ABUSE OF RIGHT IN ADMINISTRATIVE LAW : THE FOUNDATIONS OF THE CONCEPT[1]

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Abstract: The concept of abuse of rights is universal in nature and is present in all branches of law. The development of scholarly opinion and jurisprudence led in time to the introduction of the prohibition on abuse of rights as a general principle of administrative law, understood as a ban on the use of rights or powers in a manner inconsistent with the purposes for which they were established or in violation of constitutional and axiological order. This paper is a presentation of a model that describes basic characteristics of abuse of right in administrative law. These basic characteristics can be summarized in a few theses as follows: (1) subjective variability – prohibition of abuse applies to both the authority as well the individual; (2) strong links between abuse and circumvention of law – abuse of right is often aimed at avoiding the application of those norms of administrative law which the individual considers to be disadvantageous to her/him; (3) different legal basis of the prohibition of abuse – general principles of law (e.g. the principle of good faith), specific regulations referring to specific powers, immanent limits of the powers or the right; (4) "axiological entanglement" – links with universal, basic administrative law values: legality, rule of law, certainty, justice and common good; (5) vague boundaries and casuistic nature, making it difficult to formulate generalized conclusions, especially with regard to the consequences of abuse of right.

Key words: abuse of right – abuse of discretionary power – circumvention of law – common good – good faith – principle of proportionality

1 INTRODUCTION

The concept of abuse of rights has grown from roots stemmed in civil law. However, due to the common philosophical fundamentals and general construction, it is universal in nature and is present in all branches of law.[2]

In the sphere of administrative law, first concepts referred to the abuse of discretionary pow-

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[2] As Louis DUBOUIS writes, the concept of abuse of rights was established as one of the classic theories of private law, and has grown to the rank of general law theory construct (DUBOUIS, L. La théorie de l'abus de droit et la jurisprudence administrative. Paris : LGDJ, 1962, p. 13).

ers (classic: French *detournement de pouvoir*;[3] German *Ermessensmissbrauch*,[4] elements of English concepts of *ultra vires* and so-called *Wednesbury principles*[5]). These classic concepts form a common element of the European legal culture.[6] Irrespective of the differences in detail, the underlying idea is the same: it is about the body's error involving the exercise of discretionary powers in a manner contrary to the purpose for which the body was granted the freedom of action. All the concepts and instruments used to counter the abuse of discretionary powers are based on the same principle: to strike a balance between providing the administration with a certain degree of discretion (necessary for the efficient performance of tasks) and the need to effectively ensure judicial protection of an individual against excessive interference by the public administration.

The development of scholarly opinion and jurisprudence led in time to the introduction of the prohibition on abuse of rights as a general principle of administrative law, understood as a ban on the use of rights or powers in a manner inconsistent with the purposes for which they were established or in violation of constitutional and axiological order.[7]

The concept of abuse of right has long been present in the studies of administrative law. Beside the large number of less extensive studies analysing a particular aspect, or mentions in studies on other issues, one can also point to broad, comprehensive studies.[8] Their main disadvantage is that they are not comparative studies, and they discuss the issue only from the perspective of a particular legal system.[9]

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3 WELTER, H. Le côntrole juridictionnel de la moralité administrative. Paris : Sirey, 1929, p. 85 – 118; DUBOUIS, L. La théorie de l'abus, p. 184 – 199; VIDAL, R. L'evolution du détournement de pouvoir dans la jurisprudence administrative. In Revue de droit public (RDP), no. 2 (1952), p. 275 – 316; GROS, M. Fonctions manifestes et latentes du détournement de pouvoir. In RDP, 9 – 10 (1997), p. 1237 – 1253. The prohibition on abuse of power is also known in administrative law of the Netherlands (SEERDEN, R., STROINK, F. Administrative law in the Netherlands. In SEERDEN, R., STROINK, F. Administrative law of the European Union, its member states and the United States: a comparative analysis. Antwerpen : Intersentia, 2002, p. 168 – 169), Belgium (see: BATSELÉ, D., MORTIER, T., SCARCEZ, M. Manuel de droit administratif, Bruxelles : Bruyllant, 2010, s. 851), Spain (desviacion de poder – see: RETORTILLO BAQUER, s. M. La desviación de poder en el derecho español. In Revista de administración pública, N° 22 (1957), p. 129 – 178; CLAVERO ARÉVALO, M. F, La desviación de poder en la reciente jurisprudencia del tribunal supremo. In Revista de administración pública, N° 30 (1959), p. 105 – 130) or Italy (sviamento di potere – see: CASSESE, S. Istituzioni di diritto amministrativo. Milano : Giuffré Ed., 2004, p. 265).

4 WADE, W., FORSYTH, Ch. Administrative Law. 9th ed. New York : Oxford University Press, 2004, p. 35 – 36; CRAIG, P. Administrative Law. 7th ed. London : Thomson, 2012, p. 5 – 6 and 562 – 581.

5 LEWIS, C. Judicial Remedies in Public Law. London : Sweet & Maxwell, 2015, p. 1 – 2, 183 – 185.

6 In the light of Article 263.2 TFEU, the concept of misuse of powers is one of the cornerstones of judicial review of legal acts enacted by the EU authorities. The whole system of judicial review of EU acts expressly refers to classical French and German concepts of judicial review of public administration – see: CLEVER, F. Ermessensmiβbrauch und détournement de pouvoir nach dem Recht des Europäischen Gemeinschaften im Licht der Rechtsprechung ihres Gerichtshofes. Berlin : Duncker & Humblot, 1967, p. 15 and 17, BEBR, G. Development of Judicial Control of the European Communities. The Hague-Boston-London : Martinus Nijhoff Publishers, 1981, p. 117; CRAIG, P. EU Administrative Law. New York : Oxford University Press, 2006, p. 462; BUSTILLO BOLADO, R. O. La desviación de poder en el derecho comunitario y en el Convenio Europeo de derechos humanos. In Revista de Administración Pública, No 188 (2012), p. 65 – 97.

7 WOLFF, H. J., BACHOF, O., STOBER, R. Verwaltungsrecht I. München : C.H. Beck, 1994, p. 264): „(…) das Verbot, Rechte (auch Grundrechte) und rechtlichen Formen zu Zwecken zu gebrauchen, die den Zwecken, um derentwillen się gewährt sind, oder allgemein der Enthaltung einer rechtsstaatlichen Verfassungsordnung widersprechen".

8 See: DUBOUIS, L. La théorie de l'abus, passim; KNÖDLER, Ch. Miβbrauch von Rechten, selbstwidersprüchliches Verhalten und Verwirkung im öffentlichen Recht. Herbolzheim : Centaurus Verlag, 2000; GÄCHTER, T. Rechtsmissbrauch im öffentlichen Rechts. Zürich/Basel/Genf : Schulthess, 2005; HÄSLINGER, M. Umgehungsphänomene im Spiegel der Judikatur der österreichischen Gerichsthöfe öffentlichen Rechts. Wien : Holzhausen, 2012.

9 There are some comparative studiess, but they only deal with certain aspects of the abuse of right in administrative law. An example of it may be BYERS, M. Abuse of Rights: An Old Principle, A New Age. In McGill Law Journal, vol. 47 (2002), p. 389 – 431), which discusses, in principle, abuse of right in international law, or the valuable monograph edited

This state of the art results in a rather chaotic and accidental use of the concept of abuse of right in the practice of the application of administrative law. There is a multitude of administrative courts judgements in which the term "abuse of right" is used. In many cases, however, its application is intuitive, referring to terms used in the common language, without a deeper reflection on the foundations of the construct and considering whether the situation subject to legal qualification can be described as an abuse of right in strictly legal sense.

