PRAWO W DZIAŁANIU
SPRAWY CYWILNE
60/2024
DOI: 10.32041/pwd.6007

s. 208–228

Wojciech Fill

The legal nature of a competition for a financial award or grant in the European Union direct management formula

Natura prawna konkursu o nagrodę finansową lub dotację w ramach zarządzania bezpośredniego Unii Europejskiej

Abstract

The study is devoted to the analysis of the legal nature of declarations of will and knowledge, used to settle proceedings in cases for endowing grants or awards in the context of European Union law, the jurisprudence of the Court of Justice of the European Union and doctrinal views. The research carried out resulted in de lege ferenda proposals in terms of regulating contest procedures in a manner consistent with the theoretical nature of this legal institution, including proposals for modifications to the EU Model Principles of Administrative Procedure (ReNEUAL) and the EU contract law project. A possible way to improve the existing legal status could be, on the one hand, introducing a public promise to the draft EU contract law, and on the other hand, introducing in the draft administrative procedure, in all unregulated matters relating to contest procedures, a reference to the accordingly use of civil law provisions.

Keywords: *competition, grant, prize, Model Principles of Administrative Procedure, free recognition*

Streszczenie

Opracowanie zostało poświęcone analizie charakteru prawnego oświadczeń woli i wiedzy służących rozstrzyganiu postępowań konkursowych o przyznanie dotacji lub nagrody finansowej w kontekście prawa Unii Europejskiej, orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej oraz poglądów doktrynalnych, a także zaproponowaniu metody regulacji prawa konkursowego w sposób zgodny

Dr hab. Wojciech Fill, PhD in law, professor at the Institute of Law of the Kraków University of Economics; specialises in administrative and financial law; deputy notary public and tax advisor; Poland, ORCID: 0000-0001-6572-7794, e-mail: fillw@uek.krakow.pl
The manuscript was submitted by the author on 7 February 2024; the manuscript was accepted for publication by the editorial board on 6 March 2024.

z teoretyczną naturą konkursu. Przeprowadzone badania zaowocowały propozycjami de lege ferenda w zakresie uregulowania procedur konkursowych w sposób zgodny z teoretycznym charakterem tej instytucji prawnej, w tym propozycjami modyfikacji unijnych modelowych zasad postępowania administracyjnego (ReNEUAL) oraz projektu unijnego prawa umów. Możliwym sposobem poprawy istniejącego stanu prawnego w szczególności mogłoby być z jednej strony wprowadzenie do projektu prawa umów UE przyrzeczenia publicznego, z drugiej zaś wprowadzenie w projekcie postępowania administracyjnego, we wszystkich sprawach nieuregulowanych dotyczących umów publicznych oraz postępowań poprzedzających zawarcie tych umów (w szczególności postępowań konkurencyjnych), odesłania do odpowiedniego stosowania przepisów prawa cywilnego.

Słowa kluczowe: *konkurs, dotacja, nagroda, modelowe zasady postępowania administracyjnego, swobodne uznanie*

1. Introduction

The financial prizes governed by Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council[1] ("Financial Regulation") can be a valuable form of support for the units of the EU's social life. Within the meaning of the Financial Regulation (Article 2 point 48), "prize" means a financial contribution given as a reward following a contest. Where such a contribution is transferred under direct management, the award procedure shall be governed by the provisions of Title IX of the Financial Regulation. Thus, one of the basic editorial units of the Financial Regulation is entirely dedicated to the procedure for granting them. In addition, the general rules used in terms of the financial management of the EU apply to prizes. Pursuant to Article 206 paragraph 2 of the Financial Regulation, prizes may not be awarded directly without a competition. Thus, the competition is a necessary element of the award procedure. Hence, research on an award's legal nature actually means research into the legal nature of a competition's procedure.

In the area of EU law, there are no provisions specifying the legal nature of competition procedures. The lack of a binding definition of the competition also affects the understanding of this institution in the area of grant procedures. Against this background, some basic questions arise in relation to the shape of the Court of Justice of the European Union (hereinafter: the "CJEU") jurisprudence as well as the directions of work in the field of creating European law on administrative procedure and European contract law. Moreover, for many years now, doubts have been raised by the scant range of regulations concerning competitions and the ambiguity of doctrinal and interpretative views in this respect. This state of affairs is confirmed by the jurisprudence of the CJEU, the position of the European Ombudsman[2], and numerous doctrinal studies[3]. The limited regulation of subsidy competitions and also competitions in the sphere of awarding finance prizes is associated with the inability to fill the gaps in the provisions of the Financial Regulation by the provisions on European administrative proceedings and the provisions of the law of EU obligations. In many EU Member States, it is within the framework of the law of obligations that provisions

[1] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30 July 2018, p. 1).

[2] Foreword by the European Ombudsman, available at: http://www.reneual.eu/images/Home/forewordeuombudsman.pdf [accessed on: 5 January 2024].

[3] "The same rules and clauses are interpreted differently by different contracting authorities, courts, lawyers, advocates-general and academics. […]. This landscape becomes even more complex when national aspects are taken into account. Member States have very different concepts regarding public procurement (and public procurement law), whether these contracts are governed by national public or private law, or by provisions with elements of public and private law. Moreover, the lack of agreement on the essence of the public procurement law itself. In this regard, many questions arise, incl.: does the public contract law apply only to public procurement or does it also cover the conclusion and performance of any contracts concluded by public administration bodies (settlement, subsidy contracts, employment contracts)? Should contracts between public administration bodies (concerning the division of competences)

allowing for the qualification of a competition as a public promise have been included[4]. *De lege lata*, deficiencies in the general provisions on competition procedures result in insufficient – from the theoretical point of view – content of the justifications of the CJEU judgments. CJEU verdicts are based primarily on the analysis of the existing procedural regulations, and in the substantive law are based on the analysis of the general principles of the functioning of the European Union set out in the Treaty on the Functioning of the European Union[5] (hereinafter: the "TFEU"), in particular on the rules: the principle of the free movement of goods, freedom of establishment and freedom to provide services, as well as the principles that derive from them, such as: the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency[6]. These rules are systemic in nature. On the other hand, the rules of the contest's relations, are the nature of an obligation. Hence, in practice, the CJEU adapts systemic regulations for the purposes of resolving obligation disputes. In particular, the last four rules relating to the design of the competition as an instrument of EU funds management in relations with business entities are found in the civil law of all EU Member States. Hence, the doctrinal views, built over decades, functioning in the sphere of the economic aspects of civil law and relating to contest relations, could assist the CJEU in solving problems requiring reference to the theoretical concept of the competition (public promise). At the same time, it should be noted that the CJEU often uses arguments that are reflected in the thought patterns on which civil law is based. Such a situation makes it difficult to settle disputes arising from grant competitions, both from the perspective of the parties to the grant relations and from the perspective of the functioning of the EU Court. It seems that the solutions to the identified problems will be the adoption of the general EU law of obligations and the EU Code of Administrative Procedure. However, the analysis of the drafts of

be subject to the same rules as public contracts between public administration bodies and private persons?" (M. Wierzbowski, H.C.H. Hofmann, J.-S. Schneider, J. Ziller, J.-B. Auby, P. Craig, D. Curtin, G. della Cananea, D.-U. Galetta, J. Mendes, O. Mir, U. Stelkens (eds.), *ReNEUAL Model kodeksu postępowania administracyjnego Unii Europejskiej*, Warszawa 2015, pp. 145–146); see also: J.-B. Auby, M. Mirschberger, H. Schröder, U. Stelkens, J. Ziller, *ReNEUAL Model Rules on EU Administrative Procedure. Book IV – Contracts*, 2014, pp. 148–152, available at: http://www.reneual.eu/images/Home/BookIV-Contracts_online_version_individualized_final__2014-09-03.pdf [accessed on: 6 January 2024].

