

Current Development Tendencies in Public Administration

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Preface

The following books reflects an attempt of team of authors from the Czech Republic as well as from Slovakia to analyse some of the current development tendencies of Public Administration and their reflection in the field of administrative law. To some extent the authors follow up the recently released publication *Influence of Political Actors on the Functioning of Public Administration and Public Policy* by V. Fiala (Olomouc: Periplum, 2011) in which the author analyses recent trends in Public Administration however from the perspective of political science. As expected the team of authors of this book made up of lawyers has focused primarily on legal aspects of modern trends in Public Administration.

The book covers wide range of topics and it is divided into three main parts: (1) Judicial and other control mechanisms and their influence on Public Administration, (2) part concerning Selected procedures of Public Administration, and (3) Electronization of Public Administration.

First to be analysed in the first part the relatively new phenomenon of judicialization is presented. The judicialization does not concern only the Public Administration and as the introductory chapter shows it is also widely analysed and perceived from different angles (*Some notes regarding the definition of judicialization*). The action of Public Administration to a great extent influenced by judicial case-law as it is demonstrated by the second chapter (*Influence of case-law of courts on functioning of Public Administration in the Slovak Republic*). On one particular decision of the Supreme Court of Slovak Republic we demonstrate that the existing relationship between Public Administration and judiciary needs to be re-assessed regarding the quality of judiciary.

Recently the trend of “good (public) administration” is being widely discussed. Implementation of “good administration” requires *inter alia* rigorous control. The chapter *Control of Public Administration as an instrument allowing elimination of maladministration in Public Administration* analyses an unwanted phenomenon of maladministration which means that a body of Public Administration either does not act at all or it acts in contradiction with the law in force. Maladministration causes non-functioning of the system of Public Administration both in a functional and organizational meaning. This fact is subsequently linked to the problem of protecting rights and legitimate interests of citizens as participants to proceedings taking place within the framework of individual special parts of administrative law. Control of Public Administration represents an important instrument of a fight against maladministration both within prevention and consequent remedial measures.

The interaction of courts and Public Administration also takes form of judicial review of legal regulation adopted by territorial self-government units. The chapter *Legality and constitutionality of generally binding ordinances of a municipality* analyses the role of Slovak public prosecution in reviewing generally binding ordinances of municipalities and points out the legal regulation which leads to differences in understanding unconstitutionality and unlawfulness of these acts. It classifies deficiencies which cause the mentioned characteristics and finds a “borderline” between them.

The following chapter *Legal nature of professional self-government regulations and the form of measure of general measure* focuses on regulations adopted by the professional self-governing organizations and analyses their legal nature in respect to possible judicial review. The chapter *Chosen aspects of administrative judicial protection in cases of unlawful inaction of Public Administration* documents already the extensive case-law connected with the “new” power of the Czech administrative courts (in effect since 2004) to review the cases of administrative inaction. Some of the problematic aspects of judicial review of public administration actions in the field of administrative criminal law are presented in the chapter prosaically called *Not an easy path of a person unlawfully charged for paid fine*.

Among other control mechanisms of Public Administration the chapter *Extent of control competence of supreme control offices in chosen countries* analyses in comparative context the role of supreme control offices which are often being rather neglected element of Public Administration’s control. The last chapter of the first part called *Models of democratic governance and their influence on Public Administration* elaborates on an interesting topic of relationship between Public Administration’s officials and politicians either from the governing or the opposing parties. With its more political-science this chapter view closes up the part I of the book.

The part II of the book focuses on analysis of selected existing procedures of Public Administration and on possible ways of their improvement. In several chapters of this part we analyze problematic aspects of administrative procedure (*On possibilities of simplifying administrative proceedings in matters under Article 6 of the Convention for the Protection of Fundamental Rights and Freedoms, Expert and specialized opinions in administrative and tax proceedings, Conduct of land registry bodies during inscription of legal real burden and so-called public law limitations of ownership, Providers of social services in the context of social services reform as a significant part of Public Administration’s social area*), while the following chapter (*Accordance of administrative sanc-*

tioning in the Czech Republic with Recommendation of Committee of Ministers of Council of Europe no. 91(1)). brings attention to the Czech system of administrative penalties seen in the context of the Recommendation of Committee of Ministers of Council of Europe no. 91(1). The last chapter of the part II (*Protection against inaction of administrative bodies with focus on inaction as incorrect official procedure*) analyses the topic of administrative inaction as incorrect official procedure.

Besides its introductory chapter (*On possible depersonalization of originator of administrative acts*) the part III of the book focuses on electronization of Public Administration (or e-government), i.e. on use of modern electronic technologies in the field of Public Administration (*Data Boxes and communication with Public Administration, "Informatization of society" and its application in Public Administration, Electronization of Public Administration in Slovak Republic – several legal aspects*) as well as within the framework of following judicial control (*Electronic assignment of cases as an anti-corruption instrument within the framework of administration of justice*).

We hope that this book will not only contribute to the mapping of the current development trends in the Public Administration but will also serve as an initial platform for further research as the limits of the surveyed field are boundless.

In Olomouc on April 30^h, 2012
Authors

A couple of notes regarding the definition of judicialization

I divided my paper into three points: 1. The term of judicialization abroad, 2. The term of judicialization in the Czech Republic and 3. Judicialization and Public Administration.

1. The term of judicialization abroad

It seems that in the last two or three decades, we have been encountering the term of *judicialization* quite often in various connotations and relations. If we dare to try, we may “translate” this term using hazardous neoplasm *courts-involvement* (in certain area or activity); this artificially made term can hardly capture the substance of this matter adequately, however.

In the Anglo-American system, this term is used primarily in the area of political sciences but sometimes, it shows up in legal texts, too. Judicialization is probably most often connected with politics,¹ we may find relations with human rights and their protection,² or with legal issues connected to the EU³. The term of judicialization is frequently interconnected with Constitutional Law issues or directly with Constitutional Judiciary (which is undoubtedly related to political aspects of this issue)⁴.

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- 1 Comp. e.g. *Rios-Figueroa, J., Taylor, M.M.* Institutional Determinants of the Judicialisation of Policy in Brazil and Mexico. *Journal of Latin American Studies*, 2006, Vol. 38, No. 4. *Moustafa, T.* Law versus State: The Judicialization of Politics in Egypt. *Law & Social Inquiry*, 2003, Vol. 28, No. 4. *Clayton, C.W.* The Supply and Demand Sides Judicial Policy-Making (Or, Why Be So Positive about the Judicialization of Politics? *Law & Contemporary Problems*, 2002, Vol. 65, No. 3. *Domingo, P.* Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America. *Democratization*, 2004, Vol. 11, No. 1.
 - 2 Comp. e.g. *Peres-Rios, M.- V.* Finding the Perfect Fit to Prosecute Human Rights Violations in the Era of Judicialization. Conference Papers - Law & Society, 2007. *Beihl, J. et al* Judicialisation of the Right to Health in Brazil. *Lancet*, Vol. 373, No. 9682.
 - 3 E.g. *Shaffer, G.* What's new in EU trade dispute settlement? Judicialization, public-private networks and WTO legal order. *Journal of European Public Policy*, 2006, Vol. 13, No. 6. *Christensen, R.K., Wise, Charles, R.* Comparative Judicialization in the 21st Century: Are EU and US Judiciaries Comparable Policy Potentates? Conference Papers - American Political Science Association, 2004.
 - 4 Comp. e.g. *Murkens, J.E.K.* The Quest for Constitutionalism in UK Public law Discourse. *Oxford Journal of Legal Studies*, 2009, Vol. 29, No. 3. *Stone Sweet, A.* *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective.* Oxford: Oxford University Press, 1992. *Stone Sweet, A.* Judicialization and the Construction of Governance. *Comparative Political Studies*, 1999, Vol. 32, No. 2. *Couso, J.* The Transformation of Constitutional Discourse in Latin America and Judicialization. Conference Papers - Law & Society, 2007. *Kühn, Z.* Judicializace politiky aneb hrozí nám soudcovský stát? I., II. *Jiné právo* 26.11. 2006.

It is worth noting that already in 1992, one of the committees of International association of political sciences (*namely The Research Committee on Comparative Judicial Studies of the International Political Science Association*) organized a meeting on the issue of “Judicialization of Politics” in Bologna, Italy. All papers were later published.⁵

One of the participants of this meeting was also *Alec Stone Sweet*, who systematically deals with this issue.⁶ In one of his publications, he deals with the influence of European Constitutional courts and similar institutions (in France, Germany, Italy, Spain) on law and politics⁷. Among others, he refers to judicialization of the society, or judicialization of social life. He construes a model of solving problems in the society where he points out the process of judicialization whose merits consist of submission of conflict resolution to a court. This model presumes existence of four successive “stages” which may be roughly (simply) characterized as: 1. existing (legal) rule of behavior (“*Normative Structure*”), 2. origination of a conflict and its resolution between two parties (“*Dyadic Contract*”), 3. submission of the conflict to the “third subject”, i.e. a court (“*Triad*”) and resolution of the conflict by a court (“*Triadic Rule-making*”), 4. Subsequent impact of the court’s decision on the rule of behavior in force (it may be modified or changed). It is supposed to be a repeating process (cycle).⁸

2. The term of judicialization in the Czech Republic

In our circumstances, it is worth noting that the term of judicialization was mentioned in some of the judgments of the Constitutional Court or dissents of its judges. Vice-president of the Constitutional Court *E. Wagnerová* stated in her dissent to a judgment where validity of election of a senator was reviewed (and found flawless): “*There are many authors and schools convinced that the judiciary applying the law should stay far from clearly political processes which should produce judicially unassailable solutions, and there is the same*

5 *Tate, C.N., Vallinder, T.* (eds.) *The Global Expansion of Judicial Power*. New York, London: New York University Press, 1995.

6 Except of this author’s literature mentioned in footnote no. 4 comp. e.g. *Stone Sweet, A.* *Judicialization and the Construction of Governance*. *Comparative Political Studies*, 1999, Vol. 32, No. 2. *Shapiro, M., Stone Sweet, A.* *On Law, Politics, and Judicialization*. New York: Oxford University Press, 2002.

7 Already in the introduction, he states that “*creation of European politics was judicialized*” (*Stone Sweet, A.* *Governing with Judges*. *Constitutional Politics in Europe*. Oxford: Oxford University Press, 2000, p. 1).

8 In detail, comp. *ibid.* p. 13 et seq.

amount of opposite theories. General answer to this dilemma is not possible. Even the most convinced learned opponents of judicialization acknowledge that its extent and depth depends on specific historical experience (see e.g. Miller, R.A. *Lords of Democracy: The Judicialization of "Pure Politics" in the US and Germany*. Wash. and Lee L. Rev. 587, Spring 2004). They surmise, that judicialization of "pure politics" (the term is a clear innuendo to Kelsen's pure theory of law) is a reaction of constitutions to the shock caused by preceding dictatorships, or in other words, it is a response to abuse of pure political processes by preceding political regimes. This experience caused the distinguishing and acknowledgment of a constitutional principle known as "militant democracy" (*streitbare Demokratie*, see e.g. judgment BVerfG dated 24.3. 2001, 1 BvQ 13/01), which is concept of such a democracy which has a right, or in other words, an obligation to defend itself against threats present inside of itself. Political will made in political processes is thus reviewable by courts and in the last instance, by the Constitutional Court⁹.

Also judge I. Janů expressed her view in her dissent to a recent judgment which annulled Act no. 347/2010 Coll., amending certain law related to cost-saving measures within the competence of Ministry of Labor and Social Affairs: "Constitutional Court decides on the basis of a specific complaint, i.e. it does not set its own agenda. If complainants aimed to reach their political goals through decision-making activity of the Constitutional Court, such aim may be regarded as unacceptable attempt to politicize judiciary. In such situation, the Constitutional Court must be cautious not be accused of judicialization of politics by its excessive judicial activism (entering the game started by various political forces), i.e. not to be accused of an attempt to determine more and more wide spectrum of (political) issues by its decisions. If one of the legal philosophy theories emphasizes discourse in judicial procedures seeking justice (law), I reject to transfer such quasi-judicial measures to be transferred into political decision-making, as it is done by the majority of the plenum"¹⁰.

Both judges thus connect the term of judicialization with politics, again, nevertheless they do so in close connection to the performance of Constitutional judiciary.

For instance, popularity of the analyzed term is also evidenced by the fact that at Faculty of social studies of Masaryk University, they teach a course called "Judicialization of international politics". And at the Law Faculty of Charles University, one of the planned long-term projects is called "Judi-

9 Judgment no. Pl. ÚS 73/04 (no. 17/2005 Sb. ÚS, vol. 36).

10 Judgment no. Pl. ÚS 55/10 (dated 14.3. 2011). Certain words were highlighted by the author of statement.

cialization of law. Roles of courts and judicature in the Czech, European and International law”. If we attempt to generally characterize judicialization, it might be understood as *(increased) impact or interference of judiciary bodies in certain area* (notwithstanding whether private relations, politics, business etc. are concerned).

3. Judicialization and Public Administration

Surprisingly, we may find a connection between judicialization and (Public) administration already in the work of E. Hácha, when he attempts to define the then administrative judiciary: “*if we want to involve at least main features of apparatus called administrative judiciary and terms more or less synonymous, we may hardly say anything more exact than describing it as penetration into Public Administration by traditional methods of judiciary, therefore, we may speak of judicialization of Administration*”¹¹.

Recent and current expert administrative literature does not practically work with the term *judicialization (of Public Administration)*, for example, this term is not included in any of the available Czech legal encyclopedias. Probably the only explicit mentioning of judicialization (of Public Administration) may be found in an article related to the preparation of the new Administrative Procedure Code. In the opinion of its authors, the new regulation: “*increases the demands laid on administrative bodies and particular official persons in the interest of legal certainty which is reached by a certain judicialization of the process*”¹².

As far as foreign literature is concerned, it is necessary to mention work of the Polish theorist R. Suwaj, where we find connection of the Public Administration and judicialization already in the name of the publication (“Judicialization of administrative proceedings”), which might lead us to think that he connects judicialization with administrative process (proceedings).¹³ Nevertheless, in the course of more detailed study of this publication, we encounter quite a broader understanding of this term because R. Suwaj explicitly states that “*it concerns the lawmaker’s activity consisting of: 1. formalization of administrative proceedings and endowing it with features of court proceedings from the perspective of binding activities of administrative bodies and 2. judicial control of legality*

11 Hácha, E. Správní soudnictví. In: *Slovník veřejného práva československého*. Svazek IV. Brno: Polygrafia – Rudolf M. Rohrer, 1938, p. 598 et seq.

12 Kaucký, J., Ondračková, V. Vládní návrh nového správního řádu. *Veřejná správa*, 2002, no. 1–2.

13 Suwaj, R. *Judycjalizacja postepowania administracyjnego*. Warszawa: Ofycyna a Wolter Kluwer business, 2009

of administrative body's activity".¹⁴ In his opinion, the judicialization of administrative proceedings is a "continuous process consisting of gradually increasing formalization of administrative procedures and implementation of models coming from the judicial process in them".¹⁵

The term of judicialization linked to Public Administration is also used in connection with the activity of administrative tribunals in Great Britain.¹⁶

On the basis of all the aforementioned facts, that judicialization of Public Administration might be understood in two meanings. Firstly (and probably most often) – principally in accordance with the general definition of the term – this term means *influence or direct control of Public Administration by bodies of Judiciary*. Review of control activity of courts is focused on concrete (individual) and abstract (normative) administrative acts, alternatively also on other forms of activity (even eventual inaction) of Public Administration bodies. The extent of control interference of courts in Public Administration activities naturally varies from state to state. Sometimes, we even register partial substitution of decision-making activity of Public Administration.¹⁷

Second possible interpretation of judicialization of Public Administration is that it is *setting (relatively detailed) procedural rules, primarily for decision-making processes of Public Administration (administrative procedure code)*. Such legal regulation in its detail is getting close to court proceedings which are formalized in detail (notwithstanding whether its civil, criminal or administrative branch).

Supporting arguments for both concepts of judicialization of Public administration may be drawn out of – although judicialization (of Public Administration) is not specifically mentioned – a line of international documents, such as international treaties or documents of the Council of Europe and the EU¹⁸.

14 Suwaj, R., cited work, p. 13–14.

15 Ibidem, s. 14 (both citations translated by D. Kryška, for which I thank him).

16 Drewry, G. The Judicialisation of "Administrative" Tribunals in the UK: From Hewart to Leggatt. *Transylvanian Review of Administrative Sciences*, 2009, No. 28E.

17 Typically comp. so-called moderation right of an administrative court under s. 78 (2) Administrative Judiciary Code. Regarding that in detail, comp. *Sládeček, V. Soudní přezkum správního uvážení*. In: *Vopálka, V. (usp.) Nová úprava správního soudnictví*. Praha: ASPI Publishing, 2003, p. 93 an.

18 As to the first concept, it is necessary to mention the *Convention for the Protection of Fundamental Rights and Freedoms* and its famous Article 6 which in its first paragraph embeds a right to a fair trial and then mainly Recommendation R (2004) 20 Committee of Ministers of the Council of Europe on court review of administrative acts. Regarding the second concept, we may refer to a line of recommendations of Committee of Ministers of Council of Europe related to administrative proceedings, e.g. Recommendation R (80) 2, related to administrative discretion (1980), Recommendation R (87) 16, *regulating administrative proceedings involving high number of persons* a Recommendation R (91) 1, *on administrative sanctions*.

However, that is an issue which goes beyond the focus of this paper and it will be analyzed in upcoming studies.

And in the very end, a discussion question: Do both mentioned concepts of Public Administration's judicialization really mean a (desirable) modernization of Public Administration?

Influence of case-law of courts on functioning of Public Administration in the Slovak Republic

Judicial control of Public Administration in conditions of Slovak Republic has an increasing influence on its functioning. I even dare to state that in comparison to other means of control, it determines its activity the most. In my opinion, the main reason of this is hierarchically, the court as a control body is relatively high in comparison to other bodies, maybe it is the highest.

Current functioning of judiciary in relation to Public Administration gives a big power to courts. Through their decision-making activity, courts may influence not only the activity of state administration in all its level (including central state administration) but also the activity of self-government and other subjects of Public Administration.

Basis for judicial control of Public Administration is to be found in Article 46 of the Constitution of Slovak Republic, as amended¹ (hereinafter “Constitution”). In sub-section 1 of this provision, there is the enshrinement of a right to claim one’s right before an independent and impartial court. Under sub-section 2 of this Article, this right may be limited only by law. Decisions affecting fundamental rights and freedoms must not be excluded from the judicial control.

Judicial review of Public Administration in Slovak Republic was designed as control mechanism of legality. Among others, that also results from s. 244 (1) Act no. 99/1963 Coll., Civil Procedure Code, as amended^{2 3} (hereinafter “CPC”). This provision expressly provides that in administrative judiciary, legality of decisions and actions of Public Administration bodies is reviewed. Therefore, in administrative judiciary, correctness of the decision is not reviewed.⁴

With respect to its control function, judicial review is based on cassation principle.⁵ It means that in case of finding unlawfulness, courts ought to annul

1 Published under no. 460/1992 Coll., Constitutional Act no. 100/2010 Coll.

2 last amendment was brought by Act no. 183/2011 Coll.

3 In the fifth part of this law named Administrative Judiciary, (s. 244 – 250zg), court proceedings on reviewing activity of Public Administration is regulated. 99/1963 Coll. This part is divided into 7 heads. In the first head, general provisions related to all proceedings are embedded. In other heads, there are individual kinds of proceedings regulated.

4 Under s. 245 (2) CPC, within the control of Public Administration, courts do not review administrative discretion but only if it was used in the extent and the manner prescribed by law.

5 As to the cassation principle, see e.g. Sobihard, Jozef: SPRÁVNÝ PORIADOK. Komentár. IURA EDITION, spol. s r. o., Bratislava 2011, p. 233 – 235.

the contested act and they should return the case for further proceedings. In case of unlawful process, they ought to order elimination of such unlawful state.

However, these principles are bent in numerous regards. Firstly, it is allowed by legal regulation which in certain cases allows the courts to decide on the basis of appeal principle.⁶ Nevertheless, it is my opinion that some principles are bent even by the case-law itself. I will try to demonstrate this statement of mine on a particular court's decision.

Supreme Court of the Slovak Republic (hereinafter "NS SR") in its decision dated 22. 12. 2010 issued in proceedings no. 4Sžo 72/2010⁷, in a position of appellate court, changed the decision of the first instance court in the amount of sanction, a fine imposed by administrative body, by decreasing it to € 100,-. In the rest, it confirmed the first instance decision.

Subject-matter of the court proceedings was to review a decision on imposition of a fine under Act no. 377/2004 Coll., on protection of non-smokers and on amendment and supplementation of certain laws, as amended⁸ (hereinafter Act on protection of non-smokers). Inspectorate of Slovak Business Inspection fined the complainant in the amount of € 331,- under s. 10 (6) of this law. The reason was that during their operation,⁹ complainant did not notify the public that it is forbidden to smoke by security and health sign which must be placed in a visible location. Additionally, there was no information in a visible place on where and to what bodies may a notice of violation of Act on protection of non-smokers be submitted. This decision was confirmed by Slovak Business Inspection, Central Inspectorate of Slovak Business Inspection, in the position of second-instance administrative body.

Decision on imposition of a fine was contested by a party to the proceedings using extraordinary remedy, i.e. complaint to court. The first instance court rejected the complaint under s. 250j (1) CPC, as it reached the conclusion that decision and conduct of administrative body are in correspondence with the law. Complainant filed an appeal against this decision contesting the amount of fine.¹⁰

6 For instance, in the proceedings on reviewing legality of final decision by court under s. 250j (5) CPC, the court may decide by judgment of recovery of damages, monetary payment or monetary sanction if it came to conclusion that a dispute, different legal case or imposition of fine may be decided upon differently to what the administrative body found. However, that is possible only in cases arising out of civil law, labor law, family law or business law relations or in cases where a fine was imposed.

7 Decision is published at: http://www.nsud.sk/data/att/685_subor.pdf, 28. 11. 2011.

8 Last amendment by Act no. 547/2010 Coll.

9 The term of operation unit is used in the decision.

10 In the reasoning of the second-instance court, we may regarding this: *Against this decision*,

Under s. 8 (3) Act on protection of non-smokers: *A person doing business and corporation which operate the facility where smoking is forbidden, are bound to notify the public on forbiddance of smoking using security and health sign which must be placed in a visible place.* Under s. 8 (4) Act on protection of non-smokers: *In areas where under s. 7, smoking is forbidden, there must be an information in a visible place stating where and to what bodies, which are obliged to perform control of observance of this law under s. 9, it is possible to submit a notice on violation of this law.* Under s. 10 (6) Act on protection of non-smokers: *Slovak Business Inspection shall impose a fine from 331 euro do 3 319 euro to a person doing business or a corporation if they do not secure observance of limitations under s. 8 (2)–(4).*

On the basis of the information mentioned above, it is clear that the first instance administrative body imposed a fine in lower level of the legally provided rate. Specialty of the above mentioned judgment of SC SR is in decreasing the fine under limits set by law. It thus changed the administrative decision on amount of sanction by imposing a sanction which is out of the extent set for this group delinquencies by law.

In its decision, SC SR argued with various facts. It pointed out the constitutional conformity of the interpretation, extent of seriousness. It took an opinion that it is necessary to take general principles of imposing sanctions within the framework of public law into account. As to the seriousness, it actually stated: *Appellate court reckons that in case of imposing fine, it is necessary to preserve individualization of sanction with respect to a particular case and that it is necessary to assess all circumstances of the case in order for the sanction to be proportionate to the nature of committed act and for it to secure protection of society.*

SC SR also pointed out the under case-law of the European Court of Human Rights, it is necessary to regard this type of delinquencies as crimes. It subsequently stated: *When reviewing decision on imposed fine, administrative court decides in full jurisdiction. If it finds that the fine imposed by administrative body based on a provision of law was clearly disproportionate to the act of complainant and it violates the principle of proportionality, it must take this fact into account as a body securing not only a legal but also a just assessment of the case. As the regulations of criminal law allow imposition of sanction even*

complainant filed an appeal in the tie period set forth by law where they demanded that the appellate court change the appealed judgment, annul the reviewed decision of the defendant and return the case for further proceedings. Complainant argued that in their case, non-smoking operation was concerned, therefore the fine in amount of 331,- Euro is incorrect and badly evaluated and they reckon that the law-giver did not intend to interpret the law in this manner.

under the level set by law when determining its amount, there is no reason for the administrative court deciding in full jurisdiction not to decide this way in relation to an act which did not fulfill features of a crime but only features of administrative delinquency.

I regard this decision as substantial for the functioning of Public Administration because it influences Public Administration significantly. It speaks of a possibility to impose a fine in administrative sanction even out of the legally prescribed rate if the “higher” principles arising out of the Constitution and international documents having priority before the law justify that.¹¹ It is even possible to state that it indirectly establishes a duty for administrative bodies to proceed this way. If administrative do not proceed this way, they risk that in case of court complaints, their decision would be changed or annulled.

In spite of the fact that courts do not create the law, it is their task to interpret it. This interpretation is actually binding not only for the courts of inferior instance but we may state that also for all other bodies of Public Administration. This competency is in fact attributed to SC SR.

Under s. 8 (3) Act no. 757/2004 Coll., on courts and on amendment and supplementation of certain laws, as amended:¹² *Supreme Court cares for unified interpretation and unified use of acts and other generally binding legal regulation by its own decision-making activity and by making statements on unification of interpretation of law and other generally binding legal regulations and it published final court decisions of significant importance in the Collection of statements of Supreme Court and decisions of court of Slovak Republic.*

Respective provision does not concretize interpretation and use of what laws are concerned and in what proceedings. That means that this provision is linked to all laws. That applies irrespective of what area of law or life they are related to.¹³ Undoubtedly, we can subsume laws through which the Public

11 Under Article 7 (5) Constitution: *International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws.*

12 This law is the basic legal regulation for courts, their position and competence in Slovak Republic. Under s. 1 (1) of this law: *This act regulated a) basic principles of activity of courts, b) system of courts and competence of courts, c) internal organization of courts, d) governing and administration of courts, e) judicial self-government and f) participation of courts on creation of budget of courts.* Last amendment was brought by Act no. 192/2011 Coll.

13 The fact that unification of interpretation and use of law belongs to SC SR was declared also by the Constitutional Court of the Slovak Republic. This opinion was expressed e.g. in judgment dated 24. 11. 2010 rendered in proceedings I. ÚS 233/2010. (available at: http://www.concourt.sk/rozhod.do?urlpage=dokument&id_spisu=363103&lovo=zjednocova%20v%20vyklad,

Administration performs its activities under the scope of this provision.

Case-law of courts and specially SC SR is thus becoming binding for the Public Administration. This fact is further supported by some other provisions. For instance, s. 250j (6) CPC states that administrative bodies are bound by legal opinion of the court.¹⁴ We may deduce from what has been mentioned that interpretation of bodies of justice has priority over interpretation of bodies of Public Administration.

With respect to what has been mentioned, the question arises on the relation of Public Administration and courts. It is worth a thought whether courts are still only the controllers of legality of Public Administration. It is worth considering whether they decide only on violation of laws and duties in Public Administration or whether they become also some sort of methodical and interpretational bodies for other cases.

In connection with that, I ask myself a question if any other means of external control (supervision) of Public Administration has the same force as court.¹⁵ In that regard I will refer to three kinds, control by prosecutors, Public Defender of Rights and National Council of the Slovak Republic through its deputies.¹⁶

Prosecution is regulated in the first section of the eighth head of the Constitution. In comparison with the Czech Republic, prosecution is a separate power. It is not a part of the executive.

Basic competence of prosecution is given in Article 149 Constitution, under which it: *...protects rights and legally protected interests of persons and corporations and the state*. This competence is further elaborated on in Act no. 153/2001 Coll., on prosecution, as amended¹⁷ (hereinafter “Act on prosecution”). Under s. 4 (1) of this law, prosecutors perform their competence by supervising observance of legality by Public Administration bodies in the extent set forth by this law.

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14 This provision is systematically included in the fifth part of the second head of CPC, which regulates judicial review of final decisions of administrative bodies and procedures preceding them .

15 As to the external control, see e.g. Pekár, Bernard: *Kontrola vo verejnej správe v kontexte európskeho správneho práva*. Univerzita Komenského v Bratislave, Právnická fakulta, Bratislava 2011.

16 I chose the control by these subjects because all of them have their basis in the Constitution and in relation to the Public Administration, they also have relatively wide control competence.

17 This act is a general law for prosecution regulation mainly its organization and competence. Under s. 1 (1) of this act: *This act regulates position and competence of prosecution, position and competence of General Prosecutor, competence of other prosecutors, organization and administration of prosecution*. Last amendment Act no. 192/2011 Coll.

Within the framework of supervising Public Administration, Act on prosecution allows for use of two basic means.¹⁸ They are the protest of prosecutor against norm-making decision of a Public Administration body, measure issued by Public Administration body and notification of prosecutor against the steps of Public Administration body.

However, prosecutors may not decide on the violation themselves. They may only object. In case that Public Administration bodies reject them, they have to turn to a court with complaint. It means that even so a court decides on the objected violation finally.

Basis of legal regulation of Public Defender of Rights is to be found in the eighth section of the second head of the Constitution named Public Defender of Rights. Under the first sentence of Article 151a (1), making this section, Public Defender of Rights protects fundamental human rights of persons in the proceedings before Public Administration bodies.¹⁹ In detail, its competence is regulated in Act no. 564/2001 Coll., on Public Defender of Rights, as amended²⁰ (hereinafter Act on Public Defender of Rights).

However, options of Public Defender of Rights are limited. The first limit is that only observance of fundamental human rights falls within the scope of its competence and the second one is that it does not have any option to directly eliminate the objected violation.

In case a violation of fundamental human right of a person is found, the Public Defender of Rights may refer the case to be dealt with by a prosecutor, notify on the results of how the motion of Public Administration body accompanied by the motion for adopting a measure of Public Administration body, notify the competent bodies that a crime or administrative delinquency were committed, file a motion for amendment of legal regulation on the level of statute or sub-statutory regulation and file a motion for initiation of proceedings before the Constitutional Court of the Slovak Republic in cases in discrepancies of legal regulations.²¹

In spite of the fact, that Act on Public Defender of Rights gives a number of duties to the bodies of Public Administration in case of finding violation, legal regulations do not attribute the Public Defender of Rights with any direct

18 Means of supervision and their use are regulated in the third section of the fourth part of Act on prosecution named Supervision of prosecutor over observance of legality by Public Administration bodies.

19 *Public Defender of Rights is an independent body of the Slovak Republic which in the extent and the way set forth by law protects the fundamental rights and freedoms of persons and corporations in the proceedings before administrative bodies and other bodies of public power if their proceedings, decision-making or inaction is in contradiction with the legal order.*

20 Last amendment by Act no. 400/2009 Coll.

21 In details, see s. 14–22 Act on Public Defender of Rights.

instruments through which it could enforce fulfillment of these duties itself.

Basic possibility of control by deputies of National Council of the Slovak Republic results from Article 80 Constitution. Under this article, deputy may interpellate a member of government or a different body of state administration in cases falling within the scope of their competence. The process of interpellations is elaborated in detail in Act no. 350/1996 Coll., on rules of procedure of the National Council of the Slovak Republic, as amended.^{22 23}

However, this option of control is expressly related only to the state administration. It means that deputies do not really have means for control of self-government as well as other subject.

One advantage of this form of control is that an insufficient answer may be grounds for removal of a member of government. Under Article 82 (2) Constitution, there is a hearing on the response which may be connected with the vote of confidence.

It is my opinion that an option of pronouncing no-confidence to a member of government may effectively motivate this member to resolve the case of his resort which I the subject of interpellation. In spite of what has been mentioned, I reckon that it is still the most effective means of remedy in comparison to the means provided by courts. Furthermore, as I have already stated, it only applies to state administration.

Legal theory highlights other means of external control, too.²⁴ Nonetheless, it is my opinion that they are not that effective in comparison to judicial control because of the missing possibility of direct enforcement.

After comparing chosen kinds of external control with control of courts, it is my opinion that judicial control is the most effective one as a consequence of an option to directly impact basically all activities of Public Administration. By annulment, changing acts of Public Administration, orders to act, impositions of fine, banning unlawful interferences of Public Administration and other means, the courts may effectively influence proceedings and outcomes of activities of Public Administration and thus influence the Public Administration itself.

However, I think that this system gets to contradiction with the system of influencing Public Administration through its directing and superior bodies. Specially in the case of state administration where the government is at the top with central bodies of state administration.

22 See especially s. 129–130.

23 Last amendment by Act no. 187/2011 Coll.

24 In details see e.g. Škultéty, Peter and collective: *Správne právo hmotné – Všeobecná a osobitná časť*. Heuréka, Šamorín 2002, p. 125.

Under Article 108 Constitution, government is the highest body of executive. It means that at the top of the executive, i.e. including the Public Administration, there is not a court but government. At the top of individual resorts, there actually are central bodies of state administration which are among others also certain methodic and coordination centers.²⁵

State administration is based on the principle of superiority and inferiority. It has created its own mechanism through which it functions. Superior bodies in relation to inferior bodies don not operate only as bodies controlling their activities. They direct and guide their inferior bodies, e.g. through internal instructions, directives, statements, recommendations.

Certain parallel may be found also with respect to other subjects of Public Administration, no matter if we mean subject of self-government or other subjects. Their bodies also act in mutual relations where the superior bodies in relation to inferior one quite often secure both directing and control functions.²⁶

With respect to what has been mentioned, a question arises of what has a priority in interpretation, however. It is up to consideration if under current law, priority should be given to directing bodies of Public Administration or courts. It is worth assessment if for instance, an interpretation of indefinite legal term by superior body of Public Administration must be taken into account by a court when reviewing particular form of activity of Public Administration or of it may follow the interpretation made by itself.

Under Article 144 (1) Constitution, judges are independent when performing their function and when deciding, they are only bound by the constitution, constitutional acts, international treaty on human rights and fundamental freedoms, international treaty not requiring an act to be implemented and international treaty which directly gives rights and duties to persons or corporations and which was ratified and published in a way prescribed by law. It means that under this provision, court is not bound by internal directing interpretations of Public Administration bodies made in the form of various guiding acts. Therefore, it is my opinion that they may interpret individual provisions themselves on the basis of their best knowledge and conscience.

With respect to what has been mentioned, I support the opinion that gen-

25 In details, see Act no. 575/2001 Coll., on organization of activity of government and on organization of central state administration, as amended. Last amendment by Act no. 547/2010 Coll.

26 E.g. compare the relation of senate of university in relation to the rector of university under Act no. 131/2002 Coll., on universities and on amendment and supplementation of certain laws, as amended. Last amendment by Act no. 125/2011 Coll.

erally, interpretation made by court has higher power than the interpretation made by directing body.

Conclusion

On the basis of the mentioned facts, I support the opinion that with respect to their position, courts cannot be currently regarded as merely control bodies of Public Administration. By force of their decisions, they can influence future Public Administration's behavior. By their decisions, they determine ways of applying the law. I think that due to this reason, they may be regarded as methodical bodies in relation to Public Administration as such.

In my opinion, current position respecting fundamental human right to court and other legal protection is unstoppable in current legal establishment. Contrarily, I reckon that the influence of courts on Public Administration will gradually grow. Therefore I think that in future, numerous discussions should be open. However, they should not be on position of courts in relation to Public Administration but on organizing courts in the largest possible extent in order for them to be capable of fulfilling not only functions of control bodies of Public Administration but also methodical ones.

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Control of Public Administration as an instrument allowing elimination of maladministration in Public Administration

Introduction

In the beginning of this paper, I find it necessary to establish goals that I will try to reach further. Equally, I will mention starting point theses that I will develop and which are important for the merits of presented paper.

Control of Public Administration is a key legal term and object of analyses in administrative law science. I support the opinion that control cannot be analyzed individually but always in the context of a system where it takes place, that is within the framework of necessary organizational and functional connections. Therefore, the first important goal to reach is determination of general characteristic of Public Administration control as an object of administrative law science.

Maladministration of Public Administration is an unwanted phenomenon which significantly eliminates fulfillment of the main goal of Public Administration which is to reach accordance of state citizen's conduct and normative conditions in force. Maladministration occurs and demonstrates itself in the process of optimization of organizational structure of Public Administration and also in functional demonstrations of Public Administration performance. Next goal of the submitted paper is to provide characteristic of maladministration of Public Administration in its organizational and functional concept.

Control of Public Administration is realized through performance of authorities specifically set by a law. A significant role is therefore played by institutions with control authority, i.e. controlling subjects.

The spectrum of controlling subjects is very large and therefore, I will primarily focus on central control institutions where an emphasis will be put on describing Public Administration in the context of constitutional principle of controlling the government by parliament which is concurrently a significant principle of parliamentarism. In my opinion, the mentioned principal aspects are important to be stressed because they are the basis for the whole procedural system of performing control in Public Administration. I also point out that control of Public Administration in the indicated context is a legal institute of administrative law which overlaps many areas of law, in this case the indicated constitutional law.

The last goal of the submitted paper is to capture system relations within the framework of control of Public Administration as I support the view that it is a systematical legal institute which is developed through the whole Public

Administration and its expressions are possible to notice within individual parts of Public Administration performance in a complex extent.

General specification of control of Public Administration

In a general context we may state that control of Public Administration is an object of interest for the science of administrative law which profiles itself as a science with significantly prognostic character.

The science of administrative law is a complex of knowledge which allows for analysis of organizational changes and functional connections which take place within the framework of Public Administration. I support the opinion that it has synergic character which means that the result of scientific research is the unity of knowledge from preceding processes where the combination with actual analysis leads to ability of administrative law science to formulate conclusions with prognostic character.

If we want to deal with specific features of administrative law science whose integral part is also the control of Public Administration, it is necessary to note that we have a countless amount of these specific features of administrative law science which are important for taking it into account.

The control of Public Administration has undergone a shift towards expansion of its society impact, border element and equally, it expanded the shift towards prognostic specialization.

At the same time, we may observe that the science of administrative law is a social science which following other sciences demonstrates itself as using their incentives, it has border, abstract nature and it expands the scope of its information, exactness and it progresses in the direction of formulating possible prognostic specialization.¹

Science of administrative law accepts knowledge of other sciences, e.g. economy, sociology or philosophy which leads to its interconnection with society system which allows it to solve problems of society system.² Wide scope of administrative law science's interest does not allow drawing conclusions of casuistic character but contrarily, it allows generalizing knowledge which is of a system character. Therefore, border character is linked to methodological focus. Abstract character of knowledge of administrative law science is a result of the mentioned systematic approach. Administrative law science is very well informed and it adopts knowledge of other sciences which expands

1 Gašpar, M.: *Správne právo, teória a prax*. Pezinok: Typografická úprava a sadzba Agentúra Fischer & TypoSet. 1998. 469 p. ISBN 80-967911-0-9.

2 Interconnection with other knowledge leads to universalism.

its object of research. Equally, the scientific teams which concern themselves with individual institutes of administrative law science expand and the results of their research have prognostic character.

Modern control of Public Administration should thus have interdisciplinary character, which means that it should use knowledge of methodological character of different sciences, e.g. economy, and it should use knowledge of other sciences and take advantage of wide range of information in order for its results to be complex and valid outcomes for further control actions. Modern Public Administration must also be capable of capturing processes ongoing in the Public Administration, primarily decentralization of Public Administration. Modern Public Administration must therefore take into account dynamic changes both in functional dimension and the very equipment of Public Administration. However, it always has to contain target determination of activities in the Public Administration as a whole.

Control of Public Administration is inter-connected with methods and functions of Public Administration. Methods of Public Administration represent the means of influence of administering subjects on administered objects.³

For instance, if it is possible in administrative law to force methods of persuasion and compelling, then modern control of Public Administration must evolve within a framework of demonstrations of these methodological specializations of Public Administration. Prevention aspect of control of Public Administration is crucial for methodological focus of Public Administration's persuasion methods. Repressive aspect of Public Administration control is typical for compelling within the framework of performance of Public Administration.

I point out that control of Public Administration is necessary to be taken into consideration in the context of functions of Public Administration. In fact, functions of Public Administration represent homogeneous complex of activities of uniform character. Obviously, individual control activities are closely connected to the character of a particular function.

Last but not least, the character of control is influenced by a concrete partial administration of special part of administrative law. Specific control mechanisms and institutes take place e.g. in administration of education, culture, different ones in administration of taxes and fees. The indicated context is a result of various regulations of respective procedures where the control is a result of target specialization of proceedings in the whole extent.⁴

3 Škultéty, P. and col.: *Správne právo hmotné. Všeobecná a osobitná časť*. Bratislava: Vydavateľské oddelenie Právnickej fakulty UK. 2000. 316 p. ISBN 80-7160-132-2.

4 Goals of proceedings correspond with the determination of their performance.

Individual kinds of control conducted in Public Administration

If we want to deal with typology of individual kinds of control conducted within the framework of Public Administration, it is necessary to state that we have high number of various classifications of control of Public Administration where it is impossible to provide such a classification of control of Public Administration which would take into account all important aspects.

For specific area of state control performance, the law defines

- a) Internal control,
- b) External control.⁵

Internal control is typical for those parts of Public Administration which are built on the principle of subordination, i.e. superiority and subordination of individual structural elements. For example, the state administration is oriented on this principal basis where we may observe superiority of central state administration over local state administration. Ministries and other central institutions of state administration therefore may give instructions to local state administration which may be differentiated into general and specialized one after decentralization of Public Administration. Within the framework of general local state administration, the district offices remained in existence and thus, the specialized local state administration consists of a complex of specifically oriented institutions of local state administration. Using instructions and internal control, Ministry of the Interior thus may control district offices of general local state administration performing registry activities. Internal organization control in Public Administration is specific as e.g. a main controller of a municipality may control performance of administration by departments of a municipality office.

External control does not require fulfillment of the element of subordination of the superior and inferior subject. For instance, in accordance with our competency law, the Office of Government acts as different central body of state administration controlling ministries as central bodies of state administration. However, that does not lead to a conclusion that Office of Government is superior to ministries. External control is also recognizable in the performance of control of different structural elements of Public Administration mutually. For instance, under Article 71 of our Constitution, the performance of decentralized state administration is controlled by government. It follows that performance of specifically delegated competence areas of state administration conducted by self-government might be controlled by government

5 Škultéty, P. and col.: *Správne právo hmotné. Všeobecná a osobitná časť.* Bratislava: Vydavateľské oddelenie Právnickej fakulty UK. 2000. 316 p. ISBN 80-7160-132-2.

which cannot be superior to self-government. If we allowed for superiority, it would lead to a significant violation of the principle of municipal autonomy which is impossible in the legally consistent state. Nonetheless, control in this case may lead to improvement of Public Administration's performance.

General definition of maladministration of Public Administration

Maladministration of Public Administration is a very complicated legal term generally covering the situation of inactivity where the institution obliged to act either does not act at all or if it acts in contradiction with the law in force. At the same time, it may be characterized as a very dangerous phenomenon which weakens complex performance of Public Administration and fulfillment of its important key target specialization.

In my opinion, it is generally possible to differentiate functional and organizational maladministration or possibly their combination.

Functional maladministration represents that situation where inactivity is caused by uncertainty in the performance of competence areas.

Organizational maladministration occurs in a situation where the duty-bound subject does not act as a consequence of organizational, relations-linked discrepancies. For instance, that may concern competence conflicts. Resolution of organizational maladministration in case of state administration is interconnected with an important principle of subordination, in the context of which the superior state administration bodies may give binding instructions to subordinate bodies of state administration. In this case e.g. ministries may give binding instructions to local bodies of state administration such as district offices.

Organizational maladministration is identifiable e.g. in division of competence areas of state administration and self-government where with respect to delegated competencies, doubts on decision-making activity may occur. In case of schools administration for example, there may be doubts whether certain legal act is supposed to be carried out by regional school office as an institution of specialized local state administration or the municipality as a founding subject. Mentioned considerations arise in the issue of providing grants for activities of schools and school facilities. Organizational maladministration overlaps with cases of negative competence conflicts.

Analysis of authority of individual subjects of control as an instrument of eliminating maladministration

Within the framework of organizational or static concept of Public Administration, it is possible to distinguish a number of subject which have an authority to conduct control. At the same time, they are the subjects with control authority whose control rights result from the parliamentary form of government as a key constitutional law principle. They are these institutions conducting control within the framework of system of Public Administration:

- parliament,
- government,
- ministries,
- other central bodies of state administration,
- local bodies of state administration,
- specific institutions in the area of control,
- self-government.

Parliament as a subject conducting control of Public Administration

Legal position of a parliament needs to be characterized from the perspective of parliamentary form of government where we may classify Slovak Republic, as well. From this perspective, I find it necessary to define individual specific features for this form of government. In further text, I will thus concern myself with specific features of parliamentary form of government.

Lawmaking power is represented by a strong parliament which secures the legislative process, i.e. the creation of normative legal acts as formal sources of law. All remaining legal acts of sub-statutory character such as decrees of government, ordinances, measures and regulations of ministries have to be in accordance with the outcomes of parliament's lawmaking power. In this context, the creation of law is a significant right of parliament which may eventually determine rights of other subjects.

Executive is entrusted mainly to the government as the most important subject within the framework of executive power which safeguards the functioning of Public Administration through its universal policies, doctrines, conceptions and executive, sub-statutory legal regulations – decrees of government. Concurrently, the government fulfills co-ordination and control functions which I will analyze further.

Judiciary is entrusted to independent and impartial courts with hierarchical foundations. We may state that the very system of judiciary in Slovak Re-

public shows signs of heterogenic system which means that except of so-called general courts – district courts, regional courts and supreme court - there is a special category of public law courts where we may classify the Constitutional Court for example. Legal qualification of specialized criminal court is open so far and if we want to submit an opinion on this issue, I reckon that it ought to be classified with the category of special public law courts. Courts control the Public Administration using individual institutes of administrative judiciary which is linked to remedial measures.

The most important element of parliamentary form of government is the principle of responsibility of government to the parliament which is embedded in conditions of Slovak Republic by a principle that government of the Slovak Republic has a duty to ask for approval of program announcement of government of Slovak Republic within 30 days from appointment, as well as by the principle that individual deputies (minimally 30 deputies) may submit a motion for pronouncing no-confidence to any member of the parliament where such pronouncing requires 76 votes of deputies. After the vote of no-confidence to the member of government by parliament, the president removes such a member of government from office, but he is not bound by any time period.

From the mentioned specific features of parliamentary form of government, control rights of parliament towards the government originate and they represent basic constitutional line of division of power in parliamentary form of government.

The mentioned line of starting points is based on individual control institutes which will be characterized in further text.

- One of the most important control mechanisms of the parliament towards government is the pronouncing of no-confidence to an individual minister where the motion for pronouncing no-confidence may be submitted by 30 deputies in order to pronounce no-confidence to a minister, 76 votes are required. Subsequently, such a minister is removed from office by a president. If the parliament pronounces no-confidence to a prime minister, it leads to the fall of whole government. Equally, the government of Slovak republic may propose a decision to connect vote on certain legal question with a vote on its own confidence, if the parliament thus votes no-confidence to the government, president removes it from office afterwards. Decision of the parliament on pronouncing no-confidence needs not to be reasoned. The mentioned control mechanism is therefore a strong instrument of elimination maladministration in the interest of securing legal correspondence of decision-making activity of the government.

- Parliament pronounces agreement with the program announcement of the government. Government has a duty to ask for confidence of parliament within 30 days from its appointment with its own program announcement which may be characterized as a framework document which is binding for the government. Without the approved program announcement of government, it cannot take over its constitutional competences even in spite of its appointment.

- Interpellations represent another very significant mechanism of parliament towards government. They are qualified questions asked by deputies to members of the government. Principle of written form strictly applies here and minister has 30 days period to answer the question of deputy. Deputies thus have an option to find out in what stage is a particular administered matter and at the same time, they might open discussion on certain issue in plenum. If the deputy of parliament is not satisfied with an answer of respective member of the government, they may require redress.

- Deputy analysis belongs to the group of often used control institutes. As far as its legal regulation is concerned, it is an institute not covered by law but it corresponds with the general control of government by parliament. In its course, deputies visit a particular institution, most often a public law one, in order to perform concrete control. In this case, a decision on conducting such a control is obligatory, deputies obtain authorization to perform such a control by a decision of competent committee.

- A similar legal institute to interpellations is the hour of questions and in Slovak Republic, it takes place in the building of parliament every Thursday. However, in this case individual members of parliament have to be present in parliament and they have to answer the question raised by deputies immediately. Raising questions contributes to increasing the level of information of deputies on specific problematic areas resolved by the government. Within the framework of deepening the process of performing control, it is nonetheless necessary to make sure that the questions are not raised only by coalition deputies but also by opposition deputies of the parliament.

Government as a subject controlling Public Administration

Control rights of government are aimed towards individual ministries but also to local state administration, both general and specialized. Mentioned control rights result from subordination principle of organization of state administration where we follow the constitutional principle that government is the highest body of executive power. However, under the Constitution of

Slovak Republic, government may control self-government performing delegated competence areas, for instance.

Individual ministries in particular may be controlled by the prime minister which uses the apparatus of Office of Government of the Slovak Republic which is a other central body of state administration focused on performance of state control. This body also prepares documents for government's sessions. Government may control individual ministries also through the Highest Control Office of the Slovak Republic. This control institution may control subjects of Public Administration using public law budget finances. In case of this institution and in connection with decentralization of Public Administration, there was a dispute whether it may control performance of original competence areas of a municipality linked to municipal autonomy. Under law, it may conduct such a control.

I find it appropriate to briefly mention decisions of the government which have a significant position among control mechanisms of government towards individual ministries although their classification in the framework of forms of Public Administration activities might be eventually questionable. Using the decision of government which is superior to ministries, it binds a particular minister to perform certain activities. Decisions of government strictly follow its program announcement. With respect to the fact that they bind only a particular minister, they have a limited personal competence, however, indirectly, they may bind also subjects standing out of Public Administration. As it was mentioned above, it is problematic to classify decisions of government within the framework of forms of Public Administration activities.

From the perspective of legal qualifications, decisions of government are most often categorized with norm-creating forms of Public Administration activities and they demonstrate features of internal regulations.⁶

In case of non-observing a particular decision of government by a responsible minister, legal and political liability comes into consideration. Legal liability may have various forms, it depends on the extent and seriousness of violation of a legal duty, most often, it is an administrative law liability. Political liability may be drawn by a prime minister which may submit a motion for removal of respective minister by a president after that. However, it is a gesture of political liability, if the minister himself resigns in such a case.

6 Škultéty, P. and col.: *Správne právo hmotné. Všeobecná a osobitná časť.* Bratislava: Vydavateľské oddelenie Právnickej fakulty UK. 2000. 316 p. ISBN 80-7160-132-2.

Ministries as subjects controlling Public Administration

Ministries as central bodies of state administration conduct control on the basis of the mentioned principle of subordination towards local state administration. Within the framework of local state administration, we may thus distinguish general and specialized local state administration. Ministries control local state administration only on the basis and in the limits of legal authorization which is related to competence focus of respective ministry. In this way, e.g. the Ministry of Education controls regional school office performing specialized local state administration.

In connection with ministers who are responsible for the work of individual ministries, I find it important to mention the character of their legal responsibility which is threefold. Minister bears responsibility to his prime minister who may ask the president for this minister's removal if he is unsatisfied with him. Minister is also responsible to the president who has the right to participate in individual sessions of the government and at the same time, to demand necessary explanations by the members of the government. Last but not least, minister bears responsibility to the parliament which may eventually pronounce no-confidence if 76 deputies vote for it. Political liability of minister as a political nominee will not be analyzed at this place.

Other institutions of central state administration controlling Public Administration

Within the framework of this category, it is possible to differentiate and enumerate what are the legally set central institutions of state administration where we may classify e.g. Office of Statistics, Office of Government or Office for Public Procurement. These institutions conduct control within the framework of their own competence areas, e.g. Office of Statistics controls municipalities in the process of working results of elections into individual statistical units in the extent of particular statistical findings. As it has already been mentioned, Office of Government is a central body of state administration for performance of control where it controls primarily ministries' conduct in the control areas entrusted to them. Office for Public Procurement may control subjects of Public Administration issuing individual forms of public procurements, e.g. municipalities during public competitions, equally it prevents cases of direct task if the legal conditions for such a step were not fulfilled.

Control within the framework of local level – local state administration

In this direction, it is necessary to remember primarily control authorities of state administration in the extent of particular proceedings. Under the law in force, e.g regional school offices conduct competencies of a control subject in relation to individual municipalities as founders of schools.

Specific institutions conducting control

In this category, a large number of subjects conducting control within the framework of Public Administration may be distinguished. For instance, we may mention Public Defender of Rights, Prosecutor or individual municipalities.

The task of Public Defender of Rights is to help the citizen in cases of maladministration, i.e. in case of inactivity of a duty-bound subject or in case of its conduct in contradiction with the law. However, it does not have decision-making authority. In case violation of law is found in the conduct of controlled subject, Public Defender of Rights notifies this subject and imposes a remedy measure. In case they are not fulfilled in the set period of time, Public Defender of Rights may submit notification to a superior institution. Public Defender of Rights may also submit regular reports to parliament who it is responsible to.

In the area of Public Administration, Prosecutor may submit a protest which is decided upon by a superior subject in case the affected subject does not comply with the protest. Authorities of Prosecutor may be generally distinguished in civil, criminal and administrative law. Prosecutors are organized in accordance with the hierarchical principle of organization. Municipalities control observance of legal regulations within the framework of their own competence.

Conclusion

In the conclusion of this study, I find it necessary to express hope that such a control mechanism within the framework of Public Administration will be successfully construed, and that often violations of law will not occur. Public Administration in its activity must fulfill basic goal which is to provide quality services towards the subjects standing out of this complex. Therefore I hope that this paper means a certain step towards reaching an ideal goal of modern Public Administration.

Legality and constitutionality of generally binding ordinances of a municipality

Thoughts on legality, or in other words constitutionality, of generally binding ordinances of municipalities (hereinafter “GBO”), lead to a problem of defining a relationship between state and territorial self-government where only the state has a competence to assess these issues. People have a right to territorial self-government which is traditionally deduced from the constitution and it is the basis of municipality’s existence. Self-government (taking care of oneself) is understood as a right of every subject to administer their matters in their own way presuming that they do not violate society’s interest. In a certain sense, self-government is separated from the state e.g. by administering matters which are legally limited as to the merits and extent. These definitions “sense” certain contrast between the state and community – i.e. between the principle of equality and mass and principle of freedom and individualism. Every municipality – community has its ideal of legality under veil of common awareness of “we”, or in other words justice which does not need to correspond with the image of society on legality and justice and thus it may get “behind the borders of constitutionality.”¹ That eventually means that there always is a state to assess whether a municipality adopted a norm which is beyond the constitution of the state but in spite of that, it is legitimately accepted by the municipality.

Under Czechoslovak legal (constitutional) regulations, the state has right to interfere with the activity of self-government, but only in a form of law (not if it conducts delegated state administration, or in other words, on the basis of norms of higher legal force. That does not concern interferences which arise from e.g. commercial law relations where the municipality is involved as a subject (these rights may be imposed also by individual legal act), but it concerns legal relations which arise from the right to territorial self-government, or in other words the rights, which belong to municipality as naturally as to the state.

With such understanding of the relation between state and territorial self-government, there is a controversy with legal regulation which allows the state to impose the duty on territorial self-government (duty to annul GBO) by an individual legal act (a judgment of general court). Material competence to review GBO of a municipality of self-governing region is regulated under s.

