

Suspension of municipal authorities as a special measure of supervision over local government

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Abstract

In the eye of administrative law and doctrine, supervision means a specific, law-based function to ensure the proper functioning of certain elements of the public administration system by legally established entities having the competence to review and evaluate such activities in accordance with the adopted criteria. The basic measures of supervision over the activities of the municipalities include the annulment of acts of local law made by the municipality authorities the dismissal of the executive body and the suspension of the municipality's authorities and the establishment of the commissar board. The purpose of this article is to present the legal and organizational aspects of the application of the supervisory measure by the President of the Council of Ministers in the form of the suspension of municipal authorities.

Suspension of municipal authorities is a special, personal means of supervision, used in the absence of methodological and effective efficiency of the commune authorities. The suspension of the municipal authorities by the Prime Minister and the establishment of the commissar board deprives temporarily of the possibilities of exercising power by municipal authorities elected in the general election by the local community. It is also included in the "extraordinary" measures, because it influences the constitutional and judicial guarantee of independence of action of the local government. By applying this specific supervision measure the local municipality is usually forced to run an illegal financial economy incompatible with the financial economy. The scale of irregularities must empower the supervisory authority to formulate an assessment of retrospective and prospective inefficiencies in the implementation of public tasks

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In the eye of administrative law and doctrine, supervision means a specific, law-based function

to ensure the proper functioning of certain elements of the public administration system by legally established entities having the competence to review and evaluate such activities in accordance with the adopted criteria. The characteristic of supervision is checking and evaluation of the activities of the supervised entities and the possibility of authoritative interference with the activities of such entities. Supervision in public administration should be considered primarily in the aspect of administrative structures, interrelated through appropriate system and organizational regulations. Supervision is particularly important in decentralized structures such as local government, supervision performs function as a stabilizer for the implementation of public tasks, as well as to ensure connectivity between the various elements of the structure, both at the macro level, ie within the whole administration apparatus and at the level of particular units of local government. Surveillance undoubtedly limits the autonomy and freedom of action of local government units, so its scope, criteria and are regulated in the Constitution (Wiktorowska, 2002).

In the legal-constitutional system, the activities of Polish municipalities are monitored from the point of view of legality (art. 171 paragraph 1 of the Constitution of the Republic of Poland).(Stahl, 2002). Supervision over the activity of local self-government is exercised by the Prime Minister and the voivodeship, and in the area of financial matters - regional chambers of account. Supervisory powers have also been assigned to the Parliament, which can dissolve the municipality's authority in case of repeated violations of the Constitution or statutes (Constitution of the Republic of Poland, 1997). The detailed scope, criteria and supervision measures are regulated by the Act on Municipality Self-government, as well as the Act on Regional Chambers of Audit and the Act on Voivod and Government Administration in the Voivodship.

The provisions of Act on Municipality Self-government stipulate that supervision of municipal activities is carried out on the basis of the criterion of legality (art. 85). The legality of the administration is defined as the consistency of action with both laws and executive acts, internal acts and agreements, decisions and other decisions. The supervisory authorities may, however, enter municipal activities only in cases determined by law (art. 87). In doctrine and case-law is accepted that the conformity assessment of "law" is a broader concept than the term "law", but in the case of interference with the activity of local government the extension of interpretation is inadmissible. Therefore, whenever a measure of supervision is invoked, it is always necessary to refer to a specific provision of the act or to an equivalent act that has been infringed. The executive act itself can not be the prerequisite for the supervision measure. The norms in the Constitution and the laws of the supervisory authority of territorial self-government correspond to the requirements of art. 8 paragraph 1 of the European Charter of Local Government. In art.8 ECLG the notion of "administrative control" has been used but this concept should be referred primarily to the supervision of local government.

It should be noted that the ECLG is an important determinant of the way of regulating the criteria and supervision of the activity of local government. In Art. 8 paragraph 2 (first sentence) is written that "all administrative control of the activities of local communities should, in principle, aim only at ensuring compliance with constitutional law and principles. Administrative control may, however, include the control of the purposefulness carried out by the higher level authority in relation to the tasks delegated to the local communities. According to art 8 of ECLG supervision of the realization of commissioned tasks could be carried out in terms of legality and expediency, but the content of art. 171 of the Constitution unequivocally indicates that the only prerequisite for interference by supervisors in the activity of local government is violation of law. The scope and type of supervision measures to be applied should be proportionate to the importance of the interests to be protected under art. 8 paragraph 3 ECLG.

