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DECLARATIONS OF INVALIDITY OF A RESOLUTION OR ORDER OF A LOCAL GOVERNMENT BODY AS BEING ONE OF THE MEASURES OF SUPERVISION OVER A LOCAL AUTHORITY

STWIERDZENIE NIEWAŻNOŚCI UCHWAŁY LUB ZARZĄDZENIA ORGANU JEDNOSTKI SAMORZĄDU TERYTORIALNEGO JAKO JEDEN ZE ŚRODKÓW NADZORU NAD SAMORZĄDEM TERYTORIALNYM

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Abstract: In this article, basing on normative regulations, judicial decisions of administrative courts and of Constitutional Tribunal and literature of the subject, an analysis of one of the means of supervision over local government was made, which is the Voivode having the possibility of stating the invalidity of a resolution or order by the local government body. Even though government legislation has equipped the local government with a significant degree of autonomy and independence - legal, judicial, financial, organizational - it has not subjected the lawfulness of legal acts established by local government bodies to control by government administration bodies and provided for the possibility of declaring them null and void. This article analyses the provisions concerning the circumstances and procedures for the application of such a supervision measure; and its implementation, as well as the issue of appealing the analysed supervision measure to an administrative court.
Keywords: Voivode, means of supervision, local government bodies, declaration of the invalidity of a resolution, or of an order

Streszczenie: W niniejszym artykule, w oparciu o regulacje normatywne, orzecznictwo sądów administracyjnych i Trybunału Konstytucyjnego oraz literaturę przedmiotu dokonano analizy jednego ze środków nadzoru nad samorządem terytorialnym, jakim jest możliwość stwierdzenia przez wojewodę nieważności uchwały lub zarządzenia organu jednostki samorządu terytorialnego. Ustawodawca co prawda wyposażył samorząd terytorialny w znaczny zakres niezależności i samodzielności – prawnej, sądowej, finansowej, organizacyjnej, niemniej jednak poddał kontroli organów administracji rządowej legalność aktów prawnych stanowionych przez organy samorządu i przewidział możliwość stwierdzenia ich nieważności. W artykule poddano analizie przepisy dotyczące przesłanek zastosowania takiego środka nadzoru i postępowania w zakresie jego wdrożenia oraz zagadnienie zaskarżenia analizowanego środka nadzoru do sądu administracyjnego.
Słowa kluczowe: wojewoda, środek nadzoru, organy samorządu terytorialnego, stwierdzenie nieważności uchwały lub zarządzenia

Introduction

Government legislation has equipped local governments with a significant degree of autonomy and independence. This does not mean, however, that local government bodies are no subject of any supervision of the State. M. Pacak and K. Zmorek are right to notice that the "performance of tasks by local government, including in particular the legislative process, sometimes requires a specialist, comprehensive knowledge, which may be lacking amongst politicians and civil servants at the level of local government. Moreover, low income of local government bodies may result in a limited possibility of entrusting the drafting of resolutions or orders to highly qualified persons. All these factors may contribute to endangering the rule of law in the form of unlawful legal acts" (Pacak, Zmorek, 2013, thesis 3 to art.12). The legislator has provided for a whole range of instruments thanks to which state administration bodies, in particular government administration bodies, can control the legality and regularity of laws enacted by local government bodies. The basic instrument of supervision is the possibility for a voivode to declare the invalidity of a resolution or the regulation of a local government body. As noted by P. Chmielnicki: "the declaration of invalidity of a resolution or order of a local

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government body is a basic supervisory measure of a corrective type, one of a substantive and verificative nature, used by the supervisory authorities over municipal activity. The declaration of invalidity of a resolution or a regulation of a municipality body is made by way of issuing an act specified by the legislator as a supervisory decision" (Chmielnicki, 2013, art. 91 par. 1).

Literature review and research methodology

The paper uses a formal and dogmatic method in the interpretation of relevant provisions of the Act on Municipal Self-Government. To this end, the case law of administrative courts and the Constitutional Tribunal was made recourse to. A review of literature concerning the discussed issues is also carried out.