[4] They are regulated in this way, in particular, by German law (§ 657 et seq. of the German Civil Code – regarding this regulation, see e.g. H. Seiler [in:] *Münchener Kommentar*, Bd. IV, München 2009, p. 2363 et seq.), Austrian law (§ 860 et seq. of the Austrian Civil Code – for this regulation see e.g. A. Ehrenzweig, H. Mayrhofer, *Das Recht der Schuldverhältnisse. Allgemeine Lehren*, Wien 1986, p. 228 et seq.), Swiss law (Article 8 of the Swiss Code of Obligations – for this regulation see e.g. E. Bucher [in:] *Kommentar zum schweizerischen Privatrecht. Obligationenrecht I*, H. Honsell, N.V. Vogt, W. Wiegand (eds.), Basel–Genf–München 2003, p. 102 et seq.), Polish law (Articles 919–921 of the Civil Code – for this regulation see e.g. G. Sikorski [in:] *Kodeks cywilny. Komentarz aktualizowany*, J. Ciszewski, P. Nazaruk (eds.), LEX/el. 2022, Article 921).

[5] OJ C 202, 7 June 2016.

[6] In particular, the horizontal financial rules adopted by the European Parliament and the Council on the basis of Article 322 TFEU. These rules are laid down in Financial Regulation and define the procedure for establishing and implementing the Union budget through grants, procurement, prizes, indirect management and financial instruments; see more: the 7 point of preamble to the Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021, OJ L 231/159.

both acts raises further doubts as to the shaping of general provisions formalising competition procedures (public promises). In particular, the analysis of the Model Regulations of Administrative Procedure of the EU (ReNEUAL) makes it possible to state that the administrative concept of the competition procedure preceding the conclusion of the contract for co-financing, and awarding the contract will not, therefore, solve a number of problems concerning, *inter alia*, interpretation of declarations of will, disadvantages of declarations of will and representation. In view of the above, the study was devoted to the analysis of the legal nature of declarations of will and knowledge, used to resolve competition procedures for granting a subsidy or financial award, as well as to propose a method of regulating the contest's law in a manner consistent with the theoretical nature of the competition.

2. Regulation the contests in the scope of granting financial prizes and grants in the EU law

Pursuant to Article 206 of the Financial Regulation, prizes shall be awarded in accordance with the principles of transparency and equal treatment, and shall promote the achievement of policy objectives of the Union. Prizes shall not be awarded directly without a contest and the amount of the prize cannot be related to the costs incurred by the winner. Contests for prizes with a unit value of EUR 1 million or more may only be published where those prizes are mentioned in the financing decision, adopted by a Union institution or body to which the Union institution has delegated powers[7], and after information on such prizes has been submitted to the European Parliament and to the Council. Where implementation of an action or work programme requires prizes to be awarded to third parties by a beneficiary, that beneficiary may award such prizes provided that the eligibility and award criteria, the amount of the prizes and the payment arrangements are defined in the grant agreement between the beneficiary and the Commission, with no margin for discretion. The basic document regulating the rules of conducting a specific competition is the competition regulations published by the organiser. The Call Document must comply with the rules of conducting contests set out in Article 207 of the Financial Regulation. Thus, the regulations should specify, inter alia: eligibility criteria determining the conditions for participation in the competition; the manner and deadline for registration of applicants, the method of submitting applications, criteria to assess the quality of applications in relation to the intended objectives and expected results, amount of the award or prizes, rules for the payment of prizes to winners. Rules of contests may set the conditions for cancelling the contest, in particular where its objectives cannot be fulfilled. The Regulations also contain the criteria for excluding an applicant from the competition procedure

[7] For prizes, the financing decision shall set out the following: the type of participants targeted by the contest, the global budgetary envelope reserved for the contest and a specific reference to prizes with a unit value of EUR 1 million or more.

and the reasons for rejecting the competition application[8]. Prizes shall be awarded by the authorising officer responsible following an evaluation by the evaluation committee. The principles of establishing the commission and ensuring the objectivity of its operation have been defined uniformly for all procedures used in the direct management UE. On the other hand, decision's construction on awarding prizes are regulated, *mutatis mutandis*, by the provisions specifying the procedure for selecting grant recipients. In particular, pursuant to Article 200 paragraph 4 and 6 of Regulation 1046, upon completion of its work, the members of the evaluation committee shall sign a record of all the proposals examined, containing an assessment of their quality and identifying those which may receive funding. This way, a list of qualified projects is created. Where necessary that record shall rank the proposals examined, provide recommendations on the maximum amount to award and possible non-substantial adjustments to the grant application. Next, the authorising officer responsible shall, on the basis of the evaluation, take his or her decision giving at least: (a) the subject and the overall amount of the decision; (b) the names of the successful applicants, the title of the actions, the amounts accepted and the reasons for that choice, including where it is inconsistent with the opinion of the evaluation committee; (c) the names of any applicants rejected and the reasons for that rejection. The authorising officer responsible shall inform applicants in writing of the decision on their application. If the grant requested is not awarded, the Union institution concerned shall give the reasons for the rejection of the application. Rejected applicants shall be informed as soon as possible of the outcome of the evaluation of their application and in any case within 15 calendar days after information has been sent to the successful applicants. Beneficiaries within the meaning of the Regulation are eligible to participate in competition procedures, unless the competition rules provide otherwise. This means that a competition participant may not only be a natural person or entity, with or without legal personality, but also entities shaped by regulations other than civil law[9]. In the case of a rejection decision issued by an official of an EU executive agency, the applicant may apply for an examination of the legality of this decision within 1 month of receiving the letter[10]. On the other hand, an action for annulment of a decision by the CJEU is a common appeal that may be filed within two months of receiving the letter[11].

As can be seen from the above-mentioned legal regulations, the contest procedure set out in the provisions of the Financial Regulation is based on the public procurement procedure. The view is confirmed by the necessity to apply the provisions of Regulation 1046 common to procurement, subsidies and prizes. In particular, in

[8] Specified accordingly in: Articles 136 and 141 of the analysed regulation. In addition, provisions on the grant award procedure stipulating that: calls for proposals shall be published on the website of Union institutions and by any other appropriate means, including the Official Journal of the European Union, where it is necessary to provide additional publicity among potential beneficiaries (Article 194 point 3 of the Financial Regulation).

[9] See: Article 2 point 5 of the Financial Regulation.

[10] Under Article 22 of Council Regulation 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L 1/11.

