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CODIFICATION OF ADMINISTRATIVE PROCEDURE

Abstract:

The original regulation of administrative procedure stems from the Austrian administrative and legal tradition. Legislation was substantially "complemented" by case-law until 1948 (the Supreme Administrative Court) and has been again since 1992 (the restoration of administrative justice was completed in 2003; so-called substantial resolutions of the Extended Panel of the Supreme Administrative Court have been particularly significant). Another crucial point having a significant impact upon the development of the Czech legal order was the prospect of membership in the European Union, and later the accession to the EU itself.

Keywords:

Czech administrative law, administrative procedure, codification.

The Czech Republic is a country belonging to the continental system of law. The development of public law stemmed from the tradition of Austrian law and continued until the beginning of the 1950s. The following forty years saw the development of administrative law and administrative procedure under a strong influence of the Soviet system. Substantial changes were introduced after 1989: all branches of law, including administrative law, underwent essential recovery with an emphasis upon fundamental human rights and freedoms.[1]) Another crucial point having a significant impact upon the development of the Czech legal order was the prospect of membership in the European Union, and later the accession to the EU itself. Although administrative procedure is not a branch affected by direct harmonization of national law with the law of the EU, it has been necessary to ensure that any issues within Czech administrative procedure potentially could not, and in practice do not, hinder the application of any of the basic freedoms within the Internal Market of the European Union. The most significant aspect of the development of administrative procedure in the beginning of the third millennium has been the relationship to the area of freedom, security and justice as a new element within the powers shared between the EU and its Member States in the sense of Article 4 of the Treaty on the Functioning of the European Union.

[1]) TOMÁŠEK, M. et al., Czech Law between Europeanization and Globalization, Karolinum Press, Prague 2010.

I. Scope of comparison: what do we mean by "administrative procedure"?

The traditional understanding of this concept essentially included only "pure" administrative proceedings, i.e. the issuance of particular administrative decisions designated in theory as, for example, individual administrative acts (in a particular case, regarding a particular person). Today´s understanding is wider – generally it is any act by an administrative body in the course of its exercising public powers within public administration. In addition to the issuance of decisions, there are also the following activities:

- issuing measures of a general nature (in a particular case but not with respect to particular persons);
- concluding public law contracts;
- executing so-called non-regulatory administrative acts (opinions, certification, communication);
- disposing of complaints.

The concept is relating to activities of an administrative body, not persons towards whom the performance of public administration is directed. The term *public bodies* encompasses bodies which are monocratic as well as collective bodies acting as a college. Administrative procedure may be defined as the process of issuing administrative decisions, and considering their elements, features and possibly defects. Administrative procedure also covers specific processes.

The process of issuing so-called abstract acts of public administration (rule-making process) can be assigned in theory to administrative processes, however the process itself is not regulated by the law (for example, the Legislative Rules of the Government are only an internal executive document). Only some aspects of this process are subject to legislative regulation, particularly the rules for their publication: if applicable nationally, the rules are contained in the Act providing for the Collection of Laws and the Collection of International treaties; if applicable regionally, the rules are contained primarily in the Act on Municipalities and the Act on Regions.

Processes linked to direct participation of citizens in the performance of public administration can be perceived as specific administrative processes. However, they are not part of the general regulation of administrative processes. Laws governing a local referendum and a regional referendum are of a cross-sectional nature. Administrative officers are not elected, nor are officials of territorial self-governing units directly elected (mayors at the level of municipalities and governors at the level of regions, members of the council boards of municipalities or regions). Procedural issues of the organization of elections into representative assemblies can also be considered as administrative processes. Should various pieces of sectional legislation be taken into account, which impose the duty to subject issues to public consideration, the Act on Environmental Impact Assessment can be mentioned, as well as the Act on

Land-Use Planning and Building Procedure (the latter being originally used for the compilation of land-use planning documentation and recently applicable also within the standard land-use procedure).

The process of concluding public law contracts is an administrative process and is understood as such under positive law. It is part of the regulation of administrative processes. A public law contract is a relatively new and rare legal institution. Tasks of public administration are fulfilled primarily through private contracts (in relations governed by the Civil Code, Commercial Code or Labour Code; private law also governs contractual relations within public tenders). The resolution of disputes over public law contracts is within the authority of public bodies and is subject to administrative procedure (contentious administrative procedure).

