CHR report regarding the pandemic: experience and conclusions

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Editor

Piotr Mierzejewski

Authors

Łukasz Kosiedowski, Tomasz Schabowski, Małgorzata Żmudka, Grzegorz Heleniak, Joanna Koczorowska, Ewa Talma-Pogrzebska, Anna Bogucka, Katarzyna Bereda-Łabędź, Elżbieta Góźdź, Małgorzata Czarkowska

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al. Solidarności 77, 00-090 Warszawa

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Dear Readers,

When taking up the office of Commissioner for Human Rights in July this year, I announced that a report would be drawn up on problems connected with the coronavirus pandemic. I informed Members of Parliament and the public that after the unprecedented experience of fighting against the massive threat to health we needed to analyse the facts and reflect on what had happened and what, if anything, needed to be changed or improved, both in law and in practice.

We have taken every effort to draw up this report as soon as possible. I would like to thank the employees of the Office of the Commissioner for Human Rights for their commitment, reliability and direct support to citizens in this difficult time. All the more so because the pandemic threat has never really left us and we can only talk about the slowing down or speeding up of its successive waves.

Our report is focused mainly on the CHR's activities undertaken in connection with citizens' complaints, media reports and ex-officio examination of cases during the first three waves of the pandemic. Now, as we know, we are already facing the fourth wave. However, the fundamental problems with the functioning of the state, legislation, health care organization, business activity and administrative services have not been solved. Nor have we experienced the expected change of sometimes disordered responses to individual threats and problems, including, in particular, measures not coordinated at the state and local government levels. Their perception by citizens has been predominantly that of uncertainty, randomness and unpredictability.

Yet, in moments of danger it is of particular significance to strengthen citizens' confidence in their state and law. For this reason, our report aims to remind public authorities again that since the beginning of the pandemic, the Commissioner for Human Rights has been consistently reporting concerns raised by citizens and institutions. We have been raising issues that require both immediate and long-term action on the part of government agencies or the parliament. Moreover, we have often been proposing solutions, actions and recommendations. It is worth looking into them and draw conclusions.

Why is this report so important? It is so because it relates to human dignity and life as well as elementary human rights. Any negligence, any mistake or even passivity on the part of the authorities may lead to someone's tragedy. If we want to emerge safely from this health and social crisis, definitely unprecedented in recent times, we should be learning quickly and making use of the experience and knowledge gained. In particular, we should learn to quickly react to information and signals received from citizens on a daily basis.

We address this report not only to relevant public authorities but also to the general public, the media and social organizations. To all those who have experienced the effects of the pandemic in some way and are in a position to do anything to minimize our suffering and loses caused by it.

I highly recommend reading this report. We invite you to participate in the debate and to take action.

Marcin Wiącek

Commissioner for Human Rights

Part I. ADMINISTRATION

1. Restrictions on the freedoms and rights of individuals, introduced by way of regulations of the Minister of Health and the Council of Ministers

Together with the introduction, on 14 March 2020[1], of the state of epidemic threat on the territory of Poland due to the SARS-CoV-2 outbreak, the first restrictions on human freedoms and rights entered into effect. For example, on the date of the introduction of the state of epidemic threat, the restriction consisting in the "strict prohibition" to carry out business activity in a number of sectors by entrepreneurs (and other entities) was introduced. A day later, on 15 March 2020, the obligation to undergo so-called border quarantine after entering the country came into effect.

The restrictions were introduced pursuant to the parliamentary acts' provisions relating to the state of epidemic threat and the state of epidemic, which have been present in the Polish legal order since 2001[2]. They link the introduction of the state of epidemic threat, or the state of epidemic, to the powers of a voivode (province governor), the Minister of Health and, since 8 March 2020[3], also the Council of Ministers to introduce various types of restrictions. Their permissibility, however, has raised serious doubts. It has been pointed out that due to their similarity, in terms of scope, to restrictions applicable under the states of emergency, the epidemic-related states are, in fact, non-constitutional states of emergency[4] introduced despite the existing case law of the Constitutional Tribunal[5], which has clearly ruled out the possibility of introducing states which are "intermediate" between the ordinary operation of the state and the states of emergency provided for in the Constitution of the Republic of Poland.

Regardless of this, it has been found that non-introduction any of the constitutional states of emergency entails the necessity to maintain the ordinary regime of lawmaking and that no restrictions on the freedoms and rights of individuals may be introduced by way of a regulation, although this has been the model consciously selected by the legislator to combat the epidemic[6]. Constitutionality-related doubts have also been

[1] Regulation of the Minister of Health of 13 March 2020 announcing the state of epidemic threat on the territory of the Republic of Poland (Dz. U. [Journal of Laws], item 433).
[2] Originally, Article 33 et seq. of the *Act of 6 September 2001 on communicable diseases and infections* (Dz. U. [Journal of Laws] no. 126, item 1384, as amended), no longer in force; at present, Article 46 et seq. of the *Act of 5 December 2008 on prevention and control of infections and communicable diseases in humans* (Dz. U. [Journal of Laws] no. 234, item 1570, as amended).
[3] Article 25(4) of the *Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused thereby* (Journal of Laws, item 1842, as amended).
[4] Cf.: J. Paśnik, Kilka refleksji o regulacjach stanu epidemii jako sui generis pozakonstytucyjnego stanu nadzwyczajnego [A few reflections on the regulations on the state of epidemic as a specific non-constitutional state of emergency], Przegląd Prawa Publicznego 2020, no 11, pp. 69-85.
[5] In particular, in the judgment of 21 April 2009, case ref. no. K 50/07, published in OTK-A 2009/4/51.
[6] More in: S. Trociuk, Chapter I, Legislacja w stanie epidemii [Legislation during the state of epidemic] [in:] Prawa i wolności w stanie epidemii [Rights and freedoms during the state of epidemic], Warszawa 2021.

raised with regard to the legal construction of the powers to introduce restrictions, due to the lack of guidelines to issue the basic act. Objections with regard to the constitutionality of the introduced restrictions have also been put forward by the Commissioner for Human Rights in his general intervention letters[7]. Today, at the end of 2021, the violation of constitutional principles in the introduction of restrictions on the rights and freedoms individuals can be spoken about not as a hypothesis but a conclusion confirmed by hundreds of court judgments.

Chronologically, the first judgment of an administrative court, confirming a violation of the Constitution of the Republic of Poland in the introduction of the restrictions on freedoms and rights of individuals due to the epidemic was issued in Gliwice[8] following the Commissioner for Human Rights' application which challenged the obligation to undergo the border quarantine. The assertions of the application were found to be correct and the quarantine obligation was declared invalid due to the fact that the Minister of Health had exceeded his law-making powers.

The restrictions on the freedoms and rights of individuals, introduced by way of regulations of the Council of Ministers, are accompanied by administrative fines for non-compliance[9]. The numerous fines imposed have been the reason of many cases taken before administrative courts. The overwhelming majority of the judgements have questioned the constitutionality of the restrictions introduced by the Minister of Health and, subsequently, the Council of Ministers and declared the administrative sanctions for non-compliance non-permissible. It is worth emphasizing that such assessment has related to numerous obligations, restrictions and prohibitions introduced by way of regulations, such as the restriction of the freedom of assembly[10], the requirement to move in a specific way (to keep a certain distance from other

[7] Cf. in particular: letter no. VII.565.461.2020.ST of 4 June 2020 to the Prime Minister, containing a comprehensive analysis of law-making processes in the first period of the SARS-CoV-2 pandemic, https://bip.brpo.gov.pl/pl/content/raport-rpo-dla-premiera-nt-prawa-w-stanie-epidemii, access on: 19.10.2021.
[8] Judgment of the Provincial Administrative Court in Gliwice of 27 July 2020, case ref. no. III SA/Gl 319/20.
[9] Article 48a of the *Act on prevention and control of infections and communicable diseases in humans*.
[10] E.g. judgment of the Provincial Administrative Court in Gdańsk of 28 January 2021, case ref. no. III SA/Gd 780/20 pr. and judgment of the Provincial Administrative Court in Warsaw of 11 March 2021, case ref. no. VII SA/Wa 1459/20 pr.

persons)[11], the border quarantine obligation[12] or the prohibition to carry out business activity[13].

At present, in the legal space we already have the first statements by the Supreme Administrative Court[14] and the Supreme Court[15] regarding the constitutionality of the restrictions introduced by the Minister of Health and the Council of Ministers. They clearly lead to the conclusion that the restrictions on the freedoms and rights of individuals were introduced in violation of the constitutional principles of law-making. Neither the Minister of Health nor the Council of Ministers were duly empowered to establish such restrictions. It should be emphasized that the situation still exists, although nearly two years have passed since the introduction of the first restrictions.

2. Administrative fines

Soon after the introduction of the state of epidemic and the related restrictions (limitations, orders and prohibitions) in the country, the public authorities established a system of administrative fines for non-observance of the restrictions by citizens. The system found regulatory basis in Chapter 8 of the *Act of 5 December 2008 on prevention and control of infections and communicable diseases in humans* (hereinafter: "the Prevention Act") and the provisions of Article 48a[16] and Article 15 zzzz of the *Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused thereby* (hereinafter: the "Act on special solutions")[17]. The system

[11] E.g. judgments of the Provincial Administrative Court in Warsaw: of 12 January 2021, case ref. nos. VII SA/Wa 1614/20 npr. and VII SA/Wa 1434/20 pr., and of 13 January 2021, case ref. nos. VII SA/Wa 1424/20 pr., VII SA/Wa 1506/20 pr. and VII SA/Wa 1917/20 pr.

[12] E.g. judgment of the Provincial Administrative Court in Gliwice of 20 October 2020, case ref. no. III SA/Gl 540/20 pr.; judgment of the Provincial Administrative Court in Lublin of 26 November 2020, case ref. no. III SA/Lu 393/20 npr.; judgment of the Provincial Administrative Court in Warsaw of 5 January 2021, case ref. no. VIII SA/Wa 644/20 pr., judgment of the Provincial Administrative Court in Warsaw of 13 January 2021, case ref. no. VII SA/Wa 1398/20 npr., judgment of the Provincial Administrative Court in Gliwice of 14 January 2021, case ref. no. III SA/Gl 420/20.

[13] E.g. judgment of the Provincial Administrative Court in Opole of 27 October 2020, case ref. no. II SA/Op 219/20 npr., judgment of the Provincial Administrative Court in Szczecin of 11 December 2020, case ref. no. II SA/Sz 765/20 pr., judgment of the Provincial Administrative Court in Kraków of 20 April 2021, case ref. no. III SA/Kr 1306/20 pr.

[14] Judgments of 8 September 2021, case ref. nos.: II GSK 1010/21, II GSK 781/21, II GSK 602/21 and II GSK 427/21; judgments of 23 September 2021, case ref. nos.: II GSK 1011/21, II GSK 949/21, II GSK 802/21, II GSK 1011/21, II GSK 949/21, II GSK 919/21, II GSK 802/21, II GSK 884/21, II GSK 825/21, II GSK 939/21, II GSK 844/21 and II GSK 876/21.

[15] E.g. judgments of 16 March 2021, case ref. nos.: II KK 64/21 and II KK 97/21; judgment of 15 April 2021, case ref. no. V KK 111/21; judgment of 26 April 2021, case ref. no. II KK 67/21; judgment of 29 June 2021, case ref. no. II KK 255/21.

[16] Provisions inserted by Article 8(22) of the *Act of 31 March 2020 amending certain acts, insofar as they relate to the health care system, in connection with preventing, counteracting and combating COVID-19*.

[17] Provision inserted by Article 1 of the *Act of 31 March 2020 amending the Act on special solutions related to preventing, counteracting and combating COVID-19, other communicable diseases and crisis situations caused thereby and certain other acts* (Journal of Laws of 2020, item 568).

was to be independent, by nature, of the one applicable to offenses and crimes, which, as it turned out in practice, remained a mere expectation in most cases.

The very fact of introducing administrative sanctions for non-observance of constitutionally questionable restrictions necessitates a critical approach towards them. The method of their regulation also laves space for criticism. The introduced solutions are contradictory to both national and international standards of imposing administrative fines and thus constitute a tool of excessively severe and often ungrounded repression by public authorities.

The issue was raised in a long and detailed general intervention letter by the Commissioner for Human Rights, sent to the Minister of the Interior and Administration and then to the Minister of Health[18].

The Commissioner's objections concerned both norms comprising the regulation (i.e. the sanctioned norm and the sanctioning norm). In particular, the Commissioner pointed out that the sanctioned norm did not arise directly from an act of parliament but from a regulation. This violates the fundamental principle according to which a penalty may be imposed only for committing an act that is considered unlawful according to an act of parliament in force at the time the act was committed. The legislative situation also leads to legal uncertainty. Frequent changes of the regulations[19] have caused confusion regarding restrictions applicable at a given time. The state of legal uncertainty is aggravated by the fact that the provisions of the regulations leave much to be desired from the point of view of the correctness of legislation, are unclear and allow for a variety of interpretations[20].

