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Commentary on the judgment of the Appeal Court in Łódź from July 17, 2018 (I ACa 1448/17)¹

**Głosa do wyroku Sądu Apelacyjnego w Łodzi
z dnia 17 lipca 2018 r., I ACa 1448/17**

Abstract. The subject of the article is a positive analysis of the thesis of the justification of the Appeal Court in Łódź judgment of 17 July 2018 (I ACa 1448/17), according to which disputes about educational grants given by local government units to private institutions granted before 1 January 2017 have the nature of public law and should be adjudicated – in principle – by Administrative Courts. In the opinion of the author, the determination of the legal nature of educational grants and the competent court to hear disputes related to it, has been correctly interpreted by the Court of Appeal.

Keywords: educational grants; public law; administrative court; civil court; territorial self-government unit.

¹ Lex No 2615581.

Streszczenie. Przedmiotem artykułu jest pozytywna analiza tezy uzasadnienia wyroku Sądu Apelacyjnego w Łodzi z dnia 17 lipca 2018 r. (I ACa 1448/17), zgodnie z którą spory o dotacje oświatowe udzielane przez jednostki samorządu terytorialnego placówkom niepublicznym udzielone przed 1 stycznia 2017 r. mają publicznoprawny charakter i powinny być rozpoznawane – co do zasady – przez sądy administracyjne. W ocenie autora niniejszej glosy określenie charakteru prawnego dotacji oświatowych i sądu właściwego do rozpoznawania sporów z tym związanych zostało przez Sąd Apelacyjny trafnie zinterpretowane.

Słowa kluczowe: dotacje oświatowe; prawo publiczne; sąd administracyjny; sąd cywilny; jednostka samorządu terytorialnego.

Thesis: Educational subsidies granted to non-public educational institutions are undoubtedly of an administrative-legal nature and are an element of the public-private relationship. With respect to educational subsidies granted before 1 January 2017, taking into account various rulings in this area, an administrative court should be competent to hear disputes arising therefrom. However, the existing jurisprudence discrepancy in this respect justifies either the legislator's intervention in order to identify a court competent to hear such cases or the adoption by the Supreme Court of an appropriate resolution aimed at clarifying legal provisions raising doubts in practice and in jurisprudence.

1.

In the case at issue, the claimant, a private kindergarten, claimed in civil proceedings the payment of a difference between a grant payable to it and an amount of the subsidy actually paid by the local authority². A lawsuit against the municipality for the payment was filed with the District Court, indicating that the amount claimed was the difference between the subsidy due and the amount actually paid for the years 2011–2014 to the non-public kindergarten. Based on the expert opinion on the accounting, the

² Act of 17 November 1964 – The Code of Civil Procedure (Dz.U. [Polish Journal of Laws] of 2019, poz. [item] 1460, with subsequent amendments), hereinafter: CCP.

District Court in Płock accepted the claim up to the amount of PLN 311 thousand out of the PLN 314 thousand claimed by the complainant. In the opinion of the Court of First Instance, the respondent commune, by paying the grant to the claimant in the period covered by the statement of the claim, erroneously excluded some of current expenses from the basis on which the grant should be calculated. What is worth emphasizing is that already in the reply to the statement of the claim itself, the commune had granted the claim in part, fully accepting the admissibility of pursuing the claim before the civil court. However, given that the amount awarded was much higher than the amount recognised by the commune, the commune decided to lodge an appeal. The Court of Appeal in Łódź, in the commented ruling of 17 July 2018, repealed the contested judgment and rejected the claim, indicating the inadmissibility of the proceedings. At the same time, it stressed that despite the fact that the commune itself had not raised a charge of an inadmissibility of the court proceedings, this fact should have been taken into account *ex officio* because of the invalidity of the proceedings (Article 378(1) of the CCP in conjunction with Article 379(1) of the CCP). In the opinion of the Court of Appeal, the case concerning the determination of the subsidy for the non-public kindergarten in this case could not be subject to the cognition of a civil court because of its public-law (administrative and legal) nature³.