The regulation of features of administrative acts (in particular their legal force and enforceability, or the force and effect of measures of a general nature and public law contracts), as well as the regulation of the nullity *ab initio* of a decision have been in theory dealt with in the contexts of administrative processes. Under positive law, they create part of general regulation.

Providing information on the activities of public administration is a specific administrative process. It is not covered by the general regulation of administrative processes. Information should be supplied in the form of a communication; the refusal to provide information is in the form of a communication; an earlier fiction of refusal in the case of failure to act has been replaced by the institution of a complaint with one exception relating to information on the environment. Obligatory public consideration of a case, or the oral hearing, has become part of legislation in the field of environmental impact assessment and land-use planning. Meetings of some collective administrative bodies are public (the meetings of municipal or regional councils, academic senates of universities and their faculties, etc.).

The distinction between governmental activities, including the political leadership of public administration and involvement in the forming of the state policy (state policies), on the one hand, and state administration on the other has been recognized only in doctrine, and moreover not in a very clear manner. It should be added that there are components of the executive power other than state administration, namely the activities of public prosecution, the Supreme Audit Office or the Public Defender of Rights (Ombudsman), and with certain exceptions also the activities of the President of the Republic and diplomatic missions. The same applies to the issuing or loan activities of the Czech National Bank.

The process of issuing individual decisions (administrative procedure) is essentially composed of two instances: final administrative decisions are subject to judicial review. The protection of public rights is provided within the system of administrative justice before administrative courts. Where rare administrative decisions, the subject-matter of which are private relations, are at issue, and in some other individual cases, the protection of public rights is provided by civil

judiciary. Duties imposed by administrative decisions can be enforced by both the administrative type of enforcement (execution) as well as by judicial enforcement (execution). Two-instance administrative decision-making also applies to the imposing of administrative sanctions. The process of issuing measures of a general nature takes only one instance; the measure itself may be subject to judicial review (by administrative courts). Disputes over public contracts are handled in one-instance administrative proceedings. All the above-mentioned administrative acts are subject to supervisory administrative mechanisms.

Administrative bodies should be strictly distinguished from judicial bodies (i. e. courts). Bodies of a mixed nature (so-called tribunals) as a special type of public bodies do not exist in the Czech Republic. However, one body is quite close to the conception of tribunals, namely the Commission for Decision-Making in the Matters of Residence of Foreigners: it is an administrative body superior to the Ministry of the Interior, but inferior to the Minister of the Interior. It decides in special panels and members of the Commission are independent in their decision-making. Another body – the Council of the Czech Telecommunication Office acts as a collegiate administrative body and is in charge of reviewing administrative decisions.

Legal regulation of administrative processes (other than the below-mentioned codified regulation implemented by Act No. 500/2004 Sb., the Administrative Procedure Code) deals with activities of administrative bodies, particularly administrative authorities, authorities of territorial, professional and special interests self-governance, and also with private persons entrusted with powers in public administration. These activities are as follows:

(a) the issuance of particular decisions or measures of a general nature, the conclusion of public contracts, the implementation of so-called non-regulatory administrative acts and the handling of complaints (these form the subject-matter of the codification);
(b) administrative enforcement (execution) (this is only partially covered by the codification; administrative execution of monetary decisions is regulated separately within the context of tax execution);
(c) the performance of certain interventive acts, for example those aimed at monitoring (administrative supervision, State Inspection, financial control) or policing (the Police of the Czech Republic except for cases of investigation within criminal proceedings; the Municipal Police). This is not covered by the codification.
(d) the providing of information on the activities of public administration (not covered by the codification); and
(e) arrangements for the direct participation of citizens in the performance of public administration, including the organization of elections and referendums (not covered by the codification).

The legal regulation of administrative processes does not essentially contain the regulation of the issuance of so-called abstract acts of public administration.

The legal regulation of administrative processes is strictly detached from the legal regulation of judicial control over public administration (the review of the legality of particular decisions; the delivery of a new decision on a case which had been already disposed of by a legally effective decision issued by an administrative body; the protection against inactivity subsisting in the non-issuance of a concrete decision or certificate; the review of the legality of a measure of a general nature; the protection against concrete interventions, especially the protection in electoral and referendum matters).

