Different Aspects of the Right to Be Heard in Administrative Proceedings

Martin Dekleva[*]

ABSTRACT

The right to be heard is a fundamental legal principle, recognised by the highest-ranking domestic and international legal instruments, bodies, and courts. In its most general and typical sense, the right to be heard enables an individual whose rights, legal interests, or obligations are being determined in a specific proceeding to present his opinion on the relevant circumstances upon which the decision in that proceeding depends. However, the right to be heard is also important in many other legal contexts and relationships. It may be understood as a legally enforceable right or as a legal rule that prescribes the manner in which an authority must act and the way in which an individual may act. The right to be heard is especially important in administrative proceedings, where administrative authorities, as bodies vested with public powers, are in a position of superiority vis-à-vis subordinate individuals. In this context, the right to be heard is multi-layered and has wide-ranging implications. This article presents the right to be heard within the context of the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and the Slovenian administrative law system. The author examines individual aspects of the right to be heard

[*] Assistant Professor, European faculty of law, New University; advisor at the Constitutional Court of the Republic of Slovenia. The views expressed in this publication are those of the author.

and defines two groups of derogations from this right. Any derogations from the right to be heard must be carefully considered and proportionate.

Keywords: administrative law, administrative procedure, legal principles, right to be heard

Različni vidiki pravice do izjave v upravnih postopkih

POVZETEK

Pravica do izjave je temeljno pravno načelo, ki ga priznavajo že hierarhično najvišji domači in mednarodni pravni dokumenti, organi ter sodišča. V najbolj splošnem, tipičnem pomenu pravica do izjave omogoča posamezniku, o čigar pravicah, pravnih interesih ali obveznostih se odloča v konkretnem postopku, da se izjavi o pomembnih okoliščinah, od katerih je odvisna odločitev v tem postopku. Vendar je pravica do izjave pomembna tudi v številnih drugih pravnih položajih in razmerjih. Pravico do izjave je mogoče razumeti tudi kot pravno iztožljivo pravico ali kot pravno pravilo, ki natančno določa, kako mora ravnati organ in kako lahko ravna posameznik. Pravica do izjave je izjemno pomembna v upravnih postopkih, v katerih so upravni organi kot oblastni organi nadrejeni posameznikom. Tu je pravica do izjave večplastna in ima široke implikacije. V prispevku je pravica do izjave umeščena v kontekst Evropske konvencije o človekovih pravicah, Listine Evropske unije o temeljnih pravicah in slovenske upravnopravne ureditve. V prispevku avtor obravnava posamezne vidike pravice do izjave in opredeli dve skupini odstopov od te pravice. Odstopi od pravice do izjave morajo biti premišljeni in sorazmerni.

Ključne besede: upravno pravo, upravni postopek, pravna načela, pravica do izjave

1. Introduction

The purpose of this article is to present different aspects of the right to be heard and to demonstrate how they are interconnected or distinct. In administrative proceedings, the right to be heard is among the most fundamental rights, generally ensuring that parties are subjects rather than mere objects of decision-making by administrative authorities (Androjna, Kerševan, 2017, p. 88). In its basic sense, the right to be heard means that an individual, in respect of whom a superior public authority decides in an administrative relationship, has the opportunity to present his view of the matter. In this way, the right to be heard reflects principles of democracy and the protection of human dignity, and contributes to what is often referred to as good administration (*ibid.*; Kovač, 2020, p. 126). The right to be heard is explicitly regulated both in international instruments and in national legislation, and it enjoys constitutional protection.

A good understanding of the content and significance of the right to be heard, as well as of its various elements, is important from the perspective of theory and practice. It is also relevant when designing specific types of administrative proceedings, in which certain procedural rules may be adapted. The right to be heard may be considered either as a (general) legal principle or as a legal rule. In practice, the precise distinction between legal principles and legal rules is very often unclear. Generally, individuals find it easier to rely on rights that are more specific, even though principles are also of great importance and are judicially recognised (Lock, 2019). The question therefore arises as to what difference it makes if the right to be heard is understood as a legal principle or as a legal rule. Legal theory suggests that there is no uniform answer to what the essential difference is between legal rules and legal principles. The general starting point, however, is that legal principles are more "standards" that influence the application of legal rules, even if in a broader

sense they may overlap with legal rules (Pavčnik, 2020, pp. 130-136). An important characteristic of legal principles is that they may be expressed to a greater or lesser degree, because they are general in nature, and as such they influence the formation and interpretation of legal rules, which precisely determine the conduct of legal subjects (Eisenberg, 2022).

When the right to be heard is understood as a legal principle, it is considered as a general and flexible guideline on how administrative proceedings should be conducted and how different procedural rules should be interpreted. When the right to be heard is understood as a legal rule, it is primarily considered as an explicit instruction in administrative proceedings, specifying how an administrative authority must act to ensure that the party to the proceedings can be heard, or how an individual may act in order to present their position on the relevant circumstances. The legal rule defining the right to be heard is usually clear and precise. By their very nature, legal rules and legal principles overlap in practice. This also applies to the right to be heard. In administrative proceedings, a party may rely on the right to be heard as a principle and/or as a rule.

