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A FEW REMARKS CONCERNING THE CHANGES IN THE CODE OF ADMINISTRATIVE PROCEEDINGS

1. INTRODUCTION

The subject matter of the remarks discussed in this paper will be the problem of changes that have been introduced on the basis of Polish administrative proceedings as a result of an amendment to the Code of Administrative Proceedings[1] by virtue of the law passed on December 3rd 2010 that concerns changes to the law – Code of Administrative Proceedings and Statutes – Law on Administrative Courts Proceedings. This amendment was signed by the President of the Republic of Poland on December 23rd 2010 and came into force on April 11th 2011. It should be noted that this amendment has significantly changed a few basic rules concerning the CAD and has influenced the model of administrative proceedings in cases of e.g. the principle of distributing the burden of proof. The amendment of the CAD, discussed in this paper, should be treated as the most important amendment of this legal act, valid in the Polish law since 1960. In compliance with the legislature, three basic goals of the amendment should the noted.[2] The first pertains to the will to improve the administrative proceedings by abolishing major restrictions and gaps present in the rules of law currently in force. The second goal pertains to the motivation of the parties taking part in the proceedings to be more active. The last point concerns the possibility of suing not only an inactive organ of public administration but also for excessive and unwarranted protraction of proceedings.

Because of the limitations imposed on the length of this paper only the main areas of change will be discussed, such as the issues of: changes concerning the principle of objective truth, changes concerning the principle of the speed of the proceedings, changes concerning the commencement of administrative proceedings, changes concerning access to the documents related to the case, changes concerning the possibility of issuing cassations, and finally, changes concerning the possibilities of a resumption of the administrative proceedings.

[1] Henceforth referred to as CAP.

[2] Justification of statutory change bill – Code of Administrative Proceedings and Statutes – Law on Administrative Court Proceedings. Parliamentary document no. 2987.

2. CHANGES CONCERNING THE PRINCIPLE OF OBJECTIVE TRUTH

Firstly, changes pertaining to one of the most basic rules of administrative proceedings should be indicated, namely the principle of objective truth. It should be noted that this principle plays a key role in establishing the facts during a case. Furthermore, these facts constitute the foundation for decisions pertaining to the subject matter. R. Kędziora argues that proper settlement of an individual case is conditioned on the basis of decisions taken in proper, objectively existent and rightly asserted circumstances (Kędziora, 2008: p. 64). Until the introduction of the amendment, the burden of proof, in compliance with art. 7, was vested in the public administrative organ. As indicated in art. 7 of the CAP, in the course of proceedings, the public administrative organs must take all necessary steps to explain the facts of a given case precisely (…). In light of the rule of law presented, the CAP, according to the administrative courts, imposed a duty on the organs to maintain an active attitude during the entire explanatory proceedings. Previously, the administrative organ was obliged to examine the evidence needed to settle the facts of any case by virtue of the office.[3] In another ruling, the voivodship administrative court stressed that abandonment of any actions in connection with legal proceedings leading to a determination of the facts of a case constitutes a transgression against the rules of administrative proceedings. This offence has often resulted in incorrect legal decisions, especially in situations where a party refers to specific circumstances that they find are important[4]. In light of the issued ruling, a motion was formulated stating that the organ responsible for collecting and examining evidence is the administrative organ. This attribute significantly differentiates the administrative proceedings from civil proceedings. The aforementioned establishment, however, was not unanimously agreed to. In a ruling issued on August 27th 2010, the Supreme Administrative Court indicated that during administrative proceedings, the burden of proof rests with the person who, on the basis of specific facts, may call for legal consequences.[5]

Following the amendment, the content of article 7 of the CAP was changed and in relation to which, the public administrative organs, whether by virtue of the office or following a motion put forward by a party, must undertake all necessary actions to settle the facts of the case in the course of the proceedings (…)

In compliance with the current regulations, if the rules of law attach certain conduct of the addressee to his or her advantageous, legal consequences, then the burden of proving the circumstances of the case must be carried by the person or party that will benefit from it.

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[3] As stated in *The Decision of the Voivodship (see provincial) Administrative Court of Warsaw* on 7th July 2010 V SA/Wa 115/10.

[4] *The Decision of the Voivodship (see provincial) Administrative Court of Opole* on 27th July 2010 II SA/OP 309/10.

