STUDIA PRAWNICZE KUL
3 (95) 2023

The principles of issuing a crucial decision (selected problems)

Zasady wydawania decyzji zasadniczej (zagadnienia wybrane)
Принципы выдачи фундаментального решения (избранные вопросы)
Принципи видачі основного рішення (вибрані питання)

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Summary: The erection and commissioning of a nuclear power plant requires a number of administrative procedures. At the same time, in the majority of cases, it concerns proceedings that are mainly regulated outside the provisions on nuclear energy, and thus have already been discussed many times in the doctrine (e.g. cases regarding the building permit).

Against the background of the above, the procedure for issuing a crucial decision stands out. This is because this decision is not present outside the regulations concerning nuclear energy. However, it should be noted that the decision in question is of key importance as far as the possibility of starting the construction and operation of nuclear power is concerned. Thus it is surprising that the manner in which this ruling is regulated does not allow for determining such basic issues as the character of the crucial decision or the premises for issuing it. The goal of this study is to solve these dilemmas. The adopted research method is the dogmatic and legal method.

On the basis of the conducted analysis, it was established that in the current legal status, the crucial decision is of a binding nature, and the premises for its issuance are included in Article 22 Section 3 of the Act of 29 June 2011 on preparing and implementing investments in the field of nuclear power facilities and accompanying investments. It should be added that the presented results of the interpretative analysis are inconsistent with the position of the doctrine. In the literature, it is assumed that the crucial decision has a discretionary ('political') character. Moreover, the wording of the aforementioned act does not specify the conditions for issuing a crucial decision. Instead, it is suggested to look for them within the so-called legislative materials.
Key words: a crucial decision, a nuclear power plant, administration's discretion

Streszczenie: Zbudowanie i uruchomienie elektrowni jądrowej wymaga przeprowadzenia szeregu postępowań administracyjnych. Znakomita większość z nich została uregulowana poza prawem jądrowym, a w związku z tym wielokrotnie stanowiły one przedmiot analiz doktryny (np. postępowanie w sprawie wydania pozwolenia na budowę).

Na tle powyższego wyróżnia się procedura dotycząca wydawania decyzji zasadniczej. Dzieje się tak dlatego, że decyzja ta nie występuje poza regulacjami dotyczącymi energetyki jądrowej. Należy podkreślić, że przedmiotowa decyzja ma kluczowe znaczenie dla możliwości rozpoczęcia budowy i eksploatacji energetyki jądrowej. Może więc dziwić fakt, że sposób uregulowania tego rozstrzygnięcia nie pozwala na ustalenie tak podstawowych kwestii, jak charakter rzeczonej decyzji czy też przesłanki jej wydania. Celem badania jest rozwiązanie tych dylematów. Przyjętą metodą badawczą jest metoda dogmatyczno-prawna.

W toku analizy ustalono, że w obecnym stanie prawnym decyzja zasadnicza ma charakter związany, a przesłanki jej wydania zawiera art. 22 ust. 3 ustawy z dnia 29 czerwca 2011 r. o przygotowaniu i realizacji inwestycji w zakresie obiektów energetyki jądrowej oraz inwestycji towarzyszących. Należy dodać, że przedstawione wyniki analizy interpretacyjnej są niezgodne ze stanowiskiem doktryny. W literaturze przyjmuje się bowiem, że decyzja zasadnicza ma charakter uznaniowy („polityczny"), a treść ww. ustawy nie precyzuje przesłanek wydania kluczowej decyzji. Zamiast tego sugeruje się poszukiwanie ich w tzw. materiałach legislacyjnych.
Słowa kluczowe: kluczowa decyzja, elektrownia jądrowa, uznanie administracji

ISSN: 1897-7146; eISSN: 2719-4264;
https://doi.org/10.31743/sp.14978

Резюме: Строительство и ввод в эксплуатацию атомной электростанции требует выполнения ряда административных процедур. Подавляющее большинство из них регулируется вне рамок ядерного права и, как таковое, неоднократно становилось предметом доктринального анализа (например, процедура выдачи разрешения на строительство).

На фоне вышесказанного выделяется процедура выдачи фундаментального решения. Это связано с тем, что данное решение не существует вне нормативных актов по атомной энергетике. Следует подчеркнуть, что это решение является решающим для возможности начала строительства и эксплуатации атомной энергетики. Поэтому может вызвать удивление, что порядок регулирования данного решения не позволяет определить такие основные вопросы, как природа данного решения или предпосылки для его принятия. Данное исследование направлено на разрешение этих дилемм. В качестве метода исследования принят догматико-правовой метод.