The right to be heard is also of crucial importance in the international context, although its effectiveness depends on the circumstances of each particular case. Extensive literature and case law already exist on the importance of the right to be heard. As is well known, the right to be heard is by no means absolute. It is multi-layered and is reflected differently in different circumstances. This article first presents the regulation of the right to be heard within the European Convention on Human Rights (1950) (hereinafter ECHR) and the Charter of Fundamental Rights of the European Union (2016) (hereinafter EU Charter). It then examines the Slovenian legal regulation as framed by the Constitution of the Republic of Slovenia, 1991 (hereinafter Constitution) and set out in the General Administrative Procedure Act (2006)

(hereinafter ZUP) and in some other sectoral legislation. The article explains different aspects of the right to be heard and certain particularities applicable in specific contexts.

2. Regulation under the ECHR

Article 6 of the ECHR lays down the right to a fair trial. Paragraph 1 of Article 6 ECHR states that "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". By their very nature, these guarantees must undoubtedly include the right to be heard as a basic right. For the right to a fair trial to be effective, the court must examine the parties' arguments and evidence (ECtHR, *Kraska v. Switzerland*, 1993, para. 30). The misgivings of the individuals before the courts, for instance with regard to the fairness of the proceedings, must be capable of being held to be objectively justified (*ibid.*, para. 32). "Equality of arms" or a "fair balance" between the parties implies that each party must be afforded a reasonable opportunity to present his case, so that he is not placed at a substantial disadvantage vis-à-vis his opponent (ECtHR, *Dombo Beheer B.V. v. the Netherlands*, 1993, paras. 32-33). A fair trial cannot exist if a party is not heard and if arguments of the party are not taken into account. The case law of the European Court of Human Rights (hereinafter ECtHR) clearly establishes that the guarantees of Article 6 ECHR – including the right to be heard, extend also to administrative matters. This applies where administrative proceedings concern the determination of so-called "civil rights and obligations" or a "criminal charge". Of course, whether Article 6 ECHR applies in a given case depends on all the relevant circumstances of the particular case.

The case law of the ECtHR on the above mentioned issue is extensive and has already been well explored in the

literature. One of the landmark cases is *Ringeisen v. Austria*. In this case (1971, para. 94), the ECtHR explained that the applicability of paragraph 1 of Article 6 ECHR does not require both parties to the proceedings to be private persons. The provision covers all proceedings the outcome of which is decisive for private rights and obligations. Neither the nature of the applicable national legislation nor the character of the authority with jurisdiction over the matter is decisive. In *Ringeisen v. Austria*, rules of administrative law were applied, but since the administrative decision had an impact on private-law relationships, it was necessary to examine whether the proceedings complied with paragraph 1 of Article 6 ECHR. At the same time, although the concept of civil rights and obligations within the meaning of the ECHR is autonomous, national law is not irrelevant. The ECtHR takes into account the significance of the national legal framework for the parties (see, for example, ECtHR, *König v. Germany*, 1978, para. 89). Where there is the dispute between an individual and a public authority, it is not decisive whether the authority acted in a private capacity (*ex iure gestionis*) or in its sovereign capacity (*ex iure imperii*); what matters is the nature of the right in dispute (*ibid.*, para. 90). The ECtHR confirmed this position in later judgments, such as *Benthem v. The Netherlands* (1985, para. 34). The Court's case law emphasises that in administrative proceedings it is necessary to examine whether there is a link between civil rights and obligations and the matter at issue, which otherwise concerns public-law relations between the individual and the public authority, and whether that link is sufficiently substantive or direct. For instance, the grant of a licence may decisively affect the exercise of a particular economic activity and thus the use of property (*ibid.*, para. 36). Paragraph 1 of Article 6 ECHR has also been held applicable in disputes concerning social security and welfare assistance (ECtHR, *Salesi v. Italy*, § 19). On the other hand, tax matters and disciplinary proceedings do not fall within the scope of this provision

in its civil-law aspect (ECtHR, *Ferrazzini v. Italy*, 2001, para. 29; ECtHR, *Albert and Le Compte v. Belgium*, 1983, para. 25).

From the perspective of administrative law, it is also very important to note that certain administrative decisions may mean a criminal charge within the meaning of paragraph 1 of Article 6 ECHR. Typical examples include administrative sanctions imposed by administrative authorities, as well as certain measures in the field of taxation, which are not recognised as involving civil-law elements but nonetheless have a deterrent and punitive character (ECtHR, *Jussila v. Finland*, 2006, para. 38). According to the ECtHR's case law, three criteria – the so-called *Engel criteria* – are applied (ECtHR, *Engel and Others v. The Netherlands*, 1979, para. 82). The first criterion is the legal classification of the offence and proceedings under national law, the second is the nature of the offence (the seriousness of the act is not decisive), and the third is the severity of the potential penalty. The second and third criteria are not necessarily cumulative.

Article 6 ECHR refers to the right to be heard in front of a "tribunal". According to the case law of the ECtHR, two systems are acceptable in this regard. Either the competent authorities themselves comply with the requirements of paragraph 1 of Article 6 ECHR, or their decisions are subject to subsequent review by a judicial body – a "tribunal" established by law, independent and impartial, which allows for a public hearing and ensures compliance with the requirements of Article 6 ECHR (ECtHR, *Albert and Le Compte v. Belgium*, 1983, paras. 29, 31). Proceedings before courts deciding administrative disputes are distinct from administrative proceedings and constitute their continuation. The courts exercise judicial review over the legality of administrative decisions. This also means, however, that the guarantees provided by the ECHR are important for administrative proceedings themselves. The right to be heard, guaranteed by the ECHR in connection with judicial review, cannot be disregarded by administrative authorities. If a court finds

that the right to be heard has not been adequately respected in the administrative procedure, it may annul the contested administrative decision. In such a case, the administrative authority will have to reopen the procedure and ensure that the right to be heard is respected.

