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Forms of the Government Administration's Impact on the Activities of Local Governments During the COVID-19 Pandemic

Abstract: The primary burden of tackling the pandemic COVID-19 lies with the state as the entity responsible for protecting the health and life of its citizens. Hence, it can be argued that the focus of the pandemic-induced changes to the Polish legal order was on administrative law, which not only sets out the principles of the functioning of the State as the executive power but also governs the relations between the government, local government and citizens, which had to be significantly modified during the pandemic. It would be impossible to analyse and discuss all the emergency measures that appeared in Poland's administrative law due to the threats posed by the pandemic. The subject matter of the present study is the analysis of the legal solutions adopted in the Republic of Poland in the sphere of public law in connection with the spread of the virus and particular provisions shaping relationships between the two basic structural branches of Polish public administration, viz. the government administration and the local-government administration. The following part of this study will accordingly be devoted to the analysis of the legislative solution contained in Article 11h of the COVID-19 Act, establishing a legal framework for issuing binding instructions to, among others, the various bodies of local governments, local-government legal persons and local-government organisational entities without legal personality.

Keywords: *COVID-19, local government, government administration, administrative law, decentralised administration system*

1. Introduction

A time of singular danger to the state or society justifies reaching for extraordinary means of influence, enabling uniform and cohesive action to avert the impact of the associated risks (Eckhardt, 2012, p. 142). Such a time we have experienced recently and are still experiencing now is the period of the COVID-19 pandemic. It is an unprecedented time in human history, one in which the threat to public health has escalated to a global dimension. The pandemic is striking a blow to social relationships, economic stability, and the exercise of basic human rights. Hence, on the various organs of the state government and local governments rests a special duty to maintain the capacity for such response as may be adequate to the ensuing situation, especially in the face of hazards to public safety and the lives and health of citizens (Bała, 2020, p. 116). It is no wonder that because of the scale of the danger to the safety of the citizens and out of concern for the stability of the state's economic system, it has become necessary to introduce legal regulation enabling the government administration to exercise effective influence on local governments in the area of counteracting the effects of COVID-19 (Serowaniec, 2021, pp. 9–10).

Examples of European countries where the epidemic started earlier than in Poland, such as Italy, Germany, France, or Spain, have demonstrated how vital it is for state institutions to quickly react to the spread of the virus to contain the effects of the epidemic. Following their constitutional frameworks, governments of these countries decided to introduce extraordinary measures for a limited duration to protect public safety and health (Kuhlmann & Franzke; 2021; Jüptner & Klimovský, 2021; Boys et al., 2021). However, it should be kept in mind that in the light of international standards, these measures may be deployed only to protect values of supreme importance, such as the life or health of people.

The core legal instrument in response to the threats arising from the spread of COVID-19 in Poland was the Act of 2 March 2020 on Special Legal Solutions for Preventing, Counteracting and Fighting COVID-19 and Other Contagious Diseases and Crisis Situations Caused by Them (uniform text: Dz.U.1842), hereinafter the 'COVID-19 Act'. The act has received multiple amendments, becoming a succession of legislative interventions contained in an extraordinarily inconsistent and chaotic act (Serowaniec & Witkowski, 2020, pp. 155–170). Also, in the area of structural provisions of administrative law the provisions, the COVID-19 Act are dispersed and unsystematised, largely limiting the possibility of analysis and sometimes leading to the inference of incongruity (Rączka, 2021, pp. 97–105). It is noteworthy that as regards the relationships analysed herein the original wording of the Act did not contain pertinent legal solutions. It was only in consequence of the coming into force, on December 30, 2020, of the Act of 27 November 2020 Amending Certain Acts to Ensure Medical Staffing During the Declared State of Epidemic or Epidemic Threat (Dz.U. 2401) that the COVID-19 Act was amended with a new Article 11h, which provides for a special measure impacting these relationships.

