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Contents

Wojciech Piątek*

Do We Need a General Regulation on Prescription in Administrative Law?

I Introduction

Discussion of the necessity of passing a statute concerning general provisions of Polish administrative law is still present within Polish legal doctrine. Projects on such a regulation were undertaken in 1988, 1997 and 2008,[1] but none of them was added to the Polish legal system On the one hand, the doctrine of administrative law presents a significant need to pass such provisions,[2] yet, on the other, the initiative and postulates about passing general provisions of the administrative law are impossible for various, above all political, reasons.[3]

An analysis of the three above-mentioned projects concludes that they contain similar provisions. Each of them had a special general rule on prescription (Fr. *prescription,* Ger. *die Verjährung,* Pl. *przedawnienie*) in administrative law.[4] According to Article 16 paragraph 1 of the last version from 2008, an obligation cannot be imposed and the existence of the

* Wojciech Piątek (PhD, Dr. habil) is ordinary professor at the Adam Mickiewicz University, Faculty of Law and Administration, Institute of Administrative and Judicial Administrative Procedure (e-mail: wojciech.piatek@amu.edu.pl). This paper was prepared within a research stay at Oxford University financed by the Faculty of Law and Administration, Adam Mickiewicz University in Poznań.

1 The first project was published in materials from the conference of administrative law institutes in Gdańsk, devoted to administrative legislation. See Bojanowski E. (ed), *Legislacja administracyjna* (Wydawnictwo Uniwersytetu Gdańskiego 1993, Gdańsk). The second project was published in a monograph titled *Prawo administracyjne. Materiały źródłowe,* collected and prepared by team E. Smoktunowicz and others (1997), Wydawnictwo Prawo i Praktyka Gospodarcza 1997, Białystok. The third was prepared in an office of the Polish ombudsman and published in Biuletyn RPO (2008) nb 60.

2 In 2018, the need to prepare general provisions of administrative law was formulated by J. Jagielski, P. Gołaszewski, 'O problemach z prawem administracyjnym oraz niektórych węzłowych zagadnieniach tego prawa' in J. Jagielski, M. Wierzbowski (eds), *Prawo administracyjne dziś i jutro* (Wolters Kluwer 2018, Warszawa) 33–34.

3 Similar reasons are formulated in connection with passing general provisions of administrative procedure in EU law. See M. Wierzbowski, 'ReNEUAL a europeizacja i unifikacja prawa administracyjnego' in Jagielski, Wierzbowski (n 2) 313–314.

4 The term 'prescription' derives from Latin *praescriptio, onis*, which means a preliminary objection, objection raised by the accused or excuse. See M. Plezi (ed), *Słownik łacińsko-polski* Volume IV (PWN 1999, Warszawa) 263; W. Korpanty (ed), *Słownik łacińsko-polski* Volume II (PWN 2003, Warszawa) 503. A *praescriptio* appears to have been the earliest kind of exceptio used in the Roman formulary system of actions or it was the parent from which one use of exceptio sprang. See T. A. Herbert, *The law of prescription in England* (C. J. Clay and Sons 1981, London) 1.

obligation cannot be settled after the expiry date, which is five years from the day when the legal and factual basis came into existence.[5] The justification of the project explains that the need to create such regulations is obvious from the perspective of the security and stability of the legal order.[6] After this time has elapsed, connected with insufficient activity or even lack of activity by an administrative authority, a private entity is free from either the threat of punishment or being forced to perform a concrete administrative obligation, such as paying money or performing non-monetary obligations.

The above law is sufficient to inspire us to ask whether we really need a general provision on prescription in our domestic administrative law systems and in European administrative law. Given the nature of administrative law, would it be justified to introduce it as part of a general provision on the time limitation of public rights and obligations? Answering these questions is not possible without a theoretical analysis of this legal institution, which is typical of civil law in particular and originates from ancient times. It does not mean that prescription is not known within administrative law. As such, this paper will present, besides an analysis of this institution in civil law, the special provisions that are characteristic of administrative law and constitute its special axiology. Answering the question about general regulation in the area of prescription would be more complicated without an analysis of regulations about prescription in selected European countries, from the standpoint of both continental law systems and common law. In the last part of this paper, EU law and the jurisprudence of European courts will be taken into consideration to answer the prescription is currently present in European administrative law and if we need general rules to make this regulation more transparent and effective.

The expiration of a time-limit is a significant phenomenon for all branches of law and is manifested in many normative ways.[7] Prescription is one of the legal institutions that make the reconciliation of a legal order with practice possible. The preliminary thesis of this paper is linked with the increasing significance of all these kinds of institutions that make the legal system more foreseeable and certain, which can lead to the necessity for creating general regulations of prescription in the future, both in the legal regulations of domestic administrative law systems and in the EU administrative law.

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[5] Similar and special regulation was established for administrative penalties. According to Article 36 paragraph 1 of the General Provisions of Administrative law from 2008, it is not permitted to impose a pecuniary penalty after the expiry of one year from the commitment of the punishable offence. In the next paragraph of the same Article, the course of the prescription term shall be suspended during the administrative procedure.

[6] Biuletyn RPO (2008), nb 60, 84.

[7] This phenomenon is broadly analysed in the literature. See the essays by G. Husserl, *Recht und Zeit* (Vittorio Klostermann 1955, Frankfurt am Main). From the area of public law see A. Autengruber, M. Bertel, C. Drexel, T. Sanader, Ch. Schramek (eds), *Zeit im Recht – Recht in der Zeit. Tagung der Österreichischen Assistentinnen und Assistenten Öffentliches Recht* Band 6, (Jan Sramek Verlag 2016, Wien).

