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THE INTERNAL CONTROL OF ADMINISTRATIVE DECISIONS IN POLAND

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Summary. The administrative proceedings are the only one of the three principal legal proceedings (apart from the civil and criminal proceedings), in which an entirely correct decision without any, even insignificant defect, can be challenged. The remedies that make up the system of internal control of administrative decisions in Poland may aim to verify and/or challenge a decision. Verifying a decision may be conducted from the standpoint of legality and/or expediency, or binding force. Challenging a decision may be effected by quashing, amending or declaring it invalid.

Key words: administrative decision, appellate proceedings, extraordinary controlling proceedings, legal reasons for control, expediency reasons for control

1. The administrative proceedings are one of the three principal legal proceedings (apart from the civil and criminal proceedings) in which decisions that regulate the legal situation of individuals are taken in particular cases. At the same time the administrative proceedings are the only one of the three types, in which an entirely correct decision without any, even insignificant defect, can be challenged. The decision (ruling) that ends the administrative proceedings is an administrative decision. It is in this decision that the public administration authority gives a ruling on the rights and obligations of an individual addressee, defining or determining his position under the law. The determination of a person's legal position through an administrative decision may consist in granting, refusal to grant or withdrawal of a right or in the imposition or cancellation of an obligation. The binding establishment of a person's position under the law by an administrative decision may consist in authoritatively declaring the inception or extinction of a right or obligation by operation of law (*ipso iure*). The definition of the addressee's legal position (by determining or establishing it in binding terms) is the contents of decisions issued in the primary proceedings, i.e. the ordinary first-instance pro-

ceedings. The content of the decisions ending the secondary or supervisory proceedings is obviously different.

Internal control (i.e. exercised by the administration) of administrative decisions issued in the first instance takes on diverse forms. The remedies that make up this system of control may aim:

a) only to verify a decision (regarding its legality or binding force);

b) only to challenge a decision (by quashing or amending it);

c) to verify (from the standpoint of legality and expediency, or legality only) and challenge a decision (by quashing, amending or declaring it invalid).

Verification of a decision in respect of its legality is to declare that it has been issued with contravention to the law[1]. The controlling authority issues this kind of a decision when, despite finding it fundamentally defective, it cannot deprive it of its binding force, for example because the period of time limitation of quashing or declaring the decision invalid has elapsed, the decision with the defect of invalidity has already produced irreversible legal consequences, or a defect of the proceedings did not influence the content of the decision issued.

Verification of a decision in respect of its binding force is to declare the decision expired (in Polish law – Art. 162.1 CAP). The authority which issued a decision shall declare the decision expired if it became groundless. A decision may be groundless because, for example, the party exercised a right to perform a single action, which was permitted by the decision (i.e. the right which was the subject of the decision ceased to exist), the party lost qualifications necessary to exercise its rights[2], the party which had personal rights died[3], the party renounced a right[4], the object to which a right related

[1] In Polish law – Art. 151. 2, Art. 158.2 of Act of 14 June 1960 – The Code of Administrative Proceedings, uniform text: Dz. U. [Journal of Laws] of 2017, item 1257 [hereafter: CAP].

[2] J. Borkowski, [*commentary on Art. 162*], in: J. Borkowski, J. Jendrośka, R. Orzechowski [et al.], *Kodeks postępowania administracyjnego. Komentarz*, Wydawnictwo Prawnicze, Warszawa 1989, p. 269.

[3] L. Żukowski, *Kontrola rozstrzygnięć ostatecznych niewadliwych. Stwierdzenie wygaśnięcia decyzji*, in: K. Chorąży, A. Wróbel, L. Żukowski, *Postępowanie administracyjne, postępowanie przed Naczelnym Sądem Administracyjnym oraz postępowanie egzekucyjne w administracji*, Wydawnictwo UMCS Lublin–Rzeszów 1992, p. 95.