One can notice the lack of a "foundation" in the form of a systematic theory explaining the essence of the abuse of right in administrative law. To develop a comprehensive theory is a task requiring the preparation of a comprehensive monograph. My article is intended to be a kind of "prolegomena" to this theory. I would like to point out some basic assumptions, describe a model to demonstrate the basic characteristics of abuse of right in administrative law. Naturally, the model is a simplified image, based rather on general outlines than detailed analyses. However, on the other hand, it gives the opportunity to look from a further perspective, to list those elements that form the foundations of the fragment of reality being described, which sometimes could not be grasped when performing a detailed analysis of individual issues. I was guided by such a perspective when writing this paper.

2 THE GENERAL CONCEPT OF ABUSE OF RIGHT IN ADMINISTRATIVE LAW

In terms of basic construction assumptions, the prohibition of abuse of right in administrative law does not deviate from the general theoretical approach: it is about the use of legal capability to act (defined as conceptual categories of powers or subjective right) in a manner inconsistent with the goal assumed by legislature who created the legal provisions from which this capability to act is derived, or in a manner that is unacceptable under the basic axiology of the legal system. To make the argumentation brief, I will use the following terms in further considerations: teleological and axiological elements of the prohibition of abuse of right.

The following three explanatory notes must be made to the above definition.

First of all, the element of axiological contradiction first comes up in the definitions used in legal theory and civil law. In my opinion, however, the element of incompatibility with the purpose of the authorising norm is more visible in administrative law. Why is it so? In my opinion, this is due to a certain reluctance of scholars and jurisprudence to use axiology as an instrument for delimitation of boundaries of powers of an authority or freedom of an individual. Axiology is based on assessments, and these naturally interfere with the value of legal certainty. Administrative law, much more than civil law, emphasizes the exact definition of what an authority or an individual is allowed to do. Using axiological assessments to establish the limits of powers of an authority and the limits of freedom of an individual creates the risk that these boundaries may be blurred. Axiological reasoning gives less precise results than the purely logical argumentation.

Secondly, there is a disjunction between the two structural elements of abuse (teleological and axiological). One can speak of abuse of right both in the case of non-compliance with the purpose of the authorising norm and with the axiology of the legal system. In administrative law, both elements

by TARUFFO, M. Abuse of Procedural Rights: Comparative Standards of Procedural Fairness. The Hague [u.a.] : Kluwer law international, 1999, which regards abuse of right in procedural law, but focused more on civil procedure.

are often used jointly. A particular behaviour is treated as incorrect exercise of powers or rights, not only because it is inconsistent with the purpose of the authorisation granted by the legislature, but also because it violates the essential values protected by law. For example: the mere incorrect use of discretionary powers by an administrative body does not constitute a sufficient basis for an administrative court intervention. Court intervenes (e.g. by repealing an administrative act) when the authority's action additionally violates the basic values protected by administrative law, especially when the authority, wrongly using its discretionary powers, will incorrectly resolve the conflict between the public interest and the interest of the individual.

Likewise, in the case of abuse of right by an individual, the need to counter the manner the individual exercises the freedom granted to him stems not only from the fact that he does so contrary to intentions of the legislature who created guarantees of subjective right. There is also an element of "condemnation" of the individual's behaviour, due to the violation of public interest or legitimate interest of another individual.

In my opinion, mutual complementation of the teleological and axiological elements of the prohibition of abuse of right is more evident in the field of administrative law than in civil law. Therefore, it is typical for the prohibition of abuse of right in administrative law.

Thirdly, the prohibition of abuse of right in civil law is based on a general clause (good faith, principle of equity, principles of social coexistence). A characteristic feature of general clause is that it refers to assessments and values falling outside the legal system, to the basic social axiology.[10] In administrative law, references to values located outside the legal system are cumbersome. To reiterate: the construct of abuse of right is an instrument for determining the limits of powers of an authority and freedom of an individual. When defining these limits, we should not go beyond the legal system. This is clearly seen in the collision between public and individual interest. When solving this collision for a specific case, one must find specific values that stand behind these abstract concepts. When seeking these values, we must stick to the legal order. In my opinion, there is no public interest outside the sphere of law, as there is no legitimate interest of an individual outside this sphere, which can effectively compete with the public interest. In other words: when seeking a solution for the collision of the public interest and the interest of an individual, we rely on the axiology of the legal system, we cannot go beyond this area. An interest based on values which are not within the legal system is not a legal interest. For this reason, the prohibition of abuse of right in administrative law is based on a general clause, but a specific one, since it is an intra-system reference to the basic axiology of the legal system, and not outside this system.

3 SUBJECTIVE VARIABILITY OF ABUSE OF RIGHT IN ADMINISTRATIVE LAW

One of the characteristic features of abuse of right in administrative law is subjective variability: the prohibition of abuse applies to both the authority and the individual. And the fundamental question arises: how this subjective variability affects the construct of abuse of right? Does this influence refer to its basic structural elements or can it only be visible in the consequences of its use?

For the structural elements, there is no significant difference between the prohibition of abuse of right related to an authority and related to an individual. In both cases, there is both a teleologi-

[10] LESZCZYŃSKI, L. Stosowanie generalnych klauzul odsyłających. Kraków : Zakamycze, 2001, p. 21 – 22.

cal element and an axiological element. They only differ in terms of emphasis put on them. In my opinion, the teleological element prevails in relation to the authority, which is especially visible in the prohibition of abuse of discretionary powers. Generally, the mere use of powers contrary to the purpose of authorisation results in a defective administrative act. On the other hand, when applying the prohibition of abuse of right in relation to an individual, both elements are equally important, complementing each other. By applying the prohibition of abuse of right in relation to an individual, we almost always refer to the conflict between the action and the purpose of the right, and the collision with other legally protected values. As pointed out above, the mere fact that an individual exercises the right contrary to the intentions of the legislature is not enough to challenge the action of that individual. The teleological element of the prohibition of abuse of right must be complemented by the axiological element: it must be demonstrated that the behaviour of the individual violates a public interest or a legitimate interest of another individual.

The difference in consequences of their use is quite obvious. The prohibition of abuse of right applied to the authority limits the scope of its power, and thus extends the sphere of individual freedom. On the other hand, abuse of right related to an individual restricts his or her freedom. However, one needs to pay attention to some specific results.

First of all, it is difficult to say that the prohibition of abuse of right extends the sphere of power of the authority by limiting the freedom of the individual. The sphere of power of the authority must be precisely defined by law and cannot be based on vague constructs, such as abuse of right. It is only about the extension of the scope of the authority's obligation to intervene. There is no doubt that the authority must oppose the activity of the individual, which – due to its abusive character – puts the public interest or legitimate interest of other individuals at risk. In such a situation, the authority must apply legal means that are within its powers.

Secondly, restricting the sphere of individual freedom by applying the prohibition of abuse of right may result in the extension of the sphere of legally protected freedom of another individual. This can be seen in so-called multi-polar legal relations (*multipolare Verwaltungsrechtsverhältnisse*).