3. Regulation under the EU Charter

The right to be heard is expressly enshrined in the EU Charter. Article 41 EU Charter provides for the right to good administration. Pursuant to this right, the institutions, bodies, offices, and agencies of the European Union (hereinafter EU) are required to handle affairs impartially, fairly, and within a reasonable time (paragraph 1 of Article 41 EU Charter). Under paragraph 2 of Article 41 EU Charter, this right includes: "(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions." Furthermore, similar to Article 6 ECHR, Article 47 EU Charter lays down the right to an effective remedy and to a fair trial. Everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a court (paragraph 1 of Article 47 EU Charter). "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law" (paragraph 2 of Article 47 EU Charter). Under paragraph 2 of Article 48 EU Charter, the rights of the defence are guaranteed to everyone who has been charged. This guarantee may also apply in administrative contexts where the matter is of a criminal nature (see, for example, CJEU, C-383/13 PPU, para. 38).

From these guarantees under the EU Charter, it clearly follows that the right to be heard in EU law is of fundamental

importance for the proper and lawful conduct of proceedings. Individuals may be subjected to restrictions or obligations in a procedure in which they are guaranteed the right to be heard (Franchini, 2004, pp. 187, 189). At the same time, it must be recalled that the provisions of the EU Charter are addressed to the institutions of the EU in accordance with the principle of subsidiarity, and to the Member States when they are implementing EU law (paragraph 1 of Article 51 EU Charter). The EU Charter does not extend the field of application of EU law (paragraph 2 of Article 51 EU Charter). In this sense, reliance by parties on the right to be heard under the EU Charter may be limited at the national level. Where EU law is being implemented, however, the Constitutional Court of the Republic of Slovenia has repeatedly emphasised that, just like constitutional principles, the provisions of the EU Charter are binding and that national law must be interpreted in conformity with EU law in order to ensure its effectiveness (see, for example, USRS, Decision U-I-295/13).

The question whether a given case involves the implementation of EU law may at times be difficult. For instance, dilemmas may arise as to the extent to which a particular case falls within the scope of EU law and whether its effect is "direct" or "indirect" in the aforementioned sense. It appears that the concept of the application of EU law should be understood broadly. The consequence of this approach is important in situations in which individuals may rely before national authorities on the right to be heard under the EU Charter. For example, tax penalties and criminal prosecution for tax evasion constitute implementation of EU law, as they concern matters of value added tax (VAT), which is also regulated at the EU level. The Court of Justice of the European Union (hereinafter CJEU) has held that the measures in question formed part of the implementation of EU law because they were at least partly linked to infringements of obligations relating to VAT (CJEU, C-617/10). The CJEU emphasized that the fact that the relevant national legislation

regulating the penalties and prosecution in Case C-617/10 was not adopted for the purpose of transposing a directive was irrelevant. The application of that legislation was intended to sanction breaches of provisions of a directive and thus to fulfil the obligations imposed on EU member states by EU law to effectively sanction conduct contrary to the financial interests of the EU (*ibid.*, para. 28). Whether the application of EU law is direct or indirect is therefore not decisive. What matters is whether the case falls within a particular field of law regulated at EU level.

The right to be heard may be subject to restrictions under certain conditions. Such restrictions must be assessed in each individual case. This obligation of assessment lies particularly with the legislature, since, as will be discussed below, the right to be heard is expressed in different ways through the formal rules of administrative procedure. Already under the EU Charter it follows that any limitation of the right to be heard must be lawful and proportionate. Paragraph 1 of Article 52 EU Charter provides that any limitation on the exercise of the rights and freedoms must be provided for by law. In accordance with the principle of proportionality, limitations are permitted only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

The CJEU has on numerous occasions addressed the right to be heard in the context of administrative proceedings, consistently stressing its general importance. According to the CJEU, the right to be heard essentially ensures that every person has the opportunity to make his views known in an appropriate and effective manner during an administrative proceeding, before any decision which affects his interests is taken (CJEU, C-558/17 P, para. 53). The right to be heard must be respected in any proceedings which may result in an act adversely affecting an individual (CJEU, C-277/11, para. 85). Its purpose is to secure effective protection of the person concerned, enabling that person, inter alia, to correct

an error or to put forward facts relating to personal situation which argue in favour of the adoption, non-adoption, or particular content of a decision (CJEU, C-249/13, para. 37). The right to be heard also entails that the administrative authority must duly take account of the observations submitted by the person concerned (CJEU, C-277/11, para. 88). This enables the authority to conduct the proceeding in such a way as to take a decision in full knowledge of the facts and to provide reasoning that allows the person concerned to effectively exercise the right to judicial review (CJEU, C-249/13, para. 59).

