

ADMISSIBILITY OF REVOCATION BY A PARTY OF THEIR DECLARATION TO WAIVE THE RIGHT TO APPEAL

Dr. habil. Joanna Smarż, University Professor

Department of Administrative Law and Administration Sciences, Faculty of Law
and Administration, University of Technology and Humanities in Radom, Poland

e-mail: j.smarz@uthrad.pl; <https://orcid.org/0000-0002-2450-8162>

Abstract. The Code of Administrative Procedure was substantially amended in 2017. Introduction of the right to waive the right to appeal to Article 127a, Code of Administrative Procedure, is one such major change. Such a waiver is momentous, since it not only obstructs appealing but also prevents the option of complaining against a decision to courts. The new regulation, intended to accelerate administrative proceedings and enforceability of decisions, gives rise to serious doubts, chiefly concerning a party's option of withdrawing their declaration to waive the right to appeal. In spite of the legislator's intention signalled in the substantiation of the amendment, both judicial decisions and the doctrine rightly accept the possibility of withdrawing a declaration to waive the right to appeal until the last day of the term for appeals.

Keywords: appeal, administrative decision, waiver of appeal

INTRODUCTION

In administrative proceedings, a party dissatisfied with a decision of a first-instance authority can appeal against that decision. The case is then considered by a higher-instance authority as a result. This arises from the constitutional principle of two-tier administrative proceedings, expressed as the party's right to having their case handled and resolved twice by two different authorities in order to supervise the resolutions they issue.¹

This principle guarantees realisation of rights and interests of parties to and other participants in proceedings.² Thus, it serves the citizen first and foremost [Smarż 2018, 378–86]. A party eager for a positive resolution may, however, strive for the fastest possible enforceability of a decision. This is fostered by

¹ Judgment of the Supreme Administrative Court of 7 February 2008, ref. no. II GSK 382/07, Legalis no. 114623.

² Judgment of the Constitutional Court of 8 April 2014, ref. no. SK 22/11, Legalis no. 815933.

the institution of waiver of the right to appeal³ under Article 127a(1) of the Code of Administrative Procedure,⁴ intended to reduce the time of proceedings and realise the so-called “economics of trials.”⁵

The waiver of the right to appeal by all parties to proceedings results in finality and validity of an administrative decision [Adamiak and Borkowski 2021]. In the event, an administrative decision becomes final not after some time or following an appeal procedure by a second-instance authority, but by force of a party’s declaration the law endows with certain legal effects. This means an administrative decision issued by the first instance in compliance with Article 130(4) CAP, is enforceable prior to the deadline for appeals and cannot be reviewed [Kędziora 2017].⁶

When introducing this institution, the legislator has failed to resolve the essential issue of permissibility of revoking a declaration to waive the right to appeal. The statement of reasons in the amended law that introduces the regulation does say it should be assumed effective revocation is impossible due to the effects triggered by a waiver of appeal, that is, a decision becoming final and enforceable and a party waiving their appeal being unable to complain against such decision to the administrative court.

Nonetheless, some judicial decisions allow revocation of a declaration to waive the right to appeal. Differences occur in the doctrine as well. The issue cannot be ignored, therefore.

A theoretical and legal analysis of some amendments to the CAP is undertaken in order to answer the question, is a party eligible for the right to withdraw their declaration of a waiver of their right to present an appeal. The discussion is grounded in current judicial decisions and specialist literature.

1. NATURE OF THE RIGHT TO WAIVE THE APPEAL

The right to appeal is grounded in the principle of the party’s full faculty to dispose. This means it is up to a party’s will to resort to this right or not by failing to appeal or declaring their will to waive the right to appeal [Adamiak and Borkowski 2021]. It needs to be weighed what legal consequences arise from a party’s declaration of will in this respect.

³ Waiver of the right to appeal also applies to a request to have a case reconsidered under Article 127(3) of the Code of Administrative Procedure.

⁴ This is a rather new regulation introduced to the Code of Administrative Procedure by force of the Act Amending the Code of Administrative Procedure and Certain Other Acts of 7 April 2017, Journal of Laws item 935 [hereinafter: CAP].

