Summary

Institution of Taking a Position as a Form of Cooperation in the Adoption of Legislative Acts of Law and the Adoption of Decisions

The aim of the monograph is to perform a comprehensive analysis joint decision in an administrative matter (complex administrative acts) and cooperation with legislative procedures. Unlike simple administrative acts, in which one bearer participates in resolving an administrative matter, there are also administrative acts in the procedure of the adoption of which two or more bodies participate. Within the regulation of competencies (Division II Chapter 7 of the Administrative Procedure Act (Dz.U. Nr 30, poz. 168), hereinafter: KPA), the matter of a joint decision in an administrative matter is also regulated. These are the provisions of Article 106 and Article 106a of the KPA, which read:

Art. 106. Co-operation of authorities.

§ 1. If pursuant to any provision of law the decision may be issued only after another authority expresses its position (expresses opinion or consent or expresses its position in any other form), the decision shall be issued only after such authority expresses its position.

§ 2. The authority disposing of the matter, while applying to another authority to express its position, shall notify a party thereof.

§ 3. The authority to which the request to express its position has been submitted shall present its position immediately, however, no later than within two weeks of the day of the receipt of the relevant request, unless a provision of law provides for a different timeframe.

§ 4. If need be, the authority having the duty to express its position may conduct explanatory proceedings.

§ 5. The authority's position shall be expressed by means of an order against which a party may file a complaint.

§ 6. If the authority fails to take a position within the time limit specified in § 3, Articles 36–38 shall apply and the authority obligated to take a position shall immediately notify the authority disposing of the matter of the reminder notice being filed.

Art. 106a. Joint session.

§ 1. The authority disposing of the matter may, ex officio or upon application of the party or authority which was requested to express its position, convene a joint session, if it may facilitate the taking the position (joint session).

§ 2. The authority disposing of the matter may convene a joint session before the expiry of the time limit for taking the position specified in Article 106 § 3, and if a provision of law provides for another time limit, before the expiry thereof, only upon application of the authority which was requested to take a position.

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§ 3. The authority disposing of the matter may summon the parties to a joint session. The provisions of Articles 90–96 shall apply mutatis mutandis.

§ 4. Convening a joint session shall not release the authority from the obligation to consider the reminder notice referred to in Article 106 § 6. The order referred to in Article 106 § 5 may be included in the minutes of the joint session.

And there is no general regulation regarding the procedure of cooperation in administrative legislation. Only the Regulation of the President of the Council of Ministers on the "principles of legal technology" provides in § 73 and 74 on the construction of a provision authorizing to participate in the issuing of a regulation, resolution or ordinance" may be referred to. At the same time, it should be pointed out that the authorization to participate in the issuing of a normative act does not release from the obligation to agree on the draft of this act or to consult about it on the terms specified in separate regulations.

The monograph covers the main issues relating to the cooperation of the administrative authorities in administrative proceedings and in administrative legislation, including the basis for cooperation as to the extent to which the decision-making authority is linked to the grandstand of the requested authority, the conduct of the proceedings conducted by the investigating authority and the consequences of infringements of the cooperation rules.

The conducted research showed that the cooperation of public administration bodies in the form of taking a position is a permanent phenomenon in administrative law and public administration. Although the cooperating bodies do not gain decision-making powers and cannot adopt legally binding provisions of administrative legislation, their positions, especially when they are firm, often play a key role in a given procedure. They often lead to the unification of decisions by public administration in identical cases. Non-binding forms of cooperation, however, come down to providing substantive arguments to the authority competent to issue a decision in those cases that require the use of special knowledge or require taking into account various values, the care of which is the responsibility of cooperating entities. Mutual relations between the subsidiary and decisive organs constitute a kind of bond between these organs. Such ties have a positive effect on the quality of administration, as they increase professionalism in the content of the resolution. Taking joint actions by several authorities positively influences the sense of solidarity among administrative bodies, strengthens the awareness of belonging to the structure of the administrative apparatus and builds relations between administrative bodies, also at the level of administrative employees, i.e. in the internal sphere of its operation. Moreover, it also brings relief to the parties to the main proceedings, who are not excessively involved in independently obtaining the necessary positions, approvals and opinions of specialist bodies. Moreover, the Polish provisions of the Code of Administrative Procedure they guarantee the procedural position of a party in proceedings before an auxiliary authority. As a rule, almost all regulations applicable to jurisdictional proceedings are applied, with slight modifications, for example with regard to the taking of evidence.