II Prescription as a Typical Regulation in Civil Law

Regarding ancient law, the origins of prescriptive regulation are derived from Hammurabic law,[8] old Attic law[9] and the law of ancient Egypt.[10] In ancient Greece, despite the lack of a general statute of prescription, were some single regulations, the existence of which enabled the parties to plead the inadmissibility of complaints against them due to the expiry of the prescriptive period.[11] The need to set clear prescriptive rules in relation to the possession of certain objects was noticed by Plato, though he excluded the possession of houses and landed estates.[12] Similar institutions, close to the modern understanding of the statute of prescription, could be found within old Jewish law, having as their object, above all, ownership and legal estate relations.[13] The regulation of prescription was also connected with private law institutions.

At the beginning of its evolution, Roman law did not know time limits for filing complaints; ownership and usage rights could be contested perpetually. As explained in the literature, the reason for this was that Roman law was initially oriented towards the protection of citizens' rights, rather than the interests of certainty and legal peace.[14] Subsequently, with the passage of time, time restrictions were introduced on initiating proceedings.[15] This phenomenon was not known until 424 AD, when Emperor Theodosius II set general rules on the statute of limitations. According to these general rules, the demands shall not extend the 30-year period, maximum expiration time *(praescriptio),* which will result in their

[8] In § 30 of Hammurabi's Code, there is a construction also found in today's laws. It concerned the right to take ownership of an abandoned field, garden or home after having used, cultivated or lived in it undisturbed for three years. See J. Klima, *Prawa Hammurabiego* (PWN 1956, Warszawa) 77–78.

[9] The right to submit an allegation preventing the commencement of a lawsuit due to the passage of time was known in the year 402 BC in the Archinos statue. See H.J. Wolff, *Die attische Paragraphe: ein Beitrag zum Problem der Auflockerung archaischer Prozeßformen* (Graezistische Abhandlungen 1966, Weimar) 87.

[10] D. Nörr points to the Ptolemaic law of ancient Egypt, which took into account the passage of time by establishing deadlines. However, their functions are not known. Nörr provides detailed examples of the impact of the time course on the legal situation of selected entities, referring not only to the institution of prescription but also to today's circumstances. See D. Nörr, *Die Entstehung der longi temporis praescriptio. Studien zum Einfluß die Zeit im Recht und zur Rechtspolitik in der Kaiserzeit* (Westdeutscher Verlag GmbH 1969, Köln) 12–15.

[11] H. Oetker, *Die Verjährung: Strukturen eines allgemeinen Rechtsinstituts.* Kieler Rechtwissenschaftliche Abhandlungen, Band 2, (Nomos 1994, Baden-Baden) 21.

[12] The periods of prescription proposed by Plato varied because of the place of using individual objects, i.e. in the city and beyond, in the market and in the temple. See Plato, *Nomoi, Sämtliche Werke IX, Griechisch und Deutsch*, Volume XII, nb 954, (Insel Verlag 1991, Frankfurt am Main und Leipzig) 981–983.

[13] According to Mosaic Law, a slave – if a Hebrew – should serve his master for six years, and in the seventh year he should be released without redemption. See Exodus 21, 2–6. If a brother fell into captivity because of poverty, then he should serve his brother as a mercenary or as a settler only until the jubilee year. See *Leviticus* 25:40, 25, 50–54.

[14] Nörr (n 10) 72; E.J. Russell, *The law of prescription and limitation of actions in Scotland* (W. Green 2015, Edinburgh) 1–3.

[15] K. F. Savigny, *System des heutigen Römischen Rechts* Band 5, (Veit 1841, Berlin) 273; P. Nabholz, *Verjährung und Verwirkung als Rechtsuntergangsgründe des Zeitablaufs* (H.R. Sauerländer 1961, Aarau) 26.

ineffectiveness.[16] In 491 AD, Emperor Anastasius I established a law establishing a period of 30 years of prescription for all complaints that had not been covered by the institution's activities. As a result, complaints of a public-law nature began to fall into the prescriptive period.[17]

Prescription has been present in the civil law for centuries, which is even explicitly granted by the representatives of administrative legal science.[18] It is usually associated with a wider issue of 'antiquity'. In Poland, prescription is used for the joint recognition of legal norms regulating the effects of the non-exercise of rights for a period of time specified by law. These regulations include prescriptive periods, acquisitive prescription and concealment.[19] These normative institutions are collectively referred to as the 'prescription in largo sensu', and then divided into so-called 'purchase prescription', when the passage of time is a way of acquiring subjective rights, and so-called 'statutory prescription', when the course of time results in the weakening or loss of certain rights.[20] The latter version of the analyzed institution could be considered 'prescription in stricto sensu'.

It is also worth mentioning that the passage of time and the resulting consequences are not inconsequential in criminal law, in which the institution of prescription has been known for many centuries.[21] Prescription in criminal law is not only a subject of particular domestic regulations but is also present in international law.[22] Regarding other branches of law with a similar nature to administrative law, prescription is present in tax law, where one subject of this institution is tax obligation.[23]

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[16] Savigny (n 15) 274; Nörr (n 10) 73.

[17] Savigny (n 15) 276.

[18] L. K. Adamovich, B. Ch. Funk, G. Holzinger, S. L. Frank, *Österreichisches Staatsrecht* (Springer Vienna 2009, Wien) 174. At the same time, some researchers devote considerable attention to the search for those features of prescription that remain in connection with the nature of public law. F. Schack, 'Die Verjährung im öffentlichen Recht' (1954) (34) Der Betriebs-Berater 1037; E. Forsthoff, *Lehrbuch des Verwaltungsrechts* (C.H. Beck 1973, München) 193–194.

[19] S. Dalka, *Skutki prawne przedawnienia zobowiązań* (Wydawnictwo Prawnicze 1972, Warszawa) 15; W. Wolter, *Prawo cywilne. Zarys części ogólnej* (PWN 1977, Warszawa) 323–324; B. Kordasiewicz, 'Problematyka dawności' in Z. Radwański (ed), *System Prawa Prywatnego.* Tom 2. *Prawo cywilne – część ogólna* (C.H. Beck 2008, Warszawa) 565–566.

