

**COMMUNISATION OF STATE PROPERTY
AND PKP PROPERTY ENFRANCHISEMENT:
COMMENTS ON THE SUPREME
ADMINISTRATIVE COURT RULING
OF 27 FEBRUARY 2017, I OPS 2/16**

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The transformation of the political system in Poland after 1989 concerned a series of aspects of the state functioning. Among them, territorial self-governments were revived and communes became municipal legal entities independent of the state.¹ In addition, state legal entities, including state-owned enterprises, were “empowered” and became legal entities independent of the state, could represent their own financial interests and set them against the financial interests of the state (the State Treasury). The change took place, inter alia, as a result of the abolition of the principle of the uniform fund of state property expressed in Article 128 Civil Code, which was later repealed. The provision was amended by the Act of 31 January 1989.² In accordance with Article 128 Civil Code, state legal entities could acquire property rights, including the ownership right to real estate.

The above-mentioned political system transformations also required far-reaching changes with respect to former ownership relations. What caused the need was the fact that the entire public and state property constituted the object of ownership of the State Treasury (in accordance with Article 128 Civil Code). Thus, there was a need to organise and allocate the property, including the right to real estate. Under

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¹ Act of 8 March 1990 on territorial self-governments, Journal of Laws [Dz.U.] of 1990, No. 16, item 95, as amended.

² Act of 31 January 1989 amending the Act: Civil Code, Journal of Laws [Dz.U.] of 1989, No. 3, item 11.

the denationalisation process of the 1990s, the state property was communised and state and municipal legal entities were enfranchised.

The communisation of the state property took place in accordance with the Act of 10 May 1990: Provisions implementing the Act on territorial self-governments and the Act on self-government employees³ (hereinafter: Communisation Act) or the Act of 13 October 1998: Provisions implementing the Acts reforming public administration⁴ concerning public roads. The Acts gave communes the ownership right to real estate successively on 27 May 1990 and 1 January 1999. The acquisition of the right of ownership by territorial self-government units took place *ex lege* based on the above-mentioned provisions.

In accordance with Article 5 para. 1(1) to (3) Communisation Act, if other provisions do not stipulate otherwise, national (state) property belonging to the National Councils and territorial bodies of state administration of the basic level as well as state enterprises for which the above-mentioned bodies play the role of founding entities, or plants or other organisational units subordinate to those entities became the property of the communes concerned *ex lege* on the day of Communisation Act's entry into force (27 May 1990).

The Communisation Act indicates negative conditions for the acquisition of land by communes, in accordance with which the discussed property did not belong to the National Councils or territorial state administration bodies of the basic level or was excluded from the process of communisation based on special provisions. The issues were regulated in Article 11 Communisation Act, under which, inter alia, the property that serves to perform public tasks of the state administration bodies, courts and divisions of state authorities as well as that belonging to state enterprises or organisational units performing national or higher than voivodeship-level tasks may not be subject to communisation. The above-mentioned enterprises were listed in the Regulation of the Council of Ministers concerning the determination of the list of state enterprises and organisational units the property of which is not subject to communisation⁵ (hereinafter: Regulation CM of 1990).

As a result of the abandonment of the principle of the unity of the state property, state legal entities were given, also *ex lege*, property rights to real estate. It was called enfranchisement of the state legal entities performed in accordance with Article 2 of the Act of 29 September 1990 amending the Act on land management and expropriation of real estate.⁶ In accordance with this provision, on 5 May 1990, legal entities, including state enterprises, like PKP (Polish state railways), acquired

³ Act of 10 May 1990: Provisions implementing the Act on territorial self-governments and the Act on self-government employees, Journal of Laws [Dz.U.], No. 32, item 191, as amended.

⁴ Act of 13 October 1998: Provisions implementing the Acts reforming public administration, Journal of Laws [Dz.U.] of 1998, No. 133, item 872.

⁵ Regulation of the Council of Ministers of 9 July 1990 concerning the determination of the list of state enterprises and organisational units the property of which is not subject to communisation, Journal of Laws [Dz.U.] of 1990, No. 51, item 301.

⁶ Act of 29 September 1990 amending the Act on land management and expropriation of real estate, Journal of Laws [Dz.U.] of 1990, No. 79, item 464.

perpetual usufruct over land and the ownership right to buildings erected on it.⁷ It is believed that the above-mentioned regulation was of fundamental importance for the transformation of property relations in Poland.⁸

Eventually, the Act on privatisation of state enterprises was passed.⁹

Getting down to the matter of regulating the rights to railway real property, it is necessary to indicate that, in general, Article 2 Act of 29 September 1990 amending the Act on land management and expropriation of real estate constituted grounds for PKP enfranchisement. The mode of proceeding in order to recognise the acquisition of land in accordance with the above-mentioned Act is at present regulated in Article 200 Act of 21 August 1997 on real property management,¹⁰ provided an entity proves it possessed the right of management on 5 December 1990. In practice, the provisions turned out to be insufficient to implement PKP enfranchisement. The basic problem with the regulation of the legal status of railway real property consisted in the fact that the railway enterprise did not possess documents that could evidence of acquisition of perpetual usufruct over land, i.e. the company did not have documents confirming it was granted the right of management of this real property. Due to the legislator's awareness of the problems with enfranchisement, Article 34 para. 1 Act on commercialisation and restructuring of the Polskie Koleje Państwowe state enterprise¹¹ (hereinafter: PKP Commercialisation Act) made the enfranchisement of the company possible on the land being the property of the State Treasury that was in possession of PKP on 5 December 1990, for which PKP did not have documents confirming the transfer in the form required by law and could not prove its identity until the date of deleting of state enterprises from the registry. On the day the PKP Commercialisation Act entered into force, the real property became subject to PKP perpetual usufruct.

5 December 1990, i.e. a few months after communes acquired real property under the provisions of the Communisation Act, was the date when former state enterprises or those that were subject to the provisions concerning the acquisition of permanent usufruct, as in case of the above-mentioned Article 34 PKP Commercialisation Act, were enfranchised.

It is worth pointing out that, enfranchising communes and state legal entities, the legislator was not consistent in the application of the time of acquisition of rights by those entities: 27 May 1990 and 5 December 1990. Thus, communes were enfranchised first and state legal entities were enfranchised later. State legal entities acquired the right to real property of the state resources, which was already reduced by formerly communised real property. Thus, theoretically, there should not be any

⁷ K.H. Łaskiewicz, *Zmiany stosunków własnościowych w Polsce po roku 1989*, Ruch Prawniczy, Ekonomiczny i Socjologiczny Vol. LXXVI, issue 2, 2014, p. 65.

⁸ J. Jaworski, A. Prusaczyk, A. Tułodziecki, M. Wolanin, *Ustawa o gospodarce nieruchomościami. Komentarz*, 2nd edition, C.H. Beck, Warsaw 2011, p. 1427.

⁹ Act of 13 July 1990 on privatisation of state enterprises, Journal of Laws [Dz.U.] of 1990, No. 51, item 298.

¹⁰ Act of 21 August 1997 on real property management, Journal of Laws [Dz.U.] of 2016, No. 0, item 2147.

¹¹ Act of 8 September 2000 on commercialisation and restructuring of the Polskie Koleje Państwowe state enterprise, Journal of Laws [Dz.U.] of 2017, item 680.

disputes concerning communisation and enfranchisement between communes and state legal entities. Nevertheless, the difference in terms, especially that occurring in 1990, caused different interpretation of the provisions and case law, which, as a result, more and more often prevents the implementation of the legislator's intention expressed, e.g. in the PKP Commercialisation Act.

In accordance with the administrative procedure, decision-making bodies treat communisation proceedings as preliminary issues in relation to enfranchisement proceedings. Pursuant to it, the land owned by the State Treasury belonging to the National Councils and territorial state administration bodies of the basic level on 27 May 1990, i.e. the day when the Communisation Act entered into force, became the property of the communes concerned. In accordance with case law, the land that was not subject to the right of management, usufruct or permanent usufruct was recognised as land owned by the above-mentioned entities. Administrative bodies and administrative courts derive this approach from Article 6 para. 1 Act on land management and expropriation of real estate that was then in force,¹² pursuant to which territorial state administration bodies managed that land. At the same time, it was assumed, which was groundless in my opinion, that the concept of management should be interpreted as belonging to that body, regardless of the fact which entity really managed the property. The phrase "belonging to the National Councils and territorial state administration bodies of the basic level" means belonging of the state property to those entities in a legal sense (understood as possession of a specific legal title) and not only in factual sense.¹³ Real property that was recognised as "not belonging" to the state administration bodies of the basic level was only one that an organisational unit was granted the right of management or usufruct to, in accordance with Article 38 para. 2 Act on land management and expropriation of real estate, which was then in force. The lack of such a decision means, according to case law, that the real property absolutely belonged to a territorial state administration body.¹⁴ The fact that the right of management resulted directly from the provisions on the establishment and operation of PKP, which entered into force much earlier than the provisions of the Act on land management and expropriation of real estate, was not in general taken into account. It was also ignored that decisions on management were not mainly issued for PKP at that time. A question should be asked whether, adopting such interpretation after the above-mentioned Article 38 para. 2 laying down the ways of documenting the fact of being granted the right of management or perpetual usufruct over property entered into force, one should regulate the right to thousands of hectares of real property, which the PKP state enterprise used and which have been occupied for railway infrastructure for dozens of years. The adoption of such interpretation of the provisions of law deprives PKP of evidence required in communisation proceedings, which can stop the process. At the same time, the exclusion of the property of the enterprise from the process was

¹² Act of 29 April 1985 amending the Act on land management and expropriation of real estate, Journal of Laws [Dz.U.] of 1985, No. 22, item 99.

