



Bundesverwaltungsgericht



**Seminar organized by the Federal Administrative Court of  
Germany and ACA-Europe**

**Functions of and Access to Supreme Administrative  
Courts**

Berlin, 13 May 2019

**Answers to questionnaire: Poland**



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# **ACA-Europe Seminar on Functions of and Access to Supreme Administrative Courts**

12 - 14 May 2019

Oberverwaltungsgericht Berlin-Brandenburg  
(Higher Administrative Court Berlin-Brandenburg)

*Questionnaire*

## ***Responses of POLAND (Naczelny Sąd Administracyjny - Supreme Administrative Court)***

### **Introduction**

One of the most important tasks of ACA- Europe is to foster mutual understanding of the jurisprudence of the member states. The recognition and evaluation of the jurisprudence of the Supreme Administrative Courts of other member states is a key prerequisite for the development of a European legal community. For this purpose it is not sufficient to be able to read the decisions of the other member courts. In order to really understand their jurisprudence it is also eminent to understand under what conditions and traditions our colleagues perform their duties.

The conditions Supreme Administrative Courts work under are among others strongly determined by the specific functions a Supreme Administrative Court has in its national legal order. The specific functions on their part might have strong influence on how the access to the Supreme Administrative Court is designed and what scope of assessment of a case is applied. This leads to a number of questions: Which “filters”, for example, does administrative procedural law incorporate into the procedure, if it does at all? Does the procedure require a special admission or can every case be brought to the Supreme Administrative Court by the parties? Are only legal questions or also facts to be discussed?

Dealing with these questions the seminar to be held in Berlin from 12<sup>th</sup> to 14<sup>th</sup> May 2019 hopes to contribute to a deeper mutual understanding of the decisions of the member states' Supreme Administrative Courts. It shares this objective with the closely linked seminar taking place in Dublin on 25<sup>th</sup> and 26<sup>th</sup> March 2019, which will lay an emphasis on the internal mode of decision making, asking how our courts decide. Both seminars will deal with different aspects of the ways of our judicial conduct, deliberation and reasoning which are all important to understand the jurisprudence of the different member states.

These aspects cannot be studied efficiently from manuals, so ACA-Europe seminars are the right place to assess these important features of the judge's daily work.

## I. Functions of the Supreme Administrative Court (SAC)

1. a) How many **instances** are known in your (administrative) jurisdiction?

There are two instances within Polish administrative judiciary: 16 voivodship (regional) administrative courts as courts of first instance and the Supreme Administrative Court as a second and last instance court.

b) Does your SAC also serve as a first instance court?

Yes, Polish SAC exceptionally serves as a first (and last) instance court.

c) If so, under what circumstances does your court serve as a first instance court?

- depending on the subject-matter?
- depending on the importance of the case?
- depending on a choice by the plaintiff (alone) or the parties (by agreement)?
- depending on other criteria?

Please explain.

The SAC serves as a first instance court depending on subject-matter, to the extent specified by statutory provisions.

The SAC is competent as a court of first and last instance in following cases:

- proceedings regarding complaint for the protraction of proceedings (Law of 17<sup>th</sup> June 2004 on a complaint about breach of a party's right to have a case examined in an investigation conducted or supervised by a prosecutor and in judicial proceedings without undue delay - Journal of Laws 2018, item 75 - consolidated text, as amended);
- jurisdictional disputes between local self-government authorities and between self-government appellate boards and disputes as to competence between local self-government authorities and government administration agencies; hereinafter as "disputes over competence" (Article 4 of the Act of 30 August 2002 Law on Proceedings before Administrative Courts (Journal of Laws of 2018, item 1302 - consolidated text, as amended hereinafter as the LPAC);
- hearing the complaints against certain orders of the National Election Commission regarding determination of boundaries of electoral constituencies (Articles 420 and 456 of the Act of 5 January 2011 - Election Code – Journal of Laws 2018, item 754 - consolidated text, as amended);
- hearing the appeals against the resolutions of the National Council of Judiciary regarding the submission of the application for the appointment for the post of judge of Supreme Court to the President of the Republic (deciding upon the conformity of the contested resolution with the law) (Article 44 (1a) of the Act of 12 May 2011 on the National Council of the Judiciary – Journal of Laws 2018, item 389 - consolidated text, as amended).

d) What is the percentage of first instance cases compared to the overall case load? Please give statistical data about the quantity of cases (not about the quality or the relative working load resp.)!

The first instance cases accounts for only a small percentage compared to the overall case load in comparison to nearly 18 000 cassation appeals brought per year on average to the SAC in years 2013-2017.

In 2017 statistically every judge adjudicating in the SAC (including judges of the first instance courts delegated to perform duties of SAC judge) resolved 177 cases.

The requests regarding disputes over competence pro single judge (ca. 4) accounted for ca. 2 % of the case load of a single judge adjudicating cases in the SAC.