Objections of the Commissioner have also been raised by the amounts of the fines. They range from 5 (or 10) thousand PLN to 30 thousand PLN for violating epidemic-related restrictions, and amount up to 30 thousand PLN for violating the quarantine obligation. The Commissioner has pointed out that the minimum amount of the fine is equal to the maximum amount of the fine for violating restrictions which may be introduced under the state of emergency or the state of natural disaster, and exceeds the average salary for 2019. The fact that the fines are considered immediately

[18] Case ref. no. V.511.188.2020, https://bip.brpo.gov.pl/pl/content/koronawirus-zasady-karania-obywateli-budza-watpliwosci-rpo

[19] Between March 2020 and November 2021, nearly 80 amendments to the *Regulation of the Council of Ministers establishing certain restrictions, orders and prohibitions in connection with the state of epidemic* were introduced.

[20] A typical example is the use of the phrase "basic needs connected with daily life matters" as matters which may be a reason for leaving the house. According to media reports and people's complaints filed with the Commissioner, in Poland, in the first months of the epidemic most interventions by the Police took place, most fines were imposed and most cases were reported to the Sanitary Inspection for them to impose an administrative penalty.

enforceable under the related parliamentary act also makes them excessively severe[21]. The wording of the provisions also leaves much to be desired (including the statement that "the decision is enforceable "immediately on the date on which it is served" and, at the same time, that the fine "is payable within 7 days of the date of issue of the decision"). The Commissioner has also noted that the wording of the reference to Tax Ordinance provisions, contained in Article 48a(8) of the Prevention Act[22], may raise doubts as to the applicability of Chapter IVa of the Code of Administrative Procedure.

The Commissioner's intervention letter has not brought the expected effect i.e. the improvement of the regulations on the sanctions. Their content has not been changed to date.

The practice of applying the administrative sanctions for violating the epidemic-related restrictions has shown that the objections raised by the Commissioner for Human Rights have been fully justified. Cases known to the Commissioner have demonstrated that the sanctions have usually been introduced in violation of civil rights protected by the Constitution and safeguarded by the Code of Administrative Procedure. Most of the violations concerned the right to passively and actively participate in the proceedings and the right to make statements and provide evidence which, in other words, is the right of defence. The analysis of statements of grounds for decisions imposing administrative fines (both by first instance bodies and second instance bodies of the Sanitary Inspection) shows that there have been two reasons for the situation: the lack of subject-matter preparation of the State Sanitary Inspection employees to impose administrative fines, and the specific interpretation of the regulations by the State Sanitary Inspection authorities in an objective-driven manner, assuming the departure from the safeguards of the right of defence, as provided for in the code, in order to create the possibility to impose a fine on a citizen as soon as possible, without stating the grounds for it in accordance with the principle of objective truth[23].

[21] Article 48a(4) of the Prevention Act: "A decision imposing a financial penalty is enforceable immediately on the date on which it is served". The decision shall be delivered immediately (...)".

[22] Within the scope not regulated in the Act, financial penalties are regulated by the provisions of section III of the *Act of 29 August 1997 – Tax Ordinance* (Dz. U. [Journal of Laws] of 2019, item 900, as amended).

[23] Quoted from the statement of reasons for the decision no. DE HPN/01136/2020 of 30 June 2020 of the Mazowsze Province Sanitary Inspector in Warsaw, upholding the first instance decision to impose an administrative penalty in the amount of PLN 10,000: "In the case under consideration, the provisions of the *Act of 5 December 2008 on prevention and control of infections and communicable diseases in humans* (Dz. U. [Journal of Laws] of 2019, item 1239, as amended), regulating administrative penalties, aimed to make people comply almost immediately with sanitary regulations, in order to protect health and lives of other people. Urgency of action in this area was related to effective prevention of further spread of the SARS-CoV-2 virus. Had the State Sanitary Inspection units intended to notify the parties about the initiation of the proceedings and enable the parties to actively participate in the proceedings, then according to Article 10(1) of the Code of Civil Procedure, a time limit of at least 7-10 days for reading the files (in practice, only a formal note made by the police) should have been set. In the case under consideration, this would have constituted an action posing an obstacle to the speed of the proceedings in question, which speed was required, inter alia, by Article 48a(4 and 7)

The examination of individual cases by the Commissioner for Human Rights has revealed glaring deficiencies in the knowledge of the administrative procedure among the State Sanitary Inspection employees, in particular with regard to the general principles of applying the Code of Administrative Procedure, the provisions on evidentiary proceedings, and the provisions of Section IVA (Administrative fines) of the Code of Administrative Procedure, but also the provisions governing the service of documents and the calculation and setting of time limits. There have also been cases of the lack of knowledge of the provisions of the *Act on special solutions,* applicable to the imposition of fines. In a vast majority of cases, the authorities failed to notify the citizens concerned of the decision to initiate proceedings regarding the fine imposition. Citizens learnt about the proceedings only upon the servicing of the decision. The statements of grounds for the decisions suggested that the provision of Article 10(2) of the Code of Administrative Procedure permitted not notifying the person concerned, and that only an immediate decision imposing a fine without giving the citizen the time for providing explanations or evidence with the aim to defend themselves reduced the risk to human life or health and prevented irreparable material damages (the economy was suffering because of the epidemic, which resulted from non-compliance with epidemic-related restrictions), and served the purpose of broad-scope prevention. The authorities also justified their position by the necessity to accept "the prevailing interest of the society over the individual interest"[24] and to depart from balancing these interests in a given case. In some cases the authorities considered the possibility of lodging an appeal as the possibility for the party to exercise their right to actively participate in the proceedings[25].

In most cases, the authorities considered a police officer's note as the main and, most often, only piece of evidence in the case, having full evidential value. Consequently, the taking of evidence by the sanitary inspection authorities was limited to "analysing" the note without taking account of any other sources of evidence, which should also be

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of the *Act of 5 December 2008 on prevention and control of infections and communicable diseases in humans*, as well as an obstacle to achieving the aim of the regulation itself (the amendment was aimed at causing the perception of inevitability of the penalty and its dimension, in order to protect the health and lives of other people)", CHR Office case number: V.511.288.2020.

[24] E.g. Mazowsze Province Sanitary Inspector in Warsaw in the decision no. DE HPN/01136/2020 of 30 June 2020, CHR Office case no. V.511.288.2020.

[25] Quoted from the statement of reasons for the decision no. DE HDM/00839/2021 of 16 July 2021 of the Mazowsze Province Sanitary Inspector in Warsaw, upholding the first instance decision: "as regards the issue of violation of the rules of administrative procedure, raised in the appeal, e.g. by the impossibility of active participation of a party in the proceedings and the argument referred to by the appellant, quotation: "(...) I had no possibility to present evidence of my lawful behaviour, or even any testimony of witnesses", Mazowsze Province Sanitary Inspector in Warsaw explained: The first instance body has not deprived the party of the possibility to provide explanations regarding the case, or to present evidence. In the issued decision, which was served on the legal representative of Mr …(...), there is information on the right to appeal. By filing an appeal, the party may challenge the decision and present their evidence. The fact that the appeal has been filed demonstrates that the party has been effectively informed of their rights and has exercised them. "; CHR Office case no. V.511.392.2020.

assessed negatively[26]. In his appeals, the Commissioner has argued that, firstly, the police are not entitled to make available any data of persons subject to their intervention to the State Sanitary Inspection units and, secondly, that a police officer's note, considered as admitted evidence, is not sufficient to impose a fine, and needs to be confirmed by other evidence (mainly explanations provided by the party). The evidentiary proceedings at a minimum (or even "zero") level, on the part of the authorities, often resulted in erroneous findings of those authorities as to the actual commitment of the violation by the party in question[27] and in the failure to establish any circumstances acceptable as reasons for imposing a fine, as set out in Article 189d of the Code of Administrative Procedure, including, in particular, the personal situation of the sanctioned person[28]. There have been decisions in which the State Sanitary Inspection authorities openly stated that it is their duty to take into account the personal situation of the party concerned only when the case is directly connected with a given aspect of the person's situation[29] or depends on other circumstance referred to in Article 189d. When issuing decisions imposing the sanctions, the authorities in most cases failed to take into account the provision of Article 189c of the Code of Administrative Procedure ordering to apply provisions more favourable for the party concerned. At least some of the authorities changed their position following

[26] More in: general intervention letter of the Commissioner for Human Rights to the Minister of the Interior and Administration of 28 May 2020, ref. no. V.519.2.2020, https://bip.brpo.gov.pl/pl/content/kary-administracyjne-dla-obywateli-na-podst-notatek-policyjnych-bez-podstaw-rpo-do-mswia

[27] Cf. cases described on the pages of Public Information Bulletin (BIP) of the Commissioner for Human Rights: cases of a person punished for "participation in the assembly", who found himself in a "police cauldron" while walking down the street on the route of the assembly, https://bip.brpo.gov.pl/pl/content/rpo-uchylono-10-tys.-kary-za-rzekomy-udzial-w-nielegalnym-zgromadzeniu; the case of a reporter documenting the protest in front of the presidential palace, https://bip.brpo.gov.pl/pl/content/rpo-skarzy-do-wsa-kar%C4%99-mazowieckiego-sanepidu-10000-zl: the case of the person who ran to the park after a dog taken off its leash https://bip.brpo.gov.pl/index.php/pl/content/rpo-uchylono-12-tys-kary-od-inspekcji-sanitarnej-za-wejscie-do-parku; the case of the person punished for organizing the meeting, but only handed out masks etc. https://bip.brpo.gov.pl/index.php/pl/content/rpo-sprawa-10-tys-z%C5%82-kary-za-rozdawanie-maseczek-wraca-do-sanepidu

[28] For example, the case of a psychiatrically treated man who left home during quarantine, https://bip.brpo.gov.pl/pl/content/rpo-uchylono-10-tys-z%C5%82-kary-dla-mezczyzny-po-udarze-meza-pielegniarki-po-kwarantannie

[29] Quoted from the decision no. DE ZNS/01295/2020 of 29 July 2020 of the Mazowsze Province Sanitary Inspector in Warsaw: "As regards the alleged violation of Article 189d(7) of the Code of Administrative Procedure, the appeal body has concluded that the Commissioner for Human Rights has been wrong to state that when imposing an administrative fine, the body must take into account the party's personal circumstances which include their family, financial situation and salary. Personal circumstances of a party are a broader concept (covering also health condition and physical condition) and, although the party's financial situation falls within this scope, its analysis is necessary only if it is justified by the nature of the legislative provision for whose violation a fine is to be imposed, i.e. if there is a real connection with the action of the perpetrator of the administrative offence. In As regards acts for which a fine may be imposed, such conditions may be relevant if, on their basis, the person's responsibility may be excluded (no fault) or reduced (act committed in the situation of absolute necessity) or the degree of fault may be considered greater (an act deserving special moral condemnation by the society). In the case under consideration, the amount of the fine has been determined mainly based on the degree of threat to the health and life of other people caused by the action of the party to the proceedings"; CHR Office case no. VII.716.6.2020.

interventions of the Commissioner who, in the appeals filed by him, pointed to the necessity to apply Article 189c[30]. However, the Mazowsze Province Sanitary Inspector has not discontinued the practice of violating the above-mentioned standard and continues to support the position that the change in the restrictions is irrelevant for the imposition of the fine. As regards the serving of decisions, the authorities ignored the provision of Article 98 of the *Act on special solutions*[31], which prohibits the so-called fictitious serving of a document. The authorities were not able either to differentiate between the double notification period and the time limit for appeal[32].

According to the information gathered in the process of examining cases undertaken by the Commissioner, as well as to media reports, it has been common to use the police to carry out actions aimed at imposing the fines (starting from using police officer's notes as the only evidence in the case, as already mentioned, to the service of the administrative decisions). There have been situations where a citizen was informed by telephone that a decision was available at the local police station and they should collect it. As regards the issue of the use of police officers for servicing the decisions, it raised significant objections on the part of the Commissioner. They were set out in his letters to the Chief Sanitary Inspectorate and the National Police Headquarters, and in the inquiries regarding the formal basis of such cooperation[33]. The issue has not been clarified to date.

An example of a clear violation has been the imposition of by the State Sanitary Inspection authorities of fines for non-observance of the requirement to cover one's mouth and nose. The Council of Ministers had the possibility to introduce such an obligation on 29 November 2020 at the earliest[34], as before there had been no legal grounds for it in the form of an act of parliament (and no administrative fines for the violation of the obligation is provided for in the Act). Fines were also imposed for acts not connected at all with the obligations, orders or prohibitions said to be arising from the regulation. For example, fines were imposed for taking part in assemblies, although the regulation prohibited only the organization of assemblies and not the

[30] Cf. cases connected with the prohibition to stay at public places, as described on the website of the Public Information Bulletin (BIP) of the Commissioner for Human Rights: https://bip.brpo.gov.pl/index.php/pl/content/sprawa-rowerzysty-z-wadowic-rpo-przystapil-do-postepowania-10000-zl-kary-sanepid, https://bip.brpo.gov.pl/pl/content/rpo-kolejna-administracyjna-kara-pieniezna-uchylona-bo-zakaz-juz-nie-obowiazuje

[31] The *Act on special solutions* in the wording in force until 20 August 2020 (Dz. U. [Journal of Laws] of 2020, item 695).

[32] Cf.: The case described on the website of the Public Information Bulletin (BIP) of the Commissioner for Human Rights at: https://bip.brpo.gov.pl/pl/content/20-tys-kary-z-sanepidu-przywrocenie-termin-odwolania-rpo-wsa

[33] CHR Office case no. V.565.301.2020.