[4] Z. Janowicz, *Postępowanie administracyjne i postępowanie przed sądem administracyjnym*, ed. 2, Państwowe Wydawnictwo Naukowe, Warszawa–Poznań 1987, pp. 242–243.

ceased to exist[5], the period for which a decision was issued has elapsed (time limit of validity of a decision). To oversimplify it, one can say that the groundlessness of a decision stems from such circumstances (factual or legal), which, if they occurred before the issuance of the decision, i.e. in the course of the proceedings, would be the grounds for discontinuance of the proceedings (the objective of the issued decision ceased to exist or became impossible to achieve). The reason for expiry of a decision can also be a failure by a party to fulfill a specific condition subject to which the decision was issued.

To challenge a decision without its prior verification is to quash or amend the decision for reasons of expediency (in Polish law – under Art. 154, Art. 155, Art. 161 and Art. 162.2 CAP). In such cases, an authority does not verify a decision with regard to its compliance with the law because this fact is of no significance from the standpoint of admissibility to challenge the decision.

To challenge a decision preceded by its verification as to the legality and expediency is to quash or amend the decision as a result of the appellate proceedings (or the proceedings initiated by the submission of application to reconsider the matter when there is no higher-level authority over the authority which issued the decision in the first instance).

To challenge a decision preceded by its verification with regard to legality only is to quash or amend the decision as a result of the reopened proceedings (in Polish law – Art. 151.1.2 CAP) or to declare a decision invalid (in Polish law – Art. 156. 1 CAP).

The challenging of a decision may be accompanied by the ruling concerning the merits of the matter or not. The absence of a new ruling concerning the merits of the case may result from the lack of such a need (the proceedings were groundless from the beginning or became so) or the lack of powers to rule on the merits of the matter by the controlling authority (the proceedings to declare a decision invalid). The challenging of a decision combined with a simultaneous ruling anew regarding the essence of the matter is termed "amending"[6].

[5] See the judgment of the Supreme Administrative Court [NSA] of 11 October 1985, SA/Wr 556/85, ONSA 1985, no. 2, item 21.

[6] Z.R. Kmiecik, *Wszczęcie ogólnego postępowania administracyjnego*, Wolters Kluwer, Warszawa 2014, pp. 355–356.

2. The appellate proceedings have two goals, the actualization (and the necessity to realize the second) depending on the result of the realization of the first objective. It can be therefore said that the first goal has to be realized by the authority in the course of the appellate proceedings whereas the second one is conditional. The unconditional goal of the appellate proceedings is to verify the decision of the first-instance authority or to confirm its correctness in the broad sense, i.e. from the standpoint of both its legality (compliance with the law) and expediency, rightness (compliance with social and individual interest). The other, conditional goal of the appellate proceedings is to again dispose of the matter as to the merits, i.e. to apply the norms of substantive administrative law once again to the addressee of a decision. The second goal is actualized when, as a result of the realization of the first goal, it turns out that the decision appealed against has a significant defect and at the same time there are no grounds for discontinuing the proceedings or declaring the decision invalid. The second goal will be implemented either by the appellate authority or by the first-instance authority, depending on whether the evidence gathered by the first instance authority allows ruling on the case as to its merits or whether the issuance of such a ruling requires the explanatory proceedings almost in whole or in larger part. Appeal can therefore be termed as a procedural institution by means of which the parties (or other authorized entities) may demand verification and – possibly – challenging (cassation or amending) of the decision of the first instance authority.

Cassation of a decision consists in quashing it without ruling again on the merits of the matter. The cassation quashing of a decision can be accompanied by the simultaneous discontinuation of the proceedings before the first instance authority or by remanding the matter for reconsideration. It should be the rule that upon finding a defect which provides grounds for reopening the proceedings the appellate authority quashes the decision appealed against and remands the case for reconsideration to the first instance authority. The appellate authority may also confine itself to merely quashing the decision appealed against. The amending of a decision consists in quashing the decision issued by the first instance organ and ruling again as to the merits of the matter which is the object of the decision appealed against.