The complaints regarding the protraction of proceedings pro single judge (between 1 and 2) accounted for at least 1 % of the case load of a single judge adjudicating cases in the SAC.

As indicated above some categories of first instance cases have been allocated to the SAC in 2018, therefore:

1) in case of complaints against orders of the National Election Commission regarding determination of boundaries of electoral constituencies no complaints have been filed until now;

2) in case of appeals against the resolutions of the National Council of Judiciary regarding the submission of the application for the appointment for the post of judge of Supreme Court to the President of the Republic, there are currently (all appeals have been filed 2018) 19 cases pending (whereas 5 cases were combined for joint consideration, the preliminary reference was made and the court proceedings was suspended).

2.

a) Looking at the **case load** of a single judge of your SAC, can you identify larger groups of cases which make up the overall case load (quantitative approach)? I.e. Provisional proceedings, proceedings of admitting an appeal, first instance proceedings, other. What is the percentage of these groups of cases in the overall case load?

The largest groups of cases of a single judge adjudicating as a judge rapporteur, are cassation appeals against judgments or orders concluding the proceedings in the cases rendered by a voivodship administrative court.

As indicated above, in 2017 statistically every judge adjudicating in the SAC (including judges of the first instance courts delegated to perform duties of SAC judge) resolved 177 cases.

The cassation appeals pro single judge (130 cases) accounted for ca. 73 % of the case load of a single judge adjudicating cases in the SAC.

The interlocutory appeals pro single judge (42) accounted for ca. 24 % of the case load of a single judge adjudicating cases in the SAC.

The complaints regarding the protraction of proceedings pro single judge (between 1 and 2) accounted for at least 1 % of the case load of a single judge adjudicating cases in the SAC.

The request regarding disputes over competence pro single judge (ca. 4) accounted for ca. 2 % of the case load of a single judge adjudicating cases in the SAC.

b) If you can identify larger groups of cases (question a), is it possible to weigh these cases as to their complexity and thus to the amount of time required in treating them (qualitative approach)?

The largest groups of cases, as indicated above, that a single judge as a judge rapporteur must adjudicate, are cassation appeals against judgments or orders concluding the proceedings in the cases rendered by a voivodship administrative court.

It is not possible to weigh these cases as to their complexity – it is up to the case.

As to the amount of time required in treating all kinds of cases, in 2017 the SAC settled them on average within 12.3 months.

Regarding cassation appeals, in 2017 cases were settled within the period between 12 and 24 months (27.96% of cases were settled within 12 months).

3. a) In appeals cases, does your SAC:

- review decisions of the lower courts with a view to the facts and to the law?
- review decisions of the lower courts with a view to the law only?
- solely answer a(n abstract) legal question?

In appeals cases the SAC reviews decisions of the lower courts with a view to the facts and to the law.

It should be noted that the SAC does not make any autonomous factual findings, must rely on the facts adopted by the court of first instance as a basis for adjudication (this applies if the party does not challenge the position of the court of first instance on the facts of the case by way of appropriate allegations of violation of procedural law). If the party challenges the assessment of the facts made by the court of first instance, the SAC must consider this as a ground of the cassation appeal (without making any factual findings itself).

4. What are the **purposes** of the jurisdictional work of the SAC as a court of appeals?

- the standardisation/unification of the law?
- the deliverance of single case justice?
- (further) development of the law?

- care for adherence to procedural rules of lower courts?

The jurisdictional work of the SAC as a court of appeals serves all of above indicated purposes, although the most important purpose is the deliverance of single case justice and care for adherence to procedural rules of lower courts.

5. a) What are the purposes of the jurisdictional work of the SAC as a court of first instance?

The purposes of the jurisdictional work of the SAC as a court of first instance depend on the subject matter. For instance:

- care for the efficiency of the pending proceedings (also as a preventive tool) - protraction of proceedings;

- the deliverance of single case justice to candidates for judicial post - cases concerning the appointment of judges to the Supreme Court;

- efficient resolution of issues related to the organization of elections - election cases;

- care for the adherence of competence of the public authority; resolving doubts in this matter - settlement of the disputes over competence.

b) What is the rationale of assigning certain proceedings to the SAC as a court of first instance?

As in the case of purposes of the jurisdictional work of the SAC the rationale of assigning certain proceedings to the SAC vary depending on matter of the case. For example:

- ensurance of the rapidity of the procedure - election cases;

- assigning the control to the superior court - protraction of proceedings;

- the nature and significance of the case (constitutional matter) - assigning to an independent, highest level court the settlement of competence disputes between self-government and government administration;

- impartiality of the court and a guarantee that the case will be heard by the court of the same rank as in analogous cases (*please note that in Polish legal system cases concerning the appointment of judges to the SAC are heard by the Supreme Court*) - cases concerning the appointment of judges to the Supreme Court.

