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Classification of Environmental Administrative Acts in the Czech Legislation

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Abstract: *This paper aims to provide an essential characterisation and classification of environmental administrative acts regulated by law in the Czech Republic, which are related to public construction law, affect the procedural procedures of public construction law, and thus fundamentally determine the final form of construction activities in the Czech Republic. The paper is based on the premise that the results of the procedural procedures of public construction law are always influenced, at least indirectly, by environmental law regulations and administrative acts regulated by these regulations. In the paper, the author will make a primary classification of environmental administrative acts, will deal with the different types of environmental administrative acts, emphasise their importance for the preservation of sustainable development in the development of the territory, and will demonstrate the importance of this environmental legal regulation in the Czech Republic on specific examples.*

1. INTRODUCTION

In author's previous research, from which this article is extensively based, it was concluded that *"the results of public construction law proceedings in the Czech Republic are always influenced, at least even indirectly, by environmental law regulations and the administrative acts regulated by those regulations"* (Židek, 2019, p. 174). In this article, we will therefore make a primary classification of environmental administrative acts affecting (not only) construction activities as they are regulated in the Czech legal system. We will also demonstrate the importance of this environmental legal regulation in the Czech Republic with concrete examples.

Therefore, this article's primary focus is to analyse the legal nature of individual 'environmental' administrative acts and to make a primary systematic classification of them. According to the legal theory (Průcha, 2012, p. 271) and also according to the established legal practice, we divide 'environmental' administrative acts into normative administrative acts, individual administrative acts, administrative acts of mixed nature, public law contracts, factual acts with direct legal consequences and non-legal and organisational forms of public administration. These acts will be dealt with in the individual chapters of this article.

In conclusion, we will also assess whether the legal regulation set up in this way is sustainable in the conditions of the Czech Republic, especially regarding the systematisation of legal regulation, or whether it would require some de *lege ferenda* change.

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2. NORMATIVE ADMINISTRATIVE ACTS

Normative administrative acts are legal forms of public administration activity with a normative focus (Hendrych et al., 2009, p. 192), through which the content of laws outside the public administration is implemented. These normative administrative acts generally contain binding rules of conduct which apply to an unspecified range of addressees and are intended for repeated use (Průcha, 2012, p. 272). In the case of the 'environmental' ones, these are normative administrative acts which regulate legal relations in environmental protection.

The most typical normative administrative acts are, of course, **laws**. In the case of environmental legislation in the Czech legal order, it must be stated that it is not codified in the Czech Republic. Thus, in the case of environmental legislation, there is an entire range of cross-cutting and component legislation, which regulates consultative, permitting, prohibiting (restricting) and exceptional acts of environmental law. Examples: the Mining Act, the Nature and Landscape Protection Act, the Agricultural Land Fund Protection Act, the Forest Act, the Water Act, the Environmental Impact Assessment Act, etc. Regarding building siting and permitting, the fundamental law is Act No. 183/2006 Coll., on spatial planning and building regulations (Building Act). The essential procedural regulation of administrative law, Act No. 500/2004 Coll., the Administrative Code, and, in terms of judicial review, Act No. 150/2002 Coll., the Administrative Court Rules, cannot be ignored.