1 Egged, P.: Otázka komunity v komunitaristickom a tradičnom (vnútrokomunitnom) diskurze, *Filozofia* 64, 2009, No 2, p. 155, ISSN 0046-385 X

250zfa Civil Procedure Code (hereinafter “CPC”) which states that the competent court to decide on unlawfulness of GBO is the regional court in whose area is the municipality which issued GBO or a residence of self-governing region which issued the GBO. Participants to the proceedings are prosecutor whose motion was rejected in the course of prosecutor’s protest who is the only person which may submit the complaint, and self-governing units. The subject-matter of court proceedings is the assessment of correspondence of GBO with the law, decree of the government and with generally binding legal regulations of ministries and other central bodies of state administration depending on whether the GBO is issue within the framework of performing delegated state administration or while performing the original competence.²

Constitution of the Slovak Republic in its Article 125 (1) (c) (d) embeds the competence of Constitutional Court of the Slovak Republic (hereinafter “Constitutional Court”) to review correspondence of GBO with the Constitution, constitutional law, international treaties published in a way provided by law, laws, decrees of government and generally binding legal regulations of ministries and other central bodies of state administration depending on whether they are issued in the performance of state administration or in the performance of original competence.³ It results from what was mentioned, that Constitutional Court and equally also the general court reviews **legality** of GBO, or in other words **correspondence** of GBO with inferior normative legal acts. The relation between Constitutional Court and general courts is based on the principle of **subsidiarity** under which the Constitutional Court is competent is there is no other court to decide the case (if all the possibilities of remedy are exhausted). This principle was one of the reasons of missing legal regulation.⁴ In strict assessment of **constitutionality** of contested GBO, the principle of subsidiarity cannot be applied because the general court has

2 s. 240zfa CPC states: “If a municipality or higher territorial unit does not annul or amend GBO upon a protest of prosecutor, in cases of territorial self-government a prosecutor may file a motion for pronouncing inconsistency of GBO with the law before a court. In matters linked to fulfillment of duties of state administration, prosecutor may file a motion for pronouncing inconsistency of GBO even with decrees of government a generally binding legal regulations of ministries and other central bodies of state administration.” Therefore the lawgiver does not bind the prosecutor and court to review constitutionality of GBO because it is supposed to be reviewed by General Prosecutor and decided upon by the Constitutional Court.

3 In these connection, an interesting question might be raised, why lawgiver did not expand this review competence of general courts towards GBOs in CPC also with respect to, e.g. normative legal acts of local bodies of state administration as Article 125 (1) (d) applies even to these normative legal acts.

4 See the commentary to a reasoning report of amendment of Act no. 384/2008 Coll., point 137.

no legal form to relevantly state contradiction of GBO with the Constitution. Eventually, not even the legal regulation included in CPC does attribute general courts with authority to decide on correspondence of GBO with Constitution (see footnote no. 2).

It results from what was mentioned that prosecutor should evaluate the question of constitutionality and legality of GBO separately. If the General Prosecutor contests GBO due to unlawfulness (not unconstitutionality because the Constitutional Court is the only body assessing correspondence with the Constitution relevantly on merits) before the Constitutional Court without proceedings before a general court being applied, Constitutional Court should reject such a motion for non-exhaustion of all available legal remedies. This conclusion results from the wording of s. Article 125 (1) (c) (d) Constitution – last words of paragraphs “...unless a court decides on them”. Contrarily, under the law in force, prosecutor does not have a right to contest GBO before general court if it is in contradiction only with the Constitution; only the General Prosecutor has such a right as he may submit a motion before the Constitutional Court, therefore, the principle of subsidiarity does not apply here because no other court decides on constitutionality.

In connection with that, it is necessary to ask a question whether it is possible for the GBO to be in contradiction with the law and not in contradiction with Constitution, or totally irrationally, whether it may be in contradiction with Constitution and in accordance with the law.

Under constant case-law of the Constitutional Court and the Constitutional Court of the Czech Republic (accordingly to the found discrepancies of GBOs with Constitution, up to now), **it is not possible** for the GBO to be in contradiction with the law and concurrently, in accordance with Constitution. If the GBO violates the law (especially by a known violation consisting of imposing a duty not regulated in law or beyond the legal framework), at the same time, it violates the Constitution in its Article 13 (1) (a), or Article 2 (3)..⁵

Relation between legality and constitutionality of GBOs may be also observed from a different perspective. Article 125 (1) (c) and (d) sets forth the **competence** of Constitutional Court to decide on correspondence of GBOs with relevant legal acts.⁶ In this article and anywhere else in the Constitution,

5 Article 13 (1) (a) states that duties might be imposed by **law** or on the basis of law within its limits and with respect to fundamental rights and freedoms. Article 2 (3) states that everyone can do everything which is not forbidden by law and no one can be forced to do what the **law** does not impose..

6 This article begins: “*Constitutional Court decides on correspondence of generally binding ordi-*

there is no explicitly stated constitutional duty that GBO must be also in accordance with the law or other legal acts, in spite of the fact that it results from this article.⁷ This duty is set forth directly by laws.⁸ It results from what was mentioned that if a GBO is in contradiction with a law, or an act of inferior legal force, it does not *a priori* mean that it violates Constitution. Such GBO is in contradiction with the law (or a legal act of inferior legal force) which concretely violates and at the same time, it fulfills the word of the law (see footnote no. 8) on violation of a duty to issue GBO in accordance with the law. Obviously, it also applies that if GBO is in contradiction with a law, it may concurrently violate the Constitution, as well – it depends on defects that GBO has. Such **separation** of two characteristics of GBO, i.e. legality and constitutionality also anticipates the problem of classifying defects of GBOs. Qualification of these features of GBOs is decisive also for determination of material competence of prosecutor of General Prosecutor in submission of motions for correspondence of GBOs. The question of distinguishing between legality and constitutionality would be useless, if the assessment of correspondence of GBO (i.e. material competence) would only belong to the Constitutional Court.

When classifying defects which lead to unlawfulness but need not to cause unconstitutionality of GBO, we may follow the reasons leading to unlawfulness in Public Administration which may originate in the process of adopting – issuing decisions of a Public Administration body and in the very act – outcome of the process of Public Administration body. Prosecution has two different forms of supervision with respect to these two forms of unlawfulness, notification and protest. Obviously, it is questionable whether a GBO may be regarded as unlawful if the process of its adoption was unlawful but its merits are in accordance with the law. In my opinion, in this level of thinking, qualification of a fault with its impact on the very **validity** or **legality** of GBO are always concerned. For instance, there is a defect of GBO which consists of missing information on a decision in which the GBO was adopted in the record from session of municipality's assembly, or in other words, it is not documented (I point out that we speak of legality of GBO and not legality of performance of self-government).⁹ Or if GBO on local immovable property

*nances under Article 68 with the Constitution, constitutional law and international treaties,*⁹ etc.

7 Orosz L., Mazák J.: *Obce a samosprávne kraje v konaní pred ústavným súdom Slovenskej republiky*, Mayor Group s.r.o., Košice 2004, p. 82, ISBN 80-969128-0-1

8 s. 8 (1), (2) Act no. 302/2001 Coll., s. 6 (1), (2) Act no. 369/1990 Coll.

9 In the record of session of municipal assembly, there was only a declaration the decision were adopted successively as they were; it is clear from the list of adopted decisions that

taxes becomes effective after 1st January of respective year (taxation period), although s. 9 Act on local taxes allows a municipality to introduce local tax only to 1st January of taxation period.¹⁰ Such a failure in adopting GBO is in contradiction with a law but with respect to the nature of this failure, it is not possible to classify unconstitutionality due to non-respecting constitutional limits expressed in Article 2 (3) and Article 13 Constitution, or respectively, that unconstitutional violation of fundamental rights and freedoms occurred or that GBO did not respect the reservation of law. In spite of these flagrant failures, prosecution reacts on such unlawfulness which has a direct impact on legality of GBO by a prosecutor's protest and where this unlawful process of adopting GBO does not cause contradiction of GBO with law, prosecution submits notifications (e.g. if the proposal for commenting GBO was published at official desk of a municipality for a shorter period than 15 days). Therefore, it is possible to conclude that unlawfulness of GBO will be caused mainly by such procedural defects which may but need not have impact on legality or in other words, validity of the GBO itself.

In connection with that, it is important to point out a defect that in the process of adopting GBO leads to invalidity of GBO (and thus its inexistence).¹¹ Within the framework of legally consistent state, principle of presumption of constitutionality and legality of a legal act applies, and therefore, the question of legality of GBO, or in other words, its validity must be answered by a general court upon a motion of prosecutor. In classification of this defect, assessment of constitutionality does not come into account because such GBO externally fulfills basic constitutional attributes of GBO but on the other hand, it contradicts a law.

For illustration, I mention that in recent history, there was a legal regulation (in Act no. 302/2001 Coll., on self-governing regions) which set forth the right of government to return the GBO in the time period set for signing to an assembly through a chief, if the government was of the opinion that GBO passed under s. 8 (1) and (2) is in contradiction with national interests or in contradiction with interests of other higher territorial unit or municipalities. If the ordinance was repeatedly passed by an assembly in the wording of gov-

GBO was passed but it is not documented what GBO it was and by what majority of votes it was passed (source: Zhodnotenie stavu zákonnosti na úseku miestnej dane z nehnuteľností, December 2009, GPSR)

10 Ibidem as in footnote no. 9

11 In practice, there were cases when GBO was not adopted by a necessary majority but it was published in spite of that, or a GBO was passed by a decision with different text than the one present in written form of GBO, or a GBO was passed under coercion, or in other words, in connection with committing a crime...etc.

ernment's objections, it came into effect in 15 days. If not, than the ordinance lost validity if the regional court decided so upon a motion of government. Therefore, the law counted on the GBO to be in correspondence with the law but in spite of that, regional court could annul it. This provision of an object of criticism from the constitutionality of such process point of view and eventually, it has been substituted by current legal regulation. In any case, it established a reason to annul GBO by a general court which was not based on assessment of constitutionality.

If we think about unconstitutionality of GBO, a defect which may cause unconstitutionality although the GBO might be in accordance with the law, is in my opinion, an insufficient clarity, or in other words, incomprehensibility of GBO's text which may be caused especially by inconsistent work of local law-makers. Definiteness and clarity are features of legal certainty and comprehensibility arises out of these factors. Comprehensibility itself is further a pre-requisite of predictability of actions of state bodies. Similar legal opinion was stated by the Constitutional Court in the past (PL. ÚS 15/1998). A different problem, where the Constitutional Court is the competent body, is definiteness of a legal norm, but this time from an opposite perspective (too definite – individual norm). Every provision of GBO must have its own normative content and it cannot be only a reference norm applicable to one individually determined case. In spite of the fact that GBO has a normative form, it cannot become e.g. an order of municipality to a competent body imposing a duty to decide in just one case. Such GBO would not fulfill basic pre-conditions for merits of a legal norm which would lead to discrepancy with Article 1 (1) Constitution.

The difference between legality and constitutionality of GBO is also analyzed in expert literature.¹² However, it is possible to state that in the sense of understanding unlawfulness of GBO, by removing unlawfulness, unconstitutionality is removed, as well, or in other words, these two characteristics need to be perceived together. Assessment of the characteristics of GBOs in the Slovak Republic remains a domain of prosecution because only the prosecution is authorized to file a complaint for inconsistency of GBO with law within the framework of administrative judiciary and also the General Prosecutor is one of five qualified subjects authorized to file a motion before the Constitutional Court regarding correspondence of legal regulations with the Constitution. Eventually, even the constitutional Article 125 states that if Constitutional Court assesses correspondence of GBO with Constitution,

12 As footnote no. 6, last sentence of the page.

law or legal acts of inferior legal force, correspondence of GBO with either the Constitution or act of inferior legal force is thus in its “hands”, except of the general courts. Opposite interpretation of this constitutional article, or in other words, separate understanding of legality and constitutionality of GBO leads us to an opinion that the authority of prosecutor to submit a motion for pronouncing inconsistency of generally binding ordinance with the Constitution before general court is obsolete, or in other words, an unenforceable provision, to what extent would unlawfulness always lead to unconstitutionality and therefore the General Prosecutor should file a motion before the Constitutional Court.

From the perspective of prosecutor’s activity, we may sum up that constitutionality and legality of GBO needs to be perceived an interconnected manner with respect to the character of present defects of GBOs and that they are assessed jointly by general court accordingly to the principle of subsidiarity. Such understanding of material competence for reviewing **constitutionality** of GBOs corresponds with the intent of drafters of the legal regulation which was, among others, to relieve the Constitutional Court from deciding on correspondence of inferior norm-creation with constitution. Nevertheless, it is questionable which court and prosecution body would be materially competent if GBO is in contradiction **only with the Constitution**, as it was indicated above.

The problem of material competence for reviewing legality or constitutionality of GBO reflects also the understanding of GBO as a source of law. In administrative law theory, there is a dispute on originality of GBO, or respectively on a possibility of imposing a duty in a form of GBO issued in the performance of self-government if the duty is not known to the law (so-called “new duties”) but such duties are consistent with the constitution. In Slovak Republic, an answer is imminent in current legal regulation. I support the opinion that GBOs issued in the performance of self-government is derived, i.e. sub-statutory source of law and thus it does not have the “privilege” of originality as we knew it before 2008, since it is reviewable by general court and not only the Constitutional Court as a law. Such formal understanding also corresponds with Article 2 (3) Constitution, which states that no one can be forced to do something not imposed by a **law** where it is probably possible to impose such a duty by GBO but such a duty is probably unenforceable.

Finally, the problem of assessing legality or constitutionality of GBOs is also noticeable in the application of s. 4 (4) Act on municipal establishment regarding GBOs which were issued on the basis of competencies of municipalities which they had already before 1. 1. 2002, i.e. before the Act no.

416/2001 Coll. came into effect ¹³ If there are competencies of municipality where the interpretation rule does not apply, it is questionable in case of ambiguity whether it is an original competence of municipality or delegated state administration, what they should correspond with, i.e. if with a constitution or with laws and other legal acts.

13 s. 4 (4) Act no. 369/1990 Coll., on municipal establishment states that if law regulating competence of municipality does not provide that performance of transferred competence is concerned, then it applies that performance of self-government competence of municipality is concerned.

Legal nature of professional self-government regulations and the form of measure of general nature

1. Initial specification of the issue

In Public Administration as an administration of public matters in a state, we distinguish state administration and self-government. Performance of self-government in the Czech Republic may be divided into so-called territorial self-government which is performed by territorial self-governing units (municipalities and regions) and so-called interest (non-territorial) self-government performed by subjects of interest self-government where various guild chambers (e.g. of attorneys, physicians etc.) or public universities belong.¹

Characteristic expression of self-government is the performance of public power which acquires many formal shapes. In case of territorial self-government subjects, it covers primarily generally binding ordinances and decrees. i.e. administrative acts clearly regulated in law issued in the form of legal regulations.²

In the area of interest self-government, the situation is far less clear. That is caused by the fact that subjects of interest self-government are authorized to issue interest self-government regulations only by special laws governing their position and not uniformly in a constitutional act or at least in one general law together. As a consequence of that, there is an on-going discussion on the nature of interest self-government regulations called guild regulations in case of professional self-government (they are explicitly named with this term in special laws³ or the acts mentioned there correspond with their nature), or internal regulations of public university in case of academic self-government.⁴ In the following text, I will only focus on guild regulations of professional self-government but general conclusions will be applicable even to academic regulations.

1.1 Nature of guild regulations

Nowadays, in connection with the issue of guild regulations nature, we face especially the question whether guild professional regulations are legal

1 Comp. HENDRYCH, D. and col. *Správní právo: obecná část*. 7th ed. Praha : C. H. Beck, 2009. p. 178.

2 Art. 104 (3) Constitutional Act no. 1/1993 Coll., Constitution of the Czech Republic, as amended.

3 E.g. Act no 85/1996 Coll., on Advocacy, as amended.

4 DVOŘÁČEK, D. Právní povaha předpisů zájmové samosprávy. *Právní rozhledy*. 2006, no. 24. p. 882.

regulations as a source of law or not. Currently it seems, that majority of legal theory reckons that they are not legal regulations, or in other words, that they are not a formal source of law. Main argument supporting this position is that these acts are not attributed with the form of legal regulation neither by the Constitution of the Czech Republic or any law. Therefore they cannot be compared to legal regulations issued by bodies of territorial self-government because to the contrary, territorial self-government is directly authorized to issue sub-statutory legal regulations by Article 79 (3) Constitution. Accordingly to the majority opinion, guild regulations are thus regarded as merely some autonomous implementing regulations which are abstract, or in other words, normative acts addressed to a certain group of people on the basis of law although they are not a legal regulation themselves.⁵

Proponent of the opposite opinion is e.g. D. Dvořáček, who deems the guild regulations to be legal regulations because of their form and therefore, he classifies them as a source of law. He supports this opinion of his by arguing that although on general level, guild regulations are not issued on the basis of constitutional authorization, in order to regard them as legal regulations it suffices that authorization to issue guild regulations as such is implemented within the framework of special laws regulating areas of individual professional self-governments.⁶ With respect to that, he adds: *“regulations of interest self-government fulfill all usual features of legal regulations as they are fulfilled by e.g. legal regulations of municipalities, and therefore there is no reason for not regarding them as legal regulations”*.⁷ Regarding the norms set forth in legal regulations he states that *“they have a regulatory nature, they are legally binding, materially and personally general and they are enforceable”*.⁸

Not even the judicial practice is unified in its approach to the nature of guild regulations. However, up to now the court never pronounced the guild

5 Srov. HENDRYCH, D. Autonomní normotvorba v České republice. In Právní stát - současnost a budoucnost. 1st edition. Praha: UK PE, 2001.; KNAPP, V. Teorie práva. 1st edition. Praha: C. H. Beck, 1995.; SLÁDEČEK V. Ještě k povaze předpisů zájmové samosprávy. *Právní rozhledy*. 2008, no. 4.; Mikule, V. in SLÁDEČEK, V., MIKULE, V., SYLLOVÁ, J., Ústava České republiky komentář. Praha: C. H. Beck. 2007.

6 D. Dvořáček in DVORÁČEK, D. Právní povaha předpisů zájmové samosprávy. *Právní rozhledy*. 2006, no. 24. and Z. Koudelka in KOUDELKA, Z. Právní předpisy územní samosprávy. Linde : Praha. 2008. Accordingly state that in case of interest professional self-government, we may speak more about their general binding effect which is a characteristic of legal regulations.

7 DVORÁČEK, D. Právní povaha předpisů zájmové samosprávy. *Právní rozhledy*. 2006, č. 24. s. 886.

8 Ibidem p. 887.

regulations to be a source of law.⁹ At the most, Constitutional Court in its rejecting decision dated 2nd December 2008, no. IV. ÚS 1373/07 laconically stated that “*within the framework of professional self-government, there are guild regulations passed, as well, and they fulfill all the characteristic features of normative legal acts as a source of law*”. However, the mentioned opinion cannot be regarded as a case-law of the Constitutional Court confirming that guild regulations are regulations of law because mere fulfillment of definition features of legal regulations does not by itself suffice to attribution of the form of legal regulation.¹⁰

1.2 Judicial review of guild regulations

Determination of legal nature of guild regulations is really not only a problem of legal theory. Rights and obligations covered by guild regulations originate with respect to tens of thousands of individuals, quite often already on the basis of these administrative acts. Therefore they are not realized only at the moment of particular act of their application.¹¹ Although everyone who is injured by guild regulation may seek protection in administrative court proceedings on the basis of a complaint in a specific case, for the reasons mentioned above, it is desirable to allow direct contesting of the guild regulation and requiring annulment of it without waiting until the moment it leads (if only) to violation of rights of an individual in a concrete decision.¹²

Determination of a nature, or in other words, a form of guild regulations is a key factor for an option of their annulment in cases where they unlawfully interfere with public subjective rights of their addressees, then. If the guild regulations were legal regulations, the only competent court to annul them would be the Constitutional Court where the addressee of such a legal regulation whose rights were thus affected would be actively procedurally legitimated only in cases where they would simultaneously file a constitutional complaint or where they would claim that the guild regulation violates their fundamental right or freedom safeguarded by the constitutional order.

9 Comp. e.g. judgment of the Supreme Administrative Court dated 2. 4. 2003 no. 28 Ca 152/2001, judgment of the Constitutional Court dated 16. 4. 2003, no. I. ÚS 181/01, decision of the Supreme Administrative Court dated 12. 3. 2009, no. Aps 2/2007.

10 SLÁDEČEK V. Ještě k povaze předpisů zájmové samosprávy. *Právní rozhledy*. 2008, no. 4. p. 136.

11 Comp. HENDRYCH, D. a kol. *Správní právo : obecná část*. 7th ed. Praha: C. H. Beck, 2009. p. 696.

12 Comp. DVOŘÁČEK, D. Právní povaha předpisů zájmové samosprávy. *Právní rozhledy*. 2006, no. 24. p. 886 and 887.

General court is then empowered to assess accordance of a different legal regulation (other than law) with a law or international treaty which is a part of legal order and not to apply this legal regulation or its single provision if it contravenes the law or international treaty in his opinion. However, they are not empowered to annul this legal regulation or its single legal provision with effects *erga omnes* and they cannot even submit a motion for annulment of this legal regulation to the Constitutional Court which is the only competent body to annul such a regulation, not even the Supreme Administrative Court could do so even if it came to the conclusion that courts find the discrepancy repeatedly. In a particular case, such disqualified legal regulation still remains in force.¹³

If on the other hand, they would not be legal regulations as a source of law, position of an addressee of guild regulation as an affected person would be unclear, as confirmed by judicial practice, and therefore probably even more complicated than if they were a source of law. Nowhere in the Code of Administrative Justice, as a general law regulating authority and competence of courts deciding in administrative judiciary, can we find a procedural regulation explicitly related to judicial review of guild regulations. Nevertheless, some (but not all of them) special laws regulating individual areas of professional self-government establish active legitimacy for heads of competent central administrative bodies to submit a motion for review of guild regulation's legality by a court.¹⁴ On one hand, this procedure does not allow the affected addressee to directly file for annulment of a guild regulation and furthermore, it is questionable which court is competent in proceedings on annulment of a guild regulation in case of a motion filed by e.g. a minister (if there is such one) and in what kind of court proceedings.¹⁵ In the remaining cases, where courts are not empowered to annul guild regulations by individual laws, it may seem that they cannot annul guild regulations at all.¹⁶

13 SLÁDEČEK V. Ještě k povaze předpisů zájmové samosprávy. *Právní rozhledy*. 2008, no. 4.

14 An example of authorization to annul guild regulations given to courts is s. 50 (2) Act no. 85/1996 Coll., on Advocacy, as amended.

15 Exception is the Act no. 417/2004 Coll., on Patent Representatives, as amended, which in s. 64 (3) states that administrative court must proceed in accordance with provisions on a complaint against the decision of an administrative body which, however, cannot be regarded as an appropriate kind of proceedings.

16 Comp. ČERVENÁ, K., LIPERTOVÁ Š. L. Soudní přezkum předpisů zájmové samosprávy. In JUDr. Ing. Radovan Dávid, Ph.D., JUDr. David Sehnálek, Ph.D., JUDr. Jiří Valdhans, Ph.D. *Dny práva – 2009 – Days of Law* [online]. Brno: Masarykova Univerzita, 2009. [cit. 2011-11-26]. p. 18. Available at: < http://www.law.muni.cz/sborniky/dny_prava_2009/index.html>.

Except of the aforementioned facts, however, the Supreme Administrative Court in one of its decision found that guild regulations may be reviewed within the framework of assessing whether an unlawful interference under s. 82 Code of Administrative Justice (hereinafter “CAJ”) occurred, because in this court’s opinion, court protection is provided also to relations which originate as a result of guild regulation’s application without a decision being rendered because they are relations in Public Administration and these are judicially protected.¹⁷

To sum up what was mentioned above, guild regulations are currently not considered to be a source of law and judicial review leading to their annulment is probably possible only on the basis of a motion filed by a minister of competent resort which is, however, possible only in certain situations and in addition, under unclear rules including determination of court’s competence or on the basis of proceedings on protection against unlawful interference of an administrative body under s. 82 CAJ, where everyone is actively legitimated who claims that their rights were directly violated by an unlawful guild regulation. Nonetheless, there is quite a short period of time set for filing this complaint with one more limitation, under which the complaint is inadmissible if the protection or redress may be sought using different legal instruments,¹⁸ which is closely connected to the very issue of a form of measure of general nature for guild regulations that I focus on in the following part of the paper.

2. Guild regulations and measure of general nature

It results from what has been mentioned above that although there is not a full agreement on whether guild regulations are a source of law or not, guild regulations are thought of as purely normative acts. However, this approach was the only possibility (naturally, it is not possible to consider guild regulation to be an individual administrative decision) until the moment when common regulation of measures of general nature was passed as currently one of the basic forms of administrative activity regulated in Administrative Procedure Code (hereinafter “APC”). Therefore, in the still actual discussion on the nature of guild regulations especially with respect to their judicial review, I still lack more intensive reflection on them possibly having the form of measures of general nature. I lack it even more realizing that *prima facie*, measure of general nature might seem as a form corresponding with guild regulations

17 Judgment of Supreme Administrative Court dated 12. 3. 2009, no. 6 Aps 2/2007.

18 s. 84 (1) Act no. 150/2002 Sb., Code of Administrative Justice, as amended.

because they satisfy definition features of measure of general nature, i.e. concrete specification of subject-matter and general specification of addressees.

At the same time, the form of measure of general nature in case of guild regulations might significantly improve legal position of an individual which may now be described as unfavorable because guild regulations, as mentioned in the preceding part, really limit, bind and give rights to their addressees on one hand,¹⁹ but on the other hand, it is problematic to achieve their annulment by court. Furthermore, with rare exceptions the question of publication and binding effect (“effectiveness”) of guild regulation is not solved,²⁰ which may change if we attribute these acts with a form of measure of general nature because common regulation of measures of general nature includes rules for their issuing, as well.

Form of measure of general nature for guild regulations would thus primarily mean clear rules for judicial review which needs not to be started only on the basis of concrete act of application, but only a claim that guild regulation itself interferes with the legal sphere of an affected person suffices, and a court may annul it as unlawful.²¹

In order for us to be able to state that guild regulations are measures of general nature, we have to specify definition features of measures of general nature and subsequently, we have to analyze whether guild self-government regulations satisfy them or not. Discussed uncertainty regarding the nature of guild regulations grounded on whether they are a source of law or not and mainly the question of abstractness and concreteness of subject-matter of regulation and addressees of such an act will be decisive.

2.1 General definition features of measures of general nature

APC, which contains the general regulation of measures of general nature, does not state positive definition of this administrative act because it only defines measures of general nature as administrative act which is *not a legal regulation or a decision*. The mentioned definition in connection with a provision obliging administrative bodies to *proceed in accordance with the general regulation of measures of general nature in cases where special laws impose a duty to issue binding measure of general nature*, opened a discussion regarding identification of an administrative act as a measure of general nature.

19 DVORÁČEK, D. Právní povaha předpisů zájmové samosprávy. *Právní rozhledy*. 2006, no. 24. p. 886.

20 SLÁDEČEK V. Ještě k povaze předpisů zájmové samosprávy. *Právní rozhledy*. 2008, no. 4. p. 138.

21 § 101a Act no. 150/2002 Sb., Code of Administrative Justice, as amended (hereinafter “CAJ”).

Gradual evolution whose important direction has been pointed out by the Constitutional Court, eventually, led to the outcome that every act satisfying definition features of not being a legal regulation or a decision – although not as such explicitly described by a law – is a measure of general nature. This material approach requires specification of the mentioned definition features in order to determine which administrative act fulfills them and which not. Therefore the Supreme Administrative Court's law specifies definition features of measures of general nature by stating that it is an administrative act with concretely (individually) set subject-matter and generally set addressees and not with concrete addressees and abstract subject-matter.²²

Obviously, in the legal order we may encounter many administrative acts explicitly named as measures of general nature, or in other words, cases where special law explicitly states that measure of general nature is concerned. In those cases, where this is not explicitly stated, it is necessary to apply the mentioned approach.

However, the mentioned material concept cannot be used absolutely because in a situation where an administrative body is empowered to issue an administrative act in a different form than measure of general nature and even in cases where it would be clear that an administrative act fulfills definition features of a measure of general nature, it is not possible to regard such an act as a measure of general nature. Not even material concept of measure of general nature cannot overcome the fact that it was the will of lawmaker to decide on respective administrative act in a different legal form. That results also from the decision of Supreme Administrative Court dated 6. 8. 2010, no. 2 Ao 3/2010 where it is stated that *“in a situation where lawmaker (1.) presumes particular activity of a state body and (2.) sets certain form for this activity, it is not possible for a court to draw a conclusion that a different act than the one presumed by law is concerned, solely on the basis of merits of the rendered act.”* When determining a different form, administrative bodies *“are not given a legal competence to issue measures of general nature in this area and binding effect of the law on these bodies (see Article 2 (3) Constitution, Article 2 (2) Charter) does not allow to disrespect absence of legal authorization.”*²³

When determining whether respective administrative act is or is not a measure of general nature from the material view, it cannot be omitted that it

22 Judgment of Supreme Administrative Court dated 27. 9. 2005, no. 1 Ao 1/2005.

23 BAHÝLOVÁ, L. Opatření obecné povahy podle zákona o ochraně přírody a krajiny. In JUDr. Ing. Radovan Dávid, Ph.D., JUDr. David Sehnálek, Ph.D., JUDr. Jiří Valdhans, Ph.D. Dny práva – 2010 – Days of Law [online]. Brno : Masarykova Univerzita, 2010. [cit. 2011-11-26]. p. 18. Available at: <http://www.law.muni.cz/sborniky/dny_prava_2010/index.html>.

must a public power binding act which binds addressees out of Public Administration.²⁴ Therefore, measures of general nature must impose duty to outer subjects on the basis of law and at the same time, the duty imposed must be different from the duty already set forth by law (we may not speak of binding effect of an administrative act which only repeats duties imposed by law).²⁵

After fulfillment of outer binding effect of an act, the next step is to determine specificity of this mixed legal form which is its concretely-abstract nature. In advance, we may point out that while determining whether an administrative act defines its addressees generically is not hard, concreteness of subject-matter of regulation leads to a lot more complicated situation.

Administrative act defines its addressees abstractly if they are defined as a group of subjects, specified with certain attributes, where this administrative act applies to all subjects falling within this group. It is even allowed that the number of these subjects be accurately determinable, what is significant is the indefinite way of their specification.²⁶ In order to fulfill the measure of general nature definition feature of abstractness of addressees, it thus suffices if its addressees are not namely specified in this administrative act with exact identification of a particular individual.

On the other hand, the subject-matter of measure of general nature must be defined concretely. That means that from the material view, measure of general nature always resolves only a concrete case. Prevailing majority of the legally presumed measures of general nature define their subject-matter individually on the basis of concretization of the location or in other words, the place of subject-matter they are related to. Concretization of subject-matter required by measure of general nature occurs with respect to measures of general nature individualized by specifying the location leading to a duty being imposed only in certain territory. As an example of territorially concretized and explicitly named measures of general nature, let us mention territorial plans of municipalities which determine future use of particular lands in a binding way. Furthermore, measure of general nature may lead to e.g. limiting disposal with surface water where such a limit is once again related to a particular water source, or in other words, a water source situated in a certain area. Such territorially specified measures of general nature are also e.g. visiting rules of a national park which set forth conditions of limiting admission,

24 s. 173 (3) Act no. 500/2004 Coll., Administrative Procedure Code, as amended: *a duty which is set forth by law and whose extent is within the limit of law determined by a measure of general nature (...)*.

25 Judgment of Supreme Administrative Court dated 7. 1. 2009, no. 2 Ao 3/2008.

26 VEDRAL, J. *Správní řád: komentář*. Praha: Bova Polygon, 2006. p. 974 - 975.

entrance, and free movement of persons in a national park, i.e. once again conditions for concrete territory which in this case is the territory of a national park. Another example is the determination of various protection zones.²⁷ Individualization of subject-matter here is achieved due to concreteness of the location of regulation's subject-matter.

However, there is an administrative act which has its subject-matter concretized independently on a specific location and it is named as a measure of general nature. It is so-called general measure under Act on Electronic Communication where the subject –matter of regulation is e.g. setting concrete conditions concerning the use of radio frequencies with respect to purposeful use of radio spectrum and preventing harmful frequency. Naturally, with its regulation's subject-matter definition the mentioned measure of general nature cannot be applied to specific, exactly stated territory. Concreteness of the stated regulation's subject-matter therefore probably rests in uniqueness of individual frequency zones.

From the material point of view, it may be harder to identify measures of general nature with a subject-matter concretized in a different manner than the location (e.g. time). Uniqueness of the case as a definition feature of a measure of general nature will be therefore easier to determine in a situation when the administrative act regulates specifically determined location than in a situation where it is necessary to analyze concreteness of the subject-matter independently on territorially individual determination.

An example of administrative act, materially regarded as a measure of general nature with concretely defined subject-matter on the basis of a specific location, is a decision on modification of traffic using traffic signs which imposes a duty different from general regulation of road traffic because it governs traffic in a certain place (e.g. a crossing), or in other words, in a decision on fixing traffic signs, there is a place where the duty is supposed to be imposed by traffic signs individually specified.

Contrarily, an example of non-territorial material measure of general nature is a decision of an assembly of city district on determining a number of assembly's members in respective election term. *Prima facie*, it may seem that concretizing a subject of this administrative act is based on regulation for a specific city district, or in other words, that uniqueness of the case is given by specificity of a city district territory to which it is related. However, in my opinion such a specification of territory is not a definition feature of concreteness of measure of general nature's subject-matter as it to the contrary is in

27 E.g. under Act no. 254/2001 Coll., on Waters, as amended.

case of national parks mentioned above. The thing is that decision of assembly on number of members is an administrative act issued by territorial self-governing unit which has an effect on nature of regulation's subject-matter. As well as any other ordinance or a decree of municipality, this decision cannot be regarded as administrative act concretely specifying its subject-matter of regulation solely for the reason that it is related to a territory of a municipality whose borders are clearly determinable. Such territorially defined subject-matter itself does not secure regulation of a concrete situation.

In other words, if an administrative act is applied only in the territory of a municipality, it still does not mean that it regulates concrete situation. Same conclusion was also reached by Supreme Administrative Court when assessing decree of a region on integrated region program as motion for its annulment as a measure of general nature was rejected. In this case, the court stated "*solely the fact that Program is linked to a territory of one region does not establish such an extent of definiteness which would deviate from principles of normative legal regulation.*"²⁸

In order for an administrative act to define its subject-matter concretely, it is necessary that it regulates individual case, i.e. particular concrete factual background. The analyzed decision of municipality's assembly on fixing the number of its members in respective election term fulfills this by the fixation of number of members being linked to a particular election term and not all election terms in future, i.e. a certain situation, or in other words, concrete case is fixed her by the factor of time.²⁹

In the end of this part dedicated to definition features of measures of general nature, it is worth noting that a court competent to review this form of an administrative act within the framework of proceedings on complaint for its annulment decides whether an administrative act fulfills the definition features mentioned above and whether it may be materially regarded as a measure of general nature.³⁰

28 Decision of Supreme Administrative Court dated 21st January 2011, no. 8 Ao 7/2010.

29 Comp. decision of Supreme Administrative Court dated 9th August 2010, no. 4 Ao 4/2010.

30 Until the end of 2011, the first instance court in this case is the Supreme Administrative Court and since 1. 1. 2012, regional courts will be the competent courts (see Act no. 303/2011 Coll., which amends Act no. 150/2002 Coll., Code of Administrative Justice, as amended.)

2.2 Definition features of measures of general nature and guild regulations

Supreme Administrative Court dealt with a regulation of interest self-government as a measure of general nature only once in the case mentioned above so far. It occurred within the framework of a complaint requiring annulment of Czech Bar Association decision which sets forth the appearance of guild apparel of an attorney and which ought to have been a measure of general nature in the complainants' opinion. In this decision, the Supreme Administrative Court stated that s. 17a (2) Act no. 85/1996 Coll., on Advocacy, as amended, where it is provided that *association shall set forth the appearance of guild apparel of an attorney by a guild regulation*, does not authorize the Czech Bar Association to issue measures of general nature. However, in its reasoning the Supreme Administrative Court did not elaborate in detail on why it supports this view, it only stated that guild regulation (not only the adjudged one) is a sub-statutory regulation and theoretically, it highly resembles generally binding ordinances of territorial self-governments and therefore, it rejected this complaint for the lack of its authority. In its reasoning, this court thus only pronounced that the contested guild regulation is not a measure of general nature because it is a normative administrative act without directly dealing with the nature of guild regulations in connection with the form of measures of general nature, which would be deserved for the first case of guild regulations reviewed in proceedings on complaint for annulment of measure of general nature.

In my opinion, the mentioned nearly obvious exclusion of measure of general nature form for guild regulations is not appropriate because of the material concept of measures of general nature and add to that, in connection with relatively vague legal regulation of the procedure of issuing guild regulations in individual special laws because exclusion of APC from decision-making on rights and obligations in a situation where legal regulation included in the special law which the guild chamber is obliged to respect is insufficient, might be in contradiction with Article 2 (3) Constitutional Act no. 1/1993 Coll., Constitution of the Czech Republic, as amended and Article 2 (2) Constitutional Act no. 2/1993 Coll., Charter of Fundamental Rights and Freedoms, as amended, i.e. with a constitutional duty of an administrative body to proceed in accordance with the law.³¹

For assessment whether regulations of interest self-government are measures of general nature or not, it is important to find out whether these regulations fulfill necessary definition features described in the preceding part of

31 Judgment of Constitutional Court dated 5. 11. 1996, no. Pl. ÚS 14/96.

the paper and at the same time, whether the material approach may be applied in their case.

In order for the interest self-government regulations to be considered measures of general nature, they must be administrative acts with public power binding effects upon their addressees who stand out of the organizational structure of a public law corporation which issued the respective act. Concurrently, this outer position does not exclude membership of an addressee in the public self-government corporation, but it is linked to binding effect which does not result from the function of an addressee directly in bodies of public self-government corporation in the sense of an administrative act as sole internal instruction.³² In case of interest self-government regulations, it is not even a contractual binding effect depending on the will of a member to enter interest self-government where this binding effect would only result from some sort of a consensus but it is a binding effect resulting from the conditions set by state using power to order private persons to join interest self-governments as administrative bodies or to enter them if these persons wish to use their fundamental rights, such as right to performance of employment.³³ Self-government subjects of Public Administration therefore use guild regulations to set binding rules in matters which they are empowered to administer and which may simultaneously bind even different persons than members or participants of certain groups directly or indirectly.³⁴ It results from what was mentioned above, that guild self-government regulations fulfill the condition of public power binding effect for their addressees who stand outside the organizational structure of a public law corporation which issued the respective act.

The condition that measures of general nature must impose only duties on the basis of law is also satisfied in case of guild regulations as sub-statutory administrative acts. *“Under Article 2 (4) Constitution and Article 2 (3) Charter, it is unacceptable that private persons be imposed with a duty in any other form than on the basis of law and within its limits. It is thus clear that legal regula-*

32 *“Statutory regulations are principally directed to members or participants of a certain group typical with a corporative form and based on a democratic organization of such a group. Contrarily, internal regulations serve primarily to organize relations inside of one or more units and their issuance is grounded on legally embedded relation of subordination to the issuer of an act.”* HENDRYCH, D. Autonomní normotvorba v České republice. In *Právní stát - současnost a budoucnost*. 1st ed. Praha : UK PF, 2001, p. 61.

33 DVORÁČEK, D. Právní povaha předpisů zájmové samosprávy. *Právní rozhledy*. 2006, no. 24. p. 885.

34 HENDRYCH, D. Autonomní normotvorba v České republice. In *Právní stát - současnost a budoucnost*. 1st ed. Praha : UK PF, 2001, p. 61.

*tions of interest self-government must have a sub-statutory character where they may only concretize and in details regulate duties already known by the law as a primary legal regulation*³⁵

The last question necessary to answer, before we get to characteristic definition features of the measure of general nature form, is whether the law does not stipulate one of other forms regulated in our legal order for guild regulations, which would exclude authorization for any other form, i.e. even the form of measure of general nature in its material concept. Due to the binding effect of law upon administrative bodies,³⁶ they have to be such legal acts “where the lawmaker has not explicitly stated, or in other words, where it is not clear in what form they should be issued.”³⁷ As it is already mentioned above, authorization to issue regulations of interest self-governments is to be found only in special laws governing individual areas of interest self-government performance. In these laws, professional regulations are sometimes named as guild regulations or measures etc., however, these names do not indicate their subordination under one of the forms known to legal order in any way. Nevertheless, this fact is the source of discussion on guild regulation as the source of law mentioned in the beginning of this paper. Not even the fact that administrative theory regards regulation as a normative administrative act, may constitute an obstacle in possibility of applying the form of measures of general nature.

As it has been mentioned, basic definition features of measures of general nature are generality of definition of their addressees and concreteness of the subject-matter of regulation. By and large, it is not a problem to name regulations of interest self-government as administrative acts addressed to generically specified group of people. The fact that number of members of these public law corporations is exactly known and individual members may be identified in a detailed way, is not an obstacle. What is significant is the way of specification, which in typical interest self-government regulations binds its members as indefinitely specified (however, not indeterminable) group of people. Even “*some chamber regulations may have certain (partial) external ef-*

35 DVORÁČEK, D. Právní povaha předpisů zájmové samosprávy. *Právní rozhledy*. 2006, no. 24. p. 883.

36 Article 2 (3) Constitutional Act no. 1/1993 Coll., Constitution of the Czech Republic, as amended and Article 2 (2) Constitutional Act no. 2/1993 Coll., Charter of Fundamental Rights and Freedoms, as amended.

37 BAHÝLOVÁ, L. Opatření obecné povahy podle zákona o ochraně přírody a krajiny. In JUDr. Ing. Radovan Dávid, Ph.D., JUDr. David Sehnálek, Ph.D., JUDr. Jiří Valdžans, Ph.D. *Dny práva – 2010 – Days of Law* [online]. Brno: Masarykova Univerzita, 2010. [cit. 2011-11-26]. p. 18. Available at: <http://www.law.muni.cz/sborniky/dny_prava_2010/index.html>.

*fects (e.g. examination rules), or in other words, the mentioned group of bound persons is somewhat exceeded; sometimes the chosen rules are applied even in case of membership candidates.*³⁸

Answering the question whether guild regulations are concrete administrative acts, as far as their regulation's subject-matter is concerned, will not be that easy as in case of generality of addressees. Determination whether a concrete or an abstract subject-matter is concerned is the key point for nature of guild regulations of interest self-government. At the same time, I reckon that on a general level, it is not possible to *a priori* say that imposing a duty by self-government in a certain branch is always a concrete subject-matter which I will clarify further.

The opinion that I just mentioned may be reasoned on the basis of principal similarity with regulations of territorial self-government in connection with what was mentioned above regarding the subject-matter of regulation of measure of general nature. In case of interest self-government and with respect to the question of subject-matter's nature, it is the same situation as in case of a municipality which is empowered to issue generally binding ordinances. Although duties imposed on the basis of generally binding ordinances are related only to the territory of a municipality which issued them, these duties linked to the area of municipality cannot be regarded as regulation of a particular subject-matter, no matter how accurately and definitely we know the land registry area of this municipality. Concretization of a subject-matter occurs in the moment when administrative act is linked to a certain area within its territory but not due to the reason that only these certain areas fulfill the factual substance specified in an abstract subject-matter of an ordinance but due to the reason that such administrative act directly and concretely specifies these areas – it is thus a way of specifying subject-matter of regulation (an example of such a specification is the territorial plan of a municipality issued in separate competence of a municipality in the form of measures of general nature). Therefore the question of concreteness of subject-matter is not about an administrative act regulating its subject-matter within a framework of self-government territory or within the framework of professional focus area of interest self-government, but it is about its specification being directly linked to a concrete case. Concrete case must be explicitly stated in the factual substance of concretely-abstract administrative act. Concreteness of the subject-matter of measure of general nature as a key aspect of interest

38 SLÁDEČEK V. Ještě k povaze předpisů zájmové samosprávy. *Právní rozhledy*. 2008, no. 4. p. 135.

self-government nature is explained in more detail below using examples of interest self-government regulations.³⁹

2.3 Measures of general nature and examples of guild regulations

It results from the previous parts that it is not possible to regard all guild regulations *a priori* as measures of general nature and at the same time *vice versa*, it is not contrarily possible to *a priori* state that no guild regulation has a form of measure of general nature as it may seem under current case-law of Supreme Administrative Court. Determining which interest self-government regulation is a measure of general nature and which is a sub-statutory normative act is thus necessarily carried out on a case-to-case basis. Concurrently, the key nature feature deciding on whether the guild regulation is a normative or mixed administrative act is the subject-matter of its regulation.

In this place, I would like to come back to the case of guild regulation on the appearance of attorney's apparel which was the only guild regulation decided upon by Supreme Administrative Court in proceedings on annulment of a measure of general nature, where it rejected the complaint stating that such a regulation is not a measure of general nature. In this decision, I lack deeper thoughts on the very nature of this guild regulation's subject-matter as a key aspect in assessing whether a measure of general nature is concerned or not.

By the mentioned guild regulation, the Czech Bar Association sets forth the appearance of apparel which attorneys have to wear in certain types of proceedings. It is thus an administrative act which uses public power to impose a duty of wearing apparel with respective appearance to an indefinite group of attorneys as addressees standing out of the Bar Association bodies, where this duty is imposed on the basis of Act on advocacy. Simultaneously, the Act on advocacy does not explicitly provide the form of this guild regulation. If this guild regulation might be considered as concrete in a way of specification of its subject, it would fulfill all definition features of measure of general nature and at the same time, nothing would preclude the material approach on the basis of which it would be possible to name it as measure of general nature.

39 Contrarily, the question of concreteness of regulation's subject-matter is in D. Dvořáček's view "Subject-matter generality requires the norm to be applicable to general situations not concrete cases. Regulations of interest self-government do not deviate from the framework established in the Czech Republic in this regard because we ordinarily do not encounter parallels of legislative distortions on Pilsen ring road or on person who contributed to state among them." DVOŘÁČEK, D. Právní povaha předpisů zájmové samosprávy. *Právní rozhledy*. 2006, no. 24. p. 885.

Although this guild regulation visually provides in a very detailed way how the respective apparel is supposed to look, this fact in itself does not establish concreteness of subject-matter, in my opinion. No matter how materially detailed is the duty to wear apparel, even by exact description of its appearance, it is still just a regulation with generally specified subject-matter. What would have to happen is that the material duty (in any detail) should be binding in concrete situations – it is such a concretization where the duty is not specified on the very merits but with respect to concrete situations and cases it applies to, because that is what the form of normative administrative act does not have. To the contrary, e.g. ordinances of ministries which undoubtedly are of normative nature may impose duties even in a very detailed way (comp. appearance of apparel) if it respects general specification of cases this legal regulation can be applied to. By guild regulation of the appearance of apparel, I think that only concretization of legal duty merits occurs without concretizing subject-matter with a particular situation in which this duty ought to be applied.

In order to concretize the subject-matter, factual substance would have to be expressed particularly for a case fixed in a specific way. This requirement might be met by an act which may be issued by the Bar Association on the basis of authorization given by s. 17a (3) Act on advocacy which states that *chamber is authorized to determine one or more suppliers of guild apparel on the basis of conducted selection procedure*. If the mentioned provision might be interpreted as imposing a duty on attorney to order these apparels with a particular supplier (as it is indicated by Art. 2 of the guild regulation on appearance of the apparel which states that *manufacturing of gown shall be paid for by an attorney upon an order submitted to a supplier set forth by Czech Bar Association*), it may be regarded as a decision fulfilling all definition features of measure of general nature including concrete subject-matter. Concreteness in this case rests in specification of the concrete supplier of apparel which is probably not possible within the form of normative administrative act.

There is a concrete subject-matter of regulation involved also in case of regulation of ways to pay fees and contributions in Article 3 of guild regulation which governs details of paying fees and contributions.⁴⁰ It is directly stated there what particular bank accounts, or in other words, what named bank institutions in case of bank transfer should be the money paid to in order for the duty of payment to be regarded as satisfied.

40 Decision of Czech Bar Association dated 24th October 2006 which regulates details of payments of yearly fee for activity of Czech Bar Association and contribution to social fund of Czech Bar Association and which set the way of payments of contributions in fund of Czech Bar Association for education of advocacy trainees.

3. Conclusion

It seems from the case-law of Supreme Administrative Court that guild regulations cannot be measures of general nature. However, in my opinion those guild regulations which mainly regulate concrete cases may have the form of a measure of general nature and therefore, they can be annulled within the framework of review of measures of general nature. Unlawful guild regulation which is a measure of general nature may be thus annulled even for non-observance of legal procedural rules for its issuance covered by s. 171 et seq. APC because issuance of these guild regulations must be in accordance with general procedural rules for measures of general nature. The mentioned procedural steps may cause trouble in practice because it allows for participation of persons on whom the guild regulation is supposed to impose a duty in debating the draft.

If the court thoroughly observing case-law of Supreme Administrative Court (or in other words, the decision on guild regulation whose annulment was demanded in the proceedings on review of measure of general nature) deprives the complainant of legal protection within the framework of annulment of measure of general nature by rejecting their complaint for not having a competence in this matter even in case where the guild regulation would materially constitute measure of general nature, it would lead to a probable deprivation of justice (*degenatio iustitiae*) in a situation where complainant is deprived of protection under s. 101a et seq. CAJ, in case the professional chamber issued such “mixed act” which is not named as measure of general nature in the legal order but it has the same consequences in other regards as a formalized and under special law issued measure of general nature would have.⁴¹

41 Comp. HRABÁK, J., NAHODIL, T. Správní řád s výkladovými poznámkami a vybranou judikaturou: podle právního stavu ke dni 1. 5. 2009. Praha : ASPI, a. s., 2009. p. 449.

Chosen aspects of administrative judicial protection in cases of unlawful inaction of Public Administration

Unlawful inactivity of Public Administration represents a negative phenomenon for every democratic legally consistent state. Therefore all countries including the Czech Republic try to eliminate not only the causes of its origination but within the framework of their legal orders, they provide the addressee of public law operation with effective means of legal protection against prospective inaction of Public Administration. One of such means is also the possibility of administrative judiciary's protection against inaction of administrative bodies which was included in the Czech legal order by Code of Administrative Justice.¹ Until that moment, the task of administrative courts was substituted mainly by the Constitutional Court of the Czech Republic.

Firstly, it is important to emphasize a basic rule – **subsidiarity of judicial protection**. Supreme Administrative Court (hereinafter also as „SAC”) expressly states on that that „protection of public subjective rights provided by administrative courts has a subsidiary nature in relation to protection provided by administrative bodies and it shall be applied only in case a remedy was not provided within the framework of Public Administration². This paper does not claim to analyze this issue in a complex manner, it is actually focused only on certain significant, unclear or disputable aspects of this protection, all that in the context of decision-making activity of administrative courts or the Constitutional Court.

The first of all possible means of administrative judicial protection is represented by **complaint against inaction of administrative body (s. 79 et seq. CAJ)**, which allows a person or corporation to require that the court order (inactive) administrative body a duty to render a decision on merits or to render a certificate. Court protection thus does **not cover all possible forms in inaction** of administrative bodies. Law-giver chose only two of them, in their opinion probably the most serious forms of inaction – not rendering a decision on merits and furthermore, not rendering a certificate.

In case of inaction of administrative body consisting of not rendering a decision, it is necessary to emphasize that it does not cover non-rendering of any decision but only **not rendering a decision on merits, i.e. on subject-matter**. That was totally unambiguously expressed e.g. by the Regional Court in Hradec Králové which stated in its decision that „it is not possible

1 Act no. 150/2002 Coll., Code of Administrative Justice, as amended, hereinafter “CAJ”.

2 Judgment of the Supreme Administrative Court dated 18.10.2007, no. 7 Ans 1/2007-100.

to seek imposition of a duty to render any decision, material administrative act regulating substantive law position of parties to the proceedings must be concerned...it must be a decision whose issuance is in the competence of respective administrative body...and which fulfills respective requirements of such administrative acts...”³ Therefore, it is not possible to require rendering of a procedural decision and it is not even possible to order an administrative body to generally continue in proceedings.⁴ Likewise, in these proceedings, the administrative court is not authorized to evaluate formal requirements of decisions already rendered⁵, as it may only review if there is a duty of administrative body to render a decision on merits ale.⁶

As far as the second form of inaction consisting of **not rendering a certificate** is concerned, this term is not (contrarily to the term of decision⁷) legally defined, nonetheless, we may follow the doctrine or case-law when defining it. Certificate (or in other words, a confirmation) is another act of administrative body different from administrative act which officially confirms fact included in it. Certificate must be distinguished mainly from so-called declaratory administrative act where in the differentiation, it is important to follow the real nature of an act of an administrative body and not to rely only on its formal look or designation because these are usually misleading in the Czech legal order. Equally, it is not decisive whether formal administrative proceedings precede administrative action, or respective what procedural regulation is applied in the proceedings.⁸

Additionally, it is important to highlight the fact that in case of a complaint for protection against inaction, subjective public procedural rights protected (right to have the case heard and decided in a reasonable period of time⁹) and therefore, **protection against inaction must be provided even if the substantive law claim to be decided upon by an administrative body, has a private law nature.**¹⁰ What is decisive is the fact that administration has not

3 Judgment of Regional Court in Hradec Králové dated 26.8.2004, no. 52 Ca 28/2004-67, published under no. 362/2004 Coll. SAC, s. 11

4 E.g. judgment of Regional Court in Hradec Králové dated 26.8.2004, no. 52 Ca 28/2004-67, published under no. 362/2004 Coll. SAC, s. 11, or judgment of the Supreme Administrative Court dated 15.12.2004, no. Ans 4/2004-116.

5 Here, it is necessary to proceed under s. 65 et seq. CAJ

6 Judgment of the Supreme Administrative Court dated 30.9.2004, no. 7 Afs 33/2003-80.

7 Comp. s. 65 (1) CAJ. Apart from that, the term of a decision is defined in Administrative Procedure Code, s. 9.

8 Judgment of the Supreme Administrative Court dated 2.8.2004, no. 2 As 83/2003-62.

9 Provision of Art. 38 (2) Charter of Fundamental Rights and Freedoms, hereinafter “Charter”.

10 Judgment of the Supreme Administrative Court dated 14.7.2004, no. 5 As 31/2003-49.

rendered a decision or certificate although it was bound to do so under the law where it is irrelevant, if a private law or a public law case is concerned. Competence of an administrative court which is set forth in s. 4 (1) (b) CAJ, must thus be regarded as autonomous in relation to general characteristic of provided administrative judicial protection. This conclusion results from s. 2 CAJ, then, where it stated *in fine* of this provision that administrative courts decide in other cases provided by law.¹¹

One of the basic conditions of admissibility of the complaint is the fact the complainant **unsuccessfully exhausted remedies which are provided by a procedural regulation effective with respect to the proceedings before an administrative body for their protection against inaction of an administrative body**. It is a condition causing disagreements especially with respect to existing regulation against inaction in Administrative Procedure Code¹².

