Gloss to the Decision of the Supreme Administrative Court of 2 August 2019 I OSK 1650/19, Lex no. 2703804

1. Preliminary remarks

The adoption of the Act of 9 March 2017 on the specific principles of eliminating the legal effects of reprivatisation decisions concerning Warsaw’s real property issued in violation of the law, which introduced into the Polish administrative system the Commission for Reprivatisation of Warsaw’s Property as a central government administration body, has presented new challenges to legal practitioners. The solutions adopted by the legislator in light of the existing regulations concerning the reprivatisation of Warsaw’s property have resulted in a situation where legal-administrative decisions play a particularly important role and where orders issued as a result of legal-administrative reviews of the Commission’s decisions are already shaping and, more importantly, will shape the case law, doctrine and, as a consequence, the practices in the area of restitution of property nationalised under the Decree of 26 October 1945 on the Ownership and Use of Land in the Capital City of Warsaw.

According to its authors, the Bierut Decree was a temporary solution, serving to facilitate an effective and expeditious reconstruction of Warsaw which had been destroyed as a result of war operations. In fact, it turned out that the temporary normative solutions became, as a result of long-term use, generally applicable standards of law. Many of the administrative proceedings initiated through petitions filed under the Decree have not been completed until present times and the reprivatisation decisions issued in violation of the law have had negative legal consequences, some of which can no longer be reversed. The complex picture of the reprivatisation of Warsaw’s real property, reflecting not only the actual and legal status of plots of land and buildings, but also the developing abnormalities as a result of

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2. Hereinafter the “Commission”.

3. Decree of 26 October 1945 on the Ownership and Use of Land in the Capital City of Warsaw (Journal of Laws 1945, No. 50, item 279), hereinafter: the “Bierut Decree”.


which public property was taken over in violation of the law and social and individual interests (those of former property owners and their legal successors), was the reason why works were initiated towards the adoption of the Commission Act and establishment of a legal framework to reverse the negative effects of reprivatisation of Warsaw's property. The introduction of an extraordinary procedure for the verification of reprivatisation decisions and the convergence of conditions for extraordinary procedures known under the Code of Administrative Procedure, i.e. the resumption of proceedings and declaration of invalidity, while introducing new grounds, gives rise to significant practical difficulties and creates discrepancies in the interpretation of the new rules.

It is worth noting that the Supreme Administrative Court issued a final and binding decision of 2 August 2019 in case I OSK 1650/19, in which the Supreme Administrative Court dismissed a cassation appeal regarding the decision of the Provincial Administrative Court in Warsaw of 14 February 2019, ref no. I SAB/Wa 396/18, on rejecting a complaint against the Commission's inaction with respect to review activities. The decision in question is of fundamental importance for the nature and character of the review procedures carried out by the Commission in order to determine whether there are grounds for initiating examination proceedings in connection with the issuance of a reprivatisation decision. The reasoning resulting from the decision, as formulated by the Supreme Administrative Court, determines the future direction of judicature in matters concerning Warsaw's property at the stage preceding the initiation of examination proceedings, and has a significant practical meaning in the context of the institution of securing the review activities by entering a warning entry into the land and mortgage register.

2. Facts of the case

In a letter of 19 November 2018 O. spółka z o.o. in W. (hereinafter: the Company) submitted to the Provincial Administrative Court in Warsaw (hereinafter: WSA in Warsaw) a complaint regarding the Commission’s inaction at the stage of review activities. The complaint was based on a request for an examination of the excessive duration of the review activities. By way of a decision of 14 February 2019, the WSA in Warsaw rejected the Company’s complaint against the Commission’s inaction, noting that it was inadmissible because the review activities do not constitute an administrative procedure within the meaning of Article 1 of the Act of 14 June 1960 Code of Administrative Procedure, and are therefore not subject to a legal-administrative review, whose scope was defined under Article 3 § 2 of the Act of 30 August 2002 on Proceedings before Administrative Courts. The WSA in Warsaw based its decision on a