Results and discussion

Pursuant to Article 91(1) and (4) of the Act of 8 March 1990 on Municipal Self-Government (Journal of Laws 1990 no. 16 pos. 95, as amended) a resolution or order of a municipal body contrary to the law is invalid. The voivode decides whether a resolution or a regulation is invalid in whole or in part. For the implementation of the supervision measure in question, it is necessary for a self-government body to commit a serious breach of the law when issuing a legislative act. In the case of insignificant violation of the law, the voivode shall only indicate that the resolution or order was issued in violation of the law. A voivode decides on the invalidity of a resolution or regulation within no more than 30 days from the date of delivery of the resolution or regulation to the voivode.

Pursuant to article 90 of the Act on Municipal Self-Government the mayor is obliged to submit resolutions of the municipal council to the voivode within 7 days from the date of their passing. The orderly regulations shall be communicated by the mayor to the voivode within two days of their introduction. However, the dates on which resolutions or orders should be presented to a voivode are not of a preclusive nature. Exceeding them does not therefore result in any negative legal consequences for the act itself or for the powers of the supervisory authorities. The only consequence of non-compliance with these time limits is the admissibility of the voivode's statement at any time that the resolution or order is invalid (Dytko, 2008, thesis 1). According to art. 93 par. 1 of the Act on Municipal Self-Government after the expiry of the time limit indicated in art. 91 par. 1 the supervisory authority cannot, on its own, declare the invalidity of a resolution or order of a municipal authority. In this case, the supervisory authority may complain to the administrative court against the resolution or order. However, one should bear in mind the provisions of art. 94 of the Act on Municipal Self-Government, which states that an administrative court may not declare a resolution or order of a municipal body invalid after one year from the date of its adoption, unless the obligation to submit a resolution or order within the time limit specified in art. 90 par. 1 has been violated, or if they are an act of local law.

It is worth mentioning that there is a certain inconsistency in the regulations of Art. 90 and Art. 91 of the Act on Municipal Self-Government. The Art. 90 on Municipal Self-Government binds the mayor to submit to the voivode only the resolutions of the municipality council and as for the regulations of the mayor – only the enforcement regulations should be submitted. Article 91 of the Act on Municipal Self-Government states in general only that the voivode declares the invalidity of a resolution or order of a municipality body. The question arises whether the voivode may declare invalid those orders of the mayor which are not in the nature of enforcement regulations and are therefore not communicated to him. Two views are presented in the literature on local government law. According to the first of them, which is the dominant one, the resolutions of the municipality council and ordinances of the mayor are so important for the local community that it is necessary to introduce the obligation of direct submission of these acts to the voivode and to define the time limits that force the voivode to conduct a timely legal analysis of these acts. Other regulations, including the regulation on determining the organisational structure of the municipality office, are not so important. This does not mean, however, that they are not subject to supervision. On the contrary, even those acts that do not have to be directly passed on to the voivode are subject to his control (see Rutkowski, 2003, thesis 2, Chlipała, 2010, thesis 1). However, there is a view that the content of art. 91 par. 1 in connection with art. 90 par. 1 of the Act on Municipal Self-Government states that voivodes are entitled only to declare invalidity of the resolutions of the municipal council and the acts establishing the enforcement regulations – they are therefore not entitled to declare the invalidity of the regulations of a mayor other than those regulations establishing the enforcement regulations (Dziurda, 2003, thesis 3).