¹³ The Supreme Administrative Court judgement of 4 November 2015, I OSK 3106/14, CBOSA.

¹⁴ *Ibid.*

not guaranteed in the Regulation CM of 1990, which is emphasised in case law.¹⁵ As a result of the above, pursuant to Article 5 paras. 1 and 2 Communitisation Act, in accordance with the adopted case law policy, real property being at the disposal of PKP S.A. became *ex lege* the property of communes concerned on 27 May 1990.

Pursuant to the above interpretation, a uniform case law policy started to consolidate many years ago in accordance with which, although the property was at PKP's real disposal before 1990 and later but the right to its management was not confirmed in the legal form, it belonged to the National Councils and territorial public administration bodies. As a result, it is subject to communisation pursuant to the Communitisation Act of 10 May 1990. Case law totally ignores the fact that communes have never possessed this real property and did not have any rights whatsoever to it, either.

It is also worth mentioning what possibilities exist that PKP might regulate the legal status of land that has already been communised. In the present situation, the enterprise cannot apply Article 34 PKP Commercialisation Act, which was especially dedicated to it and took its specific legal situation into account, because its application requires that land should be the property of the State Treasury. As it has already been mentioned above, the mode of confirming the existence of perpetual usufruct over land being the property of communes was laid down in Article 200 Act on real property management. In this situation, filing a motion to enfranchise the commune land, an enterprise should provide documents confirming the right of management. The catalogue of evidence is much broader than the one applied in case of exclusion of land from the process of communisation. It is necessary to refer to the content of the regulation implementing Article 200 Act on real property management, in accordance with which a competent body confirms the right of management, *inter alia*, based on a decision on the calculation or updating fees for the right of management or usufruct over real property.¹⁶ However, the majority of communes do not recognise documents indicating the establishment of annual fees for management as evidence of the right of management, regardless of the fact that law directly indicates them as grounds for recognition of that right. The negative stand concerning non-recognition of the above-mentioned documents is based on administrative courts' case law, in accordance with which decisions on the calculation or updating fees may constitute documents in enfranchisement proceedings only if their content refers to a lost or damaged decision on the establishment of the right.¹⁷ In practice, at that time, a series of decisions on calculation or updating fees did not meet the criterion, which resulted from clerks' negligence or directly from the fact that decisions on management were not issued at all because the right

¹⁵ The Supreme Administrative Court judgements of 6 July 2011, I OSK 1269/10 and of 9 November 2011, I OSK 2014/10, CBOSA.

¹⁶ Section 4 para. 1(6) and (7) Regulation of the Council of Ministers of 10 February 1998 on implementation provisions concerning enfranchisement of legal entities and granting them the right to real property to which they had the right of management or usufruct before, Journal of Laws [Dz.U.] of 1998, No. 23, item 120.

¹⁷ Judgement of the Voivodeship Administrative Court in Gliwice of 30 September 2016, II SA/GI 637/16, CBOSA.

resulted directly from legal provisions. The argument is generally not recognised and a document concerning fees is treated as, e.g. confirmation of settlement of charges for non-contractual use of real property, which in case of railway land is absurd. Inter alia, the Supreme Administrative Court challenged such an approach and indicated that, due to imprecise decisions issued at that time, including decisions on the calculation of fees, most decisions, although this should be treated as blameworthy, did not refer to specific documents in accordance with which an enterprise was granted the right of management or usufruct over a given area. As a result of a linguistic interpretation, in case there is no contrary evidence, it should be assumed that decisions on the calculation or updating of fees document that the right of management existed. The adoption of a different interpretation would lead to a situation in which an act on enfranchisement would become an act on expropriation.¹⁸

With regard to the above comments, ending of the proceedings and final establishment of perpetual usufruct by the PKP enterprise, the statutory aim of which is to regulate the right to land, encounter considerable difficulties resulting from the lack of possibility of providing required documents in order to confirm the right to real property being at the disposal and management of PKP and which, as a result of communisation, belongs to communes. At this stage the application of Article 34 PKP Commercialisation Act is not possible because the land does not belong to the State Treasury since, as a result of communisation, it became communes' property. On the other hand, the lack of documents confirming PKP's right of management constitutes an obstacle to grant PKP S.A. perpetual usufruct in accordance with Article 200 Act on real property management.

Nevertheless, adjudications contrary to the discussed case law policy have also occurred in administrative courts' case law. The stand was presented in five judgements. According to them, the claim that land for which PKP does not have documents confirming the right of management was managed by territorial public administration bodies of the basic level is erroneous. The reasoning, apart from detailed legal justification, is also based on an obvious statement that "it is hard to assume that the land where there is a platform or a locomotive shed, which were built dozens of years ago, was not managed by PKP then".¹⁹ The courts present an argument that the land was given to this enterprise for management²⁰ and the Regulation of 1926 on the establishment of the Polskie Koleje Państwowe enterprise²¹ (hereinafter also: Regulation of 1926 on PKP) constitutes the evidence of the existence of its right of management. The legal act established Polskie Koleje Państwowe as a separate legal entity and granted it first the right of management,

¹⁸ The Supreme Administrative Court judgement of 19 January 2017, I OSK 1977/16, CBOSA.

¹⁹ The Supreme Administrative Court judgement of 15 July 2016, I OSK 3398/15, CBOSA.

²⁰ *Ibid.*

²¹ Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise, Journal of Laws [Dz.U.] of 1926, No. 97, item 568.

then trust and finally usufruct over that land²² in order to enable it to conduct its operations.

The establishment of a railway enterprise and rules of its operation, due to its importance for the state, were regulated in statutory provisions or the provisions of similar rank. Legal acts regulating the enterprise's establishment, competences and rules of operation concerned also the issue of the possessed property. As the Supreme Administrative Court indicated in one of its judgements, the Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise²³ uses the identical terminology as the provisions issued in the period 1944–1989 in relation to the way of allocation of the state property possessed by other state enterprises. According to the Court, as a rule, it is justified to assume that it is admissible to refer to the legal act regulating the establishment of a given entity and indicate that pursuant to this regulation, the entire, even not determined property was given to this enterprise for management. At the same time, the Court did not notice any arguments confirming that the legal acts concerned did not regulate the legal status of the given real property. It was also indicated that in legislation, the conditions from which legal consequences are derived in relation to particular entities are often defined in an abstract way; of course, it concerns provisions in the field of enfranchisement.²⁴

Case law that is favourable to former state enterprises also indicates that it is not justified to create an exhaustive catalogue of documents based on Article 38 para. 2 Act on land management and expropriation of real property, from which a legal title to particular real property may be derived. The provision, as an adjudicating bench decided in its judgement, concerns giving real property for management based on a particular legal act, which results from the wording of Article 40, indicating elements that a decision or an agreement on giving land for management must contain. The court emphasises that one cannot exclude a situation in which a particular state unit's legal title to land might have occurred before the Act on land management and expropriation of real property entered into force. In such a situation, determination of a legal title to the given real property cannot be limited to determination whether a document referred to in Article 38 para. 2 exists. Speaking about PKP, it is necessary to refer to general rules of using national (state) property by state enterprises and provisions regulating the creation and operation of a given enterprise.²⁵

Management that an enterprise was entitled to may be also derived from general provisions concerning real property management, i.e. Article 87 (after the amendment: Article 80) of the Act on land management and expropriation of

²² Article 1 para. 6 Regulation of the President of the Republic of Poland of 29 November 1930 amending and supplementing the Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise, Journal of Laws [Dz.U.] of 1930, No. 82, item 641.

²³ Uniform text, Journal of Laws [Dz.U.] of 1948, No. 43, item 312.