In the appellate proceedings, the discretionary power of the second instance authority is only remedial. The appellate authority only examines whether the first instance authority did not abuse its power by issuing an illegal and/or ineffective (unjust) decision. Therefore, when examining the decision not only in respect of its compliance with law (legality) but also in

respect of expediency (justness), the appellate authority in a way also utilizes its discretionary power. If it quashes the decision appealed against because, in its view, it is inexpedient (although legal), at the same time this authority will have to issue a new decision which will reflect its own idea of which ruling is right in light of specific factual and legal circumstances.

This conception of discretionary power of the appellate authority manifests itself not only at this stage of issuing a decision. It can be also reflected in the course of the proceedings, i.e. when a party will withdraw the appeal it has submitted. The authority is not bound by the party's withdrawal of the appeal and it will refuse to allow the appeal to be withdrawn if due to the withdrawal a decision infringing upon the law or contrary to the public interest would remain in force (Art. 137, sentence two, CAP). It follows from the foregoing that the second instance authority will accept a party's withdrawal of the appeal only when the decision appealed against (of the first instance authority) is correct with regard to legality and expediency as well as when, without infringing upon the law, it is unjust in light of the interest of the party. A decision must therefore be within the limits determined by the scope of discretion granted to the authority by the provisions of substantive law while its admissible defect (in the context of withdrawal of the appeal) may consist only in infringing upon the interest of a party.

The authority thus assesses the decision appealed against in the context of admissibility of withdrawal of the appeal but regarding its (decision's) legality and expediency, disregarding – out of the circumstances taken into account when ruling on the merits of the matter – only the question of the compliance of the decision with the interest of a party. The doctrine assumes that the conditions for the inadmissibility of withdrawal of an appeal should be interpreted narrowly by the appellate authority because they are an exception to the rule that a party has the right of appeal. This directive is of significant importance, especially when applied to the condition for the infringement upon the public interest, which in itself (the condition) is evaluative.

3. The aims of the extraordinary administrative proceedings are varied. In the case of the proceedings initiated for legal reasons the goal is to verify and possibly challenge (quash, amend or declare invalid) a decision issued under the ordinary procedure (although the proceedings may also result only in the declaration that a decision was issued in contravention to the law, when it is impossible to challenge the decision despite finding it defective). With the extraordinary proceedings initiated for expediency reasons the aim is only to challenge (quash or amend) or only to verify a decision issued un-

der the ordinary procedure (from the standpoint of binding force). While in the proceedings initiated for legal reasons the administrative authorities may verify a decision only without challenging it, even if it is defective, in the case of the proceedings initiated for expediency reasons they only challenge a decision without verifying it, or they only verify it but not with regard to its legality but only to its binding force.

In the extraordinary supervision proceedings initiated for legal reasons there is no room for the discretionary power of administrative authorities. Both in the case of reopening of the proceedings and in the proceedings to declare a decision invalid, the competent administrative authority may deprive a decision of its binding force only when one of the enumeratively specified circumstances occurred, which comprise particularly serious legal defects.

In the cases justifying the reopening of the proceedings, it is the proceedings that have a defect in the first place. A defect may consist in the violation of procedural norms, usually the rules of the evidentiary proceedings, or in the occurrence (or disclosure) of circumstances in view of which the grounds on which the ruling was based are no longer valid. The defectiveness of the decision is here consequent upon the defectiveness of the proceedings, it is therefore secondary[7]. Consequently, if it turns out as a result of the reopened proceedings that the defect of the proceedings in no way influenced the content of a decision (for example the participation of an employee that should be disqualified), the decision is not quashed. The reopening of the proceedings may also be requested when the Constitutional Tribunal ruled that the normative act on the basis of which the decision was issued did not comply with a higher order act, i.e. the Constitution, an international agreement or a statute. In cases justifying the declaration that a decision was invalid the defect is inherent in the decision itself[8]. The declaration of decision's invalidity produces legal effects *ex tunc*, i.e. it abolishes (annuls) legal effects with retroactive force (if it is at all possible). This does not mean, however, that the decision declaring a decision invalid is declaratory (a decision with the