[20] Kordasiewicz (n 19) 563–566.

[21] P. Łojko, 'Przedawnienie w prawie karnym' (2011) (7–8) Jurysta 51–53; M. Kulik, *Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym* (C.H. Beck 2014, Warszawa) 1–27.

[22] A basis for a broader analysis is Art. 7 of the *European Convention on Human Rights*. According to C. Wild and S. Weinsyein, Article 7 may be raised in an appropriate case, in that no heavier penalty shall be imposed than the one applicable when the offence was committed, bearing in mind that there is no general limitation of actions where prosecution for crime is concerned. See C. Wild, S. Weinstein, *English law. Text and Cases* (Longman 2010, Harlow) 144.

[23] In the Polish legal system, a tax obligation will not arise if the decision establishing this obligation was delivered after 3 years from the end of the calendar year in which the tax obligation arose. See Art. 68 paragraph 1 of the Tax Ordinance from 29 August 1997 (Journal of Law 2018, Poz. 800 as am.).

III The Axiology of Prescription in Administrative Law

Civil, criminal, and administrative law formulate similar justifications for the functioning of prescription in legal practice. The predominant purpose of this institution is to clarify the relationship between the parties to a dispute before court or administrative proceedings.[24] Uncertainty of their legal status causes unfavourable consequences for private entities, which have much more difficulty in planning their economic activities and anticipating their consequences, as well as for public entities, which want to conduct their social and organisational activities without surprises.[25] For this reason, it is not astonishing that the position expressed in the case law of the German Federal Administrative Court *(Bundesverwaltungsgericht)* is that the principle of legal certainty in the context of prescription institutions also serves public administration.[26] The same view is expressed in the doctrine of Austrian administrative law.[27]

The second role of prescription, which deserves to be distinguished, is an ordering function. Thanks to prescriptive regulation, organizations of public and private authority are created and function better. Legal status is not only reliable but also clear and legible. The passage of time, combined with the consequences of the passivity of an entity authorised or entitled to perform a given activity organises the normative space and makes both the private and the public sphere aware of the existing legal status, including the rights and obligations that apply to them. In that sense, the passage of time itself should be evaluated as a reason to protect established legal status.[28]

The third role of prescription is an incentive function, stimulating both the behaviour of public administrative bodies to conduct proceedings in which obligations are imposed on individuals, and then to enforce them, as well as private entities to exercise their rights, all in due time. The absence of any deadline for the exercise of the right or performance of the obligation usually has an adverse effect on the entities that are authorised or obliged to take this action. If a prescriptive period is established, public authorities are motivated to fulfill their obligations, but after the expiry of this period it will become impossible. Prescription affects an activity of public authorities in a developed and concrete way.

Prescription also has a protective function towards entities that do not remain indefinitely obliged to fulfill their obligation. Establishing a time frame beyond which it is unac-

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[24] The same reason is presented in the English doctrine of law in comparison with statutes of limitation. A potential defendant should not have to live with the risk of legal action indefinitely, if a potential plaintiff does not pursue his remedy. See T. Prime, G. Scanlan, *The modern law of limitation* (Butterworths 1993, London) 1.

[25] In the event of prescription of the rights of the addressee of an administrative act, the corresponding duties of the authority shall cease. See L. Staniszewska, *Administracyjne kary pieniężne* (Wydawnictwo Naukowe UAM 2017, Poznań) 259.

[26] U. Ramsauer in U. Ramsauer (ed), *Verwaltungsverfahrensgesetz* (C. H. Beck 2017, München) 1321.

[27] P. Weninger, 'Die Verjährung im Steuerrecht' in M. Holoubek, M. Lang (eds), *Die allgemeinen Bestimmungen der BAO* (Linde 2012, Wien) 426–427.

[28] D. Dörr, 'Die Verjährung vermögensrechtlicher Ansprüche im öffentlichen Recht' (1984) (1) Die öffentliche Verwaltung 14.

ceptable to impose an obligation on the individual or its enforcement fosters confidence in public authority, because it makes the individual aware of the fact that the administration is bound by the applicable law that prescribes its intervention.

Taking the specifics of administrative law into consideration, it is worth analysing those axiological functions of this institution that would be typical for this branch of law. In German science, as pointed out earlier, prescription favours the stabilising the economic condition of public bodies. The expiry of prescriptive periods means that the past liabilities of individuals, as well as those derived from them, are not included in the budgetary plans of state entities. This increases the level of clarity, transparency and reliability of public finances.[29]

Prescription serves to relieve public administration authorities and administrative courts from considering cases that are often complicated in terms of evidence, due to the passage of a significant period of time.[30] In some of these cases at least, making factual findings consistent with the principle of objective truth would not only be very difficult but frequently impossible.

The presented justifications do not mean that, in a doctrine of administrative law, we do not observe some negative effects of prescription, which the legal institution does not derive from natural, but positive law. A prescriptive regulation is always the consequence of a legislator's activity. Sometimes the passage of time and the resulting expiry of an obligation or entitlement may lead to unjust consequences because the private entity ceases to be obliged to fulfil public duties, which could be significant for the interests of many other entities, both public and private.[31] Prescription may help to improve the legal situation of those entities whose proceedings are not legal. They may delay their obligations to avoid fulfilling them and rely on the time expiring and with it the prescriptions' effect.