6. a) Is there a separate constitutional court in your country?

Yes, there is the separate Constitutional Tribunal (*Trybunał Konstytucyjny*). According to Article 188 of the Constitution it adjudicates in following matters:

1) the conformity of statutes and international agreements to the Constitution;

2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;

- 3) the conformity of legal provisions issued by central State authorities to the Constitution, ratified international agreements and statutes;
- 4) the conformity to the Constitution of the purposes or activities of political parties;
- 5) constitutional complaints concerning infringements of the constitutional freedoms or rights of the citizen (individual).

b) Does the SAC in your country serve as a constitutional court?

No, however the Polish SAC has competence to issue judgments on the conformity to statutes (acts of parliament) of resolutions of organs of local self-government and normative acts of territorial organs of government administration (Article 184 of the Polish Constitution).

In case of this competence the SAC acts as quasi-constitutional court because it adjudicates on hierarchical (vertical) conformity of local law – legal acts of lower rank to the normative acts (legal norms) of higher rank - statutes and eliminates provisions of local law adjudicated as incompatible with statutes from the system of law in force (*erga omnes* in terms of territorial scope of the application of act of local law concerned). It should be noted that this kind of decision falls while hearing a “concrete” pending case.

c) In how far does your SAC consider constitutional law, especially fundamental rights?

According to Article 8 (2) of the Polish Constitution the provisions of the Constitution shall apply directly, unless the Constitution provides otherwise. The Constitution may be applied directly by the SAC. The SAC uses the possibility of direct application of the Constitution makes a pro-constitutional interpretation of the law and refers to the jurisprudence of the Constitutional Tribunal.

d) If there is a separate constitutional court, is there a special/extraordinary remedy against (final) decisions of the SAC to the constitutional court claiming violations of constitutional law?

There is no special remedy against final decision of the SAC to the Constitutional Tribunal (the so-called constitutional complaint [an equivalent of *Verfassungsbeschwerde*] concerns the constitutionality of normative acts being the basis of a judgement but not the judgment itself). – see remarks I.6.f.

e) If there is a separate constitutional court and your court considers constitutional law, too, how would your court handle a case, if your court deems a relevant law as unconstitutional?

In case of constitutional doubts concerning provisions applicable in the case being heard before the court, administrative court (the SAC but also the administrative court of the first instance) may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute (Article 193). The decision taken by the Constitutional Tribunal – as the

outcome of the question referred by the administrative court - on the constitutionality of the relevant legal norms has the “*erga omnes*” effect.

The courts may apply the Constitution themselves, which is explicitly provided for in its Article 8(2). In the light of the principle of direct application of the Constitution envisaged by the quoted provision, courts are required to make “pro-Constitutional interpretation”, which may be exemplified not only by the application of a legal provision in line with Constitutional provisions, but also by disregard of unconstitutional regulations.

It follows from previous jurisprudence of the administrative courts that the possibility of refusing to apply a legal regulation due to its non-compliance with the Constitution in a given case is allowed only in several cases:

- in the case of regulations of rank lower than statutory acts (acts of parliament or regulations of comparable rank) – administrative courts confirmed this competence on numerous occasions by indicating that judges in their administration of justice are bound exclusively by the Constitution and statutory acts (Article 178(1) of the Constitution);
- in the case of so-called evident unconstitutionality, when the provisions of a statutory act and the Constitution which are compared relate to the same subject matter and they are contradictory;
- in the case of so-called secondary unconstitutionality that exists whenever a provision adopted prior to the entry into force of the Constitution does not comply in terms of its content with the applicable Constitution;
- in the case when the legislator introduced a regulation identical to a norm in respect of which the Constitutional Tribunal has already expressed its opinion by means of a judgement;
- in the case of statutory provisions that include solutions considered unconstitutional by the Constitutional Tribunal in the context of other (similar) provisions.

f) If there is a separate constitutional court in your country, can plaintiffs challenge administrative acts also before the constitutional court (i.e. without bringing the case before the SAC first)? If so, how are actions before the constitutional court related to the proceedings before the SAC?

No. Plaintiffs cannot challenge administrative acts before the constitutional court at all. However everyone whose constitutional freedoms or rights have been infringed, has the right to lodge a constitutional complaint to the Constitutional Tribunal on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations (Article 79 of the Polish Constitution). Plaintiffs must first exhaust administrative and judicial remedies (before the administrative courts).

## **II. Access to the SAC**

1. a) Does a party have to be **represented by a legal professional** before the SAC?

The party does not need to be represented by a legal professional before the SAC. The party may act personally or by a legal professional. However a cassation appeal should be drawn up and signed by a legal professional: advocates, legal advisers, tax advisers; patent agents, foreign lawyers (see also answer II.1 b).

