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Dispositional Instruments of Protection against Administrative Acts (not in Legal Force) and their Effectiveness

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ABSTRACT

Public administration is often implemented through the issuing of public acts of a unilateral and binding character. Within public administration, however, legal instruments by which those for whom the administrative acts are binding can defend themselves against any illegality or irregularity of the mentioned administrative acts, are also (must be) provided. The existence and proper effectiveness of these legal instruments can be regarded as a necessary part (sine qua non) of the democratic rule of law. The paper is concerned with the so-called dispositional legal instruments of protection against the administrative acts which are not yet in legal force and their effectiveness. Article's major finding consists in fact, that the effectiveness of dispositional instruments of protection could be limited by absence of devolutive effect, or guarantee of independence in organizational arrangement between first and second instance administrative bodies.

Key words: legal remedy, appeal, remonstrance, comments, objections

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1 Foreword

It is important to reflect the split of public administration (PA) into two basic branches:

- Non-authoritarian (care) administration is performed in the same (private law) legal forms as private administration. The public authorities performing non-authoritarian administration are in the same, respectively equal, position as private individuals.
- On the other hand, authoritarian administration is performed in typical forms of public law and its results are mainly acts of public authority, respectively administrative acts, which have a unilateral and binding character. This arrangement expresses the superiority of the administrative authorities over the addressees of these authoritarian acts. It is a typical manifestation of the authoritarian character of PA (Průcha, 2007, p. 60 and subsequent).

It is the nature of "authoritarian" administrative acts that they interfere with the rights and duties of individuals independently of their own will (it is an unequal relationship). It is therefore essential to ensure the protection of individuals whenever these acts suffer from defects requiring their amendment or cancelation. Hence, PA (administrative law) offers (must offer) various means of protection to persons whose individual rights could be endangered through defective administrative acts.

This paper deals only with those means of protection against "authoritarian" administrative acts that are at the exclusive, claimable disposal of their addressees. That is especially because precisely these means of protection and their standards are essential for the protection of individual rights and its effectiveness, which can be regarded as a necessary part (sine qua non) of the democratic rule of law. It is also important that those means of protection described above are constructed to correct defects in administrative acts before they come into force and before their enforceability. They can be submitted against issued administrative acts and, in some cases, against administrative acts before they are issued (against proposed content).

The outlined means of protection in the legal order of the Czech Republic are called

- appeals,
- remonstrances,
- objections and
- comments

and their application primarily depends on the concrete legal form of the (challenged) administrative act:

- appeals and remonstrances against individual administrative acts;

- objections and comments against hybrid administrative acts.

The main goal of this paper is to analyse, individually and also through comparison, the outlined means of protection (of subjective public rights) and their effectiveness. This analysis is focused generally on these means and also specifically on their application by the PA section of State Monument Care (SMC) in the Czech Republic. The main reason for this is that there are significant disputes in this sector of PA between public interest in the protection of cultural heritage and the private interests of individuals, especially in terms of free disposal with their property. PA in the section on SMC causes significant and unilateral cases of interference in individual rights and duties. These cases, established through "authoritarian" administrative acts, can be extreme, particularly if they are directed against owners of real estate. For all these reasons section of SMC includes all mentioned means of protection and therefore it is ideal for highlighting our conclusions. The outlined means of protection play an important role in the protection of individual rights and it is necessary to ensure their operational capability and effectiveness.

The article works with hypothesis that outlined means of protection lack principle of independence, which lower their effectiveness. For the verification of this hypothesis the empirical method and theoretical methods of description, analysis, synthesis and comparison have been used.

2 Appeal and/or Remonstrance Against Individual Administrative Acts

No PA system can be considered perfect. It is therefore the task of the legislation to create, and of PA to apply, a sufficiently effective system of protection from administrative decisions that exceed the outlined limits. If such a failure in PA occurs, it is necessary to avoid or minimize any negative impacts on specific individuals and public interests as quickly as possible. [1] In practice, this assumes the existence of some sort of system that allows public bodies to be alerted to their errors, and that also imposes corresponding obligations. This task can be fulfilled in many ways and the Czech concept of appeal (remonstrance) is just one of them.