²⁴ The Supreme Administrative Court judgement of 3 March 2016, I OSK 3397/15, CBOSA.

²⁵ The Supreme Administrative Court judgement of 6 September 2010, I OSK 1430/09, CBOSA.

real estate. In accordance with this provision, state-owned land used by the state organisational units on the day when the Act entered into force must be treated as managed by those units. It is necessary to remind that on the day when the Act entered into force, PKP was the holder of usufruct over railway land, which resulted from the provisions constituting the basis for the establishment and operation of this enterprise.²⁶ Therefore, on the day when the Act on land management and expropriation of real estate entered into force, the land started to be managed by PKP. Thus, regardless of whether the enterprise possesses documents confirming it was given particular land, it may use various means to prove that the given real property constituted land used to conduct railway activities and operate, and thus was managed by PKP. This fact is at the same time the reason for exclusion from communisation.²⁷

The successive opinions, different from those of the majority, occurred in case law in connection with the issue of non-exclusion of the railway enterprise from the process of communisation. The fact that Regulation CM of 1990 does not indicate the enterprise PKP in its list does not mean that real estate belonging to PKP must be subject to communisation. The Regulation was issued as a result of Article 11 Communisation Act, which indicates what components of the state property are not subject to communisation and refers directly to Article 5. Such formulation excludes from communisation property that directly matches the conditions of Article 5 paras. 1 to 3 Communisation Act. In addition, Regulation CM of 1990 laid down that the list contains state enterprises and organisational units subordinate to or supervised by the former National Councils and territorial state administration bodies of the basic level. The PKP enterprise has never been this type of enterprise. At the same time, the list indicates small enterprises, local in nature. The character, functions and importance of PKP clearly indicate that it is a state enterprise performing national tasks (Article 11 para. 1(2) Communisation Act). Since railway property in general is not subject to communisation, the provision of Article 11 Communisation Act and Regulation CM of 1990 do not apply to it, either.²⁸

The case law negating the process of acquisition of railway land by communes also emphasises the essence and significance of the provisions regulating the legal status of the PKP enterprise that were in force on the day when the provisions of the Communisation Act entered into force. In accordance with Article 16 para. 2 Act on the PKP state enterprise of 1989,²⁹ "resources at PKP's disposal on the day when the Act entered into force (i.e. 9 December 1989) and resources acquired by PKP in the course of its operations constitute its property". At the same time, it is indicated that the legislator was aware that PKP possessed land of the State Treasury

²⁶ Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise, Journal of Laws [Dz.U.] of 1926, No. 97, item 568, as amended.

²⁷ The Supreme Administrative Court judgement of 6 September 2010, I OSK 1401/09, CBOSA.

²⁸ The Supreme Administrative Court judgements of 6 September 2010, I OSK 1401/09 and I OSK 1430/09 and of 8 November 2011, I OSK 1956/10, CBOSA.

²⁹ Act of 27 April 1989 on the Polskie Koleje Państwowe state enterprise, Journal of Laws [Dz.U.] of 1989, No. 26, item 138; hereinafter also: Act of 1989 on PKP.

and did not have documents confirming it was transferred to the enterprise in the form required by law, which results from the provision of Article 34 para. 1 PKP Commercialisation Act. Moreover, attention is drawn to the legislator's aim laid down in Article 34a of the above-mentioned Act, which stipulates that "land referred to in Article 34 shall not be subject to communisation from 1 June 2003 in accordance with the provisions of the Act of 10 May 1990: Provisions implementing the Act on territorial self-governments and the Act on self-government employees". In order to leave no doubts concerning these provisions, the Constitutional Tribunal stated that: "the aim of the provision in question was to exclude specified land from communisation and to ensure a stable legal situation for PKP (...) with respect to real property referred to in Article 34 PKP Commercialisation Act".³⁰ Assuming the legislator's rationality, one should draw a conclusion that the land directly managed by PKP without a legal title was excluded from the process of communisation. Otherwise, it would lead to the statement that the provisions of Articles 34 and 34a PKP Commercialisation Act are subjectless because there is no land matching the criteria laid down in them.³¹

The legal issue of land communisation directly connected with the enfranchisement of land being in the possession of a state enterprise, including *inter alia* Polskie Koleje Państwowe, was the subject matter of many analyses conducted by administrative courts. As it has been stated above, the dominating courts' stand is to support communisation of property that formerly, for dozens of years, constituted the property of state enterprises. The administrative courts' opinion results mainly from the fact that those enterprises do not possess documents confirming they were granted the right of management of the given real property. The lack of the document granting the right of management became the key argument in administrative proceedings and the proceedings before administrative courts for recognition that in this situation the given real property belonged to territorial state administration bodies of the basic level on the day when the Communisation Act entered into force, and thus is subject to communisation. Only five judgements are in contradiction to this stand. Three of them were issued in the period 2010–2011. This adjudication policy occurred again in 2016, when two successive similar judgements were issued on this matter. One can guess that they constituted grounds for the President of the Supreme Administrative Court to file a motion to a bench of seven judges to adopt a resolution concerning the interpretation of the provisions on communisation of land.

The President of the Supreme Administrative Court in Warsaw asked the bench of seven judges of the Supreme Administrative Court to adopt a resolution in order to explain the debatable issue: "Does the fact that real property was at the PKP enterprise's disposal without the right documented in the way referred to in Article 38 para. 2 Act of 29 April 1985 on land management and expropriation of real estate (Journal of Laws [Dz.U.] No. 22, item 99, as amended) mean that on 27 May

³⁰ The Constitutional Tribunal judgement of 12 April 2005, K 30/03, OTK-A 2005, No. 4, item 35.

³¹ The Supreme Administrative Court judgement of 6 September 2010, I OSK 1401/09.

1990 the real property did not belong to the National Councils and territorial state administration bodies of the basic level in accordance with Article 5 para. 1 Act of 10 May 1990: Provisions implementing the Act on territorial self-governments and the Act on self-government employees (Journal of Laws [Dz.U.] No. 32, item 191, as amended)?”³²

On 27 February 2017, the Supreme Administrative Court answered the above question and the bench of seven judges adopted a resolution,³³ in which it confirmed that the fact that the real property was at the PKP enterprise’s disposal without the possession of a document granting the right concerned in the way referred to in Article 38 para. 2 Act of 29 April 1985 on land management and expropriation of real estate means that on 27 May 1990 the real property belonged to the National Councils or territorial state administration bodies of the basic level, in accordance with Article 5 para. 1 Communitisation Act. Thus, the Court confirmed the dominating opinion that land that was at the PKP enterprise’s disposal without the possession of documents confirming the right of management became *ex lege* the property of the communes concerned on 27 May 1990.

In the justification for the resolution, the Supreme Administrative Court indicated a series of arguments mainly connected with the analysis of legal acts developing the rules of functioning of the PKP enterprise starting with the Regulation of 1926 on the establishment of the PKP enterprise up to the establishment of a limited company called PKP S.A. based on the PKP Commercialisation Act.

Despite the fact that the Court indicated the land that was at a particular entity’s disposal, the content of the resolution also shapes a general opinion concerning the regulation of the rights to land possessed by other successors of state enterprises. Although it does not formally bind the public administration bodies,³⁴ it may constitute a tip for them on adjudicating on property rights.

The bench of seven judges starts the analysis of the issue presented by the President of the Supreme Administrative Court discussing the controversial phrase “belong to” used in Article 5 Communitisation Act. Using the term “belong to”, the Supreme Administrative Court refers to Article 6 para. 1 Act on land management and expropriation of real estate in the wording binding since 1 January 1988,³⁵ which stipulated that territorial state administration bodies managed land that was not subject to the right of management, usufruct or perpetual usufruct. From this provision, courts derive a general principle that land that was not allocated in the form laid down in law belongs to the National Councils and territorial state administration bodies of the basic level and, at the same time, treat the phrase as a legal term and not a factual one. The rules of giving enterprises property for management were then laid down in Article 38 para. 2 Act on land management

³² Motion of 27 October 2016 to the Supreme Administrative Court bench of seven judges to adopt a resolution, BO-4660-28/16, www.nsa.gov.pl.

³³ I OPS 2/16, CBOSA.

³⁴ R. Hauser, A. Skoczylas (ed.), *Postępowanie administracyjne i sądownoadministracyjne z kuzusami*, Wolters Kluwer, Warsaw 2016, p. 386.