The article aims to analyse the legal solutions adopted in the Republic of Poland in the sphere of public law in connection with the spread of the COVID-19 and, in particular, provisions shaping relationships between the two basic structural branches of Polish public administration, viz. the government administration and the local-government administration. The following part of this study will accordingly be devoted to the analysis of the legislative solution contained in Article 11h of the COVID-19 Act, establishing a legal framework for issuing binding instructions to, among others, the various bodies of local governments, local-government legal persons and local-government organisational entities without legal personality.

The research was conducted using descriptive methods and – due to the legal nature of the publication – the crucial role played dogmatic method, consisting in the interpretation of legal acts.

2. Theoretical Underpinnings

The relationship between the government administration and the local-government administration is shaped by the institution of supervision (in the constitutional-administrative sense), which lays the groundwork for legal instruments enabling the intervention of the government administration representing the state in the activities of the decentralised local governments (Serowaniec, 2015, pp. 589–592). In essence, therefore, supervision as a legal institution governs the terms of such an intervention, on the one hand allowing it and on the other hand essentially reducing it solely to the situations defined in the provisions defining the various supervisory measures. Thus, supervision limits the intervention of the organs of the government administration to the absolute minimum, which safeguards the independence and autonomy of the decentralised local governments that they need in order to be able to carry out their tasks properly.

Relations within the organisational system are shaped in a completely different way in the centralised administration, where – albeit no longer often in its pure form – the principle of hierarchical subordination obtains. However, similarly to how in the case of the centralised administration, hierarchical subordination admits, in principle, to intervention, with regard to the decentralised administration opportunities for intervention from the government administration have been confined to the necessary exceptions.

The administrative law literature defines the goals to be served by erecting centralised administrative structures and highlights the core reasons (functions) for which the legal frameworks provide supervision over decentralised structures are built (Ochendowski, 2018, p. 235). In the opinion of H. A. Simon, the purposes for which the administration is built around the centralisation principle include, but are not limited to, coordination and responsibility. Thus, the centralised structure should be the means for the pursuit of those tasks of the state in which the execution calls for special coordination due to the need for harmonious and cohesive actions, as well as those tasks for which the execution entails special responsibility due to the significant social cost of failure to execute them properly

or at all (Simon, 1976, p. 391). In the subject literature, limitations on the autonomy and independence of local-government structures are referred, among other things, to the necessity of guaranteeing that delegated tasks are performed at all and also performed in a harmonious way throughout the administration, which means by a whole range of entities covered by guarantees of independence in the implementation of those tasks (Rączka, 1999, p. 99).

In both cases, one can identify the common goals of both institutions involved, focusing on different aspects of administration activities. Whether by centralisation or supervision, the state attempts to guarantee coordination of relatively uniform activities aimed at achieving set goals. Similarly to how in the case of centralisation, we assume activity aimed toward a common public goal defined by the tasks, with supervision this is primarily about a uniform type of activity, i.e., the application of analogous, legally defined means of achieving such goals.

The assumptions and functioning principles of centralised and decentralised administration can be related to the concept of multi-level governance, which assumes the existence of a dense network of public and private, individual and collective actors who cooperate in the decision-making process both horizontally and vertically (Stephenson, 2013, pp. 817–837). The extraordinary situation requires the adoption of special legal solutions enabling exceptional forms of action. In this case, the statutory provisions, justified in the authors' view by the pandemic situation and the relevant threats and hazards, allow the state to employ legal instruments of influence on local-government entities proper to the centralised administration. However, introducing such legal instruments should be defined in great detail. So that after the end of the emergency, it will be possible to return to a decentralised form of functioning of local self-government. There were also similar problems for local governments in the Czech Republic, Slovakia and Hungary – countries with limited quality of collaborative governance (Horvat et al., 2021, pp. 133–158; Klimovsky et al., 2021, pp. 85–106).