2.

The commented judgment undoubtedly concerns one of the most contentious issues in both doctrine and in case-law. Doubts in this respect have a long history. It can be assumed – and probably without much mistake – that there are few issues in Polish legal system on which there appear to be so many diametrically different judgments issued by both civil and administrative courts. However, this issue is not only of a theoretical, but

³ Act of 30 August 2002 The Law on Proceedings before Administrative Courts (Dz.U. of 2018, poz. 1302 with subsequent amendments), hereinafter: LPAC. Cf. also M. Sondej, *O tym, czy dotacja była zbyt niska, zadecyduje sąd administracyjny*, System Informacji Prawnej LEX, 2019.

above all of a practical significance. According to the Association of Polish Cities, claims of non-public institutions threaten the financial stability of local governments, as these entities demand from local government units the return of subsidies from previous years, and the amounts claimed in many cities are estimated at many millions of zlotys⁴. For this reason, the Association of Polish Cities addressed a request to the Ministry of National Education to regulate issues related to granting and settling subsidies received by persons running non-public kindergartens, appealing, *inter alia*, for the statutory determination of the jurisdiction of courts to resolve disputes concerning claims before 1 January 2017 and the period for which entities managing such kindergartens may pursue claims against territorial self-government units. The lack of an explicit statutory provision directly regulating these issues, as well as discrepancies in jurisprudence in this respect, enhances the legitimacy of conducting an in-depth analysis of the commented ruling. Since neither the legislator nor the court judicature has resolved this issue unequivocally, as will be discussed below, resolving this important issue becomes the task of the doctrine and commentators.

3.

As far as the very issue of judicial competence in cases pertaining to educational grants is concerned, at first the common courts were quite unanimous in accepting the inadmissibility of court proceedings because of the administrative-legal nature of such subsidies. In this respect, the position of the Supreme Court of 1999 indicating that court proceedings are inadmissible in a case brought by a private educational institution against the State Treasury or a territorial self-government unit for the payment (the supplement) was of considerable significance. According to the Supreme

⁴ K. Kubicka-Żach, *Sporne rozszczenia o dotacje dla przedszkoli niepublicznych od samorządów*, <https://www.prawo.pl/samorzad/sporne-rozszczenia-o-dotacje-dla-przedszkoli-niepublicznych-od,443427.html> [access on-line: 12.09.2019]. Cf. also R. Krupa-Dąbrowska, *Wojna miast z prywatnymi przedszkolami o zaległe dotacje*, „Rzeczpospolita” of 8 November 2019.

Court: “(...) the case brought against the State Treasury for supplementing the subsidy granted from the State budget as deriving from the financial (budgetary) law, traditionally outside the sphere of civil law, is not a civil case within the meaning of Article 1 of the Code of Civil Procedure, and therefore does not fall within the scope of court proceedings (Article 2(1) of the CCP)”⁵.

A radical shift was made in 2007, when the Supreme Court decided that a grant is awarded to a non-public educational institution “under the Act”, and a relationship of similar characteristics to an obligation within the meaning of Article 353(1) of the Civil Code arises between the grantor and the beneficiary⁶. This position was approved by the majority of common courts⁷, and also, to a large extent, by the administrative judiciary⁸. It should be emphasized, however, that differing views emerged, according to which the issue related to educational grants (owing to its public and legal character) should be recognised by administrative courts⁹.

The doubts arose from the fact that for over a decade the legislator had not decided on a statutory definition of the legal character of the activity on awarding educational grants to non-public institutions, leaving this issue to the doctrine and judicial decisions, which in this respect were not uniform, as it has been already indicated. Some of them – as has al-

⁵ Order of the Supreme Court of 7 May 1999, I CKN 1132/97, LEX No 37009.

⁶ Act of 23 April 1964 Civil Code (Dz.U. of 2019, poz. 1145, with subsequent amendments). Cf. a decision of the Supreme Court of 3 January 2007, IV CSK 312/06, LEX No 277299.