To explain the essence of this concept, a triangular arrangement is used, in which individuals with colliding private interests face each other on opposite vertices at the base, while the administrative body which is to settle this dispute can be placed at its apex. The main problem concerns the relationship between individuals. Referring to the above-mentioned triangular model, it is to be noted that there is no administrative-law link connecting the vertices occupied by the disputing individuals (*verwaltungsrechtliche Verbindungslinie*). An example of this is legal disputes as part of investment and construction process between the investor and owners of neighbouring plots of land (located in the construction project impact area).[11]

In a multi-polar legal relationship, there is a collision between the interests of two (or more) individuals which needs to be balanced. It is difficult and even impossible to settle this kind of collision using traditional methods of describing and analysing administrative law relations. In this respect, the jurisprudence and scholars use new instruments based on the principle of good faith (*Treu und Glauben*), such as the prohibition of abuse of right, estoppel (*venire contra factum proprium*, *Verbot des widersprüchlichen Verhaltens*) or forfeiture of rights (*Verwirkung*).[12]

[11] SCHMIDT-PREUB, M. Kollidierende Privatinteressen im Verwaltungsrecht (Das subjektive öffentliche Recht im multipolaren Verwaltungsrechtsverhältniss). Berlin : Duncker & Humblot, 1992, p. 1 – 3 and 17 – 20; THIENEL, R. Mehrpolige Rechtsverhältnisse und Verwaltungsgerichtsbarkeit. Wien : Verlag Österreich, 2001, p. 14 – 15 and 149 – 150.

[12] DE WALL, H. Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht. Tübingen : Mohr Siebeck, 1999,

4 ABUSE OF RIGHT AND CIRCUMVENTION OF LAW IN ADMINISTRATIVE LAW

The administrative law is characterized by very strong links between abuse of right and circumvention of law, which is reflected in their frequent concomitance. Abuse of right is often used to circumvent law, i.e. to avoid applying the norms of administrative law which the individual considers to be disadvantageous to her/him. The scholarly opinion notes that abuse of right is a factor enabling the goal of circumvention of law (*Erfolgungsfaktor zur angestrebten Erreichung des Umgehungsziels*). One can also find terms that bring both constructs even closer, such as: "abusive circumvention of statute" *("missbräuchliche" Gesetzesumgehung*),[13] or the statement that in the case of circumvention the abuse of right affects the legal norm ("extorted" norm – *erschlichene Norm*), under which the entity acting *in fraudem legis* wants to subsume the facts created with its own activity.[14]

As in the case of abuse of right, the circumvention of law is caused by inevitable content imperfection of the legal provisions (*inhaltliche Unvollkommenheit*). A provision refers to typical behaviours, the legislator is not able to anticipate and regulate in detail all possible social situations. The inevitable collision with high creativity of addressees of legal norms, who look for gaps in the law or deliberately shape the elements of their factual state.[15]

Scholars of law point to two key elements of circumvention of law: it is a purpose-oriented construct (*zielorientiert-manipulative Konstruktion*), in order to thwart the implementation of the norm (*auf die Vereitelung des Normzwecks abgezielt*),[16] by choosing appropriate methods. In other words: an individual, in order to achieve a more favourable legal situation, deliberately chooses a form of shaping the legal relationship (*Gestaltungsform*), for which the legislature provided for other legal consequences. The "circumventor" commits manipulation of legal forms (*manipulative Benutzung von Formen des Rechts*). As in the case of abuse of right, the key element is the discrepancy between the purpose of the legal norm and the objective of the action.[17]

There are classic forms of circumvention of law occurring in the administrative law, in which the entity artificially creates conditions to prevent being qualified as falling under the scope of a prohibitive or imperative norm.

An example for the first situation may be attempts to circumvent the prohibition on running business without having the required licence, by creating the appearance of performing a completely different type of activity, which is not subject to such regulation.[18] Another example is the circum-

p. 246 – 256; HÄFELIN, U., MÜLLER, G. Grundriss des Allgemeinen Verwaltungsrechts. Zürich : Schulthess, 1998, p. 144 – 145; HUFEN, F. Verwaltungsprozessrecht. München : C.H. Beck, 2013, p. 418; STICH, R. Die Verwirkung im Verwaltungsrecht. In DVBl. (1959), p. 234 – 237; KAISER, A. – B. Bauordnungsrecht. In EHLERS, D., FEHLING, M., PÜNDER, H. (eds.). Besonderes Verwaltungsrecht, Band 2, Planungs-, Bau- und Straβenrecht, Umweltrecht, Gesundheitsrecht, Medien- und Informationsrecht. Heidelberg : C.F. Müller, 2013, p. 291 – 292.

13 HÄSLINGER, Umgehungsphänomene, p. 365 – 366.

14 KNÖDLER, Miβbrauch, p. 168.

15 HÄSLINGER, Umgehungsphänomene, p. 365.

16 Ibidem.

17 KNÖDLER, Miβbrauch, p. 168.

18 In Swiss law: TANQUEREL, T. L'abus de droit en droit public suisse. In ANCEL, P., AUBERT, G. (eds.) L'abus de droit, comparaisons franco-suisses. Saint-Etienne: Publ. de l'Université de Saint-Etienne, 2001, p. 179; in Austrian law: HÄSLINGER, Umgehungsphänomene, p. 305 and the case-law referred to therein. An example from Polish case-law is the circumvention of the requirement to obtain a taxi license, see: Supreme Administrative Court (*Naczelny Sąd Administracyjny*): 8 November 2011 (II GSK 1123/10); 18 April 2012 (II GSK 298/11); 12 October 2012 (II GSK 1801/11); orzeczenia.nsa.gov.pl.

vention of regulations providing for prohibition in terms of waste management. It is a problem of the so-called "junk tourism", i.e. export of hazardous waste, especially to third world countries. For waste consisting of a mixture of various substances, entrepreneurs try to show that the substance is not a waste but a product, which would circumvent the restrictive requirements for the export of waste.[19] Examples of this kind can be continued.

An example of circumventing imperative provisions may be the so-called "Tourism for driving licences" ("*Führerscheintourismus*"),[20] which has been addressed by numerous judgments of EU and national courts, and even legal regulations.

In brief, this phenomenon means that people whose driving license has been withdrawn or restricted in their home Member State are trying to use the institution of mutual recognition of driving licences,[21] to evade national sanctions and the need to undergo the recovery procedure in their home country. To this end, they go abroad (to another Member State or a third country) and obtain new licence there, and then demand recognition of these rights in their home country, by invoking the principle of mutual recognition of driving licences.

There is already quite abundant case-law of the ECJ on these issues. The judgement of 20 November 2008 (C-1/07, *Weber*) is of particular importance here.[22] The Court decided that the principle of mutual recognition does not preclude a Member State from refusing to recognise, in its territory, a right to drive under a driving licence issued by another Member State to a person whose right to drive was withdrawn, in the territory of the first Member State, even though that withdrawal was ordered after the issue of that driving licence, provided that the licence was obtained during a period in which a licence issued in the first Member State was suspended and both the suspension and the withdrawal are based on grounds existing at the date of issue of the second driving licence.[23] The wide occurrence of this practice has also led to the response of national legislatures which introduce exceptions to the principle, by allowing for refusal of acceptance of rights resulting from foreign documents in cases where the authority in the home state determines that there are grounds for deprivation of rights, or when the driver has already been banned from driving.[24]

Apart from classic forms, another form of circumvention of law occurs in administrative law. It involves creating artificially conditions enabling an entity who strives to circumvent the law

19 HÄSLINGER, Umgehungsphänomene, p. 282.

20 por. MOSBACHER, A., GRÄFE, J. Die Strafbarkeit von „Führerscheintourismus" nach neuem Recht. In NJW (2009), p. 801; SAURER, J. Anerkennungsgrundsatz und Rechtsmissbrauch im europäischen Fahrerlaubnisrecht. In Jura 4, (2009), p. 260 – 264.