Also because of that it was expected that interpretation of respective provisions and their mutual relation (i.e. s. 79 CAJ and s. 80 APC) will be “completed” by case-law which actually occurred. In of its decisions, Supreme Administrative Court stated that with respect to the subsidiarity of court protection “**means of remedy which must be exhausted** under s. 79 (1) CAJ before filing a complaint is **an application for using measures against inaction under s. 80 (3) APC**”¹³. The conclusion of the court is clear, nevertheless, party to the proceedings may still undergo certain troubles. For instance, the law does not provide an answer on what to do in case the superior body is inactive. Is it going to suffice to the administrative court that complainant filed an application for using a measure for protection against inaction if the superior administrative is inactive and it does not react in a qualified manner (it does not render a decision)? I reckon that yes because unsuccessful exhaustion of means of remedy covers not only rejecting decision but in my opinion, the non-reaction of superior administrative body, too. As far as inaction of administrative body which does not have a superior administrative body is concerned (e.g. inaction of a minister deciding on remonstrance), the condition of using s. 80 (3) APC is not required.¹⁴ Also in case of non-rendering a certificate, it is neces-

11 Frumarová, K.: Žaloba na ochranu proti nečinnosti správného orgánu, in Správní právo, 2011, no. 6, p.357.

12 s. 80 Act no. 500/2004 Coll., Administrative Procedure Code, as amended, hereinafter “APC”.

13 Judgment of the Supreme Administrative Court dated 18.10.2007, no. 7 Ans 1/2007-100.

14 Regional Court in Brno stated on this that: “even if the complainant required that the administrative body imposed a duty to “be active” upon itself and in relation to itself, it controlled fulfillment of this duty and made it seem that “it listened to itself”, it would only lead to formal application of the wording of law” (Decision of Regional Court in Brno dated 1.7.2008, no. 62 Ca 39/2008-102, published under no.1760/2009 Coll. SAC, s. 1).

sary with respect to the diction of s. 6 (1) APC to deduce that party must file an application under s. 80 (3) APC first.

Another condition of complaint's admissibility is the fact that **special law does not connect the inaction of administrative body with a fiction that a decision with certain subject-matter was rendered or any other legal consequence** (s. 79 (1) CAJ). Fiction of a decision (positive or a negative one) is regarded as a sufficient means of legal protection by the law-giver. If the party to the proceedings is unsatisfied with such a fictive decision (which is certainly the case in case of fictive negative decision), they obviously might seek judicial remedy but not on the basis of complaint for inaction but by filing a complaint against decision of administrative body under s. 65 et seq. CAJ. Just marginally, it is possible to indicate that administrative courts always annul fictive decision for non-reviewability due to lack of reasons (s. 76 (1 (a) CAJ)¹⁵ and the case then returns to the phase of administrative proceedings where both doctrine and case-law support the opinion that if the administrative body would be repeatedly inactive, fiction of a decision would not apply again¹⁶, and therefore, this would be the moment when complaint against inaction comes into consideration. From this viewpoint, fiction of negative decision does not seem as an effective form of protection whatsoever. The law may connect ineffectual lapsing of a period of time with not only a fiction of rendering a decision but also with different legally presumed legal consequence¹⁷.

As to the passive legitimation, the law provides that a defendant is the **administrative body which has a duty to render a decision or certificate in accordance with the statement of complaint** (s. 79 (2) CAJ). Passive legitimation is thus designated by statement of complainant in the complaint which serves as a basis (even if a duty to act would not objectively exist). Existence of a duty of defendant to render a decision or certificate is dealt with by an

15 Comp. e.g. judgment of the Supreme Administrative Court dated 4.7.2003, no. 6 A 78/2002-39, or judgment of the Supreme Administrative Court dated 29.7.2003, no. 6 A 25/2000-40.

16 In the view of Regional Court in Ostrava, a different interpretation would lead to repeated inaction of an administrative body constituting fiction of decision which would be annulled by a court for non-reviewability and everything would repeat indefinitely where this indefinite "ping pong" between administrative bodies and court would fully deny the sense and meaning of the institute of fiction of a decision, or in other words, the protection against inaction whatsoever (judgment of Regional Court in Ostrava dated 15.2.2007, no. 22 Ca 258/2005-52, published under no. 1231/2007 Coll. SAC, s. 7).

17 An example is the fictive registration of an association where an association is created on the basis of law and as a consequence of legal fact presumed in s. 8 (5) Act no.83/1990 Coll., on association of citizens, as amended.

administrative court when it assesses the complaint on merits, not when deciding on procedural issues.¹⁸ If it occurs that complainant does not designate the defendant correctly, an administrative court cannot analyze whether a different administrative body had the competence to render a decision or a certificate instead of defendant because the duty may only be imposed to the administrative body designated in the statement of complaint¹⁹.

The time period for filing a complaint is one year long, where the time period commences to run depending on whether special law sets a time limit for rendering a decision (certificate) or not. In the first case, the one year period commences in the moment of ineffectual lapsing of a time limit for rendering a decision (certificate). If the time limit is not set, it is possible to file a complaint in one year from the day when complainant made the last act towards an administrative body or an administrative body made the last act towards complainant (s. 80 (1) CAJ). In one of its subsequent decisions, Supreme Administrative Court interpreted what is understood by this “act” in the sense of s. 80 (1) CAJ. Such acts are “procedural acts of parties to the proceedings or administrative body in administrative proceedings (e.g. an application for initiation of proceedings, statement on bases of the decision before it is rendered, appeal against the decision, subpoena of a respective party to the proceedings for hearing, delivery of a decision, notice on appeals submitted by other parties etc.), contrarily, such act is not an urgency to deal with a case of or a notice of administrative body that it is of the opinion there are no reasons for it to decide any further in the case”²⁰.

Now, I would like to specify in detail what are the **cases of inaction where administrative judicial protection is provided and where it is not that way**. As far as inaction consisting of non-rendering of **certificate** is concerned, there should be no bigger application troubles appearing. It only has to be assessed correctly what act of administrative body fulfills the features of certificate and which is a different act or interference of administrative body because laws in do not use a uniform or unambiguous terminology in this regard.²¹

The situation is far more complicated as to a stated **inaction in non-rendering a decision on merits**. If inaction occurs in proceedings already begun

18 In detail, see judgment of the Supreme Administrative Court dated 8.4.2003, no. Na 249/2003-9.

19 Judgment of the Supreme Administrative Court dated 14.11.2007, no. 1 Ans 5/2007-195.

20 Judgment of the Supreme Administrative Court dated 12.6.2006, no. 8 Ans 3/2005-107.

21 E.g. Under the case-law of the Supreme Administrative Court, marking the day of registration on a copy of association agreement is regarded as a certificate – in detail comp. judgment of the Supreme Administrative Court dated 29.3.2006, no. 1 Ans 8/2005-165.

– no matter if upon an application or *ex officio* – and an administrative body causes delays or it is absolutely inactive, it is not a problem to file a complaint in order for the court to order an administrative body to render a decision on merits and finalize proceedings properly by doing so. Administrative body is obliged to decide in a time period set forth by law and if there is no such time period, then in a proportionate period of time. Even if time periods are set forth in internal normative act, administrative bodies are bound to respect them in their decision-making activity, otherwise they cause inaction.²²

As far as administrative proceedings begun upon an application of a party to the proceedings are concerned, where an administrative is inactive thinking that no proceedings were begun, it is possible to successfully seek protection by means of a complaint. A different situation occurs in administrative proceedings begun *ex officio*. It results from the case-law of administrative courts that by complaint against inaction **“it is not possible to seek an order to administrative body to commence proceedings but only that it render decision on merits or certificate in proceedings already commenced”**.²³ This conclusion results from the fact that complaint against inaction does not have its place in any case of passivity of administrative body but only in case if **substantive law establishes subjective claim of complainant to rendering a decision on merits or certificate**. Therefore, a person who only filed a motion for initiation of proceedings *ex officio* is not actively legitimated to file a complaint. Also in cases where complainant seeks only notification of a decision already rendered, a complaint is not admissible. Admissible reason for the complaint is thus only inaction as to issuance of decision but not inaction as to notification of a decision having already been rendered.²⁴

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- 22 Supreme Administrative Court adds to that by complaint for protection against inaction, it is possible to seek protection against inaction “consisting of non-decision-making in time limits which were set by administrative body to itself by creating certain administrative practices apart from these limits, where they are legally binding for the administrative body, then.” (judgment of the Supreme Administrative Court dated 28.4.2005, no. 2 Ans 1/2005-57, similarly a judgment of Municipal Court in Prague dated 15.3.2007, no. 10 Ca 101/2006-55, published under no. 1256/2007 Coll. SAC, s. 8). Likewise, the Constitutional Court found that in case of not respecting time limits set by administrative body, although they were set only by internal regulation, leads to violation of right to a fair trial (Art.36 Charter) and right to have the case dealt with in a reasonable period of time (secured by Art.38 (2) Charter) – Comp. judgment of the Constitutional Court file no. I.ÚS 5/96 dated 5.11.1996, judgment of the Constitutional Court file no. IV.ÚS 146/01 dated 28.8.2001.
- 23 Judgment of the Supreme Administrative Court dated 26.6.2007, no. 4 Ans 10/2006-59, further also judgment of the Supreme Administrative Court dated 31.3.2009, no. 8 Ans 1/2008-170.
- 24 In this regard even Administrative Procedure Code expressly distinguishes between render-

Inaction in rendering decision may be related to the first instance body, as well as a body, which is inactive in proceedings begun by submitting ordinary remedy. Furthermore, it may be an inaction connected to the application for renewal of proceedings and then in the renewed proceedings, or respectively in already begun review proceedings.

It is possible to defend oneself by a complaint in case when the decision of administrative body was annulled and the case was returned to it for further proceedings and this body does not continue in the proceedings, just the same. In this case, **administrative body is duty-bound to continue in the proceedings** and to proceed in accordance with the binding legal opinion expressed in the final court decision, **notwithstanding whether a cassation complaint was filed in this case** – this conclusion was reached by extended senate of Supreme Administrative Court which dealt with the question is filing cassation complaint is an obstacle in further administrative proceedings, or in other words, if filing cassation complaint is a part of ordinary process of administrative body excluding new decision in the case.²⁵ Supreme Administrative Court was guided by these thoughts: “Administrative courts in proceedings before them evaluate legality of the process and decision of administrative body without being connected to administrative proceedings as another instance – it is not a continuation in administrative proceedings, court deciding in administrative judiciary is not and cannot be bound by factual background found by administrative body. It is contrarily characteristic for court proceedings in administrative judiciary that administrative bodies have the position of defendant, i.e. a party to the proceedings. Their own act (submission of cassation complaint) cannot be understood as a performance of their own competence in administrative proceedings (leading to rendering a decision on merits) but as application of procedural rights of a party to the proceedings. Filing a cassation complaint therefore cannot preclude an administrative body to continue in administrative proceedings.”²⁶

With respect to the facts mentioned above, **complaint has to state inaction of administrative body in the complaint and this statement must be**

ing and notification of a decision where it covers so-called omitted participant in s. 84. As to rendering a decision comp. also judgment of the Supreme Administrative Court dated 16.4.2008, no. 1 Ans 2/2008-52.

25 Decision of Extended senate of the Supreme Administrative Court dated 24.4.2007, no. 2 Ans 3/2006-49.

26 By the way, Supreme Administrative Court also pointed out the possibility that even an administrative body may accompany cassation complaint with an application for attributing it with suspensory effect. In details, comp. Decision of Extended senate of the Supreme Administrative Court dated 24.4.2007, no. 2 Ans 3/2006-49.

proved with suggested evidence. Factual background discovered to the day of decision is always decisive for decision of administrative court on a complaint which means that **inaction must last until the day of court decision.**²⁷ If administrative body rendered a decision after a complaint was filed, this complaint would have to be rejected (if it was not withdrawn by complainant) because the reason of such complaint – inaction of administrative body – passed. It is necessary to emphasize that under existing legal regulation, administrative court may only declare that inaction occurred. *De lege ferenda*, it might be considered whether or not to allow for seeking only declaratory decision by means of this complaint, as it is possible form 1.1.2012 using complaint against unlawful interference. It would certainly have its meaning both for persons affected by inaction and the bodies of Public Administration themselves. On the other hand, it is important to take account of resulting higher burdening of administrative courts.

If the court comes to a conclusion that complaint is justified, **it orders an administrative body to render a decision or certificate by means of judgment** (s. 81 (2) CAJ). Under the consistent case-law of administrative courts²⁸ it applies, however, that **in its decision, a court cannot specify a particular content of the decision**, which is supposed to be rendered by an administrative body, or in other words, it cannot bind an administrative body as to how concretely it is supposed to act because that would amount to violation of principle of division of power arising out of Art. 2 Constitution of the Czech Republic. Such rule is without any trouble applicable to inaction when rendering a decision on merits but in case of inaction related to non-rendering a certificate, the situation is a little different because **in case of finding inaction consisting of non-rendering of certificate (of specific content) the administrative court shall have to break the boundary and order an administrative body with the very duty of rendering a certificate with specific content.**

In this regard, administrative courts emphasize that they are aware of the fact that in this type of proceedings, they should only assess if an administrative body is inactive, or in other words, if it is inactive in accordance with the law, where evaluation of how the prospective procedural activity of administrative body ought to look like does not attributed to them,²⁹ nevertheless, they add that it is not possible to oversee cases where inaction of administrative body in rendering a certificate is complained of, strict observance of

27 As to that comp. e.g. judgment of Municipal Court in Prague dated 30.1.2007, no. 9 Ca 71/2006-62, published under no. 1426/2008 Coll. SAC, s. 1

28 E.g. judgment Of the Supreme Administrative Court dated 30.9.2004, no. 7 Afs 33/2003-80.

29 Judgment Of the Supreme Administrative Court dated 31.10.2010, no. 2 Ans 1/2009-71.

the aforementioned (and undoubtedly correct) rule would not have to lead to really effective judicial protection of rights of complainant – applicant for certificate because there is no procedural mechanism which would (even in other proceedings) allow the court to review conduct of administrative body on merits. In relation to complaint against decision of an administrative body, the inaction complaint is in a way a preparatory auxiliary means whose task is to force an administrative body to render respective act – decision or certificate. In case of an act reviewable on the basis of complaint against decision, the court only imposes a duty to render an act (decision) without determining the subject-matter of such an act. In case of certificate, the possibility of subsequent review of an act in connected complaint proceedings is not given, therefore an administrative court has to deal with subject-matter of such an act in proceedings on inaction complaint and ordinarily, it defines to the administrative body (depending on what is the dispute between the parties), if the certificate ought to be published at all and respectively, if the dispute is led on a partial subject-matter aspect, it defines what should or should not be the contents of the respective act.³⁰ Additionally, we may point out that the nature of “simple” certificate (contrarily to decision) actually does not require too hard evidencing or legal assessment of the case. (Non)issuance of certificate is more or less a result of verifying necessary conditions, available from the administrative file or official registries and it does not even require necessary expert knowledge which is at disposal of administrative body as to the merits, and not a court.³¹

Obligatory part of enunciate is setting a **time period to render a decision (certificate)**. This time period must be **proportionate** where the only limiting condition is the fact that this period must not be longer than the one set forth by law (s. 81 (2) CAJ). If the court reaches a conclusion that complaint is not justified, then it rejects it. Administrative body is bound by the legal opinion mentioned in the judgment, it must act and render a decision or certificate in a time period set by court. I welcome the fact that from 1.1.2012, administrative court newly hear and decide upon complaint against inaction preferentially (s. 56 (3) CAJ), which was not possible under previous legal regulation.³²

30 Court does not deal with all subject-matter aspects of a given act but only those which are disputed between the parties or those which are related to disputed aspects of act or are dependent on them. In detail, comp. decision of Extended senate of the Supreme Administrative Court dated 16.11.2010, no. 7 Aps 3/2008-98, či similarly also judgment of the Supreme Administrative Court dated 31.10.2010, no. 2 Ans 1/2009-71.

31 Judgment of the Supreme Administrative Court dated 31.10.2010, no. 2 Ans 1/2009-71.

32 See judgment of the Supreme Administrative Court dated 8.9.2004, no. Aprk 1/2004-58.

It is possible to file a **cassation complaint** against final decision of a regional court which is decided upon by Supreme Administrative Court. As it has been mentioned above, **even though an administrative body files a cassation complaint**, it is bound by judgment of regional court and **it has an obligation to act in the case and decide** (or respectively, to render a certificate). It was a question of ambiguities and various interpretations³³ if the cassation complaint loses its substance when an administrative body decides the way it was ordered to by final judgment of regional court. Extended senate of the Supreme Administrative Court states that “the subject-matter of proceedings on cassation complaint is a decision of regional court not an inaction of administrative body (which was the subject-matter before regional court); interpretation of Code of Administrative Justice may not lead an administrative body to chose: either to act in accordance with the final judgment being aware of the loss of a remedy or to knowingly ignore final decision of regional court in order to hold admissibility of remedy and therefore, to be deprived of possibility of reviewing final decision of regional court only as a consequence of the fact that administrative body acted in accordance with the judgment (and rendered a decision), does not have support in law.³⁴ Therefore, **even if administrative body renders a decision in the meantime, it is not an obstacle in hearing the cassation complaint on merits.**

Administrative courts do not have **authority of subsequent control** of fulfillment of duties imposed by them therefore they cannot control whether administrative bodies really did render a decision or certificate within the time period set by court and they do not even have an option of respective sanctions, e.g. in form of fines. *De lege ferenda*, it is possible to consider of in this regard, powers of administrative courts ought not to be increased as it is e.g. in Slovak Republic.³⁵ However, complainant has an option of applying for **enforcement of decision**³⁶ or they may seek **recovery for damage** caused by incorrect official procedure³⁷.

33 Comp. decision of the Supreme Administrative Court dated 16.8.2005, no.5 Ans 1/2005-54, further see decision of Extended senate of the Supreme Administrative Court dated 15.8.2006, no. 8 Ans 1/2006-135.

34 Decision of Extended senate of the Supreme Administrative Court dated 15.8.2006, no. 8 Ans 1/2006-135.

35 In Slovakia, the court may impose a fine in the amount of up to 3280 euro to the inactive administrative body even repeatedly if a time period set by court was not upheld upon a repeated application of a part (s. 250u Act no.99/1963 Coll., SKCPC, as amended).

36 Act no. 99/1963 Coll., Civil Procedure Code, as amended (Comp. primarily s. 274 (b) in conjunction with s. 351).

37 Act no. 82/1998 Coll., on liability for damage caused in the performance of public power by

However, the aforementioned administrative judicial protection includes only **protection against inaction** in case of non-rendering of decision on merits, not in **other cases where an administration body is bound to act under a law** (e.g. performance of other administrative acts except of certificate may be concerned).

It is possible to approach this issue and its resolution in two ways. Some authors³⁸ think that even though CAJ speak only about certificates, this term should be interpreted extensively and apply it even to other act of administrative bodies in the sense of the fourth part of APC, especially to opinion, statement and verification (s. 154 APC).³⁹

I personally support the second option – **to regard inaction consisting of not performing other administrative acts (than certificates) as unlawful interference in the sense of s. 82 et seq. CAJ**⁴⁰. However, the basic problem is how to define and specify the term of “interference” because CAJ does not state that.

Original case-law understood the “**interference**” as relatively big amount of active acts of administrative bodies to which they are authorized by various laws when performing Public Administration, where these acts are of informal nature both possibly covered and uncovered by certain rules⁴¹, but anyway, they are binding for persons towards which they are directed.⁴² Therefore courts required fulfillment of two features, in order for the interference in the sense of s. 82 CAJ to be concerned: firstly – it must be an activity (act) of

decision or incorrect official procedure and on amendment of Act no. 358/1992 Coll., on notaries and their activity (Procedure of Notaries), as amended.

38 This opinion is supported e.g. by J.Vedral in Vedral, J.: Správní řád. Komentář. 1. vydání, Praha: Ivana Exnerová – Bova Polygon, 2006, p.89. J.Staša considers this option only in connection with verification – in Hendrych, D. and col.: Správní právo. Obecná část, 7th edition, Praha: C.H.Beck, 2009, p.288.

39 However, administrative courts did not support this interpretation positively from the very beginning, as Supreme Administrative Court states on that: “s. 79 (1) CAJ narrows the complaint protection against inaction only to inaction in rendering a decision on merits and inaction in rendering certificate where with respect to other forms of inaction, this complaint cannot be used, and the question if this regulation is sufficient *de lege ferenda*, is a different matter.” (judgment of the Supreme Administrative Court dated 29.3.2006, no. 1 Ans 8/2005-165.

40 Frumarová, K.: Ochrana před nečinností veřejné správy v českém právním řádu, 1st edition, Praha: Linde, 2005, p.105 and p.223.

41 E.g. factual instructions, immediate interferences, securing acts etc.

42 Regarding that comp. judgment of the Supreme Administrative Court dated 24.6.2004, no. 2 Ans 1/2004-64, judgment of the Supreme Administrative Court dated 1.12.2004, no. 3 As 52/2003-278, or judgment of the Supreme Administrative Court dated 16.1.2008, no. 3 Aps 3/2006-54.

administrative body, secondly – this act must be binding for a person towards whom it is directed and make them bound to do, tolerate or refrain from something.⁴³

Serious problem occurred in cases where administrative body was inactive and it did not perform any of so-called other administrative acts (except of certificate).⁴⁴ In accordance with the opinions mentioned above, it would not be possible to defend by means of complaint against decision, not an inaction complaint either and with respect to what has been mentioned above, not even by complaint against unlawful interference. But such situation would amount to unacceptable interference and a limitation of constitutional framework of right to judicial protection against unlawful activity of Public Administration secured primarily by Art. 36 Charter which led Supreme Administrative Court to a very important conclusion – that **material extent of three basic types of complaints** in proceedings under CAJ needs to be interpreted in order for **every act of Public Administration aimed at an individual and interfering with a sphere of their rights and duties** (performed by action or omission in case where the law imposes a duty to act both in a prescribed form and factually) **is subject to effective judicial control**.⁴⁵ New significantly extensive view on material extent of interference complaint under s. 82 CAJ results from this, because this complaint thus protects persons against any act or actions of Public Administration aimed at an individual which are capable of interfering with the sphere of their rights and duties and which are not act of merely a procedural nature technically safeguarding course of the proceedings. Therefore acts of informal nature or only factual acts need not to be necessarily concerned (as it was understood by courts earlier) but not even any action or omission to act if they are not subsumable under the term of decision or certificate under s. 65 and s. 79 CAJ. **Therefore interference may also be a unlawful inaction consisting of non-performing any other act** (except of certificate).

However, it is not always easy to **correctly determine real legal nature of respective of administrative body**, i.e. whether a decision is concerned (especially of declaratory nature) or certificate or any other act (subsumed under the term “interference”). In accordance with doctrinal views, certificate confirms facts which are stated in it and contrarily to declaratory act, it is ren-

43 Judgment of the Supreme Administrative Court dated 16.1.2008, no. 3 Aps 3/2006-54.

44 One of the relatively frequent cases was e.g. non-performing of record in land registry by an administrative body.

45 Decision of Extended senate of the Supreme Administrative Court dated 16.11.2010, no. 7 Aps 3/2008-98.

dered in cases where authoritative finding is not required (where there is no doubt or dispute in the case and where it is not necessary to use administrative discretion in any other way or to use administrative discretion or to interpret indefinite legal term), where it is not possible to defend against it using any formal remedy, only by proving the opposite.⁴⁶ Supreme Administrative Court sees the difference between **certificate and declaratory act** primarily in the fact that act rendered by administrative act has a nature of means of evidence whose content (evidence) may be rebutted by other evidence (then it is a certificate) or whether a binding (i.e. in the normative level and not in a factual level) determination of rights and duties which are the subject of a given administrative act (then it is a declaratory decision) is concerned.⁴⁷ Key distinguishing criterion is, if act is related to the factual level (officially confirming certain facts, but in a rebuttable way), or it is a normative act (bindingly stating that certain person does or does not have concrete rights and duties); it is more of an auxiliary criterion to what extent are facts in the certificate or analyzed in declaratory decision clear.⁴⁸

Similarly as between decisions (manly the declaratory one) and certificates, it is necessary to distinguish **certificate and interference** in the sense of s. 82 CAJ. Even here, the key criterion is whether it is a binding act of an administrative body interfering with sphere of rights and duties of an individual or if it is an act of purely evidentiary, certifying or confirming nature, i.e. an act remaining only in the factual level, not actually having a normative nature.⁴⁹

Protection in the form of **interference complaint** is justified if following **conditions** are fulfilled cumulatively: complainant must be directly (1st condition) injured in their rights (2nd condition) by an unlawful (3rd condition) interference, instruction or enforcement of administrative body (interference in a broader sense), which are not decisions (4th condition), interference was directed at them directly or as a consequence of it, they were directly interfered with (5th condition), where interference (in a broader sense) or its consequences must last or its repetition must be imminent (6th condition).⁵⁰ But as far as the sixth condition is concerned, it is important to point out, that it

46 E.g. Staša, J.: Jiné úkony. In Hendrych, D. and col.: Správní právo. Obecná část, 7th edition, Praha: C.H.Beck, 2009, p. 287, Sládeček, V.: Obecné správní právo, 2nd edition, Praha: Aspi – Wolters Kluwer, 2009, p.178.

47 Judgment of the Supreme Administrative Court dated 7.11.2007, no. 3 As 33/2006-84.

48 Decision of Extended senate of the Supreme Administrative Court dated 16.11.2010, no. 7 Aps 3/2008-98.

49 Ibidem.

50 Judgment of the Supreme Administrative Court dated 17.3.2005, no. 2 Aps 1/2005-65.

is left from 1.1.2012, and therefore it will be possible to seek mere declaration of unlawfulness of interference. In accordance with the law-giver's view, even mere declaration of unlawfulness of interference strengthens public's confidence in legally consistent state and it also helps to cultivate activity of Public Administration bodies.⁵¹ If any of the conditions mentioned above is not fulfilled, judicial protection cannot be provided.

Every person is **actively legitimated** to file a complaint if they claim that their rights were directly violated by unlawful interference (inaction). Assessment of whether this statement is substantiated is a subject-matter of judging the case on merits itself, it is not an issue of existence of conditions of the proceedings.⁵² Administrative body which performed the interference (i.e. it is inactive) in accordance with the statement of complain is **passively legitimated**, then. Complaint may be filed in **two months** from the day when complainant found out about the unlawful interference, but the latest in **two years** from the moment it occurred (i.e. when the time period for performing respective act lapsed).

Interference complaint is **inadmissible**, if protection or remedy may be sought using different means of law, which does not apply in case the complainant only seeks declaration that interference was unlawful. If other means of protection do not exist, complaint may be filed immediately. Complicated situation occurs in case when legal regulation includes different means of defense (e. g. s. 80 (3) APC). It is a question if existence of these means fully excludes an option to file a lawsuit if it is possible to file a lawsuit after "unsuccessful" application of these means, similarly to the case of inaction complaint.

Supreme Administrative Court faced this issue relatively strictly in one of its decisions, because it stated that CAJ does not give choice of legal means which a person may use against interference; complaint against interference is thus only admissible if legal order does not provide any means which may be used against existence of interference or its repetition or to remedy the state caused by interference (i.e. inaction state in our case); such complaint is inadmissible not only if such legal means exist and complainant did not use them, but also in case they exhausted legal remedies and they are not satisfied with their result.⁵³ The same court came to a little more moderate conclusion in a different decision where it stated that "possibility to file a successful

51 In detail see. reasoning report to Act no.303/2011 Coll.

52 Judgment of the Supreme Administrative Court dated 19.9.2007, no. 9 Aps 1/2007-68, or decision of Extended senate of the Supreme Administrative Court dated 16.12.2008, no. 8 Aps 6/2007-247.

53 Judgment of the Supreme Administrative Court dated 19.1.2005, no. 1 Afs 16/2004-90.

complaint against unlawful interference originates in the moment when complaint against decision does not come into consideration after an interference is “proceduralized” by other legal means in the sense of s. 85 CAJ.

I reckon that mere existence of these means needs not always secure sufficient protection of rights of a person affected by unlawful interference. For instance, if an administrative body is inactive and it does not even perform any other administrative act, person files an application for realization of measure for protection against inaction under s. 80 (3) APC, nevertheless superior administrative body is also inactive and it does not render respective decision as presumed by APC. Then, in a situation where certificate would be concerned, there is a way for judicial protection in the form of complaint for protection against inaction because the only condition here is that other means of protection were unsuccessfully exhausted. But if non-performance of a different administrative act than certificate was concerned, then under strict interpretation of Supreme Administrative Court, a complaint would not be admissible, yet, which in my opinion leads to deprivation of a constitutionally guaranteed right to judicial protection for the person injured by inaction and additionally, there would be an unjustifiably torn judicial protection within the framework of whole set of so-called other administrative acts where in case of certificates, judicial protection would be available and in case of other act not. Therefore I rather support the opinion that complaint for protection against unlawful interference should be admissible not only in cases on inexistence of different legal means but also in case where these means were unsuccessfully exhausted by complainant because the situation caused will be the same for a person: protection within the framework of Public Administration was not provided and therefore, in both cases judicial protection should be realized.⁵⁴

Court always decides on the basis of factual background found to the day of its decision (except of cases when it decides only on unlawfulness of interference), therefore **stated inaction of administrative body must last to this day**. If the complaint is justified, the court must by means of a **judgment order administrative body to perform different administrative act in the time period it sets** (although s. 87 CAJ does not expressly state that, it may be deduced *per analogiam* from s. 81), or it declares that interference (in the form of inaction of administrative body) was unlawful. If the complaint is ill-founded, it is rejected by the court. Remedy available against final decision of an administrative court (regional court) is **cassation complaint** again.

54 Frumarová, K.: Ochrana před nečinností v případě tzv. jiných správních úkonů, in Právní rozhledy, 2011, no.16, p.580.

In the conclusion of this paper, it is possible to state that under current legal regulation in CAJ, it is possible to seek judicial protection in any case of inaction of Public Administration. Nevertheless, *de lege ferenda* it would be appropriate to consider unification of this protection within the framework of one type of complaint – complaint for protection against inaction. Even with respect to principle of legal certainty and predictability of act of public power, it would be appropriate to think about law-giver defining inaction of administrative body in a broader sense, or in other words, its form in s. 79 CAJ in order to eliminate current “duplicity” of administrative judicial protection against inaction of Public Administration.

Not an easy path of a person unlawfully charged for paid fine

One of the activities of administrative court is also annulment of unlawful decisions of administrative bodies. However, sometimes such process takes years if we include proceedings before administrative bodies (i.e. the first instance, appeal or remonstrance) and two “rounds” before administrative courts (i.e. rejection of a complaint, cassation complaint and a regional court again), it may take calmly even four years. If a corporation ends up in this situation, or even better, a person doing business which paid high fine (because after an appeal was decided upon, the decision became final and they did not want to undergo administrative enforcement), 4 years long period starts during which they cannot dispose with the finances and further successfully develop their business. And as we all certainly know, fines for entrepreneurs reach amounts of millions.

How to defend oneself against bodies which impose fines on the basis of insufficiently discovered facts of the matter or which set their amount arbitrarily without taking circumstances of the case into account, is a different topic. Here, I will try to outline what to do in case that such a high fine has already been paid by an entrepreneur though firmly convinced on their innocence. How to compensate inability to dispose with finances on which the very existence of an entrepreneur is often dependent? Who to seek this compensation from and on the basis of what law?

In the beginning, it is appropriate to mention what the paid fine may be considered to constitute as well as the inability to dispose with finances used to cover this fine for a number of years. The fact that subjects were forced to use certain amount out of their financial means which – if they are a person doing business – served or could have served to their business activity, leads to their property sphere being infringed and therefore, their disposable property decreased. As far as inability to dispose with used financial means is concerned, it is clearly a lost profit, i.e. an injury which leads to the injured entrepreneur inability to expand their property because of the injury event, although it could have been expected with respect to regular course of matters.¹ Therefore we have a charged person which paid certain amount of money and thus they could not use this money further.

After evaluation of the status of a matter where the injured person knows that a duty was imposed by a decision of an administrative body in perfor-

1 ŠVESTKA, Jiří and col. *Občanský zákoník: komentář. I. díl. 2nd ed.* Prague: C.H.Beck, 2009. p. 1282.

mance of Public Administration, i.e. as a superior subject, this decision has been annulled after a long-lasting dispute held before administrative bodies and administrative courts, the injured person might presume that the fine would be returned to them kind of automatically. Administrative body imposing the fine in fact knows that its decision has been annulled and therefore there is no legal ground allowing deduction that the paid fine is lawfully collected. Administrative body thus knows that the fine collected without a legal ground is collected unlawfully. Nevertheless, the legal order does not count with the situation where if an administrative body as a superior body decides on a duty to pay the fine, then the same body could also decide on returning the fine to an injured person as a superior body. By far, the injured persons are in fact not close to the end of their effort begun four years ago because they have use their claim.

Here, we have an option to analyze necessity of using such a claim. We are in civil law where *vigilantibus iura scripta sunt*. We are in relationships which are not equal where the public power decides on duties of unequal subjects. In the matter of imposition of fine where the decision imposing it has later been annulled, it is not necessary to prove origin of harm as it would be in other cases, where the amount of harm is principally dependent on the assertion of the injured person (or it should have been).² There is one clear decision on amount of fine and clear confirmation of fine paid in this amount. Therefore, I support the opinion that in such a clear case, there ought to be an option for the body annulling unlawful decision to decide on restitution to previous state. Another option is the duty of deciding body to inform a party on an option to ask the imposed fine back. However, since such an option does not exist today, the injured person has to start another stage of a path to their unlawfully paid fine.

What to do next after we succeeded at annulment of unlawful decision?

In case of imposing fines in administrative sanctioning, an interesting situation occurs which is called shared administration. Nowadays, it is regulated in s. 105 and 106 Administrative Procedure Code³ and it used to be regulated by s. 1 (4) Act on administration of taxes and fees, which is newly

2 See e.g. VLK, Václav. Otevírá se nový prostor pro odškodňování morální újmy při zásazích státu? *Bulletin advokacie*, 2010, no. 1-2. p. 49-53

3 Act no. 500/2004 Coll., Administrative Procedure Code.

contained in s. 161 and 162 Tax Procedure Code⁴. It is a situation where imposition and subsequent payment of fines is conducted under two different procedural laws, i.e. regarding the imposition of fines, Administrative Procedure Code is applied (on general level) and regarding payment (and enforcement) of fines, under the Tax Procedure Code (so-called procedurally shared administration).⁵ In such a way, one single body may proceed under two different procedural regulations in one case. However, it occurs quite often that one body imposes the fine but it has to be paid to a different one (general administrator of tax). It is important to mention that the body, which imposes the fine in such a case of materially shared administration, is not in position of general administrator of tax. It would be in this position if procedural shared administration was concerned, that is if only the procedural law differed but not the deciding and evidentiary body. But how do we find out that the body imposing fine is also the administrator of tax? Theory distinguishes three situations of shared administration which may occur:

“The first case is the situation where only a procedural shared administration occurs but materially, the administration of payment remains up to the body which imposed monetary payment. In the text of the law, it is necessary to positively state the competence for collecting and enforcing, by a general text “for payment” (comp. e.g. s. 183 (1) Act no. 183/2006 Coll., on territorial planning and construction procedure (Construction Act): ‘Fines are collected and enforced by an administrative body which imposed them.’; or s. 129c (4) Act no. 128/2000 Coll., on municipalities (municipal establishment): ‘Order fine is collected and enforced by a body which imposed it.’).

Second case is (...) the situation where imposing body also secures the collection but it leaves administration of enforcement up to general administrator of tax. In this case, it is necessary to positively provide a competence for collection in the text of the law. In the legal order, it is possible to observe formulation such as “the fine is imposed and collected...” with simultaneous absence of an authority to “enforce”. For illustration, let us mention that s. 84 (3) Act on misdemeanors provides that “Fines in block proceedings may be imposed and collected by administrative bodies competent to try misde-

4 Act no. 280/2009 Coll., Tax Procedure Code.

5 An example may be the situation dealt with by Regional Court in Ostrava, file no. 22 Ca 212/98: Competence of financial bodies in imposing fines under s. 37 Act no. 563/1991 Coll., on accounting, is given in s. 6 (1) (a) Act no. 531/1990 Coll., on territorial financial bodies; when imposing fines, financial bodies proceed under Administrative Procedure Code with the exception of their collection and enforcement where they proceed under Act no. 337/1992 Coll., on administration of taxes and fees.

meanors, and person authorized by them and further, bodies designated by this or a different law". (...)

The last possible option is the case where imposing body does not have a competence for either collecting or enforcing monetary payment. In such case, complex administration of tax must be moved forward to general administrator of tax. In the text of the law, this fact is expressed implicitly or negatively, because a provision that respective monetary payment shall be collected or enforced is absent (comp. e.g. s. 95 (3) Energy Act: "Fines are imposed by...territorial inspectorate").⁶ Similar case is the Act on municipalities which in its s. 102 (2) (k) provides that Council of municipality has a reserved authority to impose fine in the matters of separate competence of municipality (...). Administrative Procedure Code shall be used as a subsidiary law on procedure therefore municipality imposes (i.e. decides on them) a fine for administrative delinquencies under s. 58 Act on municipalities and it is collected and enforced by general administrator of tax under Tax Procedure Code.

Therefore, definition of competences of individual bodies is important for assessment of fine as tax (under s. 2 (3) (c) tax Procedure Code, s. 1 (4) Act on administration of taxes and fees). Because the tax subject is actually the body to whom the fine is paid, fine becomes a tax in a moment of its payment. The fact that fine is not a tax but it only has its nature, overreaches into the possibility of requiring restitution of unlawfully imposed fine. If the fine was a tax from the very beginning, we would have to apply s. 254 counting with certain redress for damages caused to the tax subject by unlawful decision on determination of tax in the form of interest deduced from the tax determined this way and in case this tax was enforced in this manner, this interest is doubled. Tax Procedure Code itself provides in s. 253 (3) that payment made within the framework of shared administration does not lead to origin of interest. But the fact that fine is a monetary payment which is regarded as tax from the moment of its payment leads to the option presumed by s. 155 Tax Procedure Code, i.e. to require restitution of fine as a tax overpayment and demand the interest arising out of this overpayment, as well.⁷

The issue of shared administration and tax overpayment has been recently covered in the decision of Supreme Administrative Court dated 21.07.2010, no. 1 Afs 38/2010. Supreme Administrative Court dealt mainly with the question of origin of tax overpayment imposed by fault and time since when the

6 BAXA, Josef and col. *Daňový řád: komentář. II. díl.* Praha: Wolters Kluwer, 2011. p. 997-998.

7 In the Act on administration of taxes and fees, it is s. 64 (6).

interested is supposed to be counted. Therefore, in the opinion of Supreme Administrative Court, “the term ‘fault of tax administrator’ needs to be interpreted as ‘mistake’ or ‘inflicting’ by tax administrator and not as fault in the civil law or criminal law conception. Fault which leads to annulment of decision on determination of payment duty (notwithstanding whether a tax or a fine) either by an appellate body (if an appeal does not have suspensory effect) or by a court, necessarily causes effects of origin of tax overpayment imposed by fault. It is conditioned by fulfillment of payment duty, however. By an overpayment imposed by fault, the case-law unambiguously understands the overpayment which is originated (paid in the public budget) as a consequence of such an incorrect decision (conduct) of administrative body whose decision was annulled by ‘review authority’ “.

As it has been mentioned above, the Tax Procedure Code (as well as Act on administration of taxes and fees) counts with lost profit, which is incurred to the charged person in connection with payment of fine and it creates an option to require interest from the paid fine which is “in fact an expression of price of finance in time, which is given by interest rate. It is an economic redress resulting from finances which would otherwise grow within the mass of finances belonging to their owner.”⁸

Under constant case-law of Supreme Administrative Court, the moment since which it is necessary to count such interest is the day when a monetary amount was withdrawn from bank account of the obliged person, or after the 15 days period for withdrawal lapses, under Tax Procedure Code, after 30 days from receiving a request for restitution of overpayment.

Except of the date since when the amount of overpayment interest is supposed to be paid, it is important to decide how the overpayment shall be counted. Current Tax Procedure Code in its s. 155 (5) states that the interest yearly corresponds with the repo rate set by Czech National Bank and in force on the first day of calendar half-year increased by 14 percentage points. This construction thus corresponds with old regulation of delay interests originating in civil law relations and regulated by decree of the government no. 163/2005 Coll., although the level of percentage points is double when tax payments are concerned.⁹ Nonetheless, provision of overpayment interests as part of Act on administration of taxes and fees was changed as it reacted on changes of counting delay interests in civil law relations. Neverthe-

8 Decision of Supreme Administrative Court dated 21.07.2010, file no. 1 Afs 38/2010. Decisions of Supreme Administrative Court are available at www.nssoud.cz.

9 Tax Procedure Code has not reacted in such a manner regarding the change in counting delay interests implemented by decree of government no. 33/2010 Coll.

less, transitional provisions which operated with the use of new provisions on overpayment interests are not unequivocal and in my opinion, they might be interpreted unconstitutionally. However, how did the overpayment interest develop and what did it mean for the charged person who paid the fine in 2006 and a different one who paid it in 2007?

Until 31.12.2006, the tax overpayment interest was counted as 140% of discount rate. Since 01.01.2007, the system changed and it works up to now, when the interest rate is counted as repo rate plus 14 percentage points for half-year. Under the transitional provision (point 5), mentioned in the Act no. 230/2006 Coll., amending Act on administration of taxes and fees: "Regulation included in s. 64 (6) and s. 96a (3) of this law applies to tax overpayment, whose original date of maturity comes after this law comes into effect. For returnable tax overpayment whose original day of maturity comes until the day this law comes into force, s. 64 (6) and s. 96a (3) Act no. 337/1992 Coll., on administration of taxes and fees, in its wording effective until this law comes into force, shall be applied." In my opinion, there are two ways of how to interpret this provision, 1) if the overpayment was made before 01.01.2007, interest with respect to this overpayment should be counted as 140% of discount rate until it is paid; 2) if the overpayment was made before 01.01.2007, it should be counted until 31.12.2006 as 140% of discount rate, and since 01.01.2007 as repo rate plus 14 percentage points of the overpayment.

I regard the first interpretation as not respecting the very nature of overpayment interest because as it has been mentioned above, it ought to reflect economic profit of the amount of money which was paid as a fine. Therefore, if the lawmaker reacts on the change of economic circumstances in the state with the change of legislature, i.e. it changes the way of counting these interests, there is no justifiable reason for an old way of counting it, i.e. 140% of discount rate, then. Eventually, what may happen is that there will be a difference in the scale of tens of thousands between a person regarding which the overpayment originated earlier and a person regarding which the overpayment originated later. If the interpretation mentioned in point 1 applied, it would be of no help for the duty-bound person that Tax Procedure Code came into effect because it is stated in its transitional provisions that if the time period for restitution of overpayment had already started before this law's coming into effect, Act on administration of taxes and fees shall be applied in cases of restitution of overpayment.¹⁰ Therefore, I support the opinion that when applying Act on administration of taxes and fees and counting the

¹⁰ s. 264 (10) Tax Procedure Code.

interest of an overpayment caused by fault, it is necessary to observe changing provisions on counting this interest. This corresponds to the purpose of this interest and the principle of equality, as well.

And what about recovery of damages?

As it has been stated above, the paid fine is actually a harm caused to the charged person, which consists of real harm and lost profit. What is the relation between tax regulations and Act no. 82/1998 Coll., on liability for damage caused in the performance of public power, then?¹¹

Since 1998, Act no. 82/1998 Coll., which deals with recovery of damages caused in the performance of public power by either an unlawful decision or incorrect official procedure, is in force.¹² They will ordinarily be such actions which are either formalized, i.e. they will fulfill definition of a decision, or they will be various non-formalized acts such as interferences of members of security corps, or inaction. The law covers all performance of public power¹³, i.e. both performance of state power and performance of other forms of public power. The scope of bodies whose decisions or steps fall within the competence of this law results from this. They will certainly be bodies of state administration, i.e. typically ministries and other bodies conducting direct state administration. Then, they will be bodies conducting state administration indirectly, i.e. for instance persons and corporations to whom the performance of state administration was entrusted and territorial self-government units when performing state administration. And the law does not exclude territorial self-governing units performing self-government, too (s. 1 (2) cited act).

Act on recovery of damages will be only applicable in performance of superior administration. Where the state acts as a private law subject, i.e. on the same level as its co-contractors, the harm incurred is assessed under provisions on recovery of damages in private law (typically civil code).¹⁴

However, harm caused by decisions and steps of self-governing corporations is not a harm caused by state. Although s. 5 supplements the brief dic-

11 Hereinafter "Act on recovery of damages".

12 It follows fulfillment of constitutional requirement expressed in Article 36 (3) Charter of fundamental rights and freedoms: "Everybody is entitled to compensation for damage caused him by an unlawful decision of a court, other state bodies, or public administrative bodies, or as the result of an incorrect official procedure."

13 Regarding the definition of the term of public power, see e.g. judgment of Constitutional Court dated 25.11.1993, no. II. ÚS 75/93. Available at nalus.usoud.cz.

14 VOJTEK, Petr. *Odpovědnost za škodu při výkonu veřejné moci. Komentář*. Praha: C.H.Beck, 2005. p. 15.

tion of s. 1 with a significant ending: “decision issued (...) in administrative proceedings”¹⁵, characteristic of the decision which is capable of causing harm is nonetheless only one of the preconditions of using the cited law. The first condition for application of this law is that body which issued the respective decision (or took respective steps) falls within the scope of the law. S. 3 in conjunction with s. 1 and 4 actually characterize these bodies in detail. Thus the state is liable for damage caused by state bodies, persons and corporations conducting state administration, territorial self-governing units conducting state administration and enforcement officials and notaries conducting some of their tasks. Territorial self-governing units are liable for harm caused in the performance of self-government. Other public law corporations are not liable for damage caused in the performance of self-government under this law and we might presume that they are liable under general regulations. Lawgiver only mentions notaries and enforcement officials as representatives of self-governing chambers whose acts are subject to the protection of this law. They are acts aimed outside the chambers and the law itself characterizes them as performance of state administration, i.e. not self-government which would be concerned in cases of act effective inside the chamber. Thus for instance, in case of unlawful deletion from the list of attorneys as an imposed disciplinary sanction under s. 32 (1) (d) Act on advocacy, it is nowadays possible to seek redress for damages under civil code. The question is, how this situation corresponds with Article 36 (3) Charter which refers to “Public Administration authority” whose definition ought to be satisfied even by self-governing chamber. Its decision is in fact a decision resulting from superior character of its activity towards its members, it is a performance of public power which is entrusted to self-governing bodies by law. It is thus a question why lawgiver excluded self-governing chamber out of the scope of Act on recovery of damages.

Basic precondition for the possibility of using the mentioned regulation is the harm really incurred. That applies to both material and immaterial harm which should be recovered. Under general theory of harm’s origin, it is necessary that there is causal link between the harm and harming event which

15 It is possible to presume that by administrative proceedings, the lawmaker considered the broader variant of this term, that is not only issuing decisions under Administrative Procedure Code but also other acts under this law, or respectively different act preconditioned by exclusion of Administrative Procedure Code or alternatively only its subsidiary use. If the law would actually apply only to administrative proceedings under Administrative Procedure Code and just to those ending with issuing of a decision, the scope of protecting persons against unacceptable conduct of the state would be alarmingly narrowed. I analyze the complicated relation between Tax Procedure Code and cited law further.

under the cited law may only be represented by unlawful decision or incorrect official procedure conducted by the bodies mentioned in law.

The possibility of compensating immaterial harm under the mentioned regulation is a discussed and problematic point as to the means and amount of compensation. Immaterial harm may ordinarily occur in case of an effort to annul unlawfully imposed fine when there are delays in the proceedings. With respect to claiming the immaterial harm, there is nevertheless a shorter, half-year time period set forth by Act on recovery of damages.

Next condition of recovery of damages is to apply with a body competent to try and process it. These bodies are enumerated by s. 6 Act on recovery of damages in case the harm was caused by state. They are: Ministry of Justice, competent central administrative body, Ministry of Finances, bodies of Czech National Bank and Supreme Control Office. If the harm was caused by a body of territorial self-governing unit, it is necessary to submit the application for recovery of damages to this subject.

In case the competent body does not comply with the application, or in other words, if it does not react to it in 6 months, it is possible to file lawsuit before a court. Lawsuit filed this way is heard in civil court proceedings even if the unlawful decision was issued in administrative proceedings. That is a result of the fact that recovery of damages is concerned and in its substance, it is a civil law institute.¹⁶ In case of determining the party in lawsuit, precisely a defendant, it is necessary to take account of the difference between administrative court proceedings and civil court proceedings. In administrative court proceedings, the respondent administrative body has a procedural capacity on the basis of s. 65 in conjunction with s. 33 Act no. 150/2002 Coll., Code of Administrative Justice, in civil court proceedings, the state has this capacity as one of its fractions acts on its behalf, i.e. typically an administrative body (central) competent in the area where an administrative body issued unlawful decision or conducted incorrect official procedure. Therefore, in the lawsuit for recovery of damages under Act no. 82/1998 Coll., it is necessary to name the defendant as the Czech Republic – body authorized to act on its behalf under s. 6 of this law.

Act on administration of taxes and fees itself states in s. 64 (6) that overpayment interest is to be credited for recovery of damages which would be found under Act on recovery of damages. Supreme Administrative Court identified with this in the decision mentioned above where it states that “in

16 That may be deduced from an express reference in s. 26 of the law on subsidiary use of civil code.

obiter dictum, this court states that the opinion mentioned above does not *a priori* mean that tax debtor cannot be harmed by unlawful decision of incorrect administrative procedure of an administrative body (here in the position of administrator of tax). (...) nevertheless, such harm would be assessed in different proceedings, in the regime of Act no. 82/1998 Coll., on liability for damage caused in the performance of public power.¹⁷ In my opinion however, it is possible to deduce that the interest should be credited only regarding the material harm which was incurred to the duty-bound person, but not the immaterial harm. In this case, I reckon that material and immaterial harm cannot be interchanged because the tax overpayment and an interest reflect only the very material harm.

However, Tax Procedure Code counts with crediting the overpayment interest and recovery of damages only in case the decision on determination of tax (as mentioned earlier) itself was annulled, but to this provision the competence within the framework of shared administration does not apply. It results from this that overpayment interest under s. 155 Tax Procedure Code will not be credited to prospective harm found under Act on recovery of damages.¹⁸

The advantage of restituting fine under Tax Procedure Code is certainly the financial benefit, that is profit which the person paying fine lost, is reflected in the tax overpayment interest and it is not necessary to assess it using expert opinion and in case of fulfilling conditions set in the Tax Procedure Code, the tax subject has an entitlement for its payment. Whereas if the Act on recovery of damages was applied, it does not count with any interest set in advance. The practice shows that if the injured person claims recovery of lost profit, they have to prove the amount of it, usually by means of difficult expert opinion which takes the concrete financial situation of a subject in time into account. Regarding a specific person, this opinion thus may enumerate the lost profit in a higher amount than the interest set forth by law under Tax Procedure Code, nevertheless this financial loss may be enumerated even in lower amount. It is necessary to add that the financial means used for the mentioned expert opinion are usually equal or higher than the final recovery granted by ministry or the court..

17 Decision of Supreme Administrative Court dated 21.07.2010, no. 1 Afs 38/2010.

18 It is necessary to add to this that the Act on administration of taxes and fees operated with crediting the overpayment interest and prospective recovery of damages under Act on recovery of damages which is reflected even in the cited decision of Supreme Administrative Court.

Conclusion

As it results from what has been mentioned above, the charged persons, who after long troubles reached annulment of unlawful decision imposing a fine on them, have to undergo the process of restituting this fine and respectively other damage which was caused to this person by a decision or conduct of bodies of public power. It is clear that without the help of an attorney, the injured person will hardly meet all time periods for enforcement of their rights and turn to appropriate competent bodies. In order to simplify the legal position of injured persons, I would suggest to consider an option of a duty for annulling body to decide on restitution, i.e. on the duty to return the paid fine or respectively, at least on the duty to inform the injured person on a possibility to demand restitution of a paid fine.

Extent of control competence of supreme control offices in chosen countries¹

This paper is focused on the issue of authority of supreme control offices (hereinafter “SCO”) in a given state² to control economy and budgets of subjects different form state, both public (especially territorial self-governing units, but also so-called public institutions), and private (especially business corporations on whose property the state or a different public subject, especially territorial self-governing unit, participates). Czech Supreme Control Office (hereinafter “CZSCO”) does not have an authority to control management with this segment of public property. Contrarily, in many OECD countries, such control is included in the competence of supreme control institutions. Legislative changes of the extent of control competence of CZSCO are being prepared. This paper is supposed to show, how lawgivers of chosen countries dealt with this issue and to provide information basis for this partial, actual topic of SCOs which might be useful for a broader, systematic comparison, e.g. in the prepared amendment of Act on CZSCO.³

Lima Declaration⁴ defines purposes of control conducted by SCOs as accounting and budget control which should help to uncover cases of abuse of public finances and to highlight risky areas of internal direction which may threaten integrity of organization and effective performance of budget and other measures, to determine reliability of reports on fulfillment of budget and other records, to identify cases and character of losses to be recovered, they lead to more effective use of available source. Control findings ought to be used as an indicator of prospective need of legislative changes.⁵ During

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- 1 This paper follows partial publications of their author which were step by step published during the project, mainly they are POUPEROVÁ, O.: Nejvyšší kontrolní úřad In collective of authors: Kontrolní mechanismy fungování veřejné správy, Periplum, Olomouc, 2009, p. 159–238, POUPEROVÁ, O.: Německý Spolkový účetní dvůr, Správní právo, p., POUPEROVÁ, O.: Účetní dvůr Spolkové republiky Rakousko, Správní právo, p., POUPEROVÁ, O.: Polská Nejvyšší kontrolní komora, Správní právo, being printed, and it was inspired by collaboration in preparation of analysis of Environmental Law Service Veřejná kontrola obchodních společností s majetkovou účastí státu a samospráv, Brno, 2011.
 - 2 For the purposes of this paper, the term “supreme control office” refers to highest state body of control of accounting and budget economy (also “supreme audit institutions”).
 - 3 Act no. 166/1993 Coll., on Supreme Control Office, hereinafter “Act on CZSCO”.
 - 4 Adopted by International Organization of Supreme Audit Institutions (*INTOSAI*) in October 1977 at 9th congress in Lima. It is a soft-law document, nevertheless, it is one of the most important international documents formulating principles of functioning of SCOs.
 - 5 Translated by author under Lima declaration, General provisions, Section I. 1, original wording of Lima declaration is available at <http://www.intosai.org/en/portal/documents/intosai/>

control, information is collected and created on how finances provided by tax payers are used. Control is an essential part of public finances and integrity of disposing with public finances is necessary for confidence of public in proper administration of public finances.

Definition of control competence of CZSCO in the Czech Republic

Extent of control competence of CZSCO is given by combination of subject-matter of control and an area of subjects which are controlled by CZSCO. CZSCO performs control of organizational units of state and corporation and persons (s. 3 (2) Act on CZSCO). Those who are controlled are legally abbreviated as “*controlled person*” (s. 17 (2) Act on CZSCO), although organization unit are not a person with own legal capacity..