В ходе анализа было установлено, что в современном правовом государстве фундаментальное решение носит обязательный характер, а предпосылки для его выдачи содержатся в статье 22.3 закона от 29 июня 2011 года «О подготовке и осуществлении инвестиций в объекты атомной энергетики и сопутствующие инвестиции». Следует добавить, что представленные результаты интерпретационного анализа не согласуются с позицией доктрины. Действительно, в литературе предполагается, что фундаментальное решение носит дискреционный («политический») характер, а содержание вышеупомянутого закона не определяет предпосылки для принятия ключевого решения. Вместо этого предлагается искать их в так называемых законодательных материалах.
Ключевые слова: ключевое решение, атомная электростанция, усмотрение администрации

Резюме: Будівництво та введення в експлуатацію атомної електростанції потребує низки адміністративних процедур. Переважна більшість із них регулювалася поза ядерним законодавством, і тому вони неодноразово були предметом доктринального аналізу (наприклад, провадження щодо видачі дозволу на будівництво).

На фоні викладеного виділяється провадження щодо винесення основного рішення. Це пояснюється тим, що це рішення не виходить за межі нормативних актів щодо атомної енергетики. Слід підкреслити, що дане рішення має ключове значення для можливості початку будівництва та експлуатації атомної енергетики. Тому здивування може викликати факт, що спосіб регулювання цієї проблеми не дозволяє визначити такі принципові питання, як характер зазначеного рішення чи підстави для його винесення. Метою дослідження є вирішення цих дилем. Застосованим методом дослідження є догматично-правовий метод.

У ході аналізу встановлено, що в чинному правовому статусі основне рішення є обов'язковим, а передумови для його винесення містяться у ст. 22 абз. 3 Закону від 29 червня 2011 року про підготовку та здійснення інвестицій в плані об'єктів ядерної енергетики та супутніх інвестицій. Слід додати, що наведені результати інтерпретаційного аналізу не відповідають позиції доктрини. У літературі передбачається, що основне рішення має дискреційний («політичний») характер, а зміст згаданого вище Закону не визначає умов видачі ключового рішення. Натомість пропонується шукати їх у т. зв. законодавчих матеріалах.
Ключові слова: ключове рішення, атомна електростанція, дискреційність адміністрації

Introduction

The first nuclear reactor was created more than two billion years ago.[1] Obviously the functionality of this first reactor was based on the forces of nature with water

1 P. Ball, *Ancient Nuclear Power Controlled by Water*, Nature 2004.

acting as a peculiar driving force and 'a neutron moderator'[2] which enabled development of appropriate chain reactions.[3] Interestingly this ancient nuclear reactor was discovered as late as in 1972,[4] i.e. less than 20 years after launching the first human-built nuclear power plant.[5] In this context it is prudent to take note that operations of both this particular human-built nuclear reactor and its contemporary[6] counterparts require, similarly to the aforementioned 'ancient nuclear power plant,' utilizing water.[7] On these grounds we may state that the act of humans turning to nuclear energy is a specific reference to operations of nature and, consequently, a repeat of the natural processes. Despite that generating atomic energy is plagued with bad publicity.[8] On one hand it is a result of inevitably associating nuclear power plants with an atomic bomb[9] and on the other hand with the fear of nuclear power plant disasters.[10] In the Polish context we should mention suspending works on erecting a domestic nuclear power plant as a consequence of e.g. numerous public protests.[11]

Taking the above facts into consideration we must make note that currently public reception of nuclear power plants is changing.[12] Along with the shift in public perception the policies of Polish state are also changing as evidenced by e.g. adopting the Resolution no. 114 of 2 October 2020 regarding updating the

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2 A. Meshlik, *The Workings of an Ancient Nuclear Reactor*, Scientific American 2005, no. 293 (5), pp. 35 ff.

3 Ibidem.

4 More on the subject: J.C. Kotz, P.M. Treichel, J. Townsend, D. Treichel, *Chemistry & Chemical Reactivity*, Stamford 2014, pp. 975 ff.

5 The first nuclear power plant was erected in 1954 in USSR, L.S. Johns et al. (International Security and Commerce Program of the Office of Technology Assessment Team), *Technology and Soviet Energy Availability*, Washington 1981, p. 111.

6 "This plant […] operated for almost 50 years. Its final shutdown was on April 29, 2002."

7 More on the subject: L.-J.Li, G.-Y. Qiu, C.-H. Yan, *Relationship between Water Use and Energy Generation from Different Power Generation Types in a Megacity Facing Water Shortages: A Case Study in Shenzhen*, Water 2022, no. 14 (20); E.V. Giusti, E.L. Meyer, *Water Consumption by Nuclear Powerplants and Some Hydrological Implications*, Geological Survey Circular 1977, no. 745.

8 See: A.-S. Hacquin, S. Altay, L. Aarøe, H. Mercier, *Fear of Contamination and Public Opinion on Nuclear Energy*, PsyArXiv2020, https://psyarxiv.com/wdvuq/ [access: 25.11.2022].