The regulation regarding representatives of the party is envisaged in Article 35 (1) of the LPAC. According to this provision advocate or a legal advisor, other complainant or participant in the proceeding as well as the spouse, siblings, ascendants or descendants of the party as well as its adopted child or adoptive parent and other persons if special provisions so provide (foreign lawyers comparable with national advocates and legal advisers; tax advisers; patent agents) may act as representatives of the party.

In case of legal persons or entrepreneurs, also their employees may act as representatives (Article 35 (2) of the LPAC).

b) If so, does the representative have to be an attorney at law/solicitor/barrister?

According to the Article 175 of the LPAC:

“§ 1. A cassation appeal should be drawn up by an advocate or legal counsel (...).

§ 2. The provisions of § 1 shall not apply, when a cassation appeal is drawn up by a judge, a public prosecutor, a notary public, a counsel of the General Counsel to the Republic of Poland, or a professor or doctor habilitated in legal sciences, who is a party to the proceedings or its representative or agent, or when the cassation appeal has been brought by a public prosecutor, the Commissioner for Human Rights (Ombudsman) or the Commissioner for Children’s Rights.

§ 2a. The provisions of § 1 shall not apply also when a party to the proceedings is the President of the General Counsel to the Republic of Poland or when actions in the proceedings on behalf of government administration authorities, state organisational units which do not have legal personality or the State Treasury are taken by the General Counsel to the Republic of Poland.

§ 3. A cassation appeal may be drawn up:

- 1) in matters of tax and customs obligations and matters of administrative enforcement related to these obligations – by a tax adviser,
- 2) in matters of industrial property – by a patent agent.”

c) Are there attorneys/solicitors/barristers specially authorized to act before the SAC?

No.

d) Are other legal professionals admitted as representatives? I.e. legal scholars, representatives of NGOs...?

Legal scholars (a professor or doctor habilitated in legal sciences) and representatives of NGOs are admitted as representatives of the party in the administrative court proceedings if they fall within the scope of Article 35 (1) of the LPAC.

e) Are there specific (different) rules for representatives of administrative authorities?

Yes. There are specific rules for representatives of administrative authorities, envisaged in Article 35 (4) (5) (6) of the LPAC:

“§ 4. Persons that may act as an attorney of the authority whose action, failure to act or excessive length of proceedings is the subject of a complaint also include an officer or employee of the organisational unit managed by the authority.

§ 5. In matters:

- 1) in which the court has referred a legal issue causing serious doubts to be resolved by a panel of seven judges,
- 2) in which the court submitted a preliminary question to the Court of Justice of the European Union,
- 3) complaints against written interpretations of tax law provided on individual cases ,  
– persons that may act as an attorney of the authority also include an officer or employee of the organizational unit managed by the superior authority.

§ 6. The Head of the National Tax Administration or the Head of National Tax Information may be also represented by an official or a clerk of an office that supports the minister responsible for public finances.”

2. a) What are the **formal requirements** for an appeal to the SAC (e.g. precise application, reasoning,...)?

In every kind of cases judgments and certain types of orders concluding the proceedings in the case rendered by the voivodship administrative court, may be contested with a cassation appeal (the other orders indicated in the statutes may be challenged through an interlocutory appeal) (Article 173 (1) of the LPAC).

A cassation appeal is an ordinary legal mean, but its availability is limited by a variety of legal requirements.

A cassation appeal may be lodged by a party, a public prosecutor, the Commissioner for Human Rights (Ombudsman), the Commissioner for Small and Medium Entrepreneurs or the Commissioner for Children’s Rights after a transcript of a judicial decision with reasons given has been served to them (Article 173 (2) of the LPAC).

First, a cassation appeal must be made on one of the following grounds (Article 174 of the LPAC):

- 1) a violation of substantive law caused by its misinterpretation or improper application; or
- 2) a breach of procedural rules, if that infringement could have affected the outcome of the case.

Secondly, the cassation appeal should be prepared by a professional legal representative (see answer II.1 b).

Thirdly, it should meet the requirements prescribed for a letter lodged by a party and include (Article 176 of the LPAC):

- (1) a reference to the challenged decision and information on whether it is challenged in its entirety or in part;
- (2) citation of the grounds for cassation and their justification;
- (3) a request that a decision be annulled or modified, together with the indication of the scope of the requested annulment or modification;
- 4) a request that it be heard at a hearing or a declaration on the waiver of a hearing.

Moreover the cassation appeal should be lodged via the court that has issued the challenged judgment or order, within 30 days from the date upon which the party was served with a transcript of the judicial decision with the reasons given (Article 177 of the LPAC).

b) Is your SAC bound by (and limited to) review the case according to specific objections (on procedural law and/or on substantive law) of the appellant?