Situations characterised by the existence of extraordinary hazards, as mentioned in the introduction, provoke extraordinary measures taken to mitigate the impact. Consequently, it is difficult to take a critical view of the state's motivations in creating exceptional relationships between the government administration and local governments, which is hardly tolerable in normal circumstances. It needs to be emphasised that in the organisational sphere of administrative law, the legislative technique that was used assumed the introduction of special legislative solutions of temporary nature, refraining from permanent amendments of the statutory framework of local governments, i.e. Act on Communal Self-Government (consolidated text: Dz.U.2021.1372), Act on *Poviat* Self-Government (consolidated text: Dz.U.2020.920), and Act on Voivodeship Self-Government (consolidated text: Dz.U.2020.1668). Only this limited legislative technique was perceived as acceptable. The permanent introduction of solutions prescribed by Article 11h of the COVID-19 Act would have significantly disturbed the proper balance of the relationship between the state

administration and the decentralised administration, reducing the latter's independence to an illusory thing.

3. Binding Instructions: Personal Scope

Analysis of the personal scope of the binding instructions provided in Article 11h of the COVID-19 Act must first refer to the active entities (the issuers of the instructions) and the passive entities (the recipients of the instructions). As the organs authorised to issue binding instructions of which local-government entities are the recipients, the legislature specifies the voivode (provincial governor representing the cabinet) and the President of the Council of Ministers (Prime Minister), i.e. constitutional supervisory organs over the activities of local governments[1]. The binding instructions may be issued on the organ's own initiative in both cases. The legislature narrowed this down by stipulating that the binding instructions of the President of the Council of Ministers are to be issued by the Head of the Chancellery of the Prime Minister upon the Prime Minister's authorisation. The province governor has been assigned to immediately notify the competent minister of any binding instructions issued. In the latter case, the minister's competence is decided by which of the government administration departments the subject matter of the instruction falls under. If disagreeing with the province governor's instruction, the minister can stay its enforcement and request the Prime Minister to resolve the dispute with the province governor over the instruction. It is worth noting that instructions not covered by the analysis contained in this article and also issued based on Article 11h of the COVID-19 Act, of which different entities are the recipients, may also be issued by the minister competent for matters of health, on the minister's own or the province governor's initiative.

Under Article 11h(1) of the COVID-19 Act, the recipients of binding instructions may include without limitation the various units of local government and local-government legal persons and organisational units without legal personality. This broad formula enables instructions to be issued directly to the entities competent for their implementation. However, the mandate contained in the analysed provision is difficult to accept, for it does not link the possibility of becoming the recipient of such an instruction to the recipient's area of competence. Thus, the instruction is binding on the named recipients irrespective whether the execution of it falls within the scope of activities of a given local-government organ, legal person or organisational unit without legal personality.

[1] Article 171(2) of the Constitution of the Republic of Poland of 2 April 1997 (Dz.U.1997.78.483) provides: 'The organs exercising supervision over the activities of units of local government shall be the Prime Minister and province governors, and, for financial matters, regional audit chambers'.

4. Binding Instructions: Premises and Grounds (Temporal and Substantive Scopes)

The basic grounds for issuing binding instructions are regulated by Articles 11h(1), 11h(3) and 11h(4) of the COVID-19 Act. In Articles 11h(1) and 11h(3) the legislature specified the temporal conditions for issuing instructions. In particular, the provisions on the instructions were inserted in a part of the Act situated in Chapter 2 'Special Provisions' of the COVID-19 Act. That part gathers together legal solutions with temporal applicability limited by the duration of the epidemic threat or state of the epidemic (or a certain time thereafter, as set by the legislature). Accordingly, binding instructions may only be issued during the epidemic threat or state of the epidemic, published concerning COVID-19, and 3 months after its end. This limitation applies to the province governor's (subsection 1) and the Prime Minister's (subsection 3) instructions. Analysis of these provisions prompts a critical evaluation. The provisions should not specify the temporal confines in which a binding instruction may be issued but the temporal limits of applicability.