21 In international law, this principle is derived from Article 41 of the Convention on Road Traffic of 8 November 1968. In EU law: Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (OJ L 403, 30. 12. 2006, p. 18–60).

22 ECLI:EU:C:2008:640, no 39 – 41.

23 The Court's arguments have been confirmed and developed in subsequent case-law: ECJ: 19 Mai 2011, C-184/10, Grasser, ECLI:EU:C:2011:324; 13 October 2011, C-224/10, Apelt, ECLI:EU:C:2011:655; 1 December 2012, C-467/10, Akyüz, ECLI:EU:C:2012:112; 26 April 2012, C-419/10, Hofmann, ECLI:EU:C:2012:240; 23 April 2015, C-260/13, Aykul, ECLI:EU:C:2015:257; 21 Mai 2015, C-339/14, Wittmann, ECLI:EU:C:2015:333. In the Polish case-law: Woivodship Administrative Court (*Wojewódzki Sąd Administracyjny*) of Gliwice: 1. 10. 2014, II SA/Gl 775/14; of Szczecin: 22. 5. 2014, II SA/Sz 1409/13; of Lublin: 9. 10. 2012; III SA/Lu 317/12; orzeczenia.nsa.gov.pl.

24 See, for example, § 30 of the Austrian Driving Licence Act (Führerscheingesetz, BGBl. I Nr. 120/1997): „Besitzern von ausländischen Lenkberechtigungen kann das Recht, von ihrem Führerschein in Österreich Gebrauch zu machen, aberkannt werden, wenn Gründe für eine Entziehung der Lenkberechtigung vorliegen. Die Aberkennung des Rechts, vom Führerschein Gebrauch zu machen, ist durch ein Lenkverbot entsprechend § 32 auszusprechen". Similarly, § 28 (4) of the German regulation of 13. 12. 2010 regarding the admission of road users to traffic (Verordnung über die Zulassung von Personen zum Straßenverkehr-Fahrerlaubnis-Verordnung, BGBl. I, p. 1980).

to qualify that entity's factual situation as falling under the norm which gives the entity more benefits.

There are legal norms that grant rights if the individual meets the requirements set out in conditions of these norms (R_n). Benefits granted vary depending on the conditions met (R_1, R_2…, $R_n \rightarrow N_1$, N_2, N_n). An individual that meets the conditions of R_1 related to the benefits set out in the norm N_1 artificially aims to create such conditions (R_2), which would give the individual the possibility of qualifying its legal situation under the norm N_2, which gives more benefit. The legislature, in order to avoid artificially creating the conditions for obtaining a greater advantage, creates a metanorm (N_m) excluding the application of the more favourable norm (N_2) if the classification of that individual's situation under this norm results from artificially creating conditions of R_2.

An example of this practice is the EU regulations on counteracting the creation of conditions that increase the benefits as part of support from EU funds – including export refunds,[25] or farming subsidies. In this regard, the general legal norm is Article 4.3 of Council Regulation No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests.[26]

The mechanism of abuse of right by creating artificial conditions for being granted the payment can be seen well on the example of farming subsidies. Since support systems are usually based on degressive models (the larger the area, the lower the amount of support), and, moreover, part of the aid funds is addressed to small farms, farmers apply various methods of artificially reducing and dividing the area of their lands (e.g. by submitting applications covering smaller areas by closely affiliated entities). In response to this type of practice, the legislature waives the possibility of obtaining payments in an increased amount (or avoiding a reduction in payments) for farmers who artificially create conditions for obtaining higher support.[27]

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[25] See especially the ECJ judgement in Case *Emsland* (14. 12. 2000, Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas, C-110/99, ECLI:EU:C:2000:695, no. 52 – 53): "A finding that there is an abuse presupposes an intention on the part of the Community exporter to benefit from an advantage as a result of the application of the Community rules by artificially creating the conditions for obtaining it. Evidence of this must be placed before the national court in accordance with the rules of national law, for instance by establishing that there was collusion between that exporter and the importer of the goods into the non-member country". These arguments were developed in the subsequent case-law of the Court: ECJ: 21. 7. 2005, Eichsfelder Schlachtbetrieb, C-515/03, ECLI:EU:C:2005:491, no 39 – 41; 11. 1. 2007, Vonk Dairy Products BV v. Productschap Zuivel, C-279/05, ECLI:EU:C:2007:18, no 33 – 38.

[26] OJ L 312, 23. 12. 1995, p. 1 – 4. In view of this provision: Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal. Actions to prevent misuse of public funding are also taken by the national legislator, for example: German Gesetz gegen missbräuchliche Inanspruchnahme von Subventionen – Subventionsgesetz from 29. 7. 1976; BGBl. I p. 2034.

[27] Article 11.4 of Regulation No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009, OJ L 347, 20. 12. 2013, p. 608 – 670. According to this provision, no advantage by means of avoiding reductions of the payment shall be granted in favour of farmers in respect of whom it is established that they artificially created, after 18 October 2011, the conditions to avoid the effects of this Article. Likewise, Article 61.4 provides that: no advantage provided for under this Title shall be granted in favour of farmers in respect of whom it is established that they artificially created, after 18 October 2011, the conditions to benefit from the small farmers scheme. See also the ECJ: 12. 9. 2013 r., C-434/12, *Slanczeva sila*, ECLI:EU:C:2013:546, issued under previously applicable provisions, but indicating some universal principles for the issue of assessing abuse of the right to farming subsidies. On the national level, see for example: HÄSLINGER, Umgehungsphänomene, p. 305 and the case-law cited therein. This issue also appeared in numerous rulings of Polish administrative courts - see: Supreme Administrative Court: 25. 9. 2012, II GSK 1435/11; 12. 10. 2012, II GSK 1399/11; 14. 11. 2014, II GSK 2579/14; 15. 7. 2015, II GSK 1519/14; 4. 8. 2016, II GSK 689/15; 11. 8. 2016, II GSK 475/15; 30. 8. 2016, II GSK 569/15; orzeczenia.nsa.gov.pl.

The examples cited show a close relationship between the constructs of circumvention of law and abuse of right. This can be seen in the example of the above-mentioned driving licence cases. The obligation of mutual recognition of driving licences issued by other countries (expressed in EU directives and international conventions) results in the right of drivers to be granted recognition of their licenses obtained in another country. The purpose of this regulation is to improve the free movement of people who settle in other Member States.[28] These provisions are used in an abusive manner by persons deprived of their right to drive a vehicle in their home countries as a result of criminal or administrative punishment. The recovery of one's rights in their home country requires additional conditions to be met. To circumvent these provisions, a person deprived of rights attempts to use, contrary to the purpose (thus: abuse), the rights resulting from the principle of mutual recognition of driving privileges.

