

E-administracja

**Wyzwania
dla cyfrowych
usług publicznych
w Unii Europejskiej**

E-Government

**Challenges
for Digital
Public Services
in the EU**

REDAKCJA / EDITED BY

Sławomir Dudzik · Inga Kawka · Renata Śliwa

Krakow Jean Monnet Research Papers



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3

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ALEKSANDRA SOŁTYSIŃSKA¹

DIGITALIZATION OF APPEAL PROCEEDINGS IN PUBLIC PROCUREMENT IN POLAND

ABSTRACT: The subject of the article is the presentation of legal solutions for the use of electronic tools in appeal and complaint proceedings in public procurement in Poland. Appeal proceedings are conducted before the National Chamber of Appeals and regulated by the Public Procurement Law, while complaint proceedings, which are proceedings in the second instance, are also regulated by the provisions of the Code of Civil Procedure. The effect of entrusting jurisdiction to administrative and judicial bodies is that there is some differentiation in the legal solutions used in the digitization process, as the Public Procurement Court can use instruments designed for all common courts. Nevertheless, the main direction of digitization includes the area of service and the filing of appeals, complaints and other pleadings, as well as access to case files.

KEYWORDS: public procurement, National Chamber of Appeals, Public Procurement Court, appeal, appeal proceedings

CYFRYZACJA POSTĘPOWAŃ ODWOŁAWCZYCH W ZAMÓWIENIACH PUBLICZNYCH W POLSCE

ABSTRAKT: Przedmiotem artykułu jest prezentacja rozwiązań prawnych dotyczących wykorzystania narzędzi elektronicznych w postępowaniach odwoławczym i skargowym w zamówieniach publicznych w Polsce. Postępowanie odwoławcze jest prowadzone przed Krajową Izbą Odwoławczą i uregulowane przez ustawę Prawo zamówień publicznych, natomiast postępowanie skargowe, które jest postępowaniem w drugiej instancji, jest uregulowane również przez przepisy

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Kodeksu postępowania cywilnego. Efektem powierzenia kompetencji w zakresie jurysdykcji organom administracyjnemu i sądowemu jest pewne zróżnicowanie rozwiązań prawnych stosowanych w procesie digitalizacji, ponieważ Sąd Zamówień Publicznych może korzystać z instrumentów zaprojektowanych dla wszystkich sądów powszechnych. Niemniej jednak główny kierunek digitalizacji obejmuje obszar doręczeń i składania odwołań, skarg i pozostałych pism procesowych oraz dostęp do akt sądowych.

SŁOWA KLUCZOWE: zamówienia publiczne, Krajowa Izba Odwoławcza, Sąd Zamówień Publicznych, odwołanie, postępowanie odwoławcze

1. Introduction to public procurement law in the context of digitization

Public procurement covers that sphere of state activity that involves making purchases necessary to carry out public tasks or to implement certain economic and noneconomic policies. Public procurement is part of the internal market of the European Union and is regulated by the EU legislature through directives: Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement,² Directive 2014/25/EU of the European Parliament and the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors,³ Directive 2014/23/EU of the European Parliament and the Council of 26 February 2014 on the award of concession contracts⁴ and Directive 2009/81/EC of the European Parliament and the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security.⁵ The aforementioned directives coordinate the procedures for awarding public contracts in the EU member states and thoroughly regulate the organization of tenders, submis-

² Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement, OJ 2014, L 94, pp. 65-242.

³ Directive 2014/25/EU of the European Parliament and the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors, OJ 2014, L 94, pp. 243-374.

⁴ Directive 2014/23/EU of the European Parliament and the Council of 26 February 2014 on the award of concession contracts, OJ 2014, L 94, pp. 1-64.

⁵ Directive 2009/81/EC of the European Parliament and the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, OJ 2009, L 216, pp. 76-136.

sion of tenders, selection of economic operators and the selection of the economically most advantageous offer.

The process of awarding public contracts makes full use of electronic tools, which are the primary means of communication between economic operators and the contracting authority, which is the organizer of the tender. Participation in tenders takes place through public or private purchasing e-platforms. Except for certain exceptions that are justified by the nature of the particular public contract or the need to ensure the protection of confidential information, procurement procedures are carried out using exclusively electronic measures. Full digitization of public procurement implies that all the records and documentation of a given tender are produced in electronic format.

Procurement procedures are designed to select the best offer submitted by a reliable and suitable economic operator and then enter into a public contract with him. Legal regulations in the area of public procurement therefore refer to the precontract stage, even before the public contract is concluded. In order to enable economic operators to correct infringements that may arise during the bidding process, the EU legislator has adopted additional directives guaranteeing access to effective remedies: Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures related to the awarding of public supply and public works contracts⁶ and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.⁷ Both directives were amended by Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.⁸

⁶ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures related to the awarding of public supply and public works contracts, OJ 1989, L 395, pp. 33-35.