[11] Pursuant to Article 263 TFEU.

accordance with the TFEU rules (in particular with the principles of transparency, proportionality, equal treatment and non-discrimination), it is necessary to apply the common: exclusion criteria (Articles 136 and 141), rules of admission and the obligations in field publication (referred to in Article 129). Common to contracts, grants and prizes is also the concept of the applicant (Article 2 point 1), as well as the use of the decision as an instrument for examining applications. In addition, the procedure for awarding grants and prizes applies common rules on the procedure for assessing applications and informing about decisions issued (Article 207 point 3). Due to the assessment of the legal nature of contest procedures, an administrative decision plays an important role as a form of action by an authority in a competition procedure. It determines the procedure for submitting appeals, which is the same for competition, procurement and grant procedures. Where the decision was issued by the EU Commission or an executive agency, the basis for appeal may be Article 22 of Regulation No 58/2003. Pursuant to Article 22(1), any act of an executive agency causing detriment to a third person may be communicated to the Commission by any person directly or personally concerned or by a Member State in order to check its legality. In turn, Article 2 of Commission Implementing Decision (EU) 2022/219 of 11 February 2022 establishing rules of procedure for the review, pursuant to Article 22(1) of Council Regulation 58/2003, of the legality of acts of executive agencies which injure a third party and have been referred to the Commission by any person directly or individually concerned[12], indicates that the legality review procedure shall cover the following acts undertaken by an executive agency, in its capacity as an administrative authority: (a) rejections of a grant application; (b) rejections of a tender or a request to participate in a tender submitted in a procurement procedure; (c) rejections of an application submitted in a prize contest; (d) refusals to validate a legal entity or specific legal status in the Participants Register, as well as assessments of financial or operational capacity of applicants.

The legality review procedure shall be limited to the verification of the following: (a) legal and procedural errors, such as errors in the evaluation procedure or insufficient motivation of the act subject to legality review; (b) manifest errors of assessment which influence the overall outcome of the act subject to legality review; (c) factual errors which influence the overall outcome of the act subject to legality review; (d) misuse of power. At the same time, it should be noted that the legality review procedure shall not cover issues that are within the executive agency's margin of discretion, such as evaluation of the quality of the proposals, applications or tenders[13].

3. Legal nature of competition decisions

To assess the legal nature of the competition procedure resulting from the above-mentioned provisions, the most important factors are: 1) the definition of the role of the

[12] OJ L 37/46.
[13] See Article 2 point 3 of the analysed Decision (EU) 2022/219.

administrative decision in the competition and 2) the extent to which the Commission (the executive agency) has discretion in the process of assessing the quality of applications.

The above provisions allow for the construction of the following model of the competition procedure: 1) formal evaluation of projects, 2) substantive evaluation of projects, 3) entry on the list of qualified projects, 4) bestowing the award by issuing an administrative decision. It is worth noting that issuing a decision on awarding individual prizes may refer to all selected projects (in the case of sufficient funds for prizes) or only to the qualified projects which obtained the highest number of points (in the case of lack of funds to finance the prize for the authors of all selected projects). This leads to the conclusion that the issuing of the administrative decision serves only to approve competition projects that received a specific evaluation of meeting the competition criteria.

Thus, the administrative decision only approves the declaration of the competition body that the project has been awarded a specific evaluation (scoring). Hence, the administrative decision is not an evaluation tool in the competition procedure. The issuing of an administrative decision to award a competition prize should, therefore, be treated functionally as an instrument allowing for the distribution of public funds among positively assessed projects. The administrative decision, thus, contains declarations of will regarding the distribution of the funds allocated to the awards. From this perspective, as an instrument used only to approve the results of the competition (or to approve and divide it among the highest-ranked projects), the administrative decision adds nothing to the legal nature of the competition decisions resulting in being entered on the list of qualified projects. Hence, in the process of examining the legal nature of the competition procedure, one should refer to the nature of statements confirming that the project meets the substantive criteria.

In the doctrine of many European countries, the promise of a competition prize is one of the categories of a public promise, the essence of which is a promise of a prize for the best action or work[14]. It is commonly believed that the substantive outcome of the competition is a declaration of will that cannot be institutionally controlled due to the impossibility of objective verification of the evaluator's views, which is subjective in nature[15]. Due to the brevity of the normative regulation,

[14] Germany – Bürgerliches Gesetzbuch (BGBI. I S. 320), Zweites Buch "Recht der Schuldverhältnisse" Neunter Titel "Auslobung", § 657–661; Switzerland – Code des obligations (RS 220), Livre V, Première I, Titre I, Chapitre I, Article 8 (promesses publiques, offerta pubblica e concorso, offerta publica e concurrenzas, Preisausschreiben und Auslobung); Czech Republic – (Zákon č. 89/2012) Sb.; Díl 16, Oddíl 1, Pododdíl 1 "Příslib odměny" § 2884–2889 (Veřejný příslib); Italy – Codice civile (R.D. 16 marzo 1942, n. 262 as amended), Libro IV, Titolo IV "Delle promesse unilaterali", Articles 1987–1991 (promessa al pubblico); France – Code civil (JORF n° 0003 du 4 janvier 2024), Livre III, Titre III "Des contrats ou des obligations conventionnelles en général", Articles 1101–1369 (promesse de récompense, déclaration unilatérale de volonté); Poland – Kodeks cywilny (tekst jedn.: Dz.U. z 2024 r. poz. 1061 ze zm.), tytuł XXXVI "Przyrzeczenie publiczne", Articles 919–921.

[15] K. Zawada [in:] *System Prawa Prywatnego*, Vol. 8, *Prawo zobowiązań – część szczegółowa*, J. Panowicz-Lipska (ed.), Warszawa 2011, p. 915; A. Colin, H. Kapitant, *Cours élémentaire de droit civil français*, Vol. II, Paris 1932, p. 273; A. Ohanowicz, *Przyrzeczenie publiczne. Studjum z prawa cywilnego*, Poznań 1920, p. 37; R. Longchamps de Berier, *Uzasadnienie projektu kodeksu zobowiązań*, "Komisja Kodyfikacyjna" 1936, Issue 3, p. 153.

both the separation of activities that make up the evaluation process and the determination of their legal significance are left to the doctrine and jurisprudence. As a consequence, the stage of formal work or activity evaluation and the material evaluation stage were distinguished[16]. "The formal evaluation usually takes place immediately before the substantive evaluation and at the same time applies to all works submitted for the competition. However, there are no obstacles to make it gradually, as the entries for the competition come in. It is also permissible to perform a partial formal evaluation before the presentation of the work, limited to determining whether the person expressing the will to take part in the competition meets the conditions set for the participants. […]. The formal evaluation, involving the disclosure by the promising person only of his position as to which works meet the formal conditions of the competition, should be considered a statement of knowledge. On the other hand, in the substantive assessment, which also reveals the intention to award the prize to a specific person, a declaration of will should be seen. Thus, the competition adjudication taken as a whole is neither a declaration of knowledge nor a declaration of intent, but is of a complex nature: in part it is a declaration of knowledge, and in part a declaration of will" (translation – W.F.)[17]. At the same time, "it should be assumed that the substantive decision of the competition is, due to the fact that it has legal effects in the legal sphere of other persons, a declaration of will which cannot be changed or revoked by the promising person. He is only allowed, as well as anyone with a legal interest, to plead the absolute nullity of this declaration and to avoid its legal consequences due to error, trickery or threats. The declaration in question is also binding for the participants of the competition. Due to the fact that the substantive assessment depends in principle on the subjective recognition of the promising person, the participants cannot question its accuracy in court proceedings" (translation – W.F.)[18]. In addition, in civil science, there is a consensus of views as to the possibility of qualifying the process of evaluating competition activities as statements of knowledge, when the essence of the evaluation process is the determination of the existence of objectively verifiable facts[19].