One of the main factors ensuring compliance with the principle of proportionality of supervision measures in relation to the type and degree of irregularities in the activities of the commune authorities is the statutory regulations evaluating the legality. The Local Government Act values such assessments and, depending on the degree of the violation or the nature of the irregularity, provides for the possibility of applying certain surveillance measures. Valuing the formulated assessments according to the criterion of legality consists, for example, distinguishing the relevant and irrelevant contradictions of the law of local law subject to supervision by the voivod. As M. Kamiński rightly observes, the contradiction is a "qualified type of nonconformity that causes two standards with identical hypotheses to be excluded directly and absolutely at the disposal." Significant contradiction of the author defined as a violation of the systemic regulations defining the organization and operation of organs, violation of procedural rules governing the mode of issuing acts and standards of competence, including the objective scope and subjective scope and the legal form of action. On the other hand M. Stec considered violations of substantive provisions not affecting the content of the act and other provisions not related to the form and content of acts, eg regulations concerning the drafting of legal acts.

Another example of evaluating municipal action according to the criterion of legality is the distinction between "violation of law" and "repeated violation of the Constitution and statutes". As a consequence of the violation of the law by the municipality's authorities, depending on a particular case may be eliminated from the legal order of a given legislative act or administrative decision, a veto of a substitute order (strictly regulated by law) or a court's obligation to perform the action (in case of inactivity or chronicity of action). Only repeated infringement (...) of the Constitution or statutes "may result in the application of a supervisory measure to the authorities of the municipality in the form of an appeal of the executive body in the case.

In different way the legislator regulated the scale of assessments on the basis of which it can

suspend the municipal authorities due to incorrect implementation of public tasks. There is no literal reference to the criterion of legality in local government laws. On the other hand, the premise of chronic inefficiency in the implementation of tasks was pointed out. The regulations therefore refer to praxeological principles in assessing the correctness of the implementation of public tasks specified by law. Due to the organizational nature of public tasks, it is a right solution and takes into account the postulates and views of the doctrine.

The above comments and views on the evaluation of the activities of the municipality's authorities regarding the legality and potential consequences of the breach of the law justify the assertion that only activities rated as a qualifying violation of the law in terms of lawmaking due to the importance or application of law or the repetition or permanent lack in the performance of tasks authorizes the supervisory authorities to apply measures to limit the self-reliance of local government units.

In order to exercise supervisory powers over municipalities, the supervisory authorities (the Prime Minister, voivod and regional financial accountants) are equipped with the necessary competences to establish the facts necessary to formulate sound business assessments and, as a consequence, supervisory measures. According to art. 88 of Act on Municipality Self-government, supervisors have the right to request information and data concerning the organization and functioning of the municipality. The above allowances have been regulated in a very general way, compared to e.g., the standards determining the powers of control authorities in terms of establishing the facts. The regulations do not even specify the form in which the supervisory authority should document the findings, as well as the catalog of evidence (except for the request for information and data) that the supervisory authority may perform before applying a specific supervisory measure, such as a hearing as a witness. Regulating competence in general way to determine the facts is usually beneficial to the supervisory authority, because it allows "inspection" to be "freely carried out" on the basis of which the supervisory authority will decide on the need for a supervisory measure. On the other hand, it may lead to excessive interference with the current functioning of the municipality's e.g, by imposing an obligation to provide data and information to the supervisors that is not relevant to the nature and extent of the violation.

Annulment of acts of local law constituted by the municipality authorities, dismissal of executive authority and suspension of municipal authorities and introducing the special administration regime are basic measures of supervision over municipal activities. Annulment of acts constituted by the municipality authorities and directives issued by executive authorities (mayor, president) because of their illegality are the most frequently used measures of supervision over municipal activities in Poland. However evaluated act must violate law in "significant" way. Supervisory authority (voivod or regional chamber of audit, in the case of acts adopted in financial matters) adjudicates the annulment of acts or directives (in whole or in part) no longer

than 30 days from the date of delivery of act or directive. However, it should be noted that the supervisory authority annuls in the form of administrative acts (supervisory decisions) to which the provisions of the Code of Administrative Proceedings apply respectively.

Suspension of municipal authorities is special, personal measure of supervision, used in the absence of methodological and real efficiency of municipal authorities. Suspension of municipal authorities by the Prime Minister and introducing the special administration regime temporarily deprives of the possibility of wielding power by municipal authorities elected in general election by local community. It is also included in the "extraordinary" measures, because it influences the constitutional and judicial guaranteed of self-governing activity of local authorities. Supervision measure in the form of suspension of municipal authorities, in accordance with art. 97 paragraph 1 of Act on Municipality Self-government can be applied in the case of prolonged lack of effectiveness in realization of statutory public tasks entrusted to municipality and no hope for improvement of such a state. It should be noted that premises for suspension mentioned in the above provision are examples of references to praxeological principles in administrative law. Praxeological nature of premises for suspension doesn't mean that the legislator doesn't apply the criterion of legality in the context of the conditions of application of the abovementioned supervisory measure. Because the criterion of legality, according to art. 171 paragraph 1 of The Constitution of the Republic of Poland is the only criterion of supervision over self-government activity. Lack of effectiveness in realization public tasks must always take into account compliance aspect of action on the basis of and within limits of law, i.e. stated defective activity of municipal authorities must violate at the same time provisions regulating form and way of realizing public tasks. Among others the above point of view is confirmed by The Supreme Administrative Court, which stated that "failure to perform statutory public tasks assigned to a unit of territorial local government constitutes violation of the basic, statutory duties of local government. The public authority, which the authorities of local government units are, operate on the basis and within limits of law and performing public tasks is their duty not law. The prolonged ineffectiveness in realization of statutory public tasks entrusted to a municipality is always connected with violation of the Constitution and acts (see adjudication of The Supreme Administrative Court from 24 November 2009, file No. II OSK 1786/09, CBOSA) ".