The Polish SAC hears the case within the limits of the cassation appeal (objections on procedural and/or on substantive law raised by the appellant) (Article 183 (1) of the LPAC), however, it takes into account - on its own authority (*ex officio*) – invalidity of the proceedings. Due to the Article 183 (2) of the LPAC, the invalidity (nullity) of the proceedings occurs:

- 1) if making the recourse to the court was inadmissible;
- 2) if the party has not had the capacity to be a party in court or procedural capacity, it has not had a body appointed to represent it or statutory representative, or when the agent of the party has not been adequately authorised;
- 3) if the proceedings already instituted before an administrative court are pending in the same case or if a legally binding decision has been issued in such case;
- 4) if the formation of adjudicating panel has not complied with the provisions of law or if a judge disqualified by virtue of statute has taken part in the hearing of the case;
- 5) if the party has been deprived of the possibility to defend his/her rights;
- 6) if the voivodship administrative court has adjudicated in the case which falls within the jurisdiction of the SAC.

c) If this is the case, how does your SAC deal with its duty to refer to the ECJ for a preliminary ruling under art. 267 TFEU?

As indicated above (II.2 b) the SAC, being bound by the limits of the cassation appeal takes into account - on its own authority (*ex officio*) – only invalidity of the proceedings. There is no obligation for the SAC to apply EU law of its own motion if no grounds for cassation have been drawn up on the basis of EU law at all, or if they have been formulated incorrectly, without a specification which provision of EU law has been breached (a fortiori as a cassation appeal should be drawn up by legal professionals).

The question of dealing with SAC's duty to refer to the ECJ for a preliminary ruling under art. 267 TFEU is connected with the question of application of EU law *ex officio* by the national supreme courts.

Although the consideration of applying EU law of its own motion by the SAC would take place if the provisions of EU law regulate the same legislative matter as provisions of national law, the violation of which was indicated in grounds for the cassation appeal and it occurs the possibility of direct application of EU law provisions or pro-European interpretation of the provisions of national law.

3. Concerning the function of the SAC in your country as a **court of appeals** (i.e. not as a court of first instance):

a) Does every party of the proceedings at the lower instance have the right to seize the decision of the SAC against all kinds of decisions of the court of lower instance?

Every party of the proceedings at the lower instance have the right to seize the decision of the SAC against all judgments and most of the orders of the court of lower instance – see answer II 3. b).

b) Can certain types of decisions of lower courts (e.g. provisional decisions, certain fields of law,...) not be brought before the SAC?

Judgments and certain types of orders concluding the proceedings in the case rendered by the lower court, may be contested with a cassation appeal (Article 173 (1) of the LPAC). In addition the orders explicitly mentioned in the LPAC or in the other statute may be contested with an interlocutory appeal. As a result there are orders of court of the first instance which cannot be brought before the SAC (for example: the order stating that the judgment of the court of the first instance is legally binding or the order refusing the suspending of proceedings).

According to the Article 191 of the LPAC, the SAC, at the request of a party, also hears those orders of a voivodship administrative court, which were not subject to review by way of interlocutory appeal but which have affected the outcome of the case.

The purpose of that provision is to include in the scope of the control of the SAC also such provisional decisions - orders issued in the course of the proceedings, for which no review by way of interlocutory appeal was possible and which have a significant impact on the outcome of the case.

4. As far as in general the parties of the proceedings of the lower instance can seize the decision of the SAC (as a court of appeals):

a) Is this right restricted by a legally established **filter** (quantitative, e.g. depending on a certain value in litigation, or qualitative, e.g. in certain fields of law, depending on a preliminary assessment)?

Not applicable. There is no legally established filter procedure, no "leave to appeal". Just correct filing of a cassation appeal guarantees that it will be examined by the SAC. The legislator did not foresee any selection of cassation appeals.

b) If there is a preliminary assessment, please give details:

- Which court decides (lower court or SAC)?
- If the lower court admits a case to the SAC, does this decision have binding effect on the SAC?
- If the SAC decides, is there a specific procedure of admittance before the SAC?  
Please give details!
- If the lower court decides (in a negative way), can the SAC still admit a case?
- If the lower court decides, does it decide on the admission of an appeal ex officio or only on application?

Not applicable.

c) Are there special rules for filters for certain fields of law (e.g. asylum law,...)?

Not applicable.

d) If your jurisdiction knows a procedure of admittance, what are the general requirements under which a case can be admitted to the SAC?

Not applicable.

e) If there are more than two instances in your country, is it possible to appeal against decisions of the court of first instance to the SAC directly? Under what requirements?

Not applicable.

f) Are there specific requirements in certain fields of law?

Not applicable.

g) If your jurisdiction knows a procedure of admittance, what is the percentage of cases admitted?

Not applicable.

5. If there is no legally established filter (Q. II.4.), has your SAC established a jurisprudence on the (in-)admissibility of appeals or of specific objections (see also Q.

II.2.b)) which has the effect of a factual filter, e.g. by rejecting them as abusive, or by dismissing petty cases?

There is no SAC established jurisprudence which would have effect of a factual filter.