[5] Decision of the Supreme Administrative Court of Warsaw on 27th August 2010. II OSK 1131/10.

3. CHANGES TO THE PRINCIPLE OF SPEED OF THE PROCEEDINGS

Having considered the evaluation of the effectiveness of public administration, the further amendments pertain to a key principle (G. Łaszczyca 2005: p. 164.) The amendment in question is the principle of the speed of the proceedings, which is elaborated on in art.12 of the CAP, as well as in art. 35 and the following. It is worth remembering that according to art.12 § 1 of the CAP, the organs of public administration should investigate the case quickly and thoroughly using the simplest means possible that will lead to solving it. In compliance with § 2 of the CAP, cases that do not require that evidence, information or explanations be collected should be handled promptly.

The changes introduced within that scope pertain to two issues. Firstly, in light of the currently binding art. 35 § 4 of the CAP, the rules of law could provide different (longer or shorter) deadlines for the completion of particular cases. In accordance with the previous art., 35 § 4 of the CAP, organs of a higher rank were able to specify various cases that could be handled within shorter time limits than cases that had been specified in previous sections of that article (possible deadlines: prompt, month-long, two--month long). In practice this rule, due to organizational and structural changes in the public administration, was dead because oftentimes, and especially in relation to local government administration, the organs of a higher rank, according to the CAP, are not seen as superior to the organs responsible for issuing decisions in the first instance.

Secondly, in compliance with art. 37 § 1 of the CAP, in the event of a failure to handle a case within the time limit specified in art.35, as stated in a special regulation and determined according to art. 36, or in the event of a protraction in the proceedings, the party is entitled to file a complaint to an organ of a higher rank, or to call for the infringement of the law to be dealt with, if the first option is not possible. The change in question is of significant importance to civil servants representing public administrative organs as well as for the parties in the proceedings. The former complaint concerning a failure to decide a case within the time limit has been extended and, according to art. 37 § 1 of the CAP, it now also includes the protraction of the proceedings. The amendment to this rule came as a result of rulings passed by the European Tribunal of Human Rights in Strasburg. Both the doctrine and the judicial decision of the court will have to develop a clarification of this law, which will enable a distinction between "idleness" and "protraction". It appears that these terms partially overlap.[6] The institution to which complaints concerning the protraction of proceedings should be filed is supposed to prevent the frequent ineffectiveness of the organs that conduct the proceedings, which are manifested by undertaking certain actions at lengthy intervals or by undertaking actions that are only seemingly effective but do not pertain to the case being investigated. The amendment puts forward cases that concern the protraction of the ad-

[6] To date, judicial decisions have indicated that if the proceedings in progress are lengthy, this does not mean that the administrative organ is idle. The decision of the Voivodship Administrative Court of Bydgoszcz on 21st April 2009. II SAB/Bd 4/09. In a different ruling, it was stressed that idleness of the public administrative organ occurs not only if the organ has failed to take action within the established time limit but also if it has taken action but has failed to provide a final decision or any other administrative act. The Decision of Voivodship Administrative Court of Warsaw on 26th August 2011. SAB/Wa 266/11.

ministrative courts entitled to impose fines in relation to units of public administration known for prolonging the procedures.

It seems that instances of protraction are often manifested by the following: undertaking certain actions at lengthy intervals, undertaking activities that are seemingly effective but that do not pertain to the case, demanding that the parties present additional documents that oftentimes do not relate to the case, suspension of proceedings in compliance with art. 97 § 1 pt. 4 of the CAP in spite of the fact that a preliminary question in fact is absent.

The change described is related to the law passed on 20th January 2010 and concerns the financial liability of public servants in relation to flagrant violations of the law. It should be noted that in compliance with art. 37 § 2 *in fine* of the CAP, the organ is responsible for stating whether unattended cases seriously violated the law.