It follows from the above that the right to be heard in EU law has the status of a general legal principle, elevated beyond the provisions of the EU Charter. This can be confirmed by the fact that the CJEU recognised the fundamental importance of the right to be heard even before the entry into force of the EU Charter (Muzi, 2017, p. 482). For instance, in Case C-269/90 (paras. 14, 25), the CJEU unequivocally recognised the right to be heard (in administrative proceedings) as a fundamental general principle of EU law. Similarly, in Case C-349/07 (paras. 36-38), the CJEU held that respect for the rights of the defence is a general principle of EU law applicable where an authority intends to adopt a measure adversely affecting a person. Under this principle, addressees of decisions which significantly affect their interests must be enabled effectively to express their views on the elements on which the authority intends to base its decision. This obligation applies also to the authorities of EU member states when adopting decisions within the scope of EU law, even where the relevant EU legislation does not expressly provide for such a procedural formality. The right to be heard is said to have initially developed in EU law in the field of competition, as an element of the "rights of the defence" (Nehl, 1999, p. 70; Muzi, 2017, p. 482). The absence of a specific provision is not decisive for the exercise of the right to be heard and EU law also emphasises this right in the context of the so-called composite administrative pro-

cedures (Franchini, 2004, p. 191; European Central Bank, 2020). These are the procedures which are conducted both at the level of the EU and at the level of the EU member states. Because of their "dual" nature, particular attention is drawn to potential difficulties in safeguarding the right to be heard, which must as a matter of principle be ensured primarily in the relationship between the individual and the national administrative authority (Eckes, Mendes, 2011).

4. The Slovenian legal regime

4.1. Constitutional framework

The right to be heard in administrative law is firmly rooted in the constitutional rights guaranteed by the Constitution. Due to the nature (and substance) of the right to be heard, it intersects with a wide range of constitutional provisions. The right to be heard is probably the most directly safeguarded within the right to equal protection of rights, as enshrined in Article 22 of the Constitution: "Everyone shall be guaranteed equal protection of rights in any proceeding before a court and before other state authorities, local community authorities, and bearers of public authority that decide on his rights, duties, or legal interests" (Kovač, 2019, p. 189). It grants the individual the opportunity to actively participate in administrative proceedings and, within the limits of the law, to influence their outcome. From the perspective of individuals – natural persons, the right to be heard can be connected to personal dignity (Article 34 of the Constitution), which can be further linked, *inter alia*, to the principles of democracy and the rule of law (Article 1 and 2 of the Constitution) (Kleindienst, 2019, pp. 334-335). Under Article 21 of the Constitution, the protection of human personality and dignity is specifically guaranteed in criminal and civil proceedings; therefore, this constitutional provision does not directly extend to administrative proceedings. The right to be

heard can also be linked to the principle of equality (Article 14 of the Constitution) (Avbelj, Vatovec, 2019, p. 114; Galič, 2019, pp. 174-175), as it enables the equal treatment of parties, or can be understood as an instrument ensuring that all persons are equal before the law.

The right to be heard in administrative law primarily concerns the relationship between the individual, as a subordinate subject in a public-law relationship, and the state. As will become evident below, the right to be heard also has some more broader implications. However, it should be understood as one of the most important rights an individual possesses in relation to public authority. In this respect, the right to be heard in administrative law is different from its role in other branches of law. For example, in civil proceedings, the right to be heard is understood differently and is interconnected with other requirements – primarily as the rule or principle "*audiatur et altera pars*" or as the right to a "contradictory procedure", meaning that a party in litigation must be given the opportunity to comment on the submissions and evidence presented by the opposing party before the court (Galič, 2019, p. 175). In civil proceedings, the right to be heard is linked to the "equality of arms" or "equality of the parties" (*ibid.*, p. 181), due to the conflicting interests of the parties who appear before the court to resolve their dispute. Although similar elements of the right to be heard can also be identified in administrative proceedings, it should generally be noted that its implications are adapted to the specific characteristics of administrative law. The constitutional requirements relating to the right to be heard may be understood in a manner essentially equivalent to the approach taken under the EU Charter and the ECHR. It is also generally recognised that the principles governing administrative proceedings at the supranational and national levels do not differ in essential aspects (Franchini, 2004, p. 192). Of course, certain differences arise in concrete cases, in which the specific features of Slovenian legislation must be considered.

4.2. General administrative procedure

Generally speaking, the right to be heard is always understood as a procedural requirement. Interestingly, from a historical perspective, procedural issues in the administrative area supposedly attracted relatively little attention at first – the decisive element was thought to be, above all, the substantive content of the final individual administrative act (Franchini, 2004, p. 183). This view has since been surpassed and procedural rules are now recognised as being of fundamental importance for the correctness and lawfulness of an individual administrative act in a given case. The general administrative procedure is in Slovenian law regulated in ZUP. ZUP refers to the "principle of hearing the party". According to ZUP, this principle is classified among the fundamental principles of the general administrative procedure (Chapter 1 ZUP). Article 9 ZUP provides that a party must be given the opportunity to state its case on all facts and circumstances relevant for the decision before the issuance of the decision (paragraph 1). Where parties with opposing interests are involved, each party must have the opportunity to comment on the claims and statements of the opposing party (paragraph 2). An authority may not base its decision on facts on which all parties were not given the opportunity to comment, except in cases provided for by law (paragraph 3).

