IV SA/Wa 2787/16 - Decision of the Provincial Administrative Court in Warsaw

LEX No. 2321843

Decision

of the Provincial Administrative Court in Warsaw

of March 14, 2017

IV SA/Wa 2787/16

STATEMENT OF GROUNDS

Adjudicating Panel

Presiding Judge: Judge of the Provincial Administrative Court Teresa Zyglewska (reporting judge).
Judges of the Provincial Administrative Court: Kaja Angerman, Wanda Zielińska-Baran.

Conclusion of the decision

The Provincial Administrative Court in Warsaw, having examined on February 28, 2017, at a hearing, a case on a complaint of the Ombudsman against the approval by the Minister of Environment on March (...), 2016 (case no.: (...)) of an annex to the forest management plan prepared for the Forest District (...) for the years (...) decides to reject the complaint.

Reasons in fact

The Ombudsman, in a letter dated September 22, 2016, filed a complaint to the Provincial Administrative Court in Warsaw against the approval by the Minister of the Environment on March (...), 2016 (case no.: (...)) of an annex to the forest management plan prepared for the Forest District (...) for the years 2012–2021.
The Minister of the Environment granted the approval in the form of an administrative decision, citing as the legal basis for its issuance, inter alia, Article 104 of the Code of Administrative Procedure, as well as including an instruction on the admissibility of filing by the party dissatisfied with the "decision" an application for reconsideration of the case within 14 days of its receipt.
In the complaint, the Ombudsman alleged:
– infringement of Article 6 section 3 of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7);
– infringement of Article 96 section 1 of the Act of 3 October 2008 on access to information on the environment and its protection, public participation in environmental protection and on environmental impact assessments (Journal of Laws of 2016, item 363 – hereinafter: "AoEP") by failing to consider – before issuing the decision – whether the annex to the forest management plan could potentially have a significant impact on the Natura 2000 site;
– infringement of Article 7 and 77 § 1 of the Code of Administrative Procedure by failure to apply them and incomplete gathering of evidence, as well as Article 107 § 3 of that Act by misapplication and defective construction of the statement of grounds for the issued decision;
– infringement of Article 23 section 2 of the Forests Act of September 28, 1991 (Journal of Laws of 2011, No. 12, item 59, as amended – hereinafter “FA”) by failure to apply it and

approval of an annex to the forest management plan, including an increase in the volume of logging in the forest district in felling areas above the volume specified in the forest management plan without any connection to damage or natural disaster.

In the statement of grounds for the complaint, the Ombudsman firstly referred to the legal nature of the act of the Minister of the Environment on the approval of the forest management plan. The complainant stated that in the judgment of March 12, 2014, file ref. no. II OSK 2477/12, the Supreme Administrative Court accepted the existing opinions of the judicial pronouncements that the approval of the simplified forest management plan by the head of county is another act or activity referred to in Article 3 § 3 point 4 of the LPBAC. But the Supreme Administrative Court considered the approval of the forest management plan by the minister competent for the environment as an act of internal character, addressed to an entity subordinated organizationally to the Minister of Justice. The Ombudsman did not share the above argumentation, claiming that cases concerning the approval of the forest management plan, which are within the competence of the minister, are not excluded from the jurisdiction of administrative courts. The complainant pointed out that the concept of supervision (which the minister competent for the environment exercises over the State Forests) is not identical to the concept of organizational subordination. Supervision refers to a situation in which "an authority is equipped with the means to influence the activities of supervised entities and units, but may not do their job for them". Supervisory powers include the right to control and the ability to exercise binding influence over supervised entities and units. The authority may only use such means as the legislator has provided to it, and only for the purposes specified by those provisions.

In turn, subordination is understood "as a systemic and legal bond, in which organizationally superior entities may interfere in a subjectively and constitutionally defined scope, with the activities of subordinated entities in any phases and scope, using any means chosen for a given situation.

According to the Ombudsman, the relationship between the minister competent for the environment and the State Forests National Forest Holding (Państwowe Gospodarstwo Leśne Lasy Państwowe) with respect to forest management cannot be described as “organizational superiority”. The State Forests are undoubtedly an entity supervised by the minister competent for the environment, but they are not a subordinate entity.

According to the Ombudsman, a case concerning the approval of a forest management plan is not a case "arising from organizational superiority and subordination in relations between state authorities and other state organizational units." Therefore, the act of approval of the forest management plan is not an internal act, because it is addressed to an entity that is not organizationally subordinated to the minister, who, according to the provisions of the FA, manages forests owned by the State Treasury and carries out forest management himself in the forests managed by him, which proves the external character of this act.