The above-mentioned threat can be analysed from another angle. Prescription may make it impossible to fulfill obligations or to exercise rights that expire after the prescribed time period. Some of public obligations could be significantly important for private entities. In Poland, would be impossible for private entity to fulfill a public duty for moral or material reasons after the prescription time has passed. It could have negative consequences in applying for other public rights, if obtaining these rights depends on fulfilling previous obligations or on the good reputation of the petitioner.[32]

The reasons presented against improving prescription in administrative law are not convincing for neglecting to improve this institution into positive law. Unjust consequences

[29] E. Becker, *Die Verjährung im öffentlichen Recht* (Dissertationen 1923, Frankfurt am Main) 103; A. Guckelberger, *Die Verjährung im Öffentlichen Recht* (Mohr Siebeck 2004, Tübingen) 83.

[30] M. Binder, *Die Verjährung im schweizerischen Steuerrecht,* (Zürcher Studien zum öffentlichen Recht Bd. 54, 1985) 8–9; Guckelberger (n 29) 83–84.

[31] P. Przybysz, *Egzekucja administracyjna* (Dom Wydawniczy ABC 1999, Warszawa) 40–41.

[32] E.g. in the jurisprudence of the administrative courts, a previous conviction, despite its prescription, is important for assessing compliance with the conditions for granting a firearm permit. See the judgments of the SAC from 12 May 1999, III SA 7339/98, and from 16 October 2012, II OSK 1097/11.

should not be connected with prescription but with the passivity of the public authority that is responsible for enforcing concrete public duties. This problem is linked with the incentive function of prescription. Without this institution, an administrative authority could be obliged to perform their activities in a less active way. In other words, without prescription, the public authority conscientiousness in fulfilling its obligations within a reasonable time period would not be so obvious or clear. The matter of legislative power is to create time periods in which the enforcement of public duties will really be possible. In German science there is the doctrine of the 'useful illegality' *(brauchbare Illegalität)* of prescription, which allows surrendering the pursuit of compliance with the law after a long period of inactivity by the administration, which tolerated the existing state of affairs.[33] According to this doctrine, refraining from enforcing a public obligation after a long period of time could be less harmful for private and public bodies than involving caution in its enforcement.

Returning to the second reason presented against implementing prescription in administrative law regulations, prescription in administrative law has a substantive nature. The effect of the expiry of the prescriptive period is taken into account by the public administration authority *ex officio*. Unlike in civil law, an individual entity cannot evade the final effect of prescription and allow for the imposition and enforcement of obligations. In the legal systems of some countries, for example in Slovakia, there are known exceptional cases in which prescription in administrative law is only taken into account regarding the party's allegation.[34] Other countries have formulated proposals to create such a possibility for a private entity.[35] Some representatives of the doctrine indicate that administrative law also has a general rule regarding the statute of prescription for the party's allegation. Such a solution, due to the nature of administrative law, could only occur in exceptional cases, if the individual who was entitled to claim the statute of prescription was to be aware of the consequences of not reporting this allegation. The functioning of this possibility belongs to the special requirements and models of prescription in a specific legal system. It should not be treated as a reason for the general non-existence of prescription. Giving a positive answer to the question of implementing general prescriptive regulations in administrative law is only a first step to creating detailed solutions for normative provisions for this institution, such as concrete periods of prescription, suspension, interruption and prolongation.

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[33] Guckelberger (n 29) 111.

[34] As pointed out by M. Horvat, considering the prescriptive period by the authority only for the party's allegation is the basic criterion for distinguishing this institution from other kind of legal deadlines. See M. Horvat, *Administratívnoprávna zodpovednost právnických osôb* (Wolters Kluwer 2017, Bratislava) 98. The expiry of the prescription is taken into account at the request of the creditor, where it is a private entity, is known in Switzerland. See U. Häfelin, G. Müller, *Allgemeines Verwaltungsrecht* (Dike Verlag AG 2016, Zürich) 165–166. See also M. Binder (n 30) 299–300. This type of prescription considered for the allegation is not known, in Polish, or Austrian administrative law. See M. Kalteis, 'Verjährung im Verwaltungsrecht' in Holoubek, Lang (n 27) 469.

[35] In German legal science, it is pointed out that in the case of limitation on a charge, the party should be informed by the authority of the expiry of that period, but that it retains the right to decide on raising this allegation. See H. F. Lange, *Die verwaltungsrechtliche Verjährung. Begriff und Zweck, Wirkung sowie prozessuale Behandlung* Schriften zum öffentlichen Recht, Band 469, (Druncker und Humboldt GmbH 1984, Berlin) 85–86.

IV Prescription and Other Normative Institutions Connected with the Expiry of Time

From the presented analysis, it is possible to create a definition of prescription in administrative law: it is the legal mechanism according to which, after the passage of a set amount of time, established within administrative law, if there has been no action made by authorised person, whether a private entity or public authority, the legal right to impose an obligation, to perform, or grant rights that is to it expire.

Prescription always remains in the relationship between a public authority and a private law entity, in which the legal situation of one of them is connected with the legal situation of the other. In German and Austrian legal science, it is emphasised that the prescription affects a specific legal relationship *(das Rechtsverhältnis),* not an existing legal situation *(der Rechtszustand)*[36]. Its negative effect is caused by passivity or by the individual himself, who loses his right, or by a public authority, who cannot impose an obligation on the individual or enforce it in practice. As a legal organ arising from the relationship between public and private entities, prescription is a consequence of the specificity of administrative law and the mutual rights and obligations of these entities. Prescription does not exist in relationships within the public administration structure.

The institution of prescription is only one form in which the passage of time is connected with administrative law, where it affects this law. The other institutions or constructions, which are characteristic of administrative law are administrative silence, the temporary inactivity of an administrative authority and special inter-temporal regulation in administrative law. A difference between the theoretical nature of each of these institutions and prescription is presented below.

