed, as it allows the inclusion of the social factor in all environmental protection proceedings.

⁶⁷ See W. Piątek, *Glosa do postanowienia NSA z dn. 17 lutego 2016 r., II OZ 1270/15, układ podmiotowy postępowania sądowoadministracyjnego*, "Państwo i Prawo" 2017, no. 11, p. 131 et seq., the author presents in the gloss rational and convincing arguments in favour of extending the subject-oriented approach in administrative court proceedings.

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