Although ZUP refers to the "principle of hearing the party", it also lays down express procedural rules governing the actions of authorities and parties in this regard. This means that the principle should be viewed both as a principle (in the sense of a general guideline) and as a rule (in the sense of precise procedural requirements). As a principle, it is significant for the interpretation of various provisions of administrative proceedings – for example, which person should be invited to participate in proceedings (Article 143 ZUP). As a rule, it is reflected in numerous provisions of ZUP that in specific instances ensure the party's right to be

heard – for example the requirement to conduct a so-called "special fact-finding procedure" (Article 145 ZUP). This procedure, which is generally conducted in all administrative proceedings, requires the authority to establish the facts and circumstances relevant to the decision and to give the parties an opportunity to state their case (that is, to assert their rights and legal interests). A party has the right to participate in this procedure and, in order to achieve its purpose, to provide relevant information and defend its rights and legally protected interests (paragraph 1 of Article 146 ZUP). A party may put forward facts that could affect the resolution of the case and challenge the accuracy of claims inconsistent with its own. Until the decision is issued, a party may supplement and clarify its submissions; if this is done after the hearing, the party must justify why it was not done during the hearing (paragraph 2 of Article 146 ZUP). The right to be heard therefore means that a party in administrative proceedings is active, or at least has the opportunity to be active, and is not forced merely to act as a passive observer of the proceeding (Androjna, Kerševan, 2017, p. 90).

The right to be heard applies at all stages of proceedings, not only before the administrative authority of the first-instance (*ibid.*, p. 91). A breach of the right to be heard constitutes a substantial violation (paragraphs 2 and 3 of Article 237 ZUP), which can be remedied through legal remedies, ultimately before the administrative court. Whether the right to be heard has been infringed is also examined *ex officio* by the appellate authority (paragraph 2 of Article 247 ZUP).

While the right to be heard is a crucial principle and a rule that always guides administrative action, it is not absolute. It does not always apply, or at least not in the same way. As it has already been discussed, derogations from the right to be heard are, under certain conditions – especially where the requirement of proportionality is met –, also permissible under the ECHR and the EU Charter. Derogations from the right to be heard may take two major forms: (1) an excep-

tion where the right does not apply at all; and (2) a restriction of the right.

The main exception is the summary fact-finding procedure governed by Article 144 ZUP. In this procedure, the authority may decide immediately without hearing the party in certain circumstances, for instance where the facts can already be established on the basis of the party's own statements and evidence, or on the basis of official data, and a hearing is not necessary for the protection of the party's rights, or where urgent measures must be taken immediately and the circumstances are at least plausibly demonstrated. Reference should also be made to the possibility of excluding the right to be heard in tax law. A particular difficulty in tax proceedings is that otherwise legally separated proceedings may be connected. The dilemma is whether the party must be heard in each individual proceeding or whether it is sufficient if the party has the opportunity to be heard in one of several interconnected proceedings. The answer is not uniform. It depends on the circumstances whether the party must be heard in each proceeding. Where the party can exercise the right to be heard effectively in only one of the interconnected proceedings, this may in principle suffice, provided that proportionality is respected. The benefits of such an arrangement, which may prevail, include efficiency and procedural simplification (also from the perspective of the parties), greater consistency, and prevention of abuse, since the same fact cannot be contested repeatedly (decision of the Constitutional Court of the Republic of Slovenia No. U-I-216/20, Up-446/20). It may be said that such a position corresponds, *mutatis mutandis*, to the condition laid down in the first paragraph of Article 52 of the EU Charter, according to which limitations upon rights are permissible where they are necessary and genuinely meet objectives of general interest, or where they are required for the protection of the rights and freedoms of others. The procedural rules of various (special) administrative procedures must often consider

differing interests and ensure appropriate balances between them. This approach is similarly consistent under the ECHR.

A typical example of a restriction of the right to be heard is preclusion in administrative proceedings. This entails merely a temporal limitation tied to a specific procedural stage (Androjna, Kerševan, 2017, p. 92). Under ZUP, new facts may be raised on appeal only if the party justifies why they could not be presented earlier (paragraph 2 of Article 238 ZUP). Here too, proportionality must be respected. At the same time, the principle of procedural economy (Article 14 ZUP) must be considered, to which the parties must also contribute. For this reason, the system of preclusion is usually not legally problematic. As already noted, under EU law and similarly under the ECHR, proportionate limitations are permissible, provided that they appropriately take into account various interests involved (both the public interest and the interests of individuals). Special exceptions may be set out in sectoral legislation. Such cases may be legally questionable in terms of the protection of the right to be heard. Slovenian legislation often provides examples in proceedings before independent regulators, who are required to decide swiftly and effectively. For instance, the Financial Instruments Market Act, 2018 (hereinafter ZTFI-1) provides that, before issuing a decision *ex officio* against which no objection is admissible, the Securities Market Agency must invite the party to comment on the facts and circumstances relevant to the decision, unless the law provides another form of ensuring the right to be heard (paragraph 1 Article 470 ZTFI-1). By contrast, before the Securities Market Agency issues an order requiring the rectification of breaches of the law, the party is not given the opportunity to be heard. In such cases, the party may explain the relevant circumstances subsequently, by lodging an objection against the order (Article 496 ZTFI-1), on which the Securities Market Agency then decides by the decision. The Constitutional Court of Slovenia has already found this arrangement to be in conformity with the Constitution (de-

cision No. U-I-213/03). The reasons for special regulation of the right to be heard in sector-specific laws, which may differ from the general framework under ZUP, must be applied restrictively, confined to particular fields, and justified (Kovač, 2019, p. 197). The aim of ensuring greater procedural speed alone cannot justify denying an individual the right to be heard. Such a limitation is neither necessary nor proportionate (for example, also in the sense of paragraph 1 of Article 52 EU Charter), as procedural efficiency can be achieved through other means (e.g., prioritising decisions, limiting the right to make statements to a specific time period or restricting the scope of submissions made by the parties).