Administrative silence can be situated in opposition to prescription. Just as in the case of prescription, the legal structure of the administration's silence was based on the direct relation of the attitude of a given subject to the passage of time. The essence of administrative silence is included in the category of omission, which has legal effects.[37] The creation of administrative silence is connected with the passage of time specified by the law, regarding the exercise of a competence, on the basis of which the public authority is obliged to take action.[38] The final effect of the expiry of the deadline shapes the legal situation of the individual, as well as the expiry of the authority's competence to take action in the sphere of

[36] See Guckelberger (n 29) 162–173. See also B. Raschauer, *Allgemeines Verwaltungsrecht* (Springer Vienna 2009, Wien) 412.

[37] M. Stahl, 'Szczególne prawne formy działania administracji' in R. Hauser, Z. Niewiadomski, A. Wróbel (eds), *System Prawa Administracyjnego. Tom 5. Prawne formy działania administracji* (C.H. Beck 2013, Warszawa) 391; S. Skulová, L. Potěšil, D. Hej, R. Bražina, 'Effectiveness of judicial protection against administrative silence in the Czech Republic' (2019) 17 (1) Central European Public Administrative Review 47–48.

[38] T. Bąkowski, 'W sprawie „milczącej zgody organu"' (2010) (3) Państwo i Prawo 107–108, M. Miłosz, *Bezczynność organu administracji publicznej w postępowaniu administracyjnym* (Wolters Kluwer 2011, Warszawa) 238.

administrative law.[39] As with prescription, the administrative silence of an authority within the time limit set by the legislator gives rise to specific consequences for the legal situation of an individual. Deadlines for limitation and silence are substantive. Unlike prescription, administrative silence during the term of prescription has a positive effect for an individual who can realise their intention according to the current legal status.[40]

Inactivity in an administrative procedure possesses a distinct meaning compared to both administrative silence and prescription. It is when the administrative authority does not deal with the administrative case within the appointed period of time. In the Polish Code of Administrative Procedure,[41] an administrative case should be settled without undue delay.[42] If it is obligatory to conduct evidential proceedings, a case should be settled within a month and in complicated matters within two months.[43] Unlike prescription, administrative inactivity is of a procedural nature. The deadline for settling an administrative case and the period of prescription exist independently of each other. If a prescriptive period is linked with imposing an obligation on a private entity, administrative inactivity can lead to the prescriptive period, and in the end result in the expiry of the competence to impose the obligation on the entity.

A different nature from the other mentioned institutions has a deadline set in an administrative decision as an additional element of its structure. The term in the decision limits its binding force in such a way that its validity begins and ends after a certain period of time.[44] In such a situation, a time-limitation of the binding force of an administrative decision is performed by an administrative authority, whereas prescriptive periods are only appointed by legislation. A second difference between these two kinds of terms is connected with the activity of a private entity performed before the expiry of the term. It has crucial importance for the prescriptive period, because it can lead to making a prescription-term groundless.[45] However, a term appointed in an administrative decision is neutral toward the activity of the

[39] B. Adamiak, 'Od klasycznych do współczesnych koncepcji gwarancji prawa do szybkiego załatwienia sprawy administracyjnej' in J. Supernat (ed), *Między tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi* (Wydawnictwo Uniwersytetu Wrocławskiego 2012, Wroclaw) 24; M. Dyl, *Środki nadzoru nad rynkiem kapitałowym* (Wolters Kluwer 2012, Warszawa) 240.

[40] For example, according to Article 30 paragraph 5 of the Polish building law (Journal of Law 2018, Poz. 1202 as am.), an individual entity may initiate building works after 21 days from submitting notification to the proper public authority. During this time, the authority may reject the notification. In this event, an individual entity must apply for a building permit.

[41] Kodeks postępowania administracyjnego from 14 June 1960 (Journal of Law 2017, poz. 1257 as am., henceforth as CAP).

[42] Article 35 paragraph 1 CAP.

[43] Article 35 paragraph 3 CAP.

[44] This construction is typical of authorizations in performing statutorily regulated activities. E.g. the fire protection inspector's rights are acquired for a period of 5 years, according to Article 4a paragraph 1 a Fire protection act (Journal of Law 2018, Poz. 620 as am.).

[45] E.g. if an obligation imposed (administrative fine) on an individual is enforced, the time epirey after the enforcement has no impact on its legality. In some situations, e.g. during enforcement proceedings the prescription time can be suspended.

parties to a dispute before an administrative authority, and the effects related to the expiry of the period resulting from the decision are pre-determined. Thus, while prescription is time-sensitive, other factors may also be important, whereas administrative decisions are only concerned with the passage of time.

Prescription as an institution of positive law can be evaluated from a broader perspective of the inter-temporal law provisions. In each branch of the law, special regulations that determine the existence of time rules for the validity of legal norms operate. The basic difference between inter-temporal law and the institution of prescription concerns the legal character of these regulations. While inter-temporal law falls within the wider issue of the inter-temporal nature of the applicable legal regulation, prescription is an institution of substantive law; it does not refer to the entire legal system, or general and abstract norms, but to the legal situation of individual entities. In other words, the expiry of the limitation period affects the rights and obligations of an individual, not an unspecified circle of addressees of a legal norm.

The relationship between inter-temporal law and prescription concerns the impact that the change in legal regulation has on the course of the prescriptive period. It is particularly intensely considered in the area of criminal law, in which the right of the individual to the statute of prescription was denied, thus approving the legislator's practice of extending the running period of prescription as a part of the inter-temporal regulation. This practice is approved by ECJ.[46] There is no right to prescription. A legislator creating inter-temporal norms can modify prescriptive periods, which do not expire.

V Prescription in Administrative Law of Selected European Countries

Prescriptive regulations are present in the legal systems of European countries. Below we will analyse selected examples of this institution in Poland, England and Germany. In each of these countries, the regulations are evaluated as an exception from a general rule that administrative obligations and rights are not a subject to prescription. Nevertheless, in the selected legal systems, prescriptive regulations are present and affect administrative legal relationships in a characteristic way.