[34] Article 15(2c) of the *Act of 28 October 2020 amending certain acts in connection with countering emergencies related to the COVID-19 outbreak* (Journal of Laws 2020, item 2112).

participation in them, or for failing to keep a distance of 2 metres from another person who was standing still, although the regulation referred to the distance between two persons moving at the same time[35].

As a result, there has been a large number of complaints against the decisions of the State Sanitary Inspection authorities filed with administrative courts either by citizens themselves or by the Commissioner for Human Rights. The overwhelming majority of cases pending before administrative courts and concerning administrative fines for violations of restrictions introduced by regulations of the Minister of Health and of the Council of Ministers are resolved to the benefit of the sanctioned citizens[36]. Decisions imposing the fines are, depending on the assessment made by the court in a particular case, revoked or even declared invalid due to the lack of legal basis for imposing the fine (Article 156(1)(2) of the Code of Administrative Procedure[37]). The courts' statements of reasons for the judgments are mostly convergent due to the fact that courts find similar or even the same legal flaws in the examined decisions. The statements are, in most cases, based on the fact that the fines have been imposed without a legal basis[38] and that the authorities have failed to comply with the fundamental principles of conducting explanatory proceedings under the administrative procedure[39]. The courts have therefore shared the Commissioner's allegations and raised in his appeals challenging the decisions and his complaints to administrative courts on behalf of citizens in their individual cases.

3. Quarantine

At the time of the announcement of the state of epidemic threat, regulations were issued by the Minister of Health, and subsequently by the Council of Ministers, imposing the obligation of quarantine for persons entering Poland from abroad. The obligation of border quarantine was modified during the epidemic, both with regard to

[35] Cf. e.g. the case described on the website of the Public Information Bulletin (BIP) of the Commissioner for Human Rights at: https://bip.brpo.gov.pl/index.php/pl/content/rpo-sanepidu-o-10-tys-2-m-zgromadzenie

[36] For example, in the Central Database of Judgments of Administrative Courts, as of 3 November 2021, there were 74 judgments of the Mazowsze Province Administrative Court in Warsaw upholding complaints against decisions imposing fines; only in one case a complaint was dismissed (judgment of 27 January 2021, case ref. no. VIII SA/Wa 767/20).

[37] Act of 14 June 1960 (Dz. U. [Journal of Laws] 2021, item 735, as amended).

[38] Due to non-indication of the sanctioned norm in an act of parliament, and to the unconstitutionality of the regulations introducing the restrictions, orders and prohibitions. For example, in its judgment of 6 July 2021, case ref. no. VII SA/Wa 2304/20, the Supreme Administrative Court in Warsaw found that "The restrictions on the freedom of movement, referred to by the sanitary authorities in the case in question, are explicitly set out in the regulation of the Council of Ministers of 2 May 2020. However, the aforementioned acts of parliament, in particular the Act on prevention of communicable diseases of 2008, contain no substantive provisions which expressly introduce, as parliamentary act provisions, any specific restriction on the constitutional freedom of movement which is guaranteed, after all, by Article 52(1) of the Constitution"; see also: https://bip.brpo.gov.pl/pl/content/rpo-wsa-uchylil-kare-sanepidu-za-brak-dystansu-strajk-przedsiebiorcow

[39] Articles 7, 75, 77 and 80 of the Code of Administrative Procedure, and Article 10(1) of the Code of Administrative Procedure in conjunction with Article 61(4) thereof.

the personal scope (the list of groups of persons exempt from the obligation was changed over time) and the material scope (initially, persons arriving from abroad by any means of transport were subject to the quarantine obligation but later the regulations were changed and in the case of arrivals from EU countries the obligation concerned only persons travelling by public transport i.e. by aircraft, train, bus or minibus). Leaving aside the issue of permissibility to introduce, by way of a regulation, any restrictions on the constitutional freedom of movement within the territory of the Republic of Poland and the freedom to leave its territory[40], the border quarantine obligation is in violation of the provisions of the *Act on prevention and control of infections and communicable diseases in humans*. The obligation to undergo quarantine has been introduced based on the sole criterion of having crossed the state border. However, according to the provisions of the Act, quarantine (isolation) is required of a healthy person who has been exposed to infection i.e. to entry into and development in the body of a biological agent. This cannot be automatically assumed as a fact for all persons who have crossed the state border, and has not been verified in any way within the procedure of referral to the border quarantine[41]. This opinion has been confirmed by the case law of administrative courts[42].

As a result of the amendment to the *Regulation of the Council of Ministers of 6 May 2021 establishing certain restrictions, orders and prohibitions in connection with the state of epidemic* (Dz. U. [Journal of Laws], item 861, as amended), different legal status has been introduced for people vaccinated against COVID-19 and for people not vaccinated against COVID-19, who have returned to Poland from abroad. Non-vaccinated persons are required to undergo quarantine after entering the country from abroad, while vaccinated persons are not required to undergo the quarantine. The aim of quarantine is to prevent the spread of infections causing dangerous diseases, by isolating people who are potential carriers of viruses and thus can be a source of infection for other people. Therefore, the quarantine obligation should be applicable to people who have been exposed to the SARS-CoV-2 virus, and the exclusion of certain groups of people from the obligation should be based on the criterion that they are not suspected of carrying the virus, or on the criterion of scientific evidence that, despite the presence of SARS-CoV in their bodies, the virus cannot be transmitted by them to

[40] Cf. part A.1. of this report, and the judgments of: the Supreme Administrative Court in Warsaw of 2 March 2021, case ref. no. VII SA/Wa 1542/20; the Supreme Administrative Court in Bydgoszcz of 20 April 2021, case ref. no. II SA/Bd 1060/20; and the Supreme Administrative Court in Kraków of 26 January 2021, case ref. no. III SA/Kr 924/20.

[41] The complaints filed with the Commissioner for Human Rights show that location data of people crossing the border were collected as a purely technical measure, and that the only verification concerned circumstances which, according to the regulations, exempt a person from the obligation to undergo border quarantine.

[42] Cf. judgment of the Provincial Administrative Court in Wrocław of 25 November 2020, case ref. no. IV SA/Wr 284/20, and judgment of the Provincial Administrative Court in Szczecin of 25 March 2021, case ref. no. II SA/Sz 658/20.

other persons and cause the COVID-19 disease. The results of scientific studies regarding the effects of the vaccines as a means of preventing the virus transmission to other people lead to the conclusion that the administration of a vaccine inhibits the transmission of the SARS-CoV-2 virus but not completely. This means that people vaccinated against COVID-19 can still transmit the coronavirus infection to others. Therefore, the legislator has differentiated the quarantine-related obligations of persons entering the country, based on the criterion of being vaccinated against COVID-19 , which does not guarantee that the vaccinated person cannot be a source of SARS-CoV-2 virus transmission. The different treatment of similar persons (entering Poland from abroad) has therefore no rational grounds and is not in line with the constitutional values, in particular the protection of human health. This raises concerns as to the constitutionality of the legal regulations establishing the border quarantine obligation for non-vaccinated persons. In connection with the above, the Commissioner sent a letter to the Ministry of Health, requesting that the reasons be indicated of the legislator's decision introducing the border quarantine obligation for persons not vaccinated against COVID-19 and, at the same time, excluding vaccinated persons from the obligation despite the fact that the vaccination does not guarantee complete inhibition of the coronavirus transmission. The Ministry of Health was also requested to present arguments confirming that the different treatment of similar people is in line with the requirements of the existing jurisprudence of the Constitutional Tribunal and, therefore, does not constitute illegal discrimination of citizens. The request has remained unanswered until today.

A situation that can be called a curiosity was the factual exclusion, for over ten hours, of the applicability of the regulations exempting vaccinated people from the obligation of quarantine after a contact with an infected person[43]. The provisions of the aforementioned Regulation of the Council of Ministers of 6 May 2021 imposed the quarantine obligation on household members of persons found to be infected with SARS-CoV-2 (Article 4(6) of the Regulation). At the same time, however, the regulation (Article 4(7)) clearly exempted persons vaccinated against COVID-19 from the quarantine obligation. The problem was caused by statements made by a representative of the Ministry of Health on the media. He first announced that vaccinated persons would also be subject to quarantine[44], and later changed the position[45]. During the hours that passed between the two statements,

[43] The problem was raised in the Commissioner for Human Rights' intervention letter to the Minister of Health of 6 July 2021, ref. no. V.7018.753.2021.

[44] https://www.polsatnews.pl/wiadomosc/2021-07-05/wariant-delta-kwarantanna-nawet-dla-zaszczepionych/, access on 02.11.2021.

[45] https://www.rmf24.pl/fakty/news-wariant-delta-w-polsce-rzad-wycofuje-sie-ze-zmian-ws-kwarant,nId,5341937#crp_state=1, access on 02.11.2021.

the Sanitary Inspection authorities imposed the quarantine obligation against the regulation and then, after the change of the Ministry's “position”, discontinued the practice.

The regulations establishing certain restrictions, orders and prohibitions in connection with the state of epidemic provide for the possibility to exempt a person from the quarantine obligation or to shorten the quarantine period in justified cases. Complaints filed with the Commissioner for Human Rights show that the State Sanitary Inspection authorities had problems with the application of these provisions. Persons subject to the quarantine obligation after entering the country from abroad applied, in many cases, for exemption from quarantine. It follows from the provisions referred to above that, having examined an application for exemption from quarantine, the State Sanitary Inspector should issue an administrative decision on the application. However, the Commissioner has come across a practice, by the State Sanitary Inspection authorities, of refusing the requests of the applicants by sending ordinary letters to them, without any statement of reasons or information on the right to appeal. As the said practice violates the procedural rights of citizens, the Commissioner requested the Chief Sanitary Inspector to introduce appropriate supervision measures to ensure that applications for exemption from quarantine are lawfully considered by all the State Sanitary Inspection authorities. Unfortunately, the Chief Sanitary Inspector has failed to exercise the supervision over the State Sanitary Inspectorate authorities. He considered the Commissioner’s letters of intervention to be complaints submitted under Section VIII of the Code of Administrative Procedure, and forwarded them to the Provincial Sanitary Inspectors for consideration. In this situation, the Commissioner was forced to send an intervention letter to the Minister of Health requesting him to order the Chief Sanitary Inspector to examine as a supervisory body, as requested by the Commissioner, the irregularities in the operation of the State Sanitary Inspectorate authorities and to take appropriate measures to eliminate them[46].

4. EU digital COVID certificates

On 1 July 2021, the EU digital COVID certificates came into use[47]. Their implementation in Poland encountered many problems. The Commissioner received complaints from citizens who, after a change of their PESEL number, lost access to

[46] Letter of 20 September 2021, ref. no. V.7018.65.2021, op cit. https://bip.brpo.gov.pl/pl/content/rpo-mz-gis-utrudnia-postepowanie-kwarantanna.

[47] Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 Regulation (EU) 2021/953 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (OJ EU.L no. 211 p. 1).

their EU digital COVID certificates already issued to them and confirming, inter alia, their vaccination against COVID-19. The situation should be considered to constitute deprivation of access to medical records by means of electronic communication, which is a violation of the provisions of the *Act of 6 November 2008 on Patient Rights and Patient Ombudsman* (Dz. U. [Journal of Laws] of 2020, item 849). Given that one of the reasons for changing the PESEL number may be a "change of sex"[48], the problems with access to EU digital COVID certificates, experienced by persons who have undergone the gender reassignment procedure, can also be perceived as indirect discrimination against them. The problem has been reported by the Commissioner[49] to the director of *e-Health Centre*, an entity which is the administrator of the IT system containing information on the vaccinations and is responsible, within the territory of the Republic of Poland, for issuing the EU COVID certificates, as well as to the Ministry of Health. In the opinion of the Commissioner, a citizen whose PESEL identification number has been changed should be issued a new EU COVID certificate by the e-Health Centre, with updated data of the applicant, including his/her identity.

In order to eliminate the reported problem the Ministry of Health has proposed a temporary solution for persons reporting loss of access to their digital EU COVID Certificate, due to a change of their PESEL number. The solution consist in entering the current data in a new vaccination card. This will make it possible to generate a new certificate in the current profile in the *Patient Internet Account* application. Also, development of a final solution of the problem has been announced, which will most likely require the implementation of new solutions into the eHealth system.

[48] Article 19(1)(2) of the *Act of 24 September 2010 on population census*.
[49] Case ref. no. V.7013.72.2021, https://bip.brpo.gov.pl/pl/content/zmiana-pesel-utrata-dostepu-do-cyfrowego-certyfikatu-szczepienia-rpo-interweniuje-w-mz

Part II. HEALTH CARE

1. Functioning of covid-related health care

Pursuant to the regulations of the special-status Act relating to covid[50] orders were given to transform certain multi-speciality hospitals into single-profile hospitals to provide care to patients requiring hospitalisation due to a suspected or existing COVID-19 infection. Managers of the facilities were required to change their organisational structure in a very short time. This took place without any guidance or directions for the operation of such facilities, which resulted in organisational chaos and misinformation among both medical staff and patients. Covid departments were often established without verifying whether the required technical conditions were met (e.g. whether the ventilation system was sufficiently good)[51]. Personal protection equipment to be used in situations of suspected COVID infection by medical personnel was not ensured in sufficient amounts, which increased the problem of staff shortages[52]. Attention should be paid to the overcrowding of hospitals during the pandemic, in particular in regions with large numbers of COVID-19 infections and low numbers of vaccinated people. The number of COVID-19 patients at the peak of the pandemic caused the conversion of regular hospital departments into covid ones, which often was done at the expense of care for other patients and which generated additional costs. The issue of insufficient financial resources for the health care system, including hospitals[53], remains unsolved.