The scope of the acts to which a supervisory decision provided for in Article 91 paragraph 1 of the Act on Municipal Self-Government may apply includes the resolutions and orders of the municipality authorities. However, doubts arise as to whether the supervisory decision may apply to all acts of municipal self-government. It should be remembered that the municipality is primarily a local government unit established to perform public

tasks. But the municipality is also a legal entity, equipped with its own property, undertaking specific civil law or mixed public-private activities in relation to this property (Dolnicki, 2018, thesis 3 to art. 91). Thus, the question arises whether the voivode may declare the invalidity of a resolution or order of a municipal body relating to the property rights of the municipality. In the opinion of the Constitutional Tribunal, activities related to the exercise of the property rights of a municipality also constitute municipal activity and are subject to supervision, provided that they have been given the form of administrative acts. The Constitutional Tribunal expressed the opinion that if the act of a municipality body received a legal form of a sovereign act issued on the basis of administrative law regulations, then regardless of the nature of legal relations shaped by it, it is subject to a supervision procedure called administrative supervision. Resolutions of the municipal council relating to property matters, which constitute an authorization for the executive body of the municipality to make a civil-law declaration of will are also categorised by the Constitutional Tribunal as such acts (resolution of CT of 27 September 1994, W. 10/93, LexisNexis no. 356387, OTK 1994, no. II, pos. 46). The standpoint of the Tribunal was criticised in the doctrine mainly because it did not take into account the possibility of determining the scope of application of supervision taking into account legal regulations other than the provisions of self-government law (Dolnicki, 2018, thesis 3 to art. 91; Chmielnicki, 2013, thesis 2 to art. 91).

The resolution of the municipal council is the basic legal act of local self-government bodies subject to the supervision of a voivode. Slightly more doubts arise about the second type of legal acts issued by self-government bodies which are orders of the mayor. It should be noted that only in a few provisions of the Act on Municipal Self-Government does the legislator explicitly refer to the form of a regulation as the legal form of activity of a mayor. The mayor appoints and dismisses his deputy, orders evacuation from directly threatened areas, organizes the rules of functioning of the municipality office, issues enforcement regulations by way of an ordinance. The doctrine of self-government law is dominated by the view that since only certain activities of a mayor are covered by the form of an ordinance, there are no grounds to extend it to other acts. Therefore, all other legal acts of the mayor are not subject to supervision by the governor. Even if the mayor gave the name of a regulation to some of his acts, although the law does not require it, such an act would not be subject to the supervision of the voivode anyway. (for example, Płażek, 2007, thesis 5). However, the decisions of administrative courts are not uniform. The verdict of NSA of 30 June 2004 (OSK 439/2004, LexisNexis no. 2126253) states that “orders, apart from administrative decisions, are a legal form in which a mayor may make authoritative decisions. Since art. 38 of the Act on the Education System does not specify the form of an administrative decision for an dismissal of the school headmaster, this means that it takes the form of a regulation of a mayor (town mayor, city president). The appointment or dismissal of a school headmaster is a public administration matter with all its consequences, including the supervisory involvement of the voivode. As a result, the mayor' s order to dismiss the school headmaster is subject to supervision by the voivode”. Therefore the Voivodship Administrative Court in Gdańsk agreed with the restrictive interpretation of the concept of a regulation and argued that a mayor (town mayor, city president) may issue a regulation only in cases specified in the act, therefore in the event of refusal to invalidate a competition he cannot make use of this legal form of action (resolution of VAC in Gdańsk of 16 November 2009, III SA/Gd 442/2009). P. Chmielnicki analyses the jurisprudence of administrative courts on this subject in more detail (Chmielnicki, 2013, thesis 4 to art. 91).

Regulation of art. 91 par. 1 of the Act on Municipal Self-Government declares resolutions or orders that are against the law to be invalid. At the same time, paragraph 4 of the aforementioned article provides that, in the event of an insignificant breach of the law, the supervisory authority shall not declare such a measure null and void, but merely indicate that it was issued in breach of the law.