Controlled person is not specified by Act on CZSCO anyhow. It is concretize in plan of control activity who becomes the controlled person. Controlled person is a person or a body which falls within the scope of CZSCO’s control as it is defined by law, and which are determined by CZSCO in the plan of control activity or in its annexes. Competence of CZSCO is defined by Constitution as control the management of state property and the implementation of the state budget. Determining controlled person must correspond with a competence set this way. It is thus not *a priori* decisive, who is controlled but it is the property, or management which is the subject of control. Firstly, it is necessary to specify the subject of control and to define the controlled person after that (as its definition is very broad - see s. 3 (2) Act on CZSCO).⁶

As Act on CZSCO originally provided, Czech National was not a subject of CZSCO’s control.⁷ Under amended wording of s. 3 (3) of the law⁸, CZSCO controlled Czech National Bank only if activities linked with securing the main goal of Czech National Bank were not concerned, i.e. under s. 2 (1) first sentence of Act on Czech National Bank to care for prices stability. Clearly, this activity cannot be evaluated from the perspective of economy and therefore, it was excluded out of CZSCO’s control competence. Subsequently, the control competence of CZSCO towards Czech National Bank was in compari-

general/limaundmexikodeclaration/lima_declaration/ [12. 7. 2008, 22.20]. Organization adopted a number of other declaratory documents, defining principles of accounting and budget control in public sector with respect to their non-legal nature and abstract content, I will not concern myself with them further.

6 Comp. judgment Of the Supreme Administrative Court dated 5. 6. 2008, no. 9 Aps 3/2008-125.

7 s. 3 (3) Act on CZSCO in its wording before an amendment made by Act no. 442/2000 Coll.

8 Amendment of s. 3 (3) Act on CZSCO made by Act no. 442/2000 Coll.

son with previous formulation of s. 3 (3) Act on CZSCO even more narrowed. Under currently effective wording of law, control of Czech National Bank is performed by CZSCO only in the area of costs of acquiring property and costs of its operation (s. 3 (3) Act on CZSCO) and it does not relate to main task of Czech National Bank and not even other tasks creating the competence of Czech National Bank (s. 2 Act on Czech National Bank ČNB).

In a decision analyzed as to the competence of CZSCO further, the Constitutional Court stated that “CZSCO *does not perform anything more or anything less the control of management with state property and implementation of state budget.*”⁹ Competence of CZSCO is set that way in Constitution (Art. 97 (1) first sentence). Act on CZSCO develops and specifies the competence of CZSCO set by Constitution in s. 3 (1) stating what management with state property or implementation of state budget.

The subject-matter of CZSCO’s control is management with state property and finances collected on the basis of law in favor of corporations with the exception of finances collected by municipalities or regions in their separate competence, state conclusive account of the Czech Republic, implementation of state budget of the Czech Republic and management with finances provided to the Czech Republic from abroad and finances which were secured by state, rendering and amortization of stocks and making state orders (s. 3 (1) Act on CZSCO).

Specification what is or what is not *implementation of state budget* was dealt with by Municipal Court in Prague in proceedings on complaint against decision of CZSCO on imposition of order fine. Complainant, private corporation – payer of corporation income tax, refused to provide the controllers of CZSCO with co-operation in performance of control of whether they observe their tax duties because they were of the opinion that it is not subject to CZSCO’s control competence whatsoever. Complainant expressed their opinion that control of implementation of state budget of the Czech Republic performed by CZSCO under s. 3 (1) (c) Act on CZSCO cannot be interpreted extensively allowing CZSCO to perform tax subject’s control of fulfillment of a duty to pay corporation or personal income tax but in their opinion, CZSCO performs control in this area as to territorial financial bodies and other administrative and state bodies of the Czech Republic as well as bodies of municipalities in the Czech Republic, materially competent under special laws on administration of taxes. Payment of income tax is not an “implementation

9 Judgment of the Constitutional Court no. 89/1999 Coll. of Constitutional Court, vol. 14, Pl. ÚS 26/94 dated 18th October 1995.

of state budget of the Czech Republic”, but it is only a fulfillment of tax duty by tax payer. By the term “implementation of state budget”, lawmaker intends to follow observance of Act on state budget, i.e. if individual chapters of income and expenses of state budget are fulfilled or used in correspondence with this act. Partial control of an individual income tax payer does not have in direct link to implementation of state budget and it is not a control of implementation of state budget in the sense of s. 3 (1) (c) Act on CZSCO.¹⁰

In its decision, the court agreed with legal opinion of complainant. In court’s opinion, in connection with implementation of state budget linked to collection of taxes, CZSCO is authorized to control how competent administrative bodies implement their duties related to collection of taxes; competence of CZSCO does not, however, include control of private person aimed at implementation of their tax duties. Interpretation of “implementation of state budget” as it is done by CZSCO, is inadmissibly extensive in the court’s opinion, and it leads to application of state power beyond the framework set by Constitution.¹¹

Except of implementation of state budget, CZSCO also controls management with *state property*. What is the state property is not legally defined. Reasoning report to the draft bill of Act on property of the Czech Republic states, the property of the state is a property in its broadest understanding independently on its current location, especially if it is abroad, for instance.¹² All actives of the state are thus regarded as state property for the purposes of CZSCO’s control – movable and immovable property, monetary means, claims and other property rights, stocks and other property values. But passives of the state might also be regarded as state property.

As to the “management with state property”, there is an important decision of the Constitutional Court where it dealt with the application of a group of deputies for annulments of s. 17 (2) Act on association in political parties in wording of Act no. 117/1994 Coll., which banned all business activities of political parties movements, with part of s. 18 Act on association in political parties in wording of Act no. 117/1994 Coll., which regulated CZSCO’s competence towards political parties and political movements and an option of their dissolution if there were discrepancies in management found by CZSCO, as well as provision s. 3 (4) Act on CZSCO in wording of Act no. 117/1994 Coll.,

10 Statement of complainant in decision of Municipal Court in Prague dated 1. 11. 2000, file no. 28 Ca 38/2000.

11 decision of Municipal Court in Prague dated 1. 11. 2000, file no. 28 Ca 38/2000.

12 Reasoning report to the government draft bill of Act on property of the Czech Republic and its position in legal relations (Chamber of Deputies 1999, print 438).

by which the lawgiver set forth that management of political party and political movement with benefits from the state budget of the Czech Republic are management with state property for the purposes of this law.

Act on association in political parties imposed a duty upon political parties and political movements to yearly submit annual financial report not only to Chamber of Deputies but also to CZSCO (s. 18 (1) Act on association in political parties). If CZSCO found out that in a set period of time, the annual financial report was not submitted or it was incomplete or it included false information, it should be given notice of to Chamber of Deputies without undue delay (s. 18 (2) Act on association in political parties). Parties and movements which did not submit the annual report in a set period of time, or they submitted incomplete annual financial report or if it included false information, the CZSCO had to inform Chamber of Deputies and invite the party or movement to eliminate discrepancies; party and movements had to do so in 10 days from the day of delivery of such invitation or in a time period prolonged with the agreement of CZSCO (s. 18 (3) Act on association in political parties). Mentioned duties were regarded as fulfilled, if CZSCO approved it. Subsequently, CZSCO sent a report on the elimination of discrepancies to Chamber of Deputies, president of the republic and government. If the discrepancies were not eliminated in a time period set forth by law and not even during the time period pronged with approval of CZSCO, CZSCO was bound to give notice of this fact to Chamber of Deputies, president of the republic and government where this notice is a motion for initiation of proceedings on dissolution of political party or movement or suspension of their activity (s. 18 (4) Act on association in political parties). Chamber of Deputies or its body authorized by Chamber of Deputies, may file a motion to CZSCO to review if annual financial report of parties and movements which obtained state benefits is in accordance with the law. This procedure was possible even if there were doubts that annual financial report of a party or movement is in contradiction with the law, appeared subsequently (s. 18 (5) Act on association in political parties).

Deputies reasoned the application for annulment stating that the mentioned amendment of Act on association in political parties made management of political parties and movements subject to CZSCO's control, which was under Art. 97 (1) Constitution established to control exclusively management with state property and implementation of state budget. In accordance with the amended wording of the law, political parties and movements are bound to submit annual financial reports yearly to CZSCO which include not

only benefits from state budget but also other income, including donations from persons and non-state corporations as well as annual account records, i.e. record on property and obligations and record on incomes and expenses. Definition of CZSCO's competence towards political parties and movements including extension of competence of CZSCO in s. 3 (4) Act on CZSCO in wording under Act no. 117/1994 Coll., is thus regarded as purposeful and unconstitutional.

In accordance with the statement of Chamber of Deputies, it was the meaning of motions for amendment to create preconditions for political parties and movements to be able to concern themselves with their mission, for the performance or right to associate in political parties and movements to really serve citizens to their participation on political life of society and to allow political parties and movements to refrain from activities which burden them and take them away from their mission. Adoption of these motions for amendment, political parties and movements obtain benefits from state budget under legally provided conditions and therefore there is no need to usually necessary business activities in various forms which are very critically and sensitively evaluated by citizens. In accordance with the statement of Chamber of Deputies, necessity of the use of benefits from state budget being controlled by CZSCO logically results from the fact that it is a property of state and citizens have an inherent right for the state to secure necessary extent of control of management with such property. Protection of rights of political parties and political movements and their legal certainty are secured by separate operation of accounting records on management with benefits from state budget. Origination of certain rights to benefits from state budget is accompanied by origination of certain duties towards state budget, state and to society which justifies also the claim for state control of management with these finances.¹³

The Constitutional Court annulled s. 18 (2), (3), (4) and (5) Act on association in political parties in wording of Act no. 117/1994 Coll., reasoning that "Constitution of the Czech Republic is based on representative democracy where creation of political will and formation of state power is a result of free competition of political parties (Article 5 Constitution) within the framework of democratic, legally consistent state. The result of this competition is certain resulting political profile of state power. Therefore interferences of state bodies back to life of political parties are undesirable if they are capable of influ-

13 Statement of Chamber of Deputies of Parliament of the Czech Republic in judgment of the Constitutional Court no. 89/1999 Coll. Constitutional Court, vol. 14, Pl. ÚS 26/94 dated 18th October 1995.

encing free competition of parties – e.g. by designating behavior of specific political parties as “uneconomic” and “purpose-less”. That would contradict to constitutional principle that political parties and political movements are separated from the state (Art. 20 (4) Charter of fundamental rights and freedoms)... Financial management of political parties is a sensitive question... Amendment of law attempted to...make financial management of parties subject to intensive control of a state body – CZSCO. Control of their finances and evaluation of “economy” and “purpose” of used finances cannot the matter of state bodies competent for control of state property. Authority for property of political parties and political movements to be regarded as state property for the purposes of Act on CZSCO in contradiction with the general understanding of it, is inadmissible even from the formal constitutional viewpoint, because it materially extends Art. 97 (1) Constitution by means of ordinary law, i.e. it circumvents the Constitution.”¹⁴

Constitutional Court thus came to a conclusion that the decisive moment is the definition of CZSCO’s in Article 97 Constitution, under which CZSCO “does not anything less or anything more than control of management with state property and implementation of state budget.” Toto unambiguous constitutional definition cannot be changed in any other way than by constitutional act and therefore, the change made by provision of s. 3 (4) Act on CZSCO is unconstitutional from the procedurally constitutional point of view. However, this amendment is not acceptable even from the materially constitutional point of view because putting management of political parties and political movements under state control would be an interference which threatens principle of separation of political parties and political movements from the state. Constitutional Court deduces that after the benefits were given to political parties and political movements, “management with state property” in the sense of Art. 97 Constitution cannot be concerned because the use of these finances is only an internal matter of those subjects which they were given to. Control of management may thus only cover the phase which precedes giving these finances to them. Constitutional Court agreed with the argumentation of applicant that state benefits are not purpose-bound and that by their provision, there is no financial relation established between the state budget and budget of political parties and political movements, and after the benefit was paid by state, the benefit thus becomes property of a political party or political movements.¹⁵

14 judgment of the Constitutional Court no. 89/1999 Coll. Constitutional Court, vol. 14, Pl. ÚS 26/94 dated 18th October 1995.

15 *ibidem*.

Constitutional Court also added that control competence of CZSCO cannot be excluded as it contrarily must be accepted where a control of financial managements in and within the framework of state is concerned although this management is in direct connection with an activity of political parties. Therefore a control competence of CZSCO may cover proceedings before the ministry of finance whose goal is to set state benefits to individual political parties or distribution of certain financial amounts to club of individual political parties from the budget of Parliament because these institutions are authorized with rights and duties inside the state structure. It is a monetary benefit for clubs as parliamentary fractions to secure their participation in lawmaking process. Financial control exists here already in the framework of constituted state power because clubs are a part of Parliament and therefore a part of state.¹⁶

In accordance with the Constitution, political parties fulfill certain public tasks necessary for the life of state founded on representative democracy. Undoubtedly, there is an interest of the society on bodies performing public power in democratic legally consistent state to be legitimate in a democratic way, i.e. to be based on elections founded on free competition of political parties. This general interest leads to a claim that state allows these functions of state and necessary tasks and supports them. That corresponds with current regulation of financing political parties which is run by the effort to contribute to operation of political parties as well as an effort to partially compensate their election costs incurred.

Extent of control competence of German Federal Audit Court (hereinafter “FAC”)

FAC (Bundesrechnungshof) is the top federal body which was created in order to control budget activity and management of federation. It is a constitutional body whose existence is presumed by Basic Law¹⁷ in provision of Art. 114 (2) in the first and the second sentence. The mentioned provision of GG is implemented on the basis of constitutional authorization (Art. 114 (2) third sentence GG) in Act on FAC,¹⁸ which regulates mainly internal organization of FAC, schedule of work and decision-making competence. Tasks of FAC are

16 judgment of the Constitutional Court no. 89/1999 Coll. Constitutional Court, vol. 14, Pl. ÚS 26/94 dated 18th October 1995.

17 Grundgesetz für die Bundesrepublik Deutschland vom 23. 5. 1949 (GG, BGBl. I S 1), “Basic law” or also “GG”.

18 Gesetz über den Bundesrechnungshof (Bundesrechnungshofgesetz vom 11. Juli 1985, BRH-G, BGBl. I P. 1445), hereinafter “BRH-G”.

also regulated by Act on procedure of federal budget¹⁹ and Act on principles of budget law of federation and states²⁰.

Except of FAC, there are also state audit courts in Federal Republic of Germany (they are embedded in constitutions of individual federal states and these provisions of state constitutions are specified in state laws, then).

Control competence of FAC is related to budget and economic management of Federation including management with property of special nature and management of businesses of Federation (Art. 114 (2) GG in conjunction with s. 88 (1) BHO²¹). Competence of FAC covers *all* management of Federation²², there we speak of principle of exclusivity and generality (Prinzip der Ausschliesslichkeit und Lückenlosigkeit).²³

Public law corporation directly founded by Federation are also subject to control of FAC (s. 111 BHO).

“Places” standing out of federation administration (e.g. federation states or municipalities) are subject to control of FAC, if they implement a part of state budget or they received recovery of costs by Federation, or if they administer means or property of Federation, if they received a grant from Federation or if they are corporations of private law in which the federation has direct or indirect majority participation and which do not take part in economic competition, they fulfill public tasks and for that purpose, they were attributed with finances from federal budget or the federation provided a security to them. If these subjects transfer finances further to third persons, even these third persons are subject to control (s. 91 BHO).

Control of FAC also covers activity of Federation in private companies where Federation has direct or indirect participation, or in private corporations whose member the Federation is. The criterion of control is set pretty broadly here as BHO states that such activity of Federation is examined by FAC from the viewpoint of business principles (s. 92 BHO).

Private corporations without participation of Federation are subject to FAC’s control if on the basis of law, they received a grant from Federation or the Federation secures their obligation or they are administered by Federation or a person designated by Federation, if they negotiate control at FAC

19 Bundeshaushaltsordnung vom 19. August 1969 (BHO, BGBl. I P. 1284), hereinafter “BHO”.

20 Gesetz über die Grundsätze des Haushaltsrechts des Bundes und der Länder (Haushaltsgrundsatzgesetz vom 19. August 1969, HGGrG, BGBl. I P. 1273), hereinafter “HGGrG”

21 BHO

22 With the exception of the FAC itself, s. 101 BHO.

23 TIEMANN, P. Die staatsrechtliche Stellung der Finanzkontrolle des Bundes, Duncker & Humblot, Berlin, 1974, p. 77.

or if they are non-business subject whose statute presumes control by FAC (s. 104 BHO).

Control by FAC finally covers even other institutions if the law provides that (e.g. under s. 53 of deputy law, FAC examines accounting of Bundestag fractions as well as use of monetary and material payments provided to fractions^{24, 25}).

Extent of control competence of Austrian Audit Court (hereinafter “AAC”)

In Federal Republic of Austria, the highest control institution is AAC (Rechnungshof). It is a federal body whose existence and basic rules of activity and organization are embedded in Austrian Constitution in the sixth head called Audit and financial control (Art. 121 et seq. B-VG²⁶); these rules are concretized in federal Act on Audit Office²⁷ in accordance with constitutional authorization (čl. 128 B-VG). Except of federal AAC, there are state audit courts in Austria. Every federal state created its own state audit court (or in other words “control office” in Vienna); they are embedded in constitutions of respective federal state and their provisions are implemented by state laws on state audit court. Except of Austrian constitution and Act on audit court, there are special tasks given to AAC given by special laws.

Competence of AAC covers financial management of federation, federal states, associations of municipalities, municipalities and other subjects set by law (Art. 121 (1) B-VG). Under case-law, financial management is any disposition with financial means, accepting and giving financial means and administration of property, or in other words, every action which has consequences in financial sphere. Financial management is understood as an executive activity, not a lawmaking activity which determines executive.²⁸

24 Abgeordnetengesetz in der Fassung der Bekanntmachung vom 21. Februar 1996 (BGBl. I P. 326), das zuletzt durch das Gesetz vom 8. November 2011 (BGBl. I P. 2218) geändert worden ist (hereinafter “deputy law”).

25 Deputy fractions are defined in s. 45 et seq. of deputy law. Fractions are legally capable associations of deputies, members of Bundestag, they participate on fulfillment of tasks of Bundestag but they are not a part of Public Administration and they do not perform public power.

26 Bundes-Verfassungsgesetz, BGBl. Nr. 1/1930 (hereinafter “Austrian Constitution” or “B-VG”).

27 Bundesgesetz über den Rechnungshof (Rechnungshofgesetz, 1948), BGBl. Nr. 144/1948 (hereinafter “RHG”).

28 Decision of Constitutional Court (“Verfassungsgerichtshof”), VfSlg. 7944/1976. cit. in accordance with KÖNIG, A. Probleme der Rechnungshofkontrolle im Zusammenhang mit den Beruflichen gesetzlichen Interessenvertretungen, Wien: Univ. Wien, 1997, p. 59. Comp. also s. 1 RHG.

With respect to businesses and institutions which are subject to its control competence and which have a duty to submit annual reports to National Council, AAC performs control every two years by collecting information on average income including social benefits, material payments and rents for members of governing and control bodies and found information is reported to National Council (Art. 121 (4) B-VG).

Competences of Federation subject to control of AAC are:

- All management of Federation and management of funds, foundations and institutions administered by federal bodies or persons authorized by bodies of Federation (Art. 126b (1) B-VG, s. 2 (3) RHG);
- additionally, management of businesses where Federation itself or with different subjects subject to AAC's competence has at least 50% participation on capital or which it operates itself or with different subjects subject to AAC' competence (Art. 126b (2) B-VG);
- management of public law corporations with finances of Federation (Art. 126b (3) B-VG);
- management of social insurance companies (Art. 126c (1) B-VG)
- and management with other subjects provided by law. Another subject which is named in law as being subject to control competence of AAC, is e.g. public law operator of broadcast ÖRF.²⁹

Competencies of states subject to AAC's control are:

- management of states and managements of funds, foundations and institutions which are operated by state bodies or persons which were authorized by bodies of state (Art. 127 (1) B-VG);
- management of businesses where state itself or with different subjects subject to AAC's competence has at least 50% participation on capital or which it operates itself or with different subjects subject to AAC' competence (Art. 127 (3) B-VG);
- management of public law corporations with finances of state (Art. 127 (4) B-VG).

Respective state government is informed on results of control in matters of management of state by AAC and the government is then bound to inform AAC on measures adopted on the basis of its control finding (Art. 127 (5) B-VG).

Competencies of municipalities subject to AAC's control are:

- management of associations of municipalities and so-called large municipalities³⁰ (as to municipalities with less than 20 thousand inhabit-

29 s. 31 federal law on ÖRF (Bundesgesetz über den Österreichischen Rundfunk, ORF-G), BGBl. Nr. 379/1984.

30 Municipality with more than 20 inhabitants.

ants, AAC performs control authority only on the basis of justified application of state government under Art. 127a (7) B-VG) and management of funds, foundations and institutions which are operated by municipality bodies or persons which were authorized by bodies of municipality (Art. 127a (1) B-VG);

- management of businesses where municipality itself or with different subjects subject to AAC's competence has at least 50% participation on capital or which it operates itself or with different subjects subject to AAC' competence (Art. 127a (3) B-VG);
- management of public law corporations with finances of large municipality (Art. 127a (4) B-VG).

Results of control within the framework of management of municipalities are communicated by AAC to mayor. Mayor is supposed to make a statement on control findings and to adopt measures necessary for reparation which are to be communicated to AAC in three months. Communication on results of control and statement of mayor are submitted to state and federal government, then (Art. 127a (5) B-VG).

Professional chambers established by law are also covered by control competence of AAC (Art. 127b (1) B-VG).

Extent of control competence of Polish Highest Control Chamber (hereinafter "HCC")

In Poland, the highest control institution, the "highest body of state control" is HCC (Najwyższa Izba Kontroli). Detailed regulation of organization and activity of HCC is included in Act on HCC,³¹ statute of HCC, which is issued by Presidium of Sejm, and decrees of president of HCC.³²

Controlled persons and subject-matter of HCC's control are primarily set in Polish Constitution,³³ Act on HCC³⁴ repeats the constitutional definition and partially supplements it. From the viewpoint of subject-matter of control, the control competence of HCC is set very broadly and we might say that it has a universal character because with exceptions, it covers all activity of controlled persons.³⁵

31 Ustawa o Najwyższej Izbie kontroli z dnia 23 grudnia 1994 r. (hereinafter "Act on HCC").

32 Decrees including their wording are available at <http://www.nik.gov.pl/o-nik/podstawy-prawne-dzialania-nik/> (30. 5. 2011).

33 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Hereinafter "Constitution" or "Polish Constitution").

34 Act on HCC

35 Comp. GARLICKI, L.: *Polskie prawo konstytucyjne*, Liber, Varšava, 2007, p. 327.

Controlled persons might be divided into four categories, where from the viewpoint of control, they actually differ in the category they fall in.

Under Polish Constitution, HCC controls activity of bodies of state administration, Polish National Bank, corporations founded by state and other organizational units of state as to legality, economy, efficiency and diligence³⁶ (Art. 203 (1) Constitution, comp. Art. 2 (1) Act on HCC). Corporations founded by state are state institutions, state banks, state foundation, state universities, research institutions, and other state organization which are attributed with legal capacity by law. HCC also controls state organizations without legal capacity which perform management, they are state budget organizations, budget systems, special centers etc.³⁷

HCC may also control management of bodies of territorial self-government,³⁸ corporations founded by territorial self-governing units and other organizational units of territorial self-government from the perspective of legality, economy and diligence (Art. 203 (2) Constitution, comp. Art. 2 (2) Act on HCC). Here it is a facultative competence (contrarily to the aforementioned area of subjects covered by obligatory control competence of HCC).

Another facultative area of controlled persons under Constitution are other organizational units and economical subjects.³⁹ They are controlled only in

36 Diligence in this regard is understood as action in accordance with the set duty, with adequate special care, in the correct form and in time. Other authors referring to English translation of Art. 5 Act on HCC understand the criterion of reliability (in original wording "rzetelność") more as unity or completeness (English translation of the Act on HCC says "integrity", text of the act is published at www.nik.gov.pl/en/about-us/, date of access 20. 5. 2011). One of the meanings of "integrity" is actually a "moral integrity, honesty", see e.g. Watson, A. C. In Webster's Encyclopedic Unabridged Dictionary of the English Language, Gramercy Books, Avenel, 1994, p. 738; OHEROVÁ, J. – SVOBODA, M. – KALINA, M. – BOČÁNKOVÁ, M.: Anglicko-český právní slovník, Linde, Praha, 2010, p. 268.

With respect to the context and interpretation mentioned in Polish literature (see e.g. BANASZAK, B. Konstytucja Rzeczypospolitej Polskiej: komentarz. Warszawa: C. H. Beck, 2009, p. 889-890; GRZYBOVSKI, M. (red.): Prawo konstytucyjne, Temida 2, Białystok, 2009, p. 364-365), we support the meaning which we translate into Czech as "diligence". It is a "non-standard" quality of management, which is required by state only with respect to its bodies, not from territorial self-governing units or even. Management with state property should therefore be in accordance not only with legal regulations while respecting economy of aim to fulfill purpose set in advance, but it should also correspond with expert knowledge applied in concrete circumstances.

37 MAZUR, J.: Nowy polský zákon o Nejvyšší kontrolní komoře. *Právník*. 1997, no. 9, p. 799–800.

38 "Self-government" under Act on HCC covers self-government of municipalities, districts, voivodeship and other self-governing corporations and self-governing organizational units (Art. 2a Act on HCC).

39 The law specifies the term of economic subjects – they are subjects doing business (Art. 2 (3) Act on HCC).

the extent in which they use property of state or municipality or in which they fulfill their financial obligations towards state and only from the viewpoint of legality and economy (Art. 203 (3) Constitution, Art. 2 (3) Act on HCC). Act supplements this constitutional definition when it states that with respect to these subject, HCC performs control especially if the fulfill tasks given by state or bodies of territorial self-government, they make public orders on behalf of state or territorial self-government, they run or organize works of public service or public works, they are active with participation of state or territorial self-government or they use state or municipal property or sources assigned on the basis of international treaties, they use individually granted benefits or securities from state or territorial self-government, they give or use public support under special laws or they fulfill tasks within the framework of general health insurance (Art. 2 (3) Act on HCC). Here, the control covers non-public institutions connected in a certain extent with the activity of state and territorial self-government where the property at their disposal has partially public (state or municipal) nature.

From the perspective of *legality and economy*, HCC may also control activity of organizational units and economic subjects which are active in the area of securing monetary payments and providing aid to subjects participating in the system of securing payment in accordance with regulations on Bank security fund in accordance with the extent, in which they use property or means of state or municipalities or in which they fulfill their own financial obligations towards state (Art. 2 (5) Act on HCC).

The law further expressly states that HCC performs control of implementation of budget and financial and property management of Office of president of the republic, Office of Sejm, Constitutional Court, Public Defender of Rights, Defender of Rights of Children, Council for radiophony and television, General Inspector for the Protection of Personal Data, Institute of national memory – Commission for investigation of crimes against Polish nation, National Election Office, Supreme Court, Supreme Administrative Court, National Judicial Council and State Inspection of Labor (Art. 4 (1) Act on HCC). Control of activity of these state bodies with the exception of the aforementioned courts and National Election Office is conducted by HCC upon an order by Sejm (“na zlecenie”), within the limits of Art. 2 (1) Act on HCC. Control of activity of Office of president of the republic is conducted by HCC within the limits of Art. 2 (1) Act on HCC equally upon a motion by president of the republic (“na wniosek”), control of activity of Office of Senate likewise upon a motion by Senate (Art. 4 (2) Act on HCC). As to the mentioned subjects,

HCC examines implementation of state budget, implementation of laws and other legal regulations in the area of financial, economic, organizational and administrative tasks including internal audit (Art. 3 Act on HCC).

Summary and conclusion

From the excerpts of respective legal regulations mentioned above, it is clear that legal orders of all three mentioned states set control competence of SCO of their country much more extensively than in case of Czech law on CZSCO because under effective legal regulation, CZSCO may control only management with such public means which belong to state.

Under effective legal regulation, competence of CZSCO thus lacks especially 1) control of management with other public means than those of state (means of other public subjects different from state, e.g. management of territorial self-governing units or Czech Television or Czech Radio where only a part of their income comes from payments made by potential users), 2) control of management of subject created on private basis in which the state (or different public law subject) inputs state (or different public) property and 3) control of management with property of subjects different from state (public law and private law ones), where the state (or different public subject, especially municipality or region), however, participates personally on their administration.

But under Lima declaration, actually, all operations with public means must be subject to control of SCO in a given state irrespective whether that is reflected in state budget in any way (Art. 18 (3) Lima declaration).

Lima declaration further in Art. 23 (1) expressly states that with respect to expansion of economic activities of states which is often demonstrated by founding a private law business, control competence of SCO in a given state ought to cover these subjects founded on private law basis, as well, if the state has substantial participation in them.

From all the aforementioned SCOs, the broadest control competence is given to AAC. It covers management of Federation including public law corporations which are partially administrated with participation of Federation, and private law businesses where the Federation takes part, as well as management of federal states and management of municipalities again including other subjects where Federation participates on their management personally or as to the property. Austrian legal regulation thus fully corresponds to the mentioned requirements of Art. 18 (3) and 23 (1) Lima declaration.

Competence of HCC is set also pretty widely. It covers management of organizational units of state and corporations founded by state, as well as management of bodies of territorial self-government and corporations founded by territorial self-governing units. And in the extent in which they use the property of state or territorial self-governing unit or in which they fulfill their financial obligations towards state, then it also covers economic (or in other words, business) subjects. Even with respect to Polish regulation, we may thus say that it corresponds with the mentioned requirements of Lima declaration.

Control competence of German FAC covers all management of Federation including management of public law corporations directly founded by Federation, subjects out of federal administration, if they are connected to federal budget. Control of FAC also covers activity of Federation in private businesses where the Federation participates and activity of Federation in private companies with Federation as their member. Except of that, the FAC may perform control of corporation of private law without membership of Federation in case they received donation from the Federation or it secures their obligations on the basis of law, or they are administered by Federation or person authorized by Federation. FAC also runs audits with respect to other subjects not specified by law, if they order audit at FAC or if their statues presume them. Management of federal states and municipalities in case means of Federation are not concerned, is not covered by competence of FAC. For such control, there are different mechanisms construed by German law on the level of individual states' law.

In accordance with currently effective legal regulation, control competence of CZSCO is the narrowest in comparison with mentioned SCOs. As it has been mentioned above, extension of CZSCO's competence is being prepared. Under government draft bill of amendment of the Constitution of the Czech Republic, Article 97, which defines subject-matter of control of CZSCO, ought to state: "(1) CZSCO is an independent body which controls a) management with property of state and means provided by state from abroad, b) incomes and expenses of state budget, state final account and incomes with expenses of state funds, c) management with property of territorial self-governing units and incomes with expenses of their budgets from the viewpoint of correspondence with law, d) management with property of corporations of public law nature, where the law states so, all that in the extent set by law."⁴⁰ Connected

40 Amendment of Constitution of the Czech Republic, chamber print no. 352, VI. election term, available at http://www.psp.cz/sqw/tisky.sqw?F=H&PT=U&dx=1&o=6&na=&T=351&ZA=&f_N=on&f_I=on&f_U=on&f_S=on&f_Z=on&f_P=on&f_R=on&f_V=on&f_O=on&ra=20 (date of access 11. 11. 2011)

government draft bill of amendment of Act on CZSCO then repeats Article 97 (a) – (c) Constitution in amended wording of its s. 3 and it confirms and defines corporations of public law nature whose management is supposed to be subject to CZSCO's control competence in set extent. (1) CZSCO controls a) management with property of state and with means provided to state from abroad, b) incomes and expenses of state budget, state final account including final accounts of chapters of state budget, and incomes and expenses of state funds, c) management with property of territorial self-governing units incomes and expenses of their budgets from the viewpoint of accordance with law, d) management with property of corporations of public law nature if they are 1. health insurance companies, 2. public research institutions, 3. voluntary associations of municipalities, 4. benefits organizations or territorial self-governing units, 5. Regional councils of regions in cohesion, 6. Czech Television, 7. Czech Radio, 8. Public universities, 9. Czech National Bank. (2) When performing control under sub-section 1 from the perspectives mentioned there, it is also possible to control a) public orders, b) concession contracts and concession proceedings, c) security for obligations, d) management with bonds, e) management with means provided from abroad.”⁴¹

Under draft amendment wording of Article 97 (1) Constitution, the control competence of CZSCO would newly cover even management of municipalities and regions including financial means which are a part of municipal and regional budgets, not only management with means from state budget (as it is now under currently effective legal regulation).

Under proposed regulation, CZSCO would have the right to perform its control competence not only as to management with property of state and fulfillment of basic financial plan of state but also in relation to property of other corporations of public law nature. Draft regulation thus in this regard reflects principle of decentralization which is obvious in democratic states (or in other words, it reflects existence of other bodies of Public Administration different from state, differentiation of state administration and other Public Administration) and it adapts control competence of CZSCO to legitimate need to review other public management than the state one, as well.

Autonomy of territorial self-governing units is constitutionally guaranteed and Constitutional Court regards it as a part of substantive requisites of democratic legally consistent state under Article 9 (2) Constitution. State may

41 Amendment of Act on CZSCO, chamber print no. 352, VI. election term, available at http://www.psp.cz/sqw/tisky.sqw?F=H&PT=U&dx=1&o=6&na=&T=352&ZA=&f_N=on&f_I=on&f_U=on&f_S=on&f_Z=on&f_P=on&f_R=on&f_V=on&f_O=on&ra=20 (date of access 11. 11. 2011).

only interfere with activity of territorial self-governing units if the law says so (formal condition) and if a protection of law is concerned (material condition) (Art. 101 (4) Constitution of the Czech Republic). Proposed regulation is probably not in contradiction with constitutional guarantee of right of territorial self-governing units to self-government. Formal condition (manner set forth by law) would thus be satisfied by amendment of Constitution and connected amendment on Act on CZSCO. Material condition (if the protection of law requires so) is thus probably also fulfilled because this control of CZSCO observes if rules set forth by Act no. 128/2000 Coll., on municipalities, Act no. 129/2000 Coll., on regions and Act no. 131/2000 Coll., on capital town of Prague, are upheld. Proposed constitutional and legislative change is one of the instruments to reach balance of public budgets and transparency of management with public finances which is a goal which became even more imminent with the economic crisis.

If control of CZSCO is carried out in legal limits and in accordance with constitutional principles, especially principle of proportionality, then it will not be an unlawful interference with territorial self-government, which might be successfully contested before Constitutional Court by means of “communal complaint” under Article 87 (1) (c) Constitution, or s. 72 (1) (b) Act on Constitutional Court.⁴²

Not even the current government draft bill counts with extension of CZSCO's control competence to business corporations with property participation of state or territorial self-governing unit and totally not to subjects whose management consists of personal participation of state or territorial self-governing unit.⁴³ Where the state property or property of territorial self-governing unit transforms into the property of private subject, competence of CZSCO would not be given even under amendment of the law because *de iure*, it is not a management with property of state or property of territorial self-governing unit. If the state or territorial self-governing unit create e.g. stock company or limited liability company, they put their public property in typically private law subject. If subsequently the state or territorial self-governing unit are the only or majority stock-holder or partner, such private law company is actually filled (fully or in majority) by public contents. *De iure* in the moment of putting the property of state or territorial self-governing unit in property of business corporation, this property ceases to be public property and it becomes the property of this business corporation, *de facto* however, it

42 Act no. 182/1993 Coll., o Constitutional Court, as amended.

43 Comp. s. 104 BHO and s. 126b (2 B-VG, s. 127 (3 B-VG, s. 127a (3 B-VG.

still is management with public property.⁴⁴ This fact is reflected in the above mentioned foreign legal regulations. Nevertheless, the Czech law-giver omits that in both in effective and proposed regulation.

44 Comp. HAVLAN, P. *Majetek obcí a krajů v platné právní úpravě*, Praha, Linde, 2004, p. 63–64.

Models of democratic governance and their influence on Public Administration

From the perspective of political science, it is interesting to observe the fact that politics and mainly comparative politics omit the issue of state, or respectively, public administration to a large extent. Political scientists ordinarily end their analyses at top constitutional institutions like government, parliament, and top judicial bodies. Subsequently, they are interested in bodies of self-government which represent an expression of democracy on lower, regularly on local, level. The view of constitutional lawyers is similar, they leave primarily the area of state administration to experts in administrative law, or respectively Public Administration, and furthermore they have the tendency to perceive mainly the legal regulation and relations covered by it which leads to them missing non-legal facts which have great impact on functioning of the whole system. Relations between politicians and Public Administration are actually very important and furthermore, well-functioning Public Administration is one of the indicators of well-functioning political system.

What happens if the Public Administration does not function? For instance, corruption expands. As a consequence, high level of corruption leads to rejection of politics (anti-politics) and it may only be a nutrient soil for radical and extreme political movements.

G. Sartori sees three reasons for growth of corruption:

1. Extinction of ethics, primarily ethics of “public service”.
2. Amount of money surrounding politics (including the extent of means distributed by Public Administration.)
3. Costs of political activity have grown immensely.¹

From the perspective of Public Administration, points 1 and 2 are especially important. Cure is the task for politicians who are in a complicated situation – they themselves are in temptation and suspicion of corruption, they are very often its cause and concurrently, they should resolve corruption. Obligingness of Public Administration is extremely important for the citizen along with an endeavor to resolve matters in an effective, quick and positive manner. But politicians are in a hard situation because distrust towards politics leads to rejection of politics², and to an effort to cut them off from an opportunity to resolve, e.g. personal discrepancies in Public Administration.

1 SARTORI, Giovanni. Srovnávací ústavní inženýrství: Zkoumání struktur, podnětů a výsledků. p. 152

2 ibidem, p. 153

It is very difficult to legally regulate politics but to politically regulate Public Administration is not easy, too. Official apparatus should fulfill several contradicting conditions which may be summed up as criteria of expertise, ideology, character and party/supra-party affiliation.

- Expert qualification is undoubtedly important.
- Political ideology of official persons plays its role, too, because it has an influence on interpretation of law and the level initiative of individual officials in realization of certain public politics.
- Character of officials has an influence on how they act towards citizens but also how they are immune against corruption.
- Party affiliation has an impact on position and strength of concrete political parties.³

Behavior of officials is then formed by following factors:

1. *Manner of their admission and remuneration.*
2. *Their personal character features, e.g. their social origin, economic position and political opinions.*
3. *Nature of work they do.* (It is demonstrated that officials usually get recognized with agenda of their office more than governmental politics – e.g. provision of social benefits, protection of environment etc.)
4. *Limits given to administrative bodies operating within them externally, i.e. by political superiors, law-givers, interest groups and journalists.*⁴

It is worth noting that regulation through law and giving tasks by politicians is only one of many influential factors.

Two principles thus conflict in Public Administration: The need for stability and expertise of apparatus on one hand, and need for its motivations, efficiency and obligingness to implement public policies on the other hand.

Stability of Public Administration

An important argument for stability of Public Administration is its expertise. It may be presumed that requirements will be gradually higher in this respect and expert decision-making may get out of democratic (i.e. amateur) control more and more frequently due to this reason.⁵

Different view on a politician and state official depends on different approach and conception of “guilt”. Politicians are usually forced to resignation or they are not repeatedly elected simply, because they are unpopular, because

3 WILSON, James. Q. *Jak se vládne v USA*. p. 192

4 *ibidem*, p. 195

5 SARTORI, Giovanni. *Teória demokracie*. p. 432-435

they are little involved, or sometimes even because of totally indefinite suspicions of corruption. Summarily, we might say that politicians are viewed from the perspective of “presumption of guilt”. It is presumed that their temptation to corruption is higher, that their tendencies to get involved in illegal activities are stronger and that it is only favorable for politicians to stay in their functions temporarily, leaving after one or maximally several election terms. It is demonstrated that long-term clinging on power strengthens inter-connection of politicians with economic sphere, mafia, but also with official apparatus.

Except of this, the apparatus of Public Administration enjoys a high level of stability and certainty, despite the fact that it is often ineffective, unhelpful, and generally, it has a lot of dishonesties which cannot be adequately caught by established internal and external control mechanisms. It is not very courageous to state that cases of found and adjudicated corruption in Public Administration are only a top of an iceberg equally to politics, although stability and long-term staying in functions are emphasized with respect to officials because fear of getting and consolidating “inappropriate” contacts are totally minimal in comparison to politicians.

In connection with this, career system of state service is defended, as it should be less dependent on political power⁶, but for example in Austria, where this system has been introduced, so-called partitocracy, consisting of interconnection with political parties among others, could not be prevented. There is a joke, which is not a joke, that “even a cleaning lady at state school must have a party membership card”, 33% of electors’ population were politically organized.⁷ As a consequence of applying so-called principle of proportionality which is typical for so-called consociational democracies, not only mandates are disproportionately assigned but the same occurs also with respect to positions at lower administrative levels (including positions in industrial businesses and banks).⁸ The most significant example of government of parties, i.e. partitocracy, was Italy during 1st republic (1945-1993).⁹ But problems may occur even in countries with much freer relation to career system. British state service is based on merit system. Although it was designated as “significant holder of democracy of British system”, reality proved that it is a feature which is actually beyond democratic control and it has its own life”.¹⁰

6 TRYKAR, Luděk. *Služební poměr státních zaměstnanců*. p. 18

7 KLÍMA, Michal. *Volby a politické strany v moderních demokraciích*. p. 22

8 ŘÍCHOVÁ, Blanka. *Komparace politických systémů*. II. p. 149-150

9 Partitocracy means that “parties become a decisive source of distribution of means of power and material property with respective clientelism and orientation to immediate group and corporative interests”. ŘÍCHOVÁ, Blanka. *Komparace politických systémů : Západoevropské politické systémy*. p. 76

10 DVORÁKOVÁ, Vladimíra. *Komparace politických systémů : Základní modely demokratických*

Problem of relation of an official to governing political power

Official must decide whether to be loyal to all political subjects or to the one subject (coalition) which is actually governing. In case of loyalty to everyone involved, they have to deal with issues of informing opposition – these issues are usually very sensitive, and officials who treat everyone equally, are in suspicion of insufficient loyalty and obstruction of efforts to implement majority politics chosen by citizens in elections. In relation to opposition, they typically have to deal with question, such as:

Should I provide the opposition with only demanded factual information?

May the official make alternatives for opposition?

*Should they warn the majority party on actions of opposition they found out about?*¹¹

Additionally, they may be accused of lack of enthusiasm and initiative when implementing orders and requirements of parties which were given a mandate in elections to realize certain type of politics. For instance, state advisory committee of local self-government of Conservative Party declared that many officials “attempted to prevent the new practice of chosen political leaders and they created tension in their offices...they were not capable of acknowledging that requirements of performing power by elected leaders must be fulfilled”.¹²

In Britain, the phenomenon mentioned above was a consequence of growing political tension on 70's along with the growth of ideological distance between both main political streams – labor and conservative. In the very polarized regimes, this question is resolved even more radically. An example of very polarized society, where a decision on personal change of officials was made, was Spain. In Franco Spain, in February 1939 there was so-called Act on political liability passed which led to all employees of republican state administration being removed or fired.¹³ And contrarily, in the course of democratization in 2nd half of 70's, it was necessary to somehow secure the change of apparatus of Public Administration including separation of politics and administration. These spheres were linked within the framework of Franco National movement up to that moment, which was a colossus, party non-party where all society was supposed to be dissolved. Within the framework

systémů, p. 23

11 CHAPMAN, Richard A ed. *Etika ve veřejné službě pro nové tisíciletí*. p. 39

12 BROOKE, Rodney. *Management Aspects of Widdicombe*, Local Government Studies, Vol. 12, No. 6, November/December 1986, cited in accordance with CHAPMAN, Richard A ed. *Etika ve veřejné službě pro nové tisíciletí*. p. 39

13 ŘÍCHOVÁ, Blanka. *Komparace politických systémů*. II. p. 171

of political and social reforms, large amount of employees of public institutions were fired, then, which was partially caused by their redundancy (e.g. giant Franco unions etc.), but also the need to get rid of those disloyal to the new regime (or potentially disloyal persons), however, their leaving was connected with a lot better conditions under the new circumstances (pension, compensation etc.).

For non-democratic regime, this model, i.e. absolute interconnection and non-separation, is one of possible models, the second one is the “double-track” model where certain functions are performed by administrative apparatus but concurrently, the same areas are interfered with by party bodies – however, they have no formal rules and regularly, no responsibility, too (this approach was characteristic for communist regimes in eastern Europe, as well as fascist regimes). Contrarily, democratic regimes try to separate both spheres, although the extent may vary a lot. Mentioned examples of partitocracy (= government of parties) in Austria and Italy show one extreme pole in a very manifold spectrum.

However, an opposite example may occur, too – officials serving to actual “master” without any scruples. In the situations mentioned above, they are highly demanded. In Great Britain, a term of “can do official” became usual. It is not possible to deny that officials fulfilling any political task without hesitation allow for much better implementation of chosen policies by political set. One British consultation company expressed this fact in following words: “No advice can be successful, if it does not have co-operating and inventing officials which turn politics into practice and create documents which will secure the set goals in the best way. ...”¹⁴

It is probably not possible to eliminate certain level of interconnection, but the question is, how big it is. In USA, there are approximately 3% of state employees appointed “politically” – highest officials around cabinet and “ministers”, persons linked to state secrets and managers duty-bound to secure implementation of political will in respective institutions. But even they are purportedly frustrated by the fact that they cannot force their “politically independent” inferiors to implement public policies. It becomes visible, that American officials are actually a lot more liberal in average (which in American terminology means “more left-wing”) than the electorate average, and significantly more left-wing than what presidential elections results show.¹⁵

14 YOUNG, Artur. *The Artur Young Councillor's Handbook*, London : Harrap, 1986. s. 127-128, cited in accordance with CHAPMAN, Richard A ed. *Etika ve veřejné službě pro nové tisíciletí*. p. 40

15 WILSON, James. Q. *Jak se vládne v USA*. p. 196-198

Attempts for generalization

It may be deduced that problems of both types will be less significant where there are little ideological distances between parties and where their mutual behavior towards each other does not lead to ethical doubts. Such systems will most likely be the systems of so-called depoliticized democracy whose society is not segmented and political elites co-operate with each other (Austria), or consociational democracies whose societies are significantly segmented but this is compensated by tradition of collaboration of political elites and consensual politics (Switzerland, Belgium). But there is a threat of cartelization of political parties system, here (see further). Likewise, it has been demonstrated that relations between politicians and officials in systems of concurrency democracy worked well, if the ideological differences between parties were not too big. That is an example of Great Britain until 70's when the ideological scissors of British politics opened more than usual in preceding decades.¹⁶ Similarly, it may be presumed that in many states of USA, where the fight between republicans and democrats is more of a fight for power than fight of political ideologies, the official apparatus may work without problems under rule of various parties.

Future problems

Professionalization of politics.

Nowadays, parties are often parties of so-called "catch-all-party" party, which requires certain program definition in the first place. It is therefore positive that these parties principally cannot sharply ideologically define themselves. However, these parties also change their organizational structure at the same time. Members and activists are not that important as professional apparatus. These people are usually awarded with functions in Public Administration after elections with ambitions to stay there even after the end of election term – firstly, they increase the influence of party on administration, and furthermore, the party does not have to pay them from their sources. Therefore, they operate in gray zone between politics and administration and they try to benefit from this position.

16 BROOKE, Rodney. *Management Aspects of Widdicombe*, Local Government Studies, Vol. 12, No. 6, November/December 1986, cited in accordance with CHAPMAN, Richard A ed. *Etika ve veřejné službě pro nové tisíciletí*. p. 39

Cartels of parties

In some European countries, so-called cartels of parties were created. These cartels are characterized e.g. with limiting entrance of other parties into political competition, from our point of view, the attempt to connect to public sphere is interesting – not only from the perspective of financing parties by state, but also for the reason of colonization of Public Administration – i.e. so-called traffic for party members, parceling out the public sphere and connecting to economic sphere. Cartel parties gradually lose their internal sources for operation of party organization and for running the election campaign – *organized membership, formal structure of the party and close connection to electorate seems as ... burden... Compensation – external sources – are found with the state in the form of state grants and access to public law media... Parties get to be more and more distant from everyday problems of citizens and at the same time, they interconnect with the state.*¹⁷

Plurality a multiculturalism of society

Further problems are caused by the effort to include individual minorities into personal structure of Public Administration. There is a danger of particularization of society here – positions are appointed in accordance with various groups in society (quotas of women, racial quotas, religion quotas – criteria may sometimes actually copy party systems and they are not based on objective and retrospectively controllable factors). The extent of pluralism of western societies is getting bigger, however, pluralism cannot be extended indefinitely, otherwise an atomization of society will take place, this applies even more to party systems.¹⁸ Multiculturalism regards differences as beneficial and even creating identity of their holders – and in this sense, the aggressive (or activist) multiculturalism¹⁹ may be a big problem because in Public Administration, representatives of minorities may be considered as their representatives more than impartial officials.

The meaning of representation of minorities is not only their equality because they are also the “antennae” of respective minorities in the apparatus of Public Administration; the same applies to representatives of political parties – they know what is being prepared, in what phase, and they can impact discussions and results of implementation of individual policies. In systems

17 KLÍMA, Michal. *Volby a politické strany v moderních demokraciích*. p. 58, 62

18 SARTORI, Giovanni. *Pluralismus, multikulturalismus a přistěhovanci: Esej o multietnické společnosti*. p. 42

19 *Ibidem*, p. 43

of consociational democracies (Switzerland, Netherlands, Belgium), the principle of *proportionality* is a legitimate and necessary aspect of political culture. In a certain sense, it is possible to say that this “consociational” aspect is legitimate in every democracy, notwithstanding if it is related to representatives of political parties or individual minorities and with continuing pluralization and multiculturalization of society, it will be more and more important, irrespective of the fact that it causes risk for independence of Public Administration.

On possibilities of simplifying administrative proceedings in matters under Article 6 of the Convention for the Protection of Fundamental Rights and Freedoms

If the law entrusts decision-making in cases under Art. 6 (1) Convention for the Protection of Fundamental Rights and Freedoms, i.e. in cases of civil rights and obligations and criminal charges to primary decision-making of administrative bodies who do not have the nature of independent and impartial tribunal, it does not mean itself that Convention was violated. Nevertheless, in the proceedings on the level of administrative bodies, there cannot be procedural guarantees of right to a fair trial under Convention provided therefore it is necessary that these cases in certain phase may be heard by a court where the required guarantees shall be secured. That may be realized by transfer of authorities to courts in order for them to decide newly in discovery proceedings or by establishing authority of the court to review decision of an administrative body and proceedings before this court in so-called full jurisdiction, i.e. with an option to conduct prospective new legal and factual assessment of the case independently on findings of administrative bodies including an option to substitute administrative discretion by court's discretion.

Convention imposes a requirement that matters under Art. 6 are heard by a court at least in one procedural instance. Special requirement is set in criminal matters, because there must be a possible review on the basis of an appeal to court of a higher instance, as it may be deduced from Art. 2 (1) Protocol no. 7 to Convention. However, there is a possible exception out of this requirement under Art. 2 (2) in case of "less serious crimes". The question of seriousness of crimes is usually evaluated in accordance with the possible punishment especially if punishment of depriving one's personal liberty comes into mind.¹ Therefore we need not to doubt that in case of administrative delinquencies under Czech law, which have a character of criminal charge under Art. 6 Convention but do not lead to sanctions depriving one's personal liberty but only to sanctions principally affecting the property and sometimes banning certain activity, the Convention's requirement of right to appeal to court of a higher instance does not apply.

Securing correspondence of national legal order with requirement of procedural guarantees under Convention contrary to the state which did not correspond with these requirements is possible by *additions, extensions of new procedural guarantees to already existing procedural institutes* sometimes even

1 Case Grecu v. Romania, judgment dated 30. 11. 2006, no. 75101/01.

expanding over the framework of the Convention itself or by *new regulation of all procedures of hearing cases* under Art. 6 Convention, i.e. not only the regulation of court hearings but also prospective new or other conceptions of proceedings before administrative bodies if it is necessary at all that administrative bodies hear such cases.

The Czech regulation chose the first path to add and extend procedural guarantees without substantially interfering with the concept of administrative proceedings. Traditional two instance administrative proceedings on the basis of full appeal principle was kept in a practically unchanged shape even after establishment, or in other words, renewal of administrative judiciary after the Charter of fundamental rights and freedoms² had been passed by amendment of civil procedure code carried out by Act no. 519/1991 Coll. It was supplemented with an option to file a lawsuit with the court (against final administrative decisions, after all ordinary remedies in administrative proceedings were exhausted) or with so-called remedy measure which was admissible in cases where special law gave courts authority to decide on remedies against non-final decisions of administrative bodies, i.e. principally after one instance of proceedings before administrative body. Proceedings in administrative judiciary had one instance with the exception of pension security and pension insurance,³ against the decisions of regional or higher courts (previously the highest courts of federation and republics) deciding in administrative judiciary, there was no ordinary or extraordinary remedy admissible. Even this was one of the arguments, although more of a marginal nature, for later annulment of fifth part of civil procedure code on administrative judiciary.⁴

Court protection of subjective rights of individuals against administrative acts, conducted by Act no. 150/2002 Coll., Code of Administrative Justice, embedding an option to seek protection of subjective public rights and Act no. 151/2002 Coll., related to introduction of court decision-making in cases of private law where an administrative body decided before, i.e. embedding the new fifth part of civil procedure code, meant provision of further procedural guarantees. In cases of a decision on subjective public rights, they consisted mainly in an option of the then created Supreme Administrative Court to review final decisions of regional courts deciding in administrative justice, i.e. creating a new procedural instance. And furthermore, in an option of regional courts to decide in complaints against decisions of administrative

2 Comp. especially Art. 36 (2).

3 Comp. s. 250s (2) Civil Procedure Code in its wording amended by Act no. 519/1991 Coll.

4 Judgment of the Constitutional Court file no. Pl. ÚS 16/99 dated 27. 6. 2001.

bodies in broader context, so-called full jurisdiction which was expressed in possibilities to discover evidence and evaluate the newly discovered factual background, in cases of administrative sanctioning further with moderation of the extent of imposed sanction. In private law cases then, it was the possibility of civil courts to newly decide a case in which a decision was previously rendered in administrative proceedings where in court proceedings, there may be first instance, appellate and cassation proceedings taking place. Because *introduction of these new procedural guarantees by options of court proceedings was not interconnected with the change of system of two-instance administrative proceedings* and not even the later Administrative Procedure Code no. 500/2004 Coll. changed nothing on this principle, the procedural model reached a point that where with exceptions, a case may be heard in four instances in cases of public law (two before administrative bodies, the regional court and Supreme Administrative Court), in cases of private law in five instances (two before administrative bodies, district court, regional court⁵ and Supreme Court). Constitutionality of decision-making of these public bodies is further kept an eye on by the Constitutional Court therefore we may speak of this another instance of procedural guarantee.

The newly established authority of Public Defender of Rights to file a complaint against decision of an administrative body if she proves that there is a public interest in its filing⁶ may be regarded as further extension of procedural guarantees. Bearing the knowledge of local environment in mind, there is a fear whether the institute of Public Defender of Rights which is supposed to operate mainly due to her natural, informal authority, does not shift to different spheres where those interested in initiating court proceedings who do not initiate it themselves for a whole lot of reasons will demand the Public Defender of Rights to do so. It is not clear, what limitations of serious public interest the Public Defender creates along with subsequent court case-law, nevertheless further legal procedures may be expected in connection with this.⁷

Creating so many procedural instances of public bodies, firstly at the level of administrative bodies, subsequently at the level of courts, certainly makes the system of formally sufficient procedural guarantees of protecting rights

5 In cases of registering rights to immovable property under s. 249 (2) Civil Procedure Code, in the first instance regional courts, higher courts are appellate bodies.