⁷ Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1992, L 76, p. 14-20.

⁸ Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ 2007, L 335, pp. 31-46. The revised directives will hereafter be referred to as "the Remedies Directives".

The Remedies Directives oblige the member states to adopt legal remedies to correct violations of the law that may arise during tender procedures. Since the member states enjoy procedural autonomy, the Remedies Directives leave them considerable discretion during implementation. The member states are free to choose their own forum for dispute settlement and to shape the appeals procedures in a way that best suits their national legal traditions, provided that the standard envisaged by the Remedies Directives and Article 47 of the Charter of Fundamental Rights⁹ is upheld.

The Remedies Directives – due to the period in which they were adopted – did not introduce specific solutions for the digitization of appeal proceedings. However, due to the increasing digitization of all areas of the EU member states' activities, national legislators have introduced legal solutions that allow the use of electronic tools also in public procurement appeals.

2. Defining the subject of the paper

The purpose of this paper will be to present the process of digitization of appeal proceedings in public procurement in Poland. Due to the fact that legal remedies guaranteed to economic operators in Poland are adjudicated by different entities – an administrative body with jurisdictional functions and a judicial authority – the legal solutions adopted are either dedicated to disputes in the field of public procurement or are general solutions also applicable to other disputes in the field of civil law. This paper will also attempt to answer the question of whether the Polish legislator has made an effort to unify certain legal solutions operating in the field of public procurement and appeal procedures, and how in practice the dispute resolution bodies deal with problems arising in connection with the use of certain electronic tools.

3. Entities resolving disputes in the field of public procurement in Poland

The Remedies Directives have been implemented into Polish law, and the appeal procedure is now regulated by the Public Procurement Law of 11 September 2019 (hereinafter: the PPL).¹⁰ Public procurement cases are heard in the first instance by the National Chamber of Appeals and in the second instance by the Public Procurement

⁹ Charter of fundamental rights of the European Union, OJ 2000, C 364, pp. 1-22.

¹⁰ The Act of 11 September 2019 – Public Procurement Law, Journal of Laws 2019, item 2019, as amended.

Court, the District Court in Warsaw (hereinafter: the Public Procurement Court). The National Chamber of Appeals is an administrative body that has been granted certain jurisdictional functions in the area of public procurement, while the Public Procurement Court is a judicial body within the meaning of the Polish Constitution.¹¹

Settlement of disputes by administrative quasi-judicial bodies is permissible under EU law, as the Remedies Directives make clear that nonjudicial bodies may be equipped with the authority to rule on remedies filed. However, where national review bodies are nonjudicial their decisions should be justified in writing. The member states have also been obliged to ensure that any possibly unlawful measures taken by such a national review body or any failure to exercise the powers conferred on it will be open to review in court or appeal by another body that is a “court” within the meaning of Article 267 TFEU¹² and independent of both the contracting authority and the review body.

There is no doubt that the National Chamber of Appeals is a “court” within the meaning of Article 267 TFEU, as determined by the CJEU judgment in Case C-465/11 Forposta S.A., ABC Direct Contact sp. z o.o. v Poczta Polska SA.¹³ Ruling on the subject of jurisdiction, the CJEU stated that the National Chamber of Appeals, which is a body established on the basis of the PPL, with exclusive jurisdiction to hear disputes between economic operators and contracting authorities in the first instance, and whose functioning is regulated by the provisions of the aforementioned law, is a court within the meaning of Article 267 TFEU when it exercises its competencies covered by the provisions of the PPL. The fact that under other provisions the National Chamber of Appeals is also authorized to perform functions of a consultative nature is irrelevant in this regard.

The concept of “court” under Article 267 TFEU is an EU concept and does not in every case correspond to the qualification of the body in question in the national order. It is worth mentioning that one of the purposes of preliminary questions is to ensure uniformity in the application of EU law and thus its effectiveness throughout the EU. Restricting the possibility of cooperation between the CJEU and bodies applying the law and resolving disputes exclusively to courts under national law could lead to a situation in which the vindication of EU claims and the correct interpretation of EU law would suffer.

¹¹ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, no. 78, item 483, as amended.

¹² The Treaty on the Functioning of the European Union, consolidated version: OJ 2012, C 326, pp. 47-390.

¹³ CJEU judgment in Case C-465/11 Forposta S.A., ABC Direct Contact sp. z o.o. v Poczta Polska SA, ECLI:EU:C:2012:801.

Recognizing the National Chamber of Appeals as a court within the meaning of Article 267 TFEU, it should be assumed that the conditions provided for in Article 2(9) of the Remedies Directives have been met – the EU legislator recognizes a court or other body that is a court within the meaning of Article 267 TFEU and independent of the contracting authority, as well as the review body as the appropriate forum for appeals against the decisions of nonjudicial bodies. In the case of Poland, the National Chamber of Appeals constitutes a body that settles disputes already in the first instance, whose decisions can be appealed to the District Court in Warsaw – the Public Procurement Court – which increases guarantees of access to effective judicial protection.