II. Main features of the law on administrative procedure in the Czech Republic

The original national regulation stems from the Austrian administrative and legal tradition. Legislation was substantially "complemented" by case-law until 1948 (the Supreme Administrative Court) and has been again since 1992 (the restoration of administrative justice was completed in 2003; so-called substantial resolutions of the Extended Panel of the Supreme Administrative Court have been particularly significant). Several issues in the relevant legislation have been corrected by the Constitutional Court (such as the abolition of exemptions from codification).[2])

The main orientation of the new legal regulation was towards an optimal extent of codification, legality and substantive correctness in decision-making and towards reliable bases of solutions. The performance of public administration has been understood as a service to the public (good administration), including the respect for the protection of rights and legitimate interests, the creation of space for their exercising and the protection of good faith. It has also been necessary to consider the balance of private interests and public policy, including searching for amicable resolutions. The principles of speedy and economical processes and cooperation in public administration have also been introduced.

Procedural law can undoubtedly be designated as one of the pillars of Czech administrative law. What has often been subject to professional criticism is that administrative as well as judicial practice has sometimes excessively emphasized the procedural part of the issue (surface consideration of certain procedural defects without particular evaluation of their links with the resulting act).

Experience attained from the recent codification (effective since 2006) has been quite limited, which also influences the nature of general debates over the fulfilment of the requirements mentioned above. Simplification has been the

[2]) ČEBIŠOVÁ, T., *Správovědná studia a reforma veřejné správy* [Studies in administrative science and the reform of public administration], In: Veřejná správa a právo, Praha, C.H. Beck 1997.

permanent topic; however, we should not mix up the simplicity of legislation with the simplicity of, or absence of problems in, its application. Recently, the necessity of adopting derogations from the general legal regulation has been discussed, or, on the contrary, the need for a more comprehensive and complex regulation of administrative procedure with respect to imposing administrative sanctions. The theory has neglected the issue of abuse of procedural rights (obstructions by parties have been a rather serious problem, for example in the field of land-use planning decision-making and building procedure).

The existing Czech legal regulation has been influenced by the European standards, e.g. Council of Europe Recommendation R80(2) dealing with the exercise of discretionary powers by administrative authorities, Recommendation R81(19) providing for the access to information held by public authorities, or Recommendation R87(16) on administrative procedures affecting a large number of persons. Some rules corresponding to the postulates of the EU standards were incorporated in the Czech legal system much earlier. This applies, for example, to Resolution 77(31) on the protection of the individual in relation to the acts of administrative authorities.

The issue of so-called full jurisdiction within judicial control of public administration (Article 6 (1) of the Convention on the Protection of Human Rights and Fundamental Freedoms, and recently The Charter of Fundamental Rights of the EU) does not fall within the legal regulation of administrative processes due to the above-mentioned reasons.

III. Codification of administrative procedure

Czech administrative procedure has been codified with the above-mentioned exceptions; the codification is of a subsidiary nature and the number of particular regulations of various extent and scope reaches several dozens, or, more precisely, it exceeds one hundred. What is of a particular interest is that the regulation in the field of taxes and charges is fully autonomous and the codification of administrative procedure would not apply to it at all.[3])

The first codification of administrative procedure in the Czech territory (then part of Czechoslovakia) dates back to 1928. Before the adoption of that code, there had been partly internal regulations, and partly regulations governing

[3]) Concerning the regulation of administrative judiciary in general see, for example, HENDRYCH D. et.al.: *Správní právo: obecná část* [Administrative Law: General Part]. 6th ed., Praha: C. H. Beck, 2006, pp. 540 and subsequent sections, VOPÁLKA, V. (ed.): *Nová úprava správního soudnictví* [New Regulation of Administrative Judiciary]. Praha: ASPI Publishing, 2003.

concrete issues (such as the procedure regarding remedial measures), whose origin had mostly been Austrian.[4]) The codification of 1928 dealt with the procedure before then existing political authorities; it was followed by regulation adopted in 1955 and 1960 establishing so-called general jurisdiction of the national committees (at that time these were universal "authorities of uniform people´s administration", later "the authorities of state power and administration"). All those regulations had the form of a governmental decree; in addition, the decree of 1955 was accompanied by an implementing regulation. The first law was passed in 1967 and governed also only administrative procedure in the course of the performance of public administration. The passage of legislation valid today dates back to 2004; the Code became effective on 1st January 2006. As has already been mentioned, the Code governs a more extensive scope of issues (Act No. 500/2004 Sb., the Administrative Procedure Code).