6 S. 66 (3) Code of Administrative Justice, in its wording effective since. 1. 2012.

7 Supreme Public Prosecutor which is authorized to file a complaint against a decision of an administrative body under s. 66 (2) Code of Administrative Justice, but contrarily to Public Defender of Rights, it is not obliged to prove serious public interest in submitting this complaint because it is a matter of its discretion.

of individuals against prospectively defective acts of administration. To a significant extent, this system is complicated, long, ineffective. Additionally, this system creates prerequisites for certain looking for excuses and fear of liability of persons which decide as these may rely on the fact that in majority of cases, there will be one more body hearing the case on another procedural instance. As a consequence, it is a system which does not help the right to have a case decided in a reasonable period of time and principle of legal certainty. *Addition of further and further procedural guarantees, if it is not connected with revision of existing procedural system, needs not to be a feature of modern administration and modern legally consistent state.*

However, it is worth a thought if it is really necessary in cases falling within the scope of Art. 6 (1) Convention for a two-instance administrative proceedings to take place before initiation of prospective court proceedings. It is true that there are exceptions where administrative proceedings are of one-instance nature and further decision-making occurs in the courts line. An example is the decision-making in cases of registering rights to immovable property,⁸ decision-making on not approving an agreement on giving immovable property over under Act on regulation of property relations to soil and other agriculture property, on ownership of a person entitled to the immovable property or on annulment of servitude or imposition of a different measure.⁹ In these cases – even in not fully clear transitional provisions where in accordance with the previous regulation, there was a remedy possible against non-final decision of an administrative body (land registry or estate office) to file with courts under third head of fifth part of Civil Procedure Code in its wording effective until 31. 12. 2002 – it is possible to submit a complaint under fifth part of Civil Procedure Code in its wording effective until even after first instance instance of administrative proceedings. Act on expropriation (Act no. 183/2006 Coll.) causes interpretation troubles because its s. 28 (1) provides that in expropriation proceedings which is to be heard in civil court proceedings, a regional court is competent in the first instance and in accordance with paragraph 2, the complaint in which a party to the proceedings demands the expropriation case to be heard in civil court proceedings,

8 Comp. s. 5 (4) Act no. 265/1992 Coll., on registering ownership and other material rights to immovable property in connection with Art. XXV, point 1. Act no. 151/2002 Coll., which amends certain laws in connection with adoption of Code of Administrative Justice.

9 Comp. s. 9 (3) (4) (5) and (6) Act no. 229/1991 Coll., on regulation of ownership relations to soil and other agriculture property in connection with Art. XXV, point 1. Act no. 151/2002 Coll., which amends certain laws in connection with adoption of Code of Administrative Justice.

must be filed in 30 days from finality of the decision of expropriation body. It is possible to seek hearing of the expropriation case even after decision of expropriation body in the first instance or it is admissible (and for the initiation of court proceedings even procedurally necessary) for the decision of expropriation body in the first instance to be reviewed in appellate administrative proceedings (I share this opinion because general option of appeal under s. 81 (1) Administrative Procedure Code was not ruled out by expropriation law)?

Thoughts on whether hearing cases of administrative sanctioning in matters of criminal charge under Convention is appropriate to be subject to one instance of proceedings before administrative body and subsequently, to another phase conducted before independent and impartial body of court type as Art. 6 (1) Convention presumes, will certainly be part of new regulation of administrative sanctioning which may be expected.

Prospective limitation of a number of instances obviously requires a thought on which level should such proceedings be held on since expert decision-making in cases under s. 6 Convention would be hard to safeguard with respect to bodies which are less personally equipped. In cases of administrative sanctioning, it would thus be necessary to assess in this connection, if it is really necessary for such a quantity of administrative bodies performing materially state administration in defined area to have an authority to hear administrative delinquencies committed in this area and if it would not be more appropriate to concentrate hearing administrative delinquencies only before certain administrative bodies specialized in such activity.

Respecting procedural requirements of Art. 6 Convention on hearing cases mentioned therein should lead a decision on merits not principally having legal effects before a court decides (finally) in the case. In such cases, court complaint should therefore have suspensory effect, in cases of administrative sanctioning where the court proceedings are started, a defendant should presumed not guilty although, as it is today, she has been finally found guilty, or in other words, liable for administrative delinquency. Act no. 200/1990 Coll., on misdemeanors, partially attempted to react already in 1990, as under its s. 83 (4) "if the party to the proceedings who filed an application for reviewing decision on misdemeanor ask for suspending enforcement of the decision, administrative body shall grant this request".¹⁰ Although this provision has a meaning only for prospective compelling enforcement of decision in relation to verdicts of administrative body imposing a duty to fulfill, it is a mistake that there is no such rule generally even in case of decisions on other administra-

¹⁰ In the effective wording of Act on misdemeanors, this provision is in s. 83 (2).

tive delinquencies. Equally, we may mention s. 28 (3) Act on expropriation under which the complaint lead to suspension of finality and enforceability of decision of expropriation of office. Even though this provision has a problematic wording from the procedural perspective as the same purpose would be satisfied by “suspension of enforceability”, we should think of the same effect of complaint even in case of contesting different administrative decisions in cases under s. 6 Convention. In my opinion, regulation where suspensory effect of the complaint is attributed under specific qualified conditions by court only,¹¹ does not satisfy the sense of Art. 6 Convention in the mentioned cases, especially if the right to such hearing is called for by a person affected by administrative decision.

It follows that the issue of securing procedural guarantees in cases of civil obligations and criminal charges cannot be assessed in an isolated way only from the viewpoint of procedural codes in cases where the law entrusts decision-making on such matters primarily to administrative bodies and after their decision, it allows court hearing, because it even requires a revision of system of proceedings before administrative bodies, especially it requires to assess in how many instances should such proceedings be heard and how the transfer from the regime of decision-making before administrative bodies to the regime of court proceedings ought to be interconnected.

11 Comp. s. 73 (2) Code of Administrative Justice, s. 248 (2) Code of Civil Procedure.

Expert and specialized opinions in administrative and tax proceedings

In current practice of court review of administrative decision, expert and specialized opinion are more and more a part of reviewed proceedings and also a part of administrative court proceedings. In my practice, it is the agenda of pensions or benefits for care in reviewing health state and connected working ability or self-sufficiency and agenda of misdemeanors, so far always related to traffic accidents or alcohol in breath.

My paper is not related to on-going legislative works on new act on experts and interpreters and not even its current amendment, mainly the question of appointing experts, linked administrative proceedings, their liability etc. I dealt with certain questions of reviewing medical status in a different paper to which I refer¹ (it concerned mainly benefits for care where appellate administrative bodies required opinions of opinion-making committees of Ministry of labor and social affairs as a binding opinion and therefore, they rejected to include them in any way into the standard free assessment of evidence; subsequently, administrative court annulled the contested decisions).

New or old-new questions, which show up, include primarily the following. How is the amendment of s. 127 Civil Procedure Code (Act no. 99/1963 Coll., hereinafter “CPC”), which is to be adequately by an administrative court, reflect in practice? Since 1st September 2011, the effective wording of s. 127 (1) CPC is *“if the decision is dependent on assessment of facts requiring expert knowledge, the court shall demand a specialized statement by a body of public power. If due to the complexity of the assessed question such step is not sufficient, the court appoints an expert. The court shall hear the expert; expert may be obliged to make the opinion in written form. If more experts are appointed, they may submit an opinion made together. Instead of hearing the witness, the court may be satisfied with written opinion of an expert in reasoned cases. Under s. 127 (2) CPC, if there is doubt on correctness of opinion or if the opinion is unclear or incomplete, it is necessary to ask the expert for explanation. If it has not led to a result, the court may have expert opinion examined by different expert. Under s. 127 (3) CPC in extraordinary, particularly hard cases, requiring special scientific assessment, the court may appoint state body, scientific institution, university or an institution specialized in expert activity to submit expert opinion or review an*

1 Paper in Collection of papers from the conference of Trnava University Law Faculty: Administrative Judiciary and its development aspects held on March 7 – 8 2011 named Review of medical status in administrative courts

opinion submitted by an expert. The goal of this amendment was more effective and more economic using of expert opinions in civil court proceedings, unification of regulation with criminal proceedings and elimination of priority of expert institutions under Act on experts and interpreters. It is question whether such bodies exist which will be capable of answer to expert questions of courts and whether courts will know about them. This amendment led to not only civil court proceedings but also administrative court proceedings (possible to state in great detail) corresponding with administrative proceedings.² From this point of view, it is a question why in new Tax Procedure Code (“TPC”), there is no such provision. Current wording of s. 95 TPC actually does not give the tax administrator a possibility to seek expert statements from different public power body, they have to have expert knowledge either themselves or they must appoint an expert.³ However, the lastly mentioned provision responds to a different question (earlier controversial, sometimes): Does it always make sense to require expert opinion in proceedings on transfer of immovable property tax in way prescribed by s. 21 (3) Act no. 357/1992 Coll., on heritage tax, donation tax and transfer of immovable property tax? Administrator of tax, e.g. with respect to lands, garages or other similar constructions usually has expert knowledge in order to conclude the purchase price is higher than the one determined by expert opinion in certain cases or with high level of probability. Additionally, in accordance with certain authors’ opinion (Milík, Valjentová), filling in the price from tables or price maps when evaluating immovable property, is actually not an expert activity.⁴ In my opinion, there are cases where administrator of tax may release the tax payer from their duty in certain undoubted cases (especially those described above). But the practice clearly does not correspond with that.

2 under s. 56 Administrative Procedure Code (hereinafter “APC”), where a decision depends upon considering facts which require specialist knowledge not possessed by officials, and where it is impossible to obtain a specialist consideration of facts from another administrative body, the respective administrative body shall, by resolution, appoint a sworn expert. The resolution shall be notified only to the expert. Participants in proceedings shall be informed, in a proper manner, of the intention of the administrative body to appoint, or of the appointment of, the expert. The administrative shall request that the expert produce his report in writing and submit it within time limit determined by the administrative body. The administrative body may also subject the expert to interrogation.

3 Under s. 95 (1) TPC, administrator of tax may appoint an expert to prove facts decisive for correct finding and determination of tax, a) if the decision depends on assessment of questions requiring specialist knowledge not possessed by administrator of tax or b) if the tax subject does not submit expert opinion despite an invitation by administrator of tax, although the law obliges them to do so.

4 citation sub 13, especially p. 244 et seq.

During evaluating the possibility of using expertise, a question is usually asked on how to deal with two fully contradicting opinions. In my opinion, it is necessary to assess the matter materially and if possible, to examine whether concrete relevant arguments and discrepancies exist. However, such approach does not correspond with traditional case-law resulting primarily from the civil law branch.⁵

Part of administrative case-law (this is especially noticeable in the agenda of social security including disability pension) copies this approach to a large extent⁶ Contrarily, when reviewing construction proceedings, there was a decision made in a different manner with respect to different character of proceedings.⁷ Only closer and detailed examination might indicate whether the case-law of all administrative courts is harmonic. With respect to the legal regulation of expert law whose imperfection has been denied for a number of years on one hand but also with respect to diversity of administrative law and individual kinds of administrative proceedings on the other hand, such unequivocal conclusion cannot be expected.

In administrative judiciary, Supreme Administrative Court addressed the issue of more contradicting opinions in its judgment dated 30. 10. 2009, file no. 7 Afs 26/2008-69 (all other cited decision of Supreme Administrative Court are available at) stating that *“opinion of State Agriculture and Nutrition Inspection (SANI) used in this particular matter was made within the framework of authority given to SANI by cited law. Its use in tax proceedings is not precluded by anything because under s. 31 (4) Act on administration of*

5 We may refer to diploma thesis of L. Křístek, citation sub 12, where case-law of Supreme Court contradiction the case-law of Constitutional Court is cited.

6 Similarly, it is possible to refer to judgment of Regional Court in Ostrava dated 5. 4. 2006, no. 22 Ca 354/2004-49 (judgments of regional courts are published on website of Supreme Administrative Court or they are obtainable on the basis of application under Act no. 106/1999 Coll.), in case of medical opinion, which is applicable even to administrative proceedings, under which “assessments [of courts] are not subject to expert specialist opinions in the sense of their correctness because judges do not have expert knowledge for that. *The court evaluates only the persuasiveness of expert opinion as to its completeness in relation to the given task, logical order of expert opinion and its correspondence with other discovered evidence*”.

7 In accordance with the judgment of Regional Court in Brno dated 25. 10. 2007, no. 30 Ca 258/2005 - 37), no. 1579/2008 Coll. SAC (www.nssoud.cz), *“if the construction body does not agree with conclusions of expert opinion submitted by a party to the proceedings, in its decision, it must sufficiently and comprehensibly interpret where the conclusions of expert opinion do not correspond with factual execution of the construction and where the conclusions of expert opinion do not correspond with requirements set by legal regulations. Contrary to the conclusions resulting from expert opinion, the administrative body must also submit its own and fully concrete evaluation on whether the public interest was fulfilled (here the correspondence with an interest on protection against fire) even by using different expert opinion.”*

taxes and fees, as means of evidence it is possible to use all means which may verify the fact decisive for correct determination of tax duty and which are not obtained in contradiction with generally binding legal regulations. It concerns mainly various applications of tax subjects (admission, announcement, answers to tax administrator's invitations etc.), witness testimonies and expert opinions, public documents, reports on tax controls, protocols and official records on local investigation and examination, obligatory records managed by tax subjects and documents related to them etc. (...). Individual facts decisive for tax proceedings are proved within the framework of evidentiary proceedings. Conducted evidentiary proceedings then verify which of the presented means of evidence has really become evidence. It is thus not decisive whether an opinion designated as expert of specialized one is concerned, what is important is the merits of it, who made it and what was the purpose of it being made."

Under a different decision, contradictions between two expert opinions may be clarified using confrontation of experts in court or administrative proceedings.⁸

- 8 Comp. judgment of Supreme Administrative Court dated 24. 10. 2007, no. 1 Afs 42/2007 – 53, under which “the fact that customs duty technical laboratories [s. 3 (4) (j) Act no. 185/2004 Coll., on customs duty administration of the Czech Republic] are a part of organization structure of customs duty administration, does not in itself lower the evidence value of opinion made by them. However, opinions made by customs duty technical laboratories may not be used as means of evidence with higher evidence power than expert opinions, not even in case that expert opinions were submitted in customs duty proceedings by importer to prove facts mentioned in customs duty declaration (delivery of imported goods and following rate classification) in the sense of s. 31 (9) Act no. 337/1992 Coll., on administration of taxes and fees. Opinion made by customs duty technical laboratory is thus only one of more possibilities of evidence and it may be contested by different means of evidence.” In this case, the facts were that “in customs duty proceedings, there were two contradicting but equal means of evidence – expert opinions. There was a discrepancy between authors of opinions, Ing. P. and Customs Duty technical laboratory Prague in the question on composition of imported goods and methods used to analyze samples. Resolution of disputed questions may have impacted the rate classification and eventually even the amount of customs duty in customs duty proceedings. In such case under s. 31 (2) Tax Procedure Code, it is the defendant's task to eliminate discrepancies and to reason which means of evidence prevails and which not. It was actually necessary to evaluate if conducted evidence activity is sufficient without regard to evidence proposals of the complainant. That obviously does not mean that customs duty bodies bear burden of evidence in full extent. In customs duty proceedings, the burden of evidence is on complainant in the extent reflecting its statement. If the complaint secured an expert opinion to support their statements, it was up to the customs duty bodies to either rebut the statement constituting a conclusion of the expert opinion (using the means of evidence of equal power of evidence) or to regard the factual background evidenced by complainant as determined for the purposes of decision-making on amount of customs duty ... With the statements of expert Ing. P. dated 28. 4. 2005, which was submitted by complainant to defendant after they used an option to get to know analysis of Customs duty technical laboratory Prague, were only partially dealt with by the defendant. They did reason

Supreme Administrative Court addressed the proportionality of using expert opinions and the issue if expert opinion is obligatory evidence in judgment dated 28. 1. 2009, file no. 8 As 40/2008-170: “Evidence by expert opinion cannot be construed as obligatory evidence because such evidence would be appropriate only if the decision would be dependent on assessing facts where expert knowledge not at the disposal of administrative body are required” (the case was about land registry which was not bound to discover evidence by expert opinion because “question which is supposed to be answered by expert opinion falls within the scope of competence of administrative body”).

Similar question is whether an expert opinion provided by complainant is non-objective. An option for it to be a part of proceedings (notwithstanding if administrative or administrative court one) was not rejected by case-law of administrative courts.⁹

the inconclusiveness of sensor analysis and unsubstantiated nature of objecting microbial degradation of goods but they did not make any statement regarding other objections connected to evaluation of results of analysis made in laboratory. Contrarily, they states that complainant did not specify “what do they follow by submitted evidence (statement of expert dated 28. 4.2005)”. However, such evaluation of expert’s statement of 28. 4. 2005 cannot hold its own. Statement of expert presented by complainant casts doubt on evaluation of results of analyses conducted by Customs Duty Technical Laboratory Prague. Formally taken, it is not a submission of evidence but a supplementation of evidence means submitted earlier – the very expert’s opinion. In the instant customs duty proceedings, there really was an ongoing need to continue in taking evidence and thus we may conclude, that the main reason for which the regional court annulled decision of defendant was fulfilled. It worth adding that the way of elimination these discrepancies which was described in the decision of regional court, i.e. making “independent” expert opinion regarding the methods used in laboratory analyses conducted by customs duty technical laboratories is not the only option. Even with respect to what has been mentioned above about analyses carried out by customs duty technical laboratories as means of evidence, there is another step coming into consideration within the framework of which the defendant eliminates discrepancies between expert statements by mutual confrontation of expert Ing. P. and competent worker of Customs Duty Technical Laboratories Prague if such conduct is sufficient. The fact that regional court did not adhere to supplementation of evidence although such conduct is allowed for by s. 77 (2) Code of Administrative Justice does not change anything in the matter. Because the defects in evidence were of vast character, regional court ordered the defendant to eliminate them”

- 9 E.g. in accordance with the judgment of Supreme Administrative Court dated 27. 10. 2004, no. 3 Ads 3/2004-89, “in order to make an opinion on medical status and working ability of a citizen in proceedings on reviewing decision on termination of disability pensions, opinion-making committee of Ministry of Labor and Social Affairs is principally competent under s. 4 (2) Act no. 582/1991 Coll., on organization and implementation of social security, in its wording effective from 1. 1. 1998. If an expert provides their opinion on ability of continuous wage-earning activity, although it is an expert from respective area and area of health, their opinion might be significant for the decision made by court only if they were in contradiction with facts found by opinion-making committee.”

To what extent may the court evaluate opinion and conclusions of the expert? Expert opinion is one of the evidence and therefore the court must evaluate it equally to any other evidence. In judgment of the Constitutional Court, file no. III. ÚS 299/06 it is fittingly noted *“Expert opinion must be evaluated with care equal to any other evidence, it does not enjoy higher evidence power and it must be subject to full test of not only legal rightness but also material correctness. It is necessary even the whole process of making expert opinion including the preparation of expert analysis, securing bases for expert, the course of expert analysis, credibility of theoretical starting points by which the expert reasons its conclusions, reliability of methods used by an expert and the way of drawing expert’s conclusions. Leaving the material correctness of expert opinion unnoticed and blindly believing conclusions of an expert would as a consequence mean to deny the principle of free assessment of evidence by court in accordance with their inner belief, to privilege expert opinion and to transfer responsibility for factual correctness of court decision-making to expert; such conduct cannot be accepted from the constitutional law point of view.”* We have to vindicate the conclusion of prof. Jan Musil that solving questions of evaluating expert opinions is very complicated and that it will never be definitely finished.¹⁰

We may generally state that with growing development of health law in the Czech Republic, there is a grown need of opinions in health system, too. Likewise we may add that with growing material concept of court review of administrative decisions and fair trial, the significance of specialized opinions grows. It has been repeatedly mentioned in the past couple of years, that expert law is neglected.^{11,12,13} On the other hand, in the past couple of years, we may observe expressions of dissatisfaction with using evidence in the form of expert opinions, especially with their overuse and incorrect use.^{14,15}

Further, see case-law of Regional Court in Ostrava – branch in Olomouc (e.g. judgment file no. 72 Ad 52/2011 and others).

- 10 Prof. JUDr. Jan MUSIL, CSc., Constitutional Court of the Czech Republic: Hodnocení znaleckého posudku. Journal Kriminálnístika 3/2010. Available at <http://www.mvcr.cz/clanek/hodnoceni-znaleckeho-posudku.aspx>.
- 11 In Prof. Ivo Telec: Právní postavení znalců a tlumočnicků. Journal Právní rádce 21. 10. 2009. Available at <http://pravnicradce.ihned.cz/c1-38730880-pravni-postaveni-znalcu-a-tlumocniku>
- 12 Diploma thesis of Mgr. Ing. Lukáše Křístka: Význam znalecké činnosti v procesech aplikace práva. Charles University, Faculty of Law. Made on 6. 2. 2009. Available at http://is.cuni.cz/studium/dipl_st/index.php
- 13 Milík Tichý, Mila Valjentová. Experti a expertízy. Linde Praha. 2011. ISBN 978-80-7201-823-9
- 14 E.g. Tomáš Sokol: Justice v rukou znalců. 20. 1. 2009 Available at <http://www.epravo.cz/top/clanky/justice-v-rukou-znalcu-55464.html>; Kateřina Mahdalová: Ombudsman: Soudní znalci ničí lidské životy. Praha 14. 11. 2007. Source: <http://ihned.cz/>
- 15 Prof. Jan Musil: Převyprávění sporu soudních znalců. Published in Právo and novinky.cz 18. 2. 2011. Available at <http://www.policie.cz/clanek/prevypraveni-sporu-soudnich-znalcu.aspx>

Another very actual question is whether to appoint experts in the area of disability pensions. In accordance with certain opinions, it is not possible because the only competent bodies to determine disability are opinion-making committees of Ministry of Labor and Social Affairs.¹⁶ Trust in opinion-making committees of the state is in my experience very low. Therefore, there are expert opinions or motions for their making in the mentioned type of proceedings appearing more and more often and for this evidence, what was mentioned above applies including citations of case-law and therefore they cannot be fully excluded from the administrative court proceedings. Especially because they fully cover issues of medicine science.

Contrarily, in different types of administrative court proceedings whose subject-matter are not purely expert issue, some decisions made various different statements of the question of using expert opinions. In the same, Regional Court in Ostrava and subsequently Supreme Administrative Court came to the conclusion that regular judicial experience and knowledge suffices for evaluation of certain factual questions. In this case, customs duty proceedings were concerned and the question was whether tobacco is usable for smoking. Courts deduced that such evidence may be carried out by the judge in court room and it is evidence gained by examination.¹⁷ After all, this sophisticated legal opinion corresponds with the doctrine described by Jan

16 S. 4 (2) Act no. 582/1991 Sb., on organization and implementation of social security

17 I. Experts are used in administrative or court proceedings in order to observe facts whose cognition requires special expert knowledge on one hand and to draw expert conclusions (opinions) from such observations on the other hand, too. However, expert are not used in order to tell the body or to court what their opinions and conclusions are on questions of legal nature or questions whose correct understanding and solution does not require expert knowledge or skills, but general judicial experience and knowledge suffices with respect to the nature of circumstances of the case. In administrative proceedings, it also applies that expert is not used in cases where the administrative body has necessary expert knowledge or if they can secure expert assessment of respective facts by different administrative body (comp. s. 56 Administrative Procedure Code from 2004).

II. Test of smoking tobacco product in cigarette cavity has the form of evidence by examination (s. 38 Administrative Procedure Code 1967, s. 54 Administrative Procedure Code 2004). This test allows finding out whether final consumer is capable of filling the cigarette cavity with tobacco product without complicated manipulation, fire it and inhale created smoke. It is also an evidence of whether the tobacco product fluently smoulders even if inhalation is interrupted. By conducting the mentioned test, it is possible to eliminate the discrepancy in expert opinions if they are related to factual possibility of using the tobacco for smoking. Discovering these fact is necessary for making a conclusion that a tobacco for smoking is concerned in the sense of s. 101 (3) (c) Act no. 353/2003 Coll., on consumer taxes. In accordance with the judgment of Supreme Administrative Court dated 12. 5. 2010, no. 1 Afs 71/2009-113, www.nssoud.cz.

Převrátil on the blog “Jiné právo” where he cites “one of local judges” in whose opinion the indicative test “*ask my wife*” may be used in certain cases.¹⁸

Under administrative courts’ case-law, revision opinion are necessary after discrepancies of two or more expert opinions were not eliminated by testimony of an expert or experts or by their confrontation.¹⁹ Disagreement of the party to the proceedings themselves is not a reason to make revision opinion.²⁰

On specific question: Even in administrative court proceedings or already in the administrative proceedings, there might be issues of foreign law present. For instance in cases file no. 76A 7/2011 and 76A 2/2010 before Regional Court in Ostrava – branch in Olomouc, a question of delivering under Polish law arose. As the court found out, there is no international treaty on delivering between administrative bodies of both countries, or in other words, on delivering administrative written documents abroad and using the justice co-operation through Ministry of Justice, legal regulation was ascertained and used. In my opinion, administrative body may proceed this way, too. The way of ascertainment must be clear, reviewable and traceable. Therefore, it is not necessary to appoint an expert in the area of legal relations to foreign countries. As to 4th December 2011, there were four expert inscribed in the list of experts. The same opinion (in the time of internet) is shared by prof. Ivo Telec.²¹

18 Proč je ČR státem soudních znalců? 16. 4. 2008Sourcej: [http:// jinepravo.blogspot.com/2008/04/pro-je-r-sttem-soudnch-znalc.html](http://jinepravo.blogspot.com/2008/04/pro-je-r-sttem-soudnch-znalc.html)

19 “If in the same case administrator of tax has differing expert opinions, they are not authorized to consider themselves which of the opinions shall be used for decisive factual findings and which not. Contrarily, they are bound to eliminate their mutual discrepancies and inconsistencies, all that primarily by hearing the expert or both experts respectively. If these testimonies would not lead to clarification of resulting uncertainties, it would be appropriate to use another expert analysis or revision expert analysis.” In accordance with the judgment of Supreme Administrative Court dated 1. 7. 2010, no. 7 Afs 50/2010-60, č. 2138/2010 Sb. NSS

20 Disagreement of a party to the proceedings itself with the conclusions of expert opinion is not a reason for making a revision expert opinion. Judicial practice uses revision expert opinions (s. 127 (2) CPC) only in cases that in a given case, there are more differing expert opinions or in case a party to the proceedings submits an expert opinion made by an expert outside the proceedings as an evidence where conclusions of this expert opinion, used as evidence by document. Are inconsistent with the conclusions of an expert appointed by court. In accordance with the judgment of Supreme Administrative Court dated 6. 8. 2008, no. 3 Ads 20/2008-141

21 Prof. Ivo Telec: otázka znaleckého oboru právní vztahy k cizině. Journal Právní rádce. 23. 2. 2011. Available at <http://pravniRadce.ihned.cz/c1-50635020-otazka-znaleckeho-oboru-pravni-vztahy-k-cizine-sup-1-sup>.

In prof. Telec's opinion, expert is an official body.²² If a specific person wants to apply their subjective public right to participate in administrative of public matters by being an expert, this right may be subject to review in administrative courts.²³ In constitutional law light, prof. Telec regards the expert and interpreting activity as performance of constitutionally guaranteed public subjective economic right to do business and perform other economic activity under s. 26 (1) Charter of Fundamental Rights and Freedoms.

One of few works on expert and specialized opinions not only in the area of legal discipline is the publication "Experti a expertízy" by authors M. Tichý and M. Valjentová.²⁴ In their opinion, experts often do not participate in decision-making but they offer their opinion as a starting point for decision-makers, but sometimes the expert becomes a decision-maker unintentionally.²⁵ From the perspective of theory, distinguishing experts and meta-experts is interesting. Meta-expert is an expert in expertise (analyst who organizes expert team, accredited psychologist which precludes appointment of a lawyer to judicial function, musical critic, but not self-proclaimed critic). Meta-expertness is an ability to direct, organize, analyze and interpret performance of experts (sometimes in spite of the fact, that the evaluator does not master respective area). The demonstration of meta-expertness is not judging performances of other people without at least indicating where they made mistake. We may classify opponents of dissertation theses, technical supervisors in constructions, controllers of quality, regulator who wrote and adopted a law etc. here. Meta-expert is able to evaluate the course of expertise and quality and standard of conclusions. The demonstrations of an expert are opponent and lecturing opinions and opinions on diploma, habilitation and dissertation works. The oldest regulated expert team is the court jury. In accordance with authors, the problem of expert opinions belongs to the area of court and forensic engineering.²⁶

22 cit. sub 11

23 From this point of view, it is possible to deduce that Supreme Administrative Court decided in the case of appeal of presiding state prosecutor correctly (that is that is a case for administrative judiciary, not of labor law); after all the opinion of prof. Telec is in accordance with the judgment of Supreme Administrative Court dated 4. 2. 2004, no. 6 A 57/2002-61, no. 188/04 Coll. SAC ("Decision of minister of justice on dismissal of expert under s. 20 Act no. 36/1967 Sb., on experts and interpreters, represent authoritative decision of a body of state administration which has influence on existing subjective rights and duties of that particular person. Therefore such decision is subject to judicial review in administrative judiciary.")

24 Milík Tichý, Mila Valjentová. *Experti a expertízy*. Linde Praha. 2011. ISBN 978-80-7201-823-9

25 citation sub 24, p. 76 -77 of the publication

26 citation sub 24, p. 237

In accordance with Milík and Valjentová, expertise is always aimed at obtaining grounds for decision, expertise looks like a research task but it is not because it lacks the creative aspect, it only analyses facts. Expertise must result from the rules of human relations in society, i.e. it must be in accordance with good morals, principles of fair business relation, it must treat the parties of relation equally, discrimination is not acceptable, transparency and a possibility of controlling all relations between subjects is necessary. Common feature of expert opinions in a narrower sense is a concrete problem – the expertise is a binding basis, then. In a broader sense, resolving a problem is concerned, clarification of collection of facts.²⁷ There are three problems shared by all expert opinions: reliability, quality, and evidence value. Expertise is always based on imperfect cognition of fact. If we came to know the fact perfectly, we would not need expert opinions, therefore expertise is always estimation. Authors refer to expert opinions in criminal area and they cite prof. Jan Musil and his work “Kriminalistika” (C.H. Beck. 2nd edition of 2004), under which in USA, there were many attempts to influence the jury with expert opinions bases on probability solution. Result of this was a faulty interpretation favorable or unfavorable for the defendant and judgments supported by these expert opinions were mostly annulled (the referred source is Mlodinow: *The Drunkard’s Walk. How Randomness Rules Our Lives.* Vintage Books, Random House. New York 2004. 252 p.).

Milík and Valjentová see problems of expertise in objects and subjects which face the dangers of expert opinions: they are parties to expert opinions (ordering party, author, expert analyst, expert team as a whole, individual experts), decision-maker (if they are not the same with ordering party), target persons of decision-making and third persons and then it is the expertise itself, it faces a risk; only estimations of prices of immovable property in accordance with tables are in their substance unproblematic.²⁸

In the conclusion, the mentioned authors indicate to noteworthy analysis of expert’s responsibility (in *D’Appolinia E.D., Shaw D.E. Erel B. Engineer’s Liability in Dam Inspection Structural Safety 1982/1*, p. 27-51), under which salaries of experts do not correspond with the risk that experts face.²⁹

In Milík’s and Valjentová’s opinion, the success of expertise is conditioned by three basic pre-requisites: experts following their own interest under responsibility from the viewpoint of decisions which are to be made on the basis of their opinion and the ordering party observes the course of work and

27 citation sub 24, p. 144

28 citation sub 24, p. 244

29 citation sub 24, p. 246-249

provides assistance and it also has at least a partial mechanism of control and verification of the result. There are more additional conditions coming into mind depending on the nature of case. Generally, objectively successful expertise gives answers to given questions, it fulfilled the task order. Objective failure is the fact that expertise could not be made, conclusions are vague or ambiguous or the expertise did not provide answers to some of the questions of ordering party. Objective failure may be caused by insufficient order, insufficient communication of ordering party and author, lack of needed information, technical problems, inability of the analyst to direct expert team, sickness of expert, analyst, dissolution of team, exhaustion of financial support, manipulation with the course of making the expertise. Subjective failure of expertise is found if the expertise did not satisfy the interest of ordering party because it rebutted their original opinion, supported opinion of a different person or due to other reasons. Unforeseen eventuality may be the concern of third persons who were not concerned originally. The cause of subjective failure may be unwillingness of ordering party to perceive an opinion different from theirs, inability of ordering party or third persons to understand conclusion or their contents.³⁰

For completeness, I add practical experience where expert opinions were used in proceedings on crime of tax evasion (“for an employee”) when the opinion of expert set the harm caused to state by not paying tax in the amount of 400.000 CZK to 40.000 CZK and since it was paid, criminality of the act passed.

Practice of administrative bodies I encountered in a number of reviewed cases led to opinions submitted in administrative proceedings by certain complainant to be rejected by administrative bodies for not being credible³¹ (from the adjudicated cases, it results that the it was caused by them being ordered by complainant). This approach corresponds with civil literature which is in contradiction with administrative and constitutional case-law.

Last but not least: who is going to pay for all this and what about the ping-pong in administrative judiciary? Judicialization of administrative decision-making and overusing expert opinions is linked to the acute issue of finances both in administrative and financially undervalued court area. The second point of view is the running of time periods for passing of liability for misdemeanors or preclusive time periods. They do not run during court proceed-

30 citation sub 24, p. 250–251

31 E.g. cases heard before Regional Court in Ostrava – branch in Olomouc under file no. 76 A 4/2010 (alcohol in breath) and file no. 76 A 9/2010 (accident of two motor vehicles). Both cases were not decided in cassation proceedings at the time of writing this paper, yet.

ings although the administrative body needs not to meet the one year period in some complicated misdemeanor proceedings. Then it is necessary to answer the question whether it is compulsory to punish the defendant charged with misdemeanor under all circumstances, what is the role of proportionality principle, fair trial and also the principle *in dubio pro reo*. Or whether not to accept less paternalistic solution and leave private law problems from the area of recovery of damage to existing civil law regulations or to introduce fully different regimes or to change legal regulation (e.g. leave an activity in the process to more affected persons and also leave the duty of evidence including making expert opinions in a larger extent to them).

Now, I provide a little bit of comparison.³² Although in accordance with certain opinions, it is not possible to compare incomparable system (e.g. Central European and Anglo-American), it results from scientific comparisons that gradual globalization leads to approximation of procedure in administrative law and not only that it is possible to mutually inspire ourselves but such evolution is inevitable.³³ Catherine Donnelly points out that in the USA, expert opinions are significantly relied on, court decisions are legitimized through expert opinions and judges practically invite to their use. In European Union, there is an army of expert groups which may lead to democratic deficit and the question who decides. European courts do not impose the duty to use expert opinions unless this duty is set forth by law, but in spite of that, rights of parties to proceedings cannot be violated and the importance of expert opinions grows. In Great Britain, courts are reluctant to order administrative bodies to consult the matter outside the scope of division of power and they are skeptical towards expert opinions, they prefer to see that all interests are carefully balanced. However, under pressure of the European Union, even there they will have to increase interest for expert opinions, especially with respect to the precautionary principle.

In the conclusion, I refer to the citation of prof. Jan Musil,³⁴ that expert is a magnifying glass in the hands of a judge. But should the judge not attempt to see without magnifier or not take it without forethought? Progressive case-law

32 Catherine Donnelly: Participation and Expertise: Judicial Attitudes in Comparative Perspective. In Susan Rose-Ackerman and Peter L. Lindseth: Comparative Administrative Law. Edward Elgar Publishing 2011. ISBN 978-1-84844-642-7. p. 357 – 372

33 For more see Giacinto della Cananea: Administrative Law in Europe: A Historical and Comparative Perspective. p. 169 et seq. (http://www.ijpl.eu/assets/files/pdf/2009_volume_2/Cananea_Administrative_Law_Europe.pdf)

34 Bonnier, E.: Traité théorique et pratique des preuves en droit civil et en droit criminel, T. I., Paris 1873, p. 124, cited in accordance with Musil, J.: Některé otázky znaleckého dokazování v trestním řízení a teorie kriminalistické expertizy. Acta Universitatis Carolinae, Juridica 1974, Monographia XX – Praha 1974, p. 12

of administrative courts and Constitutional Court hints that. Equally, court practice should not negatively influence administrative practice not even by incorrect or senseless or absurd using of expert and specialized opinions, all that in any of the directions mentioned above (theory overusing or under-using, nearly unwanted or inappropriate interference with the work of experts). Certainly, sufficient education of officials and judges in expert law plays its role in this point along with their rational, complex and realistic approach.

Again, I will not refrain from citing prof. Javiera Barnes, who said that administrative law of third generation means to find the best solution.³⁵ I will also use the reaction of JUDr. Kateřina Šimáčková – and do we know, what is the best solution? My answer is: We must look for it.

35 Prof. Javier Barnes: *Towards a Third Generation of Administrative Procedure* in Susan Rose-Ackerman and Peter L. Lindseth: *Comparative Administrative Law*. ISBN 978-1-84844-642-7, Edward Elgar Publishing Limited 2011

Conduct of land registry bodies during inscription of legal real burden and so-called public law limitations of ownership

The task of land registry bodies, i.e. land registry administrations and land registry offices founded by Act no. 162/1995 Coll., on land registry and on inscription of ownership and other rights to immovable property as local bodies of state administration in the branch of land registry, is to secure administration of land registry as coherent information system on immovable property which includes data necessary for using and protecting immovable property.

Inscription of rights to immovable property on the basis of contracts, public documents and other documents falls within the scope of land registry competency as first instance body of local state administration..

This paper is partially a reaction to a paper published in “Justičná revue” named “Verejnoprávne obmedzenie vlastníckeho práva a tzv. zákonné (legálne) vecné bremená” (eng. *Public law limitations of ownership right and so-called legal real burdens*).¹ In the mentioned article, author deals with the issue of regulating real burdens in civil code and further with so-called legal real burdens under Act on energetics² and under Act on telecommunications³ and regulation of so-called public law limitations of ownership rights. He also raises the question of their inscription in land registry.

The second reason of thinking about this issue is a particular example from practice gained within the framework of prosecution’s competence in non-criminal out-of-court area.

Office of geodetics, cartography and land registry of the Slovak Republic addressed all Slovak land registries with a demand to examine a list of cases where on the basis of water pipeline or canalization operator, a “legal real burden” was registered. Simultaneously, this central body of state administration asked for realization of steps necessary for changing such inscription of so-called legal real burden in the sense of s. 20 (1) Act on water pipelines⁴. Demand results from the statement that inscription of respective real burden to land registry operate was made in spite of the fact that rights and duties towards immovable property of someone else in the sense of s. 20 (1) Act on

1 Justičná revue, no.12/2006, year 58, p. 1837 – 1851, Mgr. Jakub Handrlica, Verejnoprávne obmedzenie vlastníckeho práva a tzv. zákonné (legálne) vecné bremená

2 Act no. 656/2004 Coll., on energetics

3 Act no. 610/2003 Coll., on electronic communications

4 Act no. 442/2002 Coll. on public water pipelines and public canalizations and on amendment and supplementation of Act no. 276/2001 Coll., on regulation in network areas

water pipelines do not have the character of real burden and that real burden may only be registered on the basis of a contract on real burden concluded between the owner of property and operator of public water pipeline or public canalization. In case of origination of real burden on the basis of law, it is necessary that the lawmaker expressly characterizes certain limitations of an owner as real burden.

I quote the wording of s. 20 (1) Act on water pipelines: Operator is authorized

a) to enter someone else's property in an inevitable extent in connection with projecting, establishing, reconstruction, modernization or for the purpose of reparation and maintenance of public water pipeline or public canalization and their protection zones, water pipeline and canalization connections including necessary control and protection devices and support and marking points,

b) to eliminate and remove branches of trees and other vegetation in the inevitable extent, if they endanger security and reliability of operation of public water pipeline or public canalization including necessary control and protection devices and support and marking points, if it has not been done by owner of the property, its administrator or use after preceding invitation where special laws remain unaffected, 12/

c) to place orientation signs on immovable property which must be maintained in proper state.

Subsequently, I intend to point out to reasoning report to cited provision of law which states that *limitations of owner of immovable property under s. 20 have direct effect on the basis of law and therefore, it is not necessary for them to be registered in land registry but only record of legal real burden suffices.*

Comparing the wording of law and reasoning report leads to the conclusion that in this particular case, not even the lawmaker succeeded at unambiguous classification of contents of immovable property owner limitations either among legal real burdens or among so-called public law limitations of ownership rights.

With respect to this ambiguity in interpretation of cited provision of law which had its reflection in particular steps of land registry bodies, prosecution bodes were asked by competent land registry bodies to make a statement on whether the content of mentioned provision of law is a limitation of ownership right which have a character of real burden and they are registered in land registry by means of record based on public or a different document, or whether origination of real burden requires conclusion of a contract which is subject to registration in land registry.

The statement was made by General Prosecution of the Slovak Republic (VI/3 Gd 228/10 dated 1.12.2010). It was based on the private law nature of real burdens whose general legal regulation is included in provisions s. 151n to § 151r Civil Code⁵ and in accordance with which, real burdens limit the owner of immovable property in favor of someone else by obliging them to tolerate something, refrain from something or to do something. Rights corresponding with real burdens are connected either with ownership of certain immovable property or they belong to certain person. Real burdens connected with ownership of the immovable property are transferred with the ownership of property to the transferee. (s. 151n (1),(2) Civil Code).

Under provision s. 151o (1) Civil Code, real burdens originate by a written contract, on the basis of testament in connection with the results of inheritance proceedings, approved agreement of heirs, decision of competent body or by virtue of law. Right corresponding to real burden might also be acquired by performing a right (prescription), provisions of s. 134 apply analogically here. In order to acquire right corresponding with real burdens, inscription in land registry is necessary.

In the already mentioned statement of General Prosecution of SR, it is further stated: So-called *public law limitations of ownership rights* have to be distinguished from real burdens because they represent a complex of rights and duties which result directly from the wording of respective legal regulation having public law nature. Contrarily to private law character of rights and duties arising out of real burdens, public law limitations of ownership rights express public interest in performing certain activities. As far as these public law limitations are concerned, rights resulting from them actually are not attributed in favor of specific but only generically determined persons (e.g. geodesist under Act on geodetics and cartography,⁶ administrator of water course under Act on waters,⁷ operator of water pipeline or public canalization under Act on public water pipelines and public canalizations.⁸) Another circumstance distinguishing public law limitations of ownership rights from real burdens is the fact that *only real burdens are registered in land registry*.

We may only regard public law limitations of ownership rights which are expressly designated as real burdens in respective laws creating them as real burdens. Rights and duties resulting from the wording of s. 17 (4), s. 18 (4) and s. 20 (1) Act no. 442/2002 Coll., on public law water pipelines and public

5 Act no. 40/1964 Coll., as amended

6 S. 14 and s. 16 Act no. 215/1995 Coll., on geodetics and cartography

7 S. 49 Act no. 364/2004 Coll., on waters

8 S. 18 (4), s. 20 (1) Act no.442/2002 Coll., on public water pipelines and public canalizations

law canalizations, do not have a character of legal real burden and they are not registered by means of record in land registry.

On the basis of this statement, prosecutors filed protests against records of real burden realized under s. 20 (1) Act no. 442/2002 Coll., on public water pipelines and canalizations.

Prosecutors of district prosecutions in Prešov region submitted a total of 93 such protests to competent administrations of land registry. Protests of prosecutor were filed with indication that in these matters, there were no reasons for inscription in land registry by means of record.

Under provision s. 34 (1) first sentence Land Registry Act⁹, rights to immovable property mentioned in s. 1 (1) which were originated, changed or terminated on the basis of law, decision of state body, decision of auctioneer in public auction, prescription, addition and working, rights to immovable property verified by notary as well as rights to immovable property resulting from rent contracts, contract for transfer of administration of state property or due to different facts attesting authority to administer municipality property or property of higher territorial unit, are *registered in the land registry by means of record*.

Protest of a prosecutor as means of supervision of prosecutor in non-criminal out-of-courts area is generally regulated in s. 22 et seq. Act on prosecution.¹⁰ It may be given on the basis of three various provisions of Act on prosecution (s. 25, s. 26 and s. 27) depending on the legal act contested by protest..

From the viewpoint of prosecution, legal acts of Public Administration bodies which are reviewed by prosecutor within the framework of performing prosecutor's supervision over the activity of Public Administration bodies might be classified in three groups:

1. generally binding legal regulations issued by bodies of Public Administration,
2. measures issued by bodies of Public Administration,
3. decisions made in individual matters in the area of Public Administration.

Record in land registry is classified in the category of measures issued by bodies of Public Administration. In this connection, I refer to conception of the term of measure in s. 21 (1) (a) point 2. Act on prosecution. It is actually used as legislative abbreviation for various acts demonstratively mentioned in the law on one hand, but on the other hand, it is mentioned in demonstra-

⁹ Act no. 162/1995 Coll., on land registry

¹⁰ Act no. 153/2001 Coll., on prosecution, as amended

tive enumeration as one of the kinds of these measures (directives, decisions, regulations, measures and other legal acts of Public Administration bodies issued to secure fulfillment of Public Administration's tasks).

Protest against a measure is regulated in provisions s. 26 Act on prosecution in connection with provision s. 21 (1) (a) point 2. cited law. It may be filed against such acts of Public Administration which cannot be classified among generally binding legal regulations and not among decisions of Public Administration body issued in individual case in the area of Public Administration performance, too.

Protests filed against inscriptions in land registry by means of record in the sense of s. 20 (1) Act no. 442/2002 Coll., on public water pipelines and public canalizations primarily pointed out violation of provision s. 34 (1) Act on land registry, and last but not least, it was stated in them that opinion made in reasoning report to Act on public water pipelines and public canalizations on whether a legal real burden is concerned is without legal relevance because it is not reflected in normative text of the law.

Ultimately, it was highlighted in the protests that general demand for correspondence of decisions and measures of administrative bodies with laws is put even on measures. It results from the principle of legality, i.e. that public power bodies must act and decide on the basis of law and within its extent. It is a demonstration of principle of legality in the application of law.

In all cases of protests submitted against records of so-called real burden under s. 20 Act on public water pipelines and public canalizations, competent administration of land registry or superior Land Registry Office ruled in favor of these measures of prosecutor and therefore, concretely found cases of unlawful records were remedied by submission of protests of prosecutors and their acceptance by bodies of land registry.

Among others, the statement of General Prosecution of SR mentioned above points out the fact that issue distinguishing legal real burdens and so-called public law limitations of ownership right *was not strictly upheld even by the lawgiver*.

It may be demonstrated by reference to wording of other special law. They are e.g. a wording of s. 10 (1) and (5) Act on energetics¹¹ and s. 69 (1) and (2) Act on electronic communications¹².

Regulation similar to Act on public water pipelines and public canalizations is included in Act on electronic communications (s. 69 (1) (a), (b), (c)

11 Act no. 656/2004 Coll., on energetics

12 Act no. 610/2003 Coll., on electronic communications

Act no. 610/2003 Coll.), where this law in the provision s. 69 (2) expressly states that duties corresponding with rights under section 1 are *real burdens resting on immovable property concerned and application for making a record in land registry shall be submitted by the business.*

It is similar in Act on energetics. In provision s. 10 (1), there are measures mentioned which may be performed by holder of permit or a person authorized by them in public interest. They are e.g. authority to:

a) to enter property, building or facility of someone else in the extent and way inevitable for performing authorized activity,

b) to eliminate and remove branches of trees and other vegetation, if they endanger security and reliability of operation of energy facility, if it has not been done by owner of the property, its administrator or lessee (hereinafter “owner”) after preceding invitation to do so, the written invitation must be delivered to the owner at least three months before planned removal of trees and the extent and way of performing these activities must be agreed upon in advance by the holder of permit,

c) to enter lands or buildings where special telecommunications devices are located (s. 3 (1) Act no. 610/2003 Coll., on electronic communications, in the extent and way inevitable for performing permitted activity,

d) to set up electric line and electro-energy facility of transfer and distribution system and gas pipelines (s. 139 (3) Act no. 50/1976 Coll.) and gas facility of transfer and distribution system, container or facility for their protection or preventing their defect or accident or mitigation of consequences of defects or accidents to protection of life, health and property of persons on lands of someone else except of build-up area of a municipality (s. 139a (8) Act no. 50/1976 Coll., on territorial planning and construction procedure code, as amended), when permitting such construction, the construction body decides on conditions for realization and operation of the construction of someone else’s land, rights of constructor to realize the construction originate by finality of such decision.

In accordance with paragraph 5 of the mentioned legal provisions, *duties corresponding with authorities under paragraph one are real burdens (s. 151n - 151p Civil Code) connected with ownership of the immovable property. Application for making a record in land registry may be submitted by holder of permit (s. 34 and 35 Act no. 162/1995 Coll., on land registry and on inscription of ownership and other rights to immovable property, as amended). Owner of the immovable property is entitled to proportionate one-time compensation. Compensation will be provided for the extent in which an owner is limited in*

use of immovable property as a consequence of legal real burden by holder of permit. If the holder of permit and owner of immovable property do not agree otherwise, compensation shall be determined by expert opinion. Costs of this expert opinion shall be paid by holder of permit. Time periods for applying the claim for proportionate one-time compensation are equal to time periods set in paragraph 3.

This special law directly refers to respective provisions of Civil Code (as to real burdens) and Act on land registry (as to inscription in land registry). Concurrently, this special regulation gives owner of immovable property who is limited in its regular use as a consequence of interferences with their immovable property a right to require proportionate one-time compensation for creation of real burden.

Under this law, rights corresponding with real burdens belong to the holder of permit and if there is a personal change of holder of the permit, rights corresponding with real burdens are transferred to new holder of permit.

It follows from the mentioned documentation of legal regulations in force and effect in Slovak Republic that effective legal regulation ambiguously solves the issue of legal real burdens and so-called legal limitations of ownership rights.

The same rights and duties corresponding with them are in some cases classified as legal real burdens created on the basis of law and their existence is kept a record of, but sometimes as to the merits, they are the same rights and duties corresponding with them which are regarded as limitations of ownership rights on the basis of law which do not have a nature of real burdens and they are not kept a record of in land registry.

As a consequence of existing legal regulation, so-called legal limitations of ownership rights e.g. under Act on public water pipelines and public canalizations are unlawfully registered in land registry by means of record as legal real burden.

In its substance, this legal limitation of ownership rights actually corresponds with legal regulation of so-called legal real burdens under different special laws (e.g. Act on energetics, Act on electronic communications) which include express wording that they are legal real burdens which are registered in the land registry by means of record on the upon as application of authorized subject.

Practical result is the fact that substantially the same limitations of ownership in the sense of certain legal regulations are regarded as real burdens (and as a consequence of that, they are registered in the land registry by means of

record) and sometimes, these limitations are regarded as public law limitations of ownership whose existence is not indicated anyhow in the land registry.

I reckon that in this direction, there ought to be a unified legal regulation guaranteeing equal position for subjects entitled from certain limitation of ownership as well as subjects who are bound to tolerate limitation of their ownership.

Providers of social services in the context of social services reform as a significant part of Public Administration's social area

Introduction

Many kinds of procedures take place in the Public Administration.¹ On the basis of expert literature, they are mainly procedures in the area of law-making activity of Public Administration, procedures in the directing and organizational activity of Public Administration, procedures in planning and education activity. One of these procedures is so-called procedure in the area of individual decision-making activity of Public Administration, it is also described as a procedure in a classic, i.e. in a narrow sense, because its result is an issuing of individual administrative act – decision as so-called act of application of law. It is this very procedure which amounts to so-called administrative proceeding in a classical sense.² From the perspective of administrative law norms realization, it is so-called indirect form of realization of these norms – so-called application of administrative law norms. In this case, administrative body enters into the realization of administrative law norm. Therefore an administrative law norm gets realized through administrative body's activity.³

In my paper, I focus on the very procedure in the area of individual decision-making activity of Public Administration, i.e. administrative proceedings – but a specific, separate one, namely so-called proceedings in the matters of social services, particularly so-called proceedings on dependence on social service which are regulated in s. 92 – s. 93 Act no. 448/2008 Coll., on social services and on amendment and supplementation of Act no. 455/1991 Coll., on licensed trading (Trade Licensing Act), as amended⁴, where it is a proceeding, which in the sense of the mentioned legal regulation, is a part of the procedure on provision or securing provision of social service to a person dependent on social service.⁵

1 Author's footnote.

2 Comp.: KIOVSKÁ, M. and col.: *Procesy vo verejnej správe*, Košice: Rektorát Univerzity P. J. Šafárika v Košiciach, 1993, p. 6-9.

3 Comp.: ŠKULTÉTY, P. and col.: *Správne právo hmotné – Všeobecná a osobitná časť*, Šamorín: Heuréka, 2002, p. 49.

4 hereinafter Act no. 448/2008 Coll., as amended.

5 Author's footnote.

As far as these proceedings are concerned, I describe their course including emphasis on their specifics, I point out their significant changes introduced by one of the last amendments to Act no. 448/2008 Coll., as amended, and I give an idea on other important connections set forth by this law within the framework of steps of municipalities and higher territorial units in provision and securing provision of social service to a person dependent on social service. In the paper, I primarily focus on persons which are so-called persons dependent on help of another person and in certain connections also on persons who reached retirement age.⁶ From the viewpoint of social service kinds, I focus on so-called social services resolving unfavorable social situation caused by serious health impairment, unfavorable health status or by reaching retirement age which consist of provision of social service in a facility for persons which are dependent on another person's help and for persons who reached retirement age.⁷ With respect to the form of this kind of social service, I focus on so-called facilities for seniors and so-called house of social services.⁸

Steps of municipalities and higher territorial units in provision and securing provision of social service to a person dependent on social service

Persons who are dependent on help of other person and persons who reached retirement age are provided with a social service by so-called social service provider⁹ on the basis of so-called contract for provision of social service.¹⁰ A person who is interested in provision of social service is obliged to apply for it (application must have a written form). This application is submitted to a municipality, higher territorial unit (in the extent of their competence, i.e. for the needs of this paper – depending on the kind of social service facility concerned), or a corporation established or founded by them,¹¹ in spite of the fact that contract may be concluded even between a

6 Author's footnote.

7 Regarding this comp.: s. 12, (1) (c) (1) Act no. 448/2008 Coll., as amended.

8 Regarding this comp.: s. 35 and s. 38 Act no. 448/2008 Coll., as amended.

9 Regarding the term of social service, see s. 3 (3) Act no. 448/2008 Coll., as amended. In the context of this article, that concerns primarily a municipality, corporation established or founded by higher territorial unit, which are among others so-called public providers of social services and other persons as so-called non-public providers of social services.