The appeal proceedings conducted by the National Chamber of Appeals are fully regulated by the PPL, while the complaint filed against a decision made at first instance is only partially regulated by the PPL, and the rest of the complaint proceedings before the Public Procurement Court are carried out under the general rules of the Code of Civil Procedure.¹⁴

4. Digitization of appeal proceedings conducted by the National Chamber of Appeals

The Polish legislator has not yet decided to fully digitize the appeal proceedings conducted by the National Chamber of Appeals, but has introduced some legal concepts that allow greater use of electronic instruments.

4.1. The manner of filing an appeal and other letters of appeal

The form and manner of filing an appeal and other letters of appeal are governed by Article 508 of the PPL and by Regulation of the President of the Council of Ministers of 30 December 2020 on the procedure for consideration of appeals by the National Chamber of Appeals.¹⁵

Letters of appeal shall be submitted *in writing or in electronic form or in electronic format*, with the proviso that an appeal and application to join the appeal proceedings,¹⁶

¹⁴ The Act of 17 November 1964 – Code of Civil Procedure (i.e., Journal of Laws 2021, item 1805, as amended).

¹⁵ Regulation of the President of the Council of Ministers of 30 December 2020 on the procedure for consideration of appeals by the National Chamber of Appeals, Journal of Laws 2020, item 2453.

¹⁶ According to Article 525(1) of the PPL, the contractor may join the appeal proceedings within three days of receipt of a copy of the appeal, indicating the party it is joining and its interest in obtaining a decision in favor of the party it is joining.

submitted in electronic format, are required to bear a *trusted signature*. Letters in electronic format shall be submitted using electronic means of communication, including to the electronic delivery address referred to in Article 2(1) of the Act of 18 November 2020 on electronic delivery (hereinafter: the Electronic Delivery Law).¹⁷ From the provision analyzed, it is clear that the Polish legislator has distinguished between a letter in electronic form and in electronic format, with different requirements for identifying the author by signature, depending on the type of letter.

The emergence of the concept of electronic form is associated with the dynamic development of modern techniques of communication, a natural consequence of which has become the corresponding development of legislation, which was also reflected in Polish law. According to the content of Article 60 of the Act of 23 April 1964 of the Civil Code (hereinafter: the Civil Code),¹⁸ the will of a person performing a legal action may be expressed by any behavior of that person that reveals his or her will sufficiently, including the disclosure of that will in electronic format. The Polish legislator has made an electronic declaration of intent equal to a written declaration of intent. The concept of letters of appeal in *electronic form* should be interpreted in accordance with the content of Article 78¹(1) of the Civil Code. To observe the electronic form of a legal act it is sufficient to submit a declaration of intent in *electronic format* (an electronic document) and attach a *qualified electronic signature*. The concept of *qualified electronic signature* and *electronic document* should be understood in accordance with Regulation (EU) No. 910/2014 of the European Parliament and the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (hereafter the eIDAS Regulation).¹⁹

However, it is important that the content of the electronic document be stored in electronic format, i.e., on a data carrier stored on a computerized data carrier. The

¹⁷ The Act of 18 November 2020 on electronic delivery, Journal of Laws 2022, items 569 and 1002.

¹⁸ The Act of 23 April 1964 of the Civil Code, consolidated text: Journal of Laws, 2022, item 1360, as amended.

¹⁹ Regulation (EU) No. 910/2014 of the European Parliament and the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ 2014, L 257, pp. 73-114. According to Article 3(35) of the eIDAS Regulation “electronic document” means any content stored in electronic format, in particular text or sound, visual or audiovisual recording and under Article 3(1) of the eIDAS Regulation “electronic signature” means data in electronic format which is attached to or logically associated with other data in electronic format and which is used by the signatory to sign, meanwhile “qualified electronic signature” means an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures.

first of these terms should be understood as a file, which is the unit of recording and storing information. On the other hand, an information data carrier on which the document in question is recorded should be regarded as a kind of packaging of the file (e.g., a computer disk, CD or flash drive). Naturally, when an appeal is filed electronically it should be registered in the National Chamber of Appeals' computer system.

The other of the permissible forms of filing an appeal is "electronic format bearing a trusted signature." This phrase, in its essence describing the manner of submission of a declaration of intent rather than the form of a legal action, refers to a special case of documentary form. According to Article 77² of the Civil Code, to maintain the documentary form of a legal action it is sufficient to make a declaration of intent in the form of a document, in a way that makes it possible to determine the person making the declaration. Here it should be recalled that the Civil Code's understanding of document is strictly functional, as Article 77³ of the Civil Code defines a document as a carrier of information that makes it possible to learn its contents.