⁷ See, for example, a decision of 23 October 2007, III CZP 88/07, LEX No 345569; the Supreme Court judgment of 4 September 2008, IV CSK 204/08, LEX No 465959; the Supreme Court judgment of 20 June 2013, IV CSK 696/12, LEX No 1365732.

⁸ Cf. e.g. a decision of the Supreme Administrative Court of 18 January 2011, II GSK 1211/10, LEX No 952794; a judgment of the Supreme Administrative Court of 21 March 2012, II GSK 216/11, LEX No 1137918; a judgment of the Supreme Administrative Court of 11 May 2018, II CSK 477/17, LEX No 2486821.

⁹ For example, a judgment of the Supreme Administrative Court of 17 January 2008, II GSK 319/07, LEX No 357469; a judgment of the Voivodeship Administrative Court of Gdańsk of 3 August 2011, I SA/Gd 315/11, LEX No 864221; a judgment of the Voivodeship Administrative Court of Kraków of 13 March 2012, III SA/Kr 183/11, LEX No 1139243. Also R. Suwaj, *Glosa do postanowienia Naczelnego Sądu Administracyjnego z dnia 3 kwietnia 2012 r. (sygn. akt II GSK 521/12)*, „Zeszyty Naukowe Sądownictwa Administracyjnego” 2012, No 5, pp. 139–144.

ready been mentioned – consistently accepted the admissibility of court proceedings in matters related to subsidies holding a view of the civil law nature of the obligation. Others, accepting the public-law character of activities consisting of awarding grants, rejected the jurisdiction of civil courts in cases of this type. Still others, while recognising the administrative and legal nature of educational grants, allowed civil courts to pursue claims related to educational grants¹⁰.

This kind of judicial dualism caused the legislator to decide in 2016 on an unequivocal determination of the legal nature of an activity consisting in the granting of the subsidy¹¹. New paragraphs were added to Article 80 and 90 of the ESA (section 11), which clearly stated that the award of the educational subsidy is a public administration activity referred to in Article 3(2)(4) of the LPAC, and thus it is subject to the judicial and the administrative control¹². Currently, this standard is contained in Article 47 of the Act on Financing Educational Tasks¹³.

This solution undoubtedly had a decisive impact not only on determining the legal nature of educational grants, but also on the court's jurisdiction in the grant cases, by submitting such cases to the cognition of administrative courts. This view is confirmed by a position of the Ministry of National Education, which states that: "Determining the nature of activities undertaken by the subsidising body (first in the Act on the Education System and then in the Act on Financing Education Tasks) is important for the financial stability of territorial self-government units in the context of potential claims made by non-public kindergartens, schools and institutions subsidised from their budgets. If these activities are defined as public administration activities, complaints against them may be filed with the administrative

¹⁰ This includes, *inter alia*, a decision of the Supreme Administrative Court of 27 March 2013, II GSK 321/13, LEX No 1314145.

¹¹ Act of 7 September 1991 on the Education System (Dz.U. of 2015, poz. 2156, with subsequent amendments), hereinafter: ESA.

¹² Act of 23 June 2016 amending the Act on the Education System and certain other acts (Dz.U. of 2016, poz. 1010).

¹³ Act of 27 October 2017 on financing educational tasks (Dz.U. of 2017, poz. 2203), hereinafter: AFET. Cf. more broadly A. Ostrowska, *Samorządowe prawo dotacyjne. Dotacje jako wydatki jednostek samorządu terytorialnego*, Warszawa 2018, pp. 176–182.

court within the 30-day time limit specified in the Act of 30 August 2002 – The Law of the Administrative Court Procedure. This allows for faster settlement of disputes in this regard and avoids increasing by interest the amount of claims concerning subsidies paid many years ago”¹⁴.

However, the above-described change in the regulations governing subsidies for educational institutions run by entities other than territorial self-government units has not resolved all the existing doubts.

The greatest controversies and disputes concern the intertemporal consequences of this change in the scope of the admissibility of court proceedings in cases concerning subsidies granted before 1 January 2017, that is before the entry into force of the amendment referred to above.