6. Considering the functions of your SAC as a court of appeals (Q. I. 3.), how are these functions related to restrictions of the access to the SAC as discussed in Q. II.4.), as far as applicable?

Not applicable.

7. a) Are there any constitutional provisions in your country with respect to having an appeal's instance?

Yes. The Constitution guarantees the right of any individual to have their case heard twice by courts.

Article 78 of the Constitution provides that "Each party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute."

In addition the Article 176 of the Constitution guarantees that court proceedings has at least two stages.

b) If so, does the constitution in your country provide for a full review of a first instance decision or for access to a procedure of admittance to the next instance?

The Constitution guarantees only the right to appeal and second instance of court proceedings but does not guarantee full review of a first instance decision. That question is a statutory – sub-constitutional matter and is determined by statutes – acts regulating court proceedings.

8. Is there a political or academic discussion concerning any kind of reform with regard to the access to the SAC (e.g. introducing filters, restricting the filter, loosening the filter)?

Currently there is no political or academic discussion concerning any kind of reform with regard to the restriction of the access to the SAC.

### **III. Implementation / Procedural Aspects**

1. As far as your SAC serves as a court of first instance: What is the **possible content of decisions** of your SAC:

- cassation of the administrative act?
- obligation of the administrative authority to issue an administrative act?
- obligation of the administrative authority to issue a new discretionary decision?

- obligation of the administrative authority to act in a certain way (other than by administrative act: payment, omission...)?
- issue an administrative act itself?
- issue a discretionary decision out of its own authority?
- remit to the constitutional court?
- other?

According to Article 15 (2) of the LPAC provisions on proceedings before a voivodship administrative court shall apply accordingly to the determination of other cases falling within the jurisdiction of the SAC pursuant to separate laws.

The possible content of decisions of the SAC serving as a court of first (and last) instance:

1) disputes over competence (Article 4 of the LPAC):

- according to Article 15 (2) the disputes over competence shall be settled by the SAC, upon request, by way of order, by indicating the authority seized of the case.

2) complaint for the protraction of proceedings (Law of 17<sup>th</sup> June 2004 on a complaint about breach of a party's right to have a case examined ...without undue delay):

- if the complaint is upheld, the SAC will find that the proceeding in question is being conducted with undue delay. Moreover, at the request of the complainant or at its own initiative, the SAC may also instruct the court hearing the case on the merits to take appropriate actions. Upon request of the complainant, the court will order the State Treasury to pay the complainant a sum of money (regarded as a distinct form of compensation for violation of the party's right to have the case decided in a reasonable time, awarded under specific rules). If a monetary award is made, the payment is made by the court conducting the case where the delay occurred, out of the court's own funds.

3) hearing the complaints against certain orders of the National Election Commission regarding determination of boundaries of electoral constituencies (the Act of 5 January 2011 - Election Code)

The SAC as a court of first and last instance (there is no appeal against decision of the SAC), granting the complaint against order of the National Election Commission sets aside *in camera* the order in whole or in part, if it finds that there has been a violation of substantive law that have affected the outcome of the case (Article 145 (1) (1) of the LPAC). If the complaint is not granted in whole or in part, the SAC will dismiss the complaint, respectively, in whole or part.

According to Article 420 of the Election Code if there are no special provisions on proceedings before the Supreme Administrative Court in the Code, such proceedings is governed, accordingly, by provisions on proceedings before a voivodship administrative court, with exclusions of the application of the some provisions.

4) the appeals against the resolutions of the National Council of Judiciary regarding the submission of the application for the appointment for the post of judge of Supreme Court to the President of the Republic.

According to the Article 44 (3) of the Act of 12 May 2011 on the National Council of the Judiciary, the SAC must apply provisions of the Civil Procedure Code related to cassation appeal (filed to the Supreme Court).

The SAC, applying above mentioned provisions should dismiss the appeal against the resolution of the National Council of Judiciary if there is no justified grounds. The SAC, in case the appeal is granted, should reverse the challenged resolution of the National Council of Judiciary and remand the case for reexamination to the Council. The Council is bound by the interpretation of law made in case by the SAC.

2. As far as your SAC serves as a court of appeal:

a) What is the possible **content of decisions** of your SAC:

- cassation of the decision of the lower court and remitting the case back to the lower court?
- cassation of the administrative act?
- obligation of the administrative authority to issue an administrative act?
- obligation of the administrative authority to issue a new discretionary decision?
- obligation of the administrative authority to act in a certain way (other than by administrative act: payment, omission...)?
- issue an administrative act itself?
- issue a discretionary decision out of its own authority?
- remit to the constitutional court?
- issue a legal opinion/authoritative interpretation of the law without connection to a single case?
- other?

