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## Obsah

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# Legislative practice in the use of the terms "public authority", "public administration" and "competence" in public regulations

2, Article 97(3), Article 98(2) and Article 104(1) and (3)) and the Charter of Fundamental Rights and Freedoms (Article 2(2)), with Act No. 500/2004 Coll. being the key legislation, Administrative Procedure Code, as amended.

- According to the case law of the Constitutional Court (Resolution II. ÚS 75/93, Collection of Findings and Resolutions of the Constitutional Court, vol. 2, p. 201), public power means such power which authoritatively decides on the rights and obligations of subjects, whether directly or indirectly. A subject whose rights or obligations are decided by a public authority is not on an equal footing with that authority and the content of the decision of that authority does not depend on the will of the subject. It should be noted that the Constitutional Court does not distinguish whether such a body is part of the legislative, executive (including public administration) or judicial power.
- As to the delimitation of the sphere of action of public and private law - cf. Article 2(3) of the Constitution of the Czech Republic: "State power serves all citizens and may be exercised only in cases, within the limits and in the manner prescribed by law." ((Although the Constitution of the Czech Republic uses the term "state power" in Article 2(3), through a systematic and logical interpretation it is possible to arrive at a broader interpretation, i.e., that in fact public power is meant [cf. In particular, Article 87(1)(d) of the Constitution: defence against interference by the public authority with constitutionally guaranteed fundamental rights and freedoms]) and Article 2(2) of the Charter of Fundamental Rights and Freedoms: "State power may be exercised only in cases and within the limits prescribed by law, and in the manner prescribed by law." vs. Article 2(2) of the Charter of Fundamental Rights and Freedoms: "Everyone may do what is not prohibited by law, and no one may be compelled to do what the law does not require."
- The provision of Article 1(1) of the Administrative Procedure Code reads as follows: "This Act regulates the procedure of executive authorities, bodies of local self-government units and other bodies, legal and natural persons when they exercise competence in the field of public administration (hereinafter referred to as "administrative authority")."
- The Decision of the Supreme Administrative Court Conf. 31/2007-82 of 21 May 2008 (Supreme Administrative Court Journal, vol. 10/2008, p. 847, No. 1675/2008) on the concept of "competence" in Section 1 of the Administrative Code further states that "this provision in paragraph 1 positively defines the subject of regulation of the Administrative Code as the procedure of authorities and persons in the field of supreme administration, i.e. in the exercise of public authority. Although this term is not used directly here, this is already apparent from the construction of this provision, which refers on the one hand to the procedure of executive authorities, bodies of local self-government units and other bodies (which exist to exercise public authority), but also to the procedure of legal and natural persons 'when they exercise competence in the field of public administration'. This formulation would be meaningless if it did not refer specifically to the exercise of public authority; after all, legal and natural persons may otherwise do anything that is not prohibited by law. However, this principle does not cover the area in which a person unilaterally decides on the rights and obligations of other persons or acts authoritatively, and which is covered by a substantial part of the Administrative Code."
- The Code of Administrative Procedure therefore applies to the conduct of administrative authorities when they exercise powers in the field of public administration. Thus, the Administrative Procedure Code does not apply to the exercise of all public administration entrusted to administrative authorities, but only to such public administration as is the exercise of public authority - sometimes referred to as "superior public administration". The Administrative Procedure Code does not therefore apply to so-called non-sovereign public administration, i.e. public administration carried out primarily under the regime of private law.
- The fact that the Administrative Procedure Code applies only to that part of public administration which is in the nature of public authority and not to the whole of public administration is therefore primarily derived from the concept of 'competence' used in Article 1(1) of the Administrative Procedure Code. It is competence in the sense in which the Constitution of the Czech Republic uses this term - e.g. Article

79(1), Article 104(1), Article 97(3) and Article 98(2) of the Constitution of the Czech Republic.

On the separation of powers - formal and material separation of powers

- In the constitutional system of the Czech Republic, the separation of powers is expressed in Article 2(1) of the Constitution of the Czech Republic and in separate Titles Two (legislative power), Three (executive power) and Four (judicial power) of the Constitution of the Czech Republic.
- In reality, there is an intermingling of individual powers, and we can thus speak of a formal (institutional) and material separation of powers.

For example:

- The legislative power belongs to the Parliament of the Czech Republic, consisting of the Chamber of Deputies and the Senate, the executive and judicial power does not belong to it - formal (institutional) separation of powers.
- The only executive power of the Chamber of Deputies lies in its ability to discipline its members and to decide whether to consent to their prosecution - material separation of powers (see the Constitutional Court's ruling in Case No. Pl. ÚS 1/2000).
- Executive power (issuing government regulations and decrees is materially lawmaking in a broader sense) and judicial power (keeping the commercial register is materially public administration, not materially judiciary).

## Conclusion

The term "jurisdiction" is used synonymously with "public power" in public legislation.

Public power is not only part of public administration (where the term "public administration" is superior to the term "public power," and where public power is therefore a subset of public administration), but is also part of the legislative and judicial powers (and where, by the nature of things, public power already transcends public administration). Thus, if there is a notion of 'public administration power', then in the tripartition of powers, it is necessary - albeit theoretically - to work also with the combination of 'legislative power' and 'judicial power', i.e. with that part of public power which is exercised outside the executive power or public administration. As can be seen, the concepts of 'public power' and 'public administration' are partly subsets of each other, but partly overlapping, and it cannot be said that either concept is broader in relation to the other.

The public administration is divided into the public administration of the superiors (i.e. the exercise of public authority) and the non-executive, while only the superiors are subject to the reservation of the law (Article 2(2) of the Constitution of the Czech Republic, Article 2(2) of the Charter of Fundamental Rights and Freedoms). Subjects of public administration may also exercise non-sovereign public administration, i.e. public administration exercised under private law, in which case, in accordance with the Constitution of the Czech Republic, it is not a competence, i.e. public authority. In view of the principle of uniformity of terminology in the legal order, the term 'competence' cannot be given a meaning other than that derived from its use in the constitutional order, at least in public regulations (unless those regulations contain their own definition). At the same time, that principle precludes the same term from having more than one meaning in the same piece of legislation.

Expert literature:

- Vedral, J. Administrative Code. Commentary. II. updated and expanded edition. Prague: 2012, BOVA POLYGON.
- Sládeček V., Mikule, V., Suchánek, R., Syllová, J. Constitution of the Czech Republic. Commentary. 2nd edition. Prague: 2016, C. H. Beck, 2016.

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