Electronic format is a term indicating the medium of a given statement, from which there is no obligation to sign but only to specify the environment (material) with which this document functions. It is a record on an electronic medium. The trusted signature, referred to in Article 508(1) of the PPL, is a type of electronic signature as defined by the eIDAS Regulation. It is regulated in the provisions of the Act of 17 February 2005 on the informatization of the activities of entities performing public tasks²⁰ and in the Regulation of the Minister of Digitization of 29 June 2020 on the trusted profile and trusted signature.²¹

Other electronic letters of appeal, other than an appeal and application to join the appeal proceedings, do not require a qualified signature or a trusted signature. They can be filed electronically without any electronic signature, but only with a reproduction of the handwritten signature (scan, photo) or only with a text indicating the identity of the person filing the letter.²²

When discussing the form of filing an appeal and application to join the appeal proceedings, it should be noted that the permissible scope of using particular types of electronic signatures in appeal proceedings has not been correlated with the substantive law provisions on the submission of tenders. Pursuant to Article 63(2) of the PPL, in

²⁰ The Act of 17 February 2005 on the informatization of the activities of entities performing public tasks, Journal of Laws 2020, item 346, as amended.

²¹ Regulation of the Minister of Digitization of 29 June 2020 on the trusted profile and trusted signature, Journal of Laws 2020, item 1194.

²² J. Jerzykowski [in:] *Odwolanie i skarga w zamówieniach publicznych. Artykuły 505-590 ustawy – Prawo zamówień publicznych. Komentarz*, Warszawa 2021, article 508.

a procedure for the award of a public contract with a value below the EU threshold, a tender or a request to participate in the public contract award procedure shall be submitted, under pain of invalidity, not only in electronic form or in an electronic format with a trusted signature, but also in an electronic format with a personal signature.²³ In appeal proceedings, however, the use of this type of signature is no longer permissible. Since it was the legislator's intention to use simpler forms of electronic signature in proceedings below the EU threshold to facilitate contractors' participation in the public procurement system, it seems that solutions analogous to those in substantive law should be adopted in appeal proceedings.²⁴

4.2. Meeting the deadline for submission of appeals or other letters of appeal and compliance with formal requirements

In order to meet the deadline for filing an appeal, the moment of its receipt by the National Chamber of Appeals is important. Unlike under the Code of Civil Procedure, the moment at which an appeal or application to join the appeal proceedings is submitted to the post of an operator designated within the meaning of the Act of 23 November 2012. Postal law²⁵ or to a post office or an operator providing universal postal services in another EU member state is not decisive for meeting the deadline.

Thus, entities that choose to file an appeal or application to join the appeal proceedings in electronic form or format are obviously treated differently. This is because the deadline for filing an appeal or application to join the appeal proceedings for these entities will always expire at midnight on the last day of the deadline. Meanwhile, entities filing an appeal or application to join the appeal proceedings in written form will be forced to physically deliver it on the last day of the deadline to the office of the National Chamber of Appeals during its business hours.²⁶

Letters in the appeal proceedings in electronic format submitted by means of electronic communication shall be forwarded to the ePUAP²⁷ of the Public Procurement Office or to the indicated e-mail address, by means of which the National Chamber

²³ A personal signature is associated with having an e-ID.

²⁴ J. Jerzykowski [in:] *Odwolanie i skarga...*, article 508.

²⁵ The Act of 23 November 2021 – Postal law, consolidated text: Journal of Laws 2022, item 896, as amended.

²⁶ P. Wójcik [in:] A. Gawrońska-Baran et al., *Prawo zamówień publicznych. Komentarz aktualizowany*, LEX/el. 2023, article 508.

²⁷ ePUAP – Electronic Platform for Public Administration Services – a nationwide ICT platform for citizens and businesses to communicate with public administration units in a standardized, unified way.

of Appeals' correspondence is handled, while the appeal and application to join the appeal proceedings shall be forwarded to the ePUAP of the Public Procurement Office.

The problem of filing an appeal may arise in the case of temporary unavailability of the ePUAP service. In one of the appeal proceedings the National Chamber of Appeal recognized an appeal filed by email. The condition was to send the appeal to the National Chamber of Appeal's email address: odwolania@uzp.gov.pl, within the appeal deadline and to prove at the hearing the lack of availability of the ePUAP service through, for example: screenshots, availability reports and system response times.²⁸

The opinion of the National Chamber of Appeals is also shared in court decisions. The issue of preserving the form of the legal action for the filing of an appeal is regulated solely by law. Possible requirements for the use of a specific communication channel for the transmission of the appeal are of secondary importance. As correctly noted by the Regional Court of Krakow,²⁹ if, as a result of the inoperability of the mailbox, like the ePUAP, regardless of the reason for this, the contractor cannot send the appeal through it, it may do so to the publicly available e-mail address of the National Chamber of Appeals. Indeed, the right to a court cannot be restricted by non-statutory factors, which is undoubtedly the interruption in the operation of the mailbox, and even when the appeal is filed just before the deadline.