Apart from formal decisions (e.g. rejection of a cassation appeal due to its postponement), when examining cassation appeals, the SAC may:

- dismiss a cassation appeal (if there is no justified grounds) (Article 184 of the LPAC);
- dismiss a cassation appeal (if the challenged judicial decision complies with the law despite wrong reasons given) (Article 184 of the LPAC);
- reverse the challenged judicial decision in whole or in part and remand the case for reexamination to the court which has issued the decision (if the cassation appeal is granted) (Article 185 of the LPAC);
- reverse the challenged decision of the court of first instance and hear the appeal/examine the complaint (if the cassation appeal is granted and the SAC finds that the substance of the case has been clarified sufficiently – Article 188 of the LPAC) - while examining the complaint in such cases the SAC may adjudicate in a way that the court of first instance does e.g. the SAC may set aside the challenged decision of the public authority in whole or in part (Article 145 of the LPAC) or oblige the authority

to render a decision or order within a specified time limit, indicating the manner in which the case should be handled or determined (Article 145a of the LPAC);

- reverse, by an order, the decision issued on the case by the court of first instance and dismiss the complaint or discontinue the proceedings (if the complaint was subject to dismissal or there have existed grounds for discontinuance of the proceedings before a voivodship administrative court) (Article 189 of the LPAC).

b) To what extent can or must your SAC rely on the facts as they were investigated and determined by the lower court?

The administrative court of first instance decides on the basis of the files of the case, which means that the court examines the case on the basis of the facts existing at the date of the contested act. The administrative court does not make any factual findings in the area covered by the administrative case. It examines, however, whether the factual findings made by the public administration authority whose decisions were contested correspond to the law.

As a consequence, the SAC, which - like the court of first instance - does not make any autonomous factual findings, must rely on the facts adopted by the court of first instance as a basis for adjudication (this applies if the party does not challenge the position of the court of first instance on the facts of the case by way of appropriate allegations of violation of procedural law). If the party challenges the assessment of the facts made by the court of first instance, the SAC must consider this as a ground of the cassation appeal (without making any factual findings itself).

3. a) When your SAC serves as a first instance court, does it apply the same rules of court procedure as the common first instance courts?

According to Article 15(2) of the LPAC provisions on proceedings before a voivodship administrative court apply accordingly to:

1) the settlement of the disputes over competence

2) the determination of other cases falling within the jurisdiction of the SAC pursuant to separate laws.

As far as it concerns the latter group of cases different procedural rules are being applied by the SAC (provisions on proceedings before a voivodship administrative court are only applied accordingly):

- in case of examining complaints for the protraction of proceedings, the SAC applies provisions of the Law of 2004 on a complaint about a breach of a party's right to have a case examined without undue delay;

- in case of examining complaints against orders of the National Election Commission regarding electoral constituencies, the SAC applies provisions of the Election Code (to the extent not regulated in the Election Code, only certain provisions of the LPAC are being applied accordingly);

- in case of hearing the appeals against the resolutions of the National Council of Judiciary regarding the submission of the application for the appointment for the post of judge of the Supreme Court to the President of the Republic (deciding upon the conformity of the contested resolution with the law), the SAC must apply provisions of the Civil Procedure Code related to cassation appeal (filed to the Supreme Court).

b) If not, what are the differences?

The SAC serving as a court of first and last instance has to take into account different regulations depending on the matter of the case (see answer above). Differences might be of tremendous importance e.g. in cases concerning the appointment of judges to the Supreme Court the SAC follows the civil procedure. In other cases differences may refer to time limits to hear a case (e.g. election cases) or other factors like requirements of the complaint (e.g. protraction of proceedings).

4. As far as there is a specific procedure of admittance of appeals before the SAC, are there different rules of procedure for these procedures of admittance than for admitted appeals' procedures?

Not applicable.

5. Are there (compulsory, facultative) public hearings in procedures of admittance and or the admitted appeals' procedure?

As indicated above there is no procedure of admittance of cassation appeals before the SAC.

However it must be explained that in case of administrative courts, including the SAC the public hearings means sitting in open court (public session).

Article 90 (1) of the LPAC states that court sessions shall be public and the decision-making court hear all cases at trial (public hearing), unless a specific provisions provides otherwise. In case of filing of the cassation appeal to the SAC, it shall include also a request that it be heard at a hearing or a declaration on the waiver of a hearing (Article 176 (2) of the LPAC). The SAC hears a cassation appeal in closed session if the party that lodged the cassation appeal waived the right to a hearing and the remaining parties did not request that a public hearing be conducted (Article 182(2) of the LPAC).

It must be also highlighted that failure by parties or their agents to attend oral hearing does not stay the hearing of the case (Article 107 of the LPAC). In case of absence of a party or its agent from the trial (public hearing).

6. Do the decisions of the SAC have an effect on other cases than the one decided?

a) Are lower instance courts bound by law to follow decisions of the SAC in other (similar) cases?

No. The lower instance administrative courts are not bound by law to follow decisions - judgments and orders of the SAC in other (similar) cases. However it must be noted that issuing of judgments and orders are not the only forms of the case-law activity of the SAC.