⁵ The substantiation of the government draft Act Amending the Code of Administrative Procedure and Certain Other Acts, p. 56–58 (Print No. 1183), <http://orka.sejm.gov.pl/Druki8ka.nsf/0/F3388D1AB00B1313C125809D004C3C8E/%24File/1183.pdf> [accessed: 04.07.2017].

⁶ See also Article 130(4) CAP in fine.

Legal consequences of a waiver of the right to appeal have long been sources of scientific controversy. I. Wajnes believes, for instance, the essence of recourse as a legal remedy, that is, protection that can only be not resorted to but cannot be waived, suggests a negative answer to the question whether a party may revoke such a waiver by exercising the remedy by its deadline [Wajnes 1939, 115]. Any exceptions can only be provided for expressly by positive law [Kmieciak 2011, 105]. This is upheld by the Constitutional Court by pointing out any party has the right to complain against decisions and resolutions issued by the first instance. The Constitution in the second sentence of its Article 78 allows certain exceptions to this rule, however. They should be laid down in an act of parliament. The Constitution fails to specify the nature of these exceptions, without indicating either subjective or objective scope within which such exceptions are acceptable. This doesn't mean, though, the legislator enjoys full, untrammelled liberty at cataloguing these exceptions. First and foremost, they cannot lead to violations of other constitutional norms. In addition, they cannot void the general principle itself, which, in the framework of ordinary legislation, would in fact become an exception to the rule of single-tier proceedings introduced by a variety of trial regulations.⁷ The Constitutional Court also points out the exceptions should arise from special circumstances. The Constitution says exceptions to the right to complaint must be stipulated by law, therefore, they cannot be presumed.

Thus, the amended Article 127a CAP, referring to the case in question, can be said to fulfil this requirement as it is substantiated by the party's decision in this respect.

W. Dawidowicz finds a waiver of appeal should be treated like any other declaration of a party made as part of proceedings, which can be modified or supplemented at any time [Dawidowicz 1962, 216]. Such a declaration only expresses a party's intention at a given time and cannot restrict or change the right to submit an appeal that accrues to parties by force of the Code. A different position is presented by E. Iserzon, who claims a party is not entitled to appeal if they waive their right to appeal on delivery of a decision [Iserzon 1937, 174].

Doubts regarding the amendment are also raised by J. Zimmermann, who describes Article 127a CAP, as "an astonishing regulation" [Zimmermann 2017, 15]. The author stresses a waiver of the right to appeal is made "to a public administrative authority that has issued a decision." The question arises, therefore, if the waiver "to an authority" means a relevant declaration should be presented to the same authority or whether the meaning of this expression is far more profound and denotes e.g. the range of entities in relation to which the decision has become final. Z. Kmieciak, in turn, admits the

⁷ Judgment of the Constitutional Court of 12 June 2002, ref. no. P 13/01, the Constitutional Court ZU 4A/2002, item 42.

possibility of revocation of a party's declaration by citing the party's right to dispose of their trial entitlements [Kmieciak 2018, 105]. It should be noted, however, the party's right to dispose of their trial entitlements may argue for the regulation of Article 127a CAP, yet it fails to explain principles of this institution. In addition, the existing, though quite modest views of the doctrine seem to give priority to the functional interpretation and ignore, or even fail to perceive, imperfections of Article 127a CAP.

It should be emphasised that, prior to introducing the regulation providing for the right to waive the appeal, judicial decisions⁸ had expressed the position that even if a party declares they will not appeal, or waive this right, a decision does not become final before the deadline for appeal measures. A party could of course appeal voluntarily, yet an authority receiving such a declaration could not have the decision enforced. What is more, such a declaration failed to produce a legal effect of preventing a party from submitting an appeal or request to reconsider the case by the appropriate date. Such a declaration, therefore, did not block a complaint to an administrative court [Sadkowski 2017]. The law did not link legal consequences of a party's declaration to waive their right to appeal. As a result, waiver of the right to appeal was a legal act a party could revoke by filing an appeal until the deadline for appeals. Thus, a party's waiver of their right to appeal was revocable. A party could effectively revoke their waiver of the right to appeal within the statutory time for appealing.