2.1 Appeal in Czech legislation and practice

Appeal is a broadly applicable means of protection. It mainly targets the merits of a decision but, with certain exceptions, also procedural decisions. The Czech Administrative Procedure Code (APC) generally states that

1 If administrative protection does not lead to redress, appellant is usually entitled to bring a legal action to administrative court. However, exhaustion of remedies, which offers PA, is necessary condition for judicial review. Exhaustion of remedies is contrary to English legal system, rather absolute, than discretionary bar to the jurisdiction of administrative courts (BIBBY, 1995, p. 11).

a participant may lodge an appeal against a decision except when otherwise provided by statute.[2] It is evident that the conditions for appeal are not restrictive. However, the possibilities of appeal are limited by the fact that new proposals and evidence can be used in an appeal procedure only if they could not be applied in the first instance, without any fault of the appellant.[3]

Due to the principle of legal certainty, an appeal can only be submitted before a decision comes into force (this is why it is labelled an ordinary means of protection). Submitting an appeal has two major effects:

- Suspensive effect means that a challenged administrative decision cannot acquire legal force or enforceability until the end of the appeal procedure. A person who defends himself against an administrative decision achieves short-term protection merely by submitting an appeal. At this moment, the public authority that issued the challenged decision can reconsider its opinions regarding whether it will comply with the opinion of the appellant in full. Such a possibility is particularly useful when the administrative body realizes that it made a mistake, meaning that it will not be necessary to carry out the appeal procedure.
- Devolutive effect means that the appellate administrative authority is usually the immediate superior public authority to the one that issued the challenged administrative decision.[4]

It is important to highlight that an appeal reviews not only the legality of an administrative decision, but also the correctness of the discretion embodied in such a decision. This review can be conducted even beyond the objections expressed by the appellant, but in some cases it is only possible in cases concerning a public interest (Skulová, 2012, p. 249).

One issue directly connected to research into effectiveness is the question of how an appellant public authority can deal with an appeal. We have to mention in particular the possibility of amending the original administrative decision (unless it is a decision by a self-governing entity). The appellant public authority can also revoke the original decision, return the whole case for new proceedings, and express a binding legal opinion. The question is whether this unduly prolongs the proceedings, especially if the case is returned more than once. Although such cases are probably rare, they cannot be excluded. Moreover, the appellant public body cannot change an administrative decision to the detriment of an appellant, unless there is another appellant with differing interests.

2 Section 81(1) Act No 500/2004 Coll., Administrative Procedure Code (of the Czech Republic).

3 This principle is inapplicable in proceedings imposing administrative punishments. Such an exemption is necessary because Czech PA deals with administrative proceedings, which mean criminal charges according to Article 6 of the European Convention on Human Rights. It is highly desirable to establish higher standards for this kind of proceedings, including the possibility to submit new evidence at any time.

4 Section 89 Act No 500/2004 Coll., APC.

2.2 Problems relating to appeal

The outlined Czech appeal system presents some specific problems.

Firstly, the Czech appeal authorities cannot be considered as independent or somehow semi-independent.[5] There are many interconnections between the appellant public authority and public authorities of first instance, the existence of which is in many cases just an expression of the vertical deconcentration of state powers. Although this arrangement usually does not arouse any doubts in the Czech legal environment, there are significant differences in comparison to the common law approach to appeal tribunals (Morgan, 2012, p. 161).

We assume that the independence of the appellate authority is one of the important factors that may affect the overall effectiveness of this means of protection. It cannot be considered as effective if the legal organization of the appellant system allows the exertion of any pressure from non-legitimate interests on the decision-making authority. We defined the efficiency of the appeal system according to the quickness and helpfulness of its protection to an individual's rights and public interests. Yet if the appellant authority is not independent, it is significantly harder to say that there is no prejudice, and even when only these questions arise, a smooth process cannot be presumed. In addition, the appellant process is not even remotely effective if there really is prejudice and illegitimate means of review, because it cannot lead to any intended solution. [6]

Unfortunately, the Czech Constitutional Court refuses to acknowledge any deeper importance of public authorities' independence and states: "[...] for the decision-making process of public authorities it is logical to presume impartiality, not independence."[7] We suppose that the lack of independence causes disruption in terms of equality of weapons, and public interests take precedence during decision-making at the expense of individuals' rights. We believe that the principle of two-instance proceedings is genuinely meaningful, but it has to be organised with proper care. It is obvious that the PA cannot be substituted by administrative courts, especially if there are some parts of administrative decisions that are outside judicial review.