In line with one of these positions, the admissibility of court (civil) proceedings to pursue claims for subsidies due for the period prior to 1 January 2017 has been maintained, despite fundamental legislative changes¹⁵.

Pursuant to a different view, such subsidies should be dealt with exclusively by administrative courts, not by civil courts. Consequently, the commencement of proceedings after the amendment of the Act should result in a rejection of the claim due to the inadmissibility of the court proceedings referred to in Article 199(1) of the CCP¹⁶. In the opinion of supporters of this view, the criterion determining the admissibility of proceedings before civil courts is not the period for which the grant is claimed, but the fundamental issue is the date of filing the claim. If the

¹⁴ Reply of 27 May 2019 to a Question No 31185 from the Undersecretary of State at the Ministry of National Education, Maciej Kopeć.

¹⁵ *Inter alia* A. Olszewski, *Konsekwencje intertemporalne zmiany przepisów regulujących kwestie dotowania przedszkoli, szkół oraz placówek prowadzonych przez podmioty inne niż jednostka samorządu terytorialnego w zakresie dopuszczalności drogi sądowej*, „Finanse Komunalne” 2018, No 4, p. 5 et seq.; L. Gniady, *Roszczenia o wypłatę zaniżonych dotacji dla przedszkoli niepublicznych*, „Samorząd Terytorialny” 2018, No 3, p. 46. Also, *inter alia*, a judgment of the Supreme Court of 24 February 2017, IV CSK 212/16, LEX No 2435252; decision of the Supreme Court of 19 June 2018, IV CSK 61/18, LEX No 2512071; a judgment of the Supreme Court of 27 March 2019, V CSK 101/18, LEX No 26522272, decision of the Supreme Court of 9 May 2019, IV CSK 490/18, LEX No 2679015.

¹⁶ *Inter alia* in A. Patryk, *Dotacjami na cele oświatowe zajmują się sądy administracyjne, a nie cywilne*, LEX/el. 2018; a decision of the District Court in Warsaw of 31 July 2018, III C 1884/17, LEX No 2546004. See also a decision of the Supreme Court of 3 July 2019, II CSK 425/18, LEX No 2690996.

statement of the claim is filed in after 1 January 2017, civil court proceedings are inadmissible.

Finally, a third position can be distinguished, according to which cases brought after 1 January 2017 concerning grants from before that date, can sometimes be reviewed by civil courts and sometimes by administrative courts. The decisive factor here is whether or not a so-called grant agreement has been concluded between the grant beneficiary and a territorial self-government unit¹⁷. If such a contract has been entered into, civil action may be brought before a civil court¹⁸. In the absence of such a contract, i.e. where the grant is awarded solely on the basis of an act of law applied by a territorial self-government unit without the conclusion of a specific contract, proceedings before a civil court are inadmissible.

4.

In this dispute, it is appropriate to recognise the position presented by the Court of Appeal in the commented judgment, as it can undoubtedly be included in the group of decisions which indicate the jurisdiction of administrative courts¹⁹. Nevertheless, bearing in mind the existence of many different Supreme Court decisions allowing civil proceedings, it appears necessary to undertake more detailed considerations in this respect.

Before proceeding to further comments, however, for the sake of a full clarity, it seems necessary to explicitly resolve a legal nature of the activity consisting in awarding a subsidy to an educational institution run by an entity other than a territorial self-government unit.

The fundamental question that needs to be posed, however, concerns an issue of the relevance and the legitimacy of a division of law into private and public law. As M. Safjan points out, it is therefore required to

¹⁷ Cf. on the legal nature of the so-called grant (administrative) agreements A. Ostrowska, *Samorządowe...*, pp. 149–157; J. Zimmermann, *Prawo administracyjne*, Warszawa 2018, pp. 448–455.

¹⁸ Cf. a decision of the District Court in Świdnica of 4 July 2017, II Ca 281/17, LEX No 2344122.