Cooperation as a legal entity consisting in joint decision-making by administrative bodies is characteristic of administrative law and is a natural element of the development of tasks performed by modern administration. Cooperation in administrative law occurs both in determining by an authorized body the legal consequences of a certain factual state in relation to a certain entity, and in enacting acts of administrative legislation, and finally also in supervisory relations.

Due to various forms of adopting a position, they are taken at different stages of the main or legislative proceedings, and consequently they bring different values to the proceedings. The controversy of the institution of cooperation, however, boils down to the issue of weighing various goods and values. On the one hand, we can focus on increasing the specialization of

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organs or easing the systemic principle of departmental nature, and on the other hand, speed and simplicity of the procedure. Waiting for a position to be taken may slow down the proceedings and therefore violate the principle of speed and simplicity of action, as well as negatively affect the sense of responsibility for the decisions taken, and reduce the efficiency of the cooperating administration. From the perspective of the adjudicating bodies, there may be a concern about bearing full legal liability, especially in damages for a defective firm position of the cooperating body. On the other hand, in the case of non-binding positions for excessive prolongation of the proceedings, sometimes with a small end result in the form of imprecise positions or of little probative value. It cannot be concealed that in the rush of own affairs conducted by an auxiliary body, the obligation to take a position may appear as an additional burden, which is relegated to the further plan of the body's activities. Sometimes a barrier may be the lack of trust of the determining authority in the quality of the position taken. Therefore, the product of the teaching of German and Austrian administrative law is a multilevel act, and thus the adoption of the concept of a strong bond between the adjudicating and auxiliary organs. This concept turns out to be accurate due to the building of stronger ties between authorities based on trust and joint development of positions, for which both authorities are convinced. Moreover, it enables the main body to actually influence the time of the proceedings before the auxiliary body. In the latter context, the institution of a meeting for the purpose of cooperation is very useful. The multilevel operation of bodies in German and Austrian law also affects the procedure for appealing against acts of adopting a position. The model of an appeal against the position taken comes down to the control of this act in the proceedings pending against the main decision. Such a solution, on the one hand, may be criticized due to the lack of specialization of the higher-order body functionally competent for the determining authority, but on the other hand, it may increase the stability and certainty of decisions on the subject of taking a position, questioned only in the proceedings aimed at reviewing the main decision. Moreover, in Polish law there are basically separate appeal paths from the main decision, for the act of taking a position in the form of ordinary and extraordinary remedies. Such an appeal model increases the uncertainty of the addressees of the main acts as to the possibility of their revocation and, consequently, the repeal, amendment or annulment of auxiliary acts. The appeal against the decision of the subsidiary body as part of the review of the main decision in German and Austrian law turns out to be sufficient to provide an individual with the necessary protection, and at the same time increases the certainty of the main decision, and also has a positive effect on the time of the authorities' proceedings.

Administrative law is to serve not only the administration, but above all, the individual. It seems that from the point of view of an individual, cooperation in the main proceedings is less burdensome than initiating separate proceedings before initiating proceedings in a given case (the so-called dependent proceedings). Requesting the cooperating body to take a position is the responsibility of the body dealing with the case, not the parties to the proceedings, and Article 106 § 2 of the Code of Civil Procedure also obliges this authority to inform the party about this fact. This is a guarantee that the party will be able to take an active part at the stage of the proceedings pending before the cooperating body.