The creation of a uniform legal framework applicable to the exercise of powers within the jurisdiction of state administration, and recently public administration, came through several stages. The original decision to codify administrative procedure more than 80 years ago was adopted in quite a peaceful environment. The codifications of 1955 and 1960 reflected the social relations becoming "socialist"; particularly the latter was substantially encumbered with the ideology of the gradual dying out of the state. The codification of 1967 should be seen as a demonstration of the democratization of processes in the second half of the 1960, later strictly suppressed. The most intensive debates accompanied the preparation of the existing Code between 1996 and 2004. The debates covered various aspects such as whether a new law should be drafted or just an amendment would suffice, what should be covered in the legislation, whether public contracts and particularly measures of a general nature should be included, etc.

Act No. 500/2004 Sb., the Administrative Procedure Code, is divided into eight parts as follows:

- Introductory Provisions: in addition to defining the subject-matter of the Code, there are certain basic principles relevant for the activities of administrative bodies, some of which may be considered as the projection of general legal principles into positive law.
- General Provisions for Administrative Proceedings: this Part is further subdivided into chapters on persons and parties in administrative procedure and their mutual communication; steps taken before the commencement of administrative proceedings; administrative proceedings in the first instance from the commencement to the collection and evaluation of documents and evidence relevant for the issuing a decision, possible authoritative arrangements for the course and purpose of the proceedings, the suspension thereof, adjudication, and the discontinuance of proceedings; protection against the failure

[4]) HÁCHA, E., *Slovník veřejného práva československého* [The Dictionary of Czechoslovak Public Law], Brno 1929.

of an administrative body to act; the procedure on appeal against decisions not yet legally effective; the review of legality by virtue of office; new proceedings; administrative execution for non-monetary decisions; this Part also contains substantive provisions for the nullity of a decision *ab initio*.
- Special Provisions for Administrative Proceedings: for the context of the subdivision of this Part see below; provisions are not related to specific fields of public administration, but there are provisions for certain types of procedure and decisions, for example in joint proceedings, contentious proceedings, proceedings to determine legal relations, proceedings held on site, proceedings with a high number of participants, proceedings with time-preference of applications, proceedings to select an application, interlocutory and partial decisions, decisions conditional on a binding opinion of the body concerned, proceedings for the issuance of orders, the closing of proceedings by the issuance of a document, provisions for remedial measures regarding not yet effective decisions of a central administrative body issued in the first instance, so-called remonstrance.
- Statement, Certificate and Notification: these are so-called non-regulatory acts including some other similar acts; unless the nature of a case excludes it the remaining provisions for such acts may apply to other acts not subject to other provisions of the Code.
- Public Contracts.
- Measures of a General Nature.
- Common, Transitional and Final Provisions: the institution of a complaint against the process taken by an administrative body is governed, which is not a remedial measure against any particular administrative act.
- Effect

The structure of the Code has been influenced by the theory of administrative activities, ideas of the logical order of administrative processes, as well as the definitional approach to the regulation of judicial control over public administration. As for administrative procedure, tradition undoubtedly played its role. The distinction between general and special provisions for administrative procedure has been a consequence of the debates over the volume of contents in the Code ("to include" v. "to omit"). The absence of the regulation of administrative execution of monetary decisions resulted from the legislative development commenced in 1992: the enforcement of fines was removed from the general regulation of administrative procedure on 1st January 1993. Another factor was the failure to adopt an autonomous law regulating administrative execution: in 2001 an autonomous code of administrative enforcement procedure was unsuccessfully introduced in Parliament.[5])

[5]) Concerning the regulation of administrative judiciary in general see e.g. HENDRYCH, D. et. al.: *Správní právo: obecná část* [Administrative Law: General Part]. 6th ed., Praha: C. H. Beck, 2006, pp. 540 and subsequent sections, VOPÁLKA, V. (ed.): *Nová úprava správního soudnictví* [New Regulation of Administrative Judiciary]. Praha: ASPI Publishing, 2003.