The COVID-19 Act, albeit vaguely, regulates the substantive prerequisites for issuing a binding instruction. In line with Article 11h(4) of the Act, the binding instructions must be linked to counteracting COVID-19. The generality of this language leaves the issuing organs with much leeway to define the vague concept referenced in both the grounds and the content scope of the binding instruction.

At the same time, the legislature precluded the possibility of issuing such binding instructions as of which the contents could refer to a matter disposed of by administrative decision or investigative and exploratory activities and the activities relating to the prosecution of infractions. Thus, the issuing organs are not authorised to determine the outcomes of decisions made in such cases. In reference to instructions targeting local-government entities, particular importance is gained by the first-mentioned exclusion, preventing the binding instructions from determining the holdings of administrative decisions in individual cases. In this aspect the amendment must be met with approval, for it safeguards the independence and autonomy of local governments in the sphere of administrative jurisdiction.

5. Binding Instructions: Form and Procedure

In Article 11h(4) of the COVID-19 Act, the legislature has defined the form for issuing the binding orders studied in this article. However, it would be difficult to resist the impression that specifying a common form for diametrically different forms of activity selected based on the analysed provisions is an error. Article 11h of the COVID-19 Act, on the one hand, governs the binding instructions issued by the organs of the government administration (province governor and Prime Minister) and addressed to local-government entities, i.e. the entities composing the public administration together with the government administration, and on the other hand, the binding instructions issued by analogous organs (expended in

subsection 2 to include the minister competent for health) and addressed to entities not falling within the structure of public administration. Thus, internal and external instructions (decisions) are disposed of jointly in this provision (Ochendowski, 2018, pp. 40–41). Under Article 11h(4) of the COVID-19 Act, 'The instructions referred to in sections 1 to 3 shall be issued (…), by way of an administrative decision…'

This form is justified with regard to 'instructions' issued to the entities referred to in section 2(1) of the analysed Article, i.e. different from the government-administration organs operating in the province, or state-held legal persons, units of land self-government, self-government legal persons and organisational units without legal personality, including without limitation legal persons and organisational units without legal personality and enterprises. By this method of legislation, the legislature formalised the procedure preceding them, whereby the parties to such proceedings are given a greater opportunity to protect the legal interest that could be violated by giving the instruction. Doubtless in issuing such an instruction (administrative decision), the organ has an obligation to follow, with all consequences, the general administrative procedure regulated by June 14, 1960 – Code of Administrative Procedure (consolidated text: Dz.U.2021.735), hereinafter 'CAP'. As follows from the contents of Article 1(1) CAP[2].

However, it would scarcely be possible to draw similar inferences from the Code with regard to issuing binding instructions (administrative decisions, as the legislature has it in the analysed provision) to local-government entities[3]. Despite what appears to be a similar intention, the application of the CAP to such type of 'administrative decisions' is excluded by Article 3(3) of the Code. That makes it difficult to identify any procedural provisions applicable to binding instructions (administrative decisions) addressed to local-government entities.

In the analysed provision the legislature did, however introduce special legal solutions referred to the form of such instructions (administrative decisions under Article 11h of the COVID-19 Act). Section 4 of the same Article follows that they do not require a statement of reasons. Due to prior findings, however, such a stipulation is redundant with regard to the binding instructions issued to local-government entities. It is because any obligation to provide rationales for them could arise from applying the Code of Administrative Procedure provisions, which, as has already been noted, is excluded in this case.

It seems that the legislature, in order to correct the defective provision, should retain the form of administrative decision only for binding instructions issued in reference to entities referred to in Article 11h(2)(1) of the COVID-19 Act, and in the case of the various

[2] Article 1(1) CAP provides that the Code of Administrative Procedure governs: (1) proceedings before public-administration organs in individual cases belonging to their competence, resolved by administration decision or tacitly.

[3] The same is true for other organs and administrative entities referred to in Article 11h(1) of the COVID-19 Act, such as the organs of the government administration operating in the province.

entities co-composing the public administration the form of binding instruction should be retained as the proper form of operation in the case of individual internal acts, or employ the concept of a supervisory act, as known from the statutory framework on local governments, or the form of internal order (as a form of action proper to the internal sphere of the public administration).