1 Poland

Despite the projects mentioned on the general provisions of administrative law, until this day there is no general regulation of prescription in Polish administrative law. The normative situation changed significantly in 2017, with a significant amendment of the

[46] C-584/15, *Glencore Céréales France v Établissement national des produits de l'agriculture et de la mer (France-AgriMer),* EU:C:2017:160.

CAP.[47] The most crucial change, which caused the whole amendment, was concerned with improving the general provisions for imposing administrative penalties. As one element of these provisions, general time periods for their imposition and enforcement became regulated.

According to Article 189g paragraph 1 CAP, an administrative punishment cannot be imposed after 5 years from committing an administrative offence or the occurrence of the consequences of the infringement. The same regulation is located in Article 189g paragraph 3 CAP, in connection with the enforcement of an imposed administrative penalty. Justifying the introduction of a general provision on the imposition of administrative penalties, it was indicated that it should ensure uniform standards for treating individuals and guarantee rationality in imposing penalties.[48] One of the rational mechanisms, which relies on imposing prescriptive regulations, is making the punishment of private entities without any legal time limits impossible.

Besides these general provisions limited to administrative punishments, there are no similar regulations typical of other branches of public obligations and rights. Polish law knows only isolated examples of prescription. In the area of building law, according to Article 37 paragraph 1 of the building law,[49] a building permit shall expire if construction has not started before the expiry of 3 years from the date on which the decision became final, or if the construction was discontinued for a period longer than 3 years. It is an example of a prescriptive period in the area of individual rights and proof that prescription has a universal nature, which is not limited only to public obligations.

Many examples of prescription of a various nature are settled in the water law, which is a new act from 2017.[50] From the perspective of obligations and rights that are subject to prescription, the water law provides a prescriptive period for administrative penalties,[51] payment for the legalisation of water equipment,[52] and non-monetary obligations incurred for the benefit of a water company due to the benefits of obliged persons or contributing to the pollution of water for which the water company was founded.[53]

The above-mentioned normative examples on the one hand, are proof of only incidental regulation of prescription in administrative law without any general rules for calculating the periods of prescription and its suspension, interruption and prolongation, except general rules on prescription of administrative penalties laid down in the CAP. On the other hand,

[47] The amendment was introduced by a statue from 7th April 2017 on an amendment to the Code of Administrative Procedure and other statues (Journal of Law 2017, poz. 935).

[48] See written justification of the statue from 7th April 2017; Sejm printing nb 1183. Available at: <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1183> accessed 14 February 2020.

[49] Building law Act from 7th July 1994 (Journal of Law 2018, Poz. 1202 as am.).

[50] Water Law Act from 20th July 2017 (Journal of Law 2017, Poz. 1566 as am.).

[51] Article 109 Paragraph 9 of the Water Law Act.

[52] Article 190 Paragraph 7 of the Water Law Act.

[53] Article 454 Paragraph 8 of the Water Law Act.

new regulations on prescription in the CAP and in water law show that the legislature will take this institution into consideration in other normative regulations in the future.

2 England

English law has a normative approach to prescriptive regulation that is very similar to the Polish normative solution, though English law does not know general statutory provisions of administrative law and about prescription. A typical English regulation that combines law and an expiration of time is the Limitation Act of 1980, which, contrary to prescription, has a procedural nature and provides that, after a certain period of time, particular kinds of claims are legally unenforceable and cannot be relied on in actions.[54] It does not mean that the prescription is not known in the English law at all. From the jurisprudence of the courts, it could be stated that an expiration of time would have a negative effect on performing obligations and rights. This thought was clearly stated in the case of *Agecrest Ltd v Gwynedd* County Council, as a judge said: '…the longer the time that elapses, the less chance there will be that a court will accept that there was an intention to develop at the material time or that what was done was genuinely done for the purpose of carrying out the development'[55].

Focusing on normative acts, prescriptive regulations are present in planning law,[56] in the duration of planning permission, to be precise. According to Article 91 paragraph 1 point a) of the TCPA, every planning permit granted or deemed to be granted shall be granted or, as the case may be, be deemed to be granted, subject to the condition that the development to which it relates must be begun not later than the expiration of three years beginning with the date on which the permission is granted or, as the case may be, deemed to be granted.[57] Planning permission will lapse if the development is not begun within the prescribed time.

If the development has begun, but has not been completed within the prescribed period, the local planning authority, according to Article 94 Paragraph 2 TCPA, may serve a completion notice stating that the planning permit will cease to have effect upon the expiry of a further period specified in the notice. If, upon the date specified in the completion notice, the development has not been completed, planning permission will be invalidated.[58]

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[54] R. Hewidson, *Licensing law handbook* (Law Society 2013, London) 271–274; E.J. Russell, *The law of prescription and limitation of actions in Scotland* (W. Green 2015, Edinburgh) 5–6.

[55] R. M .C. Duxbury, *Telling & Duxbury`s planning law and procedure* (Oxford University Press 2018, Oxford) 308.

[56] Town and country planning act from 1990, legislation.gov.uk (access 19th July 2018), farther as TCPA.

[57] In Article 91 paragraph 1 point b) TCPA, an authority is authorised to appoint a longer or shorter term of prescription beginning with that date as the authority concerned with the terms of planning permission may direct. According to Article 91 paragraph 2 TCPA, the period mentioned in subsection (1)(b) shall be a period which the authority considers appropriate, having regard to the provisions of the development plan and to any other material considerations.

[58] A completion notice gives the developer the choice of completing the development or of letting the planning permission lapse. It is a particularly useful procedure where a developer has kept planning permission alive by doing only a minimal amount of preliminary work. See more Duxbury (n 55) 315.