We asked regional Czech offices for information about appellant proceedings. We were able to collect relevant data from more than half of the respondents

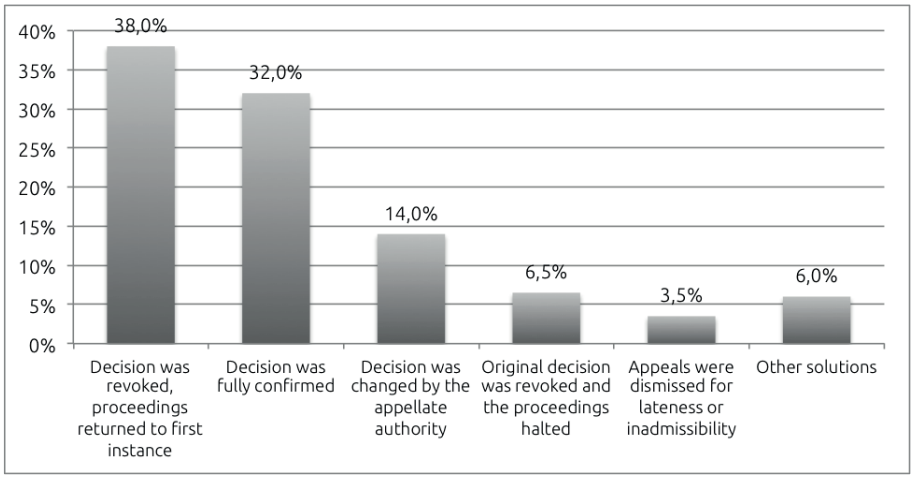
5 In English legal system appeals to tribunals belong between mechanisms which permit individuals to pass their matters to independent third party (Elliot, 2011, p. 454). In Czech legal system appeal cannot be considered as one of these mechanisms, but there is access to judicial review and also ombudsmen, both with real guarantees of independence.

6 "Thus, in the planning field effective appeal procedures are essential if appellants and objectors are to feel that their case has been fairly considered." (Neil, 1988, p. 5)

7 Decision of the Czech Constitutional Court from 25/6/2009, No II. ÚS 1062/08.

in the area of cultural monument care, representing about 500 appeals.[8] In approximately 38 % of cases the original decision was revoked and the proceedings were returned to first instance. In another 32 % the challenged administrative decision was fully confirmed. In less than 14 % of all cases the decision was changed by the appellate authority. In 6.5 % of all cases the decision was revoked and the proceedings halted. The other ways of dealing with appeals remained marginally represented (see Graph 1.

Graph 1: Results of appeal proceedings

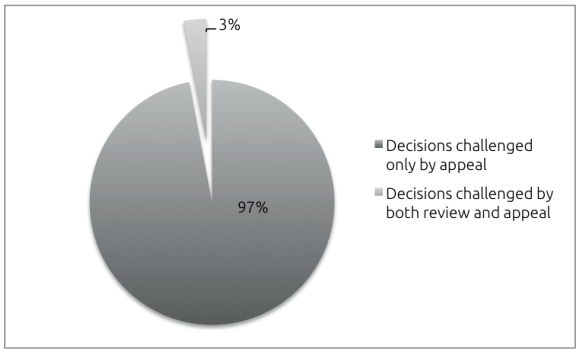


Source: Data obtained upon request from regional offices of the Czech Republic.

Unfortunately, we could not yet collect sufficient data that would allow meaningful comparisons of appeal with other Czech means of protection. There were only about 3 % of cases subject to appeal and afterwards also by review, which is one of the extraordinary Czech means of protection (see Graph 2). 10 % of these cases were revoked by review despite a previous appellant procedure (see Graph 3). However, we also found out that in these cases the appeals were dismissed because of their lateness or inadmissibility. There was only one case in which a public authority revoked its own decision despite it being previously confirmed in an appellant procedure. The authority did so after the complainant submitted an action to an administrative court. The number of submitted actions was very low, yet applicants were successful in fifty per cent of these cases.