[7] L. Żukowski, *Wznowienie postępowania administracyjnego w k.p.a*, "Administracja. Zeszyty Naukowe Centrum Podyplomowego Kształcenia Pracowników Administracji Państwowej" 3 (1988), p. 54.

[8] Idem, *Stwierdzenie nieważności decyzji na tle konstrukcji prawnych służących wzruszaniu decyzji ostatecznych w ogólnym postępowaniu administracyjnym*, "Administracja. Zeszyty Naukowe Centrum Podyplomowego Kształcenia Pracowników Administracji Państwowej" 1 (1987), p. 46.

defect of invalidity is not invalid by operation of law)[9]. Contrary to the wording used in Art. 156 et seq. CAP, the public administration authority does not in fact declare a decision invalid but only invalidates it with retroactive force.

The purpose of the proceedings to declare a decision invalid is to examine if the decision issued under the ordinary procedure has a qualified defect and, if such a defect is ascertained and negative premises are absent, to eliminate it from legal transactions with retroactive force. The purpose of reopening the proceedings is not only to examine whether a decision issued under the ordinary procedure has a qualified defect and possibly to eliminate it from legal transactions but also to rule again on the matter examined under the ordinary procedure. The declaration that a decision is invalid has therefore features of a supervision measure whereas the administrative authority carries out self-supervision in the course and as a result of the reopened proceedings.

4. The discretionary power of the public administration is fully and directly manifested in the extraordinary controlling proceedings initiated for expediency reasons. The expediency reasons that justify the initiation of the extraordinary proceedings are varied. They can embrace: the interest of a party, the public interest, the need to eliminate the condition that threatens particularly protected goods, a discrepancy between the formal and actual enforceability of a decision, elimination of a decision from legal transactions if a party did not fulfill a condition or actions subject to the fulfillment of which the authority granted the party a right. This diversity translates into the diversity of the goal of this category of the extraordinary proceedings, which is either only to challenge a decision (which may take the form of quashing or amending), or only to verify it from the perspective of the binding force of the decision (as a result the authority may declare the decision expired).

Unlike the appellate proceedings, the authority does not examine here whether the first instance authority did not abuse its power by issuing an illegal and/or inexpedient (unjust) decision, it only examines whether the expediency reasons do not argue for the invalidation of the final decision, which may be both legal and expedient (just).

[9] E. Iserzon, *Moc obowiązująca aktu administracyjnego i domniemanie jego ważności*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1 (1965), pp. 58, 62.

A characteristic feature of the extraordinary legal remedies initiated for expediency reasons is that, unlike the foregoing extraordinary remedies initiated for legal reasons, they also enable challenging entirely correct (non-defective) decisions. It should be also emphasized that, contrary to frequent opinions in the doctrine, these remedies apply also to correct decisions rather than exclusively to correct decisions. The argument, in support of a different thesis, that the remedies initiated for legal reasons (reopening of the proceedings and the proceedings to declare a decision invalid) apply to defective decisions is not acceptable because the grounds for challenging a decision under the procedure of using those last remedies do not contain the grounds for challenging a decision under the procedure applied to remedies initiated for expediency reasons. If therefore certain special circumstances and reasons (not provided for in other regulations) justify the possibility of challenging correct (non-defective) decisions, these apply the more so to defective decisions.