However, one may still be unsatisfied with the legal regulation of cooperation in Polish law. Firstly, due to the inconsistency of the legislator as an instrument of adopting a position in a given legal form. On many occasions, the legislator indicated the necessity to seek an opinion, the features of which allow to classify it only as a binding act, which is not in any way matched by the chosen nomenclature and the adopted scheme of grading acts taking a position in the doctrine. Secondly, due to the numerous legal gaps, related in particular to the liability within the administration for the defective settlement subject to agreement, as well as the problem of

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the legal consequences of defective cooperation for the main decisions. In civil law, there is no legal basis for claiming damages from the authority holding the position for issuing a binding, unlawful act of taking a position. Deriving the legal basis for such liability from the general regulation of the tort of public authorities from Article 417 of the Civil Code seems unreal due to the wording of the provision. It is all the more impossible to apply the norm from Article 417[1] of the Civil Code relating to final administrative decisions, which is not, after all, an act of taking a position. This loophole affects each time the main body is liable, which in the jurisdiction proceedings does not have the power to independently challenge even a grossly unlawful decision of a subsidiary body, or to initiate an instance control of such an act. Therefore, it bears the financial consequences of the actions of a third party, without a legal structure allowing for any recourse by the infringing entity. This violates the principles of justice also within public administration.

It is also impossible not to point to a significant drawback of the Polish legal system in the field of substantive cooperation, which is the lack of a separate regulation for adopting a position for the purposes of applying and legislating. Meanwhile, the application of the provisions of the jurisdictional procedure, in matters of law-making, does not reflect the spirit of legislative cooperation, misleads the parties to the proceedings, as well as the adjudicating bodies having problems with determining how to apply Article 106 of the Code of Administrative Procedure This provision deals with the jurisdictional procedure, and therefore its application to the legislative procedure is difficult. It would be advisable to regulate the rules of legislative cooperation, preferably in general provisions of administrative law. However, due to repeated unsuccessful attempts to regulate the general part of administrative law, it might be more realistic to pass a separate act on cooperation between public administration bodies. The best solution would be one comprehensive act on administrative cooperation, in which it is possible to regulate the position taken in administrative legislation and separately in jurisdictional proceedings. In the case of the latter type of cooperation, the code regulation should be transferred to this act.

Sometimes the problems of cooperation are related not only to imprecise, defective legislation, but also to the distortion of the practice of applying institutions. There is also a visible phenomenon of establishing cooperation "by force", which causes that this institution has only an apparent dimension. It is impossible to talk about a system of cooperation in public administration in the case when the cooperating entity is at the same time an entity of the original. In such a case, cooperation in fact does not take place due to the abolition of the possibility of achieving its main goals.

In addition, in order not to lose the sense of the institution taking a position and the legitimacy of sacrificing such values as: speed of proceedings or efficiency, it is necessary that the deciding authorities always take care to present the case to the subsidiary body in order to take a position when it is ripe for cooperation with other bodies. It is incorrect to send a case prematurely to take a position before evidence is collected in the case, especially due to the exceptional nature of taking evidence before a subsidiary body. It would be expedient to specify in the legal provisions at what stage of the explanatory proceedings should be referred to the auxiliary body in order to take a position, distinguishing between various forms of cooperation.

All these considerations mean that the cooperation, despite legislative efforts by the legislator, does not become more attractive, and the parties to complex proceedings are afraid not only of prolonging the proceedings, problems with claiming compensation for unlawful decisions on the issue of taking a position, but also the stability of the main decisions. Whereas the aim of material cooperation is to increase the individual's confidence in the activities of public administration. It seems important to standardize the procedure applicable in cases where the provisions

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of substantive law make issuance of a decision dependent on the taking of a position by another administrative body under Article 106 of the Code of Administrative Procedur.

However, the legislator has not verified and has not unified the provisions separate from the code solutions. As a result, both categories of provisions are subject to co-application, which creates many practical doubts. Codex regulation should be characterized by internal system consistency, which is currently lacking. This is important due to the significant importance of the basic regulation, in particular for the protection of the interests of a party to the proceedings. In view of the diversity of separate regulations, the code provisions cannot be ascribed the feature of external cohesion.

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