During the COVID-19 pandemic the lack of coordination between the ambulance service units and hospitals has been seen. There have been queues of ambulances waiting for hours in front of hospitals, as well as deaths of patients inside ambulances[54]. Despite the reorganisation of the National Ambulance Service and the increased funding for it, other problems in its operation have clearly not been eliminated either. These problems include: insufficient number of staff; care provision by hospital emergency units to patients who, in fact, do not require care within the

[50] *Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused thereby* (Journal of Laws of 2020, item 374, as amended), Articles 11(1) and (4).
[51] Letter of 15 October 2020. V.7010.199.2020.ET/PM, cf. furthermore https://bip.brpo.gov.pl/pl/content/rpo-do-mz-nfz-jak-poprawic-dramatyczna-sytuacje-sluzby-zdrowia
[52] Letter of 17 March 2020, ref. no. V.7018.84.2020.ET, more in: https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-przekazuje-pytania-lekarzy-kiedy-dostaniemy-skuteczne-srodki-ochrony-i-testy
[53] Letter of 12 November 2020, ref. no. V.7013.145.2020.ET/GH/PM, more in: https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-najwazniejsze-problemy-systemu-ochrony-zdrowia
[54] Letter of 12 November 2020, ref. no. V.7013.145.2020.ET/GH/PM, more in: https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-najwazniejsze-problemy-systemu-ochrony-zdrowia

emergency system; long waiting time at emergency departments; and non-observance of time limits for an ambulance team to reach a patient in need of emergency care[55]. The situation has not been improved by the lack of a professional organisation of paramedics, which would be a joint body representing the profession[56].

Medical facilities have experienced shortages of ventilators and of staff, in particular nurses, who could operate them, as well as insufficient availability of training in the use of the devices. According to the opinion of the medical community, the experience and knowledge required to operate ventilators is so broad that training in their use, in order to ensure safety for the patients, has to take a long time which was not the case during the pandemic[57]. A course ensuring the provision, to a nurse or midwife, of knowledge and skills required to provide a specific health care service within a particular area of specialisation, for example a course for nurses in anaesthetics and intensive care nursing, lasts up to 6 months[58].

The problem of staff shortages and inadequate remuneration of medical personnel still remains unsolved[59]. Currently, due to shortages of medical personnel such as paediatricians, neurologists or internal medicine specialists, the work of some hospital departments is suspended. The situation is not improved by resignations of doctors who thereby express their disagreement to the existing situation in the health care sector, or by protests of medics (the so-called 'white towns"). Objections are also raised with regard to the regulations[60] as a result of which, according to some representatives of the medical professions, their remuneration is unjust and inadequate to the work of their professional groups[61].

2. Functioning of non-covid health care

As a result of the health care sector not being prepared to combat the COVID-19 pandemic problems have occurred with access to adequate health care services by patients suffering of other diseases or conditions. Most importantly, adequate health care has not been provided to persons with emergency health conditions, in particular

[55] Cf. Information of the Supreme Audit Chamber on results of the audit of the emergency medical services system, carried out on 29.12.2020, ref. no. 176/2020/P/19/105/LWA.
[56] Letter of 13 October 2020, ref. no. V.7010.155.2020.GH; more in: https://bip.brpo.gov.pl/pl/content/rpo-ratownicy-medyczni-jedyny-zawod-medyczny-bez-samorzadu
[57] Letter of 12 November 2020, ref. no. V.7013.145.2020.ET/GH/PM, more in: https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-najwazniejsze-problemy-systemu-ochrony-zdrowia
[58] Pursuant to Article71(1) of the *Act of 15 July 2011 on the professions of nurse and midwife* (Dz. U. [Journal of Laws] of 2021, item 479 as amended).
[59] The CHR's letters: of 15 October 2020, ref. no. V.7010.199.2020.ET/PM and of 24 November 2020, ref. no. V.7018.1008.2020.ET cf. furthermore https://bip.brpo.gov.pl/pl/content/rpo-do-mz-nfz-jak-poprawic-dramatyczna-sytuacje-sluzby-zdrowia, https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-do-mz-dramatyczna-sytuacja-oddzialow-covidowych
[60] *Act of 8 June 2017 on the methods of calculating lowest basic salaries of certain employees of medical facilities* (Dz. U. [Journal of Laws] of 2021, item 1801).
[61] Letter ref. no. V.7014.5.2021.ET of 1 April 2021.

with cardiovascular diseases or hypertension problems, as well as to persons with dental problems, with chronic diseases including oncological ones, and persons in urgent need of physiotherapy e.g. after a car accident. The chaos in the work of the public health care system has been increased by the cancellation of scheduled appointments and surgical operations. Outpatient clinics cancelled patients' follow-up appointments. Moreover, examinations for pregnant women, such as ultrasound examinations, were cancelled, some gynaecology facilities were closed, birth school activities were cancelled, and local midwives' post-birth care was not sufficiently available. Cardiology procedures were also cancelled or postponed without scheduling new dates for them. This resulted in long waiting lists for cardiology procedures. At the same time, patients were not given clear information on where they could receive the required health care in the event a given medical facility limited the admissions. The situation caused, without any doubt, a real threat to human life and health[62].

During the COVID-19 pandemic, emergency health care had to be provided to patients by those medical facilities which were not assigned, as single-profile hospitals, to the infectious disease treatment. There were concerns that patients, particularly those with emergency conditions requiring inpatient care or in-person appointment with a doctor, would not actually get it[63]. After the transformation of some multi-speciality hospitals into single-profile hospitals, which was done on the basis of the special-status Act on covid [64], voivodes (province governors) also required the non-transformed hospitals to suspend the planned admissions and surgical operations. The Polish National Health Fund issued an announcement for health care providers stating that in order to minimise the risk of COVID-19 transmission it was recommended to reduce to a minimum level, or to temporarily suspend, medical procedures already scheduled or to be provided according to the treatment plan[65]. Also, the National Health Fund informed that some of the medical services could be provided using IT systems or other communication systems. It permitted the provision of such consultations also by specialists e.g. in oncology, cardiology or neurology. It is indisputable that in some cases telemedicine can ensure the continuity of healthcare provision. However, there are situations in which a remote consultation is not sufficient and an in-person appointment must not be cancelled or postponed. There have been concerns that

[62] Letter of 12 November 2020, ref. no. V.7013.145.2020.ET/GH/PM, more in: https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-najwazniejsze-problemy-systemu-ochrony-zdrowia
[63] Letter of 30 June 2020 and of 24 March 2020, ref. no. V.7010.38.2020.ET, more in: https://bip.brpo.gov.pl/pl/content/sluzba-zdrowia-walczy-z-koronawirusem-i-nie-daje-rady-zapewnic-wlasciwej-opieki-innym-chorym
[64] Article 11(1).
[65] Recommendations for health care providers regarding health care provision principles connected with the prevention and control of COVID-19, published on 15.03.2020. https://www.nfz.gov.pl/aktualnosci/aktualnoscicentrali/komunikat-dla-swiadczeniodawcow-w-sprawie-zasad-udzielania-swiadczen-opieki-zdrowotnej,7646.html

patients, in particular those with emergency conditions, who require health care provision at a medical facility and an in-person appointment, will not actually receive it. The legislation is clear that in emergency cases the required health care services have to be provided to the patient immediately[66].

Due to the limited access to health care services, patients have been forced to seek them from private health care providers although such services are not refunded to them. The *Act on health care services* does not provide for the possibility for a person insured under the public health care system to seek a refund of the costs of medical examinations or treatment outside the public system, even if the medical procedure in question is classified as a guaranteed medical service. The Act stipulates that the cost of a health care service provided by a health care provider having no contract with the National Health Fund may be refunded but only if the service has been provided as an emergency one and solely within the necessary extent. The refund is, however, made to the health care provider and not to the insured patient[67]. Concerns have been raised by the underestimated amounts of refund for care at children's home hospices[68]. Also, it should be noted that people with cancer, i.e. citizens who should receive special care within the health care system, have experienced difficulties in accessing the required procedures. In particular, problems in access of oncology patients to treatment under the emergency drug access procedure have been clearly seen[69].

The state of pandemic has deteriorated the situation in the field of psychiatric care for both children and adults, which already had been at the verge of capacity. In connection with COVID-19, psychiatric departments were closed and their patients, although requiring further medical care, were sent home. Only the most severe cases could count on the continuation of hospital treatment[70]. Moreover, the reform of the psychiatric care system - consisting in the establishment of first-level care facilities as the foundation of the new psychiatric care system for children and adolescents - coincided with the outbreak of the pandemic and thus failed to meet the needs of young patients. The community work, in practice, was not carried out and the

[66] Article 19 of the *Act of 27 August 2004 on publicly financed health care services* (Dz. U. [Journal of Laws] of 2021, item 1285, as amended, hereinafter: the Act on health care services). The basis for the provision of health care services financed by the National Health Fund from public funds is an agreement between the health care provider and the fund (Article 132 of the aforementioned act). In the event of an impossibility to provide health care services, which could not have been foreseen earlier, the health care provider shall immediately undertake steps to maintain the continuity of the provision of the services, and shall notify the President of the Fund thereof (Article 9 of the *Regulation of the Minister of Health of 8 September 2015 on general terms of contracts for health care service provision*, Dz. U.[Journal of Laws] of 2020, item 320 as amended, hereinafter: the regulation on general terms of contracts).

[67] Article 19 of the *Act on publicly financed health care services*.

[68] Letter of 3 October 2021, ref. no. V. 7012.14.2021.ETP.

[69] Letter of 28 June 2021, ref. no. V.7013.58.2021.ET, more in: https://bip.brpo.gov.pl/pl/content/rpo-mz-chorujacych-na-raka-nie-wolno-pozostawiac-samych-sobie

[70] Letter of 5 November 2020, V.7016.104.2020.

consultations were limited to remote ones. Furthermore, the number of the facilities contracted by the National Health Service has been insufficient to meet the increasing needs of children and adolescents.

The COVID-19 pandemic has affected the manner and organisation system of health care service provision. However, protection against infections must not be pursued without taking into account other values of fundamental importance for patients. The patients' right to have a close person with them during health service provision and to maintain contacts with other persons is regulated in the *Act on patient rights and Patient Ombudsman*[71]. The provisions stipulate that, due to an epidemic or other reasons posing a risk to people's health, visits to hospitals may be limited but not fully prohibited so as to deprive patients of their rights. Restrictions in this field can pose a real risk to the possibility to maintain ties between patients and their relatives, in particular if relatives intend to stay with patients in terminal condition, or to say last farewell to a deceased person in a dignified manner[72].

In connection with the COVID-19 National Vaccination Programme and the vaccination of a large number of people at risk of severe COVID-19 infection, recommendations have been drawn up for visiting patients at hospitals with the use of appropriate means of infection prevention and control[73]. However, the recommendations fail to address the problem comprehensively. They do not take account e.g. of the organisation of visits to minor patients in paediatric departments (and other hospital departments) by their parents or guardians[74] or of specific cases such as a farewell visit to a terminally ill patient[75]. The failure of the Minister of Health to take a clear position on the issue has caused informational and organisational chaos.

Problems have also been noticed in the form of the lack of recommendations on nursing care provision during the pandemic, and on difficulties faced by parents

[71] Article 21, Article 33(1) and Article 5 of the *Act of 6 November 2008 on patient rights and Patient Ombudsman* (Dz. U. [Journal of Laws] of 2020, item 849, hereinafter: *Act on patient rights*).
[72] Letter of 12 November 2020, ref. no. V.7013.145.2020.ET/GH/PM, more in: https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-najwazniejsze-problemy-systemu-ochrony-zdrowia
[73] Recommendations of the Ministry of Health and the Chief Sanitary Inspectorate on the organization of visits to patients in hospital departments during the COVID-19 epidemic in connection with the progress of the National Programme of Vaccination against COVID-19, Warsaw, 6 September 2021 https://www.gov.pl/web/zdrowie/rekomendacje-ministerstwa-zdrowia-i-glownego-inspektoratu-sanitarnego-dotyczace-odwiedzin-w-szpitalach-w-zwiazku-z-postepem-realizacji-narodowego-programu-szczepien
[74] Related recommendations have been published on the website of the Ministry of Health, https://www.gov.pl/web/zdrowie/wytyczne-dla-poszczegolnych-zakresow-i-rodzajow-swiadczen (Point 6. Paediatrics; materials for downloading).
[75] Guidelines in this area have been developed by the National Consultant in Epidemiology, and published online by the PZH National Institute of Public Health - National Research Institute: https://www.pzh.gov.pl/wp-content/uploads/2020/06/zalecenia-dla-plac%C3%B3wek-dot.-odwiedzin-os%C3%B3b-umieraj%C4%85cych.pdf

intending to provide care to their minor children as patients during the COVID pandemic-19[76]. In practice, difficulties in access to family-attended/close person-attended childbirth are still experienced[77].