In the complainant's opinion, the position of the Supreme Administrative Court presented in the judgment of March 12, 2014 that the State Treasury acts as an owner, and therefore that it directs the obligations and powers under the forest management plan "to itself", is non-relevant. This is contradicted by the definition of an owner contained in the FA itself (Article 6 section 1 point 3), according to which the owner is understood as "a natural or legal person

that is the owner or perpetual usufructuary of the forest, and a natural person, legal person or organizational unit without legal personality that is an owner-possessor, user, manager or lessee of the forest.
It follows from the above, according to the Ombudsman, that the addressee of the rights and obligations, whose source is the act of approval of the forest management plan, is not the State Treasury, but separate entities – including the State Forests (as the forest manager) having juridical capacity under the administrative law, and separate entities, including private ones, which can be perpetual usufructuaries, owners-possessors, users or lessees of the forest. The determination of the rights and obligations of private entities by means of approval of the management plan – irrespective of the lack of organizational subordination of the State Forests to the minister competent for environmental matters – makes, according to the complainant, the act of approval external and, as a result, the form in which that act should be carried out remains to be clarified.
In the opinion of the Ombudsman, the approval of a forest management plan takes the form of an administrative decision. This is determined not only by the provisions of the FA, but also the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, drawn up in Aarhus on June 25, 1998, and Directive 2011/92/EU of the European Parliament and of the Council.
The complaint sets forth extensive argument addressing the merits of the substantive allegations set forth therein.
In response to the complaint, the Minister of the Environment requested that the complaint be dismissed.

Legal grounds

The Provincial Administrative Court in Warsaw considered the following.
In the examined case, it is first necessary to consider whether this case falls within the jurisdiction of administrative courts.
It should be noted that the norms forming the basis of the judicial system, contained in the Constitution of the Republic of Poland of April 2, 1997, assume that the legislator determines the jurisdiction of administrative courts in a positive manner. Since pursuant to Article 175 section 1 of the basic law, the administration of justice in the Republic of Poland is vested in the Supreme Court, common courts and administrative courts. The structure and jurisdiction of the courts and the proceedings before them shall be determined by acts (Article 176 section 2). Common courts shall administer justice in all matters except those reserved by law for the jurisdiction of other courts (Article 177). In turn, the Supreme Administrative Court and other administrative courts exercise, to the extent specified by law, control over the activities of the public administration, and this control also includes ruling on the compliance of resolutions of local government bodies and normative acts of local government administration bodies with acts (Article 184).
The last of the constitutional rules referred to was described by the legislator in Article 1 of the Act of July 25, 2002 – Law on the System of Administrative Courts (Journal of Laws of 2016, item 1066, as amended), according to which administrative courts exercise the administration of justice by controlling the activities of public administration and settling

competence and jurisdiction disputes between bodies of local government authorities, local government appeal courts, and between these bodies and bodies of government administration. Such control shall be exercised with respect to lawfulness, unless otherwise provided by special laws.

The principle of positive determination of the jurisdiction of administrative courts is mainly concretized by the provisions of the Act of August 30, 2002 – Law on Proceedings before Administrative Courts (Journal of Laws of 2016, item 718, as amended), hereinafter referred to as the LPBAC.

In accordance with Article 3 § 1 and 2 of the LPBAC, administrative courts exercise control over the activity of public administration, which includes ruling with regard to complaints against:

1) administrative decisions,

2) decisions made in administrative proceedings which may be appealed against or which end the proceedings, as well as decisions which settle the case as to the merits,

3) decisions made in enforcement proceedings and proceedings to secure claims, which may be appealed against,

4) acts or activities, other than those specified in points 1-3, in the field of public administration concerning rights or obligations arising from legal regulations, excluding acts or activities undertaken as part of administrative proceedings specified in the act of June 14, 1960 – Code of Administrative Procedure (Journal of Laws of 2016, item 23, 868, 996 and 1579), proceedings specified in sections IV, V and VI of the act of August 29, 1997 – Tax Ordinance (Journal of Laws of 2015, item 613, as amended), proceedings referred to in section V, chapter 1 of the act of November 16, 2016 on the National Tax Administration (Journal of Laws, item 1947), and proceedings to which the provisions of the aforementioned acts apply,

4a) written interpretations of tax law regulations issued in individual cases, securing opinions and refusals to issue securing opinions,

5) local law acts of local government authorities and regional government administrative authorities,

6) acts of local government authorities and their unions, other than those specified in point 5, undertaken in cases related to public administration,

7) acts of supervision over the activities of local government authorities.