The time limits for filing an appeal are statutory and cannot be changed by the decision of the organizer of the tender or any other entity. This also means that they cannot be shortened. Meanwhile, the nonfunctioning of the electronic mailbox in the few hours preceding the deadline, in practice, leads to an unauthorized shortening of the appeal deadline. It does not matter whether this is due to a breakdown or technical interruption. Indeed, after the National Chamber Appeals' office hours (closing of the mail office), the party has no other way to effectively file an appeal within the deadline than electronically. This is because in this case the provisions on the observance of the deadline in the event of submission of a letter by traditional mail do not apply.

At the same time, the deadline for filing an appeal remains permanently open. In fact, a breakdown or technical work related to the e-PUAP platform resulting in the fact that the electronic mailbox cannot be used to file an appeal and results in shortening the deadline is impermissible and unknown to law.

Pursuant to Article 514 (2-3) of the PPL, the appellant shall transmit to the contracting authority an appeal filed in electronic form or electronic format, or a copy

²⁸ The ruling of 16 April 2019, KIO 583/19, LEX no. 2684250.

²⁹ Judgment of the District Court in Krakow of 19 December 2018, II Ca 2255/18, LEX no. 2739148.

of such appeal, if filed in writing, before the expiration of the time limit for filing an appeal in such a way that the contracting authority may become acquainted with its contents before the expiration of the time limit. The contracting authority is presumed to have been able to acquaint itself with the contents of the appeal before the expiration of the time limit for its filing, if the transmission of the appeal or a copy thereof was made before the expiration of the time limit for its filing by means of electronic communication. The above considerations also apply to deadlines for filing other letters, such as an application to join the appeal proceedings.

There is the general rule that the appellant shall transmit to the contracting authority an appeal filed in electronic form or electronic format, or a copy of such appeal, if filed in writing, before the expiration of the time limit for filing an appeal in such a way that the contracting authority may become acquainted with its contents before the expiration of the time limit.³⁰ The appellant is obliged, before the deadline for filing an appeal, to provide the contracting authority with the appeal in electronic form (with a qualified electronic signature) or an appeal in electronic format with a trusted signature – according to the form/format in which the appeal is submitted to the president of the National Chamber of Appeals.³¹

The appellant should provide the following documents: an appeal form, a proof of payment of the appeal fee in the required amount, proof of sending a copy of the appeal to the contracting authority and a document confirming the authorization to represent the appellant.

If the act of filing an appeal filed in electronic format is carried out by a representative of the economic operator, the representative should sign the appeal with his trusted signature and attach a power of attorney that also bears the trusted signature of the principal.³² Failure to attach the appropriate signature to the appeal constitutes a formal defect, subject to supplementation under Article 518 of the PPL.³³

4.3. Other legal solutions for the use of electronic tools in appeal proceedings

As mentioned earlier, due to the computerization of the procedures for awarding public contracts, the documents submitted during the tender are in electronic format or in electronic form. Before the hearing is scheduled the president of the National Chamber

³⁰ Article 514(2) of the PPL.

³¹ The order of 15 December 2022, KIO 3192/22, LEX no. 3505883.

³² The ruling of 13 March 2023, KIO 291/23, LEX no. 3508351.

³³ Judgment of the District Court in Warsaw of 20 October 2021, XXIII Zs 41/21, LEX no. 3285810.

of Appeal requests the contracting authority to immediately submit the documentation of the procurement proceedings in electronic format, saved on a computer data carrier in a manner that ensures the reading of electronic documents and information described and organized in accordance with the structure and naming methodology of electronic catalogs and documents, which allows the identification of individual documents of the proceedings and the separation of documents containing classified information or legally protected secrets. Documentation of procurement proceedings submitted in electronic form shall be transmitted on the following types of computer storage media: CD, DVD disc, USB media, USB portable drive.

In the course of the appeal proceedings it is possible to receive documents and letters from the National Chamber of Appeals using electronic communication tools. Letters in electronic format addressed by the National Chamber of Appeals or the president of the National Chamber of Appeals, in the course of the appeal proceedings, to the parties and participants in the appeal proceedings, shall be forwarded to the e-mail address indicated by the party.

Additionally, during the appeal proceedings, the president of the National Chamber of Appeals shall make the appeal file available to the parties and participants in the appeal proceedings at their request, to the electronic mail address, if the filing of the appeal is conducted entirely in electronic form.

In order to make it easier for the parties and other participants in the public procurement market to access information about the hearings and rulings, the Public Procurement Office has adopted several electronic tools available online: information on the course of appeal proceedings, search by reference, e-vocanda, information on decisions issued in camera and collection of decisions.³⁴

5. Digitization of complaint proceedings before the Public Procurement Court

As previously mentioned, the proceedings in the second instance are conducted before a judicial authority and are initiated by filing a complaint against the decision of the National Chamber of Appeals. For this reason, the procedure in the second instance can be described as a complaint procedure designed by the legislator only for disputes in the field of public procurement.