4. CHANGES CONCERNING THE COMMENCEMENT OF ADMINISTRATIVE PROCEEDINGS

One of the most important changes in the CAP is the introduction of art. 61a, according to which no proceedings may be commenced if a claim has been put forward by persons who are not associated with any of the parties, or on the basis of other reasons; the proceedings may not take place following a decision subject to a complaint. Any solution proposed by the legislature is based on art. 165a, as described in the financial regulations. By virtue of art.61a of the CAP, a specific procedure concerning preparatory proceedings has been introduced. According to this procedure, an administrative organ will only decide whether the mover is associated with a party or not. The absence of this procedure upon the introduction of the amendment has caused numerous logical issues. The assumption that a claim for commencement of proceedings put forward by a person who does not have any legal interests in the case should lead to a decision of discontinuance and constitutes, as such, a logical error. If the mover has not been associated with a party, has not represented it, nor served as an attorney, the claim *de facto* should not result in commencement of proceedings. Consequently, one should not discontinue any proceedings that have not commenced.

At this point it should be noted that art. 61a of the CAP should always be subject to analysis in accordance with art. 28 of the CAP. This article should regulate the question of the legitimacy of the party to participate in the proceedings. In compliance with this article, a person constitutes a party if the proceedings pertain to his or her legal interest, or to a person who demands action on the part of an organ in relation to his or her legal interest or duty. The fact that a person has a legal interest in the proceedings is a key factor in determining whether one constitutes a party. According to the views expressed in the ruling, legal interest in administrative proceedings means *de facto* an establishment of a binding rule of law on the basis of which one may demand that the organ fulfill their requirements. What is more, a person may limit or abandon the activities of the administrative organ that are contrary to the above-mentioned requirements.[7] In a different ruling, the administrative court indicated that legal interests con-

[7] The decision of the Voivodship Administrative Court of Rzeszów on 8th December 2010. II SA/Rz 780/10.

stitute a category of financial law. A legal interest entails participation in administrative proceedings of a person and has come into being following the direct influence of the procedures on legal cases, in accordance with financial law. The establishment of a legal interest entails the formation of a legal and financial relationship between the binding norms of financial law and the legal situations of a person. The administrative decision that concerns this norm might have an impact on the legal situation of a person within the scope of financial law[8].

Currently, the establishment of the facts that answer the question of whether certain persons who put forward motions for the commencement of proceedings are entitled to legal interest may take place only during initial procedures. If the court decides that the claim for commencement of procedures belongs to a person not associated with any party, or if the court decides that the proceedings may not be initiated because of other, justified reasons, the proceedings will not commence. Such decisions will only be taken in the course of proceedings to which a possible complaint may be subject.

What is more, the change being discussed pertains to the refusal to commence the proceedings if the ruling of the organ is no longer valid and was issued by means of the decisions taken. By virtue of this ruling, an organ of public administration decides whether the claim for continuation of the proceedings should be refuted or not.

5. CHANGES CONCERNING THE ACCESS OF PARTIES TO THE DOCUMENTS RELATED TO THE CASE

At the beginning of this section, one should take into account the fact that, on the basis of administrative procedures, the principle of the internal openness of the procedures is in force and may also be referred to as the principle of the relative openness of the proceedings (Przybysz Warsaw 2008: p. 203 Unlike civil or penal procedures, administrative proceedings are not open to parties that are not a part of the case. The principle of internal openness comes as a consequence of the principle of the active participation of parties in the proceedings (Wierzbowski Warsaw 2002: p.120)

This principle is not an absolute rule of law and its limitations are connected with the temporal aspect of the proceedings.

According to this amendment to the CAP, the principle of openness of legal acts to parties was partially altered. Parties should take this alteration into account due to significant changes to the practical consequences. In accordance with the former legal solutions, access to the documents, after termination of the administrative proceedings, was not possible except for cases regulated by the basic rules of the law concerning access to public information[9].

The possibility of examining the documents related to a case has been made possible even after termination of the case. In accordance with art.73 § 1 of the CAP, a party is entitled to examine the documents, make some notes on the basis of the case and make certified or regular copies. This rule is binding even after termination of the pro-

[8] The decision of the Voivodship Administrative Court of Warsaw on 6th October 2010. VI SA/WA 148/10.

[9] The decision of The Supreme Administrative Court of Warsaw on 20th March 2008. II GSK 459/07.

ceedings. In light of art. 73 §1, the legal actions specified in §1 take place on the premises of public administrative organs in the presence of an employee.