The link between circumvention of law and abuse of right can also be seen in the case of authority's activities. An example of this is the French concept of *détournement de procedure* (abuse of procedure), referring to a situation where an authority applies a particular procedure in circumstances where another procedure should be applied.[29] This practice can be described using both the construct of abuse of right and circumvention of law. On the one hand, the authority misuses its powers by exercising them for purposes not provided for by the legislature. On the other hand, the authority attempts, in a manner inconsistent with the intentions of the legislature, to qualify a factual situation as falling under provisions regulating a more favourable procedure for the authority. This is typical for circumventing the law, which is aimed at avoiding the application of a norm considered by the given entity as less beneficial.

5 LEGAL BASIS: GENERAL PRINCIPLES OF LAW – DETAILED REGULATIONS – IMMANENT LIMITS OF SUBJECTIVE LAW (POWERS)

The analysis of jurisprudential and judicial views points to several basic sources of prohibition of abuse of right in administrative law. It must be stipulated that these sources should not be considered separately. The prohibition of abuse of right is often derived from various sources.

The first source are the general principles of law. This is particularly evident in the German and Swiss scholarly opinion and case-law, which refer to the principle of good faith known from civil law (*Treu und Glauben*, § 242 of the German *Bürgerliches Gesetzbuch*, Article 2 (1) of the Swiss *Zivilgesetzbuch*). This principle is recognized as a general principle of law, applicable in all fields of law, thus also in the field of administrative law. One of manifestations of the principle of good faith is the prohibition of abuse of right.[30]

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[28] See recital 2 of Directive 2006/126/WE (*supra* note 21).

[29] por. CAMUS, G. Réflexions sur le détournement de procédure. In Revue de Droit Public, no 1 (1966), p. 66 – 67; CHAPUS, R. Droit administratif général. Tome I. Paris : Motchrestien, 2001, p. 1048 – 1054; GAUDEMET, Y. Traité de droit administratif. Paris : L.G.D.J., 2001, p. 495 – 498; LEBRETON, G. Droit administratif général. Paris : L.G.D.J., 2007, p. 476 – 480; LOMBARD, M., DUMONT, G. Droit administratif. Paris : Dalloz, 2007, p. 474; WALINE, J. Droit administratif. Paris : Dalloz, 2008, p. 606 – 608.

[30] GÄCHTER, Rechtsmissbrauch, p. 4 – 5, 23; ACHTERBERG, N. Allgemeines Verwaltungsrecht. Heidelberg : C.F. Müller, 1986, p. 598; BULL, H. P., MEHDE, V. Allgemeines Verwaltungsrecht mit Verwaltungslehre. Heidelberg, München, Landsberg, Frechen, Hamburg : C.F. Müller, 2009, p. 138; DE WALL, Die Anwendbarkeit, p. 242. The principle of good faith has long traditions among German scholars of administrative law – see SCHMITT, K. H. Treu und Glauben im Verwaltungsrecht. Berlin : Junker und Dünnhaupt, 1935, passim.

The second source includes detailed regulations that express the prohibition of abuse of right with respect to certain specific legal institutions. Such regulations are not very frequent, however they can be pointed out in European administrative law, as evidenced by the examples of provisions prohibiting abuse of right in regulations concerning support from public funds, including farming subsidies, cited in the previous paragraph.

The third source the prohibition of abuse of right in administrative law originates from includes immanent, internal limits of powers or right.

An example are classic constructs defining the limits of discretionary powers of the public administration (mentioned above: French concept of *detournement de pouvoir*; German concept of *Ermessensmissbrauch*¸ elements of English concepts of *ultra vires* and so-called *Wednesbury principles*). The scholarly approach to the problem of abuse of discretionary powers in various legal systems is diverse. Regardless of some differences, the essence of the problem is similar in all these systems. All the legal concepts of abuse of discretionary powers use a teleological element: each of them considers an authority's error in the exercise of discretionary powers in a way inconsistent with the purpose this sphere of freedom of action was granted for. The purpose should be determined based on a teleological interpretation of the competence norm.

All public administration activities are "objective-driven". In contrast to an individual who can freely choose the purpose of his or her actions, the administration must pursue specific objectives set by public tasks. Each competence to act within discretionary power was entrusted by the legislature for the pursue of specific objectives. This thesis is referred to as "purpose axiom". It is the administrative body's obligation to implement the purpose of the act, the body may not pursue an objective other than set by the legislature. If the body is guided by other reasons, or where it points to the alleged fulfilment of the legitimate objective in order to hide the actual intentions, then its decision is unlawful, illegal.[31]

A common feature of these constructs is the emphasis on the purpose of the competence norm. Although the essence of discretionary powers is a certain scope of freedom of action, this freedom is not unrestricted, and its basic limitation is the purpose of the authorisation. Actions that fall outside this purpose are unlawful, because they go beyond the scope of powers of this authority.

Also, as regards activities of an individual, abuse of right is a situation where the individual exercises their right in a manner that is contrary to the objectives assumed by the legislature. For example, the purpose of the right of action is to seek real legal protection before administrative court. If activities of an individual are a kind of play with public administration bodies, excessive litigiousness expressed in submitting hundreds of requests to authorities, and then complaints to administrative court, when the individual's goal is to use procedural means to harm the opponent (e.g. by prolonging the proceedings), it is to conclude that the individuals don't seek real legal protection in proceedings before administrative court. In this situation the individual uses his right for purposes other than assumed by the legislator, moreover: in a way that is against the public interest or legitimate interest of other entities. This is just abuse of right. Such an action may not be given effective legal protection.[32]

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[31] CRAIG, Administrative law, p. 568; BRINKTRINE, R. Verwaltungsermessen in Deutschland und England. Heidelberg : C. F. Müller, 1997, p. 379.

[32] More on the subject, see: PARCHOMIUK, J. Abuse of Procedural Rights in Administrative Law. In Collection of Papers from the International Academic Conference Bratislava Legal Forum 2015. Bratislava : PraF UK, 2015, p. 683 – 696, and the references cited therein.

Speaking about sources of the concept of abuse of right in administrative law, one must also emphasize the special role of judicature, which, through established traditional case-law created the foundations of the concept of abuse of right, based on very general legal grounds. This is particularly evident in the French concept of *détournement de pouvoir* established in the case law of the Council of State (*Conseil d'Etat*). This concept was derived from the very essence of powers of public administration, without basing on any single, specific legal principle.

6 AXIOLOGICAL DETERMINATION OF THE ABUSE OF RIGHT.

The construct of abuse of right is an institution that is strongly "axiologically determined". This is so also in administrative law.

The concept of abuse of right is a tool to correct the *stricti iuris* rules in a specific case, when too rigid regulations do not allow for finding the right solution. As a consequence, the construct of abuse of right faces universal values that are fundamental to administrative law: legality, the rule of law, certainty and justice. Flexibility of the clause of abuse of right may lead to an axiological collision, due to the risk of loosening the bonds resulting from the principle of rule of law which guarantee the certainty of applying the law. Undoubtedly, there is an antinomy between legal certainty, which requires stability and immutability, and flexibility in the application of law, assuming that the resolution must be adjusted to the specificity of a particular case, in accordance with the requirements of equity.[33] This is an axiological conflict rooted in the very nature of law.[34]

The prohibition of abuse of right refers to axiological criteria, and these are, by nature, vague and blurred. The problem arises particularly with respect to the individual. This poses the threat of blurring the limits of admissible limitations of individual freedom by the public administration.[35] A question arises whether it is possible to set the limits of individual freedom in administrative law based on axiological and teleological criteria.