By “breach of the law”, one should understand inconsistency with generally binding legal acts, i.e. the Constitution of the Republic of Poland, laws, executive acts and generally binding acts of local law. The conflict between a resolution or order of a municipal body and the law must be obvious and direct. There is no such conflict if a particular decision taken by that authority is not expressly prohibited by the legislator and is within the limits of discretion (verdict of VAC in Warsaw of 21 March 2007, IV SA/Wa 2296/06, LEX no. 320813). The doctrine also presents views that a voivode taking a decision referred to in Article 91 paragraph 1 of the Act on Municipal Self-Government may alternatively refer to Article 156 paragraph 1 of the Code of Administrative Procedure as a criterion for assessing the legality of a resolution or a regulation of a local government body (Majchrzak, 2017, thesis 5). Significant violations of law resulting in the invalidity of a given act undoubtedly include the violations of the following: provisions determining the authority to make resolutions, legal basis for making resolutions, provisions of the system law, provisions

of substantive law and provisions regulating the procedure of making resolutions (Adamiak, 1997, thesis 6). It is worth noting that a voivode may only declare the invalidity of a resolution or ordinance. The decision of the voivode cannot therefore "state the validity" of the resolution of the municipal body or "do not state the conflict of the resolution of the municipal body with the law", thus confirming the binding force of the resolution (Chmielnicki, 2013, thesis 19 to art. 91).

However, in the case of "insignificant infringement of the law" it refers to minor, insignificant infringements not related to the essence of the issue, consisting for example in inappropriate marking of the resolution, invoking an inappropriate legal basis (assuming that there is a legal provision authorising its adoption) or committing an obvious typographical or accounting mistake (verdict of VAC in Gliwice of 5.12.2013, IV SA/Gl 314/13, LEX no. 1436229). A determination by a voivode pertaining to insignificant violation of the law does not result in invalidation of the act and only results in the fact that the voivode indicates that the adoption of a resolution or order was made in violation of the law. It is therefore the only means of action by the supervisory authority, which is not of a sovereign nature but is only relevant to the regularity of future conduct (Dolnicki, 2018, thesis 12 to art. 91).

The legislator has not decided whether a voivode's declaration of invalidity of a resolution or regulation causes the resolution or regulation to have no legal effects only from the moment of issuing a supervisory decision, or whether such a decision has retroactive force and causes the resolution or regulation to be invalid from the moment of issuing them. In this case one can support its opinion with the verdict of CT of 9 December 2003 (P 9/02, OTK-A 2003, no. 9, pos. 100), in which the CT expressed the view that: "The annulment of the resolution is a declaratory act and therefore produces *ex tunc* effects - retroactively from the date of the resolution's passing. Therefore, the act is invalid from the moment of its adoption'; and because of this, it is legally ineffective. The result of a supervisory decision is the annulment of all legal effects which arose in the period between the effective date of the resolution and the date of its invalidity".

Proceedings for the annulment of a resolution or order of a municipal body are always conducted *ex officio*. Therefore, letters from private persons indicating legal defects of certain resolutions do not cause the obligation to initiate proceedings. However, the supervisory authority should inform the person submitting the letter on the declaration of invalidity of the act of the municipality authority about the actions taken or lack thereof. Moreover, neither a natural person nor a legal entity - outside the municipality - may participate in the supervisory proceedings of a voivode. "Forcing the supervisory entity to issue a supervisory decision cannot be made through the court" (Chmielnicki, 2013, thesis 13 to art. 91).

Pursuant to art. 91 par. 2 of the Act on Municipal Self-Government, when initiating proceedings to declare a resolution or order invalid or in the course of such proceedings, the supervisory authority may suspend their execution. Only a resolution or order formally adopted, and not the draft of such an act, may be the object of execution. Moreover, the condition for applying this measure is the commencement of proceedings for the annulment of a resolution or order. The suspension itself shall be carried out ex officio. It is optional and its application is at the discretion of the supervisory authority. The suspension may take place upon initiation of proceedings or later in the course of proceedings. It may cover all or part of the resolution or order or only part of the act (Dolnicki, 2018, thesis 15 to art. 91). The legal consequence of withholding the force of the resolution is the inadmissibility of taking actions on its basis (Adamiak, 2002, thesis 2). It should be emphasized that the literature of subject states that the measure consisting in the optional withholding by the supervisory body the execution of the resolution or order of the municipality body at the very moment of initiating proceedings to declare these acts invalid, creates a great risk of excessive limitation of the municipality's independence (Jyż, Pławecki, Szewc, 2012, thesis 2 to art. 91). According to the art. 91 par. 3 of the Act on Municipal Self-Government, the supervisory decision should contain factual and legal justification and an instruction on the admissibility of submitting a complaint to the administrative court. Article 91 par. 3 of the Act on Municipal Self-Government determines, therefore, the obligation of the supervisory authority to include in its supervisory decision a statement of reasons, the content of which will indicate the supervisory authority's reasoning as to why it declared the act or part of it null and void. The legal justification for the supervisory act should therefore include an explanation of the provisions as to which the authority is accused of infringing and the determination of the species (type) weight of the infringement found. The legal justification of the surveillance act should therefore contain an explanation of the provisions allegedly infringed by the authority concerned and the determination of the gravity (type) of the infringement found (verdict of NAC of 8 August 2018, I OSK 686/18, LEX no. 2539696). The factual justification of a supervisory act shall include reference to stated facts and circumstances relevant to the legal assessment