With the exception of laws, other 'environmental' normative administrative acts are **government regulations** (for example, Government Regulation No. 401/2015 Coll. on indicators and values of permissible pollution of surface water and wastewater, the details of permits for the discharge of wastewater into surface water and sewers and on sensitive areas); **generally binding legal regulations of ministries and other central state administration bodies** (here it is a whole range of implementing legal regulations to cross-cutting and component regulations of environmental law); **generally binding decrees of regions and generally binding decrees of municipalities** (in practice, these are typically e.g. municipal ordinances regulating the system of municipal waste treatment); **regulations of regions and municipal ordinances** [in the legislation, also with regard to the issue of sustainable development of the territory, the regulation of natural parks is interesting in the sense of Section 12(3) of the Act on Nature and Landscape Protection, according to which: *"In order to protect a landscape with significant concentrated aesthetic and natural values, which is not specially protected under Part Three of this Act, the nature protection authority may establish a nature park by a generally binding legal regulation and impose restrictions on such use of the area as would destroy, damage or disturb the condition of the area."* This generally binding legal regulation is then a county ordinance (Průchová, Židek, 2017, pp. 85-115).] A particular case of normative acts are **internal acts,** or so-called **internal regulations,** directed towards hierarchically subordinate entities within the public administration. They are usually referred to in practice as internal instructions (according to the historic ruling of the full Constitutional Court of the Czech Republic of 5 April 1994, Case No. Pl. ÚS 49/93 The "*defining feature of internal instructions is that they only specify the tasks and duties of subordinate units and employees. By issuing internal instructions, the authority to direct the activities of subordinates is exercised - even if it is done to specify the tasks laid down by generally binding legal provisions - and the corresponding obligation to comply with the orders issued, an obligation which, like the authority, derives from the legal norm establishing such a relationship of superiority and subordination. Generally binding decrees, on the other hand, may contain legal norms binding only a certain number of persons, but this binding*

character has nothing to do with the subordination of the authority which issued the regulation."), **instructions, directives**, etc. In practice, this will include, for example, a range of instructions on the interpretation and application of specific provisions of the legislation.

3. INDIVIDUAL ADMINISTRATIVE ACTS

We will focus on analysing 'environmental' individual administrative acts. These represent a form of activity of public administration bodies that is essentially the result of 'decision-making' on specific rights, legally protected interests or obligations of a particular subject. These acts represent the application of general rules of conduct contained in legal norms to specific cases and serve for 'one-off' uses or solutions to life situations (Průcha, 2012, p. 278). The most typical individual administrative act is an **administrative decision** under Article 67 of the Administrative Code (according to which *"By a decision, an administrative authority establishes, modifies or cancels the rights or obligations of a named person in a particular matter, or declares that such person has or does not have rights or obligations in a particular matter, or decides on procedural issues in cases provided for by law."*). Alternatively, a **resolution** under Article 76 of the Administrative Code (which, in principle, decides in administrative proceedings on non-meritorious matters, i.e., matters of a procedural nature). Other examples of individual administrative acts are **opinions, binding opinions** (according to Section 149 of the Administrative Code) and other acts under Part Four of the Administrative Code (various **statements, certificates, communications,** etc.). For this article, the above-mentioned administrative acts can be divided into those which may impose obligations or confer rights in themselves (typically decisions) and those which are the underlying act for the 'final' act and do not themselves create directly enforceable rights and obligations (typically opinions and binding opinions). However, individual administrative decisions can, of course, be interrelated in terms of content and time (the most typical case is that, in principle, a building permit cannot be issued without a final planning decision).

In the case of **environmental decisions,** although they are regulated in individual legal regulations, from a procedural point of view, the general legal regulation of administrative proceedings under the Administrative Code applies to them, with certain possible specifics. In particular, we would like to stress that for an environmental decision to be lawful, it must fulfil both formal and substantive requirements (we refer in detail to Articles 68 and 69 of the Administrative Code). Of course, other provisions of the Administrative Code also apply to 'environmental' decisions concerning the procedural procedure for their issuance, the handling of ordinary and extraordinary appeals, etc. Typical examples of environmental decisions include permits for felling trees growing outside land designated for forest functions, exemptions from the prohibition of interference with the habitats of specially protected species of plants and animals and exemptions for activities in specially protected areas, permits for water management, permits for the operation of a stationary source of air pollution, permits for the operation of a waste facility, permits for activities related to the use of nuclear energy or integrated permits under the IPPC Act.

The legal theory then knows the dual legal nature of these acts in cases where various acts are issued as a basis for other administrative acts. First, it is a **chain of administrative acts**, where each act acts outwardly independently, and issuing one act is a prerequisite for issuing a subsequent act. Each act is then the subject of a separate administrative procedure with an immediate external effect (Kocourek, Poláčková, 2010, p. 89). The above-mentioned environmental decisions are a typical example of chained administrative acts. The second possibility is the **subsumption of administrative acts**, which occurs when issuing the 'final' administrative decision is conditional on

issuing the underlying administrative acts with an emphasis on their content. The critical point is that these subsumed administrative acts do not act independently vis-à-vis the parties to the proceedings, but only through the 'final' administrative act, with the legal force of which these administrative acts also become final; they, therefore, follow the fate of the 'final' administrative act. Therefore, these subsumed administrative acts cannot be regarded as administrative decisions since they do not legally bind the individually designated subjects. Still, only the public administration body conducts the proceedings on the 'final' act, which generally has the nature of an administrative decision (Kocourek, Poláčková, 2010, p. 88). Typical examples of such subsumed administrative acts are environmental opinions and environmental binding opinions.