On the other hand, this is where the advantages of the construct of abuse of right can be found – in the axiological „loosening" of too rigid frameworks of administrative law. The limits of a right or power cannot always be expressed in the „strict" language of legal norms. The exercise of powers by an authority or exercise of right by an individual can lead to injustice in particular circumstances of a case. The prohibition of abuse of right is just to prevent this, to establish an additional limit for

[33] This is a problem of all general clauses, including the clause of prohibition of abuse of right – see: LESZCZYŃSKI, Stosowanie, p. 208 – 220.

[34] This ontological "ailment" of law was seen even by classical philosophers – see ARISTOTLE. *Nicomachean Ethics* (V, 10, 1137 b): "When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission – to say what the legislator himself wold have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so a decree is needed". (ARISTOTLE. *Nicomachean Ethics*. In Ross, W. D. *The Works of Aristotle*. Vol. II. Chicago-London-Toronto-Geneva-Sydney-Tokyo : Encyclopædia Britannica Inc., 1952, p. 386.

[35] This is the main source of objections to the construction of abuse of right in administrative law raised in Polish literature on the subject: PRZYBYSZ, P. Nadużycie prawa w prawie administracyjnym. In IZDEBSKI, H., STĘPKOWSKI, A. (eds.). Nadużycie prawa Warszawa : Liber, 2003, p. 197 – 198, HADEL, M. Nadużycie prawa w prawie administracyjnym. In Przegląd Prawa Publicznego, no 5 (2016), p. 46.

the exercise of powers or rights. In order to correct excessively rigid laws, the legislature allows the administrative body or the administrative court to apply assessments based on values not expressed explicitly in the rules of the legal system, for example to the rules of good faith and equity.

Abuse of right occurs in situations where there is a conflict of values protected by law. The conflict of values is not to be solved by a zero-one rule method, but by balancing them.[36] Such a mechanism links abuse of right strictly with the fundamental values of administrative law – the common good and individual interest, and the key problem of balancing these goods in administrative law.

The construct of abuse of discretionary powers creates an additional limit to the exercise of powers, forcing the administrative body to look for the proper purpose of its powers, as indicated by the legislature. Thus, the prohibition of abuse should prevent distortion of discretionary powers by using it contrary to the intentions of the legislator. In turn, in relation to an individual, the prohibition of abuse can also be understood as introducing the internal boundary of rights. Prohibition of abuse of right is contrary to the exercise of a right in a way that at first glance seems to fit into the legally admitted sphere, but in fact goes beyond this sphere, distorts the purpose of the right and leads to the violation of legitimate interests of other individuals or the public interest.

Thus, the construct of abuse of right becomes an instrument to resolve collisions between the values of the common good and the individual interest.[37] It forces a search for a balance between these values.

The fact that abuse of right is a construct strongly determined by axiological criteria leads inevitably to questions about the relationship between law and morality. Some authors even believe that the very concept of abuse of right contains an element of negative moral evaluation of someone's behaviour.[38]

The entanglement between law and morality can be seen in the classic French concepts of abuse of discretionary powers, where it was directly said about the control of "administrative morality" (*moralité administratif*). It was considered that judicial review did not only concern the formal compliance of administrative activities with the law, but also was intended to serve the interest of good administration (*l'intérêt d'une bonne administration*), that is one that respects the rights of individuals and effectively performs public service tasks.[39]

Similar elements can be seen in English administrative law, where "bad faith" is listed as a traditional basis for repealing the act because of misuse of discretionary powers. In the strict sense, this includes cases of deliberate abuse of power, as opposed to a situation where the body misuses discretionary powers, but does it as a result of ignorance or misunderstanding of the intent of the legislature. To be classified as bad faith, the deed concerned must be an intentional dishonest action.

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36 Cf. the Dworkin's and Alexy's concepts regarding the resolution of the conflict of principles and the conflict of principles: DWORKIN, R. Taking Rights Seriously. Cambridge, Mass : Harvard University Press, 1978, p. 60 – 68; ALEXY, R. Theorie der Grundrechte. Frankfurt am Main : Suhrkamp, 1986, p. 74 – 87.

37 See the classical thesis formulated by the Polish Supreme Court that in a state governed by the rule of law there is no place for a mechanically and rigidly understood principle of the supremacy of public interest over individual interests. This means that in each case, the authority concerned is obliged to indicate what general (public) interest it is about and to prove that it is so important and significant that it absolutely requires that individual citizens' rights be restricted (Supreme Court [*Sąd Najwyższy*]: 18 November 1993, III ARN 49/93; "Orzecznictwo Sądu Najwyższego" 1994, no 9, p. 181.

38 BIERVERT, B. Der Miβbrauch von Handlungsformen im Gemeinschaftsrecht. Baden-Baden : Nomos, 1999, p. 24.

39 The view supported in his classic coursebook by HAURIOU, M. Précis de droit administratif. Paris : L. Larose et Forcel, 1893, passim, and then developed by Henri WELTER (Le contrôle juridictionnel, passim).

This includes intentional damage, fraudulent manipulation, dishonesty, malice and other deliberate infringements.[40]

In contemporary approaches, the relationship between abuse of right and morality has been somewhat blurred. Nevertheless, the concept of abuse of power continues to express the general imperative of fairness in the exercise of discretionary power. It contains a very important idea that the administrative body cannot use the discretionary power to fulfil any public interest. This can be seen in the classical form of *détournement de pouvoir*, involving the use of police and administrative powers not to enforce public order, but in the fiscal interest of the state or a municipality.[41]

The relationship between the prohibition of abuse of right and morality can also be seen in the situation when actions of an individual is subject to moral assessment. Opposing abusive exercise of a subjective right includes an element of moral condemnation. The prohibition of abuse of right is usually employed where the individual's use of right is morally unacceptable, as it affects the protected goods of another individual or the value of the common good. It should be noted, however, that the mere negative moral evaluation of how the individual exercises a right is not enough to apply the prohibition of abuse of right. It is too strong interference with the rights of the individual, therefore it must be based on law. The consequences of moral condemnation must be justified by legal arguments. This may be a reference to the purpose of the legal norm from which the individual derives his right or to the principle of balancing the public interest and a legitimate interest of the individual.

7 DIFFERENTIA SPECIFICA OF THE ABUSE OF RIGHT IN ADMINISTRATIVE LAW

Despite the unquestionable similarities resulting from common sources, the "philosophy" of the prohibition of abuse of right in private law and in administrative law differ. In my opinion, three basic differences can be identified.

Firstly: the above mentioned subjective variability of abuse of rights exerts a significant influence on its functions.

In private law, the vector of influence of abuse of right is uniform: it is a means of limiting the freedom of an individual if he or she violates legitimate interests of other individuals. In administrative law, the vector of influence of abuse of right is not so unequivocal. As far as administrative bodies are concerned, the construct of abuse of powers is intended to limit administrative power. This applies especially to those spheres where the limits of authority are not strictly defined by law, i.e. the spheres where the bodies exercise their discretionary powers.