The current situation is completely different due to the contents of Article 127a CAP, according to which a party may waive their right to appeal to a public authority that has issued a decision within the time limit for appealing. As a public administrative authority receives a declaration to waive the right to appeal from the last remaining party to proceedings, a decision becomes final and enforceable. This provision identifies effects of a waiver of the right to appeal, namely, finality and enforceability.

2. CONDITIONS OF A WAIVER OF THE RIGHT TO APPEAL

The right to waive the right to appeal is subject to several conditions. It is first of all restricted subjectively to parties. As a substantive right to demand another consideration and resolution of a case, it does not accrue to entities as parties. The waiver of the right to appeal is therefore decided solely by will of a party that is not objectively restricted by the type of resolution contained in a decision of a first-instance authority. This right can therefore relate to both

⁸ Judgment of the Supreme Administrative Court of 21 February 2006, ref. no. I OSK 542/05, Legalis no. 275738.

a decision resolving in favour and against a party, both decisions creating and not creating party rights.

A waiver of the right to appeal is a party's procedural act. A declaration to waive the right to appeal should be submitted to a public administrative authority which has issued the decision, not to any such authority. The law stipulates such a declaration becomes effective on delivery to the authority, which affirms the declaration needs to be made in writing. This is also implied by the substantiation of the draft law.

The right is subject to the condition of the time limit for appealing. The declaration should be filed "within the time limit for appealing," which is expected to allow a party to review the decision after it is delivered or published.

The option of waiving the appeal is the resignation by a party to proceedings from another instance and judicial review of a decision issued by a public administrative authority. Thus, the declaration can be found correctly filed, and therefore effective, insofar as it has been submitted intentionally, especially if an entity exercising the right knows and understands effects of filing such declaration.

This is corroborated by the doctrine [Wróbel 2020, 680; Adamiak 2017b, 687], which stresses the declaration must be unambiguous and indubitable, as well as autonomous and completely free. Therefore, persuading a party to waive their right to appeal is unacceptable. An authority should instruct a party in detail on effects and importance of such a waiver, particularly that such a waiver finally deprives the party of the right to trial.⁹ An administrative authority is not allowed, however, to assess reasons for a waiver of the right to appeal, in particular, whether it is in the interest of the waiving party.¹⁰

Due to the above, an administrative authority informing a party of their procedural right under Article 127a(1) and (2) CAP, should not limit themselves to citing contents of that provision only but should also instruct a party in detail on the importance of the act of waiving and underscore its irreversibility, which should mean in practice the authority should identify, clearly and understandably, specific effects of a waiver of the right to appeal. The authority is also obliged to gather evidence as to whether and how a party has been notified of these effects.¹¹

The duty can be carried out by including in the decision instructions on the right to waive the appeal and legal consequences, including finality and

⁹ Judgment of the Regional Administrative Court in Cracow of 29 April 2019, ref. no. III SA/Kr 168/19, *Legalis* no. 1918773; judgment of the Regional Administrative Court in Warsaw of 28 May 2019, ref. no. IV SA/Wa 793/19, *Legalis* no. 2320624, and judgment of the Regional Administrative Court in Wrocław of 8 July 2020, ref. no. IV SA/Wr 261/20, *Legalis* no. 2417892.

¹⁰ Ref. no. IV SA/Wa 793/19.

¹¹ Judgment of the Regional Administrative Court in Warsaw of 25 October 2018, ref. no. IV SA/Wa 1296/18, *Legalis* no. 2311620.

enforceability of the decision. This arises from Article 107(1)(7) CAP, which obliges a public administrative authority of the first instance to instruct a party in its decision about the party's right to waive the appeal and legal effects of such waiver under Article 127a(2) CAP. Including in the decision defective instructions on the right to appeal or legal effects of a waiver of appeal, or filing a suit with general courts or a complaint with administrative courts cannot harm a party that follows such instructions (Article 112 CAP).¹²

3. EFFECTS OF A WAIVER OF APPEAL

Contents of Article 127a(2) CAP, imply a decision shall become final and enforceable as of delivery to a public administrative authority of a declaration to waive the right to appeal by the last party to proceedings.