9 See: J. Baron, S. Herzog, *Public Opinion on Nuclear Energy and Nuclear Weapons: The Attitudinal Nexus in the United States*, Energy Research & Social Science 2020, vol. 68.

10 See: N. Watts, *'Deconstructing Chernobyl' – The Meaning and Legacy of Chernobyl for European Citizens*, in: *Atomkraft als Risiko: Analysen und Konsequenzen nach Tschernobyl*, eds. L. Mez, L. Gerhold, G. de Haan, Frankfurt am Main 2010, p. 53.

11 See: J. Waluszko, *Protesty przeciwko budowie elektrowni jądrowej Żarnowiec w latach 1985–1990*, Warszawa 2013.

12 *Poparcie społeczne dla budowy elektrowni jądrowej w Polsce – badania z listopada 2020 r. (62,5% of Poles is in Favour of Erecting Nuclear Power Plants in Poland)*, https://www.gov.pl/web/klimat/poparcie-spoleczne-dla-budowy-elektrowni-jadrowej-w-polsce---badania-z-listopada-2020-r. [access: 24.11.2022].

"Polish Nuclear Energy Programme"[13] multiannual plan which projects e.g. putting two nuclear power plants into operation by 2043.[14] Obviously such plans require preparing appropriate legal 'implements'.

The regulations regarding nuclear power are primarily contained within the Nuclear Power Law Act of 29 November 2000[15] (hereinafter: the Nuclear Power Law) and in the Act of 29 June 2011 on preparing and realizing investments in the field of nuclear power facilities and supporting investments[16] (hereinafter: the special purpose act on nuclear power). The issues regarding erecting a nuclear power plant were primarily included in the latter act. The contents of the special purpose act on nuclear power indicate a number of resolutions which have to be issued prior to putting a nuclear power plant into operation. In this context the fact that a separate chapter was devoted solely to a single decision draws attention. We mean the so called crucial decision indicated in chapter three of the special purpose act on nuclear power. Securing this resolution is a prerequisite for applying for issuing a permit regarding erecting a nuclear power plant.[17] On this basis we may adopt that according to the legislator a crucial decision is of particular significance. Therefore the minimalism of the regulations referring to a crucial decision is surprising. The issue consists of encapsulating the entirety of the regulations in merely two editorial units combined with the simultaneous lack of indication of the freedom of operations of a body issuing a crucial decision. Thus a view emerged in the doctrine in relation to the above according to which the premises for issuing a ruling related to this matter should be sought outside of the statutory text.[18] In the light of the aforementioned importance of crucial decisions the invoked statement may rise doubts.

Taking the aforementioned facts into consideration it has been adopted that the goals of this study consist of determining the character of a crucial decision and the premises for issuing it. Furthermore, in speaking of the character of this resolution, we are interested in determining whether it is a constrained decision or an arbitrary decision. In turn, the opinion invoked hereinabove will serve as a reference point.

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13 Monitor Polski 2020 item 946.

14 Ibidem, p. 28.

15 Consolidated text: Journal of Laws [Dziennik Ustaw] 2023 item 1173.

16 Consolidated text: Journal of Laws 2021 item 1484.

17 Article 22 of the special purpose act on nuclear energy.

18 Ł. Młynarkiewicz, *Decyzja zasadnicza w procesie przygotowania i realizacji inwestycji w zakresie obiektów energetyki jądrowej*, Sopot 2020, p. 166.

1. A nuclear power plant

In the introduction we should explain that the contents of both the Nuclear Power Law and the special purpose act on nuclear power discuss, respectively, a nuclear facility and a nuclear power plant. The legal definitions of both these objects consist of listing individual structures related to nuclear power. Simultaneously we must explain that both mentioned concepts do not possess the same meaning, not only as a result of a ban on synonymous interpretation, but also as a result of wording of, respectively, Article 3 point 17 of the Nuclear Power Law and Article 2 point 2 of the special purpose act on nuclear power.

On the grounds of the contents of the invoked provisions we must indicate that both a nuclear facility and a nuclear power plant cover such common structures as a nuclear power plant. an isotopic enrichment facility, a nuclear fuel manufacturing plant, a spent nuclear fuel treatment plant, a spent nuclear fuel storage facility and a facility for storing radioactive wast. In turn the difference between a nuclear power plant and a nuclear facility consists of the latter also covering a research reactor and the fact that a uranium and thorium ore excavation and preliminary processing plants are also considered to be nuclear facilities.

As indicated previously the crucial decision was regulated under the special purpose act on nuclear power. Therefore this ruling pertains solely to nuclear power plants. However, in order to facilitate reception of the further contents of this study terms nuclear power plant, atomic power plant and nuclear facility shall be used interchangeably in this paper.