In the aspect regarding an individual, the abuse of rights has an opposite "vector" of influence – just as in private law, it constitutes a barrier to individual freedom. However, the direction of influence is not unequivocal. There are situations in which the restriction of freedom of an individual by way of the prohibition on abuse of rights leads to the extension of the sphere of freedom of another individual. This applies in particular to the above mentioned multipolar legal relationships (Ger-

[40] CRAIG, Administrative law, p. 576; BRINKTRINE, Verwaltungsermessen, p. 399 – 400; WOOLF, H., JOWELL, J., LE SUEUR, A. De Smith's Judicial Review. 6th ed. London : Sweet & Maxwell, 2007, p. 266 – 267; WADE, FORSYTH, Administrative Law, p. 416.

[41] WALINE, Droit adminitratif, p. 607; CHAPUS, Droit adminitratif, p. 1051; LEBRETON, Droit administratif, p. 476.

man: *multipolaren Verwaltungsrechtsverhältnisse*). Concepts referring to the general prohibition of abuse of right may, in these cases, form a tool for resolving collisions between areas of legally protected interests.

Secondly, the abuse of right in administrative law is based more on the idea of common good rather than the protection of the freedom of other individuals.

Civil law governs the relationship between peer entities. Its essence is to determine the limits of freedom of mutually equal individual. Therefore, in civil law, abuse of rights is a tool for determining the boundaries between the conflicting spheres of individual's freedom.

The basic characteristic of the classic relationship governed by administrative law is the inequality of entities. So, it mostly covers relationships between an individual and the state/government (its organs). There is another value relationship: between the interest of an individual and the public interest. These concepts are tools expressing broader conceptual values of the common good and the individual good. Therefore, the prohibition on abuse of right in administrative law is reasonable both due to the reference to freedom of another individual and to the common good. What is more, the value of common good in administrative law goes to the foreground, unlike in civil law where the common good is given less priority as to the arguments justifying the prohibition of abuse of right.

Thirdly, the prohibition of abuse of right in administrative law in certain situations is not supposed to make the law more flexible in application, but on the contrary – it is a chain that restrains freedom of the body that wrongly perceives the flexibility of applying the law.

The origin of the general concept of abuse of right lies in the tendency to correct an overly "rigid" legal norm in order to find a just solution in a specific case. This mechanism is undoubtedly evident in civil law as well as in administrative law, if we relate abuse of rights to the activity of individuals.

However, if we relate abuse of rights to the activities of an administrative body, then the mechanism of abuse of rights operates quite different. This is evident in the case of abuse of discretionary powers.

Administrative bodies are entrusted with discretionary powers where a certain amount of decision-making discretion is needed. This need arises from an overly rigid abstract legal regulation that does not allow for specific circumstances to be taken into account. The reason for granting discretionary powers to a body is that with a certain degree of discretion the body is able to flexibly and responsibly find fair solutions in real-life situations that are not fully foreseeable and which can be classified and systematised only in the general outline.[42]

In this situation, the concept of abuse of discretionary powers operates inversely – it is not a correction of the law, but rather a chain holding the discretionary powers of the authority in relation to the adjustment of the resolution to the particular circumstances of the individual case. The prohibition on abuse of discretionary powers is applied where the authority uses the powers contrary to the purpose established by the legislature.

[42] DAVIS, K. Discretionary Justice: A Preliminary Inquiry. Baton Rouge, Lousiana : Louisiana State University Press, 1969, p. 25 – 26; KOCH, Ch. Judicial Review of Administrative Discretion. In The George Washington Law Review, Vol. 56 (1986), p. 471 – 472; WOLFF, BACHOF, STOBER, Verwaltungsrecht, p. 374; ACHTERBERG, Allgemeines Verwaltungsrecht, *p*. 346.

8 LEGAL CONSEQUENCES OF ABUSE OF RIGHT

The general prohibition of abuse of right is an institution with vague limits. The case-law is very casuistic in this respect. This effect is, to a large extent, due to the nature of the prohibition of abuse of right, which is intended to be an instrument of correction of the overly "rigid" statutory law, where the considerations of equity require so. Such a correction is necessary due to the specific circumstances of a particular case. The application of the prohibition of abuse of right is determined by the circumstances of a particular case. It is an ad hoc institution that can hardly be defined in a general and abstract form.[43] The specificity of abuse of right makes it difficult to formulate generalised conclusions regarding legal effects.

In general terms, the effect of abuse of powers, as regards the administrative body, is the incompatibility of the act or action with the law. Acting in a way that is incompatible with the purpose of the powers cannot be considered to fall within the scope of the authorisation and is therefore unlawful. Specific effects depend on the type of the act and the violated component of the powers (procedural or substantive).

It should be stated that by analysing the abuse of right, administrative courts avoid examining the very merits of the decision. The prohibition of abuse of power refers to the discretionary powers of the administration. In European legal culture, courts generally show self-restraint in terms of review of the merits of a discretionary decision.

Judicial review covers only the legality of an administrative decision, its compliance with legal rules that determine the work of the administration. As *Georges Vedel* notes, if the administration operates within circumscribed powers, its activities can be assessed in terms of their legality. The administration can only decide to the extent allowed by law. Its decision may, therefore, be compliant or non-compliant with law. On the other hand, if the administration has discretionary powers, its decision can only be judged in terms of opportuneness (*opportunité*): the decision may be adequate or not adequate, right or wrong, but it cannot be illegal until the administration has the freedom to act.[44]

Since the legislation grants the body freedom to assess, the court cannot examine it, because there are no criteria for assessing what are the rules determining the way the body acts. Consistently following this argument, it would entail allowing any arbitrariness of the administration, and thus the possibility of abusing the body's discretionary powers.

The prohibition of abuse of powers arises in relation to the merits of the decision where the court claims that the authorities failed to take into account all the relevant circumstances (the English concept of *reasonableness*[45]). In this area, however, the concept of abuse of powers as an instrument of

[43] Similarly TANQUEREL (L'abus de droit, p. 191), who writes about the "irregular" (*hétéroclite*) nature of the cases where the issue of abuse of right in public law occurs, and Nathalie MERLEY (L'abus de droit dans la jurisprudence administrative française. In ANCEL, P., AUBERT, G. (eds.). L'abus de droit, comparaisons franco-suisses Saint-Étienne : Université de Saint-Étienne, 2001, p. 216), who notes that the concept of abuse is used so rarely and in so different situations that it is difficult to formulate generalised conclusions based on case-law analysis.

[44] VEDEL, G., DELVOLVÉ, P. Droit adminitstratif, T. 1. Paris : Presses Universitaires de France, 1992, p. 529; SERRAND, P. Le contrôle juridictionnel du pouvoir discrétionnaire de l'administration à travers la jurisprudence récente. In Revue du droit public, no 4 (2012), p. 906.

[45] In the light of Lord GREEN'S classic approach: "It is true the discretion must be exercised reasonably. Now what does that mean? […] [The word "unreasonable"] has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters

judicial review is displaced by other constructs referring to the proper assessment of relevant facts in the case (the concepts of manifest error of assessment – *erreur manifeste d'appréciation*,[46] balance control) or by the principle of proportionality.[47] It is easier to provide grounds for illegality of an administrative act by invoking the argument of disproportionate interference in the legal sphere of the individual, rather than using a fairly complicated instrument of abuse of powers.[48]

From the perspective of evaluation of the individual's activities, abuse of right generally means that the individual's activity does not fall within the sphere of permissible behaviour defined by the limits of the right. Therefore, the general consequence will be the ineffectiveness of invoking the guarantees provided by the right. This is the only conclusion that can be reached at such a general level of consideration. More specific conclusions can only be made at the level of detailed case studies.