A simple linguistic interpretation already gives the difference between an **opinion** and a **binding opinion**, i.e. that the administrative authority deciding on the 'final' act (in the case of public building law, typically the building authority) can never deviate from a binding opinion issued according to Section 149 of the Administrative Code; in the case of an opinion, the 'final' decision may be different in justified cases, but in some instances, its content may also be binding. As the case law has established (cf. the judgment of the Supreme Administrative Court of 7 January 2009, Case No. 2 Ao 2/2008-62), the criterion here is whether they are issued to issue a decision in an administrative procedure (these opinions are referred to as 'binding opinions' and are subject to the regime of Section 149 of the Administrative Code) or for procedures which are not administrative - these are then referred to only as 'opinions'. In general, it can also be inferred from the case law cited, and we will repeat that 'binding opinions' are always binding for the operative part of the decision on which they are issued, whereas 'opinions' are not always binding. However, it follows from the previous that even ordinary 'opinions' are sometimes binding. The legislator expressly provides that 'opinions' are 'binding documents' both for the spatial development policy and for measures of a general nature issued under the Building Act. At present, these are the opinions of the authorities concerned on the development plan, the spatial development principles, the zoning plan, the regulatory plan, the definition of the built-up area, the zoning measure on building closure and the zoning measure on the redevelopment of the area. It is therefore undoubted (Průcha, Gregorová, et al., 2017, p. 57) that, although the opinions of the authorities concerned in these cases are not designated as binding by the Building Act, they are *de facto* binding in the matter in question. We would stress, however, that they are binding only as regards their content since, although they are binding documents, they do not become 'binding opinions' under Section 149 of the Administrative Code (Roztočil et al., 2016, p. 41). This *de facto* binding nature of the opinions in question determines their considerable importance in protecting environmental interests. It is, therefore, confirmed that both 'environmental opinions' and 'environmental binding opinions' are by their very nature one of the most influential environmental protection instruments in the Czech legal order.

The theoretical basis of **binding opinions** is then followed by Section 149(1) of the Administrative Code, which legally defines a binding opinion as a type of subsumed administrative act that is not a decision in an administrative proceeding and which, from a procedural point of view is an act performed under Part Four of the Administrative Code, i.e. a particular type of statement of administrative authority on a specific issue (Vedral, 2012, p. 1138). This conclusion is also supported by settled case law (cf. judgment of the Supreme Administrative Court of 23 August 2011, Case No. 2 As 75/2009-113), which states that *"binding opinions are not decisions under Section 67 of the Administrative Code, as they do not in themselves establish, modify, abrogate or bind rights and obligations."* However, this does not mean there is no need to emphasise their proper reasoning because their content is binding on the operative part of the 'final' decision. In the case

of negative binding opinions, the Supreme Administrative Court even speaks of the appropriate application of the provisions on the content, form and formalities of an administrative decision, in particular Article 68(3) of the Administrative Code, which sets out the formalities of the reasons for the decision (cf. judgment of the Supreme Administrative Court of 22 October 2009, Case No. 9 As 21/2009-150). Thus, although binding opinions are different from administrative decisions under Article 67 of the Administrative Code, given the above and, above all, because of the mutual formal and material conditionality, it cannot be but stated that: *"although binding opinion conditions the issuance of a final (final) act, the two acts are in essence complementary"* (Poláčková, 2013, p. 17). Similar conclusions regarding the reciprocal legal nature of the administrative acts in question can be drawn, taking into account the specificities in the case of environmental opinions.