³⁵ Article 6 in the wording of the Act of 16 July 1987 amending the Act: Housing law, Journal of Laws [Dz.U.], No. 21, item 124, which entered into force on 1 January 1988.

and expropriation of real estate, in accordance with which the acquisition of the right of management takes place in the form of a decision issued by a territorial state administration body, an agreement on property transfer between state organisational units or an agreement on acquisition of real property. Examining the provisions, the Supreme Administrative Court drew a conclusion that land, although in fact possessed and managed (in the sense of operations performed) by a state enterprise, could not be recognised as given to it for management if an enterprise did not possess the above-mentioned documents. Thus, the opinion of the Supreme Administrative Court means that in a legal sense the land did not belong to a state enterprise. Thus, it was subject to communisation.

With regard to the issue of methods and possibilities of transferring real property for management, the Supreme Administrative Court commented on the issue of deriving this right from general provisions determining the status of the PKP enterprise. The former dominating adjudications of administrative courts indicated that only a decision or another document referring to the given land confirms the recognition of management. There was no question of the right being recognised based on an abstract document, i.e. for example, statute if it did not specify the property concerned. However, the Supreme Court bench of seven judges adopted a resolution on 16 November 1990, III AZP 10/90, concerning public roads and stated that management of land occupied for public roads may be performed mainly based on general legitimisation laid down in statute concerning public roads. The Supreme Administrative Court drew similar conclusions with regard to railway land and in the resolution discussed confirmed that the establishment of the right of management could have taken place *ex lege*, and in such a situation it was not necessary for any administrative body to issue a decision, which should be assessed as a positive aspect of the resolution.

In the opinion of the Supreme Administrative Court, however, the problem is different in case of PKP. According to the Court's assessment, it results from the provisions of the Act of 1960 on railways³⁶ repealing the Regulation of 1926 on the establishment of the Polskie Koleje Państwowe enterprise, in accordance with which the enterprise was granted the right of management and usufruct over real property being at its disposal. Here, the Supreme Administrative Court notices, which was not stated in the Act on railways *expressis verbis*, the moment when the state enterprise lost its right to railway land. The Court decided that since the existence and maintenance of the right of management was not mentioned in the Act of 1960 on railways, the legislator's aim was to deprive the enterprise of this right. At the same time, in the Supreme Administrative Court's opinion, successive provisions concerning the railway enterprise did not grant the enterprise this right until 2000, i.e. until the PKP Commercialisation Act entered into force.

In its resolution, the Supreme Administrative Court also discussed the issue of negative conditions for communisation laid down in Article 11 Communisation Act and indicated that the exclusions could not be applied to railway land. It

³⁶ Act of 2 December 1960 on railways, Journal of Laws [Dz.U.] of 1960, No. 54, item 311, as amended.

decided that the PKP enterprise at that time did not perform public tasks within the competence of the government administration bodies and state administration bodies, and this property could not be recognised as belonging to state enterprises or organisational units performing national or higher than voivodeship-level tasks, because the enterprise was not contained in the Regulation CM of 1990.

The opinion expressed in the Supreme Administrative Court resolution is important from the point of view of confirming PKP rights to real property under the PKP Commercialisation Act. It is necessary to realise the fact that at the time when the principle of state property unity was in force, decisions concerning the right of management were not issued and in case of such enterprises like PKP using enormous real property resources, grounds for operations were mainly based on statutory provisions (regulations), which comprehensively regulated the enterprise's legal status. Such a situation was envisaged in the Bill on PKP commercialisation. That is why, the main provisions (Article 34) were based on the possibility of enfranchisement of PKP S.A. on the possessed land being the property of the State Treasury on 5 December 1990, even if the enterprise did not have documents confirming that it was granted the right of management, as it submitted a wide range of other types of evidence making it possible to prove the right to land. Thus, in case of communisation of land on 27 May 1990, the application of the enfranchisement provisions to PKP S.A. became impossible.

The above arguments constitute the main grounds for adjudication presented in the resolution of seven judges of the Supreme Administrative Court.

Up to now, the resolution of seven judges of the Supreme Administrative Court of 27 February 2017 has been only subject to a gloss of approval,³⁷ which has inspired a broader analysis of the issue. Undoubtedly, the analysis below will present an absolutely different assessment of the Supreme Administrative Court adjudication, which is decidedly critical.

The analysis of the resolution with respect to its adjudication, mainly the motives for conclusions, raise a question whether the adjudication is based on a complete analysis of the issue and whether it is in conformity with the legislator's intention expressed in the provisions of law. It is also worth assessing the method of interpreting provisions from the legal and systemic perspective. It is worth indicating the issues that were not analysed by the Court or were discussed in a cursory way, including, inter alia:

- the nature and legal grounds for enfranchisement of railway real property that constituted the property of the former PKP state enterprise, including especially inappropriate statements contained in the resolution with regard to the loss of property rights by PKP as a result of entry into force of the Act on railways of 1960;
- marginalisation of the importance of the Act of 1989 on PKP referring directly to the range of property that PKP possessed on the day when the Communisation Act entered into force;

³⁷ P. Nowakowski-Węgrzynowski, *Możliwość komunalizacji nieruchomości pozostających we władaniu PKP S.A. – glosa do uchwały składu 7 sędziów NSA z 27.02.2017 r., I OPS 2/16*, *Finanse Komunalne* No. 7–8, 2017.

- the legislator’s activities after 1990 aimed at PKP enfranchisement;
- principles of state property management: the range of property and legal grounds for developing inventory of property that was subject to communisation (Article 17 Communisation Act) and grounds for initiating proceedings (Article 17a Communisation Act);
- reasons for excluding real property from the communisation process.

Starting the analysis of the above-mentioned issues, it is necessary to decidedly negate the statement of the Supreme Administrative Court concerning the seeming loss of the right to land by PKP due to entry into force of the Act of 1960 on railways and, as a result, repealing of the Regulation of 1926 on PKP. The statement is wrong and its justification insufficient. The adjudication ignores documents and legal principles that directly indicate that it is not true that the legislator’s intention in 1960 was to deprive PKP of its right to railway real property.

Discussing legal acts in accordance with which Polskie Koleje Państwowe S.A. manages its property, it is necessary to start with the Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise. The following legal acts were: the Act of 2 December 1960 on railways and the Act of 27 April 1989 on the Polskie Koleje Państwowe state enterprise. The above-mentioned legal acts clearly indicate that the legislator’s intention was to make the railway property a separate part of the state property. The PKP enterprise was established in 1926 and was granted the right of management of all railway (movable and immovable) property.³⁸ The right of management was next changed into trust and usufruct based on the Regulation of the President of the Republic of Poland of 29 November 1930³⁹ introducing amendments to the Regulation of 1926. The Regulation of 1930 on PKP emphasises separateness of railway property by indication that PKP’s property transferred to this enterprise in trust and usufruct is separated from the property of the State Treasury. Trust was then changed into management due to the deletion of the term “trust” on 3 August 1948.⁴⁰ The aim of the Regulation of 1930 should be emphasised here, namely the separation of the railway property from the entire state property in order to ensure proper operation of the enterprise because of the importance of rail transport for the state economy and defence.

The Regulation of 1926 constituting grounds for the establishment of the Polskie Koleje Państwowe enterprise was in force, as it was rightly indicated in the justification for the resolution, till 1960, when the provisions of the Act on

³⁸ Article 3 Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise, Journal of Laws [Dz.U.] of 1926, No. 97, item 568.

³⁹ Regulation of the President of the Republic of Poland of 29 November 1930 amending and supplementing the Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise, Journal of Laws [Dz.U.] of 1930, No. 82, item 641.

⁴⁰ Article 1 para. 19 in conjunction with Article 4 Decree of 28 July 1948 amending the Regulation of the President of the Republic of Poland of 24 September 1926 on the establishment of the Polskie Koleje Państwowe enterprise, Journal of Laws [Dz.U.] No. 36, item 255.

railways entered into force.⁴¹ Analysing the act, however, it is necessary to indicate its completely different nature in comparison with the legal act of 1926. First of all, at the moment when the Act on railways entered into force, the PKP enterprise operated, managed and used movable and immovable property it had been given in 1926. The Act of 1960 did not change the legal status of the Polskie Koleje Państwowe state enterprise, assumed continuity of its operations, did not interfere into property rights granted to this enterprise and, what is most important in the context of the Supreme Administrative Court resolution of 27 February 2017, did not stipulate expiration of the rights acquired by the enterprise. The repealing of Regulation of 1926 on PKP did not result in the loss of the possessed rights by the enterprise. The confirmation of that can be additionally found in the wording of the Statute of the Polskie Koleje Państwowe enterprise adopted by means of the Resolution No. 189 of the Council of Ministers of 26 May 1961,⁴² the existence of which the Supreme Administrative Court ignored and which indicates that in order to perform its statutory operations, including transport, maintenance of buildings used for the purpose of rail transport, and protection of railway areas, PKP must possess immovable property allocated by the state. The content of the Statute directly indicates that the Act on railways did not interfere in the possession of property by PKP and assumed its continuity. Moreover, PKP may rent or lease fixed assets in accordance with the general rules obligatory for state enterprises. That is why, it is hard to accept the arguments presented in the justification for the resolution of the Supreme Administrative Court that the legislator's intention in 1960 during the introduction of the Act on railways was to deprive the PKP state enterprise of the right to railway land. In such a situation, in order to fulfil the provisions of the PKP Statute, it was necessary to establish a new range of rights to be granted to the enterprise, which did not happen; and as the Statute resulting from the directive contained in the Act of 1960 on railways states directly, the enterprise had already possessed fixed assets. Also the assumption that with the repeal of the Regulation of 1926 on PKP all the enterprise's property rights effectively acquired expired is groundless, especially in a situation when, at the same time, continuous operation of PKP was assumed and there are the provisions of the PKP Statute of 1961 mentioned above. The adoption of such interpretation by the Supreme Administrative Court is in direct contradiction to the principle of the protection of acquired rights.