3. COVID-19 vaccination programme

The Regulation of the Council of Ministers of 14 January 2021[78] amended the *Regulation of the Council of Ministers of 21 December 2020 establishing certain restrictions, orders and prohibitions in connection with the state of epidemic* has been amended[79] by inserting Chapter 3a "Vaccinations against COVID-19". Its provisions set out the rules (sequence) of access by citizens to COVID-19 vaccination. The regulation has been issued pursuant to Article 46a and Article 46b points 1-6 and 8-13 of the *Act of 5 December 2008 on prevention and control of infections and communicable diseases in humans* [80]. These articles do not provide, however, for any statutory powers to indicate specific groups of persons to be vaccinated if the vaccination in question, as against COVID-19, is not compulsory. Consequently, the provisions do not provide a basis for regulating, in the said regulation, the sequence of access to the vaccinations which are voluntary[81].

The status of vaccination against SARS-CoV-2 is also problematic (the vaccine is not listed as a vaccine recommended under Article 19 of the *Act on prevention and control of infections and communicable diseases in humans*, and the guaranteed service basket has not been amended so as to include it, either)[82]. The criteria for the priority groups' selection are problematic too (e.g. they disregard persons who, under Article 47c of the Act on health care services, have the right to use such services beyond the waiting list; persons who are carers of patients under palliative care, persons with disabilities and their carers, persons with chronic diseases such as multiple sclerosis, etc.)[83]. Problems were also identified at the stage of the vaccine distribution and with the vaccination process organisation[84]. A major obstacle has been insufficient access to mobile

[76] Letter of 14 October 2021, ref. no. V.7013.92.2021.ETP.
[77] Letter of 31 March 2020, , ref. no. V.7010.45.2020.ET; letter of 18 May 2020, ref. no. V.7010.45.2020.ET; letter of 8 July 2020, ref. no. V.7010.125.2020.ET; letter of 3 June 2020, , ref. no. V.7010.114.2020.ET; letter of 7 July 2020, ref. no. V.7010.45.2020.ET, more in: https://bip.brpo.gov.pl/pl/content/koronawirus-ponowna-interwencja-rpo-do-mz-nfz-ws-porodow-rodzinnych
[78] (Dz. U. [Journal of Laws], item 91).
[79] (Dz. U. [Journal of Laws], items 2316, 2353 and 2430, and of 2021 item 12).
[80] (Dz. U. [Journal of Laws] of 2020, items 1845, 2112 and 2401).
[81] https://bip.brpo.gov.pl/pl/content/rpo-rzad-nie-mial-podstaw-do-okreslenia-kolejnosci-szczepien-przeciw-koronawirusowi
[82] Letter of 5 January 2021, ref. no. V.7018.3.2021.ŁK.
[83] Letter of 30 December 2020, ref. no. V.7018.1033.2020.ET and letter of 14 January 2021, ref. no. 7018.61.2021.ET, more in: https://bip.brpo.gov.pl/pl/content/rpo-sposob-organizacji-szczepien-koronawirusa-budzi-watpliwosci
[84] Letters of 16 April and 14 May 2021, ref. no. V.7018.82.2021.ET/GH, more in: https://bip.brpo.gov.pl/pl/content/koronawirus-kolejki-do-szczepien-i-podstawa-prawna-formularza-do-

vaccination points for people who are bedridden or have difficulty with moving around independently[85]. It was also necessary to ensure vaccination for persons experiencing homelessness by establishing temporary vaccination points for them[86]. The organisation of the vaccination process has failed to take into account the numerous constraints faced by older persons and persons with disabilities[87].

zapisania-sie-na-szczepienia-rpo-kprm; letter of 6 April 2021, ref. no. V.7018.419.2021.ŁK, more in: https://bip.brpo.gov.pl/pl/content/%E2%80%8B%E2%80%8B%E2%80%8B%E2%80%8B%E2%80%8B%E2%80%8Brpo-osoby-40-59-lat-musza-wyrazic-gotowosc-do-szczepien

[85] Letter of 21 January 2021, ref. no. V.7018.90.2021.GH, more in: https://bip.brpo.gov.pl/pl/content/rpo-mobilne-punkty-moglyby-szczepic-pacjentow-w-domach

[86] Letter of 2 June 2021, ref. no. V.7018.664.2021.ET, more in: https://bip.brpo.gov.pl/pl/content/rpo-do-mz-ulatwic-szczepienia-osob-w-kryzysie-bezdomnosci, https://bip.brpo.gov.pl/pl/content/szczepieni-pracownicy-noclegowni-i-ogrzewalni-koronawirus

[87] More in: https://bip.brpo.gov.pl/sites/default/files/Raport%20z%20badan%20dostepnosci%20szczepien%20dla%20osob%20starszych.pdf

Part III. ENTREPRENEURS

1. Restrictions and prohibitions regarding the conduct of business activity

The announcement of the state of epidemic on the territory of the Republic of Poland was accompanied by significant restrictions on the freedom to conduct business activity, which were introduced by regulations of the Minister of Health and, subsequently, the Council of Ministers. The comments contained in chapter 1.1 hereof apply also to the defects of the legal basis of introducing the restrictions in which, however, also other defects can be found.

The main defect has been the fact that the Council of Ministers exceeded the powers granted to it[88]. The Act of 8 December 2008 (Article 46b(2) thereof) assigns to the Council of Ministers the powers to introduce "restrictions on entrepreneurs' activity within a specific scope". It should be emphasised, however, that a restriction is not the same as a prohibition to conduct a given activity within a specific scope (and the Council of Ministers expressly introduced prohibitions with respect to certain industries). The legislator, in constructing the statutory powers, has used both the term "restriction" and the term "prohibition". This precludes the two forms of interference with the freedoms and rights of individuals from being considered the same. The statutory authorisation requires that the introduced restriction "be temporary", which criterion was not met because of the use of the phrase "until further notice" in the regulation. Over time, the subsequent regulations set specific time limits for the prohibitions[89], but their "temporary nature" was only apparent as they were regularly extended[90].

The frequent (and unexpected) changes of regulations introducing the restrictions on the conduct of business activity posed a significant difficulty for entrepreneurs, in

[88] The issue was raised by the Commissioner for Human Rights in his intervention letters to the Prime Minister; cf. letter of 4 June 2020, ref. no. VII.565.461.2020, https://bip.brpo.gov.pl/pl/content/raport-rpo-dla-premiera-nt-prawa-w-stanie-epidemii and letter of 26 October 2020, ref. no. V.7018.910.2020, https://bip.brpo.gov.pl/pl/content/rpo-do-premiera-najnowsze-nakazy-zakazy-nadal-sprzeczne-z-konstytucja

[89] A limit was set for the first time in the regulation of 26 November 2020 (Journal of Laws item 2091, as amended), establishing "the prohibition to carry out (...) business activity" in selected industries "until 27 December 2020".

[90] For example, the prohibition to operate discotheques and nightclubs, introduced by the regulation of 26 November 2020 (Dz.U.[Journal of Laws] item 2091, as amended) until 27 December 2020 was subsequently extended a number of times until: 17 January 2021, 31 January 2021, 14 February 2021 and 28 February 2021 (Regulation of 21 December 2020, Dz. U. 2316, as amended), 14 March 2021 and 28 March 2021 (regulation of 26 February 2021, Dz.U. item 447, as amended), 9 April 2021, 18 April 2021, 25 April 2021, 3 May 2021 and 7 May 2021 (regulation of 19 March 2021, , Dz.U. item 512, as amended), 5 June 2021 and 25 June 2021 (regulation of 6 May 2021, Dz.U. item 861, as amended).

particular those running small enterprises. The Commissioner is aware of cases of administrative fines imposed on Monday for violating a prohibition to conduct business activity, which was introduced one day before[91]. Also, the choice of industries affected by the prohibitions often seemed a random one[92]. Such legislative practices cannot be considered consistent with the right to legal certainly, required of the legislator[93].

Despite the "commonly known deficiencies on the part of the legislator"[94],the prohibitions and restrictions on the conduct of business activity, introduced by regulations of the Minister of Health, were enforced by the State Sanitary Inspection although in many cases they have been challenged before administrative courts[95]. The observance of the prohibitions and restrictions introduced by the regulations was controlled by way of legally questionable practices of inspecting authorities. One of the practices consisted in concealing the real purpose of the inspection (and stating that the purpose was the verification of hygiene and health requirements in meal preparation and serving), and in issuing a decision imposing a fine for violating the restrictions only in addition). The practice caused an intervention of the Commissioner[96].

The State Sanitary Inspection authorities also took attempts to stop the conduct of business activity by entrepreneurs not complying with the prohibitions and restrictions introduced in the conditions described above, which was done by means of individual administrative decisions issued on the basis of Article 27(2) of the *Act on State Sanitary Inspection*[97]. The Article provides, inter alia, for the possibility to suspend the operation of an enterprise or part thereof if its operation violates health and safety requirements, thus causing a direct threat to human life or health. The existing jurisprudence of the administrative courts, related to entrepreneurs' appeals against decisions suspending the operation of their enterprises, leads to the conclusion that in some cases (failure to observe the sanitary requirements e.g. by overcrowding of restaurants or clubs or to wear masks), the application of Article 27(2) of the *Act on*

[91] In the case ref. no. V.7018.1056.2020, the Commissioner filed an appeal with the Provincial Administrative Court in Warsaw against the decision imposing an administrative fine under such circumstances.
[92] An example was the exclusion of casinos from the prohibition, which was subsequently given up by the Council of Ministers after public criticism https://www.money.pl/gospodarka/kasyna-jednak-maja-byc-zamkniete-na-brak-klientow-nie-narzekaly-6588983117077280a.html, access on 2 November 2021.
[93] Cf. preamble to the *Act of 6 March 2018 - Law on Entrepreneurs* (Dz.U. [Journal of Laws] of 2021, item 162).
[94] The term has even been used in a judgment upholding the restrictions on business activity, introduced by way of regulations, see: the non-binding judgment of the Voivodship Administrative Court in Bydgoszcz of 17 November 2020, case ref. no. II SA/Bd 834/20, appealed, among others, by the Commissioner for Human Rights.
[95] Cf. chapter 1.2 of hereof.
[96] Case ref. no. V.7018.198.2021, https://bip.brpo.gov.pl/index.php/pl/content/rpo-sanepid-zasady-kontrolowania-przedsiebiorcow-otwieraMY
[97] Act of 14 March 1985 (Dz. U. [Journal of Laws] of 2021, item 195).

State Sanitary Inspection was permissible[98] but the mere fact of conducting an activity "prohibited" by the Council of Ministers' regulation could not constitute grounds for the application of the said Article[99]. The question of the permissibility and application of Article 27(2) of the *Act on State Sanitary Inspection* in connection with the SARS-CoV-2 epidemic will undoubtedly be a subject of a judgment of the Supreme Administrative Court. Regardless of whether the permissibility to apply the norm is confirmed by the court or not, the application of the tool by the Sanitary Inspection authorities leads to the conclusion that the legislative activities of the Council of Ministers were not effective.

2. Financial support for entrepreneurs

In connection with the introduction, on 14 March 2020, of the prohibition to conduct business activity in a number of industries the Commissioner for Human Rights started to receive entrepreneurs' complaints regarding the decision of the authorities. Apart from the constitutional concerns, mentioned in the previous chapters hereof[100], entrepreneurs expected specific declarations and solutions from the authorities as to when and under what conditions they would be able to restart their business activities. Since the beginning of the pandemic the Commissioner has kept the Ministry of Economy[101] informed of the problems and needs of entrepreneurs. As an expression of his engagement in the protection of their rights, in May 2020 the Commissioner sent an intervention letter to the Minister of Development, Labour and Technology[102], requesting that steps be taken to regulate the legal situation of entrepreneurs during and immediately after the pandemic, and called for starting partnership consultations. The Commissioner was particularly concerned[103] with the strong and repressive reaction of the police against entrepreneurs loudly manifesting their dissatisfaction with the actions of the authorities[104].

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[98] Cf. judgments of the Voivodship Administrative Court in Białystok of 24 June 2021, case ref. no. II SA/Bk 393/21 pr. and of 23 September 2021, case ref. no. II SA/Bk 534/21 npr.; at this point note should also be taken of the position presented in the statement of reasons for the judgment of the Voivodship Administrative Court in Gliwice of 17 August 2021, case ref. no. III SA/Gl 648 npr, according to which a violation of a restriction (not a prohibition) on conducting business activity, introduced by a regulation of the Council of Ministers, may be regarded as a violation of sanitary health requirements, thus permitting the application of Article 27(2) of the Act on State Sanitary Inspection.

[99] The Voivodship Administrative Court in Poznań in its judgment of 15 July 2021, case ref. no. IV SA/Po 481/21 pr.

[100] See chapters 1.1. and 3.1 hereof.

[101] The Ministry of Development, Labour and Technology at that time.

[102] Case ref. no. V.7100.26.2020.BA, https://bip.brpo.gov.pl/pl/content/koronowirus-jak-panstwo-ma-pomagac-przedsiebiorcom-rpo-do-jadwigi-emilewicz, access on 29.10.2021.

[103] https://bip.brpo.gov.pl/pl/content/stanowisko-rpo-w-sprawie-demonstracji-przedsiebiorcow-16-maja-2020-r, access on 29.10.2021.