¹⁹ Cf. also a ruling of the Court of Appeals in Łódź of 10 May 2018, I ACa 1109/17, unpublished.

determine whether this division is dictated solely by the tradition shaped in European systems and the results of the research and didactic convention, or whether it has its deeper justification, resulting from objectively existing differences that can be verified and which can justify different approaches, not only in the sphere of science and analysis of the phenomenon, but also in the sphere of lawmaking²⁰. In Polish literature there is a stance – not at all isolated – expressing fundamental doubts as to a possibility and scientific verifiability of any criterion separating public law from private law²¹.

An approach which calls into question the very possibility of objectively dividing the norms of the system of law into the private and public spheres should be regarded as misguided. This issue has been thoroughly discussed by the doctrine, in particular by M. Safjan²². A particularly important argument in favour of the scientific explicit maintenance of the distinction between private law and public law is that certain areas of individual freedom and guarantees of individual rights (e.g. a property, property rights, economic freedom) can only be effectively protected if the private-law method plays a predominant role in these areas of relations, which are covered by the said constitutional guarantees²³. The fact that public-private methods enter the field previously reserved for the private-law method may be regarded as unconstitutional. As A. Żurawik points out: “Actions under the banner of the protection of weaker individuals or ensuring proper functioning of competition, providing illustrative justifications for interference by the authorities in the sphere of private law, may pass imperceptibly into actions aimed at infiltrating society for particular purposes of power”²⁴. For this reason, according to this author, the process needs to be monitored with the Constitutional Tribunal play-

²⁰ M. Safjan, *Pojęcie i systematyka prawa prywatnego* [in:] M. Safjan (ed.), *System prawa prywatnego. T. 1. Prawo cywilne – część ogólna*, Warszawa 2007, p. 31.

²¹ In particular J. Nowacki, *Prawo publiczne – prawo prywatne*, Kraków 1992, pp. 106–108; Z. Ziemiński, *Szkice z metodologii szczegółowych nauk prawnych*, Warszawa–Poznań 1983, p. 114 et seq.

²² Cf. M. Safjan, *Pojęcie...*, p. 30 et seq.

²³ Ibidem, p. 47.

²⁴ A. Żurawik, *Problem publicyzacji prawa prywatnego w kontekście ustrojowym*, „Państwo i Prawo” 2010, No 5, p. 41.

ing a major role in this regard²⁵. However, in order for such control to be exercised, it is necessary to opt for the possibility and scientific verifiability (correctness) of the division of law into public law and private law.

The literature points to different criteria for the separation between private law and public law. However, it is generally accepted that the best and the most precise criterion for the distinction between private law and public law is the method used by the legislator to regulate legal relations. In other words, it is crucial whether the legislator used the public-private method or the private-private method to regulate a given legal relationship.

The essence of the private-law method boils down to the principle of equivalence of relations between the entities of a given legal relationship²⁶. A further consequence of the adoption of this method is the autonomy of the will of the parties²⁷.

Once the above considerations are applied to the issue of our interest, it should be stated with all the certainty that the relationship between a territorial self-government unit and a beneficiary of an educational grant is not established on an equal footing. It is undisputed that the territorial self-government unit granting the subsidy occupies the position of a body having public-law authority granted under the Act in relation to the eligible entity, which excludes the existence of a civil-law relationship between the parties²⁸.

As the Court of Appeal in Łódź rightly pointed out, partly repeating the position of S. Gajewski²⁹, „(...) after interpreting the relevant provisions (...), the executive body of a territorial self-government unit will, in relation to each beneficiary, make the necessary factual findings, including examining whether it is an entity entitled to receive a grant and whether it meets the requirements specified in the provisions (...). Subsequently, the subsidizing authority subsumes the facts thus established

²⁵ Ibidem.

²⁶ Safjan, *Prawo...*, pp. 36–38.

²⁷ Ibidem, pp. 39–41.

²⁸ Cf. the Supreme Court decision of 7 May 1999, CKN 1132/97, LEX No 37009.