4.3. Relations with the administrative authority and with other parties

The right to be heard is of primary importance in the relationship between the authority and the party. Here, it should be emphasised that the right to be heard, in the sense in which it is also understood under the ECHR and the EU Charter, pertains to individual administrative decisions – although it must be borne in mind that such a limitation of the scope of the right to be heard is not always very clear (Craig, 2012, pp. 295-296). This question goes beyond the scope of this contribution, thus it should suffice to recall that the right to be heard must be respected where an administrative decision is, in substance, of an individual nature and affects the legal position of an individual, even if, formally speaking, it takes the form of a general act. In its basic, proper meaning, the right to be heard does not, for example, extend to the adoption of general administrative acts.

As is clear from Articles 9 and 146 ZUP, the right to be heard also extends to relations between parties (Androjna, Kerševan, 2017, p. 89). Where multiple parties with conflicting interests are involved, an oral hearing must be held (Article 154 ZUP). At the hearing, parties may confront one

another directly, thereby realising their right to be heard. In this respect, the right approaches its significance in judicial proceedings, where the claimant and defendant present their views before a court resolving a dispute. Conflicts of interest among parties are not very rare in administrative proceedings, particularly when independent regulators decide disputes between market actors. One example is the competence of the Agency for Communication Networks and Services of the Republic of Slovenia to resolve disputes between natural and legal persons in the electronic communications market, including cross-border disputes (Articles 282 and 284 of the Electronic Communications Act, 2022, hereinafter ZEKom-2). In such proceedings, the general rules of administrative proceedings apply subsidiarily (paragraph 5 of Article 283 ZEKom-2), which also means respect for the right to be heard. For the effective exercise of the right to be heard in relation to the authority and other parties, it is essential that the parties are properly informed, for example with the documentation relevant to the authority's decision (decision of the Constitutional Court of Slovenia No. Up-256/18).

4.4. Questions of fact and law

There is no doubt that the right to be heard extends to factual matters. An authority must enable a party to comment on all circumstances and facts established in the fact-finding procedure (paragraph 3, point 1 of Article 146 ZUP). The right covers those facts that are decisive for the authority's decision (paragraph 1 of Article 9 ZUP). Accordingly, where a fact is not important for the decision, the right is not violated even if the party had no opportunity to comment. As already noted, the right is excluded in the summary fact-finding procedure.

The right to be heard also extends to legal issues (Androjna, Kerševan, 2017, p. 89). It covers those "circumstances"

(paragraph 3, point 1 of Article 146 ZUP) that are of a legal nature. Authorities are deemed to know the law *ex officio*. Nevertheless, the authority must allow a party to address the legal aspects relevant to the decision insofar as they are connected to facts that the party may present. Legal and factual issues are often very connected in practice and it is not always possible to strictly separate them. Which facts must be presented depends on the applicable legal rules. This is particularly relevant if parties with conflicting interests have opposing legal arguments. If one party puts forward a legal objection, it is only proper that the other parties have the opportunity to address it. The same logic applies in judicial proceedings (Supreme Court of the Republic of Slovenia judgments No. I Ips 41/2004 and No. III Ips 133/2007).

4.5. Submissions of other persons

A party must also have the opportunity to be heard in relation to other persons relevant to the proceeding, for example by questioning witnesses and experts (paragraph 3, point 4 of Article 146 ZUP). Where witnesses or experts must be heard, an oral hearing must be held (Article 154 ZUP). Throughout the proceeding, the authority must ensure *ex officio* that all persons whose rights or legal interests could be affected by the decision are involved (Article 44 ZUP). Third-party participants are included to enable them to exercise their right to be heard in relation to matters affecting them. If a person seeks to intervene in the procedure, other parties must be notified, who may object, whereupon the authority decides on their participation (paragraph 3 of Article 142 ZUP). It follows that the right to be heard extends beyond the boundaries of a particular proceeding, potentially encompassing relations with persons outside it. This broad scope of the right stems from its very nature. Anyone engaging with a public authority must be "heard", that is,

treated as a subject rather than a passive object of proceedings. It is essentially a dialogue between public authority and individuals.

4.6. Evidence

Evidence is crucial, as it establishes legally relevant facts. Consequently, the right to be heard is of great importance for the outcome of proceedings. A party must be able to participate in the taking of evidence, express views on it, question witnesses (paragraph 3 of Article 146 ZUP) and take part in on-site inspections (paragraph 1 of Article 200 ZUP). Where one party requests preservation of evidence, other parties must be allowed to comment, except in urgent cases requiring immediate decision (paragraph 4 of Article 204 ZUP).

A special issue arises with evidence constituting classified information. Classified information is a fact concerning public security, defence, foreign affairs, or the intelligence and security service of the state, designated as classified in accordance with law (paragraph 1 of Article 2 Classified Information Act, 2006, hereinafter ZTP). Paragraph 5 of Article 82 ZUP provides that if documents containing classified information are used in the procedure as a basis for the decision, the parties have the right to inspect them. The Supreme Court of the Republic of Slovenia addressed classified information in decision No. X Ips 2/2023, concerning international protection. The Supreme Court confirmed that parties only have the right to inspect such information. Copying or transcription is not allowed. However, it also emphasised that ZUP does not permit an administrative authority to withhold classified information entirely. In the case, the authority had not allowed the party to comment on classified information even though the administrative act was based on it. The Administrative Court of the Republic of Slovenia remedied this violation in subsequent judicial proceedings by fully dis-

closing the classified information at the hearing and granting the party an opportunity to respond. The Supreme Court upheld this approach as lawful. It added that it did not examine whether full disclosure had adequately protected (also) the public interest, as this was not decisive question in a given situation.