The planning law also regulates time limits for enforcement actions that must be taken within a certain time from the breach of planning control having occurred. There are two principal time periods, which depend on the subject of control. According to Article 171 B paragraph 1 and 2 TCPA, enforcement action is enforced if operational development is undertaken without planning permission for building, engineering, mining or other operations in, on, over or under land, or the change of use of any building to use as a single dwelling house. This enforcement can only be taken within 4 years, beginning with the date on which the operations were substantially completed or with the date of the breach, if it concerns using a building as a single dwelling house. In the case of any other breach of planning control, according to Article 171 B paragraph 2 TCPA, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

The above-presented regulation is regarded in the English doctrine of law as fair to both parties in a dispute. The local planning authority has sufficient time to identify any significant planning problem arising as a result of the breach of planning control. At the same time, it would not place an undue evidential burden upon the landowner, who could rest assured that after 10 years he would be free of the threat of enforcement action.[59] This kind of reasoning is unfamiliar for the Polish legislator, who has not decided to embrace prescription influence non-pecuniary obligations from an area of planning law.

3 Germany

In Germany, as with Poland and England, a general regulation on prescription in administrative law does not exist. There is only one general rule devoted to prescription in public law, located in Article 53 of the statue on administrative procedure.[60] According to the 1st paragraph of Article 53 VwVfG, an administrative act adopted to establish or enforce the right of a public law entity suspends the prescriptive period of that claim. The suspension ceases when the administrative act is final or six months after it has been discharged. In the 2nd paragraph of the same Article, there is la general prescriptive period for the essence of an administrative act as up to 30 years from its becoming final and binding. This provision is reduced only to the effects of issuing an administrative act and its consequences to the prescriptive period and does not explain the essence of this institution and all plots of its existence in practice.

Prescription is partially regulated in some statutes in the area of administrative law. According to Article 45 paragraph 1 of the statute on social assistance[61] a request for social benefits prescribe in 4 years, at the end of the year in which they were granted. In the next paragraph of the same Article, the suspension, interruption, and influence of prescription

[59] R. Harwood, *Planning enforcement* (Bloomsbury Professional 2013, London) 35.

[60] Verwaltungsverfahrensgesetz von dem 25 Mai 1976 (Journal of Law 2003 I S. 102), hereinafter as VwVfG.

[61] Das erste Buch Sozialgesetzbuch – Allgemeiner Teil von dem 11 Dezember 1975 (BGBl. 1975 I S. 3015), farther as SGB.

is governed by regulations from civil law[62] Special regulations concerning prescription are also located in the statute on the marketing of medical supplies,[63] and in the statute on protection against harmful soil changes and remediation from contaminated sites.[64] A separate regulation of prescription is present in the tax law[65].

If there are no special regulations regarding prescription then property law provisions which are the most similar to the nature of a special claim are borrowed by analogy *(die sachnächste Verjährungregelung)*[66]. In reality, the regulation that is usually applied, comes from BGB[67]. It is worth mentioning that the common regulation on prescription in BGB was significantly amended in 2001.[68] As a result of this change, the general prescriptive period from Article 195 BGB was shortened from 30 down to 3 years. The other periods of prescription are 10 years for claims connected with real estate,[69] and 30 years for various special claims derived from judgments or enforceable settlements.[70]

The lack of general provisions on prescription in administrative law is negatively perceived by some members of the doctrine of law, who formulate *de lege ferenda* postulates.[71] The reasons for these conclusions are the same as in Poland. Only partial and incidental regulation of prescription does not give real certainty in applying the norms of administrative law.

VI Prescription in EU Administrative Law

Provisions containing some prescriptive regulations are not only typical of domestic legal regulations, but are also present in selected parts of European Community administrative law. A clear example of that regulation is connected with international cooperation between EU Member States in recovering public claims. The basic legal act devoted to this regulation is Directive 2010/24/EU.[72]

The directive does not contain either general provisions of prescription or even use the term of this institution. Taking the features of this institution into consideration, it contains

[62] Bürgerliches Gesetzbuch von dem 18 August 1896 (Journal of Law 2002 I S. 42, 2909; 2003 I S. 738).
[63] § 105b Arzneimittelgesetz von dem 24 August 1976 (Journal of Law 2005 I S. 3394).
[64] § 24 paragraph 2 Bundes-Bodenschutzgesetz von dem 17 March 1998 (Journal of Law 1998 I S. 502).
[65] See § 169 Abgabenordnung von dem 16 March 1976 (Journal of Law 2002 I p. 3866; 2003 I S. 61). See more Guckelberger (n 29) 48–58.
[66] A. Engels, 'Commentary to the Article 53 VwVfG' in T. Mann, Ch. Sennekamp, M. Uechtritz (eds), *Verwaltungsverfahrensgesetz* (Nomos 2014, Baden-Baden) 1385.
[67] W. Dötsch, 'Verjährung vermögensrechtlicher Ansprüche im öffentlichen Recht' (2004) (7) Die öffentliche Verwaltung 277–278.
[68] Das Schuldrechtsmoderniesierungsgesetz von dem 26. November 2001 (BGBl. 2001 I S. 3118).
[69] Article 196 BGB.
[70] Article 197 BGB.
[71] Dörr (n 28) 18.
[72] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, Official Journal of EU from 31.03.2010, L 84/1.

provisions that correspond with its nature. According to Article 18 paragraph 2, a requested authority shall not be obliged to grant the assistance provided in the listed provisions if the initial request for assistance is made in respect of claims that are more than 5 years old, dating from the due date of the claim in the applicant Member State to the date of the initial request for assistance. In such conditions, a requested authority may refuse to grant assistance.[73] Inaction by an applying authority within a defined period of time can make assistance impossible. A difference between the above-defined prescription and the presented example relies on the final effect of the expiring time for prescription, which in public law is considered *ex officio* and without a possibility to resign from their binding influence.