Pursuant to Article 3 § 3 of the LPBAC, administrative courts also rule on cases in which the provisions of special laws provide for judicial control, and apply the measures specified in those provisions.

Positive determination of jurisdiction means that a complaint to an administrative court is admissible only against legal forms of action of public administration bodies referred to in Article 3 § 2 section 1-8 of the LPBAC and in situations provided for by special laws, subject

to the following Article 5 of the LPBAC. A contrario, a complaint against other forms of action is inadmissible and subject to rejection pursuant to Article 58 § 1 point 1 or 6 of the LPBAC, obviously with particular regard to the right to court guaranteed by article 45 section 1 of the Constitution and the already mentioned principle of presumption of competence of common courts (Article 177 of the Constitution).

It is therefore necessary to consider whether the approval of the forest management plan by the Minister of the Environment is one of the legal forms of action mentioned above, and in particular whether it is an administrative decision.

The Code of Administrative Procedure does not contain a legal definition of the term "administrative decision" but it is a concept extensively developed in the doctrine.

An administrative decision is a unilateral act of a public administration body, which has a proper form and determines the consequences of the applied legal norm in an individual case in relation to a specifically identified addressee, who is not subordinated in this case, either organizationally or professionally, to this body. The feature of an administrative decision consisting in the fact that the entity, whose legal situation it defines, is not subordinated to the administrative body, causes that outside the scope of the notion of an administrative decision remain all acts issued by higher rank authorities in relation to lower rank authorities and by superiors in relation to subordinates, which are collectively referred to in the literature and in the jurisprudence of administrative courts as "internal acts". The referent for external relations in administration is an administrative decision, while for internal relations it is a service order. The distinction between external individual acts (administrative decision) and internal individual acts (service order) is legally important, because according to Article 3 § 3 point 1 i 2 of the Code of Administrative Procedure, the provisions of the Code do not apply to proceedings in cases arising from organizational superiority and official subordination.

Summarizing the above, an administrative decision is an act of external character, authoritative and doubly concrete: addressed to a specific addressee and relating to a specific situation, which this act resolves, determining the rights or obligations of its addressee.

Referring this to the present case, it should be noted that in accordance with Article 19 section 1 of the Forests Act, forest management plans are drawn up for forests owned by the State Treasury, subject to section 2. And pursuant to Article 19 section 2 of the Forests Act, simplified forest management plans, subject to section 3 and 4, are prepared for forests that are not owned by the State Treasury and for forests that are part of the Agricultural Property Stock of the State Treasury.

According to Article 22 section 1 of the Forests Act, the minister competent for the environment approves a forest management plan for forests owned by the State Treasury and simplified forest management plans for forests comprising the Agricultural Property Stock of the State Treasury. And in accordance with Article 22 section 2 of the FA, the head of county, after receiving an opinion of the territorially competent forest district manager, approves the simplified forest management plan.

With this in mind, it should be noted that pursuant to Article 4 of the Forests Act, the forests owned by the State Treasury are managed by the State Forests National Forest Holding. The State Forests as a state organizational unit without legal personality represent the State Treasury within the scope of its managed property (Article 32 section 1of the FA). The State

Forests are managed by the Director General with the help of directors of regional directorates of State Forests (Article 33 section 1 point 1 of the FA). Supervision over forest management in the forests owned by the State Treasury is exercised by the minister competent for the environment (Article 5 section 1 point 1 of the FA). The minister competent for the environment also supervises the State Forests (Article 4 section 4 of the FA).

The aforementioned provisions of the FA indicate the legal relations between the minister competent for the environment vs the State Forests and the Director General regarding the management of forests owned by the State Treasury.

The activities undertaken by the minister for the environment refer to the property of the State Treasury, which is represented by the State Forests. The actions taken are not external in nature, as there is no addressee to whom they would be addressed. Thus, they do not rule on the rights or obligations of a non-existent addressee. The actions taken by the minister competent for environmental protection are of an internal nature and are related to the management of State Treasury property. Under these circumstances, a public administration body, such as the minister competent for environmental protection, is not taking actions of an external, authoritative nature and does not decide about the legal rights or obligations of a specific entity in an individual case. Therefore, approval of a forest management plan by the minister competent for environmental protection is not performed in the form of an administrative decision.