Praxeological nature of the premises mentioned in art. 97 paragraph 1 of Act on Municipality Self-government requires the definition of an insufficient assessment of the performance of public tasks by municipal authorities. Ratings are statements in which value (positive or negative) is assigned to a certain part of reality. In science there is opinion that any ratings can't be used to evaluate functioning of an organization, but only practical ratings, so those that do not express feelings or emotions, only talk about the suitability or unhelpfulness of a particular factor involved. Efficiency of activity, as one of the premises for the suspension of

municipal authorities is the criterion of evaluation which qualifies as "value" of efficient activity. The main element of the scope of conceptual effectiveness is the cost or value of the result, which makes it possible to compare positively or negatively the desired and undesirable effects. The value of cost is the sum of the values of all negatively evaluated effects of activity. The value of result (useful) is the sum of all positively evaluated effects of activity. If the value of target is equal to the value of result then the action will qualify as effective. In the case of public administration, first of all, realization of legally defined objectives and public tasks, in accordance with the law and in the forms provided for by law is effect of action, which is evaluated positively. Therefore organizing of public administration, which guarantees achievement of legally defined aims and tasks will be effective activity of public administration. On the other hand, lack of effectiveness in realization public tasks by municipal authorities will occur in the case of abandonment of realization own tasks or commissioned tasks or not to achieve effects of such tasks resulting from provisions of the law.

However the above-defined definition of inefficiency can not be used in an abstract manner to evaluate the activities of the municipal authorities. Phrase "lack of effectiveness" has evaluative nature. The assessment of the phrase "lack of effectiveness" makes it necessary to apply the standard referred to art 97 paragraph 1 application of individual and situational assessment. As M. Zdyb points out, "phrases with evaluative nature require systematic clarification, i.e. they acquire content contours only when determining the content of particular individual interests, formed on the basis of substantive administrative law ".Therefore every time supervisory authority, evaluating the effectiveness of municipal authorities in realization public tasks, should specify the type of tasks provided for by law which have not been and are not properly perform and / or aims that are not achieved by a municipality as a result of no realization or inappropriate realization of tasks.

It should be noted that the hypothesis of the norm contained in art. 97 of Act on Municipality Self-government indicates a qualified lack of effectiveness, i.e. prolonged and not promising, as a premise for suspension of municipal authorities. Therefore supervisory authority should evaluate lack of efficiencies by defining appropriate measures beforehand. The term "prolonged" is a determinant on the basis of which supervisory authority defines measure in the form of duration of lack of effectiveness. The period of time accepted by supervisory authority should comply general premise of the violation of law by e.g., failing to meet the statutory deadlines for the commencement and realization tasks, inactivity or chronicity of authorities activities. Ability of municipal authorities to eliminate the lack of effectiveness in the foreseeable short period of time is another determinant to evaluate of lack of effectiveness. In this case legislator uses the term "no hope for rapid improvement". The financial system of public administrations predicts essentially a one-year period of planning and accounting for public tasks which are financed from the municipal budget or the state budget. It can be

assumed that the appropriate period for evaluation of the protracted ineffective implementation of the municipality should be a period not shorter than one year . However evaluation of opportunities for "quick improvement" should take into account a maximum of one year to bring about realization of tasks accordance to law. Otherwise there is a risk that the supervisory authorities may exceed range of the supervisory intervention, assuming that several weeks of delay in the execution of the tasks entitle to suspend municipal authorities. It would be inconsistent with the substance of the supervision to deprive supervisory authorities of the possibility of suspending municipal authorities in the case of submitting repair programs which assume reaching accordance to law only after few years.

Measures of prolonged and not fast-fixing measures of ineffectiveness may be expressed numerically in the form of indicators and thresholds of a financial nature that exceed the applicable law. Analysis of reports on realization of the municipal budget, in terms of achieved and required indicators and financial thresholds allows objectively evaluate current financial situation of the municipality. Measures also make it possible to evaluate the threat of lack of effectiveness in realization public tasks in the future. Ability to pay statutory and civil liabilities and obligations arising from employment contracts may also be a measurement of the effectiveness of municipal activities.