5. The basic conditions for challenging a decision for expediency reasons is justification by the public interest or just interest of the party (Art. 154 and Art. 155 CAP). The Polish Code of Administrative Proceedings treats these premises in an alternative (equivalent) way: the quashing or amending should be "the public interest or just interest of the party". Consequently, the concurrence of these circumstances is not required. Nevertheless, one cannot recognize that the expediency of challenging a decision because of one of the foregoing interests should be the sufficient grounds for challenging the decision regardless of the assessment of this challenge in light of the other protected interest. Although it is enough that one factor justifies the quashing or amending of the decision, the other should not, however, counter such challenging. This requirement directly stems from the general principle of the administrative proceedings (in Art. 7 *in fine* CAP), according to which, when disposing of the matter, the administrative authority should take into account the public interest and just interest of the citizens.

The reasons of the public interest or just interest of the party is a sufficient condition for challenging the final decision only when the party has not acquired a right by force of this decision. Otherwise, to challenge the decision will also require the consent of the party which acquired a right under the verified decision.

The acquisition of rights by an administrative decision, making the admissibility of challenging a decision conditional on the consent of the party which acquired the rights, is defined in a very broad sense: as any advantage gained by the party from the disposal of its case by this decision. An advan-

tageous ruling for a party is therefore not only to grant it a specific right under the decision but also to declare in a binding way that the party has a given right by operation of law because only when such an act was issued, the party can, in contentious cases, effectively invoke its rights. The party also derives a legal advantage from the disposal of the matter, consisting in the abolishment of an obligation formerly imposed upon it (party) or in the declaration that it expired. Finally, an advantage to the party may involve a decision imposing an obligation upon it. The amendment to such a decision may impose an obligation to a greater extent or on less advantageous conditions (e.g. change of the time limit of the fulfillment of an obligation) and thereby worsen the legal situation of the party. The party can thus derive advantages both from constitutive and declaratory decisions, as well as both from decisions issued upon its application and *ex officio*. The Supreme Administrative Court ruled against the admissibility of challenging declaratory decisions in this procedure (as decisions that do not create any rights and obligations) inter alia in judgments of: 14 March 1997, I SA 235/96[10]; 22 July 1998, I SA 154/98[11]; 29 October 1999, I SA 2088/98[12]. These judgments are based on the position once expressed by J. Borkowski[13], which he gave up, however, as the doctrine did not accept it[14].

The consent of a party to quash or amend a final decision under the procedure in question is therefore not required only in the case of a negative decision (one dismissing the demand of the party), a decision withdrawing a formerly granted right in whole or declaring the right expired, and a decision imposing an obligation upon the party to the maximum extent[15]. Only such decisions do not benefit the party in any way, and when amended or quashed they do not worsen the party's legal situation. The foregoing decisions may not however be verified pursuant to Art. 154 CAP if the case involves parties with conflicting interests because one of the parties will then be able to infer its right from the decision[16].

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[10] ONSA 1997, no. 4, item 186.
[11] LEX no. 45052.
[12] LEX no. 48625.
[13] J. Borkowski, *Zmiany i uchylanie ostatecznych decyzji administracyjnych*, Państwowe Wydawnictwo Naukowe Warszawa 1967, p. 30.
[14] Idem, [*gloss to the judgment of the Supreme Administrative Court of 31August 1995, SA/Po 313-314/95*], "Glosa" 12 (1996), p. 16.
[15] E. Iserzon, J. Starościak, *Kodeks postępowania administracyjnego. Komentarz, teksty, wzory i formularze*, ed. 4, Wydawnictwo Prawnicze, Warszawa 1970, p. 260.
[16] See the Supreme Administrative Court judgment of 15 July 1999, I SA 1644/98, LEX no. 48558.

6. In cases when the public or individual interest is especially threatened, a correct decision that grants a right to a party may be quashed or amended even without the consent of the party. This is the so-called "expropriation of a right". In the Polish legal order, the administrative authority may do so if challenging a decision is necessary in order to eliminate a threat to human life or health, or to prevent significant damage to the national economy or material interest of the State (Art. 161 CAP).