The legislation stipulates, therefore, such decision cannot be appealed in administrative proceedings or complained to an administrative court (the attribute of enforceability), nor can a request to reconsider the case be filed (the attribute of finality).

Considering the literal wording of the said provision, it should be assumed appealing after an effective waiver of the right to appeal causes inadmissibility of appealing and thus of instigating appeal proceedings that would lead to a decision by force of Article 138 CAP. An appeal authority should then resolve by force of Article 134 CAP.¹³ If there are a number of parties, a waiver of the right to appeal becomes effective at the date the last party to the proceedings submits their declaration to the public administrative authority that has issued the given decision. This excludes opposability in administrative proceedings and acceptability of executing an obligation imposed by the decision not only voluntarily but also by way of compulsory administrative enforcement.¹⁴ A party who has presented their declaration of waiver of the right to appeal could possibly prevent the legal effects under Article 127a(2) CAP, as long as at least one party has not submitted the declaration provided for thereunder and thus before the decision of a first-instance authority has become final. In the event, legal effects of a declaration can be evaded by appeal of a party who has waived their right to appeal before.

Where parties waive the right to appeal effectively, the decision such a waiver relates to cannot be complained to administrative courts (Article

¹² Cf. e.g. judgment of the Regional Administrative Court in Warsaw of 8 April 2021, ref. no. IV SA/Wa 26/21, Legalis no. 2582559 and the judgment of the Regional Administrative Court in Warsaw decision of 25 March 2021, ref. no. VII SA/Wa 318/21, Legalis no. 2561103.

¹³ Judgment of the Regional Administrative Court in Szczecin of 18 March 2021, ref. no. II SA/Sz 807/20, Legalis no. 2561299.

¹⁴ Ref. no. IV SA/Wa 793/19.

16(3) CAP).¹⁵ This is due both to effectiveness of the decision and to the fact the parties have failed to exhaust administrative complaint measures in relation to the same decision, which is absolutely prerequisite to filing complaints with administrative courts.

4. POSSIBILITY OF WITHDRAWING A DECLARATION TO WAIVE THE RIGHT TO APPEAL

The Code of Administrative Procedure fails to clearly resolve admissibility of revoking a declaration to waive the right to appeal. The substantiation of the draft 2017 amendment does emphasise, in connection with effects of the waiver of the right to appeal, “it should be assumed an effective withdrawal of a declaration in this respect is impossible. Such a declaration, if correctly filed, is immovable once delivered to the authority by a party or, if there are more parties to proceedings, by all parties.”¹⁶

In spite of that substantiation, there are judicial decisions that allow the option of revoking a declaration to waive the right to appeal. Differences in this regard are voiced by the doctrine as well.

The judicial decisions assume the option of withdrawing a party’s declaration to waive the right to appeal should be accepted if the effects contemplated by Article 127a(2) CAP, have not taken place, that is, if a decision has not become final and enforceable and a letter revoking the waiver is delivered by the deadline for appeal (set to a given party).¹⁷ In practice, this will be the case if there are more parties to a case and only some waive their right to appeal, since exercise of this right by one party (or some parties) cannot affect the legal positions of the remaining parties. This means a decision is not final until the deadline for appeal by the remaining parties or until those parties waive their rights and an entity who has waived their right to appeal before can revoke such a declaration effectively. A declaration contemplated by Article 127a(1) CAP, could be revoked within 14 days of decision delivery to a given party. An appeal should be submitted by the same date and may contain a declaration to revoke the waiver of the right to appeal. A declaration to waive the

¹⁵ Decision of the Regional Administrative Court in Lublin of 17 June 2020, ref. no. III SA/Lu 124/20, *Legalis* no. 2492662.

¹⁶ The substantiation of the government draft do Act Amending the Code of Administrative Procedure and Certain Other Acts, p. 57–58 (Print No. 1183) and judgment of the Regional Administrative Court in Białystok of 13 September 2018, ref. no. II SA/Bk 409/18, *Legalis* no. 1827451.