10 Regarding this comp.: s. 74 (1) Act no. 448/2008 Coll., as amended.

11 Regarding this comp.: s. 74 (3) Act no. 448/2008 Coll., as amended.

person and so-called non-public provider.¹² On the basis of the application, the mentioned contract is thus concluded by social service provider, i.e. most often municipality or higher territorial unit¹³ or non-public provider (which is bound to conclude a contract for provision of social service with this person if upon the selection of a person, a municipality or higher territorial unit ask this social service provider to provide a social service to a person dependent on it, in case it provides social service on which this person is dependent and if it has free space to provide social service).¹⁴

So-called decision on dependence on social service in a final form (with exceptions provided by law)¹⁵ must be attached to the application for conclusion of a contract for provision of social service. This decision is a result of the aforementioned proceedings in the matters of social services, specifically so-called proceedings on dependence on social service. Mentioned decision is rendered by municipalities and higher territorial units, even in cases where the social service is provided by non-public social service provider.¹⁶ Municipalities and higher territorial units also have the duty to maintain records of these decisions issued by them¹⁷. Municipalities and higher territorial units thus operate as administrative bodies in the proceedings on dependence on social service (depending on the kind of facility concerned where the social service is supposed to be provided, with respect to the focus of this paper – in a facility for seniors, they are the administrative body and therefore the decision on dependence is issued by municipalities and in the house of social services, they are territorial units)¹⁸. At the same time, they operate as administrative bodies in the matter of termination of dependence on social services.¹⁹ The mentioned proceedings most often begin on the basis of written applica-

12 Author's footnote.

13 Regarding this comp.: s. 80 (h), point 1. (municipality), s. 81 (higher territorial unit) and s. 8 (8) municipality, higher territorial unit) and (9) (non-public provider) Act no. 448/2008 Coll., as amended.

14 Regarding this comp.: s. 8 (9) Act no. 448/2008 Coll., as amended.

15 Regarding this comp.: s. 74 (5) Act no. 448/2008 Coll., as amended.

16 Author's footnote: This is not explicitly stated by the mentioned law, but it arises from its content. I stress this fact with respect to focus on position of non-public providers of social services within the framework of these proceedings.

17 Regarding this comp.: s. 80 (h), point 1. (municipality), s. 81 (higher territorial unit) and s. 8 (8) (municipality, higher territorial unit) and (9) (non-public provider) Act no. 448/2008 Coll., as amended

18 Regarding this comp.: s. 92 (2) and (3) Act no. 448/2008 Coll., as amended.

19 Regarding this comp.: s. 80 letter. r), point 2. (municipality) and s. 81 letter. v), point 2. (higher territorial unit) Act no. 448/2008 Coll., as amended.

tion of a person whose dependence on social service is determined. It is so-called application for determination of dependence on social service which is submitted to the municipality or higher territorial unit respecting the material competence for rendering the stated decision depending on the form of establishment of social services, where the social service is to be provided,²⁰ even in cases, if the provider of public service is non-public.²¹ However, the stated proceedings may be begun also on the basis of a motion of municipalities and higher territorial units, as bodies which render the mentioned decision. Territorial competence of municipalities and higher territorial units is determined in accordance with the place of permanent residence of this person.²²

It is a special kind of proceedings regulated, though only partially, in a special law, which is in this case Act no. 448/2008 Coll., as amended, whose specialty²³ means also that the basis for rendering a decision on dependence on social service is so-called opinion on dependence on social service.²⁴ These opinions (once again depending on the kind of social service and facility where the social service is to be provided)²⁵ are made (as well as decisions on dependence on social service are made) either by municipalities or higher territorial units which maintain their evidence.²⁶

This opinion is made on the basis of so-called medical opinion and so-called social opinion.²⁷ Medical opinion is principally a result of so-called medical opinion activity conducted by a physician on the basis of a contract with municipality or higher territorial unit – the so-called examining physician. This type of opinion includes both a level of person's dependence on help of another person and date of repeated examination of person's medical status (with legally provided exceptions).²⁸ The so-called social opinion is a result of so-called social opinion activity which is conducted by social worker of a municipality or higher territorial unit or on the basis of an authorization by a municipality or higher territorial unit, a social worker of a corporation established or founded by a municipality or established or founded by a higher territorial unit. This type of opinion includes disadvantaging of

20 Regarding this comp.: s. 92 (1), (2) and (3) Act no. 448/2008 Coll., as amended.

21 Author's footnote: it is a principle analyzed in footnote no. 16.

22 Regarding this comp.: s. 92 (1) and (4) Act no. 448/2008 Coll., as amended.

23 Author's footnote

24 Regarding this comp.: s. 92 (9) Act no. 448/2008 Coll., as amended.

25 Author's footnote

26 Regarding this comp.: s. 80 letter d) and letter r) point 1. (municipality) and s. 81 letter. c) and letter. v) point 1. (higher territorial unit) Act no. 448/2008 Coll., as amended.

27 Regarding this comp.: s. 51 Act no. 448/2008 Coll., as amended.

28 Regarding this comp.: s. 49 (1) and (4) Act no. 448/2008 Coll., as amended.

persons with serious medical impairment or with unfavorable medical status in the area of self-serving acts, acts of care for their home and basic social activities in comparison with a person of the same age and sex without medical impairment or unfavorable medical status.²⁹

Proceedings on dependence on social service are thus finished (in case these proceedings are not discontinued³⁰) by issuing a so-called decision on dependence on social service. However, the mentioned legal regulation does not contain e.g. a time period for issuing this decision, contents of this decision etc. As far as the time period is concerned, it is not set forth by this law even with respect to the aforementioned opinion on dependence as a basis for issuing this decision.³¹ It is my opinion that in this case – in this type of proceedings, it is necessary to proceed in accordance with a legislative solution for the use of procedural laws under which “*it is necessary to proceed under special laws in cases regulated by special law and only in cases, where special laws do not contain required regulation for a certain procedural issue, provisions of administrative procedure code are used.*”³² I.e. administrative procedure code is used as a subsidiary law.³³ In my opinion, the fact that specifically proceedings on dependence on social service are conducted under Act no. 71/1967 Coll., on administrative proceedings (Administrative Procedure Code)³⁴ results also from s. 27 (2) Act no. 369/1990 Coll., on municipal establishment, as amended³⁵, in the case of municipalities and s. 22 (1) Act no. 302/2011 Coll., on self-government of higher territorial units (on self-governing regions), as amended³⁶ (with respect to the fact that decisions on dependence on social service are made and respective proceedings are con-

29 Regarding this comp.: s. 50 (2) and (3) Act no. 448/2008 Coll., as amended.

30 Regarding this comp.: s. 92 (3) Act no. 448/2008 Coll., as amended.

31 Author's footnote

32 KOŠIČIAROVÁ, S.: *Správny poriadok – komentár*, Šamorín: Heuréka, 2004, p. 15.

33 Author's footnote. Regarding this comp.: KOŠIČIAROVÁ, S.: *Správny poriadok – komentár*, p. 15.

34 Hereinafter “Administrative Procedure Code”.

35 Hereinafter Act no. 369/1990 Coll., as amended.

36 Author's footnote Regarding this comp.: s. 27 (2) Act no. 369/1990 Coll., as amended, under which “*the proceedings where rights, interests protected by law and duties of persons and corporations are decided upon by a municipality within the framework of performing self-government shall be governed by general law on administrative proceedings.*” Under s. 22 (1) Act no. 302/2001 Coll., on self-government of higher territorial units (on self-governing regions), as amended (hereinafter Act no. 302/2001 Coll., as amended) “*the proceedings where rights, interests protected by law and duties of persons and corporations are decided upon by a higher territorial unit within the framework of performing self-government shall be governed by general law on administrative proceedings, if the law provide otherwise.*”

ducted by municipalities and higher territorial units). It is also important to stress that this decision-making of municipalities and higher territorial units falls within the self-government competence of a municipality and as such, it is realized within the framework of performing self-government.³⁷ As far as the time period for issuing the mentioned decision is concerned, it is based on time period for issuing a decision under s. 49 Administrative Procedure Code. And since the Act no. 448/2008 Coll., as amended, does not include a time period even for issuing an opinion on dependence on social service, as already mentioned, it is my opinion that from the viewpoint of time, a municipality and higher territorial unit have to proceed as if they secured grounds for issuing a decision in a time period sufficiently advanced for issuing a decision within the time limits set under s. 49 Administrative Procedure Code.³⁸

In case both conditions are met, i.e. if a person has a final decision on dependence on social service whose provision they ask and they also asked for conclusion of a contract on provision of social service, a municipality or a higher territorial unit has an obligation to provide or secure provision of social service within their competence in maximum of 60 days after receiving an application for conclusion of a contract on provision of social service to a municipality, higher territorial unit or a corporation established or founded by a municipality or higher territorial unit (the procedure is different if a person chooses non-public provider of social service³⁹).⁴⁰ As to the time period for provision or securing provision of social service, it is not practically realized

37 Author's footnote: Although Act no. 448/2008 Coll., as amended, in none of its provisions – not even s. 80 and 81 which state that municipalities and higher territorial units are among others administrative bodies in proceedings on dependence on social service (therefore in practice, they issue decisions on dependence, as well), they make opinions on dependence on social service, they conclude contracts for provision of social service – directly states whether these tasks of a municipality or a higher territorial unit are conducted within the framework of self-government of transferred performance of state-administration, in case of a municipality it results from the provision of s. 4 (3) (p) Act no. 369/1990 Coll., as amended, under which a municipality when performing self-government mainly: *“fulfills the tasks in the area of social care under special law.”* If it was not mentioned specifically in Act no. 369/1990 Coll., as amended, the rule under s. 4 of this law would apply and under this rule: *“If the law covering competence of a municipality does not state whether performance of a transferred competence in state administration is concerned, it applies that performance of self-government is concerned.”* Regarding higher territorial units, the fact that performance of self-government is concerned results from s. 4 (1) (i) Act no. 369/1990 Coll., as amended, under which the higher territorial unit when performing self-government *“fulfills the tasks in the area of social services.”*

38 Author's footnote

39 Author's footnote Regarding this comp.: s. 8 (9) Act no. 448/2008 Coll., as amended.

40 Regarding this comp.: s. 8 (4) Act no. 448/2008 Coll., as amended.

because under Art. III Act no. 448/2008 Coll., as amended, s. 8 (4) comes into effect as far as 1. 1. 2013.⁴¹ Furthermore, under the draft of act changing and supplementing Act no. 448/2008 Coll., on social services, the 60 days long period for provision or securing provision of social services is to be abolished due to predominating demand over supply of social services, where there is a presumption that municipalities and higher territorial units in reality will not be capable of providing or securing provision of a social service in this period of time.⁴²

Significant changes related to the steps of municipalities and higher territorial units in provision or securing provision of a social service to a person dependent on social service, introduced by Act no. 551/2010 Coll., amending the Act no. 448/2008 Coll., as amended

A significant change in these steps has been brought by the judgment of Constitutional Court of the Slovak Republic no. PL. ÚS 13/09-81 dated 18. 5. 2010. As a follow-up to this judgment, Act no. 551/2010 Coll., amending and supplementing Act no. 448/2008 Coll., as amended, was passed.⁴³ Among others, the stated change was related to the mechanism for access to securing social service mentioned in s. 8 (2) and in s. 8 (3) Act no. 448/2008 Coll., as amended, under which it was the duty of a municipality or a higher territorial unit to provide or secure provision of social service to persons dependent on it in a legally set (binding) order where a) in the first place, a social service was provided by the municipality or higher territorial unit, b) second, a municipality or a higher territorial unit secured provision of a social service through a corporation established or founded by them, c) third, a municipality or a higher territorial unit secured provision of a social service by a different public provider of social service (in case the step under letter b) was not possible and respective person agrees with it). Municipality or a higher territorial unit secured the provision of a social service by a non-public provider in the fourth place (i.e. under letter d), but that happened only in cases, if it could not be secured by any of the preceding ways, i.e. under letters a) to c).

This mechanism directly disadvantaged non-public providers of social services in their access to performance of the same entrepreneurial activity or a different profit activity. As a consequence of these steps, non-public

41 Author's footnote Regarding this see closer Art. III Act no. 448/2008 Coll., as amended.

42 Reasoning report to the bill amending and supplementing Act no. 448/2008 Coll., as amended.

43 Author's footnote

providers did not have real possibility to get appropriate clientele and while respecting this legally set mechanism, they could get to so-called „remaining clientele”⁴⁴, i.e. those persons which could not be provided with respective social service directly by municipalities or higher territorial units or through public providers of social services. This mechanism also narrowed or minimized the right of a person dependent on social service to choose the social service provider⁴⁵, because such person clearly could not realize the right of choice in case the required service could be provided by a municipality or a higher territorial unit directly. This mechanism was also in contradiction with the purpose of Act no. 448/2008 Coll., as amended, which stresses securing availability and the highest quality of social services for persons dependent on their provision and not satisfaction or protection of fiscal interests of municipalities and higher territorial units.⁴⁶

In accordance with the mentioned judgment of the Constitutional Court, s. 8 (2) and (3) with s. 6 (1) Act no. 448/2008 Coll., as amended, have been changed. After this change, choice of social service provider by a person who asks for conclusion of a contract for provision of social service⁴⁷ is important, and the wording of s. 6 (1) and s. 8 (2) and (3) now states: under s. 6 (1): *“If conditions set forth by this law are met, a person has a right to choose social service, form of its provision and a right to choose a provider of social service.”* Under s. 8 (2): *“Within the extent of its competence, a municipality shall provide the person asking for conclusion of a contract for provision of social service, on the basis of a choice made by this person, with: a) social service, if it is registered as a provider of social service, or b) securing provision of a social service by a registered provider.”* Under s. 8 (3): *“Within the extent of its competence, a higher territorial unit shall secure the person asking for conclusion of a contract for provision of a social service on the basis of the choice of social service provider made by this person with provision of social service by a registered provider.”*⁴⁸

44 Author's footnote: the mentioned term is to be understood only in connection to the form of disadvantage of these persons in the sense of Act no. 448/2008 Coll, in its wording before Act no. 551/2010 Coll., came into effect

45 Author's footnote: it concerned the right of a person to choose a social service and their right to choose a provider of this service which was narrowed under Act no. 551/2010 Coll., to the extent set in s. 8 (2) and (3) Act no. 448/2008 Coll., as amended. Regard that see closer s. 6 (1) of this law in its wording before the mentioned amendment came into force.

46 Comp.: Nález Ústavného súdu Slovenskej republiky č. PL. ÚS 13/09-81 z 18. mája 2010 [online]. [Cited 1st December 2011]. Available at: <<http://www.concourt.sk/rozhod.do?url...>>, s. 1–24.

47 Author's footnote

48 s. 6 (1) and s. 8.(2) and (3) Act no. 448/2008 Coll., as amended.

Further substantial changes brought by Act no. 551/2010 Coll., amending and supplementing Act no. 448/2008 Coll., as amended, are related mainly to the proceedings on dependence on social service. Many of these changes are connected to so-called materially-technical operations as one of the forms of Public Administration's activities⁴⁹, which do not have law-creating effects but have to be observed by their addressees who have an obligation to respect them. They are various acts, among others certificates, opinions, statements, standpoints, evidentiary, registration, information a documentary acts.⁵⁰ The aforementioned special kind of administrative proceedings is typical with the mentioned form of Public Administration's activity being conducted there, especially various opinions are relied upon (as it is analyzed in a different place of this paper, mainly the so-called medical opinion, so-called social opinion and in relation to them the so-called opinion on dependence on social service), which constitute grounds for issuing a decision on dependence on social service and consequently, for conclusion of a contract for provision of a social service.⁵¹ The outlined changes – as far as realization of e.g. the mentioned opinions, but also changes of a different nature are concerned – ought to lead to primarily simplifying, speeding up of this kind of administrative proceedings, its higher economy, not uselessly burdening the parties to the proceedings, i.e. fulfilling mainly the so-called basic principles of administrative proceedings as they arise from s. 3 and 4 Administrative Procedure Code and other provisions of it. They should follow reaching the goal to approximate Public Administration to citizens and they should be directed also to fulfill basic principles of territorial self-government functioning,⁵² which are e.g. economy, effectiveness and purpose.⁵³

There are more relevant changes corresponding with the mentioned principles and maxims regarding the mentioned opinions: with effect from 1. 3. 2011, the examining physician conducting medical examination activity needs not follow exclusively the medical report, opinion, report on course and development of a disease and medical impairment submitted by a person asking examination of dependence on social service – as it was before Act no. 551/2010 Coll., came into effect but newly, they also follow abstract

49 Author's footnote

50 Comp.: ŠKULTÉTY, P. and col.: *Správne právo hmotné – Všeobecná časť*, Šamorín: Heuréka, 2006, p. 114.

51 Author's footnote

52 Author's footnote

53 Regarding the terms of economy, effectiveness and purpose see works of SOTOLÁŘ, J.

from health documentation if it is not older than six months.⁵⁴ This procedure shortens the opinion proceedings and at the same time, the proceeding on dependence on social service speeds up, costs of medical opinion activity incurred to municipalities and higher territorial units decrease as before this change municipalities and higher territorial units had to pay for medical report made by contractual physician of a client⁵⁵ and client thus becomes less administratively burdened.⁵⁶

In relation to opinions as grounds for issuing a decision on dependence on social service, one more change occurred as the so-called social opinion making activity for purposes of determining dependence on social service is not conducted solely by social worker of a municipality or a higher territorial unit but newly, it may be conducted also by a social worker of a corporation established or founded by a municipality or a higher territorial unit on the basis of authorization of a municipality or a higher territorial unit.⁵⁷ This change follows saving costs of external opinion making activity, i.e. it aims to make costs of this activity more efficient by using existing expert personnel.⁵⁸

Another change is linked to determination of dependence of a person on help of another person in a specific case, i.e. if it is a person which reached retirement age and she asks for determination of dependence on social service to be provided in a facility for seniors where they ask for determination of dependence due to different serious reasons⁵⁹, such as loss of residence or abuse of this person. The change introduced by Act no. 551/2010 Coll., means that if there are different serious reasons, the unfavorable medical status is not determined regarding this person.⁶⁰

A different change consists of an option to provide or secure provision of a social service by a municipality or a higher territorial unit without undue

54 Regarding this comp.: s. 49 (3) Act no. 448/2008 Coll, as amended (including the amendment – Act no. 551/2010 Coll.).

55 Author's footnote: under the term client, a person seeking determination of dependence on social service is understood.

56 Regarding this comp.: *Ludia si opäť môžu vybrať poskytovateľa sociálnej služby* [online]. [Cited 1st December 2011]. Available at: <<http://www.webnoviny.sk/ekonomika>>, s. 1.

57 Regarding this comp.: s. 50 (3) Act no. 448/2008 Coll., as amended (including the amendment – Act no. 551/2010 Coll.).

58 Regarding this comp.: *Ludia si opäť môžu vybrať poskytovateľa sociálnej služby* [online]. [Cited 1st December 2011]. Available at: <<http://www.webnoviny.sk/ekonomika>>, s. 1.

59 Regarding this comp.: s. 49 (14) Act no. 448/2008 Coll., as amended (including the amendment – Act no. 551/2010 Coll.).

60 Regarding this comp.: *Ludia si opäť môžu vybrať poskytovateľa sociálnej služby* [online]. [Cited 1st December 2011]. Available at: <<http://www.webnoviny.sk/ekonomika>>, s. 1.

delay, e.g. if a human life or health are seriously endangered or if a person fails at securing conditions to satisfy basic human needs etc.⁶¹ This fact has a subsequent impact to the possibility of providing such a person with a social service even before the decision on dependence on social service reaches finality.⁶² For the mentioned reason, application for conclusion of a contract for provision of a social service needs not to be supplemented with a final decision on dependence on social service.⁶³

As far as proceedings on dependence on social service are concerned, in the sense of Act no. 551/2010 Coll., it is not carried out in case of so-called transfer service, i.e. dependence on this kind of a social service is not determined⁶⁴ and in practice, e.g. only an opinion of competent Labor, Social Matters and Family Office suffices as well as confirmation by a physician.⁶⁵

A different change is related to so-called evidentiary acts, conducted specifically by so-called non-public providers of social services who now have a longer period of time to submit records of recipients of social services to a municipality or a higher territorial unit depending on their competence, it is now two months longer.⁶⁶

Act no. 551/2010 Coll., brought even more changes I do not mention because this paper is aimed at pointing out changes linked primarily to the proceedings on dependence on social service.⁶⁷

61 Regarding this comp.: s. 8 (6) Act no. 448/2008 Coll., as amended (including the amendment – Act no. 551/2010 Coll.).

62 Regarding this comp.: s. 92 (8) Act no. 448/2008 Coll., as amended (including the amendment – Act no. 551/2010 Coll.).

63 Regarding this comp.: s. 74 (5) Act no. 448/2008 Coll., as amended (including the amendment – Act no. 551/2010 Coll.).

64 Regarding this comp.: s. 92 (1) Act no. 448/2008 Coll., as amended (including the amendment – Act no. 551/2010 Coll.). Author's footnote: in s. 92 (1) dealing with beginning of the proceedings on dependence on social services, the transfer service is not explicitly included.

65 Regarding this comp.: *Ludia si opäť môžu vybrať poskytovateľa sociálnej služby* [online]. [Cited 1st December 2011]. Available at: <<http://www.webnoviny.sk/ekonomika>>, s. 1.

66 Author's footnote In the sense of s. 95 (7) Act no. 551/2010 Coll., these records are submitted monthly but every three months. In addition, before this amendment, it concerned a municipality and higher territorial unit in whose territorial area the client had an address of permanent residence, after the amendment, the determining factor is the kind of social service provided.

67 Author's footnote

Conclusion

Presented changes connected to the conduct of municipalities and higher territorial units in providing or securing provision of social service to a person dependent on social service introduced by Act no. 551/2010 Coll., amending and supplementing Act no. 448/2008 Coll., as amended, observe realization of indicated principles of administrative proceedings and principles for functioning of Public Administration including territorial self-government.

Prima facie, they might seem as concrete examples of modernization aspects of procedures in Public Administration which would correspond with the topic of the conference where this paper is submitted. Under modernization of procedures in Public Administration, we generally understand upgrading, improving the procedures within the framework of this process which is regarded as a current trend.

However, it is my opinion that in reality, it is rather only “quenching something”, i.e. changes of this law which should have been obvious already in the time of passing this law especially since it concerns a specific area of Public Administration and specific administrative proceedings whose procedures and steps are directly to a person dependent on help of another person, i.e. in a specific situation, therefore they should primarily focus on benefit of this person mainly in the sense of making her position in the proceedings easier and reaching their natural effort and need for an ordinary life in harder conditions by that.⁶⁸

68 Author's footnote

Accordance of administrative sanctioning in the Czech Republic with Recommendation of Committee of Ministers of Council of Europe no. 91(1)

Meaning Recommendation of Committee of Ministers of Council of Europe no. 91(1)

Recommendation no. 91 (1) (hereinafter “Recommendation”) sets forth 10 basic principles of imposition of administrative sanctions. They are the principle of legality, principle of non-retroactivity, *ne bis in idem* principle, principle of Public Administration body’s taking account of sanction imposed by different body, principle of quickness, principle of imposing sanction only by decision, principles of fair trial, principle of exclusion of fair trial principles on the basis of agreement of the defendant in less serious case, principle of burden of proof of an administrative body, principle of reviewability of decision of Public Administration by court.¹

Principle of legality

Principle of legality in relation to administrative delinquencies is not expressly embedded in our legal order. Article 39 Charter of Fundamental Rights and Freedoms (hereinafter “Charter”) states: “*Only a law may designate the acts which constitute a crime and the penalties or other detriments to rights or property that may be imposed for committing them*” Provision of Art. 39 Charter is problematic itself because it speaks expressly of crimes. Case-law of Supreme Administrative Court and Constitutional Court, which have expressed their views on principle of legality in relation to imposition of administrative sanctions many times, approaches Art. 31 Charter extensively and it adds the area of administrative delinquencies under the term of crime. In this relation we may state e.g. the judgment of plenum of Constitutional Court of the Czech Republic, dated 5. 4. 1994, file no. Pl. ÚS 8/93, where it is expressly stated that: “... *new bodies of misdemeanors and sanctions may only be provided by law...*” As far as observing principle of legality of administrative sanctions for administrative delinquencies is concerned, we may sum up that in reality of Czech law-making, this principle is fully respected although it is not expressly stated.

¹ In their substance, they are not principles which are legally binding but more of requirements put on process of imposition of administrative sanctions. These requirements were deduced from the case-law of European Court of Human Rights whose main task is to protect rights embedded by Convention whose provision it interprets in its judgments.

Principle of non-retroactivity

On the constitutional level, principle of non-retroactivity is regulated in provision Art. 40 (6) Charter, where it is stated that *“The question whether an act is punishable or not shall be considered, and penalties shall be imposed, in accordance with the law in effect at the time the act was committed. A subsequent law shall be applied if it is more favorable to the offender.”* Contrarily to Art. 31 Charter, Art. 40 (6) does not expressly speak of crime but of act and this act being punishable. Being punishable, i.e. right and duty of Public Administration body to impose sanction for administrative delinquency and duty of wrongdoer to go through the punishment is one of basic definition features of administrative delinquencies. This conclusion was also confirmed by judgment of Constitutional Court dated 13. 6. 2002, file no. III. ÚS 611/01, where it is stated that: *“it is necessary to deduce from Art. 1 Constitution that this forbiddance must be applied in other areas of law, too.”* Forbiddance of retroactivity expressly results from s. 7 (1) Act no. 200/1990 Coll., Act on misdemeanors (hereinafter “AOM”) where it is stated that: *“Liability for misdemeanor shall be considered in accordance with the law the law in effect at the time the act was committed, subsequent law shall be applied if it is more favorable to the offender.”* Therefore, principle of non-retroactivity is not without exceptions in the area of imposing administrative sanctions for administrative delinquencies. In the sense of provision of Art. 40 (6) Charter, retroactivity is admissible in favor of the administrative delinquency offender.² Retroactivity is divided into the pure retroactivity where legal norm provides that earlier legal facts are considered in accordance with subsequent legal norm and non-pure one where objective law effective in the time of substantive law relation’s origination applies to them. Recommendation itself bans pure retroactivity unless the application of subsequent legal regulation to administrative delinquency is favorable to the offender. In this sense, Czech corresponds with the Recommendation.

Ne bis in idem principle

Event this principle is embedded in Charter, namely in Art. 40 (5), where it is stated that: *“No one may be criminally prosecuted for an act for which she has already been finally convicted or acquitted of the charges.”* Even the Supreme

2 That is confirmed by judgment of Supreme Administrative Court dated 27. 10. 2004, file no. 6 A 126/2002, where it is stated that *“... security ... consisting of admissibility of sanctioning in accordance with the new law, if this new regulation is more favorable to the offender, applies even in proceedings on sanctions for administrative delinquencies.”*

Administrative Court in its decision dated 8. 6. 2005, file no. 3 As 51/2004 reaches the conclusion that: “... *even in administrative sanctioning, the ne bis in idem principle applies and under it, no one can be punished twice for the same act.*” *Ne bis in idem* principle shall be applied only to so-called identical act (identity of act is kept, if at least the identity of action or identity of consequences are kept). Contrarily, it results from this judgment of Supreme Administrative Court that *ne bis in idem principle* shall not be applied to cases of so-called one-act concurrence where one action leads to violation of more legal regulations.³ In this sense, the Czech regulation thus fully corresponds with the Recommendation.

Principle of Public Administration body’s taking account of sanction imposed by different body

This principle included in Recommendation is not regulated on constitutional level. It is not even expressly regulated in other legal regulations. In provision s. 2 (4) Act no. 500/2004 Coll., Administrative Procedure Code (hereinafter “APC”), it is only stated that: “*An administrative body shall ensure that an adopted measure is in accordance with public policy and corresponds to the circumstances of a particular case, and shall ensure that no unreasonable differences occur in deciding cases which were identical or similar with respect to the facts.*”⁴ And furthermore, even AOM in its provision of s. 12 states that: “*When determining the kind of sanction and its extent, seriousness of the misdemeanor must be taken into account, especially its consequences, circumstances under which it was committed, extent of fault, motives and person of the offender, whether and how they were sanctioned for the same act in disciplinary proceedings.*”⁵ High Court in Prague which dealt with this issue, reached a conclusion in its judgment dated 27. 12. 2001, file no. 7 A 77/99 that: “... *If the law does not include exhaustive enumeration of factors which must be taken into account by an administrative body when determining the amount of*

3 It actually results from the decision of Supreme Administrative Court dated 8. 6. 2005, file no. 3 As 51/2004 that if: “...*complainant by the same action fulfills bodies of two various administrative delinquencies which are not misdemeanors and whose bodies and sanctions are regulated by two different laws, it is the case of one-act concurrence of two administrative delinquencies. In this case double sanctioning for the same administrative delinquency does not occur, it is actually sanctioning of two administrative delinquencies committed by identical action.*”

4 It is a principle of predictability of administrative decision which is applicable to all activity of Public Administration.

5 However, Recommendation does explicitly exclude disciplinary delinquencies out of its scope of competence.

*fine, but it includes only demonstrative enumeration, then such legal regulation binds an administrative body because these very legal factors have to be taken into account every time, when apart from this, it is left for administrative body's discretion if it takes into account other factors not expressly regulated by law (therefore all relevant circumstances are concerned)...*⁶ That means that body of Public Administration dealing with the misdemeanor must take account of the mentioned factors which does not preclude it to take other factors into account. This approach which does not fix an administrative body only to circumstances specified by law, when dealing with a particular misdemeanor, is fully in accordance with Recommendation which expressly excludes disciplinary administrative delinquencies out of its scope of competence.

Principle of quickness

Principle of quickness is regulated in detail in Czech legal order, namely in s. 38 (2) Charter, where it is stated that : *“Everyone has the right to have her case considered in public, without unnecessary delay, and in her presence, as well as to express her opinion on all of the admitted evidence.”* In this provision, Charter speaks only of case which covers a legal case. We may include even the area of sanctioning and punishing for administrative delinquencies under this term. Principle of quickness is regulated in very detailed manner in APC which is widely applicable in imposing sanctions for administrative delinquencies, even with respect to its s. 177 (2). Principle of quickness is regulated in s. 6 APC, where it is stated that: *“Administrative body shall deal with the case without unreasonable delay. If the administrative body fails to act within the time limit set forth by law, or in a reasonable period of time if the time limit is not set forth by law, provisions on protection against inaction shall be applied (§ 80).”* APC regulates two basic groups of time limits for rendering a decision in a case. On one hand, they are time limits set by law which cannot be prolonged or shortened by Public Administration body, and on the other hand, there are so-called reasonable time limits set by administrative body. When setting them, administrative body must take account of not threatening the purpose of proceedings, equality of parties to the proceedings and public interest. Therefore, if delays occur in Public Administration body's actions when dealing with administrative delinquency, it is possible for the

6 It further results from this judgment of High Court that in cases of one-act concurrence, where one administrative delinquency led to violation of more legal regulations, administrative body ought to take account of decisions of other bodies on the same act and extent of sanctions imposed by them.

party to the proceedings to initiate application of measures against inaction at a superior body. These measures must be adopted by superior body *ex offio* in the moment it finds out that one of the bodies inferior to it violated the time limit set for rendering a decision, or respectively, if it finds out that inferior body did not initiate proceedings *ex offio* in 30 days from the day when it found out about the fact justifying commencement of proceedings *ex offio*. However, Recommendation is not fully upheld, because s. 80 (3) names cases where superior body may apply measures against inaction. After unsuccessful attempt of application of measure against inaction under s. 80 APC, the party to the proceedings may file an administrative complaint against inaction with the court under s. 79 Act no. 150/2002 Coll., Administrative Procedure Code (hereinafter "CAJ"). Effort to quicken the proceedings on misdemeanors is visible even in provision of s. 12 AOM, where it is stated that: "*Misdemeanor case cannot be heard, if the time period of one year lapsed from the day of its lapsing.*"⁷

Sanction must be imposed by decision

This principle is seemingly fulfilled by s. 9 APC where it stated that: "*Administrative proceedings is the process of administrative body whose purpose is to render a decision which leads to creation, amendment or annulment of rights or duties of namely determined person or which leads to declaration that such person does or does not have rights or duties in a particular case.*" Imposition of administrative sanctions for administrative delinquencies is, in the sense of APC, one of processes of body of Public Administration (administrative proceedings) and under provision s. 9 APC, this proceeding must be finalized by rendering a decision. Decision on administrative sanction for administrative delinquency might be regarded both as a constitutive and declaratory administrative act. S. 68 and 69 APC then sets forth material and formal requirements of administrative decision which leads to imposition of administrative sanction for administrative delinquency. However, it is necessary to realize that legal regulation in APC is only general (it regulates procedural institutes of general administrative proceedings) and in relation to special kinds of administrative proceedings, it applies only as a subsidiary law. Special kinds of

⁷ In decision of Supreme Administrative Court dated 15. 12. 2005, file no. 3 As 57/2004, it is stated regarding this that: "*Time limit set for hearing the misdemeanor is preclusive. Therefore suspension or stopping it with such legal consequences, which lead to its prolongation in case it was not possible to continue in the proceedings due to reasons which were not caused with fault of an administrative body, do not come into consideration.*"

administrative proceedings are regulated in special laws where these special regulations are not complex in any case. AOM is a certain exception in this regard because except of regulation of bodies of misdemeanors, it also includes special procedural regulation of misdemeanor proceedings as a special kind of administrative proceedings. In its provisions s. 84 – 88, AOM includes two special kinds of so called fast-track proceedings, namely block proceedings and order proceedings. In case of order proceedings, there is no problem as to correspondence with Recommendation because order proceedings is finalized by imposing a fine in so-called order which has all the requirements of decision under AOM and in the sense of PAC, it is a form of administrative decision which may be contested by means of protest. Block proceedings are finalized by imposition of fine in the form of block fine. This block fine certainly is a decision from the material viewpoint because it interferes with rights and legitimate interests of addressees of Public Administration addressees, but from the formal viewpoint, block fine is not regarded as a decision by AOM or APC. Furthermore, it is necessary to mention that block fine is not reviewable in administrative proceedings.⁸ I am convinced that this casts a serious discrepancy between the Czech legal regulation and Recommendation. As it results from case-law (e.g. *Airey v. Ireland*) of the European Court of Human Rights on Art. 6 Convention, decision on punishable delinquency must fulfill all basic material requirements (verdict, reasoning, informing on remedies) and there must be an effective possibility to review this decision in independent and impartial judicial process.

Principles of fair trial

The text of Recommendation sets forth principles of fair trial in which there are administrative sanctions imposed. They are the following requirements: a person must be informed on charges against it, a person must have sufficient time in order to prepare for the proceedings, a person must be informed on evidence against her, a person has a right to be heard, a decision on sanction must be reasoned. The first requirement linked to informing the person suspect of committing administrative delinquency is regulated by s. 46 APC, concerned with commencement of proceedings *ex officio*, which states

8 This conclusion is supported by judgment of Supreme Administrative Court dated 29. 12. 2004, file no. 6 As 49/2003, under which: "... *complaint against decision which was rendered with agreement of the party to the proceedings must be inadmissible..., misdemeanor will not be dealt with in proceedings whose subject would be factual and legal assessment of their conduct.*"

that: “*Proceedings ex offa are commenced on the day, when an administrative body informed party to the proceedings named in s. 27 (1) by delivering a notification or by oral information, and if an administrative body is not aware of this party to the proceedings, any other party to the proceedings shall be notified. Notification must include identification of an administrative body, subject of proceedings, name, surname, function or service number and signature of authorized official person.*” At this point, it is necessary to mention that vast majority of proceedings on administrative delinquencies are commenced *ex offa*.⁹ Provision of s. 46 (3) APC expressly states that party to the proceedings (person charged with administrative delinquency) must be informed on subject of the proceedings, in other words on rights and duties which will concerned within the framework of these proceedings (notification of charge without its specification therefore does not suffice).¹⁰ In this sense, Recommendation is observed in our legal order. The second requirement consisting of sufficient time for preparation for proceedings is embedded in Art. 40 (3) Charter where it is stated that: “*Defendant has the right to be provided with time and opportunity for preparation of defense...*” Additionally, this requirement is embedded in s. 49 (1) APC where it is stated that: “*If there is no threat of delay, administrative body shall notify parties to the proceedings on oral hearing at least 5 days in advance...*”, further in s. 51 (2) APC where it is stated that: “*Parties to the proceedings must be informed on taking evidence out of oral hearing in time, if there is no threat of delay.*” Diction of these two provisions of APC does not lead to a deduction if Czech legal regulation is in accordance with Recommendation, because it only mentions “*sufficient time.*” Requirement of informing a person charged with administrative delinquency on evidence against her is embedded in Art. 38 (2) Charter, where it is stated that: “*Everyone has the right to express their opinion on all taken evidence...*” In the sense of Recommendation, it is necessary that persons charged with administrative delinquency know evidence against them and that they have an option to express their opinions on such evidence. This requirement is embedded also through s. 36 (3) APC, where it is stated: “*If the law does not provide otherwise, parties to the proceedings must be given an opportunity to*

9 In this sense, so-called complaint misdemeanors regulated by AMO are an exception, because proceedings on them are commenced upon a complaint by the injured party (however, in following phases, Public Administration body proceeds *ex offa*).

10 In its judgment dated 20. 11. 2003, file no. 5 A 73/2002, Supreme Administrative Court stated that: “...it must be clear from the notification on commenced proceedings what will be its subject-matter and what will be decided upon...in sanction proceedings, it is appropriate to mention what kind of punishment may be imposed ...”

express their opinion on grounds of decision before this decision is rendered... (even on means of evidence)“ and also through the institute of looking into administrative file under provision s. 38, where it is stated that: “*Parties to the proceedings and their representatives have the right to look into file...*”. Certain problem may occur in case of proceedings, where application of APC is excluded. In these cases, it is necessary to proceed in accordance with basic principles of operation of Public Administration bodies which are provided in s. 2 – 8 APC (especially under s. 4 (3), where it is stated that: “*Administrative body will allow persons concerned to apply their rights and legitimate interests...*”). Requirement of hearing the person charged with administrative delinquency is primarily set forth in Art. 40 (3) Charter, where it is stated that: “*defendant has the right to defend herself, either pro se or with the assistance of counsel.*” In the sense of Recommendation, this right covers both right to defend oneself, i.e. to state facts, present evidence and have witnesses heard in their favor, but also not in their favor, to which they cannot be forced, and right to express one’s opinion on all taken evidence presented by all subjects to the proceedings. This requirement is also embedded in s. 36 (1) APC, where it is stated that: “... *parties to the proceedings are authorized to present evidence and file other motions during the whole course of the proceedings until a decision is rendered...*”¹¹ Therefore in this regard, Czech legal regulation corresponds with requirements of Recommendation. As far as the requirement of reasoning a decision is concerned, Czech legal regulation may be criticized with the same aspect mentioned about imposition of administrative sanction for administrative delinquency only by a decision.

Principle of exclusion of fair trial principles on the basis of defendant’s agreement in less serious cases

In case of this principle, it is not possible to state sufficiently that Czech legal regulation fulfills the requirement of Recommendation, because the Recommendation does not define the term of “*less serious case*”.

11 Supreme Administrative Court expressed its opinion on this issue in its judgment dated 20. 1. 2006, file no. 4 As 2/2005 where it is stated: “... *It is unquestionable that there is a right of an administrative body operating proceedings on misdemeanor, to use its discretion in deciding what evidence will be taken and what evidence will be determined as superfluous ...however, realization of this right must not preclude application of basic safeguards of persons facing certain charge of punishable nature ...*”

Principle of Public Administration body's burden of proof

This principle is fulfilled through provision of s. 50 (3) APC, where it is stated that *"In proceedings where there is a duty to be imposed ex offio, administrative body is bound to find out all decisive circumstances both in favor or not in favor of a person to whom the duty is to be imposed, all that even without a motion."* The problem of non-application of this provision in cases where APC cannot be applied, may be solved by applying the principle mentioned in s. 3 APC, where it is stated that: *"Unless the law provides otherwise, administrative body proceeds in order to discover factual background without any reasonable doubts, in the extent which is necessary for accordance of its act with requirements mentioned in s. 2."*¹² With respect to what has been mentioned above, it is clear that Czech legal regulation corresponds with Recommendation.

Principle of reviewability of decision of Public Administration by court

This principle is embedded in provision of Art. 36 (1) and (2), where it is stated that: *"Everyone may assert, through the legally prescribed procedure, his rights before an independent and impartial court or, in specified cases, before another body. Unless a law provides otherwise, a person who claims that her rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision. However, judicial review of decisions affecting the fundamental rights and basic freedoms listed in this Charter may not be removed from the jurisdiction of courts."* Certain provisions of CAJ are also in accordance with this starting point. Particularly, they are provisions of s. 4 (1) (a), s. 65, and provision s. 78 (1) and (2). Court review is covered also by s. 83 (2) AOM, where it is stated that: *"When reviewing decision on misdemeanor by court, special law shall be applied (it is CAJ)."* Constitutional Court of the Czech Republic also gave numerous opinions on court review of decisions of Public Administration.¹³ On the basis of the aforemen-

12 The problem of burden of proof of Public Administration body was covered in judgment of Supreme Administrative Court dated 21. 10. 2003, file no. 7 A 195/2000, which stated that: *"...principle of material truth represents a duty of administrative body to exactly and completely find out real factual background of the case and to obtain sufficient extent of data and information...Administrative body is not bound by motions of parties to the proceedings for taking evidence. It discovers all legally relevant fact notwithstanding in whose favor they are."*

13 In its judgment dated 19. 12. 2002, file no. III. ÚS 321/02, it states that: *"Deprivation of court protection in matters of reviewing decisions of Public Administration bodies is only possible if the law says so...such process does not come into consideration if the decision of Public Administration bodies would have in any manner affected fundamental rights and freedoms under constitutional acts and international treaties which bind the Czech Republic."*

tioned facts, we may come to a conclusion that Czech legal regulation is in accordance with Recommendation.

Conclusion

Principally, we may summarize that Czech legal regulation corresponds with principles mentioned in Recommendation. All principles included in it may be deduced from basic principles of Public Administration bodies' operation which are defined in s. 2-8 APC and which are applicable to all processes within the framework of Public Administration, if application of APC itself is excluded. The only serious exception is legal regulation of block proceedings which do not correspond with principles named in Recommendation in any case.

Although the Czech legal regulation principally fulfills requirements of Recommendation, one of the basic requirements on quality of legal regulation in this area is not fulfilled, namely a legal certainty of an addressee of this legal regulation. Administrative sanctioning is diffused in many legal regulations which regulate substantive law and procedural issues. This situation is unsustainable in a long-term horizon and I am convinced that this situation creates a discrepancy with Charter, namely with its Article 4 which states that everyone may do anything which is not expressly forbidden by law. In order for this principle to be upheld in real life, it is of utmost importance that addressees of law may find out without any obstacle, what is expressly forbidden. However, current legal regulation is so complicated that such crucial information of what is forbidden cannot be obtained by addressees without any obstacle.

It is thus necessary to adopt new legal regulation, in the best option one of a codex type, especially in the area of misdemeanor law. Such new created codex ought to include bodies of all misdemeanors, all necessary procedural institutes from investigation of misdemeanors to enforcement of Public Administration's body decision, and also the principles of misdemeanor proceedings which are different from principles of administrative proceedings. Such codex should also include express provision on exclusion of application of APC. APC regulates the area of administrative proceedings, whose purpose mentioned in s. 9 is different from the purpose of misdemeanor proceedings.

Protection against inaction of administrative bodies with focus on inaction as incorrect official procedure

Introduction

Except of simplification of administrative activities and communication with addressees of Public Administration (e.g. electronization of written submissions, unification of central basic registries operated by administrative), it is also the goal of modernization of processes in Public Administration to speed up steps taken in Public Administration which must not be unreasonably lengthy. Real influence of Public Administration in lives of individuals is increasing with the growth of Public tasks and therefore, there must be legal mechanisms whose goal is the protection of persons against actions of administrative bodies which goes beyond the limits set forth by law. Public Administration is primarily a service to public and it may only be that if competent administrative body deals with cases without undue delays. Issue of inaction of administrative bodies is a negative phenomenon linked to serious legal consequences. Both the person affected by inaction and administrative body which does not act in accordance with the legally set duty itself have to face these negative consequences. Possibilities of individual's defense, usually in position of a party to the proceedings, are usually factually limited by the position of inactive administrative body itself, or the administrative body superior to it. Uncertainty regarding further course of administrative proceedings and postponing the moment of rendering a decision with effects on legal sphere of persons may cause harm to a person consisting of ongoing legal uncertainty and often also with moral and psychical harm. Inaction of administrative body may thus have consequences in the property and personal sphere of an injured person. Immaterial harm may be financially compensated irrespective of harm being caused by incorrect official procedure or in the form of inaction of administrative body.¹ There are obviously more legal remedies against inaction of administrative bodies. In the following text, I will try to provide their brief outline.

1 Comp. Act no. 82/1998 Coll., on liability for damage caused in the performance of public power by decision or incorrect official procedure and on amendment of Act of Czech National Council no. 358/1992 Coll., on notaries and their activity (notaries' procedure code), in the wording of amendment made by Act no. 160/2006 Coll., with effect from 27. 4. 2006. Before the amendment, Act no. 82/1998 Coll. did not include any special way of recovering damages and not even any other effective law in the Czech Republic created a possibility of recovering damages which would state certain satisfaction if right to have the case heard within a reasonable period of time was evidently violated, independently on property of the injured person and irrespective to property harm. In its judgment dated 12th February 1997, file no. IV. ÚS 215/96 stated that law does not give it an option to grant different satisfaction that drawing a conclusion that this right was violated where this fact in itself cannot even be a reason for annulment of appealed decisions.

Legal remedies against inaction of administrative body

Legal order of the Czech Republic knows a number of processes whose goal is to prevent inaction of administrative bodies both in existing inaction and threatening inaction.

Constitutional starting-point is the enshrinement of *right to reasonable length of proceedings* which represents an important aspect of right to a fair trial. Charter of Fundamental Rights and Freedoms² in Article 38 (2) guarantees everyone a right to having the case heard without unreasonable delays and to express their views on all of the admitted evidence.³ Mentioned provisions of constitutional order are implemented in laws of procedural character.

In administrative law, the basic regulation covering processes of administrative bodies is the Act no. 500/2004 Coll., Administrative Procedure Code (hereinafter “APC”). Special procedural steps are usually a matter of special laws’ legal regulation, which as a usual rule, apply APC as a subsidiary law.⁴ As one of the basic principles of administrative bodies’ operation, APC states in its introductory provision s. 6 (1), that administrative bodies must proceed in accordance with the principle of quickness and economy. APC also sets a general time framework for decision-making of administrative bodies by setting time limits for rendering a decision in s. 71, where the administrative body’s time limit begins to run from the moment of initiation of proceedings. Administrative body is duty-bound to deal with cases without unreasonable delays, to perform acts in a time period set by law and if it is not set, in a proportionate period of time. Provisions of APC on protection against inaction is included in s. 80, partially also in provisions related to possibility or rendering an interim decision in certain cases or partial decision.⁵ Provision s. 80 APC is a key one as to the solution of inaction of administrative bodies. It is the first

2 Resolution of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the Charter of Fundamental Rights and Basic Freedoms as a part of the constitutional order of the Czech Republic.

3 Right to have the case heard within a reasonable period of time is also enshrined in Article 6 (1) Convention for the Protection of Fundamental Rights and Freedoms (in the Czech Republic published under no. 209/1992 Coll.) and Recommendation of Council of Ministers CM/Rec (2007) 7 on good public administration in the provision of part I., Article 7., it imposes a duty to act and fulfill duties within a reasonable period of time.

4 It is necessary to mention that principles of administrative bodies’ operation mentioned in s. 2 - 8 APC (including the principle of quickness) apply even if special law excludes the use of APC and it does not contain regulation corresponding with these principles itself. Comp. s. 177 (1) APC.

5 Comp. s. 148 APC. Practical combination of both of these types of decision and adoption of certain measure against inaction by superior administrative body is possible, too.

direct legal instrument for elimination of concrete inaction of administrative body consisting of an *option to turn to superior administrative body and require adoption of certain measure against inaction in accordance with s. 80 APC*.⁶ The term inaction in APC refers to both not rendering a decision on merits in legal, or proportionate period of time by a competent administrative body and a case when this body does not initiate proceedings *ex officio* in thirty days from the day it became aware of facts justifying commencement of proceedings. Superior administrative body must perform the measure against inaction as soon as it finds out about inaction either from a party to the proceedings who is attributed with this option after ineffectual lapsing of periods for rendering a decision or from an administrative body operating the proceedings. The problem of inaction may also be discovered by superior administrative body itself during fulfillment of their supervision activities.⁷ Measures against inaction may be adopted by superior administrative body even before the inaction occurs, i.e. if it is clear under given circumstances that materially and locally competent administrative body will not uphold the time period for rendering a decision on application, for commencement of proceedings *ex officio* or if it cannot continue in the proceedings properly.

The second legal means of protection might especially be the *complaint against inaction under Act no. 150/2002 Coll., Code of Administrative Justice* (hereinafter "CAJ", s. 79–81). Complaint against inaction of administrative body is admissible in case of ineffectual exhaustion of remedies provided by procedural regulation applicable in proceedings before an administrative body. Subsidiarity of judicial protection is supposed to allow priority use of remedies within the framework of Public Administration itself. Complaint

6 Under s. 80 (4) APC, there are four measures against inaction. The first one of them is order to inactive administrative body to adopt a remedy measure or to render a decision. The second measure is takeover of the case and rendering a decision instead of inactive administrative body (so-called attraction). The third option of superior administrative body is to authorize a different administrative body in its administrative area to run the proceedings (so-called delegation) and the fourth possibility is to reasonably prolong the time period for rendering a decision in case it is justifiably presumable that a decision on merits would be rendered in this time period and if such conduct is advantageous for parties to the proceedings. In order to respect constitutionally guaranteed right to self-government, the law forbids using the conduct consisting of so-called attraction and so-called delegation towards bodies of territorial self-governing units when performing separate competence.

7 V. Sládeček regards measure against inaction as supervision means where he is its specialty in the fact that they are not directed against administrative act but against inaction of administrative body, i.e. reluctance to render an administrative act (in a given time period) whatsoever. In Sládeček, V. *Obecné správní právo*. 2nd edition, Praha: ASPI - Wolters Kluwer, 2009, p. 139.

against inaction of administrative body in administrative judiciary may be successfully filed especially if measures adopted against inaction are fruitless, i.e. they are not respected by inactive administrative body. The possibility to seek judicial protection is also given if superior administrative body does not accept measure against inaction or does not react to party's application to use them. Complainant always has to provide evidence that they defended themselves against inaction actively before filing a complaint. In their favor, the law provides quite a long objective time period for filing a complaint.⁸ Complaint may be filed against inaction in the form of not rendering a decision or a certificate by administrative body and it may be sought that court impose a duty upon an administrative body to render a decision on merits or a certificate in the time period set in the decision of court. This time period set by a court is binding for the administrative body complained of.

The third legal remedy against inaction of administrative body is an application addressed to *Constitutional Court*, which has a special place in the system of courts in the Czech Republic. Concept of specialized and concentrated constitutional judiciary in the constitutional system of the Czech Republic is founded on the fact that Constitutional Court fulfills the role of "judicial body of protection of constitutionality" (Art. 83 Constitution of the Czech Republic).⁹ In relation to bodies of public power, its task is to review their steps from the constitutional point of view, not mere legality or any other viewpoints.¹⁰ Equally, the principle of subsidiarity thus demonstrates itself in the constitutional judiciary along with respecting minimization of interferences with decision-making activity of other bodies of public power. Only in case the person affected by inaction of administrative body exhausts all means of protection their rights provided by law,¹¹ they may file a *constitu-*

8 Complaint may be filed in one year from the day of lapsing of a period for rendering a decision or a certificate given by special law, and if it is not given, from the day of the last act made by complainant towards an administrative body or by an administrative body towards complainant.

9 Šimíček, V. *Ústavní stížnost*. 3rd edition, Praha: Linde Praha, 2005, p. 136

10 Ibidem.

11 Principle of subsidiarity of proceedings on constitutional appeal is broken by a duty of Constitutional Court not to reject a constitutional appeal in case of not fulfilling the condition of exhaustion of all means of remedy for protection of appellant's right if the importance of the complaint significantly overreaches own interests of the appellant and it was filed in one year from the day when the fact which is a subject of constitutional appeal occurred, or if in proceedings on filed remedy, there are significant delays which may lead to serious and inevitable harm. Comp. s. 75 (2) Act no. 182/1993 Coll., on Constitutional Court. In details, see commentary to this provision in Filip, J., Holländer, P., Šimíček, V. *Zákon o Ústavním soudu. Komentář*. 1st edition. Praha: C.H. Beck, 2011, s. 327 – 355. Also see Šimíček, V. *Ústavní stížnost*. 3rd edition, Praha: Linde Praha, 2005, p. 134–142.

tional appeal to the Constitutional Court, where they would claim violation of constitutionally guaranteed right to have the case heard without unreasonable delays, or in proportionate time, by an administrative body. Constitutional Court supports a constant opinion that inaction of administrative bodies is a form of violation of constitutionally guaranteed rights and freedoms. If the Constitutional Court in its judgment rules in favor of a person or a corporation, it forbids the competent body to continue in violating the right. Because an inaction is concerned, it is not possible to apply Constitutional Court's authority to order restitution of a satet before violation because it not really feasible.¹² For completeness, it is necessary to add that constitutional complaint may be also aimed against delays in proceedings before courts which may concern themselves with inaction both within the administrative law framework and civil law competence. But here, the condition of exhausting of legal remedies for protection of rights would consist of preceding application of complaint on delays in proceedings before a court.¹³

As the fourth one, it is important to mention the possibility of turning to *Public Defender of Rights*. In our country, ombudsman is actually authorized to provide protection to persons against not only actions of bodies and other institutions mentioned in the law from the viewpoint of its correspondence with the law, principles of democratic legally consistent state and good administration,¹⁴ but explicitly also to *protection of persons against their inaction*.¹⁵ Everyone has access to Public Defender of Rights and the application is not paid for. If the case falls within the scope of defender's competence, examination of the application is started including an option of visiting the inactive body which may be more effective in elimination of causes of inaction than written correspondence. If the inactive body does not react to defender's invitation to remedy, defender may propose various remedial measures.¹⁶ If the eventually adopted measures against inaction are insufficient, defender notifies the superior body and if there is no such body, it informs the govern-

12 Comp. s. 82 (3) Act no. 182/1993 Coll., on Constitutional Court, as amendedv platném znění.

13 Legal regulation of a complaint for delays in court proceedings dealt with by bodies of administration of courts, is a subject of regulation in s. 6/2002 Coll., on courts and judges and s. 30 CAJ.

14 The first Public Defender of Rights JUDr. Otakar Motejl included the principle of timeliness among the principles of good administration. Comp. <http://www.ochrance.cz/stiznosti-naurady/stanoviska-ochrance/principy-dobre-spravy/>.