Literature and judicial decisions assume that the condition for the admissibility of quashing or amending a decision under Art. 161 CAP should be to demonstrate that the public administration authority ineffectively tried to quash or amend a decision pursuant to other provisions of the Code (e.g. under Art. 154, 155 or 163), and that the authority failed to declare the decision invalid or quash it because the proceedings were reopened[17]. This view cannot be agreed with.

Art. 161 clearly stipulates that the competent authority may quash or amend any final decision unless – in any other manner (than by quashing or amending the decision) – it is impossible to eliminate or prevent the threats specified in the Article rather than if, in any other manner, it is impossible to challenge the decision whose existence (enforcement) causes or may cause such threats. As Z. Janowicz rightly observes, "the authority should […] seek any possible solutions under these circumstances before it decides to apply the final, necessary possibility: to quash or amend the decision"[18]. "Quashing or amending a decision" as such, regardless of what procedure should be applied, is therefore the final possibility rather than quashing or amending a decision pursuant to the procedure of "expropriation of a right" admitted by Art. 161 CAP. From the standpoint of the principle of durability of final administrative decisions the reason for challenging a final decision does not matter at all as long as the reason is clearly admissible in the provisions of the law in force. The principle of durability of final administrative decisions requires that prior to challenging a decision under the procedure of "expropriation of a right" (Art. 161 CAP.) the authority consider (and, possibly, should circumstances permit it, try) the possibilities (ways) of eli-

[17] See for example P. Przybysz, *Kodeks postępowania administracyjnego. Komentarz*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2004, p. 348; W. Chróścielewski, J.P. Tarno, *Postępowanie administracyjne. Zagadnienia podstawowe*, Difin, Warszawa, p. 161.

[18] Z. Janowicz, *Kodeks postępowania administracyjnego. Komentarz*, ed. 4, Wydawnictwa Prawnicze PWN, Warszawa 1999, p. 460; similarly W. Dawidowicz, *Zarys procesu administracyjnego*, Państwowe Wydawnictwo Naukowe, Warszawa 1989, p. 212.

minating the state constituting the ground for applying it (the procedure) that do not involve challenging the issued decision.

As J. Zimmermann stresses, a special threat permitting the "expropriation of a right" (stipulated under Art. 161 CAP), requires a speedy, often instant action, in which there is certainly not enough time and room for the extended jurisdiction proceedings. Amendment is therefore carried out here "under the intervention procedure", and the resultant administrative decision more resembles the so-called immediately effective administrative act than a typical decision that is the result of the jurisdiction proceedings and at the same an act of the application of substantive law. The effective prevention of threats defined as "the state of administrative necessity" most often requires not so much amending a decision but only quashing it, and after quashing, it requires acting by way of other forms available to the administrative authority. These can also be other decisions, not connected with the decision being quashed[19].

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[19] J. Zimmermann, *Polska jurysdykcja administracyjna*, Wydawnictwo Prawnicze, Warszawa 1996, p. 208.

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KONTROLA WEWNĘTRZNA DECYZJI ADMINISTRACYJNYCH W POLSCE

Streszczenie. Postępowanie administracyjne jest jedynym spośród trzech najważniejszych postępowań prawnych (oprócz postępowań cywilnego i karnego), w którym zupełnie prawidłowe orzeczenie, niedotknięte nawet wadą nieistotną, może być wzruszone. Środki prawne tworzące system wewnętrznej kontroli decyzji administracyjnych w Polsce mogą mieć na celu weryfikację oraz (lub) wzruszenie decyzji. Weryfikacja decyzji może być przeprowadzana pod kątem legalności oraz (lub) celowości, albo mocy obowiązującej. Wzruszenie decyzji może nastąpić poprzez jej uchylenie, zmianę albo stwierdzenie nieważności.

Słowa kluczowe: decyzja administracyjna, postępowanie odwoławcze, nadzwyczajne postępowania administracyjne, względy legalności, względy celowości