Only in the light of the concepts of civil law presented above, is it possible to fully analyse the above-mentioned Article 2 clause 3 of the Commission Implementing Decision (EU) 2022/219, according to which "the legality control procedure does

[16] Cf. K. Zawada [in:] *System*…, Vol. 8, *Prawo*…, n. 15, p. 914.
[17] K. Zawada [in:] *System*…, Vol. 8, *Prawo*…, p. 915. Cf. K. Krziskowska [in:] *Kodeks cywilny. Komentarz*, Vol. V, *Zobowiązania. Część szczególna (art. 765–921)*, M. Fras, M. Habdas (eds.), Warszawa 2018, Article 921. As for the legal nature of contest activities as declarations of knowledge and declarations of will – cf. Z. Radwański (ed.), *System Prawa Prywatnego*, Vol. 2, Warszawa 2002, p. 27.
[18] K. Zawada [in:] *System*…, Vol. 8, *Prawo*…, n. 15, p. 915. See also: A. Ohanowicz, *Przyrzeczenie*…, n. 15, p. 37. In turn, on the contrary, he believes – with regard to the possibility of using the institution of protest in the area of competitions regulated by the public procurement law – R. Szostak, *Charakter prawny konkursu na dzieło projektowe w zamówieniach publicznych*, "Państwo i Prawo" 2004, No. 6, p. 71.
[19] W. Piechocki, *Prawne zasady realizacji konkursów*, Warszawa 1976, p. 55; K. Krziskowska [in:] *Kodeks*…, Vol. V, *Zobowiązania*…, n. 17, Article 921; K. Zawada [in:] *Kodeks cywilny*, Vol. II, *Komentarz do art. 450–1088*, K. Pietrzykowski (ed.), Warszawa 2020, pp. 997–998.

not cover issues that are left to the executive agency's discretion, such as the quality assessment of applications or tenders". Firstly, the views of civil law science make it possible to establish the reasons why declarations of will made by an expert commission regarding the fulfilment or non-fulfilment of the prerequisites of the nature of declarations of will, in some cases, cannot be controlled[20]. The rules of the competition may provide for both a situation in which the project evaluation criteria are very general, making it impossible to link a specific number of points awarded by the jury with the fulfilment of specific objectively verifiable criteria, and the opposite situation, in which the competition criteria precisely determine the value of the awarded grade. In the first case, the members of the selection board make judgments based on their professional experience and often based on a subjective artistic sense. Therefore, such declarations are in the nature of declarations of will, as it is impossible to objectively verify (e.g., in the process of judicial review) the validity of the assessment made. These types of evaluation criteria are most often used in competitions in which the award is to be given for the implementation of an artistic work (which some people may like and others may not) or scientific work of the nature of basic research, the effects of which are hypothetical[21]. Due to the lack of the possibility to control the validity of the assessment made, in these cases the guarantee of rational use of public funds in the competition settlement is ensured by appointing to the evaluation bodies persons generally recognised as authorities in the relevant field. However, competition criteria may also determine precise and objectively verifiable scoring rules. Everyone can then check whether the project meets the competition requirement or not (rating system 0–1). For this type of assessment, an extensive scoring system can also be used (e.g., from 1–5). However, also in this case, the award of a specific number of points is related to the fact that the competition design meets specific, objectively verifiable premises. Due to the fact that the jury combine the award of a certain number of points with objective premises (that can be checked and confirmed by every rational person), its declarations deciding the competition are in the form of statements of knowledge. With this type of criteria, it is also possible to verify the correctness of the awarded scores (also in court proceedings). Taking the above into account, it should be stated that the analysed provision stating that: "the legality control procedure does not cover issues that are left to the executive agency's discretion, such as the quality assessment of applications, or tenders", may only apply to such project evaluation criteria that force the members of the selection board to make declarations of will. However, most of the competing procedures run by the Commission or executive agencies contain criteria to justify the knowledge declarations made by the selection bodies[22]. Obviously, the considered objection does not preclude a formal control of the correctness of the evaluation made by the selection board. Moreover, the analysed exclusion was not expressed *expressis verbis*

[20] It should be emphasised that the doctrine of administrative law lacks broader research on the legal nature of knowledge statements.
[21] This reasoning can also be applied to grant award procedures.
[22] Shown in the fourth point of this study.

in the case of an appeal to the CJEU pursuant to Article 263 TFEU[23]. It is also worth adding that identical interpretation problems with regard to the qualification of declarations of contest bodies may occur in all cases where the selection of the beneficiary is based on the assessment of whether the beneficiary meets the criteria specified in the regulations. The problem, therefore, also concerns public procurement competitions and the selection of grant beneficiaries[24]. The analysis of EU regulations leads, on the one hand, to the conclusion that the regulation of contest procedures and subsidy procedures at the stage of lodging appeals contains regulations clearly derived from private law in the form of: practical references to differences between declarations of will and declarations of knowledge, and errors in the scope of declarations of will and knowledge. On the other hand, the analysed provisions lack precise regulations allowing for making unambiguous decisions in the process of applying the law and settling disputes[25]. Moreover, a deeper exegesis of problems that may arise in the context of various types of declarations of will and knowledge statements when assessing the fulfilment of the criteria for granting a subsidy or award is possible only in the field of civil law science. It has a wealth of examples and views that are absent in the science of administrative law. These shortcomings are not resolved by the detailed rules of procedure for granting awards or subsidies. These regulations mainly contain the criteria for endowing the award or grants and duplicate the content of the above-mentioned provisions of the Financial Regulation and Regulation No 58/2003[26].

4. Competition for a financial award in the jurisprudence of the CJEU

The indicated shortcomings of European regulations concerning, first and foremost, competition and grant procedures are reflected in the jurisprudence of the CJEU. Disputes in this area often arise when the Commission has to assess complex factual and accounting situations on the basis of information contained in applications in order to select the best projects for EU funding[27]. As is clear from case law, the

[23] Cf. A. Cuyvers, *Judicial Protection under EU Law: Direct Actions* [in:] *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, E. Ugirashebuja, J.E. Ruhangisa, T. Ottervanger, A. Cuyvers (eds.), Leiden–Boston 2017, pp. 254–264 and see the literature cited there.

[24] Based on Article 263 of TFEU, competitions organised by bodies other than the Commission and executive agencies may also be subject to review by the European Court. See, e.g., the action brought on 11 October 2023, *PF v. Parliament*, T-317/22, ECLI:EU:T:2023:620.