15 S. 1 Act no. 349/1999 Coll., on Public Defender of Rights.

16 See s. 19 Act no. 349/1999 Coll., on Public Defender of Rights.

ment, where it may also inform the public on their findings.¹⁷ Public Defender of Rights does not have legal means of direct enforcement of remedy by competent bodies at its disposal, nonetheless, remedial measures proposed by it are usually respected by bodies and they are eventually effective. The personal aspect is also important, because complainants turn to defender not as to state body but rather as to a human being where they might find support. Empathic approach of a person of ombudsman in connection with his expert erudition gives them a safeguard the someone will effectively step in against inaction of administrative body, finally. Public Defender of Rights dealt with a line of complaints for inaction of competent ministries when assessing applications for recovery of damages for unlawful decision or incorrect official procedure with an application for proportionate compensation for immaterial harm under Act no. 82/1998 Coll., on liability for damage caused in the performance of public power by decision or incorrect official procedure. Upon finding discrepant processes of administrative bodies when assessing these applications, Public Defender of Rights formulated so-called *ten commandments of good practice when assessing an application for recovery of damages*.¹⁸ Their goal is not only to eliminate delays when dealing with the mentioned applications by ministries and other competent administrative bodies (competence of administrative bodies is regulated by s. 6 Act no. 82/1998 Coll.), but also to increase predictability of their assessment which corresponds both with the constitutional principle of equality in rights and before the law, as well as ban of discrimination and principle of legitimate expectations as one of the key principles of administrative bodies' operation.¹⁹

Among the subjects which provide protection of persons in case of inaction of administrative bodies, it is important to include also the *European Court of Human Rights*. Its authority established by Convention for the protection of fundamental rights and freedoms, published in the Czech Republic under no. 209/1992 Coll., gives it a right to evaluate observance of agreed

17 Public Defender of Rights may proceed similarly in case the body during an examination does not fulfill their duties toward defender. Duty of co-operation consists mainly of a duty to provide information and explanations and other written documents, to provide information on factual and legal questions in written form, to take evidence proposed by defender, to perform acts of supervision which the defender proposes.

18 <http://www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2010/desatero-dobre-praxe-proposouzeni-zadosti-o-odskodneni/>

19 Legislatively, the principle of legitimate expectation (predictability) is embedded in s. 2 (4) APC and its substance is the duty of administrative body to take care that decision-making of factually the same or similar cases does not lead to creation of unjustifiable differences. In details, see e.g. Skulová, S. et al. *Správní právo procesní*. Plzeň: Aleš Čeněk, 2008, p. 68 – 71.

obligations by contractual states on the basis of individual applications. European Court of Human Rights also deals with applications regarding delays in proceedings which it regards as violation of right to a fair trial under Art. 6 (1) Convention. The Czech Republic was repeatedly order to financially compensate applicant for violating this provision and case-law of European Court of Human Rights meant a significant breakthrough in evaluating proportionality of length of court proceedings in the Czech Republic.²⁰ However, it was also the main impulse for introducing an option of financial compensation of so-called immaterial harm caused during performance of public power by unlawful decision or incorrect official procedure in our legal order.²¹

Inaction of administrative body as an incorrect official procedure

Inaction of administrative body is so-called incorrect official procedure in the sense of Act no. 82/1998 Coll., on liability for damage caused in the performance of public power by decision or incorrect official procedure and on amendment of Act of Czech National Council no. 358/1992 Coll., on notaries and their activity (notaries' procedure code). Liable subject may be the state or territorial self-governing unit depending on whether the harm was caused in realization of state administration (even delegated to corporations or persons or to bodies of territorial self-governing units) or self-government.²²

20 Case-law of the European Court of Human Rights related to Article 6 (1) Convention is very vast and diverse. For the purposes of this paper, I point out the constant opinion of the European Court of Human Rights that the most appropriate and desirable solution of the issue of unreasonably lengthy proceedings are preventive measures and such in advance presumed organization and such legally regulated functioning of judiciary which provides conditions for running proceedings whose results are as quick decisions on merits as possible, all that with respect to observing principles of legality and justice of the proceedings. Article 6 (1) requires the convention countries to organize its judiciary in order for their courts to satisfy all their requirements, i.e. even the requirement of hearing the case within a reasonable period of time. Comp. e.g. judgment of Grand Chamber dated 29th March 2006 in case *Apicella v. Italy*, complaint no. 64890/01, point 72.

21 Already in the introduction named amendment of Act no. 82/1998 Coll., on liability for damage caused in the performance of public power by decision or incorrect official procedure and on amendment of Act of Czech National Council no. 358/1992 Coll., on notaries and their activity (notaries' procedure code), in the wording of amendment made by Act no. 160/2006 Coll., with effect from 27. 4. 2006.

22 State is liable for damage caused by state bodies, corporations and persons when performing state administration which was entrusted to them by law or on the basis of law. State is also liable for damage caused by bodies of territorial self-governing units if the damage was caused in performance of state administration which was transferred to them by law or on the basis of law. Territorial self-governing units are liable for damage caused in the performance of public power entrusted to them by law within the framework of separate competence.

Right to recovery of damages caused by unlawful inaction of state bodies or bodies of territorial self-governing units is given to a person to whom these damages were incurred. It is a *special kind of civil law liability* where there is no option of liberation of liable subject under this law. Origination of liability requires only objective features, i.e. unlawful actions in the form of incorrect official procedure, origination of harm and causal nexus between them. Demonstrations of inaction of administrative body may consist of not only delays in on-going proceedings but also in “not-proceeding” as to partial acts in the proceedings and finally also in postponing the moment of finalization of rendering a decision on merits in the time period set forth by law, or in a proportionate period. The harm caused to a person affected by inaction of an administrative body may have three forms. Except of real harm, it may be a lost profit. After the amendment of Act no. 82/1998 Coll. by Act no. 160/2006 Coll., there is also an option of so-called immaterial harm. Proportionate compensation is provided for it irrespective of harm being actually caused by incorrect official procedure or inaction. Form of proportionate compensation is monetary if the immaterial harm could not be compensated differently and the very declaration of violation of law would not seem as sufficient.

In case of liability of state, the injured person must apply their claims firstly at the materially competent central administrative body (usually a ministry) in whose competence is the area of state administration, where the harm occurred.²³ This hearing of a claim is not an administrative proceeding, as it has an informal nature as a certain “agreement” out-of-court proceeding which ends by granting recovery of damages in the required amount or partial grant or rejection of application. The injured person may seek damages before the court only if their claim was not fully satisfied in six months from the day of application submitted to competent central administrative body. If the territorial self-governing unit is responsible for inaction of administrative body or incorrect official procedure, the law does not require previous use of so-called preliminary hearing at the territorial self-governing unit, however, it is not excluded. Claim for recovery of damages and claim for proportionate compensation for immaterial harm caused by bodies of territorial self-governing unit when performing separate competence may be applied directly before a court. Conditions of liability must be always duly proved by the injured person, in the court proceedings it is the plaintiff who bears the burden of statement and burden of proof.

23 In detail, comp s. 6 Act no. 82/1998 Coll., on liability for damage caused in the performance of public power by decision or incorrect official procedure and on amendment of Act of Czech National Council no. 358/1992 Coll., on notaries and their activity (notaries' procedure code).

Claim based on delays in proceedings is subject to six months long statute of limitations from the day that the injured found out about created immaterial harm, however, in ten years maximum from the day when legal fact occurred leading to linked origination of immaterial harm. However, the statute of limitations shall not end sooner than six months from the end of proceedings where this incorrect official procedure took place.²⁴

When determining the amount of *immaterial harm*, seriousness of the incurred harm is taken into account along with circumstances under which the harm occurred. It is a norm with relatively indefinite hypothesis requiring the court (or already the competent central body within the framework of preliminary hearing of the claim) to determine circumstances important for determining the amount of compensation itself with respect to concrete factual circumstances of every individual case.²⁵ In case the harm was caused by delays in proceedings before court or other body, s. 31a (3) Act no. 82/1998 Coll. names other subsidiary criteria. When determining concrete amount of proportionate compensation, the competent body must give regard especially to *aggregate length of the proceedings, complexity of the proceedings, actions of affected persons which contributed to delays in proceedings in a given process and whether they used all available means of remedy capable of eliminating delays, to steps of body in dealing with the case and the importance of the case for the affected person*. These criteria have their origin in case-law of European Court of Human Rights.

Chosen case-law in matters of complaints for recovery of damages

For the purposed of this article, I chose three decisions of Supreme Court which cover recovering of damages under Act no. 82/1998 Coll. The first two ones have a nature of judgment, the third one is a statement on interpretation of certain provisions of this law linked to recovery of immaterial harm caused by delays in proceedings.

In the first case, the process of land registry body was examined as its inaction caused harm to the plaintiff, owner of the immovable property regarding which it failed to register change of legal relations in land registry. District

24 Reasoning report to Act no. 160/2006 Coll. states on this issue that this specific setting of statutes of limitations underlines the importance of looking at the proceedings as one unit because the recovery of immaterial harm may be required in six months from the end even if delays took place only in some of the previous phases of the proceedings. Comp. <http://www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=1117&CT1=0>.

25 Vojtek, P. *Odpovědnost za škodu při výkonu veřejné moci*. Komentář. 2nd edition. Praha: C. H. Beck, 2007, p. 177 – 178.

Court in T. ordered enforcement of judgment by selling the immovable property of defendant to cover claims of plaintiff under previously enforceable judgment of the same court. Although the decision of court was delivered to Land Registry in T on 11th March 1998, the note in land registry was not made and with effects to 30th March 1008, this body allowed inscription of ownership right to immovable property, subject to enforcement of a judgment, on the basis of a purchase contract dated 12th March 1998 by which the defendant sold to a third person. The plaintiff thus sought recovery of damages by state consisting of a loss of an option to enforce adjudicated claim by their otherwise insolvent debtor along with the costs of the first instance and enforcement proceedings. He indicated that the incorrect official procedure occurred by not-performing an inscription of ban of transfer of immovable property to a third person by competent land registry body under s. 9 Act no. 265/1992 Coll., on registering ownership and other material rights to immovable property. The defendant – the Czech Republic, Czech Geodetics and Land Registry Office, doubted the assessment of an issue of incorrectness of land registry's official procedure consisting of not registering a note in land registry after delivery of court's decision on ordering enforcement of judgment by means of selling immovable property claiming, that such a duty originates after enforceability of a decision which in their opinion took place approximately half a year after delivery of the decision. The case was repeatedly dealt with by Regional Court in B., for the last time it confirmed the first instance court decision.²⁶ The Supreme Court dealt with the case on the basis of cassation of the defendant against judgment of Regional Court in B. In the cassation, defendant argued that due to the fact that the decision on ordering enforcement of judgment was not enforceable at the time of conclusion of purchase contract, parties to the contract were not limited in their in their contractual autonomy and land registry body had no reason not to perform inscription of ownership right. By delivery of unenforceable decision, the duty of registering a note did not originate in cassation complainant's view and its inaction thus could not have an impact on proceedings on allowing inscription of ownership right. Supreme Court rejected the cassation, and among others, it stated in reasoning of its judgment that note under s. 9 Act no. 265/1992 Coll., on registering ownership and other material rights to immovable property serves to capture fact named by law which themselves do not have an impact on ownership rights put in land registry, nevertheless, they may have an impor-

26 In details, see reasoning of Supreme Court of the Czech Republic dated 26th February 2008, file no. 25 Cdo 3054/2005 (Collection of civil decisions SC CR 5799).

tance from this viewpoint depending on the course of respective proceedings (e.g. enforcement or bankruptcy) where a decision, which is a basis for making a record in land registry, may be rendered. However, it follows from the express wording of law that the decisive moment for activity of land registry body is the delivery of respective decision, not enforceability as cassation complainant incorrectly deduced. In the decision in mentioned case dated 26th February 2008, file no. 25 Cdo 3054/2005 (Collection of civil decisions SC CR 5799), the Supreme Court formulated this legal sentence: *“The fact that land registry body did not make a note in land registry on the basis of delivery of respective decision, and it did so after it became final, constitutes incorrect official procedure.”*

In the second case, the Supreme Court made a statement on unlawful decision which was annulled, but the same duty was again imposed in new decision. In case the harm was created by unlawful decision, s. 8 Act no. 82/1998 Coll. provides that final decision must be annulled for unlawfulness or amended by competent body as a legal condition of applying the claim. The injured person must also prove that it used all procedural means which the law provides for protection of their rights. In the instant case, two administrative decisions were concerned, rendered under Act no. 246/1992 Coll., on protection of animals against torture, in July 2003, i.e. in the time when preceding Act no. 58/1969 Coll., on liability for harm caused by decision of state body or incorrect official procedure, was in force. In the first decision, Municipal body of B. ordered immediate removal of 60 to 70 dogs from the house of family S. due to their torture because these animals lived in inadequate conditions, they were strongly fouled and had minor injuries. Animals were given to breeding stations. In the second decision of the same body, it was decided on removal of other ten animals, seven cats and three parrots, from house of parties to the proceedings. Both decisions were subsequently annulled by District Office in B., because they were not adopted in accordance with Act no. 71/1967 Coll., Administrative Procedure Code, as they lack sufficient reasoning, commencement of administrative proceedings did not precede them, and a different municipal body was supposed to decide on removal of animals on the basis of suspecting their torture than the one which did render the decision. Competent municipal body then decided in proper administrative proceedings, but instead of two decisions, it rendered only one which replaced the first of previously annulled ones, precisely the decision on removal dogs (now in specified count of 57 dogs). Under s. 4 (1) Act no. 58/1969 Coll., the claim for recovery of damages cannot be applied until the

final decision, which caused the harm, is annulled for unlawfulness by competent body where the court deciding on recovery of damages is bound by decision of this body. The complaint for recovery of damages was filed by family S. claiming that the harm consists of decrease of their property state by value of all animals which were unlawfully removed from them. However, complainant's were injured in causal nexus with only one of the annulled decisions which was not replaced by later decision of the same content, accurately in the amount of 7 cats and three parrots determined by expert opinion. This amount was granted to them in court proceedings. In the cassation proceedings, Supreme Court stated that harm in the amount of removed dogs may be caused to plaintiffs only if the removal was made on the basis of decision which was annulled for unlawfulness. Because the later rendered decision contained the same verdict on justified and lawful removal of plaintiffs' dogs, conditions of liability mentioned in s. 4 Act no. 58/1969 Coll. were not fulfilled. It was the judgment of Supreme Court of the Czech Republic dated 19th March 2009, file no. 25 Cdo 917/2007.²⁷ For clarification, I cite the legal sentence from judgment: *"Decrease of property state by removal of a thing on the basis of decision which was annulled for unlawfulness, does not constitute recoverable damage which would be in causal nexus with unlawful decision, if the later rendered decision containing the same verdict was not amended or annulled for unlawfulness."*

In decision making of courts in so-called compensation proceedings created by unlawful inaction in performance of public power under Act no. 82/1998 Coll., the relatively new statement of Supreme Court is of great importance.²⁸ It is the statement of civil law and commercial collegium of the Supreme Court of the Czech Republic dated 13th April 2011, file no. Cpjn 206/2010 on interpretation of s. 13 (1) the first and the third sentence, s. 31a, s. 32 (3) Act no. 82/1998 Coll., on liability for damage caused in the performance of public power by decision or incorrect official procedure a čl. II. Act no. 160/2006 Coll., in case of not rendering a decision within a reasonable period of time.²⁹ In the reasoning, the Supreme Court states that the purpose of statement is to provide courts of inferior instances with certain guideline

27 Published in Soudní rozhledy 9/2009, decision no. 99.

28 Supreme Court of the Czech Republic observes and evaluates final decisions of courts in civil and criminal proceedings and on the basis of them in the interest of uniform decision-making of courts, it makes statements on decision-making activity of courts in cases of certain kind which have indisputable significance in interpretation and application of norms within the framework of decision-making activity of courts although they are not binding in our legal system.

29 Published in Collection of court decisions and statements under no. 58/2011.

on how to proceed in assessing the claim for proportionate compensation in the sense of s. 31a Act no. 82/1998 Coll., and thus to contribute to simplification and shortening of compensation proceedings. This proceeding in itself must not be unreasonably long. With respect to large extent of this statement, I will only focus on parts regarding two key topics which are the length of the proceedings and immaterial harm.

Two legal sentences of the statement are related to the length of proceedings:

When assessing aggregate length of the proceedings, it is not possible to ignore the part which occurred before European Convention for the protection of fundamental rights and freedoms became binding for the Czech Republic.

*When assessing aggregate length of the proceedings, it is necessary to take account of the part where party to the proceedings acted as legal predecessor which entered the proceedings as their heir and which now demands proportionate compensation under s. 31a of the law.*³⁰

Except of determining a moment when proceedings were commenced and when it was finished, the Supreme Court also dealt with the issue of suspension of proceedings which must be principally counted in the aggregate length of the proceedings and reasonability of the length of proceedings. “When assessing reasonability of length of the proceedings, it is necessary to take account of two (usually contradictory) aspects of right to a fair trial, i.e. right of a party to the proceedings to have their case heard and decided within a reasonable period of time and concurrently, the general requirement of proceeding in accordance with legal regulations and security of rights of a party to the proceedings (e.g. s. 2 Civil Procedure Code, s. 2 CAJ, s. 1 Criminal Procedure Code). Just for this reason, it is not possible to follow any abstract previously set length of the proceedings which would be regarded as reasonable from the perspective of s. 31a of the Act, or Article 6 Convention. It is necessary to take account of particular circumstances of individual case.”³¹

Supreme Court dealt with the immaterial harm in the mentioned statement on various levels, it refers to relevant Czech case-law and judicature of European Court of Human Rights in reasoning of the statement. For quotations, I choose the third, the fourth and the fifth legal sentence of the statement:

Immaterial harm caused by incorrect official procedure in the sense of s. 13 (1) the third sentence and s. 22 (1) the third sentence of the Act, is necessary

30 Statement of Supreme Court of the Czech Republic dated 13th April 2011, file no. Cpjn 206/2010.

31 Ibidem.

to be claimed and if it is not effectively refuted or if declaration of the law does not suffice, monetary compensation is granted.

When assessing the provision of proportionate compensation, it is necessary to take account of the aggregate length of the period, i.e. not only to the time period during which delays occurred in the sense of inaction.

*Reasoning of the amount of granted compensation must include evaluation which follows the basic amount set by multiple of aggregate length of the proceedings in years or months and amounts granted for unit of time of proceedings with subsequent addition or subtraction of impact of facts resulting from criteria included in s. 31a (3) (b) – (e) of the Act.*³²

As to the amount of proportionate compensation, the Supreme Court stated that certain general principles and generalization of how to proceed in a particular case may be deduced from the case-law of European Court of Human Rights. It may be deduced from the decision of Grand Chamber of European Court of Human Rights in case *Apicella* that this court finds it proportionate if domestic body the granted the injured with 45% of what it would grant itself.³³ On the basis of annual amount which is the basis for Ministry of Justice of the Czech Republic when determining amount of proportionate compensation and following the case-law of European Court of Human Rights in proceedings where proportionate compensation was granted, delays caused in proceedings before state bodies of the Czech Republic, Supreme Court came to the conclusion that “in condition of the Czech Republic, it is proportionate, if the basic amount, which is the basis for determining of amount of proportionate compensation, is within the range from 15.000,- CZK to 20.000,- CZK (approximately 600 to 800 EUR) for one year of proceedings, i.e. 1.250,- CZK to 1.667,- CZK (approximately 50 to 67 EUR) for one month of proceedings. But Supreme Court regards it as necessary to take into account that every proceeding takes a certain period of time. It would thus be incorrect, if the initial time period of proceedings (which may be regarded as proportionate) would be compensated in the same amount as the time period overlapping it. For the purposes of settling up with this issue, Supreme Court thus finds it reasonable, if the first two years of proceedings (or in other words, the first 24 months) are evaluated with an amount which half lower than the amounts mentioned above, i. e. from 15.000,- CZK to 20.000,- CZK for the first two years of proceedings together (7.500,- CZK to 10.000,- CZK for one year, then). When determining the basic amount, ag-

³² Ibidem.

³³ Judgment of Grand Chamber of the European Court of Human Rights dated 29th March 2006, *Apicella v. Italy*, application no. 64890/01.

gregate length of the proceedings thus plays a significant role. Additionally, if proceedings were generally extremely long (if its length was multiple longer than expected with respect to circumstances of the case), the granted amount for respective period of time will be close to upper level of intervals mentioned above. Likewise, it is possible to increase the basic amount for respective time period in case the compensation proceeding itself is unreasonably long and a complaint moves for increase of compensation for this reason.”³⁴ In its statement, Supreme Court also highlights the duty of court declared by the Constitutional Court, to assess every case individually and depending on it, to determine adequate compensation possibly even out of intervals given by Supreme Court.³⁵

In the reasoning of aforementioned statement, Supreme Court dealt with more questions, where all problematic places of the Czech legal regulation were assessed in the light of case-law of the European Court of Human Rights. Statement is also a summary of existing case-law of Supreme Court. In case courts will uphold the mentioned statement of Supreme Court on interpretation and application of provisions of Act no. 82/1998 Coll., there is a higher probability that persons affected by inaction, who were fairly compensated in proceedings before Czech courts, will not have to turn to European Court of Human Rights. In case the matter gets to this court upon an application, it is possible to predict that conduct of Czech courts would be approved in its decision.

Conclusion

The goal of this paper was to point out main legal means of defense against inaction of administrative bodies. Inaction of administrative bodies is an incorrect official procedure connected with claim for recovery of damages as well as claim for compensation of so-called immaterial harm. Using the mentioned examples from case-law of Supreme Court, I tried to capture important aspects of legal regulation and to draw reader’s attention to statement of Supreme Court of the Czech Republic on interpretation of certain provisions of Act no. 82/1998 Coll., in the wording of amendment by Act no. 160/2006 Coll..

34 Statement of Supreme Court of the Czech Republic dated 13th March 2011, file no. Cpjn 206/2010.

35 It is the judgment of Constitutional Court dated 9th December 2010, file no. III. ÚS 1320/10, in which the Constitutional Court reacted to judgment of Supreme Court dated 21st June 2010, file no. 30 Cdo 3026/2009, where Supreme Court provided the mentioned basic rules for counting amount of proportionate compensation.

On possible depersonalization of originator of administrative acts

In the process of modernization, automatization and computerization or electronization of Public Administration, there are many new technical and technological solutions used. Among others, they impact or might impact origination of new institutes of administrative law or change of the current ones which represent the foundation of certain administrative acts. Such development has both positive and negative consequences. With a little exaggeration, one of the negative ones is the possibility or in other words, the risk of depersonalization of originator of respective or conditional administrative activities. It has been the aim of my paper to signalize and on chosen cases, to illustrate this problem and indicate some of its procedural and liability connections.

To the basic terms

- in administrative law, administrative act is understood as an expression of performer of Public Administration which is based on a norm of administrative law; the subject of this paper's attention will actually be (firstly) concrete administrative acts of external nature concerning addressees standing out of the Public Administration's structure on one hand and on the other hand (secondly), abstract administrative acts which represent the basis of expressions of will of Public Administration's addressees, and concrete administrative acts consisting of reception of these expressions of will of Public Administration's addressees, and (thirdly) administrative acts of internal nature realized within the framework of Public Administration,
- originator of administrative act is, strictly speaking, a performer of Public Administration; but they act on behalf of Public Administration bearer; acts of performer of Public Administration are eventually fulfilled by persons who represent its personal substrate (within the framework of superior Public Administration, they are primarily individual official persons),
- depersonalization is a term known to different disciplines, primarily psychiatry¹; it shift in administrative law and administrative law sci-

1 See e.g. SIERRA, M.: *Depersonalization. A New Look at a Neglected Syndrome*, Cambridge University Press, New York, 2009; SIMEON, D., ABUGEL, J.: *Depersonalization Disorder and the Loss of the Self*, Oxford University Press, New York, 2009; NEZIROGLU, F., DO-

ence is supposed to express weakening or loss of awareness of official persons' sense of belonging with administrative acts of Public Administration performers, or in other words, togetherness of Public Administration performers with their acts who demonstration is looking at "oneself" and at one's own administrative activity from the "outside" as an activity of someone else which may result in the feeling of "irresponsibility".

A.

1. We may begin with a trivial example of concrete administrative act of external nature which is the factual instruction of an officer of Police of the Czech Republic (= policeman) when directing the road traffic.² From the perspective of legally binding effect, light signals (and acoustic signals respectively) made by technical signalization device have the same importance.³ There are two situations for comparison:

- physical instructions of a policeman; there may be a fault of a policeman as an official person,
- technical signalization device operated by a policeman; there may be a defect of the device as well as fault of a policeman when operating it,
- technical signalization device works automatically when the policeman is present; fault of the policeman may occur in case there is a defect of the device and they should have noticed this defect and react to it,
- technical device works automatically (it is connected separately or in the set of several such devices) without the presence of anyone, there is the impression of "irresponsibility" or it is strengthened.

Even in the lastly mentioned case, functioning of technical signalization device or set of technical signalization devices must be nonetheless supervised. In case it is equally supervised automatically, problem moves to a "higher level". It highlights the issue of programming the directing system of a set, then. Ultimately, the use of technical signalization devices is a consequence of expression of will of the respective Public Administration performer.⁴

NELLY, K.: *Overcoming Depersonalization Disorder*, New Harbinger Publications, Oakland, 2010; RASZKA, M., CHALUPNÍČEK, A., PRAŠKO, J.: *Depersonalizace a derealizace z klinického hlediska*, *Psychiatrie* no. 3/2010.

2 s. 69 and 75 of effective wording of Act no. 361/2000 Coll., on road traffic and on amendment of certain other laws (Act on road traffic).

3 s. 69–74 of effective wording of cit. Act on road traffic.

4 "Setting forth" under s. 77 of effective wording of cit. Act on road traffic, which is supposed

2. The most characteristic concrete administrative act of external nature is an administrative decision (administrative act). When issuing decisions by performers of Public Administration, modernization has a number of shapes:

- non-specific use of IT in connection with making the written decision; it only concerns subalterate office works, it is not an automatization, yet; an unwanted consequence is the occurrence of previously unseen mistakes in written decision made by not paying attention when copying text in block; it follows that such mistake should be accounted to official person,
- specific use of IT consisting of rendering electronic decision by an authorized official person; we may speak of automatic assistance in decision-making; fault of an authorized official person will be ordinarily related to a mistake when operating computer program, theoretically there might additionally be a defect of a computer program, or in other words, its low level of user-friendliness,
- specific use of IT consisting of rendering decision “through” automatized system of processing data; we may speak of automatic decision-making; for various reasons, there might be technical defect of automatized system of data functioning.

Even here it applies that any mistake (defect of a decision or non-issuance of a decision) is accountable to the respective subject of Public Administration. Automatization may play significant role when considering secondary recourse to those “interested”.

As far as automatic assistance or automatized decision-making are concerned, on the basis of positive law, without any effort to analyze closer, we may mention making a decision with automatized IT in cases of pension insurance⁵, or rendering a decision on release in the customs duty regime or termination of customs duty regime electronically (by an official person or with help of an automatized system of working the data)⁶.

3. Special attention needs to be paid to making of administrative decisions and other administrative acts in the form of data message (electronic delivering).⁷ Regarding certain aspects of electronic communication between

to be in correspondence with s. 78 therein.

5 s. 86 (1) of effective wording of Act no. 582/1991 Coll., on organization and implementation of social security.

6 s. 104 (1) (b) of effective wording of Act no. 13/1993 Coll., on customs duty.

7 s. 17 Act no. 300/2008 Coll., on electronic acts and authorized conversion of documents. Particularly e. g. s. 16a (2) of effective wording of Act no. 143/2001 Coll., on protection of economic competition.

performers of Public Administration and addressees of Public Administration (and vice versa), see below.

4. Electronization naturally impacted even performance of other (so-called non-regulatory) administrative acts. Compare e.g. electronic auction when selling movable and immovable property within the framework of administrative enforcement of monetary obligations.⁸

5. Non-regulatory administrative act of an external nature which represents a “boundary” between a written document and data message is one of the forms of certificate – authorized conversion of documents⁹.

B.

1. Modernized abstract administrative acts which are a foundation for applications of Public Administration’s addressees are electronic interactive forms prescribed by ordinances. Such form cannot be filled in incorrectly from the formal point of view. That may cast both an advantage and disadvantage for the applicant. It depends on their skills, nevertheless questions arise. What if they “lose” the fight with electronic form and they do not submit the application or they miss the deadline for it? What if it was caused also by misleading instructions for filling in the form?

Principally, only technical problems may then arise in connection with following corresponding concrete receptive administrative acts.

Application for deciding a dispute between parties by Czech Telecommunications Office¹⁰, application for provision of data in registry of inhabitants or in registry of rights and duties¹¹, application for issuance of citizen’s identification card¹² or application for provision of data in the evidence of travelling identification¹³ may serve as examples of electronic forms in our positive law.

8 s. 194 (6) Act no. 280/2009 Coll., Tax Procedure Code. Announced implementing ordinance has not been published, yet.

9 s. 22–26 of effective wording of cit. Act on electronic acts and authorized conversion of documents.

10 s. 129 (2) of effective wording of Act no. 127/2005 Coll., on electronic communications and ordinance no. 360/2010 Coll., providing the example of electronic form of application for decision in dispute on duty of monetary payment and technical requirements of its using.

11 s. 58 (2) Act no. 111/2009 Coll., on basic registries.

12 s. 4 (2) and s. 18a (6) Act no. 328/1999 Coll., on citizen’s identifications in its wording effective since 1st January 2012.

13 s. 30a (6) Act no. 329/1999 Coll., on travelling identification, in its wording effective since 1st January 2012.

Certification of successful taking over of data in counting form was presumed by the regulation of the last counting of persons, houses and apartments.¹⁴

2. Electronic form may have an analogy in prescribing form and structure of data message.¹⁵ Contrarily, documents available through computer network as well as documents coming out of computer printer containing data whose filling in prescribed by documents must be distinguished from electronic forms in the sense mentioned above.¹⁶

3. Accessing forms electronically is one of the tasks of Public Administration portal.¹⁷

4. Using electronic forms is generally observed in registration of Public Administration's agendas.¹⁸

C.

Administrative acts of internal nature which are interesting from the viewpoint of this paper's topic, are linked primarily to the administration and running information systems of Public Administration¹⁹, performance of file

14 s. 3 (3) ordinance no. 279/2010 Coll., on implementation of certain other provisions of Act no. 296/2009 Coll., on counting of persons, houses and apartments in 2011, in connection with s. 3 (1) and (2) therein, as well as s. 2 (l) and s. 7 (1) (a) of the mentioned act.

15 s. 4 (1) and (2) and s. 6c of effective wording of Act no. 258/2000 Coll., on protection of public health and on amendment of certain related laws, and effective wording ordinance no. 35/2004 Coll., which sets forth requirements, form of electronic appearance and data interface of protocol on control of drinking water quality and pool water quality. s. 72 (3) cit. Tax Procedure Code and instruction no. D-349 which sets forth the format and structure of data message used for application specified in s. 72 (1) Act no. 280/2009 Coll., and which is simultaneously sent to administrator of tax through data box; in a given case, a legal regulation is not concerned (!).

16 s. 72 (1) cit. Tax Procedure Code. In s. 123e (2) in connection with substituting the printed form, there are notes among others on computer set and on IT product. Further comp. e.g. s. 196 (1) Act no. 183/2006 Coll., on territorial planning and construction procedure (construction acts).

17 s. 6f (4) of effective wording of Act no. 365/2000 Coll., on information systems of Public Administration and on amendment of certain other laws. In s. 123e (2) in connection with substituting the printed form, there are notes among others on computer set and on IT product.

18 s. 54 (1) (n) cit. Act on basic registries, in relation to s. 2 (d), s. 3 (d) and s. 53 therein.

19 Cited Act on information systems of Public Administration. This Act on information systems of Public Administration was originally specified by standards of information systems; because of fear of "possible contradiction with legal regulations covering duties of territorial self-governing units" (= reasoning report to government draft amendment of cit. law; print of Chamber of Deputies of Parliament of the Czech Republic no. 837, IV. Election term) the regulation by standard was substituted by regulation using ordinances. Examples of regulations of individual information systems of Public Administration are s. 60 of ef-

service in electronic form in electronic systems of file service²⁰ and generally, with electronization of relations in mutual communication of Public Administration's structures (including provision of data from information systems)²¹.

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- fective wording of Act no. 455/1991 Coll., Trade Licensing Act, a s. 2 (3), s. 3 (1) (e) a s. 5 (1) (e) of effective wording of Act no. 570/1991 Coll., on trade licensing bodies, s. 34b and s. 34c of effective wording of Act no. 111/1994 Coll., on road traffic, s. 4 (1) (e) and s. 4a of effective wording of Act no. 200/1994 Coll., on land surveying and on amendment of certain other laws linked to its establishment, s. 46r of effective wording of Act no. 266/1994 Coll., on railways, s. 19a of effective wording of Act no. 89/1995 Coll., on state statistic service, s. 32a of effective wording of Act no. 114/1995 Coll., on inland sailing, s. 22b of effective wording of Act no. 13/1997 Coll., on road network, s. 11a of effective wording of Act no. 123/1998 Coll., on right to information about environment, s. 48 (1) (m) of effective wording of Act no. 166/1999 Coll., on veterinary care and on amendment of certain laws (veterinary act), s. 158 of effective wording of Act no. 326/1999 Coll., on residence of foreigners in the territory of the Czech Republic and on amendment of certain laws, s. 22, 23, 25, 27a, s. 51 (6) and s. 54 a 55 of effective wording of Act no. 359/1999 Coll., on social legal protection of children, s. 67 (1) (d) of effective wording of Act no. 129/2000 Coll., on regions (regional establishment), s. 3 and 13b of effective wording of Act no. 133/2000 Coll., on evidence of inhabitants and birth numbers and on amendment of certain laws (act on evidence of inhabitants), s. 26 of effective wording of Act no. 240/2000 Coll., on crisis management and on amendment of certain laws (crisis act), s. 119 and 122 cit. Act on road traffic, s. 19 and s. 22 (3) and (4) of effective wording of Act no. 254/2001 Coll., on waters and on amendment of certain laws (water act), s. 13 (3) and s. 43 (f) of effective wording of Act no. 86/2002 Coll., on protection of air and on amendment of certain laws (act on protection of air), s. 30 and 32 of effective wording of Act no. 130/2002 Coll., on support of research, experimental evolution and innovation from public sources and on amendment of certain related laws (act on support of research and evolution), s. 3 (3) (i) and s. 3a of effective wording of Act no. 215/2004 Coll., on regulation of certain relations in the area of public support and on amendment of act on support of research and evolution, s. 12, 63 to 65, 68, 69 and s. 87 of effective wording of Act no. 326/2004 Coll., on medical plant care and on amendment of certain related laws, s. 85 to 87 of effective wording of Act no. 108/2006 Coll., on social services, s. 157 Act no. 137/2006 Coll., on public orders, s. 121 Act no. 187/2006 Coll., on sickness insurance, s. 137 Act no. 262/2006 Coll., labor code, s. 2 Act no. 25/2008 Coll., on integrated registry of pollution of environment and integrated system of fulfillment of reporting duties in the area of environment and on amendment of certain laws, s. 14 of effective wording of cit. Act on electronic acts and authorized conversion of documents, or s. 2 (a) and s. 3 cit. Act on basic registries.
- 20 s. 63 (3) of effective wording of Act no. 499/2004 Coll., on archiving and file service and on amendment of certain laws.
- 21 s. 17 (1) first sentence cit. Act on electronic acts and authorized conversion of documents. Examples of regulations of providing information in electronic form are s. 38 (5) and s. 45i (4) of effective wording of Act no. 114/1992 Coll., on protection of nature and landscape, s. 45a (5) of effective wording of Act no. 42/1994 Coll., on pension additional insurance with state contribution and on amendment of certain laws linked to its establishment, s. 9 (1) and (2) (a) of effective wording of cit. act on state statistical service, s. 3 (11) to (13) of effective wording of Act no. 252/1997 Coll., on agriculture, s. 71 (6) and (14) of effective wording of Act no. 325/1999 Coll., on asylum and on amendment of Act no. 283/1991 Coll., on Police of the Czech Republic, as amended (asylum law), s. 8 (15) and (16) and s. 22c and

Provided or published “electronic data” should have official character (equal importance as “physical” data): nonetheless, positive law sometimes “carefully” stresses their informative character.²²

Electronic form of data registered within the framework of Public Administration’s agendas may have an impact on competence to realize administrative acts.²³

Problems linked to realization of administrative acts are similar to the aforementioned problems felt by addressees of Public Administration where actually the role of users of modernized agendas belongs to official persons.

D.

1. Simplification of communication between performers of Public Administration and addressees of Public Administration (and vice versa) bring, or respectively, it is supposed to bring performing of administrative acts (and submitting documents) through data boxes.²⁴ This form of communication has a priority importance and among others, it makes the electronic written contact “easier” because there is no duty to sign the documents with secured

23a of effective wording of cit. act on evidence of inhabitants, s. 19 (2 of effective wording of cit. water act, s. 5a of effective wording of Act no. 185/2004 Coll., on Customs duty Administration of the Czech Republic, s. 26 (10) of effective wording of Act no. 321/2004 Coll., on viticulture and viniculture and on amendment of certain related laws (act on viticulture and viniculture), s. 8 (6) and s. 134a of effective wording of Act no. 127/2005 Coll., on electronic communications and on amendment of certain related laws (act on electronic communications), s. 4 (4) and 5 of effective wording of Act no. 251/2005 Coll., on labor inspection, s. 32 (1) (d) and s. 33 Act no. 59/2006 Coll., on prevention of serious accidents caused by selected dangerous chemical substances and chemical materials and on amendment of Act no. 258/2000 Coll., on protection of public health and on amendment of certain related laws, as amended, and Act no. 320/2002 Coll., on amendment and derogation of certain laws in connection with termination of operation of district office, as amended (act on prevention of serious accidents), s. 14 (4) of effective wording of Act no. 69/2006 Coll., on implementation of international sanctions, s. 115a, s. 116 (4), s. 117 (6), s. 118 (8) and s. 160a cit. act on sickness insurance, s. 87 and 90 Act no. 266/2006 Coll., on injury insurance of employees, effective since 1st January 2013, or s. 30 (4) Act no. 253/2008 Coll., on certain measures against legalization of profits of criminal activity and financing terrorism. Supranational connection is given to s. 10 Act no. 191/2004 Coll., on international help when enforcing certain financial claims, or s. 4 (4) of effective wording of cit. act on regulation o certain relations in the area of public support.

22 s. 141 (4) Act no. 561/2004 Coll., on pre-school, basic, secondary, higher expert and other education (school act).

23 s. 22 (2) of effective wording of Act no. 344/1992 Coll., on land registry of the Czech Republic (land registry act).

24 s. 1 (1) (a) to (c), s. 2 to 21 cit. Act on electronic acts and authorized conversion of documents.

electronic signature.²⁵ In connection with using data boxes, couple of questions arose or showed up again.²⁶

2. The requirement of publishing contents of official board in a manner allowing distant access is a demonstration of modernization of delivering using public ordinance.²⁷ Not publishing a written document this way has fatal consequences for delivery.²⁸ Non-establishment (“not running”) electronic form of official board must have equal consequences, obviously. Problems may be caused running them in “non-authentic” environment.²⁹ User’s comfort would be strengthened if electronic official board would be inter-connected with data box of a person or corporation upon their demand.

E.

Several words on issues of future:

Electronic file is the music of future for Public Administration.³⁰ Substituting physical presence of file with access right would simplify both reviewing decisions rendered in administrative proceedings which were appealed,³¹ and designation of finality clause or enforceability³².

Project of electronic publication instrument is a started agenda.³³

Automatized issuing, prolongation and change of personal documents³⁴, or automatized control of personal documents³⁵.

25 s. 17 (1) second and third sentence of cit. Act on electronic acts and authorized conversion of documents, s. 19 (1) and (2) of effective wording of cit. administrative procedure code.

26 Conclusions no. 86/2009 and no. 93/2010 of Advisory committee of minister of the interior for administrative procedure code, decision of Supreme Administrative Court file no. 9 Afs 28/2010 – 79. A question also appeared if introduction of data boxes should not lead to informing senders communicating with “address” of electronic registry (in case data box is not used for communication, it is necessary to confirm, or respectively to supplement application made without secured electronic signature which may be beyond understanding of sender).

27 s. 26 (1) third sentence and (3) and (4) cit. administrative procedure code.

28 s. 25 (2) second and third sentence of cit. administrative procedure code.

29 At various internet portals.

30 Electronic form of court file is mentioned in s. 40b (1) of effective wording of Act no. 99/1963 Coll., civil procedure code.

31 Comp. e. g. in case of appealing decision rendered under s. 28 or s. 64 (1) or (with respect to an option of separate appeal, not very fortunate) s. 14 (2), s. 95 (5) and s. 96 (1) Act no. 500/2004 Coll., administrative procedure code.

32 See s. 75 (1) and (2) cit. administrative procedure code.

33 So-called. e-Sbirka (e-Collection), whose project is available at <http://www.mvcz.cz/soubor/zapis-10gremium-250209-prezentace-pdf.aspx>.

34 Find inspiration e.g. at <http://www.dol.wa.gov/driverslicense/idcards.html>.

35 Find inspiration e.g. at <http://www.legco.gov.hk/yr09-10/english/panels/se/papers/se0601cb2-1633-4-e.pdf>.

Electronic elections are an issue which affects Public Administration, too.³⁶

* * *

The mentioned institutes of administrative law impact the risk of depersonalization of originator of Public Administration (in the sense mentioned above) in varying extent either separately or in mutual connection.

As in medicine, even in Public Administration and administrative law depersonalization is a diagnosis.

With respect to the difficulty of therapy, it is important to put emphasis on prevention. Emphasize that “de-shadowing” of official person from her act with hardware and mainly software changes nothing on the fact that it is an act of Public Administration subject including respective performer of Public Administration counting in specific official person.

However, there is a new phenomenon consisting of participation of different subjects, taking part indirectly or even directly in performing administrative acts, or respectively, a significant increase of the level of such participation. But legally, this participation is actually based principally on business law relations.

Contrasting situation occurs in case of the liability for damage caused by an administrative act. It is a question whether (in close or further future) current legal regulation of its compensation will suffice³⁷. Although the substance of liability for damage does not change, we may speak of an influence of modernization, automatization or computerization with electronization of Public Administration on an option to require regressive compensation or on decrease (?) of possible shared liability of the injured individual. In broader context, the question is whether current concept corresponds with the status affected by the mentioned participation of other subjects.

Even steps to taking in preventing damage may be automatized. Equally with the use artificial intelligence, the system itself may secure functioning of a system and eliminate created defects. Paradoxically, this may lead to deepening of depersonalization.³⁸

36 It is currently largely discussed issue even in our country. Electronic election is in various extent used in Estonia, France, Canada, United States of America, Switzerland or in Great Britain.

37 Act no. 82/1998 Coll., on liability for damage caused in the performance of public power by decision or incorrect official procedure and on amendment of Act of Czech National Council no. 358/1992 Coll., on notaries and their activity (notaries' procedure code), as amended. Act no. 40/1964 Coll., civil code, as amended, shall be applied as a subsidiary law.

38 Fabrication to Renčín's drawing available at http://media.novinky.cz/477/294771-top_foto1-obmxv.jpg may contribute to making the issue of depersonalization of originator of administrative acts more fun. Depersonalized officer observes himself as another person operating (judicialized) Public Administration using technical means.

Data Boxes and communication with Public Administration¹

Introduction

The system of data boxes, which was introduced by law² with effect to 1st July 2009, is in the external observer's view the most important demonstration of electronization of Public Administration in recent years. Its consequences significantly prevail even over the previously revolutionary adoption of electronic signature: they are the extent of expansion (subjects listed in the commercial register have an obligation to own data box) and also "both-directions" way of functioning. Their implementation was connected with a number of troubles linked mainly to the user practicability of the system.³ However, two years have passed since the start of their working service which gives us hope that majority of problems has been eliminated; and that public power bodies and private users have learnt how to work with the system.

In spring 2011, I used the system of data boxes to collect information for research on political rights of foreigners which was connected with contacting hundreds of bodies of territorial self-governing units, mainly municipal bodies. Incidentally in a way, I gained plenty of information on how data boxes work in practice. Although I initially did not intend to concern myself with this topic a lot, I felt it would be a pity if I left the collected material only for me. Therefore, the ambition of this paper is no complex evaluation of data boxes; it is more of isolated notes supported by empirical research on a relatively large sample which might nonetheless be useful for further development of the system.⁴

With few exceptional cases, I do not name the bodies regarding which I obtained experience described in this paper; my intention is actually not to point out deficiencies of individual subjects, it is a system analysis.

- 1 This paper has been created with the contribution of Grant agency of the Czech Republic (project no. P408/11/P366).
- 2 Act no. 300/2008 Coll., on electronic acts and authorized conversion of documents (herein after "EAC").
- 3 Tens of articles published by Jiří Peterka available at <http://www.lupa.cz/n/datove-schranky/> might serve as a detailed chronicle of whole implementation
- 4 With respect to the limited extent, I only focus on the functioning of data boxes itself and not the linked questions which are related to the very access to information; in near future I plan to publish full results, however..

Basic parameters of research

Basic purpose of the original research was an effort to find out in what extent foreigners from EU states (EU citizens) with residence in the Czech Republic use the possibility to participate in elections to municipal assemblies provided to them by European Law. This information is included in annexes to the permanent list of voters run by every municipal office where EU citizens desiring to vote are listed upon their application.

There are 6 251 municipal offices in the Czech Republic: I did not find it purposeful to contact all of them therefore, I created a sample of approximately 5% instead. In order for the selection to be representative, it was necessary to take account of geographical locations and the size of municipalities. I chose the complex of contacted bodies in a pseudo-random way, as in each of the 14 regions, I included:

- a) City Hall of the largest, i.e. regional town
- b) Bodies of all other towns larger than 50 thousand inhabitants (in practice, they are only in Ústí and Moravia – Silesian region)
- c) In the category of towns between 3 and 50 thousand inhabitants, always the body of the largest, middle and smallest ones,
- d) From the remaining municipalities in the region ranked in accordance with their size, every twentieth municipal office.

All such chosen municipal offices (see table no. 1) were sent an application for provision of information through data boxes with an express reference to Act no. 106/1999 Coll., on free access to information (hereinafter “InfA”) with a relatively simple questionnaire including questions regarding the number of voters, number of candidates, number of elected representatives etc. All these data were related to elections which took place in fall of 2010, i.e. approximately half a year ago. In the application, I further stated that I work at the Department of Constitutional Law of LF CU and that I collect the data for the purpose of research on political rights of foreigners. Except of obligatory requirements of the application set forth in s. 14 (2) InfA (among others, name, date of birth, address of permanent residence), I additionally asked for delivering the data to data box and I stated its ID.

Later on, I contacted all district offices in Prague (in aggregate 57) and Brno (29): in accordance with their statutes, these bodies run lists of voters, and contacted City Halls did not have the required information at their disposal⁵:

5 At this point, I would like to thank Mgr. Radek Dronka from the Magistrate Office of the City of Ostrava for his outstandingly supportive approach, where he contacted all offices of

Size	Number
>= 500 000	1
>= 300 000	2
>= 100 000	3
>= 50 000	16
>= 10 000	14
>= 3 000	27
>= 1 000	41
>= 400	96
< 400	147
DP Praha	57
DP Brno	29
TOTAL	433

Table no. 1: Location of the contacted sample of offices in accordance with the size of the municipality

Looking up the data box of a public power body

When sending data messages I encountered a problem of how to look up a data box of a particular body. Internal search in the system of data boxes suffers with a number of flaws: primarily, it is very hard to distinguish data boxes of subjects with same name (which occurs very often in case of municipal offices; there are many municipalities with the same name). Designation of data boxes further suffers with considerable style disunity. For instance, district parts in Prague may serve as an example, because they format their names in a different manner: comp. e.g. “District Part Prague - Běchovice”, “District Part Prague – Dubeč” and “District Part Prague Březiněves“. *Prima facie* these differences may seem as totally banal, but they may cause problems for a user looking up specific data box. Therefore, it would be appropriate to unify designation of all boxes.

This could be improved by amendment act no. 263/2011 Coll., which in s. 14b EAC obliges the ministry of interior to run “*public list of persons, persons doing business, corporations and bodies of public power which have created and accessible data box*” as a part of the data box system.

city districts in Ostrava, he worked up the information gained and he provided me with the summary data.

Time period between submission of application and its actual receiving

EAC in its s. 17 regulates the moment of delivery of the document sent to data box. It is regarded as delivered in the moment when the authorized person logs in the box (section 3); therefore, it is not necessary for them to read it. In case that does not occur in 10 days after the arrival of the document, there is a legal fiction of delivery set on the last day of this time period (s. 4). In accordance with the conclusion of Advisory Committee of Minister of the Interior for Administrative Procedure Code⁶, which I share, these provisions are not applicable to applications submitted to the body of public power. The reason is primarily that general provision of s. 37 (6) Administrative Procedure Code states that an application to administrative body is made on the day when it occurred. That corresponds with the system of EAC because s. 17 only applies to delivery of documents of public power bodies.

Notwithstanding that, the system of data boxes indicates to a sender, when the message was actually received, or in other words, when the authorized person of addressee logged in the data box. Only in case that does not occur in ten days, that figure is set automatically to a time moment of accurately 240 hours (10 days) after the moment of arrival.

This characteristic of the system allowed me to find out how big is the gap between fictive and real receiving of the document. As it is clear in the table no. 2, nearly three thirds of bodies (74 %) logged in the data box on the very day I sent a message. An opposite extreme consisted of 9 bodies (2 %) which have not logged in the data box within the followed 10 days which led to automatic setting of time and day of delivery. Afterwards, it showed up that three out of these nine bodies have not reacted anyhow to my application for information even after I filed a complaint regarding the process of working the application under s. 16a which has not even been transferred to the superior body. Equally, it occurs to me as very probable that they never found out about my application because they never opened the data box.

Number of days	Municipalities
0	321
1	51
2	12
3	1
4	5

6 Conclusion no. 84 from the meeting of Advisory Committee of the Minister of Interior for Administrative Procedure Code dated 14. 12. 2009 – Determination of a moment of making an application to public power body through data box.

5	16
6	10
7	5
8	2
9	1
10 and more	9

Table no. 2: How many days from arrival of a message to the body had it actual taken before it was read

If we look closely, it is clear that there is a boundary at municipalities with 1 800 inhabitants. In larger municipalities, offices without exception received the data message on the day of its submission, but in smaller municipalities, the average gap was gradually extending as shown in diagram no. 1. Discovery that smaller municipalities open data box less frequently than the larger ones, corresponds with the presumptions; what is interesting is the sharp shift at the level of 1 800 inhabitants, which is probably linked to the way of organization and personal background of bodies in municipalities of this size.⁷

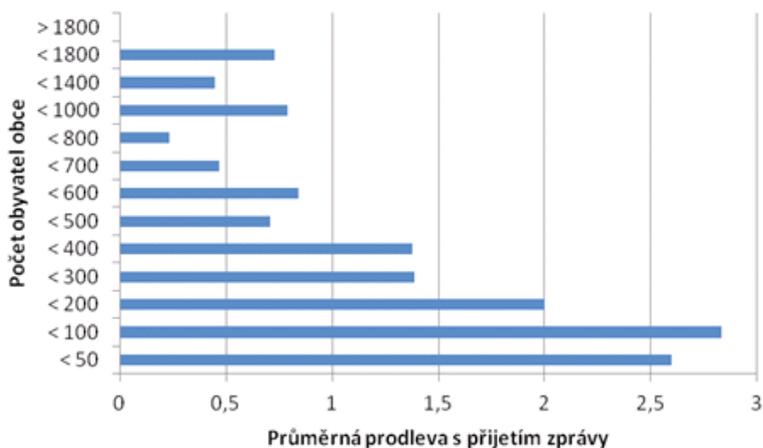


Diagram no. 1: Relation between the size of a municipality and the gap between arrival and delivery of the message

⁷ Because of the size of the sample, I did not succeed at obtaining convincing data on whether the approach of municipal offices in individual regions differs. Very significant deviation to the better was nonetheless noted in Ústí region: However, I cannot assess whether this is a result of a better methodological support of municipalities from this regional office or a mere coincidence.

In case of an application for information which must be provided in 15 days by the duty-bound person under s. 14 (5) (a) InfA,⁸ a couple of days of delay does not seem fundamental. In certain cases, however, law set forth much shorter time periods for the decision-making of municipal offices: e. g. an assembly may be forbidden for reasons given by the law only in the time period of three working days from announcement. Therefore, if somebody does it by means of data message, use of this authority is thus excluded. Therefore, the need for regular checking in data box has practical reasons and current practice is not optimal.

Delivering by public power bodies

If a private person has a data box (no matter whether voluntarily or on the basis of law), under s. 17 (1) EAC, public power bodies have an obligation to deliver this way. Before they choose the way of delivering, they are thus bound to verify whether a specific person has a data box established. Nevertheless, practical experience indicates that it is not always so.

In the described case, the situation was simpler as I submitted my application to the data box of bodies which made it clear that I also have it created and additionally, I explicitly stated that I wish to be delivered documents and messages this way. In spite of that, I only received 91% of answers this way whereas 9% of answers (40 in aggregate) were delivered by mail, ordinarily by a recommended letter.⁹

In this case, the way of delivery was equally linked to the size of municipality. All bodies of municipalities larger than 3 thousand inhabitants delivered properly, problems arose under this level. It was surprising for me how faulty was the delivering of bodies of district parts in Prague (and partially in Brno) which despite of a professional background ended under average (11 %, or in other words. 7 % of faulty deliveries). It did not concern small district parts only which could be an explanation; in this group, there was even a body of one of the biggest district parts of Prague with more than 100 thousand inhabitants.

Size	Number	Mail	%
>= 500 000	1	0	0%

⁸ However, in certain cases, the InfA sets forth shorter time periods: e. g. if it is necessary to supplement the application (s. 17 (5) (a)) or if it is discontinued, because it is not related to the competence of a duty-bound subject (letter. c), the applicant should be notified in 7 days.

⁹ In one case by telephone.

>= 300 000	2	0	0%
>= 100 000	3	0	0%
>= 50 000	16	0	0%
>= 10 000	14	0	0%
>= 3 000	27	0	0%
>= 1 000	41	3	7%
>= 400	96	13	14%
< 400	147	16	11%
DP Prague	57	6	11%
DP Brno	29	2	7%
TOTAL	433	40	9%

Table no. 3: Way of delivering in accordance with the size of municipality

In some cases, the body stated in the delivered written document that it realizes that it does not deliver in a legally prescribed way and it reasoned this by technical difficulties (non-functioning PC, insufficient training, bad service of the system etc.); typically, this concerned offices of the smallest municipalities without professional officials. Procedural problems with data boxes have not missed larger municipalities which I deduce from the reasons of excuse after I – after the time period lapsed – complained of non-provision of information.

Except of certain discomfort for an addressee and higher costs for sender, incorrect delivering also has certain consequences in legal area. As it is stated in another conclusion of Advisory Committee of Minister of Interior for Administrative Procedure Code, if public power body delivers incorrectly by mail instead of data box, fiction of delivery under s. 24 Administrative Procedure Code does not apply.¹⁰ I also share this opinion: an opposite interpretation would mean, that as a result of unlawful steps taken by public power body, harm would be caused to an addressee who is not able to get to know what the written document contains, although it is regarded as delivered, which is unacceptable. It is therefore in the interest of bodies themselves to deliver properly.

¹⁰ Conclusion no. 86 from the meeting of Advisory Committee of Ministry of Interior for Administrative Procedure Code dated 14. 12. 2009.

Requirement of electronic signature

Under s. 18 (2) EAC, an act carried out by an authorized person through data box towards public power body has the same effects as an act carried out in a written form and signed. The exception is a situation where special law or internal regulation requires an act of more persons together (e.g. if the association agreement requires common actions of two executives).¹¹

For the purposes of the research, this provision had a meaning in the sense that the sent applications had a character of written applications under s. 13 InfA which enjoy higher procedural protection. However, it was not a significant meaning: the requirement of written form would be satisfied even in case of delivery by regular electronic mail. Signature (i.e. not even the secured electronic one) is not an obligatory requirement of an application under InfA.