¹⁷ Ref. no. IV SA/WA 793/19; judgment of the Regional Administrative Court in Bydgoszcz of 14 December 2018, ref. no. II SA/SA/Bd 1173/18, *Legalis* no. 1876645, and judgment of the Regional Administrative Court in Warsaw of 6 August 2019, ref. no. VII SA/Wa 162/19, *Legalis* no. 2521565.

right to appeal cannot be revoked after such date or after occurrences that result in a decision becoming final and enforceable. If there is only one party to proceedings, on the other hand, their effective waiver of the right to appeal by force of Article 127a(1) CAP, makes the decision instantly final and enforceable. Thus, the party is not allowed to revoke their earlier declaration of will.¹⁸

Meanwhile, the doctrine of administrative law finds resignation from a subjective right unacceptable in principle [Zimmermann 2014, 319; Kmiecik 2011, 105]. With reference to the institution of waiver of the right to appeal, it is claimed a party may change their mind and exercise their subjective right until the last day of the time for appeals. J. Zimmermann allows a party has an unlimited right to change their mind until the deadline for appeals [Idem 2017, 15–16].¹⁹ Since allowing the waiver of the right to appeal impinges on the very essence of the public subjective rights of citizens, any doubts as to exercise of this right should be resolved to the benefit of parties.

This can be juxtaposed with the position of K. Glibowski, who refers to the draft law substantiation and finds revocation of a declaration to waive the right to appeal inadmissible [Glibowski 2021]. In this connection, the need is recognised for a greater emphasis on exhaustive instructions to parties on the importance and irreversibility of the waiver [Piątek 2019, 54–55].

Other positions are compromises. For example, B. Adamiak does not question admissibility of a waiver and effectiveness of its revocation (on general Civil Code principles) while stressing the principle of the faculty to dispose [Adamiak 2017a, 168–70]. That author accepts pursuit of a party's claim should depend on their will yet believes effective withdrawal of a declaration should depend on fulfilment of the conditions under Article 61 of the Civil Code, that is, parallel submission of a declaration to waive the right to appeal and a revocation of the same declaration [Adamiak and Borkowski 2021]. If this condition is not met, B. Adamiak underlines, the Code of Administrative Procedure allows no such revocation as a matter of principle. Applicability of regulations concerning defective declarations of will is assumed here [ibid.]. If the will is defective, then the Civil Code's provisions on defective statements of will must apply (Chapter IV). It should be assumed then defects of a statement, e.g. conditions excluding a conscious decision and expression of will when misled by information from staff of a public administrative authority, a party has the right to evade effects of their declaration to waive

¹⁸ Judgment of the Supreme Administrative Court of 29 August 2019, ref. no. II OSK 873/19, Legalis no. 2248674; decision of the Supreme Administrative Court of 16 February 2021, ref. no. III OSK 3180/21, Legalis no. 2540690, and judgment of the Regional Administrative Court in Kielce of 2 December 2020, ref. no. II SA/Ke 926/20, Legalis no. 2509087.

¹⁹ Judgment of the Regional Administrative Court in Gdansk of 17 October 2018, ref. no. II SA/Gd 421/18, Legalis no. 1842487 and judgment of the Regional Administrative Court in Gliwice of 8 June 2020, ref. no. II SA/Gl 175/20, Legalis no. 2392985.

the right to appeal. This may apply to undoubted cases of a party's defective will that gives rise to adverse effects to the same party. As the Regional Administrative Court in Warsaw has stressed, an error of a legal act under the Civil Code should be understood broadly as a conception of an act which is non-conforming with reality, with such nonconformity relative not only to facts but also to law.