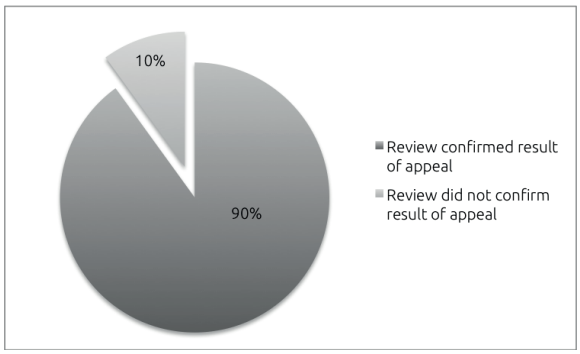
8 Unfortunately, respondents were not able to provide data about the whole amount of first-instance decisions. We consider this fact as a significant problem of Czech public administration, which lowers possibility of outer control. These data are necessary for recognising share of challenged decision. Hence we were not able to research efficiency of appeal in this regard. But we were able to research effectiveness according to the manner of resolving appeal (the same applies to remonstrance in next chapter).

Graph 2: Decisions challenged by review after appeal



Source: Data obtained upon request from regional offices of the Czech Republic.

Graph 3: Appeal vs. review



Source: Data obtained upon request from regional offices of the Czech Republic.

The obtained data show the following conclusions:

1. Appellate administrative authorities confirmed first-instance decisions in about 32 % of all cases.
2. At the same time it was not shown that means of protection other than appeal provide significantly different results.
3. It was shown that if the appellant public authority reveals some failure it returns it for a new procedure twice as frequently as it changes it. Yet it has to be noted that appellate administrative authorities probably do not have the capacity to change all undesirable decisions.
4. According to the opinion of the appellant public authority, first-instance decisions are defective in almost 60 % of all challenged cases.
5. According to the opinion of administrative courts, second-instance decisions are defective in almost 50 % of all challenged cases. If the 50 % success rate for actions against administrative decisions was also confirmed in a larger sample of data, it would surely be a warning sign

that the appeal system in the Czech Republic is not very efficient and produces a large amount of defective decisions.

2.3 Remonstrance in Czech legislation and practice

A special means of protection against decisions by public authorities at the central level of state administration in the Czech legal environment is called remonstrance. It also can be applied against an administrative decision that is not in force and it has a suspensive effect, however it has some necessary specifics.

The nature of the matter means that it is not possible to delegate the decision-making process about remonstrance to some higher authority, simply because there is none. It requires other solutions for many procedural questions, which are otherwise based on the devolutive effect. This is the main reason why Czech legislation distinguishes between appeals and remonstrances. Remonstrance is exclusively decided on by the head of the central authority that issued the challenged decision. This fact practically excludes the principle of two-instance proceedings at the central level of state administration.[9] On the other hand, remonstrance proceedings include the obligatory consideration of the case in front of a remonstrance commission that should consist mostly of professionals not employed by the affected central public authority.

The remonstrance method combines reconsideration and appeal. The Czech APC also expressly states that provisions about appeal should be proportionally used for remonstrance (Hendrych, 2012, p. 389). Proceedings in front of remonstrance should also be proportionally conducted according to the provisions of the APC on proceedings in front of a collegial authority, even if the remonstrance commission cannot be considered as an administrative authority in the true sense. The opinion of the remonstrance commission is not binding and is only a kind of recommendation for a head of a central administrative authority. A commission meeting can only be attended by its members and record keeper. According to law, practice establishes its own procedure and it became usual for a person with knowledge of the first-instance proceedings to refer to the members of the remonstrate commission, which starts its proceedings after this person leaves the room (Mates, 2007).

Nevertheless, a non-binding opinion from the remonstrance commission is obligatory and it should primarily act by force of their arguments (Jemelka, 2013, p. 520). Whether the head of the central administrative authority decides to respect the opinion of the remonstrance commission or not, proper justification of the decision must be provided.

The APC provides several ways for dealing with a submitted remonstrance, largely based on the application of provisions about appeal. However,

9 Decision of the Czech Supreme Administrative Court of 15/1/2001, No 6 A 11/2002.

some possibilities are controversial, as is the power to return a case for new proceedings, because it is sometimes considered contrary to the sense of remonstrance.

2.4 Problems relating to remonstrance

The first problem to point out is that the remonstrance commission cannot be considered independent even if it includes an element of professionalism. The appointment, but also recall, of individual members of this commission is the exclusive power of the head of the central administrative authority and can be performed without any significant restrictions. Therefore it is questionable to what extent the final opinion of the remonstrance commission reflects the true opinion of its members. Maintaining the independence of the remonstrance commission could be quite a difficult task. We appreciate the legislators' effort at professionalization. On the other hand, the Czech APC does not propose anything more than that the members of the commission should be "experts". Yet there is no mention about the specialization of these experts or any other interpretation regarding this provision, so the choice of the head of the public body can be quite broad.