The statement in the justification for the resolution of the Supreme Administrative Court that the 1960 repeal of the Regulation of 1926 on PKP caused that PKP lost its rights to the possessed property is, in my opinion, groundless and, first of all, unjustified and should be treated in a decidedly critical way. Similar conclusions concerning the statements in the resolution were indicated in the Supreme Administrative Court ruling of 21 June 2017, I OSK 2148/15⁴³. In this particular case, the bench referred a legal issue concerning communisation of railway real

⁴¹ Act of 2 December 1960 on railways, Journal of Laws [Dz.U.] of 1960, No. 54, item 311.

⁴² Resolution No. 189 of the Council of Ministers of 26 May 1961 on the adoption of the Statute of the Polskie Koleje Państwowe enterprise, Monitor Polski 1961, No. 47, item 210.

⁴³ Announcement of the Supreme Administrative Court's Adjudication Office No. 32/17 of 27 June 2017, www.nsa.gov.pl.

property for adjudication. Asking the question about the rights established in the Regulation of 1926 on PKP, the adjudicating bench indicates that these “rights were not terminated by any clear statutory provision (including especially on 8 December 1960 by whatever provision of the Act of 2 December 1960 on railways, Journal of Laws [Dz.U.] No. 54, item 311)”.

Indicating the legislator’s activities concerning granting the PKP enterprise property rights, it is necessary to refer to the content of Article 16 paras. 1 and 2 Act of 27 April 1989 on the Polskie Koleje Państwowe state enterprise in the wording that was in force also on the day when Communisation Act entered into force. It directly states that the property of PKP constitutes a separated part of the national property and contains resources at its disposal on the day of the Act’s entry into force and resources acquired by PKP in the course of its operations. Next, in para. 4, the legislator emphasised that PKP exercises all rights to property at its disposal. It is emphasised again that on the day of the Communisation Act’s entry into force, PKP possessed property in the form of real estate. Similarly to the Regulation of 1926 on PKP, the legislator highlights independent nature of railway property as separated from the national property.

Taking into consideration such PKP’s entitlements to manage property and emphasis on the fact that PKP’s property is a separated part of the national property, one cannot accept the approach presented in the Supreme Administrative Court resolution concerned, in accordance with which the provisions of the Act of 1989 on PKP were of no importance for the exclusion of this property from the process of communisation.

It is also hard to agree that the property that was really managed by the PKP state enterprise ever constituted property allocated to communes or that it was intended. It is also not possible to approve of the interpretation that, seemingly in accordance with Article 6 Act on land management and expropriation of real estate, there was a presumption of the existence of the right of management of railway real property granted to territorial state administration bodies. Article 6 stipulates that those bodies manage state-owned land that has not become subject to the right of management, usufruct or perpetual usufruct. It should be indicated that the term “manage” cannot be interpreted as granting the right of management, but the performance of management activities, i.e. maintenance, use or lease. The Polskie Koleje Państwowe state enterprise performed all these activities in relation to railway land. The provisions of the Act of 1989 on PKP directly indicate that PKP was legally obliged to maintain order and ensure security in railway areas. The railway enterprise managed residential estates that were at its disposal and was a party to apartment rent contracts. As it has been mentioned above, what was really important was the content of Article 16 Act on PKP that was in force on the day when the Communisation Act entered into force. It indicated that PKP’s property constitutes a separated part of the national property. This property constitutes resources being at PKP’s disposal on the day of the Act’s entry into force and resources acquired in the course of its operations. At the same time, PKP was obliged to ensure the protection of the possessed property and authorised to exercise any rights to property being at its disposal. This indicates that PKP could, just within the possessed rights, apply

the provisions of the Civil Code in order to protect its possessions. All these facts indicate that the PKP enterprise really managed railway real property and exercised all the rights in the way typical of an entity possessing the right to real property. Taking into account the above-mentioned provisions, which were not thoroughly analysed in the Supreme Administrative Court resolution, one should assume that the case law policy in accordance with which on 27 May 1990 railway property was managed by territorial state administration bodies of the basic level is not right.

Taking into account the fact that the Supreme Administrative Court bench of seven judges adopted the resolution after 27 years of the Communitisation Act being in force, it is also necessary to indicate the activities of the legislator, who developed legal regulations at the time in the way enabling the PKP enterprise, after the political transformation in Poland and the abolition of the principle of unity of the state property, as a result of commercialisation and restructuring, to acquire usufruct over the possessed land. The activities, although they undoubtedly have considerable significance for the issue, were very briefly discussed in the resolution. First of all, the resolution ignored the intention and aim of amendments to legal provisions concerning PKP enfranchisement, which were directly expressed in justification for the bills.

Restructuring of the railway property started on 5 December 1990 when the Act of 29 September 1990 amending the Act on land management and expropriation of real estate entered into force. In accordance with Article 2 of the Act, land constituting the property of the State Treasury or communes that on 5 December 1990 was subject to management of state legal entities other than the State Treasury became on that day *ex lege* subject to perpetual usufruct over that property. The legislator also decided on the method of acquisition of buildings raised on that land. It is necessary to indicate Article 42 of the Act of 6 July 1995 on the Polskie Koleje Państwowe state enterprise,⁴⁴ which supplemented the provisions and stipulated that the acquisition of buildings by PKP should be free of charge.

The introduction of the provisions of the Act on commercialisation, restructuring and privatisation of the Polskie Koleje Państwowe state enterprise was another step towards railway land enfranchisement.⁴⁵ The issue was regulated in Chapter 5 of this Act. Willing to present the legislator's intention, one should refer to the content of the justification for the Bill on PKP commercialisation, which although very brief, clearly indicates circumstances and the aim of its establishment. It reads: "Chapter 5 contains solutions that make it possible to regulate the legal status of land being the property of the State Treasury, which on 5 December 1990 was possessed by PKP, for which PKP does not have documents confirming its transfer in the form required by law".⁴⁶ The legislator was fully aware in 1999 that there are considerable shortages

⁴⁴ Act of 6 July 1995 on the Polskie Koleje Państwowe state enterprise, Journal of Laws [Dz.U.] of 1995, No. 95, item 474.

⁴⁵ Act of 8 September 2000 on commercialisation, restructuring and privatisation of the Polskie Koleje Państwowe state enterprise, Journal of Laws [Dz.U.] of 2000, No. 84, item 948, as amended.

⁴⁶ Sejm paper no. 1368 of 22 September 1999 presenting bills on commercialisation, restructuring and privatisation of the Polskie Koleje Państwowe state enterprise and on amendments to some acts with justification for them.

in archival documents concerning the right to real property and predicted that such documents might not exist at all, and the aim of the Act was the enfranchisement on the land that on 5 December 1990 was at PKP's disposal. It should be emphasised that such decisions were not issued in relation to most real property in that period, regardless of the fact that state enterprises managed that property before 1990. At that time, decisions on granting the right of management were not issued because, firstly, the rights of the PKP state enterprise were acquired *ex lege* and, secondly, such proceedings were often practiced because of the principle of the uniform fund of the state property. In the justification, the legislator did not indicate who the owner of railway land was on 5 December 1990, although in the text of the proposed provision of Article 32, it is stated that it is the State Treasury. It should be presumed that the legislator did not envisage then that communes might become owners of whichever railway property on 5 December 1990 and that there might occur a conflict with the Communisation Act. If there had been such an assumption, a rational legislator would have predicted it in the content of a provision.