Regarding the legal nature of other acts under Part Four of the Administrative Code, we note that the general regulation of these acts is defined in Sections 154 to 158 of the Administrative Code, whereby these acts are referred to as **statements, certificates and communications**. However, this group of acts is not uniform, either in terms of terminology or in terms of legal effects. Their unifying and essential element is that they do not fulfil the substantive criteria of administrative decisions or binding opinions. As it follows from the diction and systematics of the Administrative Code (e.g. according to Section 158(1) of the Administrative Code: "*The provisions of this Part shall apply mutatis mutandis when an administrative authority carries out other acts which are not regulated in Part One, Three, Five or Six or in this Part.")* it is a specific "residual" category of acts which cannot be classified in their legal form under other regulations under the Administrative Code. On the other hand, the provisions for other administrative acts under the Administrative Code apply to their issuance by analogy or proportionately.

4. ADMINISTRATIVE ACTS OF A MIXED NATURE

Administrative acts of a mixed nature (also called 'measures of a general nature'), standing on the borderline between legal acts and administrative decisions, are administrative acts which exhibit some features of normative administrative acts and some of the individual administrative acts (Průcha, 2012, p. 302; Sládeček, 2013, pp. 168-169; Dienstbier, 2007, p. 17; Hrabák, Nahodil, 2009, p. 448). In Section 171 of the Administrative Code, the legislator introduced the designation of **measures of a general nature** in the Czech legal system with a negative definition that they are neither a legal act nor an administrative decision. This institute aims to fill a particular gap between these primary forms of administrative acts when it is necessary to adopt an administrative act that combines both. It follows from case law that a measure of a general nature *"represents a bridging of the two basic forms of unilateral administrative acts traditionally used in public administration: normative (abstract) legal acts on the one hand and individual (concrete) legal acts on the other. In certain situations, however, the activity of public administration requires the adoption of administrative acts that are not exclusively normative or individual but are a certain combination of them; they are thus administrative acts of a mixed nature with a specifically defined subject of regulation and a generally defined range of addressees."* (cf. the ruling of the Constitutional Court of 19 November 2008, Case No. Pl. ÚS 14/07).

The aim of a measure of a general nature is not to replace the issuance of the aforementioned acts, nor to create an alternative to these forms of state administration, but to create an institute that combines both of these acts (Vedral, 2012, p. 1330). In simple terms, this act can therefore be characterised as having a defined subject matter, a general range of addressees to whom it is addressed and a binding nature. In more detail, it can be stated that *"A measure of a general*

nature is an administrative act with a specifically defined subject matter (i.e., it relates to a specific situation) and a generally defined range of addressees. [...] A measure of a general nature cannot replace sub-legislative normative work or impose new obligations beyond the scope of the law; it serves only to specify existing obligations arising from the law and not to impose new obligations not contained in the law." (Kocourek, 2010, p. 132). Therefore, it is possible to speak of a measure of a general nature as an act of a general-specific nature (i.e. as a combination of generality from a normative legal act and specificity from an individual administrative act) (Kocourek, 2012, p. 185). Another specificity of this institute is that the Administrative Code does not stipulate in which cases and possibly under what conditions a measure of a general nature is issued and leaves this issue entirely to specific laws (including those from environmental law).