5. Conclusion

The right to be heard in administrative proceedings has multiple aspects. Broadly speaking, it functions as a legal principle, a right, and a rule. In its widest sense, it must be understood as a (general) legal principle that must always be respected in administrative proceedings, regardless of whether it is expressly provided in the relevant regulation. It is also a fundamental right guaranteed at the international level by both the ECHR and the EU Charter. In addition, the right is also set out as a clear and explicit legal rule in various procedural provisions. The right to be heard may thus be viewed simultaneously from all these perspectives, which often overlap. Which aspect is most relevant depends on the context of the particular case.

This article has examined the Slovenian regulation under ZUP. ZUP demonstrates that the right to be heard extends not only to relations between the authority and the party but also to relations between multiple parties where more than one is involved in the proceedings. Moreover, it extends to other participants such as third-party interveners, and even to persons whose rights or obligations are not directly at issue but who seek to participate in a proceeding (parties have the right to respond to such applications for entry into the proceeding). It may also encompass witnesses and experts. This broad reach of the right to be heard reflects the nature of this right, which requires that administrative authorities treat individuals (natural and legal persons) as subjects of proceedings.

Despite its importance, the right to be heard is not absolute or unlimited. This article has highlighted situations in which exceptions or restrictions apply. ZUP itself provides for a summary fact-finding procedure in which the right is excluded in exceptional circumstances. The right may also be (only) restricted, for instance to a specific stage of proceedings, as in the case of preclusion rules. Derogations from the right to be heard can usually be find in administrative frameworks that stress the need for effective decision-making. In all such cases, however, it remains essential that exceptions and restrictions respect the principle of proportionality.

LITERATURE AND SOURCES:

Androjna, V., Kerševan, E. (2017). Upravno procesno pravo: upravni postopek in upravni spor. Ljubljana: IUS software, GV Založba.

Avbelj, M., Vatovec, K. (2019). Komentar k 14. členu Ustave. In: Komentar Ustave Republike Slovenije, del 1: človekove pravice in temeljne svoboščine / Avbelj, M. (ed.). Nova Gorica: Nova univerza, Evropska pravna fakulteta, pp. 110-123.

Charter of Fundamental Rights of the European Union. (2016). Official Journal of the European Union C 202.

CJEU, C-617/10, *Åklagaren v Hans Åkerberg Fransson*, Court of Justice of the European Union, 7. 5. 2013, ECLI:EU:C:2013:280.

CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, Court of Justice of the European Union, 11. 12. 2014, ECLI:EU:C:2014:2431.

CJEU, C-383/13 PPU, *M. G. and N. R. v Staatssecretaris van Veiligheid en Justitie*, Court of Justice of the European Union, 10. 9. 2013, ECLI:EU:2013:533.

CJEU, C-277/11, *M. M. v Minister for Justice, Equality and Law Reform and Others*, Court of Justice of the European Union, 22. 11. 2012, ECLI:EU:C:2012:744.

CJEU, C-558/17 P, *OZ v European Investment Bank*, Court of Justice of the European Union, 4. 4. 2019, ECLI:EU:C:2019:289.

CJEU, C-349/07, *Sopropé - Organizações de Calçado Lda v Fazenda Pública*, Court of Justice of the European Union, 18. 12. 2008, ECLI:EU:C:2008:746.

CJEU, C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, Court of Justice of the European Union, 21. 11. 1991, ECLI:EU:C:1991:438.

Classified Information Act – Zakon o tajnih podatkih (ZTP). (2006) Uradni list RS, št. 50/06 – uradno prečiščeno besedilo, 9/10, 60/11, 8/20 in 18/23 – ZDU-1O.

Constitution of the Republic of Slovenia – Ustava Republike Slovenije. (1991). Uradni list RS, št. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a in 92/21 – UZ62a.

Craig, P. (2012). EU Administrative Law. Oxford etc.: Oxford University Press.

Eckes, C., Mendes, J. (2011). The Right to Be Heard in Composite Administrative Procedures: Lost in between Protection? European Law Review, 36, pp. 651-670.