The PKP Commercialisation Act with respect to enfranchisement eventually stipulates in Article 34 that "the land that is the property of the State Treasury that on 5 December was possessed by PKP, which did not have documents confirming that the land was transferred to the enterprise in the form required by law, and did not have them till the date when it was deleted from the register of state enterprises, shall become *ex lege* subject to PKP usufruct on the day of the Act's entry into force". The legislator also decided in what way the possession of land by PKP should be confirmed, which was laid down in the Regulation of the Council of Ministers⁴⁷. The act contains enumerative list of types of evidence indicating the possession of land, regardless of the lack of decisions granting the right of management.

The enfranchisement provisions of the PKP Commercialisation Act were amended in 2003.⁴⁸ The justification for the bill indicates that it is aimed, inter alia, at "accelerating the procedure of regulating the legal status of the land being part of railways in order to allocate it as a non-cash contribution to PKL S.A., by means of new legal instruments of organisation of property relations concerning this land analogous to regulations for real property occupied for public roads". Implementing the above, the legislator introduced Article 37a to the PKP Commercialisation Act, which concerns the acquisition of the land occupied by railways and constituting the property of entities other than the State Treasury, units of territorial self-government and PKP S.A., and Article 34a concerning railway property. The content of Article 34a PKP Commercialisation Act indicates that the legislator tried to intervene in communisation of railway property by stipulating that: "The land referred to in Article 34 is not subject to communisation on 1 June 2003, in accordance with the

⁴⁷ Regulation of the Council of Ministers of 3 January 2001 concerning the method of confirming that the Polskie Koleje Państwowe state enterprise possesses the land that is the property of the State Treasury, including documents constituting evidence in such cases, Journal of Laws [Dz.U.] of 2001, No. 4, item 29.

⁴⁸ Act of 28 March 2003 amending the Act on commercialisation, restructuring and privatisation of the Polskie Koleje Państwowe state enterprise and amending the Act on real property management, Journal of Laws [Dz.U.] of 2003, No. 80, item 720.

provisions of the Act of 10 May 1990: Provisions implementing the Act on territorial self-governments and the Act on self-government employees (Journal of Laws [Dz.U.] No. 32, item 191, as amended)". In addition, the provision of Article 5 of the Act implementing Article 34a laid down that cases concerning communisation of real property that were pending but did not finish before the Act entered into force were to be discontinued. However, the introduction of Article 34a was ineffective because of the interpretation presented by the Constitutional Tribunal in 2003,⁴⁹ which indicates that the provision is applicable to communisation performed on the motion of a commune filed in the mode of Article 5 paras. 3 or 4 Communisation Act and cannot be applied to proceedings concerning the acquisition *ex lege*, i.e. in the mode of Article 5 paras. 1 and 2 of the Act.⁵⁰ It should be emphasised, however, that the Constitutional Tribunal did not recognise Article 34a PKP Commercialisation Act to be in conflict with the Constitution of the Republic of Poland.⁵¹

Analysing the process of communisation of real property, which resulted from the establishment of commune self-governments and granting them legal status, inter alia, in accordance with the Act of 1990 on commune self-governments,⁵² it is necessary to indicate the provisions regulating the process as far as the substantial and procedural aspects are concerned, which was dealt with too briefly in the Supreme Administrative Court resolution. The substantive grounds for the acquisition of property *ex lege* by communes were thoroughly regulated in Article 5 paras. 1 and 2 Communisation Act. The principles of classification of property that should be subject to acquisition and detailed rules connected with the administrative procedure in this area were laid down in Articles 17, 18 and 20 of this Act.

In accordance with Article 5 paras. 1(1) to (3) Communisation Act, if other provisions do not stipulate otherwise, national (state) property belonging to the National Councils and territorial state administration bodies of the basic level and state enterprises for which those bodies are the founding ones or plants and other organisational units subordinate to those bodies, on the day of the Communisation Act's entry into force (27 May 1990), becomes *ex lege* the property of the communes concerned. Article 5 para. 2 concerns real property for public use belonging to the National Councils of Warsaw, Kraków and Łódź. The land that matched the criterion laid down in Article 5 para. 1, i.e. "belonging" to the National Councils and territorial state administration bodies of the basic level included one that was not transferred to other entities and subject to the right of management, usufruct or perpetual usufruct.⁵³ Pursuant to the directive laid down in Article 17 para. 1

⁴⁹ The Constitutional Tribunal judgement of 12 April 2005, K 30/03, OTK-A 2005, No. 4, item 35.

⁵⁰ M. Bednarek, a gloss on the Constitutional Tribunal judgement of 12 April 2005, K 30/03, Monitor Prawniczy No. 5, 2006, p. 264.

⁵¹ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dz.U.], No. 78, item 483, as amended. A different opinion can be found in P. Nowakowski-Węgrzynowski, *Możliwość komunalizacji...*

⁵² Act of 8 March 1990 on commune self-governments, Journal of Laws [Dz.U.] of 1990, No. 16, item 95, as amended.

⁵³ Article 6 Act of 29 September 1990 on land management and expropriation of real estate, Journal of Laws [Dz.U.] of 1987, No. 21, item 124.

Communisation Act, communes have been obliged to develop inventories of property that is subject to communisation. Inventory committees appointed by commune councils were to fulfil this aim. The inventories were to be available for 30 days to entities that might have legal interest in the established facts and could challenge them. The inventory committees were authorised to deal with potential complaints. Moreover, Article 17 para. 7 indicates the directive for the Council of Ministers on determining the method of taking inventories. The provisions of Articles 18 and 20 Communisation Act, on the other hand, lay down the competence of bodies conducting administrative proceedings concerning recognition of the acquisition of rights by communes and determine the nature and force of decisions concerning the acquisition of commune property.

For the needs of the present article, attention should be drawn to the significance and role of the inventories, which constituted the first step in the acquisition of property rights to real property by communes, the existence of which was practically ignored in the resolution. Detailed rules of taking them as well as instructions what type of property should be considered in the inventories were laid down in the "Instruction in methods of taking inventories of property that is subject to communisation", which was an annex to the Resolution No. 104 of the Council of Ministers of 9 July 1990⁵⁴ (repealed on 30 March 2001⁵⁵).

The Instruction thoroughly determined what type of property should be subject to communisation and what is excluded from the process. It also contained rules and methods of inventory committees' work and provided specimens of inventory documents and annexes. In case of real property, it was a copy of a cadastre map with a marked area subject to communisation. An inventory form should contain data of real estate, information about buildings, constructions and facilities situated there, information whether and who was granted the right of management, usufruct or perpetual usufruct over it as well as the value by land and buildings. In addition, the Instruction provided the specimen of a competent voivode's decision stating the acquisition *ex lege* of real property by a given commune free of charge. The justification for the decision should contain details concerning the inventory taken, including complaints and claims to the property filed during the former stage. Speaking about the inventories, one should not ignore their important role played in the entire process. As the Supreme Administrative Court indicated, "the provisions of Article 17 paras. 1 and 4 to 6 Communisation Act do not admit arbitrariness of the inventory proceeding mode and they do not envisage a possibility of abandoning the regulated proceeding mode. Before issuing a communisation decision, a competent voivode is obliged to check whether the proceeding inventory mode laid down in statute has been applied".⁵⁶

⁵⁴ Resolution No. 104 of the Council of Ministers of 9 July 1990 concerning the methods of taking inventories of public property, Monitor Polski 1990, No. 30, item 235.

⁵⁵ In accordance with Article 75 para. 2 of the Act of 22 December 2000 amending some types of statutory authorisations to issue normative acts and amending some acts, Journal of Laws [Dz.U.] of 2000, No. 120, item 1268.

⁵⁶ The Supreme Administrative Court judgement of 30 July 1998, I SA 125/98, LEX No. 45039.

Analysing the Instruction, although the legal act is no longer in force, which was applied in the period of taking the inventories and thoroughly determined what type of property was subject to communisation, one cannot agree with the opinion that property belonging to the PKP state enterprise should have been subject to inventory.

It is necessary to quote and analyse directives laid down in the Instruction, Part III, item 2(1), which obviously, due to their content, cannot be recognised as ones concerning railway property. Pursuant to the above-mentioned directives, the inventories of the state property subject to communisation *ex lege* (Article 5 para. 1(1) Communisation Act) should list the state land, i.e. the land referred to in Article 6 and Article 13n Act on land management and expropriation of real estate. Article 13 indicates land resources intended for building towns and villages, especially residential buildings. On the other hand, Article 6 indicates the state land that was not subject to the right of management or perpetual usufruct and, thus, was managed by territorial state administration bodies. As everybody knows, railway land was not intended for the purpose of building houses and the land was transferred to the PKP enterprise for management, which resulted directly from the legal acts regulating its establishment and operation.