[104] Cf. Commissioner for Human Rights' intervention letters connected with entrepreneurs' protests in May 2020 ref. no. II.519.549.2020.PS https://bip.brpo.gov.pl/pl/content/rpo-pyta-policje-o-likwidacje-miasteczka-przedsi%C4%99biorcow-pod-sejmem; https://bip.brpo.gov.pl/pl/content/rpo-zatrzymanie-dziennikarza-na-

The prohibition to conduct business activity, introduced overnight, also resulted in an influx of complaints from entrepreneurs deprived of their often sole source of income, on which the lives of their entire families were dependent. This impacted in particular entrepreneurs in the following sectors: HORECA, transport (passenger transport), culture, entertainment, fitness and beauty, as well as trading in various goods not considered necessity goods.

To improve the situation of entrepreneurs, the so-called anti-crisis shield[105] was introduced, which soon proved insufficient and was followed by subsequent shields[106]. Hasty development of the related legislation, without sound knowledge of the actual needs of entrepreneurs resulted in legislative flaws[107]. They, in turn, entailed further legislative changes[108], which made it difficult for the entrepreneurs to understand the available financial aid options. The complex procedures of applying for the aid also caused problems. Entrepreneurs were required to fill in long applications and make detailed statements subject to criminal liability. The filed complaints showed that the degree of complexity of the procedures, in connection with the dynamic changes in the

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demonstracji-narusza-wolnosc-mediow; https://bip.brpo.gov.pl/pl/content/rpo-pyta-stolecznego-komendanta-policji-o-szczegoly-interwencji-16-maja; https://bip.brpo.gov.pl/pl/content/rpo-protestuje-przeciwko-zaklamywaniu-we-wpisach-komendy-stolecznej-policji-na-twitterze-roli-rpo; https://bip.brpo.gov.pl/pl/content/wydarzenia-7-8-maja-2020-w-swietle-odpowiedzi-policji-dla-rpo; https://bip.brpo.gov.pl/pl/content/stoleczna-policja-odpisala-rpo-ws-interwencji-16-maja; https://bip.brpo.gov.pl/pl/content/informacja-policji-dla-rpo-o-interwencji-23-maja-2020-w-warszawie; https://bip.brpo.gov.pl/pl/content/stoleczna-policja-bezzasadnie-zatrzymuje-manifestantow-rpo-do-senatu, access on 29.10.2021.

[105] The first shield (*Act of 31 March 2020 amending the Act on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused thereby and certain other acts*, Dz. U. [Journal of Laws] of 2020, item 568).

[106] Shield 2.0 (*Act of 16 April 2020 on special support measures connected with the spread of the SARS-CoV-2 virus*, Dz. U. [Journal of Laws] of 2020, item 695); Shield 3.0 (Act of 14 May 2020 amending the Act *on special support measures connected with the spread of the SARS-CoV-2 virus*, Dz. U. [Journal of Laws] of 2020, item 875); Shield 4.0 (*Act of 19 June 2020 on subsidies to bank loan interests for entrepreneurs affected by the COVID-19 epidemic and on simplified proceedings arrangements in connection with the COVID-19 epidemic*, Dz. U. [Journal of Laws] of 2020, item 1086); Shield 5.0 (Industry Shield; *Act of 7 September 2020 amending the Act on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused thereby and certain other acts*, Dz. U. [Journal of Laws] of 2020, item 1639), Shield 6.0 (*Act of 9 December 2020 amending the Act on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused thereby and certain other acts*, Dz. U. [Journal of Laws] of 2020, item 2255); Shield 7.0 (*Regulation of the Council of Ministers of 19 January 2021 on support for entrepreneurs affected by the COVID-19 pandemic* (Dz. U. [Journal of Laws] of 2021, item 152); Shield 8.0 (Regulation of the Council of Ministers of 26 February 2021 *on support for entrepreneurs affected by the COVID-19 pandemic*, Dz. U. [Journal of Laws] of 2021, item 371); Shield 9.0 (*Regulation of the Council of Ministers of 16 April 2021 amending the Regulation of the Council of Ministers on support for economic operators affected by the COVID-19 pandemic*, Dz. U. [Journal of Laws] of 2021, item 713);

[107] Ref. no. V.7100.26.2020.BA of 26 June 2020. https://bip.brpo.gov.pl/pl/content/koronawirus-ponowna-interwencja%C2%A0-rpo-na-rzecz-przedsiebiorcow, access on 29.10.2021.

[108] For example, only the anti-crisis shield 4.0 exempted various forms of subsidies and loans granted by district labour offices from seizure and enforcement, although such protection was provided for much earlier (in April 2020) for financial support provided to entrepreneurs by the Polski Fundusz Rozwoju S.A.; letter ref. no. V.7100.26.2020.BA of 26 June 2020. https://bip.brpo.gov.pl/pl/content/koronawirus-ponowna-interwencja%C2%A0-rpo-na-rzecz-przedsiebiorcow, access on 29.10.2021.

regulations[109] negatively affected also the work of public officials and institutions allocating the financial subsidies. There was no coherence in the application of the regulations and the time of waiting for the support was long.

The main problem was the dispersion of the aid programmes. Contrary to the Commissioner's call[110], the legislator did not issue a separate legal act regulating the aid provision to entrepreneurs. As a result, the complaints received from them by the CHR reflected their confusion and disorientation as to in what situations they could benefit from the financial support provided by the state. Support in this regard was provided by the SME Ombudsman who established a platform offering free of charge legal aid by professional lawyers to SME sector entrepreneurs seeking the financial assistance[111]. At that stage of the pandemic, many of the complaints related also to unequal treatment of entrepreneurs and the lack of support for entities which had started their operations shortly before the outbreak of the pandemic.

Entrepreneurs who had overcome the problems and submitted their applications for the financial aid were soon faced with another problem, namely the refusal of the aid. Moreover, at the end of April 2020, the Polish Development Fund S.A. (PFD)[112] amended the regulations on the aid but further doubts occurred as to the period of the new regulations' applicability[113]. The PFD demanded the entrepreneurs to return the subsidies who had submitted the applications in accordance with the regulations in force but to whom the new regulations were applied as a result of the change in the regulations.

Given the long duration of the state of epidemic and the decision to "defrost the economy" the legislator introduced industry-specific shields[114]. Financial support was targeted at selected groups of entrepreneurs, on the basis of their specific Business Classification Codes[115]. The decision caused entrepreneurs' protests regarding unequal treatment. It turned out that many entrepreneurs had not updated their codes in the relevant registers and thus were deprived of the aid. The legislator then decided to

[109] Cf. requests for explanation of the regulations, sent by the SME Ombudsman, https://rzecznikmsp.gov.pl/ratujbiznes/wnioski-o-objasnienia-covid19/, access on 29.10.2021.
[110] Ref. no. V.7100.26.2020.BA, https://bip.brpo.gov.pl/pl/content/koronowirus-jak-panstwo-ma-pomagac-przedsiebiorcom-rpo-do-jadwigi-emilewicz, access on: 29.10.2021.
[111] The action entitled #RatujBiznes [#SaveBusiness] - https://rzecznikmsp.gov.pl/ratujbiznes/, access on: 29.10.2021.
[112] https://pfrsa.pl/tarcza-finansowa-pfr/tarcza-finansowa-pfr-10.html#mmsp, access: 29.10.2021.
[113]https://wyborcza.biz/biznes/7,177151,26036920,dostali-3-5-mln-zl-z-tarczy-pfr-teraz-musza-je-oddac-prawdopodobnie.html, access on: 29.10.2021.
[114] Anti-crisis shields starting from shield 5.0.
[115] Ref. no. V.7108.96.2021 https://bip.brpo.gov.pl/pl/content/rpo-tylko-czesc-przedsiebiorcow-uprawniona-do-wsparcia-panstwa, access on: 29.10.2021.

extend the list of industries but it turned out that, for example, school kiosks had been left aside and a subsequent amendment of the regulations was needed[116].

The unclear legal regulations and the introduction of requirements that are difficult to be met by entrepreneurs is still a problem that needs to be solved. In 2020, there were problems e.g. with the availability of disposable gloves or hand disinfectants for shop customers[117]. At present, we are facing the attempts to shift the responsibility for verifying employees' vaccination status on entrepreneurs, and the lack of legal instruments in this regard, not to mention the lack of legitimacy of such legal solutions which would constitute unacceptable privatisation of the public sector's tasks[118].

[116] *Act of 24 June 2021 amending the Act on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused thereby and certain other acts* (Dz. U. [Journal of Laws] of 2021, item 1192); https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210001192/O/D20211192.pdf

[117] Ref. no. V.7102.2.2020 https://bip.brpo.gov.pl/pl/content/koronawirus-rekawiczki-w-sklepach-blad-lub; https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-przepisy-o-rekawiczkach-w-sklepach-wciaz-niejasne; https://bip.brpo.gov.pl/pl/content/koronawirus-mz-sklepy-mog%C4%85-wybra%C4%87-czy-zapewni%C4%87-klientom-jednorazowe-r%C4%99kawiczki-czy-%C5%9Brodki; access on: 29.10.2021.

[118] Ref. no. VII.501.21.2021 https://bip.brpo.gov.pl/pl/content/ograniczenia-praw-osob-niezaszczepionych-moga-byc-wprowadzane-tylko-na-drodze-ustawowej; access on: 29.10.2021.

Part IV. TAX LAW

1. Imprecise tax legislation at the time of the pandemic

The SARS-CoV-2 pandemic resulted also in the need to adjust the tax legislation to the new conditions. By way of the successive anti-crisis shields, the legislator introduced comprehensive changes impacting the situation of taxpayers and the position of the tax authorities. The large number of amendments introduced hastily and at very short time intervals and resulted in many questions regarding the correct interpretation and scope of applicability of the new regulations.

An example of a regulation that still raises a number of doubts as to the interpretation is Article 15zzr of the covid Act[119] which is no longer in force. The provision regulated the postponement and suspension of the time limits set in administrative law. It entered into force on 31 March 2020 and remained in effect until 23 May 2020. The problems were caused by the following phrase used in Article 15zzr: "the time limits set in administrative law". Given that the legislator referred to administrative law, it was not clear whether the said provision could be applied to the time limits provided for in tax law.

In its official position, the Ministry of Finance[120] stated that Article 15zzr of the covid Act did not apply to time limits set out in tax law. The Ministry argued that tax law should be considered a separate and autonomous branch of public law, derived from administrative law and public finance law. In practice, it turned out that tax authorities did not take account of the suspension of time limits set out in the tax law, e.g. with regard to the submission of forms required for exemption from the inheritance tax and gift tax payable by close relatives.

The Office of the Commissioner for Human Rights received reports from citizens for whom the deadline for submitting the SD-Z2 form (required for the tax exemption under Article 4a of the *Act on the inheritance tax*[121]) expired at the time of the strictest

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[119] Article 15zzr(1) of the *Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused thereby* (Dz. U. [Journal of Laws] of 2020, item 1842, as amended, hereinafter: the "covid Act").
At the time of the state of epidemic threat or of the state of epidemic caused by COVID-19, the time limits provided for in administrative law, 1) the observance of which is decisive for legal protection before a court or an authority, 2) for a party to perform actions determining their rights and obligations, 3) constituting the limitation period, 4) the non-observance of which results in the expiry or change of material rights, claims or receivables, or delay, 5) fixed time limits the non-observance of which results in negative consequences to a party pursuant to the act, 6) for entities or organizational units, required to be entered in a relevant register, to take action that requires entry in the register, and to fulfil the obligations arising from the regulations on their organisational structure - shall not start running and if already started, shall be suspended for that period.
[120] Letter of 1 May 2020 (ref. no. SP5.055.2.2020).
[121] Article 4a(1) of the *Act of 28 July 1983 on the inheritance tax* (Dz. U. [Journal of Laws] of 2021, item 1043, as amended).

restrictions i.e. the so-called full lockdown in spring 2020. Citizens pointed out that due to the movement-related restrictions there existed no possibilities to deliver in person or to send via the Polish postal service the from required for the exemption from the inheritance tax or gift tax. Referring to Article 15zzr of the covid Act which was in force for 54 days (from 31 March 2020 to 23 May 2020), citizens demanded the extension of the deadline for filing the SD-Z2 form by that period. The Commissioner was informed that the tax authorities did not take into account the taxpayers' arguments. As a consequence, such cases are currently considered by administrative courts. The position of the tax authorities has found no approval of the judicature[122]. Administrative courts of the first instance point to the necessity to adopt an interpretation related to the purpose and function of the provision. They emphasise that the purpose of Article 15zzr of the covid Act was to protect citizens against negative consequences of missed deadlines during the SARS-CoV-2 pandemic, including substantive deadlines. The courts emphasise, notably, that the adoption of the position of the tax authorities in the disputed scope would be a violation of fundamental constitutional norms, including the principle of citizens' confidence in their state and law, arising from Article 2 of the Polish Constitution.

Given that most of the related judgments of the first instance courts are not final, the tax authorities should be expected not to change their pro-fiscal approach until the Supreme Administrative Court has ruled on the matter. The Commissioner for Human Rights reported[123] the problem to the Ministry of Finance and drew attention also to another aspect of the matter. It has turned out that when calculating limitation period of tax liabilities, the tax authorities see no obstacles to invoking Article 15zzr(1)(3) of the covid Act. Based on it, they state, the limitation period for a tax liability may be suspended (which finally extends the period and causes negative consequences for the taxpayer). In such cases the phrase used in Article 15zzr of the covid Act and

Acquisition of property, or property rights, by a spouse, descendant, ascendant, stepchild, sibling, stepfather or stepmother shall be exempt from the tax if:
1) they report the acquisition of the property or the property rights to the head of the competent tax office within 6 months of the date on which the tax obligation arises pursuant to Article 6 para. 1 points 2-5, 7 and 8, and Article 6 para. 2, and in the event of acquisition by inheritance, within 6 months of the date on which the court decision certifying the acquisition of the property becomes final, subject to paras. 2 and 4, and
2) if the donation or gift concerns money, and the overall value of donations or gifts received from the same person during the 5 years preceding the year in which the last donation or gift was received, added to the value of the property and property rights acquired most recently exceeds the amount set out in Article 9, para. 1 point 1, they document their receipt by a proof of transfer to a payment account of the receiving person, or his/her other account in a bank, or a cooperative savings union, or by postal order.