[25] The analysed provisions also lack solutions regarding the forms of power of attorney and the effects of its revocation or expiry.

[26] See, e.g., Call Document Horizon Impact Award (Rules of Contest): V1.1 – 23 February 2022 − the Call Document (Rules of Contest) outlines the: background, objectives, scope, activities that can be funded and the expected results, available budget and timetable, admissibility, eligibility and criteria for exclusion, evaluation and award procedure, award criteria, how to submit an application, and the online manual outlines the procedures to register and submit applications, available at: https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/horizon/wp-call/2022/roc_horizon-widera-2022-impactprize_en.pdf [accessed on: 5 August 2022].

[27] See, e.g., judgment of 14 February 2008, *Provincia di Imperia v. Commission*, T-351/05, ECLI:EU:T:2008:40, paragraph 86 and the case-law cited there; judgment of 6 June 2007, *Mediocurso v. Commission*, T-251/05 and T-425/05, ECLI:EU:T:2007:162, paragraph 73 and the case-law cited there; judgment of 1 March 2018, *Poland v. Commission*, T-402/15, ECLI:EU:T:2018:107, paragraph 36.

Commission then enjoys wide-ranging discretion[28]. The discretion scope is often questioned by grant applicants. However, there is a well-established line of jurisprudence in this respect, which has been in force for at least thirty years[29]. Justifying the wide scope of the discretionary power of the Commission, the General Court points to the institution of discretion in administrative proceedings, the application of which is dictated by the care for the Community's financial interests[30]. In no ruling on the analysed issue in the last thirty years, has the examined problem not been considered on the basis of the nature of the competition grounds, or on the basis of which the Commission assesses the projects. Hence, it can be concluded that the arguments invoked are primarily of a pragmatic nature[31]. This creates a theoretical gap that needs to be filled. At the same time, it can be noted that the analysis of the indicated problem through the prism of the scope of the discretion of administrative assessment, does not allow for an analysis of the legal nature of the competition criteria. The science of administrative law is limited to setting the boundaries of discretion[32]. On the other hand, the main reason – not so much to apply the administrative discretion, but rather to make a subjective assessment of the fulfilment of the contest criteria – is the legal nature of the declarations of will. At the same time, it should be emphasised that the analysis of the case law shows that the General Court does not notice this fundamental difference in legal nature. Moreover, even in cases in which the General Court rejects the allegation that the assessment of compliance with the competition criteria is defective – due to "the view established in the jurisprudence, according to which the Commission has a wide discretionary power in this type of competitive proceedings", it usually justifies broadly and very precisely the reasons why the Commission (Executive Agency) made a negative assessment. In the case of applying the criteria for evaluating projects (applications) allowing for a subjective assessment – which resulted in the necessity to submit

[28] "It is also apparent from the case-law that, where the institutions of the European Union enjoy a wide discretion, respect for the guarantees conferred by the legal order of the European Union in administrative procedures takes on fundamental importance" (translation – W.F.) – judgment of The General Court (Seventh Chamber) of 14 February 2019, T-366/17, ECLI:EU:T:2019:90, paragraph 39. See also: judgment of 7 May 1992, *Pesquerias De Bermeo SA and Naviera Laida SA v. Commission of the European Communities*, C-258/90 and C-259/90, ECLI:EU:C:1992:199, paragraph 26; court judgment of 14 February 2019, T-366/17, ECLI:EU:T:2019:90, paragraph 35–39; judgment of 1 March 2018, *Poland v. Commission*, T-402/15, ECLI:EU:T:2018:107, paragraph 37.

[29] See e.g. judgment of The Court (Second Chamber) of 7 May 1992, *Pesquerias De Bermeo SA and Naviera Laida SA v. Commission of the European Communities*, C-258/90 and C-259/90, ECLI:EU:C:1992:199.

[30] See as above.

[31] "In those circumstances, the review by the Court of First Instance is limited to verifying that the Commission did not commit a manifest error of assessment and, to that end, it is for the applicant to submit facts or in law which may show that the Commission's assessment is vitiated by such an error; see: judgment of 1 March 2018, *Poland v. Commission*, T 402/15, EU: T: 2018: 107, paragraph 38 and case-law cited" (translation – W.F.) – the above-mentioned judgment, T-366/17, ECLI:EU:T:2019:90, paragraph 38.

[32] According to the requirements of a democratic state ruled by law, there can be no completely "free", unconnected and uncontrolled operation of the administration. From a formal institution which establishes discretion, discretion becomes merely a form of some administrative flexibility that allows and obliges the competent authorities to examine all the circumstances of the case to determine the most appropriate, corresponding to the objective truth and its purpose (the judgment of the Polish Constitutional Tribunal of 29 September 1993, K 17/92, OTK 1993/2, item 33).

declarations of will by the selection board – the Court could not provide such precise explanations. In fact, the EU Court refers the possibility of subjective assessment to the settlings of the competition jury, having the nature of statements of knowledge, often specialist knowledge, but nevertheless possible to translate into objectively verifiable circumstances. The reasoning of the General Court, therefore, shows an internal contradiction. If the competition jury has the possibility of assessing the fulfilment of the discretionary criteria – in the sense that they cannot be verified on the basis of objective evidence – then there is no possibility for the General Court to control the validity of the assessment made. If, on the other hand, the General Court can control the validity of the assessment made by the competition jury, then these criteria must be objectively verifiable, and the statements about meeting them/not meeting them are statements of knowledge. The demonstrated contradiction on the basis of the jurisprudence leads to the conclusion that the discretionary nature of the assessment is most often associated with the possibility of awarding 1, 2, 3 or a different number of points (in accordance with the rules of a given competitive procedure), and not with the possibility for the on-competition jury to assess compliance – at least some criteria – in isolation from commonly verifiable objective circumstances (as is the case, for example, in the case of piano competitions, where the assessment of the way of building tension or shaping the form of the performed piece may be assessed in a diametrically opposite but at the same time acceptable way). One of the judgments, on the one hand, underlying the formation of the above-mentioned jurisprudence of the European court, and on the other, allowing the above views to be confirmed is the judgment of the Court of 7 May 1992 – *Pesquerias De Bermeo SA and Naviera Laida SA v. Commission of the European Communities*[33]. The subject of the appeal to Court was a Commission decision declaring that the project did not meet the conditions for granting Community financial aid under Council Regulation (EEC) No 4028/86. In the ruling, the Court stated, *inter alia*: "Where the Commission is called on to adopt a decision under Article 14 of Regulation No 4028/86 concerning the grant of financial aid for a project for an exploratory fishing voyage, as defined in Article 13 of that regulation, it enjoys a wide discretion as to whether the conditions for the grant of the aid are fulfilled, in particular the requirement that the project relate to zones where, on the basis of an estimate of potential fishery resources, stable and profitable exploitation seems possible in the long term. As a result of that discretion, the observance of the safeguards provided for by the Community legal order in relation to administrative procedures is of fundamental importance. Those safeguards include, in particular, the obligation to give an adequate statement of the reasons for the decision. […]. Economic agents cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained. That applies to a field like that of exploratory fishing, where the objective being pursued is constantly changing by reference, in particular, to the results of previous fishing voyages. Accordingly,

[33] C-258/90 and C-259/90, ECLI:EU:C:1992:199.

economic agents cannot claim to have legitimate expectations that incentive premiums will be granted for projects on the ground that such premiums were granted for previous voyages […]"[34].