6. CHANGES CONCERNING THE POSSIBILITY OF ISSUING CASSATIONS

The scope of decisions that are allowable in revocatory proceedings has also been changed. In particular, the solution concerning cassations that results from an abatement of the decisions taken by administrative organs of the first instance or that results from a case being remanded has been subject to limitations. This problem is of utmost importance not only to public administrative organs, especially of the first instance, but also to the parties who are oftentimes keen for a speedy termination of the proceedings. The decisions that concern cassations consist in an abatement of the decisions that have been appealed against and in handing over the case to an organ that remanded the case in question. Such decisions should have an exceptional character in relation to decisions pertaining to the content and that terminate the proceeding. As indicated by B. Adamiak and J. Borkowski, in accordance with the two-instance procedure principle, the appellate organ is obliged to a repeated examination and settlement of a case that was decided in the first instance with any reservation concerning the solution provided in art. 138 §2 of the CAP (Adamiak, Borkowski, Warsaw 2009: p. 487.

According to the current form of art. 138 §2 of the CAP, the appellate organ may completely repeal the decision that has been appealed. What is more, it may remand the case to an organ of the first instance on condition that the decision was issued against the law of the proceedings, although the scope of the case required for its solution may affect its settlement. If an organ is willing to hand over the case, it should first indicate the circumstances that should be taken into consideration during future reexaminations of the case. Nowadays, cassation settlements will only be allowable if the decisions taken by the organs of the first instance are against the law of the proceedings while the scope of the case will have a great impact on the settlement. In compliance with the previous form of the legal regulations, the appellate organs could either repeal the decision, or remand it, in the event that the settlement required prior explanatory proceedings, in full or in part. The previous form of art. 138 §2 of the CAP created many doubts that were resolved by the administrative courts. In one of the rulings, the administrative court indicated that making references to the reasons why the application of methods described in art. 138 §2 of the CAP was used is unwarranted. Furthermore, such application is unwarranted because of incorrect legal grounds, especially in situations where such grounds are existent under the law. This kind of offence may be resolved through reformatory methods.[10] In a different ruling, it was stressed that explanatory proceedings, as described in art. 138 §2 of the CAP, lead to the establishment of factual circumstances that are crucial to cases whose establishment requires a complementary hearing of evidence. The need for repeated clarification of the binding rules is not included within the scope of this hearing.[11]

[10] The Decision of Voivodship Administrative Court of Gliwice on 14th December 2010. I SA/Gl.

[11] The Decision of Voivodship Administrative Court of Warsaw on 2nd December 2010. VII SA/Wa 1762/10.

According to the legislature, the decision introduced is to limit the possibility of cassation only in situations where the settlement of the administrative organ would not comply with the two-instance procedure principle. It should be noted that – just as in the previous legal status – if the appellate organ suggests a decision of cassation, it will have to be based on the notion of essential influence, which pertains to the settlement and also constitutes the so-called fuzzy concept.

What is more, the appellate organ should indicate the circumstances that should be taken into consideration during the reexamination of the case. To date, this option was a possibility but it has never been obligatory.

7. CHANGES CONCERNING THE POSSIBILITY OF THE RESUMPTION OF ADMINISTRATIVE PROCEEDINGS

By terms of the amendment, art. 145b of the CAP has introduced the possibility of demanding that the proceedings be resumed even if the court has issued a ruling that the principle of equal treatment has been breached in compliance with an act passed on 3rd December 2010. This act specifies the implementation of a few rules of the European Union, within the scope of equal treatment[12], and on condition that the breach of this rule has impacted the final settlement of a case. In situations specified in §1, the complaint concerning the resumption of the proceedings should be lodged within one month from the time of the validation of the ruling.

The indicated document refers to the concept of equal treatment as stated in an act passed on 3rd December 2010 concerning the introduction of some rules of the European Union within the scope of equal treatment. These rules set a basic framework that is to deal with sexual, racial, ethnic and national discrimination as well as with discrimination against denomination, religion, outlooks, disability, age and sexual orientation. The catalogue of premises concerning the ban on unequal treatment is closed ended.

CONCLUSION

The amendment to the Code of Administrative Proceedings passed by the terms of the rule issued on 3rd December 2010, concerning the changes to the act – Code of Administrative Proceedings, and the act – Laws on Conduct in Administrative Courts should be assessed as positive. This amendment adjusts Polish administrative proceedings to the standards set by the norms of European law. Furthermore, it also takes a stand against demands specified in legal doctrines as well as in judicial rulings. One should hope that the altered rules will be correctly interpreted by public administrative organs in the process of the application of the CAP.

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