²⁹ S. Gajewski, *Sądowoadministracyjna kontrola udzielania dotacji z budżetów jednostek samorządu terytorialnego, o których mowa w art. 90 ustawy z 7.09.1991 r. o systemie oświaty*, „Finanse Komunalne” 2015, No 4, p. 55.

under the applicable provisions of the Act on the Education System, which result in an algorithm for determining the amount of subsidy and, as a result, issues a decision awarding a subsidy to a specific beneficiary in a specified amount. In this way, the public administration body creates a certain individual and specific standard, which is implemented through the payment of the due amount of a grant. The standard is, however, established in a sovereign and unilateral manner, since the beneficiary has no influence over its content”³⁰.

The validity of this claim is compounded by the fact that the parties to the educational grant relationship do not, in principle, have any freedom to form the relationship between them.

The Act imposes on territorial self-government units (and imposed in the previous legal state) an obligation to adopt a resolution, which specifies, *inter alia*, the procedure for granting and settling subsidies, as well as the procedure, scope and some other rules for conducting the control of the correctness of their collection and use (Article 38 of AFET). On the other hand, the method of a payment of grants is defined by the legislator (Article 34 and Article 42 of AFET).

The lack of freedom in the manner of payment of grants clearly indicates that this is not a private-law method of regulating the relationship between the parties since they have not been given autonomy in the choice of specific behaviour to shape their relationship, which is not based on the autonomy of the will of the parties.

Moreover, one should not lose sight of the fact that, paradoxically, the acceptance of the admissibility of a lawsuit for the payment (a subsidy, a supplement, a difference in payment) of a subsidy may lead to a situation in which entities will not have to account for this “additional subsidy” at all, since according to the adopted case-law such funds no longer constitute subsidies. Such a situation undoubtedly puts such a grant beneficiary in a privileged position in relation to other entities which are

³⁰ A judgment of the Court of Appeal in Łódź of 17 July 2018, I ACa 1448/17, LEX No 2615581.

obliged to account for the funds received³¹. Acceptance of such an unequal treatment of parties in a comparable position with respect to the subsidizing territorial self-government unit may be considered as a violation of a principle of equality of citizens, especially those in a similar legal and factual situation in relation to the law, which after all has constitutional grounds (Article 32(1) of the Constitution of the Republic of Poland).

It should be emphasized that the ruling of the Court of Appeal in Łódź reminds us that in the case law and doctrine there is also a view that the choice of the court competent to hear a case depends on whether or not the subsidy agreement is concluded between the body awarding the grant and the beneficiary of the grant. According to this position, in the case of concluding such an agreement, despite controversy as to its nature, the admissibility of a proceeding before a common court should be assumed. However, if the grant was awarded without the so-called subsidy agreement, the competent court to hear the case is the administrative court³².

Acceptance of this position would mean that in matters relating to grants and pertaining to the period before 1 January 2017, given the variety of judgments in this area, the competent court may be either a civil court or an administrative court. The decisive criterion would therefore be whether the grant was provided by the subsidizing authority to the beneficiary on the basis of the so-called subsidy agreement or not. In the absence of such an agreement, taking into account undoubtedly the administrative and legal nature of educational subsidies, the court competent to hear the case would be exclusively an administrative court. Where such an agreement has been concluded, it would be possible to refer the case to a common court.

³¹ A. Ostrowska, *Samorządowe...*, p. 182. Cf. J. Kotlińska, *Podstawy prawne udzielania dotacji przez jednostki samorządu terytorialnego na zadania oświatowe* [in:] A. Babczuk, A. Talik (ed.), *Dotacje oświatowe. Problemy i wyzwania*, Warszawa 2015, p. 37 et seq.

³² Decision of the Supreme Administrative Court of 15 July 2014, II GSK 1634/14, LEX No 1485499; decision of the Supreme Administrative Court 7 judges of the SAC Warsaw of 14 January 2009, II GPS 7/08, LEX No 500021; S. Gajewski, *Sądowoadministracyjna...*, p. 57.