The Provincial Administrative Court in Warsaw fully shares in this respect the view of the Supreme Administrative Court contained in the judgment of March 12, 2014, file ref. no. II OSK 2477/12 and in the decision of November 27, 2015, file ref. no. II OW 85/15.

The Ombudsman's view that the relationship between the minister competent for the environment and the State Forests National Forest Holding with respect to forest management is not one of organizational superiority cannot be shared. First of all, it should be noted that the minister competent for the environment grants, by way of an order, statutes to the State Forests, specifying in particular the rules and mode of operation and the internal bodies, with a view to create optimal organizational conditions for the implementation of tasks by the State Forests (Article 44 of the FA).

Importantly, the State Forests National Forest Holding has not been granted legal personality, which follows directly from Article 32 section 1 of FA. This entity has also not been granted juridical capacity, so it cannot be the subject of civil law rights and obligations. This is because the legislator did not explicitly attributed to this entity the features that make up the concept of juridical capacity. It follows directly from Article 32 section 1 of the FA that the primary purpose of establishing the State Forests is to manage the property of the State Treasury, and in particular to represent the State Treasury in the management of its property. It follows from Article 38 section 1, Article 38a section 1 and Article 39 of the FA that this entity performs actions for and on behalf of the State Treasury. The State Forests are therefore stationes fisci of the State Treasury (cf. Bartosz Rakoczy, Wybrane problemy prawa leśnego, LEX). This circumstance is, therefore, the decisive reason why the approval of the forest management plan by the minister competent for the environment is not an act

addressed outside, to third parties, but an action addressed towards "itself", i.e. an internal act. Consequently, it lacks the elements attributed to an administrative decision.

Contrary to the complainant's opinion, the approval of the forest management plan by the competent minister for the environment cannot be regarded as an administrative decision also in consideration of the wording of Article 22 section 4 of the FA. According to this provision, the minister competent for the environment supervises the execution of forest management plans for the forests owned by the State Treasury and the execution of simplified forest management plans for the forests that are part of the Agricultural Property Stock of the State Treasury. This provision gives the minister competent for the environment the power to intervene in the implementation of forest management plans for properties owned by the State Treasury. This shows that the nature of a forest management plan for State Treasury-owned properties is different from an administrative decision. This is because, in the case of an administrative decision, the Act on Enforcement Proceedings in Administration of June 17, 1966 provides for appropriate coercive measures to be taken in order to enforce the decision. In the case of a forest management plan approved by the minister, this possibility is excluded.

In the opinion of the Provincial Administrative Court, the minister's approval of the forest management plan cannot be described as having a character of an administrative decision on the basis of the definition of a forest owner included in Article 6 section 1 point 3 of the FA, as it is claimed by the complainant. According to the mentioned provision, the forest owner should be understood as a natural or legal person that is the owner or perpetual usufructuary of the forest, and a natural person, legal person or organizational unit without legal personality that is an owner-possessor, user, manager or lessee of the forest. However, contrary to what the complainant tries to claim, this does not mean that the State Forests as the manager of a forest is its owner. It should be remembered, as it was mentioned before, that on the basis of the FA, the State Forests represent the State Treasury in the management of property, and thus are merely stationes fisci of the State Treasury. Consequently, the State Forests are not, within the meaning of the aforementioned provision, the owners of the forests which they are managing on behalf of the State Treasury. Moreover, it should be noted that according to Article 4 section 1, the State Forests National Forest Holding manages forests owned by the State Treasury, but this provision does not apply to the forests:

- held in perpetual usufruct by national parks,
- which are part of the Agricultural Property Stock of the State Treasury,
- held in perpetual usufruct pursuant to separate regulations.

Thus, in this case, the approval of the forest management plan by the minister competent for the environment is not addressed to the third party, as the plan does not cover these forests.

The complainant's view that the management plan for forests owned by the State Treasury is addressed to third parties, which is to be inferred from Article 39 of the FA cannot be shared. This provision states that "forests referred to in Article 3 point 1 letter a and point 2, which are under the management of the State Forests, may be leased by the forest district manager with the consent of the director of the regional directorate of the State Forests, in accordance with the objectives and tasks of forest management specified in the forest management plan." The possibility of concluding such a civil law agreement with a third party does not make the

said forest management plan an external act. This is because the condition for leasing these forests is to maintain the objectives and tasks set forth in the forest management plan. The obligations are therefore not imposed on the lessor by the forest management plan, but by a civil law agreement.