It should be emphasised that, in accordance with the above-mentioned Instruction, the property of PKP was not subject to inventory and the enterprise was not obliged to produce a balance sheet of its property as in case of enterprises the property of which was subject to communisation. The state enterprises' obligation to produce a balance sheet of property subject to communisation was laid down in §2 Resolution No. 104.

The above analysis clearly shows that the legislator's intention was different from the one the Supreme Administrative Court assumed with respect to railway land communisation. The fact that the Court totally ignored this issue means that it adopted a selective approach to the problem of land communisation.

The provisions of the Communisation Act in the area of taking inventories and stating the acquisition of property by communes *ex lege* were aimed at fast and full regulation of the rights to real property. However, the process has not been in fact completed up to now. The problem was noticed, inter alia, in 2003, when legislative work was undertaken in order to discipline communes in the field of taking the inventories. The justification for the amendments indicated that the situation when there is no decision concerning the owner of land (a commune or the State Treasury) constitutes a considerable obstacle to property management and managerial decision-taking. It was indicated that the reason for that could be found in communisation provisions, which require that an inventory should be taken and submitted before a voivode's decision is issued. Thus, a deadline for the process was proposed: at first it was to be 31 December 2004, and eventually the date 31 December 2005 was set. In case inventories were not taken to that deadline, voivodes were to have a possibility of initiating communisation proceedings without inventories. It should be emphasised that the author of the proposal indicated that the provision was to provide a possibility of initiating proceedings and not to create an obligation to initiate them.⁵⁷

⁵⁷ Sejm paper no. 1421 of 12 March 2003 presenting the Bill amending the Act on real property management and some other acts.

The amendment to the provisions presented above took place on 22 September 2004, when the provision of Article 17a added by means of Article 3 Act of 28 November 2003 amending the Act on land management and some other acts entered into force.⁵⁸ In accordance with Article 17a, in case of real property that was not contained in the inventories taken by communes concerned and submitted to voivodes until 31 December 2005 but became communes' property pursuant to Article 5 paras. 1 and 2 Communitisation Act, a voivode initiates proceedings *ex officio* to confirm the acquisition of the right to real property by a commune, as it was laid down in the provision introduced eventually. The amendment caused initiation of a series of communitisation proceedings, inter alia, concerning railway land that communes have never possessed and, moreover, which has never met the criteria laid down for the inventories taken for the purpose of communitisation.

As it was pointed out above, originally, property listed in the inventories, the taking of which was thoroughly regulated by the legislator, was to be subject to communitisation. The rules of taking them enabled entities involved to take active part in the administrative proceedings from this very stage. Despite that, as a result of amendments to the Communitisation Act, since 2006 the range of real property that is subject to communitisation proceedings initiation has been extended, for which there is no justification whatsoever. Since then, some voivodeship authorities have been initiating communitisation proceedings concerning most real property that is claimed by entitled enterprises filing enfranchisement motions. These activities result from the wrong interpretation of Article 17a para. 3 Communitisation Act, pursuant to which a voivode initiates communitisation proceedings *ex lege* in every case when it is probable that the land of the State Treasury became commune land *ex lege* on 27 May 1990. In practice, some authorities do not examine in the course of the proceedings whether such a probability occurs. The interpretation does not take into consideration the aspect of the purpose of the provision at all. As it was rightly indicated in the Supreme Administrative Court judgement, the aim of the introduction of the provision of Article 17a Communitisation Act was to accelerate the process of communitisation of property being at communes' disposal but communes failed to undertake activities connected with its acquisition.⁵⁹ The presented opinion is totally the same as the justification for the bill introducing the discussed provision. In practice, however, the provision is also applied to the land that has never been at the disposal of territorial state administration bodies of the basic level and next at communes' disposal.

The issue of railway land communitisation before the above-described amendment to the provisions of the Communitisation Act in 2004, when Article 17a was introduced, was considerably less important. It resulted from the fact that communes did not list this property in inventories taken for the purpose of communitisation because they did not possess it and, with some exceptions, did not claim the right to its acquisition. Groundless claims to land within the communitisation process since 1 January 2006

⁵⁸ Journal of Laws [Dz.U.] of 2004, No. 141, item 1492.

⁵⁹ Judgement of the Voivodeship Administrative Court in Warsaw of 11 September 2006, I SA/Wa 797/06, CBOSA.

(initiation of proceedings *ex officio* pursuant to Article 17a Communitisation Act) have caused serious obstacles to the implementation of the process of state enterprises' land enfranchisement.

Summing up, the provision of Article 17a Communitisation Act caused initiation of communitisation proceedings concerning land not listed in the inventories and the range of this land has not been limited in any way. As a result of this inappropriate approach, communitisation is initiated, regardless of whether given real property has ever been at a commune's disposal (managed by it) and whether the property should be listed in the inventories of property that is subject to communitisation. The above conclusion indicates that today's interpretation and application of the provisions of the Act are far from matching the legislator's intention.

The above-mentioned provisions directly concerning determination of the type of property that was subject to communitisation were not analysed by the bench of seven judges of the Supreme Administrative Court, although this is of great importance for the discussed issue.

Indicating the interpretation of the provisions of Article 17a Communitisation Act in the context of railway real property, it is necessary to point out a wide range of real property that was subject to this process. We deal with communitisation of land where there are railway stations and apartment buildings as well as railways that are important for the state. It leads to the regulation of rights to the railway real property in a way that is different from one that the legislator originally assumed, and this makes particular parts of railways become the property of independent entities, which should be recognised as absurd.

It is also worth mentioning the negative conditions for communitisation laid down by the legislator. It is necessary to point out Article 11 para. 2 Communitisation Act, in accordance with which the property belonging to state enterprises or organisational units performing national or higher than voivodeship-level tasks are not to be subject to communitisation. The provision also contains a directive for the Council of Ministers on issuing a relevant regulation determining enterprises concerned. As the Supreme Administrative Court stated in its resolution, the exclusion of the railway enterprise's property from the communitisation process was not ensured in the Regulation of the Council of Ministers of 1990, which is not an unintentional solution, though. It should be emphasised that the provision of Article 11 para. 1(2) directly concerns property components referred to in Article 5 para. 1(2). This provision stipulates exclusion of property belonging to state enterprises for which the National Councils or territorial state administration bodies play the function of their founding bodies or organisational units performing national or higher than voivodeship-level tasks. This means that the list of enterprises contained in the Regulation CM of 1990 does not concern national enterprises subordinate to central administration bodies, and the PKP state enterprise was one. The above fact indicates that since PKP was an enterprise for which the Minister of Transport, Shipping and Communications, a central administration body, was a founding entity, PKP's property did not match any of the criteria under Article 5 paras. 1 to 3 Communitisation Act. Thus, also Article 11 para. 1(2) could not refer to it so, rightly, it could not be listed in the Regulation CM of 1990. In addition, railway property,

as a rule, was not intended to be subject to communisation and, that is why, it was not listed in the Regulation.

It is also hard to approve of the opinion expressed in the Supreme Administrative Court resolution that the railway property did not serve the purpose of performing public tasks within the competence of state administration or state authority bodies and was not excluded from the process pursuant to Article 11 para. 1 Communisation Act, even if one recognised, although inappropriately, that it could be subject to communisation. Providing arguments for inappropriateness of the stand presented in the Supreme Administrative Court resolution, it is necessary to indicate that rail transport unquestionably constitutes the implementation of public objectives and the Polskie Koleje Państwowe enterprise undoubtedly was a state enterprise covering the whole country, i.e. was an enterprise operating at the nationwide level. A competent minister, i.e. a central authority, was PKP founding body, which results directly from the legal acts that established the enterprise. The fact that, as Article 11 para. 1 Communisation Act stipulates, the performance of rail transport tasks was within the competence of the Minister of Transport and Maritime Economy is then confirmed in the provisions based on which the office of the Minister of Transport and Maritime Economy was founded.⁶⁰

Providing arguments for the above, it is also necessary to refer to the provisions concerning PKP that were binding on the day when the Communisation Act entered into force. The Act of 27 April 1989 on the Polskie Koleje Państwowe state enterprise laid down obligations and rights of PKP, including, inter alia, the domestic and international transport of people and cargo by rail of public use in order to meet the needs of the public and national economy as well as the state defence and security (Article 1), and tasks resulting from the provisions on the common obligation to defend the Polish People's Republic (PRL), including military transport and preparation of the railways for the needs of the state defence (Article 7). Moreover, PKP organisational units were entitled to use the emblem of PRL and official stamps with the image of the eagle from the emblem and the enterprise title in the ring (Article 4). It is also important that the Act contained the list of tasks of the state administration that PKP was obliged to perform (Article 8). At that time, the Minister of Transport, Shipping and Communications supervised PKP's operations.