³⁴ National Chamber of Appeals, <https://www.uzp.gov.pl/kio/strona-glowna> (11.09.2023).

Litigation before the Public Procurement Court is generally not regulated by the PPL – Article 579(2) refers to the Code of Civil Procedure in the section on appeals, except for a few issues separately regulated by the PPL. By referring to the Code of Civil Procedure, certain electronic tool solutions specific to other civil proceedings will apply during a complaint procedure before the Public Procurement Court.

The complaint shall be lodged via the president of the National Chamber of Appeals. Under Article 580(2) of the PPL the complaint may be sent by mail or to the electronic delivery address referred to in Article 2(1) of the Electronic Delivery Law. The complaint cannot be sent directly to the Public Procurement Court. Sending the complaint directly to this court will be equivalent to compliance with the deadline if, and only if, within the deadline for filing the complaint the court sends it in accordance with its jurisdiction to the president of the National Chamber of Appeals.³⁵

5.1. General rules on civil litigation protocols

The legislator established the principle that *the minutes of a public hearing will be taken by recording the proceedings by means of a sound or image and sound recording device* and in writing, which depends on the equipment of the entity.³⁶ The protocol drawn up with the use of equipment recording sound or image and sound fully reflects the course of the activity and is consistent with reality. Such a record of the course of the court session, created with the help of techno digital logic, captures the statements and wording of the participants, which are not altered in any way by the recording clerk or any other person. The inability to record the proceedings of the hearing with the use of technical equipment does not justify the postponement of the hearing, but means that it must be recorded in the traditional manner.³⁷

Transcription of the minutes prepared by means of a sound or image and sound recording device is not an official document and does not constitute the basis for determining the proceedings of the hearing. Evidence of the hearing is the recording itself. If the minutes prepared by means of a sound or image and sound recording device do not allow, in the part covering the evidentiary action to determine its content, the court shall repeat the action to the appropriate extent.³⁸

³⁵ Order of the District Court in Gliwice of 14 September X Ga 228/10, ZPO 2011, no. 8, item 187.

³⁶ Article 157 (1) of the Code of Civil Procedure.

³⁷ Order of the Supreme Court of 26 August 2021, III PSK 93/21, LEX no. 3400438.

³⁸ Article 241 of the Code of Civil Procedure.

When raising an allegation of erroneous evaluation of evidence in an appeal, the complainant does not have to point to a specific passage in the audio or video recording of the taking of that evidence.³⁹

5.2. Access to court files and records and the information portals

The popular solution is to make the contents of minutes and letters available through the ICT system that handles court proceedings. According to Article 9 of the Code of Civil Procedure, parties and participants in the proceedings have the right to review the case file and receive copies or excerpts of the file. The contents of the minutes and letters may also be made available in electronic format through the information and communication system serving the court proceedings or any other information and communication system for providing access to such minutes or letters. The legislator has created special information portal courts in the district of each appellate court in the territory of the Republic of Poland, which is to make it easier for parties, professional attorneys as well as other persons authorized to view cases conducted by the court and has a direct impact on speeding up the recognition of cases.

The abovementioned information portal is nothing more than a portal offering litigants and their professional attorneys remote access to all information from court proceedings as found in software supporting court office work in cases heard in the district of a particular appellate court. On the portal you can find documents produced by the court, current information on the status of the case, the dates of hearings, minutes of hearings held and recordings of hearings and transcripts.

The establishment of an account is regulated by the Ordinance of the Minister of Justice of 26 April 2016 on the procedure for establishing and providing access to an account in the information and communication system supporting court proceedings.⁴⁰ A subject with access to the information portal is given a login and password to log in to the website. It should be emphasized that the use of the information portal does not involve any fees, does not require special software; the use of a web browser is sufficient. The obligatory condition for using the service is to consent to the processing of personal data. After passing the registration procedure and obtaining login credentials, and after registering a specific case in the portal, we gain access to the

³⁹ Resolution of the Supreme Court of 23 March 2016, III CZP 102/15, OSNC 2016, nos. 7-8, item 88.

⁴⁰ The Ordinance of the Minister of Justice of 26 April 2016 on the procedure for establishing and providing access to an account in the information and communication system supporting court proceedings, Journal of Laws 2016, item 637, as amended.

documents, including in particular minutes of hearings and recordings of e-protocols with the possibility of listening to them, as well as downloading them to the device. Transcriptions of the e-protocols are being made, making it easier to read the recordings and listen to the minutes. It is not necessary, as in the case of ordinary protocols, to ask the court with an appropriate request to record a CD of the e-protocol. The recordings can be listened to repeatedly and returned to their contents at any time, whenever the need arises.

5.3. Information systems as a tool for sending and receiving pleadings and letters

The ICT system can also be used for filing pleadings and other letters. According to the wording of Article 125(2)⁴¹ of the Code of Civil Procedure, if a special provision so provides or an option has been made to file pleadings through the ICT system, pleadings and other letters in the case shall be filed only through the ICT system. The choice of filing pleadings or letters through the ICT system and the continued filing of these pleadings through this system is permissible if, for technical reasons on the part of the court, this is possible.