In view of the above: "the Commission considers that, before adopting a decision on the grant of financial aid for an exploratory fishing voyage, it must evaluate the technical data of the project, viewing it within the general and complex framework of the fishing sector. In undertaking such an evaluation, it enjoys a discretion, which it did not overstep by taking account of the results of previous exploratory fishing voyages in the South-West Atlantic. As is apparent from the statement of the reasons for the contested decisions, the projects in question did not fulfil certain conditions laid down for grant of the premium. […]. In that regard, it must be stated, first, that Article 13 of Regulation No 4028/86 defines exploratory fishing as any fishing operation carried out for commercial purposes in a given area with a view to assessing the profitability of regular, long-term exploitation of the fishery resources in that area. Thus, the Commission can award financial aid for such a project only if it covers (a) a clearly defined zone within the waters mentioned in Article 14(1) of Regulation No 4028/86 and (b) fishing zones where, on the basis of an estimate of potential fishery resources, stable and profitable exploitation seems possible in the long term […]. Furthermore, the Commission, relying on the results of 25 exploratory fishing voyages between 1987 and 1989 in the South-West Atlantic zone, some of which were in fact undertaken by Naviera and Pesquerías themselves, had made its position known to the Committee and to Naviera and Pesquerías in April 1990. It follows that the Commission gave a sufficient statement of the reasons for its adverse decisions and therefore that the pleas as to infringement of the conditions for the application of Regulation No 4028/86 must be rejected"[35].

As is apparent from the passages in the grounds of the judgment in joined cases C-258/90 and C-259/90, the Court states that the fulfilment of the criterion for granting financial aid for a sightseeing fishing trip project must include the technical characteristics of the project, viewing it in the general and complex framework of the fisheries sector. In making such an assessment, the Commission exercised discretion which it did not exceed, in the view of the Court, in light of the results of previous exploratory fisheries in the Southwest Atlantic. Thus, discretion in this case does not consist in making an assessment based on the subjective perceptions of the members of the Commission as to the appropriateness of subsidising a subsequent exploration voyage, but, on the contrary, leads to an assessment of the award criterion on the basis of verifiable objective conditions. Ergo, discretion in the process of assessing is not, in the analysed case, an instrument for assessing whether the criteria for granting a subsidy are met, but only a tool for determining (specifying) the facts presented in the application for a subsidy. Such an understanding of "having wide discretionary power" by the Evaluation Committee should be applied in particular to the situation where

[34] C-258/90 and C-259/90, ECLI:EU:C:1992:199, n. 33, paragraphs 2–3 of summary.
[35] C-258/90 and C-259/90, ECLI:EU:C:1992:199, paragraphs 24–29.

the data included in the application for awarding the award (subsidy) are ambiguous. This state of affairs requires the exercise of a wide discretion in order to unequivocally establish objective circumstances. The discretionary powers in the case of qualification based on objective circumstances are, therefore, not used to evaluate the score, but only to judge whether or not a circumstance exists. This statement is a statement of knowledge (it is not a statement of will). Hence, the analysed decision of the Commission may be subject to the control of the Court. If, in the case under examination, the discretion of the Commission entailed the possibility of detaching the assessment of compliance with the conditions for granting a subsidy from the project's compliance with objective criteria, then a judicial review would be virtually impossible.

The analysis may also lead to identical conclusions of the Judgment of the Court of 16 December 2020 in joined cases T-236/17 and T-596/17, *Balti Gaas OÜ supported by the Republic of Estonia v. The European Commission and the Executive Agency for Innovation and Networks (INEA)*. The Court stated, inter alia, that the proposals submitted for the CEF in the field of energy infrastructure, in response to the call for proposals of 30 June 2016, were evaluated (negative) by the Commission in the light of the criteria specified in the decision on the multiannual work programme and in that call for proposals. In that regard, the call for proposals of 30 June 2016 set out seven criteria for the award of grants under the which the proposals are assessed: (i) degree of maturity of the action; (ii) cross-border dimension of the action; (iii) extent of positive externality provided by the action; (iv) need to overcome financial obstacles; (v) soundness of the implementation plan proposed for the action; (vi) stimulating effect of CEF financial assistance on the completion of the action, and (vii) priority and urgency of the action. Each grant award criterion is given a score between 0 and 5 points. The minimum acceptance threshold for each criterion is 3 points before weighting and a proposal that does not achieve at least 3 points for each criterion is not selected. In the sphere of assessing the fulfilment of the indicated criteria, the Commission enjoys a wide discretion when it is called upon to assess complex facts and accounts[36], and assess the consistency of a major project with the priorities of the operational program[37]. In those circumstances, the Court's judicial review of such an assessment is limited to verifying that the Commission did not make a manifest error of assessment and, to that end, it is for the applicant to adduce any matters of law or fact to show that the Commission's assessment is vitiated by such an error. Furthermore, that review implies that the EU Courts determine whether the evidence adduced by the applicant is sufficient to render implausible the assessments of the complex economic facts made in the contested decision[38]. Subject

[36] See, to that effect, the judgment of 6 June 2007, *Mediocurso v. Commission*, T-251/05 and T-425/05, ECLI:EU:T:2007:162, paragraph 73 and the case-law cited.

[37] Cf.: judgment of 14 February 2019, *Poland v. Commission*, T-366/17, ECLI:EU:T:2019:90, paragraph 36 and the case-law cited there; judgment of 19 May 1994, *Consorzio gruppo di azione locale "Murgia Messapica" v. Commission*, T-465/93, ECLI:EU:T:1994:56, paragraph 47.

[38] Similarly in the judgments of 12 December 1996, *AIUFFASS and AKT v. Commission*, T-380/94, ECLI:EU:T:1996:195, paragraph 59; of 12 February 2008, *BUPA and Others v. Commission*, T-289/03, ECLI:EU:T:2008:29, paragraph 221.

to that review of plausibility, it is not the Court's role to substitute its assessment of the relevant complex economic facts for that made by the institution which adopted the decision. In such a context, review by the Court consists in ascertaining that the Commission complied with the rules of procedure and the rules relating to the duty to give reasons, but also that the facts relied on were accurate and that there was no error of law, manifest error of assessment or misuse of powers[39]. Finally, it is important to note that, in an action for annulment under Article 263 TFEU, the legality of an EU measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted[40]. In that context, it must be noted that none of the arguments put forward by the applicant was capable of establishing that the Commission's assessment that the proposal of 8 November 2016 was awarded 2 out of 5 points because it demonstrates only to a limited extent the significant externalities in the region in terms of security of supply, in view of the already existing infrastructure (the Klaipėda terminal) and the infrastructure under development, is vitiated by a manifest error of assessment. Thus, it should be noted that the applicant, has not demonstrated that the region's dependence on Gazprom has remained unchanged since the appearance of the Klaipėda terminal and that the Paldiski project could contribute to security of supply in any more than a limited way[41].