It should be noted that the formulation of the evaluation, which constitutes the basis for the suspension of municipal authorities, requires prior verification factual state in range of realization of public tasks. In doctrine, process of verifying whether and to what extent and dates public tasks are realized is called as general concept: public administration accountable. The settlement municipal authorities from execution of public tasks concerns both material and financial realization of own tasks and commissioned tasks. Acts of law specify the type of tasks, their range and aims, whereas the way of their implementation is specified by acts of law or executive regulations. In practice, range and level of the implementation of public tasks depends on financial situation of a municipality, municipal budget adopted by legislative authority, as well as the organizational efficiency of municipal authorities in realization of public tasks.

Settlement of municipal authorities from their tasks is carried out through internal and external verification, whereby the external control carried out by the regional chamber of audit or the Supreme Audit Office usually reveals the lack of effectiveness of municipal authorities. Although the internal control carried out within management verification or internal audit contributes to improving the efficiency of municipal authorities, e.g. through risk's analysis and control activities, supervisory authorities are not normally informed of the results of such controls, including disclosed irregularities because it is fear about responsibility for breach of public finance discipline by the head of unit. Whereas the external audit authorities have a

legally protected range of independence with regard to municipal authorities, what allows to formulate evaluation impartially and objectively.

Regional chambers of audit play a special role in the settlement of municipal authorities from their public tasks. The arrangements made by the chambers are most often the basis for initiating supervisory proceedings to suspend municipal authorities. Although the Prime Minister has instruments entitling to determine factual status, in the majority of cases factual status is determined on the basis of control carried out by the regional chambers of audit.

Once every four years chambers verify the level of performance of the tasks of a municipality by carrying out a comprehensive control of the financial management of a municipality. In addition, the chambers are obliged to check according to the criterion of legality of resolutions adopted in financial matters concerning, i.a.: budget and its changes, incurring liabilities which have an impact on the level of public debt of a municipality and granting loans, and also declaring invalidity their (in whole or in part) in case if their against the law. Chambers also perform signaling function and opinion-making function, respectively:

- inform municipal authorities about repeated irregularities or threats of non-compliance with statutory tasks (in the form of a report on the state of financial management);
- issue opinions i.a.: about the reports on implementation of the budget, about information on the implementation of the budget for the first half of the year, about repair programs for local government units.

Organizational and substantive preparation of regional chambers of audit to verify and document the activities of municipal authorities does not raise doubts. However it should be noted, that supervisory authorities should not formulate evaluations only on the basis of the results of the control of municipal authorities without carrying out their own actual findings. There may be violation of the principle of direct examination of evidence. Audits are also lumbered with "risk of the control", i.e. the risk of defects in internal control systems, the risk of non-detection by the controller and the inherent risk. Therefore it is reasonable that the supervisory authority, when establishing the facts and formulating evaluation, is based not only on the data from the control protocols, but also on the analysis of the source evidence.

The suspension of municipal authorities always applies to both the executive apparatus and the legislative apparatus. This follows directly from art. 97 of Act on Municipality Self-government, in which phrases: " municipal authorities" and "until the election of municipality council and mayor" are mentioned, with application of conjunction. The supervisory decision issued by the Prime Minister concerning the suspension of the commune authorities and the introduction of the commissar board is at the same time a character of a discretionary act whose application is conditional upon the occurrence of the conditions set out in the above provision of the law. Potential examination of the legality of such decision will be therefore

limited to determining whether the formal premises for such a solution have been occurred and whether the limits of recognition haven't been exceeded.

Summing up the above statements and interpretations, it should be stated that the suspension of the municipality's authorities is a personal and discretionary act of supervision interfering with the exercise of power by the municipal authorities. The application of this supervision measure is usually associated with the ineffective, illegal financial management. At the same time, the scale of irregularities must allow the supervisory authority to formulate evaluation of the lack of effectiveness in carrying out public tasks. It should be noted that the lack of effectiveness must be both retrospective and prospective, this follows from the provisions of art. 97 of Act on Municipality Self-government. Application of supervisory measure should always be preceded by making possibility to improve effectiveness by the municipality. This is usually done by introducing and implementing a repair program in the municipality. Only a negative evaluation of the implementation of such a program usually results in the suspension of municipal authorities by the supervisory authority.

An analysis of the regulations governing the use of a supervisory measure in the form of a suspension of municipal authorities may raise doubts as to their interpretation, due to the use of praxeological terms such as "lack of effectiveness". In addition, the definition by the legislator of the competence of the supervisory authorities to determine factual status may seem too general. The case of law of the administrative courts in matters concerning the assessment of the legality of supervisory decisions in the form of suspension of the municipality, however, is consistent with the interpretation of the above concepts.

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