7 A. Dalkowska, Zabezpieczenie w postępowaniu administracyjnym, “Przegląd Prawa Publicznego”.


broad analysis of the nature of the review activities undertaken by the Commission. The court of first instance concluded that “review activities are designed to assess whether there exist grounds for initiating examination proceedings which have administrative character. (...) Neither the review proceedings defined in Article 15 of the Act nor their result specify the generally applicable standards with respect to a particular addressee of the legal standard (rights and obligations) in a specific individual case. (...) The proceedings therefore do not create a legal and administrative relationship and do not determine in an authoritative unilateral manner the legal situation of an entity outside the administrative structure. Review proceedings cannot be treated as proceedings in an individual case resolved through an administrative decision, to which the provisions of Article 1(1) and (2) c.a.p. would apply”

Following an analysis, WSA in Warsaw concluded that review activities remain outside the scope of jurisdiction of administrative courts as they are not included in the catalogue specified in Article 3 § 2 and § 3 p.b.a.c., including Article 3 § 2 (8) and (9) p.b.a.c.(concerning inaction and excessive duration of proceedings).

Position of the Supreme Administrative Court on the matter of the Commission's inaction during review activities

The position presented by WSA in Warsaw in the statement of reasons to the decision of 14 February 2019 was upheld by the Supreme Administrative Court by means of the decision in question, as the latter dismissed the Company’s cassation appeal indicating that the essence of the matter at hand with respect to the facts of the case on which the decision in question was based, boiled down to answering the question whether the review activities were subject to the court’s jurisdiction as part of its control of public administration. Concluding its deliberations, the Supreme Administrative Court unambiguously indicated that the review activities do not result in the issue of administrative decisions or any of the decisions referred to in Article 3 § 2(2) and (3) p.b.a.c., and “that the issue of a decision to initiate examination proceedings, i.e. administrative proceedings in their own right, constitutes the only procedural form of completing the review activities. Moreover, review activities are not public administration activities regarding rights or obligations resulting from the provisions of law. These activities do not specify the entity’s rights or obligations in the sphere of substantive law by means of an authoritative, unilateral, external act issued by an administrative authority”.

3. Analysis of the decision of the Supreme Administrative Court of 2 August 2019, I OSK 1650/19, lex no. 2703804

3.1. The essence of the dispute subjected to the decision in question was limited to the legal nature of the review activities carried out by the Commission on the basis of Article 15 of the Commission Act.

The issue in question has been absent from the existing case law, which is a natural consequence of
the fact that the new solutions adopted in the Commission Act have been in force only since 14 March 2017. In the above context, the decision of NSA is an important voice in the discussion on the nature of the preliminary stage of the Commission's procedures consisting of a series of material and technical activities, including the gathering and collection of materials and evidence in order to determine whether there is a likelihood that certain reprivatisation decisions were issued in violation of the law. By acknowledging the inadmissibility of the complaint regarding the inaction of the body in question at the review activities stage, the Supreme Administrative Court in fact presented its opinion on the nature and essence of the review activities, which is of fundamental importance for the assessment of other issues related to the Commission securing review activities and entering a warning in the land and mortgage register, and as a consequence it affects the assessment of potential effects in the sphere of civil law, related to the real property trading after the establishment of the said security.

3.2. When analysing the problem, we should start by noting that the position expressed by NSA in the decision in question, indicating that it's not possible to subject review activities to legal and administrative control, is correct.

It is based on the interpretation of Article 15 of the Commission Act in the context of other regulations. In a broad sense, review activities constitute one of the forms of material and technical activities undertaken by the public administration, which have legal effects. Undoubtedly, they represent an active form of action. It should be noted, however, that in literature there are positions according to which inactivity, i.e. omission, may also be classified as a form of public administration activity. In the decision in question, the Supreme Administrative Court recognised, and rightly so, that review activities cannot be classified as procedural acts in administrative examination proceedings. The correctness of the above-mentioned position is confirmed first and foremost by the regulation in Article 38(2) of the Commission Act, which explicitly excludes the possibility of applying the Code of Administrative Procedure to the above-mentioned review activities. Based on the express statutory exclusion, the provisions of c.a.p. do not apply to them. The correctness of the Supreme Administrative Court's position is also confirmed by the fact that the Commission cannot decide on individual rights or obligations of a specific entity in the course of review activities and, as a consequence, it cannot ascribe a legal interest to such and entity; there is no administrative matter that would delineate the factual and legal limits of administrative decisions. The Supreme Administrative Court agreed with the views expressed by WSA in Warsaw in its decision of 14 February 2019 in case ref. I SAB/Wa 396/18, according to which "administrative proceedings focus on an administrative matter which in the literature