6. Binding Instructions: Consequences of Service or Publication

Considering the exceptional circumstances in which the analysed binding instructions would be given, the legislature also provided detailed regulation of the consequences of issuing such instructions. Under Article 11h(4) of the COVID-19 Act, such type of instructions are immediately enforceable upon service or publication. Considering the role in the fight against the spread of COVID-19 to be played by the various forms of influence over local-government entities, such a legislative solution must be met with approval. The dynamics of the threats and hazards connected with the development of the pandemic justify making the instructions immediately enforceable by the operation of the law. Of course, if any such instruction is to be able to take such legal effect, it must be successfully served or published, which means the recipient must become aware of the contents. In line with prior findings, the legal provisions determining the service of process or the publications contained in the Code of Administrative Procedure will not apply. They will be issued in a manner appropriate for internal administrative legislation. However, the legislator does introduce special legal solutions reducing the formalities involved in issuing such instructions[4]. In line with section 11 of the analysed Article, those (among others) addresses to self-government entities may also be issued orally, in writing in the form of annotation, by telephone, by electronic communication within the meaning of Article 2(5) of the Act of 18 July 2020 on Providing Services Electronically (Dz.U.2020.344) or via other communication methods. However, the legislature has mandated that the organ issuing such an instruction execute a certified record of the circumstances of the resolution of the case in one such manner.

The service or publication of such an instruction created on the recipient's part an obligation to carry it out (in the analysed scope: a local-government organ, legal person or organisational unit without legal personality). The nature of the tasks imposed by such a binding instruction is, therefore, mandatory, and, as the lawmaker emphasises in Article 11h(13) of the COVID-19 Act, they are to be implemented by units of local government as delegated tasks from the area of government administration.

[4] Doubtless this is a consequence of the mistaken view of the drafters that the provisions of the Code of Administrative Procedure would have to be followed when issuing those instructions.

7. Binding Instructions: Detailed Procedure for Verification

The COVID-19 Act also prescribes a special path for verifying binding instructions issued under Article 11h. Also in this case, it would appear that the lawmaker intended to introduce solutions having the nature of *lex specialis* relative to the provisions of CAP. Under section 5 of that Article, the instructions may be rescinded or modified in a party's social or legitimate interest. Moreover, the legislature provides that their rescission or modification does not require the parties' consent. Thus, terms proper to the administrative procedure are used. Regarding instructions issued to local-government entities, however, assuming the application of the provisions of the Code of Administrative Procedure is excluded, the conclusion must be that the rescission or modification of such instructions may, outside of social interest, be guided by the recipient's interest and does not require the recipient's consent. The defect of this drafting is that there is no specification of the organ competent to rescind or modify the instructions on this path. It appears, however, that in the absence of appropriate legislative provisions, the organs competent to issue the relevant binding instruction should be regarded as competent for rescission or modification (the province governor, Prime Minister).

8. Summary

By way of summary, the provision of Article 11h of the COVID-19 Act has to undergo legal evaluation but only in respect of the subject matter of the analysis of this article, i.e., binding instructions which can be issued to local-government entities.

As noted in the introduction, the special situation requires the adoption of special legal solutions enabling the use of exceptional forms of action. In this case, the statutory provisions, justified in the authors' view by the pandemic situation and the relevant threats and hazards, allow the state to employ legal instruments of influence on local-government entities proper to the centralised administration, in the proper sphere for supervisory intervention in the activities of local-government units.

The manner of introduction of various types of legal instruments leaves much to be desired, however. The insufficient procedural regulation and the erroneous combination, in one article, of the bases for the use of diametrically different legal forms of action is not conducive to legislative transparency. Furthermore, numerous doubts are awakened by the temporal scope of the applicability of the instructions issued under the analysed legislation and the subject matter (i.e., substantive) scope.

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