In the context of the legal nature of the declarations of the committee evaluating the projects, the above ruling allows the conclusion to be drawn that the broad discretion of the Commission in the evaluation process does not mean a departure from being guided by factual and legal circumstances (objectively verifiable). These circumstances objectively exist or do not exist. If they exist, the Commission may award any such number of points so as to enable the conclusion of a subsidy contract (in the analysed case from 3 to 5 points). If there are no circumstances specified in the application evaluation criteria, the Commission awards the number of points which does not allow for the conclusion of the subsidy contract (1 or 2 points in the analysed case). Thus, the assessment that results in the possibility of awarding a subsidy or the lack of such a possibility amounts to checking the objective existence of certain circumstances. Hence, the decision in this respect has the character of a knowledge statement. And it is precisely this circumstance that determines the possibility for the Tribunal to examine whether the facts referred to by the body assessing the fulfilment of the competition conditions were correct and there was no violation of the law, manifest error of assessment or abuse of power. Hypothetically, if the subject of the above-mentioned dispute between the Commission and Paldiski would be the Commission's awarding of only 3 or 4 points instead of 5 points, then due to the lack of criteria for awarding the indicated number of points specified in the

[39] See judgment of 12 February 2008, *BUPA and Others v. Commission*, T-289/03, ECLI:EU:T:2008:29, paragraph 221 and the case-law cited.
[40] See judgment of 20 July 2017, *Badica and Kardiam v. Council*, T-619/15, ECLI:EU:T:2017:532, paragraph 46 and the case-law cited.
[41] Judgment of 16 December 2020, *Balti Gaas OÜ v. European Commission and Innovation and Networks Executive Agency*, T-236/17 and T-596/17, ECLI:EU:T:2020:612, paragraphs 146–168.

rules of this competition[42], the Court would not be able to verify the correctness of the Commission's operation in terms of the correctness of the points awarded. Both in the event that the Commission would award 3 or 4 points, it would mean that the theoretical conditions for concluding a subsidy contract were met by the applicant. Hence, it is only in the context of such a hypothetical example that the essence of the declaration of intent of the competition authority as a free (and in fact not subject to the Tribunal's control) evaluation is revealed. Hence, in the analysed case, free discretion is not an instrument for assessing compliance with the criteria for granting a subsidy, but is only a tool for determining (specifying) the actual state of affairs presented in the application for subsidy in a competitive procedure used in the process of interpreting the provisions. Therefore, in the reasoning of the Tribunal, it comes to logical simplifications consisting in equating the freedom of evaluation (in cases where the evaluating body can allow itself to adjudicate in isolation from the objective circumstances clearly formulated in the rules of procedure) with the freedom to assess unclear circumstances constituting the factual state of which the applicant would like to implement the awarded project. This is a drawback that is noticeable primarily from the theoretical perspective. However, it cannot be ruled out that it will be raised in future proceedings. In order to address the charges, the Tribunal will have to refer to the above-mentioned solutions developed in the civil law doctrine.

5. Legal qualification of the competition for the award of the prize in the light of the ReNEUAL Model Rules on EU Administrative Procedure

Rules of competitive proceedings preceding the award of a financial award or subsidy, have been also defined in the text of the ReNEUAL Model Principles of the EU administrative procedure. In particular, the content of this draft includes a group of provisions titled: "Competitive award procedure" (Section 3: Articles IV-9-Articles IV-19 in Chapter 2 titled: "Procedures for the conclusion of contracts"). This procedure is modelled on the rules set out in the EU soft law on the award of public contracts, which are not or only partially covered by the Public Procurement Directives[43]. The draft regulates, among others, the obligations regarding: publication of the contract notice, the content of the notice (Article IV–11), equal access for business entities from all Member States (Article IV–14), the possibility of limiting the number of participants in the procedure (Article IV–15) and the structure of the decision resolving the procedure (Articles IV–18). Consequently, the provisions

[42] Call for proposals concerning projects of common interest under The Connecting Europe Facility (CEF) programme in the field of the trans-European energy infrastructure under the second 2016 call for proposals (CEFEnergy-2016-2), available at: https://ec.europa.eu/inea/sites/default/files/cef_energy_2016_2_call_text_for_publication.pdf [accessed on: 23 August 2022].

[43] See Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/2).

contained in the ReNEUAL model focus on the guarantees of the EU principles of awarding public contracts, which have been developed in the jurisprudence of the CJEU: transparency, equal treatment and proportionality[44]. The provisions on pre-contractual competitive proceedings set out in the draft should be applied if the specific provisions of the Financial Regulation (resulting from Title VIII "Subsidies" or Title IX "Awards") are not applicable in a given case. It is worth noting at this point that the Financial Regulation does not regulate the scope of the discretion in proceedings aimed at assessing the facts. It also does not regulate the relationship between the declaration of will or knowledge submitted by the evaluation committee and the issuing of an administrative decision allowing the conclusion of an agreement with the beneficiary of a competitive procedure. At the same time, these issues are ignored by the ReNEUAL Model Principles of the EU administrative procedure. In this normative context, it can be considered that the declarations of will or knowledge made by the evaluation committee are part of the evidence proceedings, especially when the declaration of meeting the competition criteria or not is issued by an executive agency and an administrative decision by the EU Commission. On the other hand, submitting statements by the evaluation committee (assessing whether the application meets the criteria or not) is a *sine qua non* condition for issuing a decision. When analysing the relationship between the statements of the evaluation committee and the administrative decision, it can be noticed that the administrative decision is a declaration of will which: 1) confirms that the evaluation of the assessment was carried out correctly, 2) allows funds to be distributed to beneficiaries who received positive evaluations (unless it is impossible to award prizes to all applications that received positive evaluations), 3) are subject to control, 4) its substantive control consists essentially in examining the correctness of statements of evaluation bodies (examination of errors in evaluation). All four features indicate the approving character of the analysed administrative decision as an act enabling the transition to the next stages of the competitive procedure (conclusion of the contract or examination of the correctness of the procedure). Therefore, the core of the competition procedure is not so much the administrative decision as the assessment of the application (submission of a declaration in this respect by the evaluation committee). The decision approving the result of this assessment becomes a technical medium for statements made in the process of formal and material assessment. The technical nature of the decision is also disclosed when there is a need for an administrative allocation of funds between applicants whose applications received positive marks and the highest score (in the case of limited financial resources for prizes or grants). This is a procedure similar to approving an administrative settlement. Also in the substantive law, the imperious nature of the actions of a public administration body is not evident. Instead, the

[44] See also: Communication From The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (COM(2005) 569 final) and Commission Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP) – Re-Opening (C (2007)6661).

elements characteristic of a public promise are revealed. The non-imperious nature of this institution also explains the relationship between the examined declarations of knowledge and will. This leads to the conclusion that the competitive procedure, both under the provisions of the Financial Regulation and under the ReNEUAL Model Principles of the EU administrative procedure, use solutions characteristic of private law. In the absence of uniform civil law provisions in the EU, such a solution seems understandable. These solutions, however, did not radically change their character by being included in the public law regulations. For the purposes of legal interpretation, this circumstance cannot be forgotten[45]. Hence, one could consider modifying the provisions of the draft code of administrative procedure of the EU in such a way that the regulations relating to competitive procedures[46] include a clause allowing the use of the doctrinal wealth of private law in the field of competition procedures. Otherwise, the solutions contained in the ReNEUAL model rules on EU administrative proceedings will only consolidate the lines of case law existing in the jurisprudence of the CJEU, hindering a wider analysis of the problems identified.