Pursuant to Article 38 of the Commission Act: 1. In matters not regulated by this Act, the provisions of the Act of 14 June 1960 – Code of Administrative Procedure, with the exception of Article 6 § 2, Article 13, Article 25, Article 31, Articles 96–96n, Articles 114–122, Articles 127–144 of that Act shall apply accordingly. 2. The provisions of the Act referred to in paragraph 1 shall not apply to the review activities mentioned in Article 15(1).
is defined as the possibility, provided for under the substantive law, of specifying the mutual rights and obligations of the parties to the administrative law relationship, such parties being an administrative authority and an individual entity. The lack of a substantive relationship between the applicable standard of the administrative law and the legal situation of a particular entity, which would determine the result of review activities, is the driving force behind the accuracy of the NSA’s position, according to which it lacks jurisdiction to control the accuracy of the review activities.

3.3. It is worth noting that the formula of review activities introduced in the Commission Act is not a complete novelty in the existing legal order.

The view adopted in the decision in question corresponds to the current doctrine which holds that “review activities constitute a preliminary, internal administrative phase of the proceedings held before the Commission, which has the character of verification activities aimed at determining the probability that a repatriation decision was issued in violation of the law.” In the case-law, review activities are also mentioned as an example of “internal administrative verification procedure conducted by an entity situated organisationally within the administrative system, which is not directed towards another entity.” Thus, one has to agree with the position expressed by the Supreme Administrative Court and previously in the decision of the WSA in Warsaw of 14 February 2019 that “neither the review proceedings nor their result specify the generally applicable standards with respect to a particular addressee of the legal standard (rights and obligations) in a specific individual case. The proceedings therefore do not create a legal and administrative relationship and do not determine in an authoritative unilateral manner the legal situation of an entity outside the administrative structure.” Since, as rightly noted by the Supreme Administrative Court, the complaint concerns the Commission’s inaction at the stage of review activities, then, assuming that these do not have the character of administrative

Judgements of the Supreme Administrative Court NSA: of 20.03.2008, I OSK 2016/06, Lex no. 505371; of 9.05.2013, II GSK 330/12, Lex no. 1329710; decisions of the Supreme Administrative Court of 21.11.2018, I OSK 3766/18, Lex no. 2580592; I OSK 3660/18, Lex no. 2580590; I OSK 3659/18, Lex no. 2580589; I OSK 3896/18, Lex no. 2580593.

Review activities can be found, for example, in fiscal proceedings. See Articles 272 to 280 of the Tax Ordinance Act of 29 August 1997 (Journal of Laws of 2019, item 900).

Decision of the District Court in Warsaw of 12 December 2018, V Ca 2852/18, unpublished.
proceedings and are not included in the catalogue specified in Article 3 § 2 and § 3 p.b.a.c., it was only right of the Court to acknowledge the inadmissibility of the cassation appeal and to dismiss it.

4. Conclusions

The above considerations allow us to conclude that the decision of the Supreme Administrative Court of 2 August 2019, even though de facto addressing the issue of admissibility of a complaint concerning inaction of a body at the stage of review activities, is in fact an important commentary, unprecedented in the existing case law of the Supreme Administrative Court, on the legal nature of the review activities undertaken and carried out by the Commission pursuant to Article 15 of the Commission Act. Thus, it indirectly concerns issues related to civil law transactions, especially in the context of the effects of review activity warnings entered into the land and mortgage registers, which is very important for the interests of owners and third parties. Taking into consideration the accuracy of the Supreme Administrative Court's position concerning the absence of entities whose legal interest may be subject to review activities, it should be concluded that the established security in no way restricts the ownership title, as – in accordance with Article 24a(3) of the Commission Act – it does not exclude the principle of public credibility of land and mortgage registers.