2. An axiological 'void'

Adoption of the special purpose act on nuclear power was justified with the fact that the provisions effective at that time were supposedly preventing carrying out investment proceedings concerning nuclear power plants efficiently.[19] Adopting within the framework of the special purpose act on nuclear power such solutions as e.g. shortening selected proceedings or restricting the opportunities for launching extraordinary proceedings was supposed to remedy the situation.[20] Thus it must be

[19] *Uzasadnienie projektu ustawy – o przygotowaniu i realizacji inwestycji w zakresie obiektów energetyki jądrowej oraz inwestycji towarzyszących*, Parliamentary Document no. 3937, p. 2.

[20] More on the subject: Ł. Dubiński, *Legal Perspective on the Development of a Nuclear Energy in Poland*, in: *Towards the Polish-German Green Deal*, ed. O. Hałub-Kowalczyk, Toruń 2022, pp. 209–223.

noted that the provisions adopted in the invoked act concern the matters regulated under different legal acts. A construction permit may serve as an example.[21] Therefore we cannot speak of a uniform and cohesive axiological system in regards to the entirety of the special purpose act on nuclear power. At most we may indicate the goal of this legal act indicated in the introduction.

Taking the aforementioned facts into consideration it must be emphasized that a crucial decision is not present in any legal act apart from the special purpose act on nuclear power. Therefore there is no act which would define the axiological paradigm for making the analyzed ruling. We also cannot state that adopting the regulations concerning a crucial decision translates into shortening the time required for concluding the entirety of the proceedings carried out prior to erecting a nuclear power plant and putting it into operation. On the contrary, it should be stated that adopting the regulations concerning a crucial decision results in extending the time required for erecting a nuclear facility. Introduction of the concept of a crucial decision as it is currently defined into the legal system is equivalent to adding an obligation of carrying out additional administrative proceedings. Furthermore, in relation to the proceedings concerning issuing a crucial decision, the legislator did not reserve the option for applying all the procedural solutions of the special purpose act on nuclear power which are aimed at shortening the processing period for a given case.[22] Thus we must not interpret the goal of adoption of the special purpose act on nuclear power as the axiological perspective for interpretation of the provisions concerning a crucial decision.

Bearing the above facts in mind we should turn our attention to the fact that the provisions of the special purpose act on nuclear power constitute only a part of the regulations concerning nuclear power. The basic act in this regard is, obviously, the Nuclear Power Law.[23] Thus it would appear that the axiological perspective of this act should be taken into consideration when interpreting individual regulations pertaining to nuclear power. Thus it must be indicated that the provisions of the Nuclear Power Law were subordinated to realization of the singular value of nuclear security understood as achieving appropriate exploitation conditions,

21 Articles 15 and following of the special purpose act on nuclear energy.

22 For instance, the solution consisting of imposing a fine on a body which fails to meet the deadline for resolving a case was not reserved.

23 This statement is based on three arguments. Firstly it should be noted that labelling this legal act as 'law' suggests that similarly to a code it is an act of crucial importance for a specific field of law. Secondly the Nuclear Law contains the general solutions pertaining to nuclear power. Finally it must be noted that consistently with Article 1 Section 2 of the special purpose act on nuclear power the provisions of this act do not apply to the matters regulated under the provisions of the Nuclear Power Law.

preventing failures and alleviating results of failures and, in consequence, guarding employees and general populace against the dangers of the ionizing radiation produced by nuclear facilities.[24]

In connection with the above, it is worth noting that when creating regulations of the atomic law, the legislator directly refers to the provisions of the constitution. Of course, this is about regulations that determine 'security.' It should be noted that this concept appears in the constitution in a number of contexts as many as eighteen times. Such a large presence of 'security' in the Constitution should not be surprising. It should be pointed out that "so far the most perfect form of securing the needs of the individual and individual social groups in the field of security is the state."[25] It is therefore obvious that security should be mentioned in the basic legal act, which is undoubtedly the constitution. It should be noted, however, that there is no legal definition of this term.[26] However, this procedure on the part of the legislator can be considered accurate. In this way, the understanding of 'security' can be adapted to the changing economic and social reality, and thus also to the plans for the development of nuclear energy.

The analysis of security issues in constitutional terms goes beyond the scope of this study. For the purposes of this text, attention should be paid primarily to Article 5 of the Constitution,[27] which makes the state responsible for the security of citizens. In the context of nuclear energy, the aspect of protecting the society against the risks associated with the use of nuclear power plants will come to the fore. Of course, it will be about both legislative actions (i.e. adoption of appropriate legal acts) and actual actions (e.g. conducting inspections of nuclear power plants).

Bearing in mind the issues of nuclear energy, it is also worth noting Article 31 Section 3 of the Constitution. This provision provides for the introduction of restrictions on the exercise of constitutional freedoms and rights, e.g. for security reasons. Therefore, it should be stated that on the basis of the Constitution itself, one can speak of the need to respect 'nuclear security' in the context of interpreting and applying the provisions of the nuclear law. This concerns in particular the assumption that the aforementioned value justifies limiting the freedom to build and operate nuclear power plants.