Notwithstanding that in one case, I encountered a requirement to sign my application with secured electronic signature otherwise it would not be dealt with because internal systems of municipal office do not allow that; the body revoked this requirement after further communication and submission of formal application. Within the whole complex, this was a unique case which corroborates the fact that regular practice of bodies is alright in this regard.

Deleting messages from the data box after 90 days

Provision s. 20 (3) EAC imposes the duty upon ministry of interior to regulate the time period for saving data message in the data box by an ordinance. This authorization was fulfilled by ordinance no. 194/2009 Coll., on setting details of using and running information system of data boxes (hereinafter only “ordinance”), concretely in s. 6. In accordance with this provision, the time period for saving is “90 days since the day when a person having access to the document contained in the data box, with respect to the extent of their authority, logged in this data box.”, or in other words, since the day when fiction of delivery took place. If the user wishes to keep their messages even after this time period lapses, they have to order the Data vault service with the Czech Post which is paid for depending on the number of kept data. One hundred messages cost 1 440 CZK yearly, 500 messages 6 480 CZK yearly and 5 000 messages cost 57 600 CZK a year. Data messages actually disappear from the

11 As Budiš and Hřebíková state “in such case, data message would have to be attached with secured electronic signature of all such persons Technically, such possibility exists, nevertheless, it may be linked to a risk of violating integrity of signed document with attaching another electronic signature. In such case, different means of filing would be probably used.” (Budiš, P., Hřebíková, I.: *Datové schránky*. Olomouc: ANAG, 2010, p. 100).

data box fully: not only their contents but also all information on the fact that such message ever existed.

I regard this construction as one of the biggest weaknesses of the current system because it substantially violates legal certainty: if the addressee or sender does not in time – in an authorized way – convert them to a written form, they cannot prove their existence in future which may be crucial in case of any dispute. Ninety days long time period seems as unreasonably short to me in such situation. Furthermore, it is a question, what is the reason of such approach. If it is the saving of financial costs for long-term saving of huge quantity of data, it might be accepted that delivered documents disappear after certain period of time. But I find it totally unacceptable that not even headlines (sender, addressee, date and time of sending and delivery, subject of a message) are not kept as their data size is fractional.

For my practical needs, I resolved this problem by local archiving of data boxes through the program called *dsgui*, which through API accedes data box and it saves messages at own computer. Nevertheless, in one case I did so in the very end of the time period, i.e. the 90th day after delivery; however, messages were not in the box anymore. As the worker of info line told me, the reason was the fact that the system counts precisely, to the second from the moment of delivery; and whereas I logged in 90 days ago in the morning, I am now trying to archive in the afternoon, i.e. after 90 days and a couple of hours.

Under s. 40 (1) (a) Administrative Procedure Code, the day when the fact determining start of the time occurred is not counted in the course of time period; that does not apply only if the time period is given in hours. The course of time periods is regulated similarly by other basic codes, too (civil code, code of civil procedure, code of criminal procedure) and under judgment of the Constitutional Court file no. Pl. ÚS 33/97 dated 17. 12. 1997 it currently belongs to general principles which are universally applied in the Czech Law. Law-giver actually has an option to deviate from them but it is necessary that he does so expressly which did not happen in case of data boxes. Therefore if the ordinance sets forth a time period for saving in the length of 90 days, this time period should lapse on midnight of the last day and until this moment, messages should be available in the data box.

Therefore I turned to ministry of interior using a complaint under s. 175 Administrative Procedure Code and I sought remedy in the form of additional access to all deleted messages. In its response, the ministry states that this kind of behavior is a part of data boxes since the start of their use and it was not subject to any complaints before, on the basis of my complaint, how-

ever, the competent department had an expert opinion made and it came to the same conclusion as I did. Since September 18 2011, the system works in accordance with the law, then. Unlawfully erased message were not capable of being returned to me by the ministry of interior though with the argument, that it is impossible as they are not at the disposal of information system of data boxes any longer.

If we accept this reasoning, it is a very critical deficiency because it would mean that after the 90 days time period lapses, there are no back-ups. With respect to the seriousness of delivered documents, I would regard such approach as totally unacceptable and non-corresponding with the basic principles of security in information systems. Therefore I think there is more probable explanation that back-ups do exist but looking up a number of concrete messages was connected with efforts which the ministry did not regard as purposeful to make, although an unlawful procedure was concerned.

Conclusion

Even though the system of data boxes has been run for two years already, collected knowledge proves that they still do not work without troubles. They take place on the side of user as well as public power bodies which is not surprising especially as to small bodies but also as to its administrator, i.e. ministry of interior.

“Informatization of society” and its application in Public Administration

Public Administration and its informatization is a societal phenomenon which influences activity of state on various levels in various ways, and equally, it interferes with rights of citizens. In the second half of twentieth century, Public Administration underwent a reform. Currently, aspect of informatization is included in Public Administration, which should lead to mutual interconnection of agendas of Public Administration in favor of a citizen. Informatization and its application are closely connected with the evolution of communication means. In the twenty first century, there are new unified forms of electronic communication used systematically within the framework of modernizing communication.

“Informatization of society” and Public Administration within its framework is primarily a directed process which ought to lead to modernization of Public Administration electronization. This process must create new social relations between state administration, self-government and citizens on the basis of new modern technologic measure as well s necessary legislative changes. It is necessary to direct this process centrally with acceptance of societal needs, however. In this context, it is necessary to realize that Public Administration as well as administration of public matters, is an administration in public interest.

In a decision no. 1004/2006 dated 6th December 2006, the Government of the Czech Republic adopted Operation program “Informatization of society”¹ and Strategy of informatization of Public Administration was adopted in the decision no. 131/2008 dated 27.2.2008, where it defined the vision, strategic goals and directions of e-Government towards Public Administration. Realization of this strategic goal was initiated through operation program of informatization of society which is a reference document which serves as a basis for obtaining grant support from structural funds of the European Union for projects of informatization of society, digitalization of fund institutions and support of broadband internet in year 2007-2013.

Adoption of operation program of informatization of society was preceded by National strategic reference framework (adopted by Government of the Slovak Republic in years 2002–2006), which put emphasis on informatization of society. On the basis of it, draft of separate operation program Knowledge Economy was made, which dealt with informatization of society only partially.

1 www.informatizacia.sk.

After 2006, there were competence delays regarding informatization between ministry of transport, post offices and telecommunications and ministry of finances. On the basis of amendment of competency act², tasks of administrating program of informatization of society were distributed between directing body which is the Office of Government of the Slovak Republic and intermediary body which is the Ministry of Finance of Slovak Republic.

When amending competency act, it was not take into account that Ministry of Interior performs the most out of state administration activity towards Public Administration. In this context, all its requirements were not taken into consideration before operation program informatization of society was adopted. It was forgotten, that operation program informatization of society cannot be additionally amended (new projects within the framework of individual priority axes) because for their realization, structural funds of the European Union are provided and every change is conditioned by approval of competent institution of the European Union.

State administration uses Portal of legal regulations and editor of legal regulations which serve for electronic making, commenting and archiving generally binding legal regulations. In the twenty first century, bodies of Public Administration still prepare legal regulations in a written form where they are not unified and their interconnection is uniform. Information system similar to Portal of legal regulations designed for conditions of Public Administration might be made more efficient and it might be possible to formalize their work and activity. Such system would also be in favor of citizens as they might participate on making and control of such regulation (the mentioned term in this context must be understood in a broader context) and it would allow them to centrally access these information. From the perspective of citizen, it is necessary to access to information of regulations which are published by bodies of Public Administration in full wording. With respect to judgment of courts of the Czech Republic³ indication the diction of Act on freedom of information,⁴ body of Public Administration may provide information which it has at its disposal (regulation and its amendments). The mentioned state is in the interest of citizen, it may be resolved by electronization of steps of Public Administration when issuing regulations. However, such project and not even a similar one to it got to the operation program of informatization of

2 Act no. 575/2001 Coll., o organization of activity of government and organization of central state administration, as amended.

3 Judgment of Supreme Court of Slovak Republic no. 2 Sžo 190/2008 dated 4th June 2008.

4 Act no. 211/2000 Coll., on free access to information and on amendment of certain laws (act on freedom of information), as amended.

society. On the other hand, everything starts and ends with financial means, it is only questionable which national projects are more important.

Operation program informatization of society is divided into a couple of priority axes:

Priority axis 1 – Electronization of Public Administration and development of electronic services,

Priority axis 2 – Development of memory and fund institutions and renewal of their national infrastructure,

Priority axis 3 – Increasing accessibility to broadband internet,

Priority axis 4 – Technical help.

Individual priority axes of operation program informatization of society consist of national projects. National projects of operation program informatization of society Priority axis 1 electronization of Public Administration and development of electronic services are mentioned in the attachment. One of the main goals of operation program informatization of society is creation of information society as means for development of high-performing knowledge economy.

Goals of operation program informatization of society Priority axis 1 electronization of Public Administration and development of electronic services are mainly

- Decreasing administrative barriers for citizen,
- Introduction of the rule “once and enough” through submission or confirmation of data by citizen for Public Administration body,
- Substitution of confirmation in paper form with legally binding electronic transcripts,
- Making provision of services more effective,
- Decreasing the need to prove one’s identity with documents and identification,
- Not requiring the data from a person repeatedly but exchanging it, or in other words, make it accessible even for other body of Public Administration,
- Increasing availability of services,
- Elimination of administrative fees,
- Shortening administration,
- Dynamics of change of provided services in accordance with needs of citizens.

On the basis of the aforementioned goals of operation program informatization of society Priority axis 1, the most important national projects seem

to be projects Information system of registry of persons, Electronic identification card and Electronic services of central registry.

Introduction of registry of persons is important because it shall be the basic central reference registry of integrated information system of Public Administration through which all other information systems of Public Administration mutually communicate. Registry of persons is primarily a uniform point for obtaining actually effective data on persons (on-line), obtaining changes of data of persons (off-line), verification of validity of data of persons (on-line) and identification of persons (off-line) with attributing them an unambiguous identifier. Registry of persons will be a connection point for all other information systems of Public Administration through which they will actualize or use actual data of persons.

In relation to other information systems of Public Administration, realization of national project Electronic identification card creates electronic citizen's identification, or in other words identification card as means of quickening administrative acts for citizens, improving accessibility of services to citizens as well as the prerequisite for creation of electronic contact. Authentication of card's owner allows for use of electronic service eGovernment, eBusiness, their mechanism is based on cryptographic functions with the use of EAC PKI or alternatively on the basis of name/password, challenge/response with authentication certificate. It is a simplified parallel of electronic signature⁵ allowing the citizen's card to electronic access to information systems of Public Administration. It is necessary to point out that electronic signature is issued for five years and validity of electronic identification card is presumed for two years in the form of paid for service. It is questionable if citizens will use this service under such conditions, from the perspective of presumption of saving finances when performing automatized changes in information systems of Public Administration, it seems that these services should be provided free of charge. Electronic identification card will allow authorization of electronic acts in information systems of Public Administration which will concurrently constitute legal acts. National project "Electronic services of central registry" is a technological aspect of process of modernization of information systems of Public Administration through which the citizen will electronically enter majority of information systems of Public Administration.

Operation program informatization of society accepts inevitability of informatization of society in Public Administration, this impact will affect the

5 Act no. 215/2002 Coll., on electronic signature and on amendment and supplementation of certain laws, as amended.

whole territory of Slovak Republic from the geographical point of view. If we speak of geographical viewpoint, it is necessary to understand that informatization of municipalities (introduction of electronic communications, e.g. internet) is realized slowly and in certain regions, it is regularly not even carried out, because it financially costly (municipalities have a few citizens and terrain is inaccessible). Contrarily, majority of national projects whose object is to create registries or electronization of the already existing registries of Public Administration are in the phase of realization. In this phase, the question arises if in these regions, the operation program informatization of society has any contribution or if in the nationwide viewpoint, its contribution will not decrease. The solution is that in affected regions, introduction of electronic communications would be realized in chosen municipalities (so-called catchment municipalities) and other municipalities would realize their activities linked to informatization of Public Administration in chosen municipalities through common workplace. It is questionable if municipalities would agree to such solution or because the costs of common workplaces as well as of operation of electronic communications would have to be divided and the key of division of cost would always be regarded as unfavorable by one of the parties.

As I have already mentioned in the paper, majority of national project aimed at creation of registries (e.g. Registry of persons) or electronization of existing registries of Public Administration are being implemented. From this perspective, such situation might seem as a positive one. But it is necessary to realize that implementation of such national projects was not preceded by needed legislative measures such as unification of terminology because the same activities, services, processes etc. are named with different terms in generally binding legal regulations. However, in this context interconnection of information systems of Public Administration might lead to internal conflict of individual information systems, or new terms will be introduced but they will not correspond with effective legal order. Legislatively, it is not a problem to prepare drafts of necessary legislative changes because it is a specification of already introduced terms. In the legal order of Slovak Republic, there are many various terms for document in a written form, e.g. "registrature record,⁶ written application,⁷ written document,⁸" and their enumeration is not definite, the mentioned terms are related primarily to the institute of delivering.

6 Act no. 395/2002 Coll. on archives and registratures and on supplementation of certain laws, as amended.

7 E.g. s. 41 Act no. 351/2011 Coll. on electronic communications.

8 E.g. s. 29 Act no. 99/1963 Coll., Civil Procedure Code, as amended, s. 16 Act no. 71/1967 Coll., on administrative proceedings (Administrative Procedure Code), as amended.

Problem may arise if the law-giver decides to adopt needed changes and also in case of their adoption, it is necessary to take account of time aspect of legislative process which is not insignificant as to time.

Similar problem is represented by processing personal data⁹ in relation to Public Administration which is ordinarily performed on the basis of special laws. Among others, these special laws set forth the extent of processed personal data as well as their obtaining, collection, registering, organizing, working them up, looking them up, browsing, re-grouping, combining, re-locating, using, maintaining, liquidation, their transfer, provision, accessing or publishing. Newly created registries (e.g. Registry of persons) technologically have created collection of worked data (not all of them are personal data) and mechanisms of their communication without creating necessary legislative framework. In this case when implementing new registries of Public Administration, the will of legislative framework adopted by law-giving body needs not to be identical with expectations of ordering parties of national projects. It is questionable how financing will be regulated in such case and if the national project will be supported from structural funds of European Union.

Individual chapter of problems of operation program informatization of society are meaningless identifiers which are supposed to substitute mainly birth numbers and dates of birth in connection with surname and name. These national projects are supposed to be realized in the end. It is questionable how will it possible to interfere with already created registries of Public Administration because the security provided by maker will cover them. Makers of the respective registry will probably desire to make it themselves on the expenses of state. But in this case, public orders would have to be circumvented (e.g. direct appearance) or it would have to be performed formally. It is questionable if such project would be co-financed by European Union from structural funds or if it would be refunded.

National projects of operation program “Informatization of society” are preceded by studies of practicability. Studies of practicability are not directed at electronization of existing processes but at eliminating the duty of citizens to excessively communicate with Public Administration. It is a weakness of the study of practicability that there are no consistent researches of starting-point situation of information systems of Public Administration because of short period of time provided for its creation along with no experience with similar operation program from preceding periods.

9 Act no. 428/2002 Coll., on protection of personal data, as amended.

Operation program “Informatization of society” in priority axis 1 secures a number of companies on the basis of public competition and therefore it is necessary to safeguard uniform

1. User’s boundary, which secures exchange of information between information systems of Public Administration and users,
2. Standard interface for communication of application layer with presentation layer, data layer and other information systems through interface of web services,
3. Processing data, especially provision, saving and change of data in data layer,
4. Maintaining needed data in appropriately chosen structure for the needs of working them by application layer.

Introduction of interface in information systems of Public Administration on various levels is necessary because they will be chaining. It results from this that whole mutual interconnection will be safe in the extent of the weakest part, in other words, the information system with lowest security. Equally, it is important to realize in this context, that old information systems will mutually interconnect old information systems whose program possibilities are lower than newly created information systems of registries.

Several towns and municipalities try to introduce informatization of Public Administration at regional level. They are primarily informatization of services provided by towns or municipalities. They create maps of grave places, they publish data on grave places, e.g. the time until when is the grave place paid for, where and how is it possible to prolong this period of time (even in the form of electronic application and payment). Likewise, they allow to submit various electronic form applications, however, these have to be additionally supplemented with signed written application because usually, this is provided by generally binding legal regulations. Without interconnection of similar activities to identification card or electronic signature, it is not possible to refrain from written form because of authorization.

Prima facie informatization seems to be as positive for the citizen in a form of increasing comfort. However, informatization of society also has its negatives. The biggest negative of informatization in relation to citizen is the fact that their feeling of protection of privacy is decreased.

Nevertheless, process of informatization of Public Administration also has its risk, namely external, internal an security one linked to constitutional right to protection of privacy. External risks necessarily include interest of various corporations to get to source of data from information system of Public

Administration as potential database of new customers in a way which needs not to be uniform with goals of modernization of Public Administration. Not negligible factor are also the attacks of hackers on information systems of Public Administration because there is a threat that disturbing one information system may lead to collapse of all interconnected systems. Another big threat is the theft of identity etc. Internal risk is demonstrated especially by anonymization of person towards Public Administration, there will depersonalization from Public Administration.

Within the framework of informatization of society, there are new registries being made which are created on the basis of law, in accordance with special laws, however¹⁰ and these registries may be accessed even by force bodies of state, e.g. operative and intelligence services. It is similar with registries which are created, however, within the framework of informatization, they are supposed to switch from manual form to electronic one, initially these bodies could have looked in a concrete file but after electronization, they will have access to whole registry which will violate current status quo and it is questionable if such expansion is in accordance with constitutional principle of protection of privacy..

I hope that after finalization of technologic process of informatization of Public Administration and harmonization of individual special laws which regulate Public Administration, influence of modernization which took place will lead to recodification of Administrative Procedure Code,¹¹ which will bring end to modernization of Public Administration in the beginning of twenty first century by implementation of modern electronic communications.

The goal of this paper was not to thorough describe processes in implementation of operation program of informatization of society but to highlight certain discrepancies with outlining their elimination.

Annex

List of national projects and recipients of priority axis I

Electronization of Public Administration and development of electronic services

10 E.g. Act of national council of the Slovak Republic no.46/1993 Coll. o Slovak Information Service, as amended, Act of national council of the Slovak Republic no. 171/1993 Coll., on Police, as amended, Act of national council of the Slovak Republic no. 198/1994 Coll., on military intelligence, as amended.

11 Act no. 71/1967 Coll., on administrative proceedings (Administrative Procedure Code), as amended.

Control information system	Supreme Control Office
Electronization of register of birth and deaths	Ministry of Interior
Information system of registry of persons	Ministry of Interior
Information system of identifier of persons	Ministry of Interior
Electronic services of land registry	Office of geodetics, cartography and land registry
Electronic identification card	Ministry of Interior
Electronic services MLSAF SR in the area of state social benefits, social help and help in material need	Ministry of Labor, Social Affairs and Family
Electronization of Social Insurance Company services	Social Insurance Company
Electronic services of health care	Ministry of Health Care
Information system of registry of addresses	Ministry of Interior
Electronic services land registry FB GIS (fundamental basis of geographic information system)	Office of geodetics, cartography and land registry
Electronic services of central registry	Ministry of Interior
Register of area information	Ministry of Environment
Contact center	Office of the Government
Electronic services of national registry of vehicles	Ministry of Interior
Electronic services of mobile units of Ministry of Interior of SR	Ministry of Interior
Electronic services of Statistical Office of SR	Statistical Office
Electronic services of certificate on registering vehicle	Ministry of Interior
Electronic services of central electronic folder	Ministry of Finance
ÚGKK – provision of services pro RPI	Office of geodetics, cartography and land registry
Electronic services of public procurement	Office for Public Procurement

Electronic services of Ministry of Foreign Affairs	Ministry of Foreign Affairs
Electronic services of tax agendas of Ministry of Finance	Ministry of Finance
Electronic services of construction procedure	Ministry of Construction and Regional Development
Electronic services of financial and budget agenda of Ministry of Finance	Ministry of Finance
Electronic services of common modules ÚPVS and access components	National agency for network a electronic services
Registry and identifier of corporations and entrepreneurs	Statistical Office
Electronic services of customs duty administration	Customs Duty Directorate
Register of institutions of Public Administration	Ministry of Interior
Electronic services of Ministry of Economy	Ministry of Economy
Integrated service points	Will be additionally determined.
Datacenter of towns and municipalities	Will be additionally determined.

Electronization of Public Administration in Slovak Republic – several legal aspects ¹

Introduction

Public Administration in conditions of Slovak Republic has undergone several changes and reforms since 1989. Before 1989, Public Administration was performed solely by state and its bodies where a centralized performance of state functions was concerned. Therefore, it occurred quite often that terms of state and public administration were confused or equated. Amendment and passing of numerous legal regulations led to creation of system of Public Administration as administration of public matters which consists of two main parts, namely state administration and self-government. Obviously, even after these changes, it was necessary to continue in making the Public Administration complete and based on principles of efficiency and economy. One of the means to reach effective and economic functioning of Public Administration is also an informatization of Public Administration.

Activities related to informatization of Public Administration might be observed in Slovak Republic for quite a long time. In 1992 already, the government of Slovak Republic approved **National plan of informatization**. It represented a starting point for working up and realization of programs of informatizing individual resorts. Gradually, informatization started to show up also in program announcement of newly created governments in Slovak Republic and recently, it has been included in them regularly.

In the following period of time, there was a line of documents made which dealt with informatization and electronization of Public Administration. Let us mention at least those which we regard as the most significant. **Policy of informatization of society in Slovak Republic** is a document which results from the initiative eEurope+ and where one of the priority goals is to work up and implement long-term Strategy of informatization of society in Slovak Republic and its realization through short-term action plans and medium-term programs. This document was approved by 2001 decision of government. This document is followed by **Strategy of informatization of society in conditions of Slovak Republic**, which was adopted by 2004 decision of government and it is realized through action plans, i.e. concrete and binding time schedule of activities linked to process of informatization of society. In 2008, there were

1 This paper was made with support of project "Právna úprava súdnictva v Slovenskej republike (Legal regulation of judiciary in Slovak Republic)" supported by Agency for support of research and development, number of project APVV-0448-10.

two more undoubtedly important documents passed, namely **Strategy of informatization of Public Administration** and **National concept of informatization of Public Administration**, which are regarded as principal strategic documents for directing informatization of Public Administration and for principles of building eGovernment and implementation of electronic services in Slovakia. Even in 2011, activities in this area took place and they led to creation and adoption of further materials. Material adopted by government “**Revision of building e-Government (medium-term plan of implementation of priorities)**” evaluates mainly the practical level of implementation of projects, it indicates the need to revise conceptual starting points in medium term horizon. **Digital agenda for Europe in conditions of Slovak Republic** is an informative material which informs the government of Slovak Republic on activities in European Union in the area of information society and on the need of effective and coordinated implementation of measures on national level.² For nearly 20 years, there have been conceptions and plans in Slovakia covering the way to create functioning and effective Public Administration through available and still evolving information technologies. This topic is given attention to even in the premises of European Union equally long.

On the level of European Union, activities linked to informatization of society are visible already in the first half of 90's of the previous century (so-called Bangemann's report from 1994). Among other significant documents, there is the initiative “**eEurope – information society for all**”, which was the outcome of Lisbon strategy³. From the later made strategic documents, let us mention e.g. **Initiative i2010 – European information society for economic growth and employment, Digital agenda 2010–2015 2010–2015**.

If we were to characterize materials mentioned above made in the conditions of Slovak Republic, their common denominator is the fact that they create a kind of conceptual framework and they are the starting point for other activities aimed at achieving goals mentioned in these documents. They usually include an analysis of existing situation, legislative framework of the issue, financial costs connected with realization of the set goals and in certain cases, they also include solution of financing the mentioned tasks. If at least a part of the goals set in these documents was achieved, Slovak Republic would not

2 Complete wording of mentioned materials is available at www.informatizacia.sk.

3 Lisbon strategy is the result of discussions of highest representatives of states and governments which took place in March 2000 in Lisbon and where they agreed on ambitious project, which is to make European Union the most competitive and the most dynamic knowledge oriented economy of the world capable of permanently sustainable growth until 2010 which would, among others, include the policy of informatization of society.

be in the bottom of the table of countries of European Union in the area of informatization.

Terms linked with informatization⁴

When working up the issue of informatization and electronization of Public Administration in Slovak Republic, we regard it as important to clarify terms which have more of a technical character but getting to know them is, in our opinion, an inevitable pre-requisite for their successful establishment and functioning.

Informatization is characterized as ambitious and systematic implementation of information and communication technologies in all relevant areas of social, political and economic life with the goal of increasing knowledge potential of society.

Electronic registry is a technical device serving mainly to receiving, sending and confirming of reception of electronic documents, electronic documents signed by electronic signature and electronic documents signed by secured electronic signature.

Electronic service of Public Administration or e-government service is an electronic form for material communication of the public with Public Administration when dealing with cases, participation of public in administration of public matters or access of public to information.

Electronic delivery is defined as delivery of document in electronic form where electronic delivery with or without evidence is distinguished.

Electronic form is a prescribed form for filling in data in electronic form, which is used in connection with e-Government to deal with services of Public Administration.

E-government or its synonym term **electronic Public Administration, electronic government** are defined as using information and communication technology on-line in Public Administration linked with organization changes and new skills with the goal of improving services of Public Administration and applying democratic procedures as well as strengthening support of public policies. It is an electronic form of performance of Public Administration when applying information-communication technologies in processes of Public Administration.

E-government exists in a number of forms depending on the kind of subjects involved:

⁴ The mentioned terms are defined in Methodical instruction of Ministry of Finances for using expert terms for the area of informatization of society no. MF/014235/2008-132

G2G (Government to Government) - electronic communication between institutions of Public Administration mutually,

G2C (Government to Citizen) - electronic communication between institutions of Public Administration and citizens. Sometimes, this communication is named also as G2P (Government to Public). This kind of e-Government has a task to secure access of citizens to information and services of Public Administration (e. g. communication with register of births and deaths).

G2B (Government to Business) - electronic communication between institutions of Public Administration and business subjects. It allows more effective and cheaper communication, simplified and more effective public care or sending various records by business subjects in an electronic form (e.g. an option to submit tax declaration in an electronic form).

G2E (Government to Employees) – electronic communication within the framework of institutions of Public Administration. It allows effective internal processes linked with care for employees, decreasing costs and increasing satisfaction of employees (e.g. installation of intranet).

Obviously, in the area of electronization and informatization of Public Administration, there are other terms and procedures used, but with respect to the character of this article, we regard the terms mentioned and defined above as sufficient.

Current situation

However, some of the mentioned goals included in the documents from the area of informatization stated above were achieved although we may only speak of partial successes.

In 1995, National Council of Slovak Republic passed Act no. 261/1995 Coll., on state information system. It regulated conditions for creation and running of state information system as well as rights and duties of bodies operating in the area of state information system. Bodies operating in the area of state information system were Statistical Office of Slovak Republic and Council of Government of Slovak Republic for IT. This act came into effect on 1st January 1996 and it was in force for more than ten years.

Another important step was the adoption of Act no. 215/2002 Coll., on electronic signature and on amendment and supplementation of certain laws. This law provides conditions, under which electronic signature has legal effect of a signature made by one's own hand, and therefore it equalizes documents in electronic form signed by secured electronic signature with legal acts

conducted in written form. New terms of electronic signature and secured electronic signature were defined and other legal regulations were amended, especially those of procedural character, which broadened the possibility to make an application using electronic means signed by secured electronic signature under conditions set by this very law.

With effect from 1st June 2006, Act no. 275/2006 Coll., on information systems of Public Administration and on amendment and supplementation of certain laws was passed and among others, it derogated the Act of National Council of Slovak Republic no. 261/1995 Coll., on state information system. This act regulates:

- a) rights and duties of duty-bound persons in the area of creating, operating, using and development of information systems of Public Administration,
- b) basic conditions for securing integrability and security of information systems of Public Administration,
- c) administration and operation of central portal of Public Administration,
- d) conduct in issuing electronic transcript from information systems of Public Administration and outcome of information systems of Public Administration⁵.

By this act, **Central portal of Public Administration** was created, and it is defined as information system of Public Administration for providing services and information by duty bound persons through common access point which allows for access to common functions of evidence, authentication, authorization and support of users, directing the flow of information, electronic registry and electronic payments of taxes and fees.⁶ It secures central and uniform access to information sources and services of Public Administration. The goal of portal is to provide information and services which are the part of information servers of individual resorts of Public Administration, to integrate and in a clear and accessible way, to be at user's disposal. Among the most important tasks of the portal, there is directing the user to use concrete electronic service of Public Administration with use of relevant information sources.⁷ From them viewpoint of its use, we reckon that it is the mostly used as source of information on individual sections of Public Administration or alternatively, it serves for looking up the respective form and printable docu-

5 S. 1 (1) Act no. 275/ 2006 Coll., on information systems of Public Administration and on amendment and supplementation of certain laws, as amended.

6 S. 2 (j) Act no. 275/ 2006 Coll., on information systems of Public Administration and on amendment and supplementation of certain laws, as amended.

7 More information about the portal is available at www.upvs.sk.

ments or it serves for re-directing to website of individual bodies of Public Administration.

If we look closer on individual information systems of Public Administration, then under the law, a duty-bound person responsible for securing performance of Public Administration in certain branch of Public Administration under special law is responsible for creation, administration and development of information system of Public Administration. These duty-bound persons are individual central bodies of state administration as well as other bodies set by law, but also including municipalities and higher territorial units and for instance, also chambers of regulated professions with persons and corporations to whom the performance of public power is transferred or which fulfill the tasks in the area of transferred performance of state administration.

By amendment of the law, integrated service point was created which performs the activity of verifying person and it secures the access to services of Public Administration provided by duty-bound persons, especially submission of applications, motions and different filings to duty-bound persons and different communication with duty bound persons.

As far as the possibilities of electronic communication are concerned, I will mention only some of them.

E-Žaloba (eLawsuit) Portal is designated for submission of applications for initiation of proceedings (lawsuits) to district and regional courts in civil matters (civil law, labor law, family law and commercial law cases, except of business register) in electronic form. Through this portal, it is possible to make an electronic application regarding an existing proceeding, i.e. to make an application which does not lead to initiation of new court proceedings (e.g. sending a statement on lawsuit, application for release from the duty to pay court fees etc.). However, applications addressed to court through eLawsuit portal need not to be signed with secured electronic signature. If the electronic application includes an act on merits (i.e. application for initiation of proceedings – lawsuit, withdrawal of application, change of application, appeal in the case and so on) and it is not signed with valid secured electronic signature, it is necessary to supplement it by presenting the court with an original in written form in 3 days since delivery, otherwise the court shall not take it into account. If electronic application including an act on merits is signed with valid secured electronic signature, it is not necessary to supplement it with additional presentation of an original.

Amendment of Act no. 530/2003 Coll., on business registry and on amendment and supplementation of certain law allowed for submission of **applica-**

tion for inscription in business registry by electronic means. This application for inscription is submitted in electronic form of printable document which is published on internet website of central portal of Public Administration and this application must be signed with secured electronic signature of applicant, otherwise the registry court does not take it into consideration. If the application for inscription was filed in written document form all documents must have written document form otherwise the application is regarded as incomplete. If the application for inscription was filed using electronic means, documents may be submitted in a written document form or in electronic **form** using electronic means. Written document form of the document converted into electronic form for the purposes of its filing in electronic form must have a prescribed form. Application for inscription may also be filed through district body which plays the role of uniform contact point. Uniform contact point secures the delivery of application for inscription and its annexes to registry court mentioned in application for inscription. Uniform contact point delivers the application for inscription using electronic means. Application for inscription must be signed with secured electronic signature of uniform contact point or secured electronic signature of an operator of information system of trade licensing.

Application called **eDane (eTaxes)** allows tax subjects (represented by authorized user) to deliver electronic documents to the address of Electronic registry of Administrator of Tax. Delivered documents might be signed with secured electronic signature or without the secured electronic signature. If documents without secured electronic signature are concerned, the inevitable condition of using this service is conclusion of Contract on way delivering written documents delivered using electronic means which are not signed with secured electronic signature concluded under s. 20 (8) Act on administration of taxes and fees. By concluding this Contract, tax subjects is bound to deliver the first page of written document in five days from the day of electronic filing of the document in written form as well as Declaration on filing a written document in electronic form, so-called covering paper.

Social Insurance Company allows the payer of insurance levy (employer, corporation or a person) to use **electronic services through EZU system (eng. Electronic Collection of Data)**. This system provides services securing electronic change of information between Social Insurance Company, employers and employees within the framework of regular working on social insurance agenda.

Electronic communication is possible also in customs duty proceedings, it is used e.g. when submitting customs-duty declarations in export and preliminary customs-duty declarations in import and export.

Electronic services of health care are in the preparation phase – **eHealth**.

Big contribution for citizens was the start of operation of information system of geodetics, cartography and land registry through web services of internet portal, so-called **katasterportál (land registry portal)**. As it has been mentioned at the very website, it is an application aimed at the citizen primarily. It allows for access to data from land registry and obtaining basic information immediately linked to legal relations to immovable property immediately and without visiting competent administration of land registry.⁸ Land registry portal allows looking up information linked to legal relations to immovable property in accordance with certain identifiers, e.g. sheets of ownership, parcels, buildings, picturing of land registry map, information on land registry proceedings or using electronic forms.

When implementing electronization of Public Administration, we cannot omit creation of **uniform contact points**.⁹ They were created as a result of implementing Directive 2006/123/ES on services of internal market and thus they were created in all member states of European Union and states which are signatories of the agreement on European Economic Area. The purpose of creating uniform contact points in Slovak Republic was to simplify entrance of Slovak and foreign business interested candidates in the area of services to Slovak market. By their creation, individual obligatory administrative acts linked with trade are concentrated in one place and they secure that traders fulfill all formalities which are related to access to trade or with its performance. It concerns mainly the deregistering trade license, applications for issuing a permit for trading under special laws, registering in respective registry, registering in business register, signing up to compulsory health insurance, requiring abstract from register of punishments. With effect from 1st January 2012, it is possible to realize all acts necessary to obtain trade license or business permit by electronic means through electronic forms place at Central portal of Public Administration without the necessity to personally visit individual uniform contact points.

8 More information about the portal is available at www.katasterportal.sk.

9 Uniform contact points were created by Act no. 136/2010 Coll., on services of internal market and supplementation of certain law, where under s. 11 (2) of this law, tasks and competence of uniform contact point are regulated by special law. This special law is Act no. 455/1991 Coll., on trade licensing (Trade Licensing Act), as amended.

How further?

If we wanted to evaluate process of informatization and electronization of Public Administration in Slovak Republic, we could say that at the time of origination of Slovak Republic, there were many documents created but after nearly 20 years of process of informatization of Public Administration, the results are not satisfactory and it is inevitable to continue in informatization of Public Administration.

On the other hand, way cannot omit what has already been created. However, created and functioning information systems of Public Administration are not sufficiently known and promoted which leads to them being used a little especially by common citizens. They are used mainly by subjects who get more often in touch with them and their acts repeat often contrarily to the majority of citizens which use them only several times a year. That is weighed in by relatively high costs of using electronic signature which is compensated by lower administrative fees if the application or different document is filed electronically. Question arises to what extent is that motivating. For instance, in case of land registry, the administrative fee for application for registering is € 66,-, but if it is filed electronically, then the administrative fee is in the amount of € 33,-, for fast-track application filed electronically, the administrative fee is in the amount of 130 € instead of € 265,50; in case of registering business corporation, it is € 165,50 instead of € 331,50.

As another important negative we regard the fact that existing information systems of Public Administration are not inter-connected, their activities are not coordinated which means that one information system does not know how to use information contained in different information system. Creation of the mentioned uniform contact points means a certain breaking-point. Therefore, it is important to realize changes in this area and legislature should adequately react to these changes as Public Administration may only act in the extent and form and way specified by legal regulations. That is also one of the reasons why new way of “electronic performance of Public Administration” must be codified by legislation, current situation takes into account especially “paper” mode of Public Administration operation.

However, if we look at other activities in this area, we might state that “better times are coming”. In September 2010, the government of Slovak Republic passed **Legislative intent of Act on electronic Public Administration**¹⁰, which prefigures significant changes (also) in the area of communication with

10 Legislative intent of Act on electronic Public Administration was passed by decision of the government no. . 657/2010 dated 29th September 2010.

bodies of Public Administration which currently takes place to large extent in “traditional” form, i.e. in written form through mail or orally (e.g. during “page days”). Nowadays, electronic form of communication with bodies of Public Administration is embedded diffusively and without concept in various regulations and its application is relatively complicated.

And currently, legislative procedures include also **draft act on electronization of administrative processes and on amendment and supplementation of certain laws**,¹¹ which follows the Legislative intent of Act on electronic Public Administration and legislatively and materially, it follows Act no. 275/2006 Coll., on information systems of Public Administration and on amendment and supplementation of certain laws, as amended. Concurrently as to the program, it follows the National conception of informatization of Public Administration which was passed by government of the Slovak Republic in 2008, and which describes principles of building e-Government and implementation of electronic services in Slovakia. It is the goal of this act to introduce general legal regulation of the manner of performance of Public Administration and public power electronically, including related legal institutes and through that allow realization of electronic services of Public Administration in a uniform way without a need for critical intervention to every individual legal regulation which covers this performance in concrete cases with the exception of procedural regulations. The idea is to eliminate partial legal regulation of electronic Public Administration which is numerous individually regulated for every area of Public Administration performance, in an equal extent there are duplicates as well as differences regarding the same institutes.¹²

Draft act consists of two units. In its first part, it regulates basic rules for functioning of basic registers among other information systems of Public Administration, disposal with their contents, regulation of the position of persons responsible for administration of data and conditions for disposal with these data. One of the contributions of this legal regulation will be the unification of data collected by Public Administration and decreasing of announcement of data changes or their evidencing to various bodies. The goal of the second part is to introduce basic frameworks of electronization of acts in administrative relations. The core of legislative changes is the codification of electronic communication as principal form of communication with Public Administration and public power including the very Public Administration and public power between themselves in order to simplify, quicken, clarify

11 Inter-resort comments proceedings to this draft act was finalized on 14th October 2011.

12 Reasoning report to this draft act of Act on electronic administrative processes and on amendment and supplementation of certain laws.

and unify communication processes and to increase the security of this communication. Draft act deals with introduction of legal frameworks for procedural acts such as delivering, filing and decision-making. Another important part of the act is introduction of fully new legal institutes, e.g. conversion of documents, electronic personal boxes and official record which were absent in existing legal environment and they are inevitable or a significant contribution for proper functioning of electronic processes.

Equally to other spheres of society, even in informatization of Public Administration, financing plays an important role. At this point, we would like to point out to options of using financial support from the Operation program Informatization of society 2007-2013, where up to 993 million euros might be available for providing support to projects of e-Government, digitalization and access of contents of memory and funding institutions and broadband internet. Equally to other operation programs, not even here the forms of obtaining financial sources are not used in full extent.

Conclusion

I afford to state that process of informatization of Public Administration, or in other words, building e-Government in Slovak Republic is still unfinished. Particular boundary may be the adoption of draft act on electronization of administrative processes, however, it is clear that it will be very challenging, primarily because it is a legal regulation which significantly intervenes in the activity of Public Administration bodies and changes it. This fact proves also the course of comments proceedings regarding this draft act and it is evidence by high number of comments to the presented material. Nonetheless, if we want to have better, or in other words better functioning Public Administration in Slovak Republic which comes towards those who use it, i.e. especially citizens, it necessary to continuously improve it. And of the most significant steps of modernization of whole Public Administration is also the electronization.

Electronic assignment of cases as an anti-corruption instrument within the framework of administration of justice

In this short paper of mine, I would like to present and analyze one prepared novelty in the area of law of courts. By using the term law of courts, I mean the “area” of law which is, simply put, concerned with organization and administration of courts.¹ I deliberately put the term “area” in quotation marks because it actually is a complex of legal rules and principles which could be classified in the constitutional, administrative, financial or labor law. Modern movement of „*Law & Economics*”² also finds its practical reflection here. Law of courts has a number of specifics which distinguish it in a way from the areas of law mentioned above. It is classic example today that in the area of administration of justice, the classic principle “he who appoints, dismisses” which is a principle typical for state administration cannot be applied in the area of administration of courts.³ Within the framework of justice administration, conflict occur between principles of the mentioned areas of law and resolution of their conflicts is usually not unambiguous as it is hard to create generally rules applicable to all similar cases. This fact is further entangled by the Constitutional Court which in one of its decisions deduced inseparable identity of a person performing the function of a judge and function of (vice) president of the Supreme Court⁴ where constitutional principles of judiciary apply even to performing functionary authorities on one hand, but on the other hand in a different decision, it deduced that function period of court functionaries may be limited and that they cannot be repeatedly appointed to the same function⁵. However, such function is totally in contradiction with the constitutional command providing that judge must be appointed with any time restrictions⁶. Result of balancing all principles applicable to issues of ad-

1 See also KOPA, Martin. *Cesty (samo)správy soudů*. *Časopis pro právní vědu a praxi*, 2011, no. 1. p. 41

2 See also e.g. POSNER, Richard A. *Economic Analysis of Law*. 8th ed. New York: Aspen Publishers: 2011. 1009 p.

3 see judgment of the Constitutional Court file no.. Pl.ÚS 18/06 dated 11th July 2006, part VII.

4 see judgment of the Constitutional Court file no.. Pl.ÚS 18/06 dated 11th July 2006

5 see judgment of the Constitutional Court file no.. Pl. ÚS 39/08 dated 6. října 2010, bod 65 a 66

6 In details see KOPA: *Cesty (samo)správy soudů*, p. 46; by the mentioned statement I do not mean to say that I do not agree with this opinion, I actually do agree with it. But this conclusion is problematic in connection with the unity of a person of a judge and court functionary where I contrarily agree with the separate opinion of judge Vladimír Kůrka in judgment Pl.ÚS 18/06

ministering justice especially with principles of independence and impartiality of judges is thus always necessary to apply in relation to their unique and particular collision in the practice of administration of courts.

I will mention one problem I encountered during the time I spent working in Judiciary section of the Ministry of Justice of the Czech Republic when I prepared an analysis of schedules of work of regional courts as an example of bending the principle of a lawful judge over the edge of its flexibility. In some of them⁷, we may find the institute of so-called directing president of the senate⁸. After the new case comes and it is assigned to a certain senate in accordance with schedule of work, their task is among others to determine composition of the senate in a particular matter if the senate has more than three members, or to decide on assigned of new cases to individual members of the senate where they care about balanced workload of the judges.

If we understand the substance of principle of a lawful judge as “*submitting applications to courts and assignment of cases to judges (...) under rules set in advance leading to minimizing the possibility of their influencing, corruption and arbitrariness etc.*”⁹, than the magical formula “*care about balanced workload of individual members of the senate*” used in schedules of work and an authority of directing presidents of senates to determine composition of senates in particular matters might *prima facie* present more of a possibility maximize influencing of assignment of new cases, corruption and arbitrariness. On the other hand we have to take into account what the practice of administration of justice looks like and ask ourselves, how to do it differently? There must actually be a mechanism which would allow for reaction to sudden circumstances and the fact that directing president of the senate takes care of assignment of cases actually is a rule set in advance.

Nevertheless, Ministry of Justice decided this and other threats with the goal of finding a way which would exclude all doubts and preclude presence of any kind of corruption spawn whatsoever. In connection with these efforts, they looked around the world with the intent to get inspired by systems of

7 E.g. schedule of work at Regional Court in Ostrava for 2011 available at <<http://portal.justice.cz/Justice2/soubor.aspx?id=90044>>, schedule of work of Regional Court in Hradec Králové for 2011 available at: <<http://portal.justice.cz/justice2/soud/soud.aspx?o=18&j=28&k=5327&d=310366>> or schedule of work of Regional Court in Brno for 2011 available at <<http://infodeska.justice.cz/soubor.aspx?souborid=1764923>>

8 Regarding that see s. 2 (2) Instruction of Ministry of Justice dated 3rd December 2001, č. j. 505/2001-Org, publishing internal and office procedure code for district, regional and high courts, as amended

9 see ŠIMÍČEK, Vojtěch. Článek 81. In *Ústava České republiky – komentář*. ŠIMÍČEK, Vojtěch and col. Praha: Linde, 2010. p. 968 - 969

assigning cases in other countries. They did not even have to go far because the inspiration worth following was found immediately in the country of our eastern neighbors – Slovakia. Thanks to that, Slovakia becomes sort of an eclectic “example of justice” for the Czech Republic¹⁰.

If we want to concretely examine the Slovak regulation of assigning cases, we have to look into s. 51 Act no. 757/2004 Coll., on courts and on amendment and supplementation of certain law, as amended (hereinafter “SKAC”)¹¹. We find five variables in this provision: a) subject-matter of the proceedings, b) correspondence with the schedule of work, c) random selection, d) technical instruments and program instruments approved by ministry, e) exclusion of a possibility to influence assignment of a case. I would like to analyze especially the three lastly mentioned variables on following lines because as you probably suspect, the mentioned provision has been translated and put into draft amendment to Act no. 6/2002 Sb., on courts and judges, as amended (hereinafter “CZAC”)¹².

Randomness of a selection in assignment of cases to court departments

Firstly, I would like to answer the question of when we may speak of randomness of a selection. Draft of an amendment of CZAC, proposer’s file no. 743/11-LO-SP (hereinafter “ACZAC”) gives us an answer in its first article where we find new provision of s. 42b defining selection as random if the case is assigned to one of at least two court departments. Under NCZAC, this condition is fulfilled even if the president of the court stops assigning cases to one of judges in case of unbalanced workload or necessity to let them prepare for new agenda. If we compare this regulation with Slovak regulation, we come to the conclusion that NCZAC really is a legal “transplant” in this matter¹³.

10 It is an eclectic example because an analogy of Council of Judiciary still does not have enough support at the Ministry of Justice as one of the norm-makers in the area of law of courts

11 For transparency, I cite first two paragraphs of this provision: *“(1) Unless this law provides otherwise, cases determined by their subject-matter are assigned in accordance with the schedule of work to individual senates, single judges, court officials and notaries using random selection by technical instruments and program instrument approved by ministry in order to exclude the possibility of influencing assignment of cases. (2) Condition of random selection under paragraph 1 is fulfilled, if the case is to be assigned to one of at least two senates, single judges, court officials or notaries”*

12 In the time I wrote this paper (end of November 2011), draft amendment was in inter-resort comment proceedings, it was available in the Library of prepared legislature on website <<http://eklep.vlada.cz/eklep/page.jsf>>

13 See s. 51 (1) (2) SKAC

Additionally, random selection is thus given a word in a number of casuistically defined situations linked to absence, exclusion or inability of a judge to hear and decide a case assigned to them earlier. I would especially like to point out a problem outlined by s. 42b (2) (a) NCZAC, i. e. absence of a judge for at least six weeks and its consequences for assignment of cases. Schedule of work should primarily think of substitute-judges which would perform necessary acts in the matter (e.g. a decision on preliminary measures or custody cases) instead of an absenting judge. If the judge is absent longer than six weeks or if this long absence is justifiably predictable, it is desirable that the case be re-assigned to a different judge using random selection where this judge could even do decisions on merits. But a logical question comes to mind: what if the initial lawful judge comes back?

If the case was not returned to the initial lawful judge, then materially, parties to the proceedings would be taken away from their lawful judge, which is principally constitutionally unacceptable¹⁴. I intentionally write the word principally, because the principle of a lawful judge in the area of criminal procedure conflicts with principles of oral and direct hearing¹⁵. In our case, the return of initial judge after the day of trial along with defendant's disagreement would lead to the necessity to repeating the whole trial¹⁶. In case the trial is set, there are thus legitimate reasons for an exception out of the rule that the case should be assigned back to returning lawful judge.¹⁷ When preparing NCZAC, we therefore encountered even significant impact of criminal law on administration of justice.

Technical instruments and program instruments approved by Ministry of Justice

Under this very generally sounding legislative term I used in the title and which is legislatively abbreviated as "application"¹⁸, a legal transplant from the

14 See Art 38 (1) Resolution of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the Charter of Fundamental Rights and Basic Freedoms as a part of the constitutional order of the Czech Republic, as amended by constitutional act no. 162/1998 Coll. (hereinafter "CFRF")

15 see Art. 38 (2) CFRF, s. 2 (11), (12) Act no. 141/1961 Coll., on criminal court procedure (criminal procedure code), as amended (hereinafter "CPC")

16 see s. 219 (3) second sentence CPC: "*if the composition of senate changed or a longer period of lapsed since the trial was postponed, with agreement of state prosecutor and the defendant, president of the senate shall read a substantial part of protocol on trial including evidence discovered; if the agreement is not given, trial must take place again.*" further see ŠÁMAL, Pavel and col. *Trestní řád. Komentář*. 6th ed. Praha: C. H. Beck, 2008. p. 1735 et seq.

17 see s. 42e NCZAC

18 see s. 42 (1) (e) NCZAC

area of IT is hidden and in Slovakia as “donor country”, it is exclusively called “Electronic registry”¹⁹. Slovak colleagues actually taught us that it is so-called “Combined *Multiple Recursive Generator (CMRG)*“, which is a term I am not able to explain as well as the way of creating algorithm taking the wording of SKAC into account. It is important that in view of judges themselves²⁰, it works and it accurately corresponds with ideas on fulfilling the principle of a lawful judge.

But a logical question comes to mind, what if the generator gets broken and stops working even temporarily? NCZAC in the light of Slovak inspiration thinks of this situation as it states that this situation should be covered by schedule of work²¹. How this coverage ought to look is then limited by a condition of necessary exclusion of an option to influence assignment of a case²² and also by a condition that application could not be used to assign new cases for at least two days²³. General rules for assignment of cases otherwise applicable even to functioning application obviously apply for such “substitute assignment”²⁴.

That is a very general and broad definition of “alternative” assignment of new cases which might cause problems if in practice a defect occurred. The simplest solution is thus looking where these problems are resolved today already, i.e. schedules of work of Slovak courts. Solution we find in many Slovak schedules of work is that all applications delivered to courts are hand-marked with time of delivery and number of order in the registry of courts where the applications delivered by mail have the same time of delivery and the number of order follows to number of order of the last preceding application. Registry distributes the numbered applications into section which take them over in

19 comp. e.g. schedule of work of District Court in Bratislava I for 2011 available here: <http://wwwold.justice.sk/dwn/rs/2011/osba1/rpsosba111_zd7.pdf>

20 In this case I can refer you to e.g. JUDr. Róbert Urban, president of Regional Court in Žilina, who participated in meetings of working group for reform of justice which was held at the Ministry of Justice of the Czech Republic

21 see s. 42 (1) (e) (f) NCZAC

22 see s. 42c NCZAC

23 see s. 42 (1) (e) NCZAC

24 That is assignment of cases to court departments in accordance with their kind determined by subject-matter of the proceedings; rules of assignment of cases are concurrently set in order to secure specialization of court departments in accordance with special laws, to secure that cases heard and decided at the branch of the court are assigned to court department operating at this branch, to secure that workload of individual court departments would be the same if possible; rules for assigning insolvency cases should further provide securing that insolvency cases of debtors falling in concern are heard by the same court (see s. 42 (1) (d) NCZAC)

registry. If we go one step further, in court departments working in criminal, civil and commercial section, the supervising officer distributes all new applications (indictments and others) into court departments in the order gradually from the lowest number of order to the highest number of order as applications were delivered that day. The fact that a case was assigned “alternatively” in this substitute way, there must a record made in the file²⁵.

Exclusion of a possibility of influencing assignment of case

What does the proposer mean when NCZAC states that a possibility of influencing assignment of case ought to be excluded? When creating this provision, I and my colleagues influenced by Slovak inspiration meant two levels of this possibly a vague term for someone. The first level was an effort to primarily exclude human factor out of assignment of new cases because its presence in re-assignment always has the nature of risk in the fact that respective person really re-assigning new cases may succumb to prospective corruption pressure from the outside. If in case of application's failure the human factor has to be present, it should at least be bound by strict limits given by law which were described in the previous part of this paper.

In the light of a right to lawful judge, NCZAC includes a duty of court to give the party to proceedings a certificate on taking a case over and assignment of a case upon request of the party without undue delay. If the application was delivered through data box or to electronic address of registry, this duty of court is actually obligatory and not only facultative requiring a request of the party to the proceedings²⁶. Everyone who has a legal interest in the matter might look into the file with the purpose of finding out how the case was assigned which is an information necessarily recorded in the file. The goal of this institute is the control of fulfilling a principle of lawful judge even by participants to the proceedings who may thus verify whether the judge deciding in their case really is a lawful one.

Conclusion

I strongly believe that in summary, the principle of lawful judge might reach a higher level of fulfillment if NCZAC passes a successful legislative path and it would not have to step aside the way of other conflicting princi-

25 As an example, schedule of work of District Court in Banská Bystrica might serve <<http://www.justice.gov.sk/Stranky/Sudy/Okresny-sud-Banska-Bystrica/Rozvrh-prace.aspx>>

26 see s. 42f NCZAC

ples of law of courts. Except of electronic registry, NCZAC brings about other novelties, e.g. obligatory agreement of the judge transferred to a new agenda and provision of a time period of at least two months for preparation for new agenda. I am a little disappointed that it does not already contain previously planned obligatory agreement of council of judges (or assembly of all judges where the council of judges does not operate), but may this institute shall be found in one of other reform law prepared by Ministry of Justice of the Czech Republic.

If NCZAC is adopted by Parliament of the Czech Republic and subsequently signed by president of the republic, it is planned that it would come into effect on 1. 1. 2014. IT department of Ministry of Justice would thus have a lot of work ahead of them in order to secure starting electronic assignment of new cases from the previously mentioned date. Therefore, I hope that this time the electronization of justice will have much more positive effect than the effect brought by electronic payment orders which unfortunately led to even worse “burdening” of justice and it paradoxically it complicated the situation of courts and prolonged the length of certain proceedings although the initial goal was help the clients and make the proceedings shorter and easier. But in case of NCZAC, I do not see the possibility of this happening, therefore I hope that electronic assignment of new case shall not surprise us similarly unpleasantly.

Conclusion

As it has already been suggested in this book's introduction the publication you hold in your hands naturally could not to grasp all development tendencies and trends in Public Administration in their complexity. There is no doubt that there are other unexplored fields of Public Administration to focus on which might lead to or suggest other new evolutionary trends and phenomena.

One of the interesting trends of the Czech Public Administration seems to be the recent development in organization of Public Administration, especially the state administration. There are basically two tendencies to be traced. The first demonstrates signs of divergence from the organization of territorial operation of state administration based on regionally established administrative division (according to the Act no. 36/1960 Coll., on territorial division of the state) and adjustment of territorial operation of public authorities to the territorial division of regional self-governing units. One example that clearly demonstrates this tendency is a recently finished transformation of territorial organization of the Czech Republic's State Police. The second tendency or development trend is represented by a gradual concentration of the territorial state administration which results in smaller number of regional public authorities (the so-called deconcentrates) as separate organizational units (e.g. land registry) or even in concentration of state administration into one organizationally independent centre (e.g. Labour Office of the Czech Republic) with dependent affiliates.

Among trends affecting to the large extent the procedural aspects of Public Administration this book has elaborated on judicialization, formalization, simplification or electronization of Public Administration and has demonstrated how these trends keep on influencing the operation of Public Administration in the Czech Republic, Slovak Republic as well as in other European countries.

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