The above circumstances do not allow that the approval of the forest management plan be attributed the nature of a decision.

Nor can the minister's approval be qualified as another act or activity within the meaning of Article 3 § 2 point 4 of the LPBAC.

Unlike in the case of simplified forest management plans, which are drawn up for forests that are not owned by the State Treasury and approved by the head of county, the minister's action is not directed at third parties – natural persons or legal persons that own the forest. In view of this key difference relevant to the settlement of the case, one should consider another than in the case of a forest management plan for a State Treasury owned forest, special procedure for drawing up a simplified forest management plan and including: 1) the requirements to make the draft of the simplified forest management plan available for public inspection for 60 days at the commune office and to inform in writing the forest owners about making the draft available, 2) the possibility for the forest owners to raise objections and proposals within 30 days from making the drafts available, and 3) the issuance of decisions by the head of county on the acceptance or non-acceptance of the objections or proposals (Article 21 section 4 and 5 of the FA).

In accordance with Article 22 section 2 of the FA, the head of county, after receiving an opinion of the territorially competent forest district manager, approves the simplified forest management plan. The approval of a simplified forest management plan by the head of county gives rise to certain rights and obligations of the forest owner with regard to its forest management operations. If the owner of a forest that is not owned by the State Treasury fails to carry out the tasks set out in the simplified forest management plan (or in the decision of the head of county in the case mentioned in Article 19 section 3 of the FA, the head of county shall order the fulfillment of these obligations and tasks by issuing a decision (Article 24 of the FA).

Therefore, the above-mentioned regulations allow to conclude that the approval of the simplified forest management plan by the head of county does not take the form of an administrative decision (the legislator has clearly provided for the situations in which the head of county is entitled to issue a decision: Article 19 section 3, Article 21 section 5, Article 24 of the Act); however, the approval by the head of county is an act that is addressed outwards, as the addressees are third parties (forest owners). In addition, there are specific rights and obligations of forest owners arising from the approved simplified forest management plan, and if they are not fulfilled, the head of county may issue a decision imposing an obligation to fulfill them.

In these circumstances, it is reasonable to assume that the approval of simplified plans by the head of county should be qualified in accordance with Article 3 § 2 point 4 of the LPBAC (see e.g. judgments of the Provincial Administrative Court in Warsaw of May 27, 2011, file ref. no. IV SA/Wa 354/11 and of March 3, 2010, file ref. no. IV SA/Wa 1298/09; decision of the same Court of June 24, 2009, ref. no. IV SA/Wa 1890/08).

The above remarks concerning the simplified forest management plans, the rules for their preparation, the relationship between the head of county and the owners of forests covered by the simplified forest management plan show that the legal character of the approval of the simplified forest management plan by the head of county must not be equated to that of the approval of the forest management plan by the minister.

Article 3 § 2 point 4 of LPBAC provides for judicial review by administrative courts with respect to acts and actions taken in individual cases, i.e. towards specific entities, addressees of such actions or obligations. In the same way as an administrative decision, issued by an administrative authority, has the character of an outward action that is addressed to an individual entity, the action or act referred to in Article 3 § 2 point 4 of LPBAC also needs to be addressed to an external entity. However, this condition is not met in the case of approval of a forest management plan by the minister competent for environmental protection, where the forest is owned by the State Treasury and is managed by the State Forests (which are a state organizational unit without legal personality) representing the State Treasury with respect to the managed property, which are supervised by the minister competent for environmental protection.

The State Treasury is ex lege a state legal person and represents state property, whenever by law another state legal person does not do so. In this situation, the State Treasury acts as the owner (dominium). This position should be contrasted with the situation in which the authority of the State, i.e. *imperium*, is externalized, when the State acts through appropriate authorities and exercises superiority over other subjects of law, using orders, prohibitions, creating statutory acts, issuing administrative orders and other legal forms, the execution of which is guaranteed by means of administrative coercion. Therefore, approval of management plans by the minister competent for environmental protection for forests owned by the State Treasury is an internal action undertaken in connection with the performance of ownership tasks, thus a dominium, not imperium, activity.

In this state of affairs, the Provincial Administrative Court in Warsaw, pursuant to Article 58 § 1 point 6 in conjunction with Article 58 § 3 of the Law on Proceedings before Administrative Courts, rejected the complaint.