In light of the provisions of the Ordinance of the Minister of Justice of 10 October 2015 on the manner of filing pleadings through the ICT system supporting court proceedings,⁴¹ the filing of a letter by a user through the ICT system supporting court proceedings involves several stages. First, the user is authenticated, then the content of the letter is entered and attachments, if any, are attached. The letter is then affixed with an electronic signature. If the letter is subject to a fee and a specific provision does not provide otherwise, there is an irreversible initiation of the procedure for payment of the court fee by means of a mechanism provided by the ICT system ensuring identification of the fee payer. Immediately after filing the letter, the user obtains from the ICT system an electronic confirmation of the filing of the letter. The electronic confirmation of the filing of a letter is a set of data unambiguously indicating the letter being filed, the user filing it and the date on which this occurs. In light of the aforementioned regulation, a user is an individual who has set up an account in the ICT system supporting court proceedings.⁴²

⁴¹ The Ordinance of the Minister of Justice of 10 October 2015 on the manner of filing pleadings through the ICT system supporting court proceedings, Journal of Laws 2015, item 1783, as amended.

⁴² J. Parafianowicz [in:] *Code of Civil Procedure. Procedural Proceedings. Commentary Updated*, O. M. Piaskowska (ed.), LEX/el. 2023, article 125.

If a choice is made to file pleadings via the ICT system, the filing of a letter in paper form has no legal effect. In a situation where the timely filing of a letter via the ICT system has proved impossible, the provisions on restoration of the deadline shall apply in view of the fact that the failure to comply with the deadline was due to circumstances for which the party was not at fault. The filing of a statement by one of the parties on the choice of filing pleadings through the ICT system does not prejudice the need for the other participants in the proceedings to use the system. A statement of choice or resignation from the choice of filing pleadings through the ICT system shall be made through the system. The statement is binding only on the person who made it.

According to the wording of Article 131¹(1) of the Code of Civil Procedure, the court shall make service by means of an ICT system (electronic service) if the addressee has filed a letter via an ICT system or has chosen to file letters via an ICT system.⁴³ In the case of electronic delivery, the letter is considered delivered at the time indicated in the electronic acknowledgment of receipt of correspondence. In the absence of such confirmation, electronic delivery shall be considered effective 14 days after the date the letter is placed in the ICT system.⁴⁴ The above solutions imply a change in the method of delivery of correspondence from the court, that is, instead of the traditional delivery through the postal operator, it is envisaged to provide access to the letter (document), which the attorney can download from the ICT system.

In this case, the stage of physical delivery has been replaced by electronic delivery. So now it is up to the interested party to log in to the portal and thus learn about the content of the document, and importantly he can do so on any day (including holidays) and at any time. Failure to get acquainted with the document made available has certain negative procedural consequences. It is worth noting the opinion of the Supreme Court regarding possible difficulties in applying new technical and legal solutions. In the jurisprudence of the Supreme Court, the concept has been developed that during the period of introduction of significant changes in the manner of service of court pleadings, especially in their initial period, when these changes may cause significant difficulties of interpretation it is necessary to prudently place requirements on participants in the proceedings, including professional attorneys, to comply with procedural deadlines, for example, to file a request for the preparation and service of

⁴³ Order of the Supreme Court of 13 April 2018, I CZ 37/18, LEX no. 2498082.

⁴⁴ Article 131¹(2) of the Code of Civil Procedure.

a statement of reasons for the judgment. In such situations it is postulated to follow the principle of procedural loyalty.⁴⁵

In the mode of service in question, the key date is the date of placement of the letter in the information and communication system, and not the moment when it is read by the addressee, regardless of the date on which such placement takes place, and it is from this date (and not from the moment of reading the contents of the letter) that the time limit for taking any procedural action runs. In turn, after its expiration, regardless of whether the letter is read or not – it is assumed that it was effectively delivered to the addressee.⁴⁶

The mode of electronic service regulated by Article 131¹ of the Code of Civil Procedure was further clarified by the Ordinance of the Minister of Justice of 20 October 2015 on the mode and manner of electronic service.⁴⁷ The letter shall be served through the information and communication system that handles court proceedings in such a way that it is placed in the account from which the addressee filed the first letter in the case, unless a special provision provides otherwise. Electronic acknowledgment of the receipt of correspondence is transmitted to the court automatically, via the ICT system. Before authentication, the account user should be informed of the method and consequences of electronic delivery.