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24 Article 3 point 2 of the Nuclear Power Law.

25 M. Serowaniec, W. Włoch, *Kategoria bezpieczeństwa w ujęciu prawno-filozoficznym*, Studia Iuridica Toruniensia 2016, vol. 18, p. 162.

26 P. Lisowski, *Pojęcie bezpieczeństwa w obowiązującym systemie prawa – kilka refleksji na temat normatywizacji problematyki bezpieczeństwa*, Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji 2016, no. 106, p. 44.

27 The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997 no. 78, item 483.

Therefore on the basis of the above claim we could ascertain that the nuclear security should also constitute a reference point for interpretation of the regulations concerning a crucial decision. However, it must be noted that the Nuclear Law defines precise regulations concerning rationing of all the nuclear security aspects contained in the previously invoked legal definition of this term.[28] Furthermore, attention should be drawn to the fact that the issue of nuclear security is subject of one of the proceedings preceding launching operations of a nuclear power plant.[29] Therefore it would be intolerable to consider this issue under the proceedings concerning crucial decisions. In adopting a different approach we should simultaneously accept a situation in which the same issues (i.e. the issue of nuclear security or its selected aspects) become a subject of more than one proceedings. Therefore it would appear that rooting a crucial decision outside of the Nuclear Power Law (i.e. in the special purpose act on nuclear power) was an intentional act of the legislator (*argumentum a rubrica*) performed with the goal of removing the necessity of analyzing and interpreting the issue subjectively through the lens of nuclear security.

The presented remarks lead to the conclusion that we cannot speak of a specific axiology concerning the regulations for issuing a crucial decision. In consequence the body handling the proceedings regarding resolving this matter may at most refer to the values commonly protected under the Polish legal system. The literature on the subject presents a different view. The doctrine indicates that the economic and policy interests[30] should constitute the values which should be considered by the body issuing a crucial decision. In this context we must take note that the presented approach is not consistent with the legal text. It is so because the invoked view is based primarily on the contents of the justification for the draft of the special purpose act on nuclear power.[31] Furthermore, the necessity of reaching out to the invoked legislative material is being justified with the regulations for issuing a crucial decision being inadequately specific.[32] As a result verification of the presented view requires checking whether the contents of the special purpose act on nuclear power contain the premises for issuing a crucial decision – the issue which shall be covered in the subsequent part of our deliberations.

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28 See Article 2 of the Nuclear Power Law.

29 This case refers to the issue of issuing a permit for erecting a nuclear facility. See: Ł. Dubiński, *Specustawa jądrowa i prawo atomowe (ocena wybranych planów legislacyjnych)*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2022, vol. 11, no. 2, pp. 89 ff.

30 Ł. Młynarkiewicz, *Decyzja zasadnicza*…, p. 437.

31 Ibidem, pp. 11 ff.

32 Ibidem.

3. Premises for issuing a crucial decision

The doctrine adopts that the contents of the special purpose act on nuclear power "lack defined premises or material and legal criteria which must be taken into consideration by the minister appropriate for energy affairs when issuing a positive or a negative ruling."[33] As indicated previously it is being assumed under this approach that the conditions for issuing a crucial decision should be sought for in the justification for the draft of the invoked act.[34] Therefore in this context we should remind that in both the doctrine and the case law we may come across two principally different approaches regarding whether the so called legislative materials can be used for the purpose of interpreting legal provisions. On one hand the statement is being put forward that only this is meaningful "What the legislator stated and not what legislator intended to state."[35] Consistently with this view the interpretation should be contained within the boundaries of the statutory text. On the other hand it is being indicated that on the basis of legislative materials the true intent of the legislator can be recreated.[36] Therefore under this approach e.g. the justification for the draft of an act can be utilized as a *de facto* essential part of the interpretation process. Undoubtedly the deliberations concerning both these views are beyond the scope of this study. We only wish to indicate that the author is inclined more towards the former view (expressed by the so called 'textualists'). However, for the purpose of this paper we shall engage in the deliberations pertaining not to the issue of reaching out to legislative materials at all but to the issue of whether it is necessary to utilize legislative materials in the case of determining the regulations for issuing a crucial decision. In other words – can we recreate the premises which should be taken into consideration by the body resolving the matter of issuing a crucial decision solely on the basis of the text of the special purpose act on nuclear power?

Taking the above into consideration we should take note that the task of determining the premises for issuing an administrative decision may be approached in various ways. The legislator may restrict himself to listing the reasons for issuing

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33 Ibidem, p. 166.