Moreover, the Administrative Code even allows these laws to determine a different procedure from a procedural point of view than it provides for (Vopálka, 2005, p. 230). There has been a relatively complex legal debate in legal scholarship and jurisprudence as to whether only those acts which are formally designated as such should be considered as measures of a general nature or whether these acts should be assessed according to their content (material concept) (Průcha, 2012, p. 305 vs Jemelka, Pondělíčková, Bohadlo, 2013, p. 719). For example, in its ruling of 5 March 2009, Case No. I. ÚS 960/08, the Constitutional Court simplistically stated that in proceedings concerning a measure of a general nature, it is necessary to examine whether or not the act in question meets the material characteristics of a measure of a general nature. After all, the material concept of this institution has recently prevailed in case law practice (cf. e.g. the judgment of the Supreme Administrative Court of 22 July 2016, Case No. 2 As 78/2016-72, in which the Supreme Administrative Court wholly inclined towards the material concept, in a case concerning the environment, when it stated that the prohibition of entry into a hunting ground is a measure of a general nature even though Section 66 of Act No. 449/2001 Coll, on hunting, that clearly states that an administrative decision is to be issued in this case). The case law, therefore, even admits that, based on a substantive approach, it is possible to judicially review as a measure of a general nature, quite exceptionally, even an act in respect of which the legislator has clearly expressed its will to issue it in a specific legal form (different from a measure of a general nature) and to maintain that will (there is no change in the legal regulation in that respect). However, these are cases in which this form can only be overturned for judicial review by the Constitutional Court, *"which - without exceeding its jurisdiction - may intervene in cases where the legally prescribed form of the act does not correspond to its content"* (judgment of the Supreme Administrative Court of 21 January 2011, Case No. 8 Ao 7/2010-65). From the point of view of the topic of this article, it can be concluded that a measure of a general nature terminates several processes of public construction law with an environmental element (for all of them, in particular, the territorial development plan, the principles of territorial development or the territorial and regulatory plan). A measure of a general nature may also regulate relations under individual environmental law regulations - these may then be called 'environmental' measures of a general nature. These include, for example, exemption processes under the Nature and Landscape Protection Act or the establishment of a water resource protection zone.

5. PUBLIC LAW CONTRACTS

An atypical form of implementation of public administration, also in environmental protection, is represented by the so-called public law contracts, which are regulated in Part Five of the Administrative Code (Section 159-170). They regulate legal acts that establish, amend, or cancel rights and obligations in public law, not excluding the environment. In the conditions of

the Czech Republic, two types of public law contracts are concluded, namely the **coordination contracts** (which are concluded between public administration entities) and the **subordination contracts** (concluded between a public administration entity and, as a rule, a natural or legal person to perform public administration tasks). The institute of public law contracts is also used in environmental law, both coordinating ones (e.g. Section 190(2) of the Building Act, which provides for the possibility of concluding a coordinating public law contract on the performance of the competencies of the construction authority) and subordination ones (e.g. For the procedural regime of public law contracts, Part One and Part Two of the Administrative Code apply mutatis mutandis, as make the provisions of the Civil Code), while for a more detailed definition of the conclusion of public law contracts, reference can be made to the current Czech legislation, which we consider to be clear and transparent.

6. FACTUAL ACTS WITH DIRECT LEGAL CONSEQUENCES AND NON-LEGAL AND ORGANISATIONAL FORMS OF PUBLIC ADMINISTRATION

To conclude this article, we will briefly comment on the remaining two types of environmental administrative law acts, which are not so fundamental to the topic of this article as to warrant more extensive attention. First, these are **factual acts with direct legal consequences**. These are operationally imposed binding orders, direct interventions by public authorities, or other enforcement actions. Such actions are then only applicable where the law allows it and only under the conditions laid down by law. They must comply with the principle of proportionality of the intervention (Průcha, 2012, p. 319). Concerning protecting environmental interests, reference should be made to the guards' powers (e.g. fishing guards, nature guards, forest guards and hunting guards).

The last acts are then **non-legal and organisational forms of public administration**, which no longer directly express legal forms of public administration implementation and may be directed to external addressees of public administration action (e.g. legally non-binding factual instructions or information). The non-legal forms of implementation also include material and technical operations (e.g. acts in the operation of the office's mailroom) (Průcha, 2012, p. 320).

7. CONCLUSION

As it is evident from the above, based on the systematisation of environmental administrative acts in the Czech legal system, it can be concluded that their legal regulation cannot be described as straightforward, which sometimes leads to interpretation problems in practice. This fact is mainly caused by the significant fragmentation of the forms of public administration activities in environmental law and the different types of acts required for individual environmental procedures. The question for the future is the possible further integration of the individual processes of public construction law and environmental administrative acts into one so-called *one-stop-shop* assessment. The idea of greater integration of processes within environmental law brings to mind the once unrealised Environmental Law Code, which was intended, at least in part, to codify the fragmented legal framework. We believe that the idea and implementation of a code of environmental law in the Czech Republic could solve many of the problems caused by the fragmentation of legislation.

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