Undoubtedly, an important argument in favour of such a position is the fact that there are agreements in Polish legal system which, despite the predominance of administrative and public elements, have been subject to the cognition of the common court (civil). For example, one can point here to contracts concluded in the social sphere or in the public procurement law³³.

The limited scope of the framework of this study does not allow for a broader analysis of this aspect. The conclusion can be drawn from the commented judgment and other rulings, that the attribution of a decisive role to the so-called subsidy agreement is often practiced without a deeper analysis of this issue. At this point, it should be pointed out that in judicature, the position which entirely precludes the possibility of transferring educational subsidies in the form of an agreement is not isolated at all³⁴. Regardless of this, the question arises as to whether the mere fact of a possible conclusion of such a “subsidy agreement” may change the nature of the educational subsidy relationship, which after all stems from the Act and is of an administrative and legal nature. An unambiguous resolution of this issue would require more in-depth consideration on the legal nature of educational subsidies. After all, the currently binding Article 250 of the Public Finance Act provides for the possibility of concluding the so-called subsidy agreement only in the case of targeted subsidies³⁵. Meanwhile, the determination of the legal nature of educational subsidies granted to non-public institutions would require reaching for the provisions that were in force before 1 January 2017. Over the years and in the course of subsequent amendments, their character underwent numerous transformations. For example, in 2015 when discussing this issue M. Pilich pointed out that: “The changes introduced to the commented provision under the 2009 amendment act may raise doubts as to the specific legal character of the subsidy (...) it is sufficient to state that it is still

³³ Cf. more broadly A. Ostrowska, *Samorządowe...*, pp. 154–157.

³⁴ *Inter alia*, a judgment of the Voivodeship Administrative Court in Poznań of 28 July 2010, IV SA/Po 396/10, LEX No 695110.

³⁵ Act of 27 August 2009 on Public Finance (Dz.U. of 2019, poz. 869, with subsequent amendments).

a subsidy of a subjective nature; it is granted to entities outside the public finance sector for the purpose of general co-financing of their current statutory activity”³⁶.

A further issue requiring more in-depth consideration – although of a secondary importance from the point of view of the court competent to hear the case – is whether the awarding of a grant in the situation before 1 January 2017 was a public administration activity or an administrative act referred to in Article 3(2)(4) of the LPAC. In both cases the court competent to hear the case is an administrative court.

However, it is not permissible to conduct two separate cases before different courts, i.e. before a civil court and an administrative court. In such a situation, pursuant to Article 58(1)(4) of the LPAC, the court rejects the complaint if the case covered by the complaint between the same parties is pending or has already been finally judged. Pursuant to Article 199(1)(2) of the CCP a court will reject the claim if the same claim between the same parties is pending or has already been finally judged. E. Wójcicka points out that: “The mechanism of preventing conflicts of competence adopted by the legislator does not take into account either the constitutional designation of the jurisdiction of administrative courts or the provisions of the law on proceedings before administrative courts, in which the scope of cases falling within their jurisdiction has been specified”³⁷. Therefore, Polish law excludes a possibility of negative conflicts of competence between courts, but does not resolve the problem of positive disputes³⁸. This is the situation in the area of educational grants, where both common and administrative courts are competent to handle disputes.

It is stated in the doctrine that in adopting such a solution, the legislator did not primarily focus on which court would decide on a particular case, but on ensuring that the case was resolved. The secondary issue is,

³⁶ M. Pilich, *Komentarz do art. 90* [in:] M. Pilich, *Ustawa o systemie oświaty. Komentarz*, publ. VI. LEX, 2015.

³⁷ E. Wójcicka, *Rozstrzygnięcie sporów kompetencyjnych między sądami administracyjnymi a sądami powszechnymi – od Trybunału Kompetencyjnego do współczesności*, „Studia z Zakresu Prawa, Administracji i Zarządzania” 2016, vol. 9, p. 175.