34 See: P. Wysocka, P. Nowakowska, *Rola decyzji zasadniczej w procesie inwestycyjnym elektrowni jądrowej. Rozważania na tle aktualnego stanu prawnego i projektowanej nowelizacji*, Nowa Energia 2022, no. 5–6 (86), pp. 53–54.

35 Z. Tobor, *W poszukiwaniu intencji prawodawcy*, Warszawa 2013, p. 123. See also: A. Bielska-Brodziak, *Śladami prawodawcy faktycznego. Materiały legislacyjne jako narzędzie wykładni prawa*, Warszawa 2017.

36 More on the subject: Z. Tobor, *Rola materiałów legislacyjnych w porządku prawnym*, Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji 2016, no. 104, pp. 171–181.

a refusal. In such case a phrase may be used like "we reject issuing a permit […] if […]."[37] By the same token, provisions may specify solely the premises meeting which is equivalent to securing a positive resolution of a case. In such cases phrases are used like "the permit is being issued to an entity which meets the statutory requirements and if: […]."[38] Therefore it is prudent to turn attention to the contents of Article 22 Section 3 of the special purpose act on nuclear power according to which a crucial decision may be issued to an investor who:

1) is established in a member state of the European Union or in a member state of the European Free Trade Agreement which is a party to the European Economic Area Agreement;
2) shall indicate that either himself or an entity related in terms of equity was over the last 10 years engaged for a period of at least 1 year in exploitation of large power plants with the total installed power of at least 1000 MWe, including at least one large power plant with installed power of at least 200 MWe;
3) will secure a decision regarding determining location for the investment consisting of erecting a nuclear power facility.

Looking upon the invoked regulation from the perspective of the *a contrario* reasoning it would be appropriate to state that consistently with the invoked provision the refusal to issue a crucial decision occurs in the case of not meeting the three criteria indicated hereinabove. We should also take note that the similarity is visible between the wording used in Article 22 Section 3 of the special purpose act on nuclear power "may be issued to an investor who" and the previously indicated example of the regulation concerning the criteria for issuing an administrative decision. Therefore we can undoubtedly adopt that the invoked contents discuss the requirements for issuing a crucial decision. We must also note that the premises contained within the contents of the invoked provision were formulated unambiguously and thus their interpretation does not require referring to e.g. the axiological justification behind the presence of a crucial decision in the special purpose act on nuclear power. As a result the view presented in the doctrine should be rejected. It is so because referring to the justification for the draft of the special purpose act on nuclear power in order to determine the premises for issuing a crucial decision is not necessary.

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37 Article 399 Section 1 of the Water Law Act of 20 July 2017, consolidated text: Journal of Laws 2022 item 2625 as amended. More on the subject: K. Flipek, P. Michalski, M. Soberski, *Prawo wodne – analiza wybranych zagadnień*, Warszawa 2022.

38 Article 148 of the Telecommunications Law Act of 16 of July 2004, consolidated text: Journal of Laws 2022 item 1648 as amended. More on the subject: S. Piątek, *Prawo telekomunikacyjne. Komentarz*, Warszawa 2019.

For the sake of completeness it is also prudent to draw attention to the parliamentary works on amending the special purpose act on nuclear power.[39] The designs of the legislator include supplementing the invoked act with Article 3d Section 1 consistently with which the minister appropriate for energy affairs issues a crucial decision or refuses to issue a crucial decision within 90 days from the date of receiving the application for issuing a crucial decision in consideration of public interest, in particular:

1) the goals of state policies, including the energy policy, jointly with the current and projected national demand for electric energy and heat;
2) the influence of investments in the field of erecting a nuclear power facility on the internal security of the state.

It must be underscored that the legislator projects removal of the previously invoked Article 22 Section 3 of the special purpose act on nuclear power. Therefore we may not claim that the regulations of the planned Article 3d Section 1 of the special purpose act on nuclear power are to serve as a reference point for interpretation of the previously presented premises concerning issuing a crucial decision. Instead one set of premises is to be exchanged for a different set of premises. Thus it is appropriate to adopt that legislator's designs indirectly confirm the thesis according to which under the current legislation the premises for issuing a crucial decision should be sought for in the contents of Article 22 Section 3 of the special purpose act on nuclear power. Simultaneously it should be emphasized that referring to the designs of the legislator is solely auxiliary in character if only due to the possibility of these designs being susceptible to change at any given time. In turn, as indicated previously, in order to determine the rationales for issuing a crucial decision it is sufficient to analyze the contents of the special purpose act on nuclear power, Article 22 of the act to be specific.