[122] Cf. e.g. final judgments of the Provincial Administrative Courts in: Łódź of 10 February 2021 (case ref. nos. I SA/Łd 574/20 and I SA/Łd 575/20) and non-final judgments of the Provincial Administrative Court in Szczecin of 17 February 2021 (case ref. no. I SA/Sz 965/20), Provincial Administrative Court in Bydgoszcz of 25 May 2021. (case ref. no. I SA/Bd 147/21), and Provincial Administrative Court in Kraków of 15 September 2021 (case ref. no. I SA/Kr 831/21).

[123] Letter of the Commissioner for Human Rights of 5 July 2021 (ref. no. V.511.40.2020).

concerning the time limits provided for in administrative law is not problematic. Such a position, unfavourable for taxpayers can also be found in some judgments of administrative courts[124]. The Ministry of Finance has upheld the view that the disputed provision does not apply to time limits set in tax law and has stated that the issue will be finally resolved only when a uniform line of jurisprudence of administrative courts can be determined[125].

The legislation drawn up hastily during the SARS-CoV-2 pandemic has resulted in great chaos in its interpretation. There have been cases where the provision that is no longer in force (Article 15zzr of the covid Act) was interpreted by the same entity in different ways depending on which interpretation was more favourable for the tax authority in a given case. In cases where the extension of the limitation period for a tax liability was in the interest of the authorities they concluded that the limitation period could be suspended. In cases where the extension of the limitation period was in the interest of the taxpayer (e.g. when filing SD-Z2 forms) the authorities concluded that the limitation period could not be suspended. The situation is, certainly, not conducive to building citizens' confidence in their state and laws enacted by it. It enhances the negative consequences for citizens in the area of taxes in which increased standards should be observed in terms of clarity and consistency of law, even at the time of the SARS-CoV-2 pandemic.

2. Broader powers of tax authorities during the pandemic

The analysis of the entirety of changes introduced by the successive anti-crisis shields leads to the conclusion that the legislator has focused on developing regulations aimed at supporting the tax administration's activities rather than at providing real financial assistance to taxpayers. It is of particular concern that the increased powers of tax authorities are to be maintained until the state of epidemic threat and the state of epidemic related to COVID-19 are revoked, which means that at present they are still in effect.

For example, in Article 31g of the covid Act[126] the legislator provides that for taxpayers' requests for individual interpretation, submitted and still pending on 31

[124] Cf. e.g. final judgment of the Provincial Administrative Court in Łódź of 30 November 2020 (case ref. no. I SA/Łd 364/20) and non-final judgment of the Provincial Administrative Court in Gliwice of 27 November 2020. (case ref. no. I SA/Gl 1054/20).

[125] Response from the Ministry of Finance of 9 August 2021 (ref. no. DOP8.055.1.2021).

[126] Article 31g(1) of the covid Act.
Requests for an individual interpretation, submitted and still pending on the date of entry into force of the Act of 31 March 2020 amending the Act on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused thereby and certain other acts, and submitted between the date of entry into force of the Act and the date on which the state of epidemic threat and

March 2020, and for those submitted between 31 March 2020 and the date on which the state of epidemic threat and the state of epidemic introduced in connection with COVID-19 are revoked the time limit for issuing an individual interpretation will be extended, according to the act, by 3 months. As a rule, an individual interpretation of tax law provisions is required to be issued without undue delay and no later than 3 months as of the receipt of the request. If an individual interpretation is not issued within the said time limit, it is considered that an interpretation in support of the applicant's position has been issued (the so-called silent interpretation).

Thus, the covid Act sanctions the possibility to extend the time limit for issuing individual interpretations of tax law provisions. The rationale of the act points out that the provision is necessary to make it possible the implementation of duties by tax authorities, having difficulties due to the pandemic to meet the 3-month deadline for issuing individual interpretations. There is no doubt that the provision is favourable for the tax administration. It also permits successive extensions of the deadline (by no more than 3 months), which follows from Article 31g(3) of the covid Act. For taxpayers, however, the solution means the extended state of uncertainty.

When developing new legislation during the SARS-CoV-2 pandemic, the legislator has enacted regulations safeguarding the interests of the tax administration. The possibility to issue tax interpretations within deadlines extended, in practice, for an unspecified period (until the state of epidemic threat and the state of epidemic declared in connection with COVID-19 are cancelled) finds no justification. Therefore, in the opinion of the Commissioner for Human Rights the regulation should be eliminated from the legislative system.

3. Taxpayers' problems during the pandemic

Entrepreneurs turned to the Commissioner for Human Rights requesting him to undertake intervention with regard to problems faced by most companies in the country during the SARS-CoV-2 pandemic. They included long-lasting financial difficulties caused by suspended orders of contractors, by supply chain interruptions and the lack of adequate or sufficient legal solutions (including tax solutions) supporting them at this difficult time.

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the state of epidemic are revoked, the three-month time limit referred to in Article 14d(1) of the Act of 29 August 1997 - Tax Ordinance, shall be extended by 3 months.
(2) The extension of the time limit referred to in paragraph (1) shall not affect the time limit for issuing general interpretations in reply to requests referred to in Article 14a(1)(1) of the Act of 29 August 1997 - Tax Ordinance.
(3) The minister competent for public finance may, in the case referred to in subsection 1, extend by way of regulation the time limit for issuing an individual interpretation referred to in Article 14d(1) of the Act of 29 August 1997 - Tax Ordinance, by further periods but by no more than 3 months, taking into account the effects of COVID-19.

To meet the expectations of taxpayers, the Commissioner took action and reported the problems to the Ministry of Finance and other bodies. As regards the difficulties with VAT refund to entrepreneurs, the Commissioner called for[127] streamlining the VAT refund procedure e.g. by shortening the time limit for the refund. He also pointed out that the legislator had failed to take into account the tax consequences of changing the legal form of business activity and network establishment by many entrepreneurs, as a result of which they have to pay tax at the rate of 23% (i.e. almost three times higher than the 8% rate applicable during normal operation). However, the Ministry of Finance does not see the need to shorten the statutory time limits for VAT refund, which it justifies by the risk of abuse of the system. In the opinion of the Ministry the support provided to entrepreneurs under the successive anti-crisis shields was sufficient. As regards the issue of a higher VAT rate applicable to services provided online, the Ministry of Finance pointed out that pursuant to the Community regulations[128] such services cannot be subject to a reduced VAT rate. It also pointed out that since 2018 work has been ongoing in the Council of the European Union on the reform of the system of VAT rates[129]. It seeks to modernise the VAT policy e.g. by giving EU Member States more flexibility in their determination. As a result, possible changes to the system of VAT rates in Poland can be introduced.

Taxpayers have also reported problems with getting tax relief (e.g. of real estate tax), due to unclear provisions of the local law regulating the procedure of applying for the reliefs. Pursuant to Articles 15-15q of the covid Act, municipal councils, by way of a resolution, could extend the deadlines for property tax payment by specific groups of entrepreneurs. Due to imprecise provisions of the resolutions, the Commissioner reported difficulties faced by taxpayers in submitting the applications.

The problems experienced during the SARS-CoV-2 pandemic (those reported by taxpayers and those noticed by the Commissioner for Human Rights) prove that the instruments introduced to assist entrepreneurs in difficult financial situation have been insufficient and often inadequate. This applies, in particular, to VAT refunds and lengthy procedures of verifying the legitimacy of tax refund, which result in a high risk of loss of financial liquidity. In practice, instead of speeding up the verification process (due to taxpayers' difficult financial situation) the tax authorities extend it on the grounds of the pandemic which is said to affect the course of the proceedings[130]. It

[127] General intervention letter of the Commissioner for Human Rights to the Minister of Finance of 10 April 2020. (ref. no. V.511.164.2020).
[128] Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ 2011 L 77, p. 1, as amended).
[129] Draft Council Directive amending Directive 2006/112/EC within the scope of rates of value added tax COM(2018)20).
[130] Cf. final judgment of the Provincial Administrative Court in Warsaw of 3 December 2020. (ref. III SA/Wa 1721/20).

is therefore important for the Ministry of Finance, in the event of a new wave of the pandemic, to have instruments ready to support entrepreneurs and react in a flexible way to the health and economic situation so that the aid provided by the state is truly effective.

Part V. CONSUMER RIGHTS

The epidemic and, in particular, the related regulations adopted by the legislator have significantly affected the legal situation of consumers in Poland. Information provided by citizens to the Commissioner for Human Rights, and the conducted analysis of the course of the recent legislative processes have revealed a number of problems experienced by consumers who have often borne, in part, the "costs" of the changes introduced by the legislator and the manner of their introduction.

Among the problems faced by consumers (but also entrepreneurs) is the issue of access provision to health data which constitutes a special category of personal data as defined in Article 9(1) of Regulation 2016/679 of the EU Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC[131]. The issue relates to the information on COVID-19 vaccination status and contraindications to mask wearing.

Consumers, in their correspondence to the Commissioner, have raised the issue of requests to provide COVID-19 vaccination status information e.g. when purchasing tickets for concerts. The event organisers required such information mainly in connection with the limits on the number of audience, set e.g. in Article 26(15)(3) of the *Regulation of the Council of Ministers of 6 May 2021 establishing certain restrictions, orders and prohibitions in connection with the state of epidemic*[132] and the non-inclusion of people vaccinated against COVID-into the limits (Article 16 of the said regulation).

The provisions of the regulation do not, however, require citizens attending events to provide their vaccination status information, and do not authorize event organizers to request such information from event participants. The information on the vaccination status may be sought only if the person concerned intends to provide it voluntarily (in compliance with the principles set out in Article 4(11) and Article 7 GDPR), thus meeting the requirement set out in Article 9(2)(a) GDPR[133].

Nevertheless, the Commissioner for Human Rights pointed out in advance that citizens may object to the attempts to limit access to services to people vaccinated against COVID-19, which would constitute discrimination against those not vaccinated for various reasons[134]. In this connection the Commissioner, in his letter to the Minister

[131] OJ.EU.L.2016.119.1; hereinafter abbreviated as "GDPR".
[132] Dz. U. [Journal of Laws] of 2021, item 861, as amended.
[133] Cf. opinion of the Data Protection Authority, https://uodo.gov.pl/pl/138/2088 (access: 26.10.2021)
[134] https://bip.brpo.gov.pl/pl/content/rpo-nie-ograniczac-dostepu-do-uslug-tylko-do-zaszczepionych

for Development, Labour and Technology, stated that "regardless of the understandable encouragement of citizens to get vaccinated, it seems necessary to clearly communicate to the public that any restrictions on access to services will not discriminate against non-vaccinated persons"[135].

In view of the fact that COVID-19 vaccination is not considered a mandatory vaccination, and that certain persons may not be vaccinated for health reasons, service provision may not be restricted to vaccinated consumers only[136], and consumer rights may not be restricted in any way that is not necessary for public health protection. Also, people who have had a coronavirus infection or have been tested recently should have the same access to services as vaccinated people[137]. Every effort should be taken, both at the law-making stage and the enforcement stage, to ensure that consumers who are unvaccinated (for any reason) are not discriminated as compared with vaccinated people, and that any differentiation between the groups is related solely by the need to protect public health.

Another problem faced by consumers is not respecting their right *not* to wear a mask due to health-related contraindications (e.g. in shops, post offices or banks). The Commissioner has received numerous complaints from consumers who cannot cover their mouth and nose for health reasons and who, because of this, had problems in shops, post offices or banks.

According to Article 25(1)(1) of the *Regulation of the Council of Ministers of 6 May 2021 establishing certain restrictions, orders and prohibitions in connection with the state of epidemic* [138], until 30 November 2021 a mask covering the mouth and nose is required in publicly accessible places such as shopping malls, service provision facilities, shops, market places, public use buildings such as banks, shopping centres, catering facilities and other service provision points, including post offices. Pursuant to Article 25(4)(4) of the aforementioned regulation it does not apply to people who may not cover their mouth or nose due to: general developmental disorders, mental disorders, moderate or severe intellectual disability, difficulty in covering or uncovering the mouth or nose independently; neurological, respiratory or cardiovascular system disease with respiratory or circulatory insufficiency. These persons, according to the regulation, are required to have a medical certificate or other document certifying general developmental disorders, mental disorders, moderate or

[135] Letter to the Minister of Development, Labour and Technology of 29 April 2021, https://bip.brpo.gov.pl/sites/default/files/RPO_do_MRPiT_29.04.2021.pdf (access on: 26.10.2021).
[136] Cf. letter to the Minister of Development, Labour and Technology of 29 April 2021. https://bip.brpo.gov.pl/sites/default/files/RPO_do_MRPiT_29.04.2021.pdf (access on: 26.10.2021).
[137] https://bip.brpo.gov.pl/pl/content/rpo-nie-ograniczac-dostepu-do-uslug-tylko-do-zaszczepionych (access: 26.10.2021).
[138] Dz. U. [Journal of Laws] of 2021, item 861, as amended.

severe intellectual disability, difficulty in covering or uncovering the mouth or nose independently; neurological, respiratory or cardiovascular system disease with respiratory or circulatory insufficiency, and to show it at the request to: the police, municipal guard, the Parliament Guard in places under the management of the Chancellery of the Sejm or the Chancellery of the Senate, the Border Guard at airport border crossings, and Railway Security Service on a train or in places for travellers using railway transport, within railway stations (Article 25(7) of the Regulation). The list of entities authorised to request a certificate is limited and the regulation does not authorize e.g. a shopping centre manager or a shop owner or staff to request such a certificate from a person not covering their mouth and nose. This causes a number of problems both for consumers and for entrepreneurs providing various services. There are problems with verifying a consumer's right not to cover the mouth and nose, although not wearing a mask can raise concerns of entrepreneurs, personnel or other consumers regarding their health safety. On the other hand, however, not respecting the right not to cover the mouth and nose constitutes a violation of civil rights.