³⁸ *Ibidem*, p. 176.

however, whether in a specific case the proceedings were brought before a competent court³⁹. Such a position cannot be accepted, however, as it leads to a great chaos and a confusion in territorial self-government units.

It has already been pointed out in this study that the Association of Polish Cities applied to the legislator with a proposal for the statutory determination of the jurisdiction of courts settling disputes concerning claims related to subsidies granted before 1 January 2017. The lack of an explicit statutory provision directly regulating this issue, as well as the jurisprudence discrepancy in this respect justify, in the opinion of the author of this commentary, the submission – by any of the entities authorised to do so – of a motion to the Supreme Court to resolve this issue⁴⁰. This is also a further aim of the present study, because – despite a fairly unequivocal position contained in the commentary – the signalled jurisprudence discrepancy requires either an intervention of the legislator (as proposed by the Association of Polish Cities), or a unification of jurisprudence.

De lege ferenda – in the first place – it is necessary to agree with the position expressed by the Association of Polish Cities, and an appeal to the legislator to take legislative steps aimed at the statutory identification of a court competent to resolve the dispute in the field of claims for educational subsidies before 1 January 2017.

In view of the administrative and legal nature of the educational grants awarded to non-public institutions by territorial self-government units, it should be proposed that there should be an official indication of the jurisdiction of administrative courts. The opposite solution, according to which the legislator would indicate that a civil court is competent to

³⁹ W. Sanetra, *Spór o spory kompetencyjne*, „Przegląd Sądowy” 2003, No 9, p. 18.

⁴⁰ Pursuant to Article 83 § 1 of the Act of 8 December 2017 on the Supreme Court (consolidated text, Dz.U. of 2019, poz. 825), hereinafter referred to as the SCA, if a jurisprudence of common courts, military courts or the Supreme Court reveals discrepancies in the interpretation of the provisions of law which constitute the basis for their rulings, the First President of the Supreme Court or the President of the Supreme Court may, in order to ensure uniformity of a jurisprudence, submit a motion for the resolution of a legal issue to the Supreme Court, composed of 7 judges or of another proper composition. It is worth noting that Sec. 2 of the same article indicates other entities entitled to apply to the Supreme Court for a legal decision.

resolve such cases, could be considered as unconstitutional. Pursuant to Article 184 of the Constitution, the Supreme Administrative Court and other administrative courts exercise, to the extent specified in the Act, control over the activities of public administration. However, in the earlier part of this commentary it was clearly indicated that educational subsidies are of an obligatory nature and are granted under the Act; therefore, judicial control boils down to the control of the correctness, in particular of the amount, of subsidies allocated by a territorial self-government unit. This circumstance further compounds the conviction that it is necessary to subject cases of this kind to the cognition of administrative courts.

On the other hand, it is important to be aware that convincing the legislator at this moment to introduce statutory provisions that would regulate only the jurisdiction of the court in cases of claims dating from before 1 January 2017 may prove to be a very difficult task. Moreover, indicating the jurisdiction of administrative courts in these cases would probably have to be connected with an introduction of transitional provisions. The rule in proceedings before administrative courts is that the time limit for filing a complaint to an administrative court is 30 days (Article 53(1) and (2) of the LPAC). Meanwhile in the commented issue we are dealing with claims concerning educational subsidies granted before 1 January 2017.

For this reason, it is equally important to propose that the Supreme Court deal with this issue. It is a truism to state that court decisions are not a source of law in Polish legal system. However, it is obvious that through its interpretation, judicial decisions, especially those of the Supreme Court, influence the practice of a law application. The Supreme Court is a judicial authority appointed to perform, *inter alia*, an administration of a justice by ensuring a compliance with the law and a uniformity of the decisions of common courts and military courts, not only by recognizing remedies, but also by adopting resolutions resolving legal issues (Article 1(1)(1) of the SCA).

The formulation of the above remarks was accompanied by the conviction that both problems pointed out in this publication and other issues related to educational subsidies granted to non-public educational institu-

tions, in the absence of the possibility of their exhaustive presentation, will provoke further discussion on this subject.

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