Generally speaking, abuse of right will result in the refusal to grant the right claimed by the abusively acting individual, or the application of the sanction which the individual wants to evade in an unlawful manner. In the sphere of procedural rights, the question of legal consequences of abuse of right comes down to the question of whether the abuse has a formal or substantive effect. In the first case, the court will reject the complaint, considering that it is inadmissible, in the second it will refuse to accept the complaint, deciding that it is groundless for substantive reasons. The jurisprudence does not give a definite answer, as it applies both options, depending on the procedural right involved.

With reference to circumvention of law, the sanction in administrative law is generally consistent with the findings of legal theory. If we adopt the *Christian Pestalozza's* reasoning that circumvention of law is a "failure of subsumption attempt",[49] the sanction will be to challenging the qualification requested by the party and qualifying an action without the „trick" of artificially created conditions.

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which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. […] That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another." (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation; Court of Appeal: 10 November 1947, [1948] 1 KB 223). The rationality test describes the outermost, final limit of admissibility of discretionary action, the authority is not allowed to exceed (CRAIG, Administrative law, p. 562; BRINKTRINE, Verwaltungsermessen, p. 393).

46 The construct of manifest error is aimed at limiting abuses that may occur during exercise of discretionary powers. For this reason, it is similar to the construct of *détournement de pouvoir*. The purpose of the prohibition of abuse of power is to subject the administration to certain minimum standards of morality and prevent the use of powers to pursue objectives inconsistent with the public interest (Judge of the Council of State Guy BRAIBANT In the commentary on the Council of State's judgement in case Lambert of 13. 11. 1970, AJDA 1971, p. 35, as cited in: SERRAND, Le contrôle, p. 907). The concept of manifest error also occurs in the case-law of European courts (ECJ: 14 March 1973, 57/72, Westzucker GmbH p. Einfuhr- und Vorratsstelle für Zucker, no 14, ECLI:EU:C:1973:30; 25 January 1979, C-162/96, Racke v. Hauptzollamt Mainz, no 5, ECLI:EU:C:1998:293).

47 The effect of displacing the concept of abuse of power by the review of proportionality is seen in the case law of the EU courts in terms of review of discretionary powers of the EU administration (CLEVER, Ermessensmiβbrauch, p. 118; Van RAEPENBUSCH, S. Droit institutionnel de l'Union et des Communautés européennes. Bruxelles : Larcier, 2001, p. 509 – 510; STĘPKOWSKI, A. Zasada proporcjonalności w europejskiej kulturze prawnej. Warszawa : Liber, 2010, p. 232 – 239). Similarly, there are opinions in English administrative law about the decline of the classical ideas, which are being superseded by the principle of proportionality (por. WADE, FORSYTH, Administrative law, p. 371 – 372).

48 Quite rare cases of the invalidation of an act based on the construct of *détournement de pouvoir* induced some authors to express the opinion of decline (*déclin*) or marginalisation of this institution (FERNANDEZ-MAUBLANC, L.-V. Le prétendu déclin du détournement de pouvoir. In Mélanges offerts à Jean-Marie Auby. Paris : Dalloz 1992, p. 239. The Belgian administrative law's literature provides similar reasons for the very rare use of the power abuse concept by the Belgian Council of State (BATSELÉ, MORTIER, SCARCEZ, Manuel de droit administratif, p. 851).

49 PESTALOZZA, Ch. Formenmiβbrauch des Staates. München : C. H. Beck, 1973, p. 66 – 68. To put it in a certain simplification, which allows a short summary of the complex theory by this author: an abuser wants to apply a certain norm to a specific fact, but this attempt to subsume does not succeed, because it is not accepted by the law.

Sometimes, however, the law introduces another type of sanction. An example is the regulations on farming subsidies referred to above, where the sanction is a refusal to grant a benefit.

9 CONCLUSIONS – PERSPECTIVES OF APPLYING THE PROHIBITION OF ABUSE OF RIGHT

The answer to the question, what is the future of the concept of abuse of right in administrative law, depends on the subjective perspectives.

When analysing the case law regarding the review of the exercise of discretionary powers by the administration, it is evident that the classic concept of abuse of power has clearly lost its significance. Although it is still referred to in administrative law course-books by scholars, it appears less and less frequently in the case law. At the same time, one may note that, while applicants with persevering "enthusiasm" invoke charges of abuse of power, the courts are less and less concerned about these charges. The causes of this phenomenon are in the specificity of the concept of abuse of powers, which, in classical terms, makes it necessary to assess the intentions of an official acting on behalf of the authority. On the one hand, this causes evidence finding difficulties. On the other, it makes it difficult to formulate objectively verifiable arguments in a legal dispute regarding the legality of the act. In that situation, the construct of abuse of power is superseded by other grounds of complaint that allow for the same effect (repealing the act), but are based on more transparent and objectively perceptible criteria (in particular the principle of proportionality or the concept of manifest error in assessment).

Despite the declining practical significance, the concept of abuse of powers remains an *ultima ratio* means to challenge administrative acts that are unacceptable from the point of view of the axiology of the legal system. It is the "ultimate weapon" of an administrative court judge. The value of this concept is also expressed in the fact that it emphasizes the importance of the objective of the competence norm. Without denying that competence provisions should be strictly interpreted, it must be recognized that each power of an administrative body has its own specific purpose. The use of powers for purposes others than that originally intended leads to an unacceptable restriction of the rights of the individual. The search for the purpose of the powers, characteristic for prohibition of abuse of powers, does not blur the limits of sovereign interference, but on the contrary: allows them to be given a rational sense.

It should be noted that the prohibition of abuse of power under the European soft law is still one of the basic standards for exercising powers by a public administration body and one of the basic criteria for judicial review of public administration (art. 7 of the European Code of Good Administrative Behavior; Recommendation no. R (80) 2 of the Comittee of Ministers Concerning the Exercise of Discretionary Powers by Administrative Authorities,[50] Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts[51]).

[50] Among basic principles applicable to the exercise discretionary powers by administrative authorities the recommendation points to the principle of reasonableness: "An administrative authority, when exercising a discretionary power: 1. does not pursue a purpose other than that for which the power has been conferred (II.1)".

[51] According to the point 1.b, referring to the scope of judicial review: "The tribunal should be able to review any violation of the law, including lack of competence, procedural impropriety and abuse of power".

The future of the concept of abuse of right in administrative law is, in my opinion, primarily in its aspect relating to the individual. I do not share concerns of those scholars who rule out the reception of the concept of abuse of right in administrative law.[52] I see the problems related this, in particular the risk of blurring the permissible „limits of limitation" of individual freedom. However, in my opinion, in view of the „feedback" between the individual and his environment, increasingly stronger in the modern world, as well as the resulting complexity of legal relations in administrative law, new methods of shaping these relations need to be sought for. The classical forms in which we have traditionally considered these relations can be insufficient, as evidenced, inter alia, by the above-mentioned problem of multi-polar legal relations in administrative law.

The prohibition of abuse of right by an individual may be a source of some flexibility, as this is the role of this concept. It is obvious, however, that its application should be accompanied by far-reaching caution. It should be borne in mind that even under private law the prohibition of abuse of right is considered an exceptional instrument for the correction of statutory law, applied only in exceptional cases. The same is true for the abuse of right in administrative law.

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[52] Przybysz, Nadużycie, p. 197 – 198.

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