carried out by the supervisory authority (Kmieciak, 1996, thesis 3).

Pursuant to the provisions of Art. 91 par. 5 of the Act on Municipal Self-Government, the provisions of the Code of Administrative Procedure shall apply to proceedings concerning the declaration of invalidity of a resolution or an order (the Act of 14 June 1960 the Code of Administrative Procedure Journal of Laws 1960 no. 30 pos. 168 as amended). Dolnicki rightly emphasises that, when properly applying the provisions of the Code of Administrative Procedure, attention should be paid to the specific nature of supervisory proceeding, which is not administrative proceedings in individual case. The subject of the decision is not a verdict in an individual case within the scope of administration, but a decision on the compliance or illegality of resolutions or orders of municipal authorities. In the supervisory proceedings, therefore, no material and evidence are collected in order to establish the de facto state of the case, and therefore the provisions governing the gathering and taking of evidence do not apply (Dolnicki, 2008, thesis 18).

At this point, the situation should be analysed if the voivode finally decides that the resolution or order of the municipal body is not contrary to the law. As mentioned above, the voivode is not entitled to declare the “validity” of a resolution or order. The legislator did not specify whether the voivode should issue a formal act terminating the supervisory proceedings. The legislator also failed to define the rules of conduct in a situation where the supervisory authority exceeds the deadline for the issuance of a supervisory decision (art. 91 par. 1). P. Chmielnicki rightly indicates that this problem takes a significant practical character in the situation when the supervisory authority has suspended the execution of a resolution or order of a municipal authority. The provisions of the commented Act do not stipulate that the suspension of the execution of an act of the municipal body shall expire upon the lapse of the time limit for the issuance of a supervisory decision. Therefore, in this situation it seems necessary to issue an act under which the decision about suspension of the execution of a resolution or order of a municipal bodies deprived of its power. The issuing of a decision about discontinuing of a supervisory proceeding shall be an appropriate form (Chmielnicki, 2013, thesis 23).

The supervisory procedure shall be one instance only. The Act on Municipal Self-Government does not introduce the possibility of appealing against the supervisory decision of the municipal authorities within the framework of administrative proceedings. The lack of two-instance administrative proceedings in this respect is, however, consistent with article 78 of the Constitution, which allows for statutory exceptions to the two-instance rule (Miemiec, 2000, thesis 1). The fact that a municipality has no right of appeal in administrative proceedings does not mean that the supervisory decision of the voivode is final and not subject to any review. According to art. 98 par. 1 to 3, decisions of the supervisory authority concerning the municipality, including the declaration of invalidity of a resolution or order, are subject to appeal to the administrative court for non-compliance with the law within 30 days from the date of their delivery. A municipality or an inter-municipal association whose legal interest, entitlement or competence has been violated is be entitled to submit a complaint to a court. When examining a municipality's complaint against a supervisory measure declaring a resolution of a municipal body to be invalid, the court is required to examine, in particular, the content of the resolution itself, determining, inter alia, whether the declaration of invalidity was made in accordance with the provision establishing the criteria for that declaration. Therefore, the subject of the court's assessment must also be to determine whether the resolution or order actually significantly breaches the law. The action of the court should be a two-step process, involving an examination of the legality of the resolution or order itself, followed by an examination of the legality of the decision about the invalidity of the supervisory decision (verdict of VAC in Gorzów Wielkopolski of 26 May 2017, II SA/Go 185/17, LEX no. 2305077). Only the municipality has the right to submit a complaint against the supervisory decision referred to in art. 96 par. 2 of the Act on Municipal Self-Government and therefore other entities cannot submit a complaint on the grounds that they have a legal interest in it (decision of NAC of 29 October 2013, II OSK 2691/13, LEX no. 1435119).