ECtHR, *Albert and Le Compte v. Belgium*, European Court of Human Rights, Nos. 7299/75, 7496/76, 10. 2. 1983, ECLI:CE:ECHR:1983:0210JUD000729975.
ECtHR, *Benthem v. The Netherlands*, European Court of Human Rights, No. 8848/80, 23. 10. 1985, ECLI:CE:ECHR:1985:1023JUD000887880.
ECtHR, *Dombo Beheer B.V. v. the Netherlands*, European Court of Human Rights, No. 14448/88, 27. 10. 1993, ECLI:CE:ECHR:1993:1027JUD001444888.
ECtHR, *Engel and Others v. The Netherlands*, European Court of Human Rights, Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8. 6. 1976, ECLI:CE:ECHR:1976:0608JUD00510071.
ECtHR, *Ferrazzini v. Italy*, European Court of Human Rights, No. 44759/98, 12. 7. 2001, ECČ LI:CE:ECHR:2001:0712JUD004475998.
ECtHR, *Jussila v. Finland*, European Court of Human Rights, No. 73053/01, 23. 11. 2006, ECL I:CE:ECHR:2006:1123JUD007305301.
ECtHR, *König v. Germany*, European Court of Human Rights, No. 6232/73, 28. 6. 1978, ECLI: CE:ECHR:1978:0628JUD000623273.
ECtHR, *Kraska v. Switzerland*, European Court of Human Rights, No. 13942/88, 19. 4. 1993, ECLI:CE:ECHR:1993:0419JUD001394288..
ECtHR, *Ringeisen v. Austria*, European Court of Human Rights, No. 2614/65, 16. 7. 1971, ECL I:CE:ECHR:1971,0716JUD000261465.
ECtHR, *Salesi v. Italy*, European Court of Human Rights, No. 13023/87, 26. 2. 1993, ECLI:CE: ECHR:1993:0226JUD001302387.
Eisenberg, M. A. (2022). Legal Rules, Principles, and Standards. In *Legal Reasoning* (pp. 60-63). Cambridge: Cambridge University Press.
Electronic Communications Act – Zakon o elektronskih komunikacijah (ZEKom-2). (2022) Uradni list RS, št. 130/22, 18/23 – ZDU-1O in 40/25 – ZInfV-1.
European Central Bank, Eckes, T. and D'Ambrosio, R. (2020). Composite administrative procedures in the European Union.
European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms), (1950), ECHR. Council of Europe.
Franchini, C. (2004). European Principles Governing National Administrative Proceedings. Law and Contemporary Problems, 68(1), pp. 183-196.
Galič, A. (2019). Komentar k 22. členu Ustave. In Komentar Ustave Republike Slovenije, del 1: človekove pravice in temeljne svoboščine / Avbelj, M. (ed.), Nova Gorica: Nova univerza, Evropska pravna fakulteta, pp. 171-185.
General Administrative Procedure Act – Zakon o splošnem upravnem postopku (ZUP). (2006). Uradni list RS, št. 24/06 – uradno prečiščeno besedilo, 105/06 – ZUS-1, 126/07, 65/08, 8/10, 82/13, 175/20 – ZIUOPDVE in 3/22 – ZDeb.
Kleindienst, P. (2019). Komentar k 34. členu Ustave. In Komentar Ustave Republike Slovenije, del 1: človekove pravice in temeljne svoboščine / Avbelj, M. (ed.), Nova Gorica: Nova univerza, Evropska pravna fakulteta, pp. 334-339.
Kovač, P. (2019). Komentar k 22. členu Ustave. In Komentar Ustave Republike Slovenije, del 1: človekove pravice in temeljne svoboščine / Avbelj, M. (ed.), Nova Gorica: Nova univerza, Evropska pravna fakulteta, pp. 189-197.
Kovač, P. (2020). Komentar k 9. členu Zakona o splošnem upravnem postopku. In Komentar Zakona o splošnem upravnem postopku (ZUP). Ljubljana: Uradni list Republike Slovenije, Pravna fakulteta Univerze v Ljubljani, pp. 126-144.
Lock, T. (2019). Rights and principles in the EU Charter of Fundamental Rights. Common Market Law Review, 56(5), pp. 1201-1226.
Market in Financial Instruments Act – Zakon o trgu finančnih instrumentov (ZTFI-1). (2018). Uradni list RS, št. 77/18, 17/19 – popr., 66/19, 123/21 in 45/24.
Muzi, L. (2017). Administrative due process of law in the light of the jurisprudence of EU Courts: a quantitative and qualitative analysis. In Research Handbook on EU Administrative Law / Harlow, C., Leino, P., della Cananea, G. (eds). Cheltenham, Northampton: Edward Elgar Publishing, pp. 468-489.
Nehl, H. P. (1999). Principles of Administrative Procedure in EC Law. Oxford: Hart Publishing.
Pavčnik, M. (2020). Teorija prava: prispevek k razumevanju prava. Ljubljana: Lexpera, GV Založba.
USRS, Decision Up-256/18, Constitutional Court of the Republic of Slovenia, 23. 6. 2022,

ECLI:SI:USRS:2022:Up.256.18.
USRS, Decision U-I-213/03, Constitutional Court of the Republic of Slovenia, 12. 1. 2006, ECLI:SI:USRS:2006:U.I.213.03.
USRS, Decision U-I-295/13, Constitutional Court of the Republic of Slovenia, 19. 10. 2016, ECLI:SI:USRS:2016:U.I.295.13.
USRS, Decision U-I-216/20, Up-446/20, Constitutional Court of the Republic of Slovenia, 18. 1. 2024, ECLI:SI:USRS:U.I.216.20.
VSRS, I Ips 41/2004, Supreme Court of the Republic of Slovenia, 18. 3. 2004, ECLI:SI:VSRS:I.IPS.41.2004.
VSRS, III Ips 133/2007, Supreme Court of the Republic of Slovenia, 9. 2. 2010, ECLI:SI:VSRS:III.IPS.133.2007.
VSRS, X Ips 2/2023, Supreme Court of the Republic of Slovenia, 1. 3. 2023, ECLI:SI:VSRS:X.IPS.2.2023.1.