The option of revoking a declaration to waive the right to appeal by the remaining parties delivering their declarations to waive the right to appeal is also accepted by R. Kędziora [Kędziora 2017]. A similar view is offered by P. Gołaszewski [Gołaszewski 2017a, 915–16], who believes a party's revocation of a declaration to waive the right to appeal should be admissible in general [Idem 2017b, 155 ff]²⁰ (in spite of what the legislator assumed in the substantiation of the 2017 amendments to the CAP), with admissibility of such a revocation dependent on how many parties there are to proceedings. Until a formally (Article 63 CAP) and substantially (in respect of contents) effective declaration to waive the right to appeal is presented to the authority by the last remaining party, with the consequent finality, validity, and enforceability of the decision (Articles 127a and 130(4) CAP), such declaration may be revoked, therefore. The Supreme Administrative Court finds likewise in its judgement of 29 August 2019²¹ and decision of 16 February 2021.²²

A. Wróbel adopts a similar position by acknowledging once the declaration is filed by the last party, the decision becomes final and effective. It acquires the attribute of enforceability as well (Article 130(4) CAP *in fine*). Only if a declaration to waive the right to appeal is received by the authority earlier than such declaration by the last remaining party to proceedings would the provision not be effective. The CAP has not prohibited withdrawal of this declaration, only specifying effects of submission of such declaration to the authority by the last party to proceedings. A waiver of the right to appeal is a unilateral act. It can be assumed, therefore, consent of a public administrative authority to the withdrawal (revocation) of a waiver is not required if a letter revoking the waiver is filed before the deadline for appeals. This must take place, however, prior to the effects under Article 127a(2) CAP [Wróbel 2020].

The admissibility of a declaration to waive the right to appeal is likewise accepted by W. Piątek, who rightly notes withdrawal of the waiver deprives such waiver of its legal effects in full. Thus, a party may withdraw their

²⁰ This arises from the general rules of revocability of parties' procedural acts, according to which a party may revoke a procedural act as long as such act has not achieved its (intended) legal (procedural) effect.

²¹ Ref. no. II OSK 873/19.

²² Ref. no. III OSK 3180/21.

declaration to waive the right to appeal effectively if a letter withdrawing such waiver is filed prior to the deadline for appeals [Piątek 2019, 54–55].²³

The doctrine's view of the inadmissibility of revoking a declaration to waive the right to appeal, with the effect provided for by Article 127a(2) CAP, namely, a decision gaining the attributes of finality and effectiveness, being the key argument for such a firm position, is not approved by the Regional Administrative Court in Wrocław,²⁴ especially as some proponents of the doctrine are critical of Article 127a(2) CAP, claiming a waiver of a public subjective right, namely, the individual right to complain against decisions and resolutions issued by the first instance derived from Article 78 of the Polish Constitution [Zimmermann 2017, 12–16]. The Wrocław court supports the view a party who has effectively waived their right to appeal can withdraw such waiver by making an appropriate declaration to withdraw the waiver and submit an appeal against a decision.

CONCLUSIONS

The option of waiving the right to appeal, introduced to the Code of Administrative Procedure, is an institution implying far-reaching effects. The possibility of waiving the right to appeal prevents a party from filing an appeal (finality) or a complaint with an administrative court (effectiveness).

Given such far-reaching consequences of this institution, the foregoing analysis is intended to answer the question, does a party have the right to withdraw their declaration of waiving their right to appeal.

An institution expected to accelerate proceedings gives rise to grave doubts about exercise of rights of parties to administrative proceedings. A party a decision is addressed to may be deprived of one of the fundamental human rights, i.e., the right to complain against a decision, and consequently the right to trial, by waiving their right to appeal as a result of their own, not necessarily conscious decisions or ignorance of law.

In my opinion, a party has the right to change their mind and exercise their subjective right until the very end of the term for filing an appeal. The admission of a waiver of the right to appeal undermines the very essence of the citizen's public subjective right, therefore, any doubts regarding the way this entitlement is exercised that arise as part of proceedings should be decided in favour of a party.

²³ Judgment of the Regional Administrative Court in Bydgoszcz of 14 December 2018, ref. no. II SA/Bd 1173/18, *Legalis* no. 1876645.

²⁴ Ref. no. IV SA/Wr 261/20.

In view of the above and despite the legislator's intention expressed in the substantiation, admissibility should be supported of withdrawing a declaration to waive the right to appeal until the last date of the period for appealing.

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