According to art. 148 of the act of 30 August 2002 Law on administrative court proceedings (Journal of Laws 2002 No. 153 pos. 1270, as amended), an administrative court, having regard to the complaint of the local self-government body against the act of supervision, revokes that act. There is no obstacle for a court to overrule a supervisory decision in whole or in part. If the court does not accept the merits of the complaint, it shall decide to dismiss it. In both cases, the decision of the administrative court takes the form of a verdict. Where an administrative court judgment upholds a complaint, it has effect before it is delivered and therefore acts *ex tunc*, revoking the contested supervisory decision of its force. If, on the other hand, the court dismisses the appeal, its decision is declaratory in nature and has an ex nunc effect (Chmielnicki, 2013, thesis 2 to art. 98).

Pursuant to art. 98 par. 5 of the Act on Municipal Self-Government, a supervisory decision becomes legally binding upon expiry of the time limit for filing a complaint or upon the date of dismissal

or rejection of the complaint by the court. The supervisory decision thus becomes legally binding: first, if the period for bringing an appeal before the administrative court has expired without effect. This is the case if no complaint has been submitted at all or if the complaint has been submitted after the statutory time limit has expired and the time limit has not been restored by a court decision. Secondly, where a complaint against a supervision measure – brought in accordance with the formal conditions – has been successfully rejected or where the court has rejected the complaint on the ground that the formal conditions for bringing proceedings had not been complied with (Jagoda, 2011, Chapter III. 3. 3.5).

As a side note, it should be noted that the suspending by the voivode of the execution of a resolution or order of a municipal body pursuant to art. 91 par. 2 of the Act on Municipal Self-Government is not a supervisory decision referred to in article 98 paragraph 1 of this Act, therefore it is not subject to appeal to an administrative court (resolution of VAC in Szczecin of 26 October 2015, II SA/Sz 1181/15, LEX no. 1819053).

This article contains legislative solutions concerning municipal self-government; however, analogous solutions concerning the supervision measure were adopted in the Act of 5 June 1998 on district self-government (Journal of Laws 1998 no. 91 pos. 578 as amended) and of the act of 5 June 1998 about the self-government of the voivodship (Journal of laws 1998 no. 91 pos. 576 as amended).

Conclusions

Polish territorial self-governments, although equipped by the legislator with a large scope of autonomy and independence, have been made subject to supervision from government administration bodies. Such supervision includes the declaration of invalidity of a resolution or order of territorial self-government unit bodies by a voivode.

It is obvious that in a democratic state, local governments cannot be completely excluded from the supervision of government administrative bodies. Nevertheless, any act of supervision over local government, including the possibility of declaring a resolution or order invalid, should be applied with extreme caution. It should be remembered that the bodies constituting local government at every level, as well as mayors, town mayors and presidents come from direct elections and have very strong social legitimacy to perform their functions. State administration bodies, including a voivode, on the one hand must ensure compliance of the local law enacted by local government bodies with the generally applicable law, but on the other hand, they cannot arbitrarily intervene into the functioning of a local community such as a local government.

It should also be remembered that administrative courts play an important role in protecting local government units against arbitrary actions by government administration bodies. The possibility for a local government unit to challenge a supervisory decision applied to it before an administrative court is an important guarantee that supervisory acts applied by a government administrative body will not be arbitrary or conditioned by criteria other than legal ones, for example political circumstances.

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