Adjudication on the issue indicated in the question asked by the President of the Supreme Administrative Court may constitute a crucial comment on communisation of the property, which, as it has been described above, for almost 90 years has been railway property possessed by the state enterprise. The activity may result in depriving the State Treasury of its rights and, with regard to the arguments presented above, it is hard to assume that the legislator intended that when developing the structures of commune self-governments. Groundless communisation of the property that is possessed by PKP totally negates the adopted statutory solutions connected with the implementation of the process of commercialisation of the enterprise and is against the adopted solutions within the state transport policy.

⁶⁰ Article 3 para. 3 of the Act of 1 December 1989 on the establishment of the office of the Minister of Transport and Maritime Economy, Journal of Laws [Dz.U.] of 1989, No. 67, item 407.

In this situation, one can risk a statement that the adopted resolution is in conflict with the interest of the State Treasury and inconsistent with the systemic and logical interpretation of provisions. Recognition that the Polskie Koleje Państwowe state enterprise's management, despite the lack of documents referred to in Article 38 para. 2 Act of 29 April 1985 on land management and expropriation of real estate, is equivalent to the fact that the real property belonged to the National Councils and territorial state administration bodies of the basic level constitutes the negation of the legislator's intention adopted when the provisions determining PKP operations were introduced in order to change property relations in 1990.

The way of drawing inferences ignores a series of important legal acts that directly prove that the statements about the legislator's intentions to deprive the PKP enterprise of the right to land in 1990 are not true. The legislator was aware that there were problems with archival documents concerning PKP and undertook a number of steps aimed at regulating the situation. As it has been pointed out in the present article, this results directly from the provisions concerning PKP as well as the content of the justification for their introduction. Therefore, the resolution directly negates the principle of the rational legislator who wanted PKP to possess property rights to railway property, which results from the provisions on enfranchisement of the property of the former state enterprise. With such an assumption, the provision of Article 34 PKP Commercialisation Act, because of the lack of the basic condition for the State Treasury property, becomes a subjectless regulation. The Court completely forgets about the principle of the rational legislator in its resolution.

It is also hard to approve of the statement that the legislator has ever intended to communise this property and this is what the Supreme Administrative Court resolution indirectly suggests. The provisions concerning PKP operations as well as the Communisation Act's implementation provisions concerning taking inventories are the proof of that.

The Supreme Administrative Court resolution is abstract in nature, which causes that it is binding on adjudicating benches of administrative courts, however, not absolutely. This means that in case of a lack of approval of the opinion, there is a possibility of referring a prejudicial question to a competent bench of the Supreme Administrative Court,⁶¹ which creates a possibility of "overruling the binding resolution".⁶²

Finally, it is worth referring to loud comments that have been made since the resolution was adopted. It is argued that self-governments were given opportunities connected with communisation of land to acquire additional financial resources from fees for perpetual usufruct over railway land. However, what is forgotten are the provisions of the Act on rail transport,⁶³ which directly stipulates that railway land is exempt from those fees.

⁶¹ Article 269 §1 of the Act of 30 August 2002: Law on the proceedings before administrative courts, Journal of Laws [Dz.U.] of 2017, item 1369.

⁶² R. Hauser, A. Skoczylas (ed.), *Postępowanie administracyjne...*, p. 387.

⁶³ Article 8 of the Act of 28 March 2003 on rail transport, Journal of Laws [Dz.U.] of 2016, item 1727.

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COMMUNISATION OF STATE PROPERTY AND PKP PROPERTY

ENFRANCHISEMENT: COMMENTS ON THE SUPREME

ADMINISTRATIVE COURT RULING OF 27 FEBRUARY 2017, I OPS 2/16

Summary

The article deals with the legal issue concerning the acquisition of public property by communes and the enfranchisement of the Polskie Koleje Państwowe state enterprise, which resulted from the transformation of property relations in Poland after 1989. The differences in administrative courts case law concerning the issue led to a solution provided by the Supreme Administrative Court bench of seven judges, which adopted a resolution of 27 February 2017, I OPS 2/16, and pointed out that possessing real property by the PKP state enterprise without the right documented in the way referred to in Article 38 para. 2 Act of 29 April 1985 on land management and expropriation of real estate (Journal of Laws [Dz.U.] No. 22, item 99, as amended) means that on 27 May 1990 the real property belonged to the National Councils and territorial state administration bodies of the basic level, in accordance with Article 5 para. 1 Act of 10 May 1990: Provisions implementing the Act on territorial self-governments and the Act on self-government employees (Journal of Laws [Dz. U.] No. 32, item 191, as amended). The content of the resolution, first of all the motives for drawing conclusions, inspired the author to ask a question whether the adopted resolution is based on a complete analysis of the issue and whether it is in conformity with the legislator's intention expressed in the provisions of law. The author presents a short

outline of the history of property relation transformations in Poland connected with the abolition of the principle of the uniform fund of state property and the separation of property, especially with regard to the provisions concerning the acquisition of property rights by PKP. He presents two case law approaches that made the President of the Supreme Administrative Court ask a legal question. Next, the author presents the Supreme Administrative Court stand contained in its resolution and issues that, in his opinion, raise doubts. He analyses them, inter alia, based on the content of legal acts, justification to bills and case law. The conducted analysis indicates that, in the author's opinion, the adopted resolution is based on a cursory analysis of the examined issue and does not take into account the aspect of the purpose of the enfranchisement provisions. As a result, the article has the form of a critical gloss.

Keywords: enfranchisement, communisation, PKP, perpetual usufruct, transformations of property relations

KOMUNALIZACJA MIENIA PAŃSTWOWEGO ORAZ UWŁASZCZENIE PKP – UWAGI NA KANWIE UCHWAŁY NACZELNEGO SĄDU ADMINISTRACYJNEGO Z DNIA 27 LUTEGO 2017 R., SYGN. AKT I OPS 2/16

Streszczenie

Prezentowany artykuł odnosi się do zagadnienia prawnego związanego z nabywaniem mienia komunalnego przez gminy i uwłaszczeniem przedsiębiorstwa państwowego Polskie Koleje Państwowe, co było następstwem przekształceń własnościowych w Polsce po 1989 r. Rozbieżności w orzecznictwie sądów administracyjnych w powyższym zakresie stały się asumptem do podjęcia rozstrzygnięcia przez skład siedmiu sędziów Naczelnego Sądu Administracyjnego, który w uchwale z dnia 27 lutego 2017 r. (sygn. akt I OPS 2/16) wskazał, że pozostawanie nieruchomości we władaniu przedsiębiorstwa państwowego PKP bez udokumentowanego prawa w sposób określony w art. 38 ust. 2 ustawy z dnia 29 kwietnia 1985 r. o gospodarce gruntami i wywłaszczaniu nieruchomości (Dz.U. Nr 22, poz. 99 ze zm.) oznacza, że nieruchomość ta należała w dniu 27 maja 1990 r. do rad narodowych i terenowych organów administracji państwowej stopnia podstawowego w rozumieniu art. 5 ust. 1 ustawy z dnia 10 maja 1990 r. Przepisy wprowadzające ustawę o samorządzie terytorialnym i ustawę o pracownikach samorządowych (Dz.U. Nr 32, poz. 191, ze zm.). Treść uchwały, a przede wszystkim motywy wniosku, skłoniły autora do postawienia pytania, czy podjęte rozstrzygnięcie oparte jest na pełnej analizie zagadnienia oraz czy jest ono zgodne z intencją ustawodawcy wyrażoną w przepisach prawa. Autor w swoim opracowaniu przedstawił krótki rys historyczny przemian własnościowych w Polsce, związanych ze zniesieniem zasady jednolitego funduszu własności państwowej i rozdziału majątku, ze szczególnym uwzględnieniem przepisów dotyczących nabywania praw majątkowych przez PKP. Wskazał dwie linie orzecznicze, które skłoniły Prezesa NSA do postawienia pytania prawnego. W dalszej części autor zaprezentował stanowisko Naczelnego Sądu Administracyjnego zawartego w uchwale oraz zagadnienia budzące jego wątpliwości, które następnie zostały szczegółowo przeanalizowane m.in. w oparciu o treść aktów prawnych, uzasadnienia do projektów ustaw oraz orzecznictwo. Przeprowadzona analiza wskazuje zdaniem autora, że podjęta uchwała oparta jest na pobieżnej analizie badanego zagadnienia oraz nie uwzględnia aspektu celowościowego przepisów uwłaszczeniowych. Powyższe skutkowało tym, że artykuł przybrał formę glosy krytycznej.

Słowa kluczowe: uwłaszczenie, komunalizacja, PKP, użytkowanie wieczyste, przemiany własnościowe

Cytuj jako:

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