In connection with numerous complaints from citizens in this regard, the Commissioner pointed out e.g. to the Minister of Health that the current regulations in this area cause many practical problems and are difficult to enforce[139]. The Commissioner also reported the issue to the President of the Polish Chamber of Commerce and the Board of the National Council of Trade and Service Associations[140]. The Commissioner, based on the complaints received, stated inter alia that the problems in question do not result from policies of individual stores and shopping networks but from insufficient information provided to their staff on the restrictions and exceptions from them, and that it was difficult to transfer such information because of the complexity of the regulations their frequent changes.[141] Therefore, it is necessary make the regulations more clear.

Another important aspect highlighted by consumers in their complaints sent to the Commissioner was too hasty introduction of restrictions with regard to various services provided to customers, in particular those related to air traffic, tourism and shopping. The Commissioner for Human Rights reported the problem to authorities responsible for drawing up and implementing regulations in these areas. As regards regulations applicable to air passenger transport, for example, the Commissioner pointed out that they should be introduced in an orderly manner so as not to expose

[139] Letter of 19 June 2020 (ref. no. V.7018.481.2020).
[140] Letter of 27 April 2020 (ref. no. V.7224.52.2020), https://bip.brpo.gov.pl/sites/default/files/Do%20Polskiej%20Izby%20Handlu,%2027,04.2020.pdf; https://bip.brpo.gov.pl/sites/default/files/Do%20Naczelnej%20Rady%20Zrzesze%C5%84%20Handlu%20i%20Us%C5%82ug,%2027.04.2020.pdf (access on: 26.10.2021).
[141] Ibid.

consumers to unpredictable situations such as the need to cancel a trip. Information on destinations that will not be served should not be provided to passengers (as well as carriers and airport operators) without giving them a period of time for adjusting to the new conditions.[142] The Commissioner argued that the regulations introducing prohibitions relating to air traffic and caused by COVID-19 were introduced with a very short notice, immediately before revoking the preceding act[143]. When introducing significant changes in the operation of passenger air traffic, it is necessary to ensure a period of time for persons concerned to find out about the new conditions, which means that at least a short *vacatio legis* period should be ensured before the regulations come into effect[144]. Even taking into account the argument raised by the Ministry of Infrastructure in this regard, i.e. the need to follow most up-to-date information and data published by European and world health organisations on the dynamically changing epidemic situation[145], a period of one or two days for studying the new legal regulations and adapting to them (as was the case in the above-described situations) is glaringly short.

The multiple sudden introduction of restrictions on service provision to consumers, and the short validity periods of such regulations, followed by periods in which the preceding state was restored (without sufficient notice), i.e. the unpredictability of regulations applicable to service provision, hindered the functioning of entrepreneurs as well as consumers. Such mechanisms lead to the necessity for consumers to monitor the legislation and attempt to predict whether the regulations will be tightened or relaxed.

Although the above described practices of the legislator have been, undoubtedly, caused by the dynamic development of the epidemic situation, consideration should be given to solutions ensuring that consumers receive relevant information possibly in advance to be able to plan and use services without having to bear the main burden of the epidemic.

Consumers also pointed to the problems experienced by them as a result of the cancellation of package travel trips due to the SARS-CoV-2 virus outbreak. In this

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[142] Letter of 3 July 2020 to the Prime Minister regarding restrictions applicable to air traffic, https://bip.brpo.gov.pl/sites/default/files/WG%20do%20Prezesa%20Rady%20Ministr%C3%B3w%20w%20sprawie%20zakaz%C3%B3w%20w%20ruchu%20lotniczym,%203.07.2020.pdf (access: 02.11.2021).

[143] For example: *the Regulation of the Council of Ministers of 16 June 2020 on restrictions applicable to air traffic (Dz. U. [Journal of Laws] of 2020, item 1050) entered into force on 17 June 2020, and the preceding Regulation of the Council of Ministers of 5 June 2020 on restrictions applicable to air traffic (Dz. U. [Journal of Laws] of 2020, item 1005), published on 6 June 2020, entered into force on 7 June 2020 (ibid.)*

[144] Cf. ibid.

[145] Letter from the Ministry of Infrastructure of 15 July 2021, https://bip.brpo.gov.pl/sites/default/files/Odpowied%C5%BA%20MI,%2015.07.2020.pdf (access on: 2.11.2021).

regard, the legislator introduced the solution set out in Article 15k of the *Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused thereby* (Dz. U. [Journal of Laws] of 2020, item 1842, as amended, hereinafter: the COVID-19 Act). Pursuant to Article 15k(1) of the COVID-19 Act, the withdrawal from a contract under the procedure set out in Article 47(4) of the *Act of 24 November 2017 on package travel and linked travel arrangements* (Dz. U. [Journal of Laws] of 2020 item 2139, as amended), or the termination by a tour operator of a package travel contract under the procedure set out in Article 47(5)(2) of that Act, which withdrawal or termination is directly related to the outbreak of the epidemic of the SARS-CoV-2 virus, shall take effect upon the expiry of 180 days of the notification of the withdrawal by the traveller, or the notification of the contract termination by the tour operator. The termination or withdrawal shall not be effective if the traveller has consented to receiving, from the tour operator, a voucher to be used to pay for a package travel trip in the future, within a period of 2 years[146] of the date on which the originally planned package travel trip was to start (Article 15k(2) of the COVID-19 Act).

In connection with the above-mentioned regulations, the Commissioner for Human Rights has pointed out to the doubts regarding their application[147]. The Commissioner argued, among others, that the introduced solution resulted in damages suffered by a large group of customers who, according to the previous wording of the *Act of 24 November 2017 on package travel and linked travel arrangements*, should receive a refund within 14 days of the termination of their package travel contract (Article 47(6) of the *Act on package travel and linked travel arrangements*). However, the COVID-19 Act has granted to tour operators the right to postpone the refund of money paid by travellers in advance for services not provided due to the epidemic, or to offer to such customers a voucher instead of the money refund (see Article 15k(1) and (2) of the COVID-19 Act). In the case of a refund, after six months the travel agency still has the additional 14 days to refund the money[148]. The Commissioner has emphasized the very long period of time for which the consumers' money at the disposal of tour operators, which is to the detriment of the consumers. This is all the more so because consumers' private money, made available for disposal by tour operators for as long as six months,

[146] Under the preceding regulation, the validity period of the voucher was shorter i.e. one year. It was changed pursuant to Article 1 of the *Act of 24 June 2021 amending the Act on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused thereby and certain other acts* (Dz. U. [Journal of Laws] of 2021 item 1192).

[147] Letter to the Minister of Development of 30 April 2021, https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Minister%20Rozwoju,%2030.04.2020.pdf (access on: 2.11.2021).

[148] Cf. explanations by the President of the Office of Competition and Customer Protection, https://www.uokik.gov.pl/faq_koronawirus_imprezy_turystyczne_wycieczki.php#faq3952 (access on: 2.11.2021).

often belongs to people who have unexpectedly lost their jobs or other earning possibilities, or to senior persons who, on account of their age or state of health, were to be given special protection by the legislator in connection with the coronavirus epidemic. Consumers' private money has been in fact frozen for a long period of time (either pursuant to Article 15k(1) or Article 15k(2) of the COVID-19 act) without interest due. This is a clear manifestation of the fact that it has been consumers who have been burdened with the consequences of the epidemic and the economic crisis, in violation of the constitutional standards of the protection of the rights of consumers who are the weaker participants of the travel services market.[149] It is necessary to strive for systemic solutions that do not support enterprises at the expense of consumer rights, and that ensure due legal protection to consumers.

[149] Cf. letter to the Minister of Development of 30 April 2021, https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Minister%20Rozwoju,%2030.04.2020.pdf (access on: 2.11.2021).

CONCLUSION

The SARS-CoV-2 pandemic has been an unprecedented event in recent history, for which the State was not prepared. The chaos at its beginning can be considered understandable, but with each successive wave of the pandemic there were major organisational shortcomings in many areas. The glaring example has been the pandemic-related legislation. The regulations were drawn up hastily, without sufficient examination of their compliance with the Polish Constitution, and then were repeatedly amended at an extraordinary pace in order to eliminate the numerous mistakes which could have been avoided had the legislative process been properly conducted. Such infringements occurred under the "ordinary" law-making regime. Now that the above-mentioned flaws in the pandemic-related legislation no longer raise any doubts, and have been confirmed by numerous judgments of the Supreme Court and the Supreme Administrative Court, we are facing the need to eliminate their effects and, on the other hand, to prepare the state for future challenges which cannot be excluded.

In the first area, it is necessary to bring the provisions of the *Act on prevention and control of infections and communicable diseases in humans,* and its implementing regulations, in line with the standards provided for in the Constitution of the Republic of Poland. Until this is done, it is necessary for the State Sanitary Inspection authorities to refrain from applying the unconstitutional – as we know already - regulations regarding fines[150], to withdraw from enforcing the fines already imposed and to immediately refund the fines paid, also in order to minimise the costs of ongoing administrative proceedings and proceedings before administrative courts. The taking of such steps with regard to persons on whom a fine has been imposed and who have not lodged an appeal against it may require the commencement of extraordinary procedures provided for in the Code of Administrative Procedure, or even the intervention of the legislator.

In the second area, consideration should be given to eliminating the currently existing normative dualism[151]. It consists in the permissibility to introduce not only the state of natural disaster, provided for in the Constitution, but also any of the epidemic-related states provided for in the *Act on prevention and control of infections and*

[150] Similar postulates have been expressed by the Commissioner for Human Rights with regard to the responsibility for misdemeanours, also under the challenged regulations of the Minister of Health and of the Council of Ministers, in the Commissioner's letter to Police Commander-in-Chief, of 30 May 2021, ref. no. VII.613.112.2020 https://bip.brpo.gov.pl/pl/content/rpo-policja-powinna-wycofac-mandaty-bezprawnie-nakladane-w-pandemii-aktualizacja-odpowiedz

[151] Cf.: J. Paśnik, Kilka refleksji o regulacjach stanu epidemii jako sui generis pozakonstytucyjnego stanu nadzwyczajnego [A few reflections on the regulations on the state of epidemic as a specific non-constitutional state of emergency], Przegląd Prawa Publicznego 2020, no 11, pp. 69-85.

communicable diseases in humans. The formal possibility of applying the provisions of the latter act seems to have been the primary cause of the legislative problems faced by us during the pandemic.

The time of the pandemic has been, in particular, a time of many concerns about meeting people's health needs and observing the rights of patients. There is no doubt that the Polish health care system has been facing one of the greatest challenges in recent years. The system has to cope with the requirements connected with the pandemic, which have evolved over time, including the provision of appropriate equipment and means of personal protection. Furthermore, the period of the pandemic has highlighted the still unresolved and accumulating problems of the health care system, related e.g. to staffing and availability of services. These problems have been reflected by the insufficient preparedness of the health care system for the development of the pandemic.

The problems of the health care system should be the starting point for a debate, across political divides, on a thorough reform of the system, including its financing. One of the key elements of the debate should be the issue of ensuring an adequate number of medical staff and their decent remuneration. These problems have been commonly known for years but so far they have been addressed only by way of scattered measures, often taken too late[152]. Increasing the capacity of the health care system should constitute a key objective for all decision-makers. It is of particular significance given that we do not yet know all long-term health consequences of COVID-19, and the impact of the health care system paralysis during the pandemic on the treatment of other diseases.

The state has also failed to adequately meet the needs of businesses, taxpayers and consumers. This opinion has its grounds in all the flaws of the legislative process, which were known already before the pandemic and were compounded by it. It is essential to eliminate legal uncertainty by applying sound legislation standards. Rebuilding confidence in the law-making bodies in our country (the lack of confidence in which is clearly visible) is one of the key tasks faced at present by the authorities.

[152] For example, the issue of streamlining the principles of employment of medical personnel from across our eastern border has been raised by the Commissioner for Human Rights in his general intervention letters to the successive Ministers of Health since 2016 (https://bip.brpo.gov.pl/pl/content/prawo-lekarzy-spoza-ue-do-wykonywania-zawodu-%E2%80%93-odpowiedz-ministra-zdrowia). However, these suggestions have been met only during the pandemic.