The Code is of a more general nature. The part of the Code dealing with administrative procedure is based upon the conception of an administrative act being a particular (individual) decision. An administrative act is understood as a decision in a concrete matter addressed to particularly named persons; decisions *in rem* addressed to an unknown person, such as an unknown owner of real property, form a certain modification to this conception. Administrative bodies perform other regulatory acts whose regulation is also included in the Code, such as issuing measures of a general nature and making public contracts.

Public contracts are dealt with in a separate part of the Code. The Code also contains substantive provisions with respect to public contracts. The subject-matter of the regulation is contracts in general; in addition, there are particular types of public contracts, namely so-called coordination contracts (with respect to the division of powers or other types of cooperation within public administration), so-called subordination contracts (as a pattern to replace, or directly replacing administrative decisions), and so-called "third contracts" facilitating the disposition of public rights or public duties. The provisions of the Administrative Procedure Code governing administrative procedure apply subsidiarily to the provisions for public contracts, followed by the provisions of the Civil Code with stipulated exceptions. However, in practice, the occurrence of subordination and third contracts is very rare. As it has already been mentioned, disputes over public contracts are handled by administrative bodies in contentious proceedings. Consenting expression of will is the substance of conciliation in contentious proceedings; however, the conciliation itself is not designated as a public contract. Informal agreement of a participant in the proceedings is the requirement for the issuance of an order on site.

Regulation contained in the Code provides an administrative body, or competent officers, with discretionary powers, for example with respect to the following: the mode of conducting procedure; whether an oral hearing should be ordered; what documents and other evidence should be produced for the issuance of a decision and how to evaluate them; whether proceedings should be suspended; whether the deferral effect of appeal should be excluded or awarded with respect to certain filings or decisions; whether the challenged decision should be altered as a result of appeal, or cancelled and returned back to the first instance body; whether the interests in remedying the defective situation or the interest in preserving the rights acquired in good faith should prevail in the review of illegitimate decisions by virtue of office. The application of discretionary powers is limited by the above-mentioned principles for the conduct of administrative bodies.

The direct participation of citizens (in the sense of the participation by the public) is dealt with by the Code only marginally: an administrative body is obliged to enable all persons concerned, not just parties in the proceedings, to raise their legitimate interests; every person may file an unqualified application to commence administrative proceedings by virtue of office and the body requested must dispose of such application; oral hearings can be open to the

public – this possibility is generally optional; the delivery by a public notice is to attain primarily different objectives; there is a duty to publish a measure of a general nature in order to invite the public to comment on it.

The preparation of the conception of the existing codification was shared by representatives of the theory of administrative procedure (specialized consulting groups, working groups, reviewers of drafts). Jurisprudence representatives have been included in the Board of Advisors of the Minister of the Interior, and in charge of the Administrative Procedure Code, particularly of interpretation of its individual provisions.

The Code does not encompass all administrative processes and does not represent the entire regulation of those covered by the Code. In the Czech Republic, there are up to one hundred specialized regulations of administrative procedure. It should be distinguished which of them are special with regard to the Code, i.e. the Code is subsidiary to them. These regulations form the majority and include, for example, the regulation of procedure regarding administrative transgressions, land-use planning, building or water-planning procedures, and the issuance of measures of a general nature (such as land-use planning documentation containing its principles, plans, regulatory plans). The second, though marginal, group encompass regulations excluding the application of the Code, such as the procedure regarding the administration of taxes and charges, which, in addition to its primary function, also fulfils the function of the general regulation of administrative enforcement of monetary decisions.

Due to its relatively short existence and extensive volume (compared to earlier codifications) the new Code has brought in many impulses for legal theory. There have been attempts to doctrinally interpret certain provisions as well as critically analyse various institutions. There have been no doubts that the regulation is effective and proper; however, more time is needed to assess the Code and its application as a whole. Making the codification of administrative procedure more precise has led to its practical application being "more complex", but it has resulted essentially in no significant obstacles.