The presented provisions introduced into the Code of Civil Procedure related to the electronic filing of pleadings, as well as the service of court letters, including in the implementing regulations, are special provisions in relation to norms of a general nature. Such are considered to be Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market, and repealing Directive 1999/93/EC⁴⁸ for qualified services of registered electronic delivery.⁴⁹

In the future, pleadings will also be able to be filed at the court's electronic delivery address, as referred to in Article 2(1) of the Electronic Delivery Law⁵⁰ entered

⁴⁵ Order of the Supreme Court of 17 January 2023, II UZ 14/22, LEX no. 3510782; Supreme Court ruling of May 26, 2021, III CSKP 92/21, LEX no. 3219728.

⁴⁶ J. Parafianowicz [in:] *Code of Civil Procedure...*, article. 131(1).

⁴⁷ The Ordinance of the Minister of Justice of 20 October 2015 on the mode and manner of electronic service, consolidated text: Journal of Laws 2023, item 452.

⁴⁸ Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market, and repealing Directive 1999/93/EC, OJ 2014, L 257, pp. 73-114.

⁴⁹ T. Zyznowski [in:] *Code of Civil Procedure. Commentary*, vol. 1: *Articles 1-366*, T. Wiśniewski (ed.), Warsaw 2021, art. 131(1).

⁵⁰ Electronic delivery address – an electronic address, as referred to in Article 2 item 1 of the Act of 18 July 2002 on Providing Services by Electronic Means (Journal of Laws 2020, item 344) of an

in the database of electronic addresses referred to in Article 25 of this law, and in the absence of such an address, to the electronic delivery address associated with the qualified registered electronic delivery service from which the addressee filed the letter.⁵¹ Similarly, service will be made to the electronic delivery address according to the intention of Article 2(1) of the Electronic Delivery Law.⁵²

As a result of the provisions of the Electronic Delivery Law, all major procedures – administrative and judicial – will begin to see electronic delivery as the primary ongoing circulation of correspondence. This means that from the point of view of the parties to these proceedings and their attorneys, the era of paper registered mail will essentially come to an end. The existing method of creating letters (including printing them) and sending them (using the services of a postal operator) will change in favor of the introduction of the e-Correspondence application, which allows sending and receiving electronic correspondence, which is the equivalent of registered mail (registered mail or mail with return receipt).⁵³

6. Conclusion

The legal solutions presented in the paper, which allow the use of electronic tools in appeal and complaint proceedings, are a natural consequence of the acceptance years ago that the will of an individual can also be expressed by means of a document in electronic format. The advanced digitization of various types of public services has not omitted judicial and administrative proceedings. The use of electronic tools for communication – sending and receiving pleadings – is speeding up court proceedings and, in the future, may reduce the cost of judicial operations. The most popular legal solutions involve accessing court records and submitting pleadings through information portals – e-PUAP or by email.

When it comes to resolving disputes in the field of public procurement, it is noticeable that there is divergence in the regulation of appeal proceedings before the National Chamber of Appeals and complaint proceedings before the Public Procurement Court. Such discrepancies are a natural consequence of the transfer of jurisdic-

entity using a public registered electronic delivery service or a public hybrid service or a qualified registered electronic delivery service, allowing unambiguous identification of the sender or addressee of data sent under these services.

⁵¹ Article 125(5) of the Code of Civil Procedure, which will come into force on January 1, 2030.

⁵² Article 131²(1) of the Code of Civil Procedure, which will come into force on January 1, 2030.

⁵³ J. Gołaczyński, *Informatyzacja postępowania cywilnego. Od odrębności do modelu podstawowego*, „Gdańskie Studia Prawnicze” 2022, no. 5(57), pp. 145-179.

tion in the second instance to a general court and the use of ready-made solutions provided by the Code of Civil Procedure. It seems that in the future the differences in the electronic tools will diminish, especially after new regulations on mandatory addresses for service come into force. An interesting solution would be to connect the National Chamber of Appeals to the information portal specific to the Warsaw appellation area so that the parties to the proceedings could use a single ICT system during the first and second instance.

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Przedstawia ona analizę wdrożenia i funkcjonowania cyfrowych usług publicznych w Polsce i w Europie ze szczególnym uwzględnieniem związanych z tym wyzwań. Dotyczą one m.in. rozwoju infrastruktury teleinformatycznej, zapobiegania wykluczeniu cyfrowemu oraz zapewniania ochrony prywatności i bezpieczeństwa obywatelom.

Książka adresowana jest do badaczy zajmujących się administracją, prawem administracyjnym i europejskim oraz do praktyków w wymienionych dziedzinach. Mamy nadzieję, że publikacja poszerzy wiedzę czytelników na temat cyfryzacji usług publicznych oraz zachęci środowisko naukowe do dalszych badań w tym zakresie.

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The book presents an analysis of the implementation and functioning of digital public services in Poland and Europe with a particular focus on the challenges involved. These include the development of ICT infrastructure, preventing digital exclusion and ensuring privacy and security of citizens.

The monograph is addressed to researchers in administration, administrative and European law as well as to practitioners in the mentioned fields. We hope the publication will broaden the readers' knowledge of the digitization of public services and encourage the scientific community to further research in this area.



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