The same directive lays down a special rule that settles a conflict between national laws on prescription. According to its Article 19 paragraph 1, questions concerning periods of prescription shall be governed solely by the law in force in the applicant Member State. The main reason for this provision is to simplify the existing rules in the area of suspension, interruption and prolongation of periods of prescription.[74] Although the directive does not formulate its own prescription provisions directly, the EU legislature recognises the existence of this institution in national legislations and seeks a solution that reconciles the contradictions at the EU level between them.

Positive regulation of prescription in European administrative law creates only one sphere of this institution. The second is linked with the jurisprudence of the ECJ on the basis of domestic prescriptive rules. Because of an absence of general provisions on prescription at the level of EU law, the ECJ allows the application of national rules on prescriptive periods under the indirect effect of national law on EU law. The ECJ insists that the length of the prescriptive periods should take account of the balance between allowing the competent national authorities to handle irregularities causing damage to the Union budget and the requirements of the certainty and stability of legal transactions. In concrete judgments, the ECJ has assessed national prescriptive periods as too short,[75] proportionate,[76] and too long[77].

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[73] See more J. Olszanowski, Realizacja wniosku o odzyskanie należności pieniężnych in J. Olszanowski, W. Piątek (eds), *Współpraca państw członkowskich UE przy odzyskiwaniu wierzytelności podatkowych* (Wolters Kluwer 2016, Warszawa) 143–144.

[74] More detailed rules than a general provision are located in Article 19 paragraph 2 of Directive 2010/24/EU. Any steps taken in a requested Member State in the recovery of claims, if they had been carried out on behalf of the applicant authority in its Member State, would have an effect in the applicant Member State insofar as that effect is in this State concerned.

[75] In the judgment *Taricco II,* the ECJ, granting Member States the right to set rules for limitation of the fulfilment of obligations under art. 325 TFEU stressed that the legislator shall ensure that the national prescription system does not lead to impunity in a significant number of cases of serious fraud in the field of VAT. See C-42/17, *M.A.S., M.B. with the participation of Presidente del Consiglio dei Ministri,* EU:C:2017:936.

[76] In the opinion of the ECJ, a 3-year prescriptive period may allow every average taxpayer enforce his or her legal rights to effectively in the Union's legal order. See C-472/08, *Alstom Power Hydro against Valsts ieņēmumu dienests,* EU:C:2010:32.

[77] The 30-year prescriptive period for disputes concerning the refund of unduly collected refunds, which are provided for in Regulation No 2988/95, was assessed negatively by the ECJ. See joined cases C-201/10 and C-202/10, *Ze Fu Fleischhandel GmbH and Vion Trading GmbH against Hauptzollamt Hamburg-Jonas,* EU:C:2011:282.

The ECJ allowed the possibility of applying, by analogy to disputes relating to the refund of unduly paid refunds, prescriptive periods laid down in national law, provided that their application remains the result of a sufficiently foreseeable judicial practice, which should be verified by the national court.[78] This judgment is of particular importance in those countries wherein, in the absence of specific solutions regarding prescription in administrative law, they apply regulations from other areas, including primarily civil law.

VII Conclusions

Prescription is a legal institution, not only typical of civil law but contemporarily known in all branches of law, including administrative law, both at the European level as well as domestic legal orders. The history of this institution, the same as the history of administrative law, is less developed in comparison to civil law and for that reason has weaker theoretical grounds. A visible proof of this thesis is clearly recognisable in Germany, where prescriptive regulations from civil law find supplementary application in administrative law. It does not mean that administrative law does not need solutions that would be helpful for legal institutions to adapt to practical requirements. Prescription, as an institution wherein expiry of the defined time leads to a loss of rights and obligations as well as entitlements for individual entities, is one of the time-oriented institutions of law and is necessary for all branches.

Contemporarily, both in domestic and European administrative law, the general regulation of prescription is not known. There are only selected provisions in special areas of administrative law, such as planning law in Poland and England, water law in Poland or social benefits in Germany. In some countries it is clear that the rules of prescription are implemented in new legal branches, such as medical supplies in Germany or in new statutes that are adjusting traditional administrative law branches, such as the new water law in Poland. This tendency can justify the thesis on the gradual increase of prescription in national administrative law. It is coherent with the axiological grounds of this institution, and with the need to synchronise legal order with contemporary challenges of economic demands.

In answer to the question of implementing general laws on prescription in administrative law, it is not possible to give a reasonably positive or negative explanation for all domestic and European legal orders. It is noticeable that, in some countries, for example Poland, prescription is implemented in new areas of administrative law by the legislature. In such circumstances, a general law could be more transparent than only selected provisions. In other countries, where the process of implementation is not developed, the same proposal would not be necessary or understandable. If there are no regulations connected with a special normative institution, there is no need to formulate general provisions for its functioning. It does not mean that prescription should not be present in select areas of administrative law, where the relationship between law and time is intensive.

[78] Ibid.

Observing a general tendency in Europe, the expiry of time will affect administrative law in a deeper way. This process is connected with the increasing speed of the legal market. Therefore, in the future, the above-mentioned answer could be insufficient, and we would need this kind of common regulation in many domestic legal systems as well as in European administrative law. Prescription will have a significant importance, not only from the theoretical but, above all, from the practical point of view.

VIII Summary

This paper's analysis is devoted to an institution that is typical of civil law but has its own significance also in administrative law. Prescription, as an institution which, after a defined time has lapsed, leads to the loss of rights, both obligations and entitlements for individual entities, is one of the time-oriented institutions and is necessary for all branches of law. Observing a general tendency in Europe, such expirations of time will affect administrative law in a deeper way. Therefore, in the future the answer to the necessity for implementing a general regulation of prescription within administrative law could be unambiguously positive and we would need this kind of common regulation in many domestic legal, as well as in European administrative law.

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CONTENTS