4. The degree of freedom of the body issuing a crucial decision

The issuance of a crucial decision is directly governed by two provisions. The first provision is Article 22 Section 2 of the special purpose act on nuclear power. Consistently with this provision a crucial decision is issued by the minister appropriate

[39] See: *Rządowy projekt ustawy o zmianie ustawy o przygotowaniu i realizacji inwestycji w zakresie obiektów energetyki jądrowej oraz inwestycji towarzyszących oraz niektórych innych ustaw*, https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=C8A3F3F3018D9444C12588B7004892B1 [access: 6.12.2022].

for energy upon the application of an investor, following consulting with the head of the National Security Agency on the issue of influence of the investment on the internal national security. *At a first glance* it would appear that the invoked provision is decisive for the constrained character of a crucial decision. The basis for such assumption could consist of using a phrase 'issues' in the wording of Article 22 Section 2 of the special purpose act on nuclear power.

Taking the above fact into consideration we should invoke the second of the provisions directly governing issuing crucial decisions. It is the previously invoked Article 22 Section 3 of the special purpose act on nuclear power, specifically in the part stating that "a crucial decision may be issued to an investor […]." On the basis of contents of this provision it is possible to claim that a crucial decision is of an arbitrary character. The basis for such assumption would obviously consist of the fact of using word 'may' in Article 22 Section 3 of the special purpose act on nuclear power.

It is undoubtedly unacceptable to accept both presented interpretations simultaneously. Therefore it is prudent to turn attention to the function of the first of the invoked provisions. Article 22 Section 2 of the special purpose act on nuclear power lists the bodies participating in the proceedings concerning issuing a crucial decision. The same provision also lists the tasks of these bodies (i.e. issuing a decision and an opinion). Thus it must be stated that the invoked provision is not decisive for the scope of freedom of the body issuing a crucial decision. Instead the meaning of Article 22 Section 2 of the special purpose act on nuclear power consists in determining competences of the bodies participating in the proceedings which concern issuing a crucial decision. The presented interpretation is indirectly confirmed by the fact that the analogous approach can be observed in case of other acts.[40]

The proposition presented hereinabove concerning the understanding of Article 22 Section 2 of the special purpose act on nuclear power does not automatically translate into acceptance of the opinion claiming that a crucial decision is of an arbitrary character. However, it must be admitted that the previously indicated use of word 'may' in the wording of the invoked provision is being put forward by the majority of authors as an argument for qualifying the determined resolution

[40] For instance, consistently with Article 4 Section 6 point 1 of the Act of 10 July 2007 on fertilizers and fertilizing (consolidated text: Journal of Laws 2023 item 569 as amended) the minister appropriate for agriculture issues a decision regarding the permit for introducing into circulation a fertilizer or plant growth supplement indicated in Article 3 Section 2 following securing opinions of authorized organizational units issued on the basis of the conducted research confirming that […].

as arbitrary in character.[41] Such approach is also presented in the doctrine in the context of the regulations concerning issuing a crucial decision.[42]

Taking note of the aforementioned facts it seems worthwhile to quote the *omnia sunt interpretanda*[43] adage. On its basis we should claim that it would be inappropriate to determine the regulations for issuing crucial decisions solely on the basis of the dictionary definition of word 'may.' To be more specific, the essence lies in the obvious assertion consistently with which if the subject of interpretation consist of an entire regulation its interpretation should not be limited to a single word. This premise is even more significant for the analyzed case because currently phrase 'may issue a decision'[44] is not equivalent to indicating the arbitrary character of a given resolution. On a different tangent, we can remark that the 'and' connective should be treated analogously as its presence in specific sentence structures may translate into its different meaning.[45] For instance, the 'and' connective can mean 'as well as.'[46]

Returning to the issue in question we should refer to the view according to which whether in a given case we should speak of administration's discretion may [!] result from both using a particular phrase as well as the entirety of the regulation.[47] Thus referring to the placement of word 'may' in the analyzed case we should remind that, as previously determined, the invoked word precedes the list of unambiguously formulated conditions and premises for issuing a crucial decision. Therefore there is no place for freedom of interpretation and decision making. The

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41 See: M. Stahl, *Formy prawne w sferze działań zewnętrznych administracji publicznej*, in: *System Prawa Administracyjnego*, vol. 5. *Prawne formy działania administracji*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2013 [Legalis database].

42 Ł. Młynarkiewicz, *Decyzja zasadnicza*…, p. 447.

43 For the meaning of this principle see: M. Zieliński, *Derywacyjna koncepcja wykładni jako koncepcja zintegrowana*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 2006, no. 3, p. 100.

44 Taking into consideration the current regulations we should invoke Article 16 Section 2 of Act on collective supply in water and collective discharge of waste water of 7 June 2001 (consolidated text: Journal of Laws 2023 item 537 as amended) consistently with which the permit may be issued upon the application of a water and sewerage company which […]. In the light of the above the doctrine indicates that "a permit is being issued by a village mayor (town mayor, city mayor) through a constrained decision." The phrase 'the permit may be issued' used by the legislator in Article 16 Section 2 may be misleading, J. Rotko, in: P. Bojarski, W. Radecki, J. Rotko, *Ustawa o zbiorowym zaopatrzeniu w wodę i zbiorowym odprowadzaniu ścieków. Komentarz*, Warszawa 2011 [LEX database], Commentary on Article 16.