6. Conclusions

The conducted analysis of regulations and jurisprudence lines shaping the competitive mode of awarding cash prizes and subsidies allows for the formulation of the following final conclusions and normative postulates. The bodies assessing the fulfilment of the criteria in competitive procedures do not dispose of any regulations that would indicate the legal nature of the statements of knowledge they submit in competition procedures for granting subsidies or financial prizes. In the EU law, these proceedings have become administrative procedures concluded with an administrative decision enabling the conclusion of a public-law contract. However, this circumstance does not change the fact that the examined types of competitive procedures show the features of a public promise regulated in the civil law of many EU countries. Giving a public-law form to the competition procedure – although understandable for pragmatic reasons – did not, however, change the legal nature of this procedure. This essence is the submission of declarations of knowledge or will by the competition committee regarding the fulfilment (or not) with the evaluation criteria specified in the competition regulations. In this case, the administrative decision serves only to verify the correctness of this assessment and, consequently, to approve it. Thus, this statement

[45] Especially that the authors of the draft code of administrative procedure of the European Union express far-reaching doubts as to whether the provisions of the public procurement law used in the draft as the basis for the pre-contractual procedure regulation (Book IV) should also be used in proceedings leading to awarding prizes or concluding contracts for financing (see: J.-B. Auby, M. Mirschberger, H. Schröder, U. Stelkens, J. Ziller, *ReNEUAL…*, n. 3, pp. 145–156).

[46] Other than public procurement procedures exhaustively regulated by the provisions of Directives: 2014/24/EU of The European Parliament and of The Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (L 94/65) and 2014/25/EU of The European Parliament and of The Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (L 94/243).

of the selection board affects the assessment of the legal nature of the competitive procedure. The administrative decision loses its function as an instrument resolving the matter in substance. The matter was resolved in essence by the jury. In many EU countries, the competition procedure does not end with the obligation to issue an administrative decision at all[47]. In the absence of normative regulations in terms of necessity to issue administrative decisions, the procedure is concluded with the statement of the evaluation committee. In the situation of the normative impossibility of terminating this procedure with a formal administrative decision, it is difficult to justify that the procedure was of an administrative nature.

Moreover, as a consequence of the combination of private and public-law features, in the process of applying the law, doubts may arise as to the circumstances in which the evaluating body may break away from objectively verifiable circumstances, and in which it cannot. The lack of clear indication on the basis of the CJEU jurisprudence and the doctrine that contest is an instrument of private law applied under public law[48] may also lead to a defective application of the institution of discretion in the analysed area. On the basis of the examined competition procedures, it can be concluded that it is most often an instrument to determine (clarify) the actual state of affairs, and not an evaluation tool.

From this perspective, the solutions contained in the ReNEUAL Model Principles of EU administrative procedures – concerning competitive procedures preceding the conclusion of a procurement or co-financing agreement – seem to be too general and too detached from the views of civil law. A possible way to improve the existing legal status could be, on the one hand, introducing a public promise to the draft EU contract law[49], and on the other hand, introducing in the draft administrative procedure, in all unregulated matters relating to contest procedures, a reference to the accordingly used provisions of civil law[50].

References

1. Auby J.-B., Mirschberger M., Schröder H., Stelkens U., Ziller J., *ReNEUAL Model Rules on EU Administrative Procedure. Book IV – Contracts, 2014*, available at: http://www.reneual.eu/images/Home/BookIV-Contracts_online_version_individualized_final__2014-09-03.pdf.
2. Bucher E. [in:] *Kommentar zum schweizerischen Privatrecht. Obligationenrecht I*, H. Honsell, N.V. Vogt, W. Wiegand (eds.), Basel–Genf–München 2003.
3. Colin A., Kapitant H., *Cours élémentaire de droit civil français*, Vol. II, Paris 1932.

[47] Also in the case of competitive grant award procedures. See e.g. Articles 13–16 of the Polish Act on public benefit activities and volunteering of 24 April 2003 (tekst jedn.: Dz.U. z 2024 r. poz. 1491).
[48] Just like a contract of sale, lease or pre-emption.
[49] Cf.: O. Lando, H. Beale (eds.), *Principle of European Contract Law*, The Hague–London–Boston 2000, XXI–XXVII.
[50] It could be modelled on § 62 of the German Act on Administrative Procedure (VwVfG).

4. Cuyvers A., *Judicial Protection under EU Law: Direct Actions* [in:] *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, E. Ugirashebuja, J.E. Ruhangisa, T. Ottervanger, A. Cuyvers (eds.), Leiden–Boston 2017.
5. Ehrenzweig A., Mayrhofer H., *Das Recht der Schuldverhältnisse. Allgemeine Lehren*, Wien 1986.
6. Krziskowska K. [in:] *Kodeks cywilny. Komentarz*, Vol. V, *Zobowiązania. Część szczególna (art. 765–921)*, M. Fras, M. Habdas (eds.), Warszawa 2018.
7. Lando O., Beale H. (eds.), *Principle of European Contract Law*, The Hague–London–Boston 2000.
8. Longchamps de Berier R., *Uzasadnienie projektu kodeksu zobowiązań*, Komisja Kodyfikacyjna 1936, Issue 3.
9. Ohanowicz A., *Przyrzeczenie publiczne. Studjum z prawa cywilnego*, Poznań 1920.
10. Piechocki W., *Prawne zasady realizacji konkursów*, Warszawa 1976.
11. Radwański Z. (ed.), *System Prawa Prywatnego*, Vol. 2, Warszawa 2002.
12. Seiler H. [in:] *Münchener Kommentar*, Bd. IV, München 2009.
13. Sikorski G. [in:] *Kodeks cywilny. Komentarz aktualizowany*, J. Ciszewski, P. Nazaruk (eds.), LEX/el. 2022.
14. Szostak R., *Charakter prawny konkursu na dzieło projektowe w zamówieniach publicznych*, Państwo i Prawo 2004, No. 6.
15. Wierzbowski M., Hofmann H.C.H., Schneider J.-S., Ziller J., Auby J.-B., Craig P., Curtin D., della Cananea G., Galetta D.-U., Mendes J., Mir O., Stelkens U. (eds.), *ReNEUAL Model kodeksu postępowania administracyjnego Unii Europejskiej*, Warszawa 2015.
16. Zawada K. [in:] *Kodeks cywilny*, Vol. II, *Komentarz do art. 450–1088*, K. Pietrzykowski (ed.), Warszawa 2020.
17. Zawada K. [in:] *System Prawa Prywatnego*, Vol. 8, *Prawo zobowiązań – część szczegółowa*, J. Panowicz-Lipska (ed.), Warszawa 2011.