The exception is result of the SAC competence to adopt resolutions clarifying legal provisions whose application has caused disparities in the jurisprudence of the administrative courts.

Apart from adjudicating on cassation appeals, complaints, appeals the SAC (as the only administrative court having competence in this matter) may also adopt resolutions. Resolutions aim to safeguard the unity of administrative court jurisprudence, to provide legal certainty and legal safety for individuals. The panels of the SAC and panels of lower courts – voivodship administrative courts are bound by the resolutions of the SAC.

There are two categories of resolutions: (1) 'abstract' – clarifying legal provisions whose application has caused disparities in the jurisprudence of the administrative courts; (2) 'concrete' – clarifying the legal issues that raise considerable doubts in the context of cases pending before administrative court.

'Abstract' resolutions are adopted in order to clarify those provisions that were interpreted differently by the administrative courts. The subject of such a resolution is the clarification of legal doubts that are not connected to any particular administrative court case. Resolutions are adopted by the SAC by a panel of seven judges, the entire Chamber or the full panel of the SAC. The decision on which panel will be assigned to a particular case lies within the hands of the President of the SAC. However, each panel may refer a case to the next panel, i.e. the panel of seven judges may refer a question of law to be resolved by a panel of the entire Chamber and the Chamber is able to refer it to the full panel of the SAC.

The court may not adopt a resolution *ex officio*, but instead always acts upon request.

'Abstract' resolutions may be adopted upon the request of: the President of the SAC, the Public Prosecutor General, General Counsel to the Republic of Poland, the Commissioner for Human Rights (Ombudsman), the Commissioner for Small and Medium Entrepreneurs or the Commissioner for Children's Rights (Article 264 § 2 of the LPAC).

In turn 'concrete' resolutions may be adopted upon the request of the adjudicating panel of the SAC when examining a cassation complaint (Article 187 § 1 LPAC), although the proceedings may not always lead to the adoption of a resolution, because the extended panel may assume the case for judgment, which results in the issuance of a judgment or an order (Article 187 § 3 LPAC). Resolutions may also be adopted by a panel of the entire Chamber or by the full panel of the SAC, as the panel of seven judges may refer a question of law to be resolved by a panel of the entire Chamber, and the Chamber may refer it to the full panel of the SAC (Article 264 § 1 in conjunction with § 4 LPAC). The "concrete" resolution adopted in this mode is binding in a given case (Article 187 § 2 LPAC).

The SAC is not bound by the request and may refuse to adopt a resolution if in particular there is no need to resolve doubts (Article 267 of the LPAC).

Resolutions of the SAC are binding upon all judges of the administrative courts. The binding force of resolutions means that all administrative courts are obliged to follow them until they are changed by the SAC.

If any panel of the administrative court does not share the position adopted in the resolution of the panel of seven judges, the entire Chamber or the full panel of the SAC, it submits the legal issue for settlement to the appropriate panel (Article 269 § 1 of the LPAC). The appropriately composed SAC then applies respectively Article 187 § 1 and 2 when re-issuing the resolution, however, it cannot apply Article 267 of the LPAC, which gives the extended panel of the SAC the opportunity to refuse to adopt a resolution. Any panel of the administrative courts means any panel of the VAC or the SAC.

Resolutions are binding irrespective of their character. Academics and administrative courts share the opinion that both 'abstract' and 'concrete' resolutions have the same binding effect. Therefore, 'concrete' resolutions are binding in particular cases that give reasoning for adopting the resolution but also in any other administrative court cases. Each resolution should consist of an element and a statement of reasoning. It should be noted that only the operative part is binding on the administrative courts. A statement of reasoning has an explanatory value and it does not limit the administrative courts during their adjudication of cases. Resolutions are directly binding only upon the administrative courts. However, public administrations may not disregard the resolutions of the NSA. Therefore, the administrative courts indicate that resolutions are also indirectly binding upon all public authorities.

b) If so, under which conditions can they deviate from a decision of the SAC?

As mentioned above the courts of first instance are not bound by law to follow decisions of the SAC in other (similar) cases, except the resolutions of extended panels of the SAC.

If the panel of first instance court wants to deviate from previous resolution of the SAC, it must (as mentioned above) initiate the procedure provided in Article 269 of the LPAC (see answer III.6 a).

c) Is the SAC bound by law to follow its own previous decisions?

No, except the resolutions of extended panels of the SAC.

d) If so, under which conditions can it deviate from its previous decision?

If the SAC panel wants to deviate from previous resolution of the SAC, it must (as mentioned above) initiate the procedure provided for in Article 269 of the LPAC (see answer III.6 a).

7. Are the judges of your SAC bound by the decisions of other sections within your SAC?

No. However such an effect have the resolutions of the extended panels of the SAC (see answer III.6 a and III.6 c).