45 See: E. Magner, *Koniunkcja w ekstensjonalnej logice a spójnik międzyzdaniowy „i" w języku naturalnym*, Studia Philosophiae Christianae 2005, vol. 41, no. 1, pp. 101–114.

46 M. Zeifert, *Problem wieloznaczności składniowej w przepisach zawierających wyliczenia wierszowe*, Studia Iuridica 2020, no. 83, pp. 267–268.

47 E. Ochendowski, *Prawo administracyjne. Część ogólna*, Toruń 1998, p. 123.

conditions indicated in Article 22 Section 3 of the special purpose act on nuclear power can or cannot be met.

Furthermore, attention must be drawn to the consequences of subscribing to the view according to which a crucial decision is supposed to be an arbitrary resolution. In such case we should simultaneously adopt that the body issuing a crucial decision enjoys the same degree of freedom when deciding rights of an individual and such interpretation is not supported by the legal text. Even the opponents of recognizing a crucial decision as a constrained decision admit that the criteria for issuing such resolution should be sought for outside of the contents of the special purpose act on nuclear power; to be more specific in the legislative materials developed during works on the draft of this act.[48] Under the discussed context we must admit that using legislative materials is not prohibited during the course of interpretation. Despite the decisively critical attitude towards the presented phenomenon in relation to the need for maintaining objective approach we shall also mention that there are cases of breaching the literal meaning of provisions due to the contents of the legislative materials. However, it must be recorded that the very advocates of referring to these documents during the course of the interpretation process frequently emphasize the similarity of such action to reaching for dictionaries.[49] Thus we must take note that the discussed case is not strictly concerned with breaching the literal interpretation but with developing a new regulation which would define the premises for issuing a crucial decision. In other words, in consequence of accepting the previously presented view expressed in the doctrine the so called legislative materials would have to be recognized as a foundation for issuing an administrative decision. Such approach would, in turn, be equivalent to violating Article 7 of the Basic Law according to which public authority bodies are operating on the basis and within the boundaries of law. Consistently with the invoked view legislative materials would not serve as an interpretation aid but would *de facto* serve as competing source of law.

Conclusion

Currently the administrative proceedings regarding investing in the field of nuclear power plants are not being carried out. However, taking into consideration the growing demand for *de facto* each type of energy we may expect that such cases will begin

48 Ł. Młynarkiewicz, *Decyzja zasadnicza*…, p. 128.

49 See: Z. Tobor, *W poszukiwaniu*…; A. Bielska-Brodziak, *Śladami prawodawcy faktycznego*…

to be considered in the forthcoming future. Thus it is to be expected that the manner in which appropriate procedures will be regulated will not mean solely adopting a subsequent special purpose act which will be primarily devoted to limiting the duration of each administrative procedure. It is so because such short proceedings cannot (at least in theory) forgo the time devoted to considering the manner of understanding of individual relations, including the meaning of a word 'may.' Such trite word may [!] spark a major dispute further devolving into a never-ending debate between textualists and supporters of the concept of a legislative intent.

Classifying word 'may' as 'trite' certainly results from the fact that its meaning in a legal text should not, in principle, raise any doubts. However, if a language is only a deficient copy of reality then constituent components of a language not always 'fit in with' the context created by the legislator. When considering the essence of the dispute described in this paper we could state that the introduction of word 'may' into the special purpose act on nuclear power could reflect at least some of the premises resulting from the justification for the draft of this act if not for the remaining structure of the provision. Taking this fact into consideration we could state that creating a transparent and clear law should not boil down to simply preserving provisions of proper legislation but should also encompass ensuring that the contents of the act are reflected in the plans expressed under legislative materials. Thus the idea is not for the parliament to become a 'hostage' of act's justification but to be able to expect that the final draft of the act submitted to the president will be accompanied by a consistent documentation which would be produced e.g. as a result of deliberations of an appropriate commission. However, it must be emphasized that even the most complete and credible legislative materials should not modify the text which is to be published as a legal act.

In turn in the analysis of a crucial decision we should adopt that owing to the unambiguous character of the criteria for issuing a crucial decision the invoked resolution is constrained in character. The very same reasoning also leads to the conclusion that in order to properly interpret the solutions concerning issuing a crucial decision it is unnecessary to refer to a specific axiology (i.e. the axiology determined in a given legal act). At the same time we should take note that we cannot speak of a coherent system of values under the special purpose act on nuclear power as an obvious result of the fact that this act contains fragmented solutions which concern issues regulated under different legal acts. It should be added that, the premises for issuance of the crucial decison are included Article 22 Section 3 of the special purpose act on nuclear power.

Translated by Monika Zielińska

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