The main question asked is whether remonstrance could be considered a full means of protection. We believe that this is at least controversial without major requirements relating to the independence of the remonstrance commission. As mentioned above, administrative courts cannot substitute for PA, especially if their power to review "factual findings" is very limited. Although it is not possible to establish a clear boundary between the review of "factual findings" inside of discretion and between the legality of decisions, this only emphasizes the need for the effective investigation of administrative decisions by PA.[10] It means that deficiencies in the area of review by PA cannot be ignored just because there are still administrative courts present (Macur, 1992, p. 50).

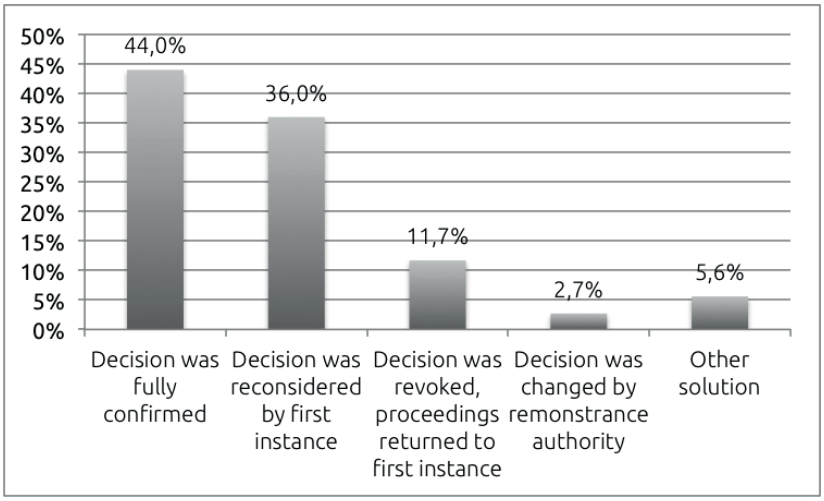
It is obvious that two-instance administrative proceedings are of significant importance. However, the Czech Constitutional Court has the following opinion: "[...] the absence of a two-level procedure is not in and of itself unconstitutional [...]."[11]

10 Czech approach to importance of dividing matters of law and facts is to some extent similar with English approach. (Griffith, 1973, p. 146) We also believe that PA bodies are usually more appropriate for dealing with factual findings than courts. However, Czech PA system did not develop organized system of some administrative tribunals, which could combine independence and fast, cheap, informal and expert mass administrative justice. (Craig, 2012, p. 231) In Czech constitutional system it is not possible to establish fully independent administrative appeal tribunals. Similar tribunals could be established as a part of executive, but not a part of PA. It means that in Czech legal system these tribunals cannot be named as „administrative". Potential establishment of these tribunals outside PA would cause double-tracking, which is criticised by some Czech (or Slovak) legal scientist.

11 Decision of the Czech Constitutional Court from 26/4/2005, No Pl. ÚS 21/04.

For the purposes of our research we asked the Czech Ministry of Culture to provide information about remonstrance proceedings in some areas of cultural monument care. The obtained data show that remonstrances were applied against 1.3 % of more than eight thousand administrative decisions issued by the Ministry of Culture. The Ministry of Culture resolved 36 % of all applied remonstrances through reconsideration. The second instance confirmed the decision of the first instance in 44 % of all remonstrance proceedings.

Graph 4: Results of remonstrance proceedings

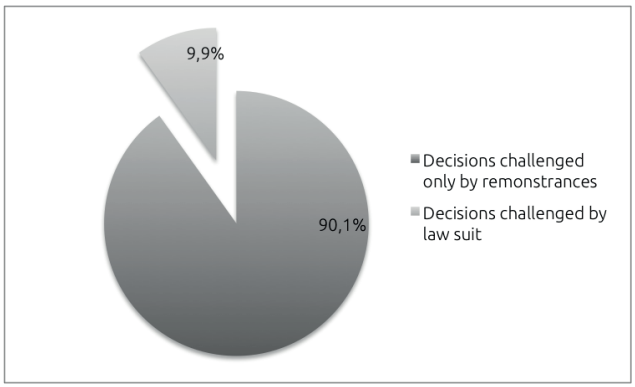


Approximately 12 % of all decisions were revoked and returned for further proceedings. Decisions were changed in less than 3 % of all remonstrances.

Source: Data obtained upon request from the Czech Ministry of Culture.

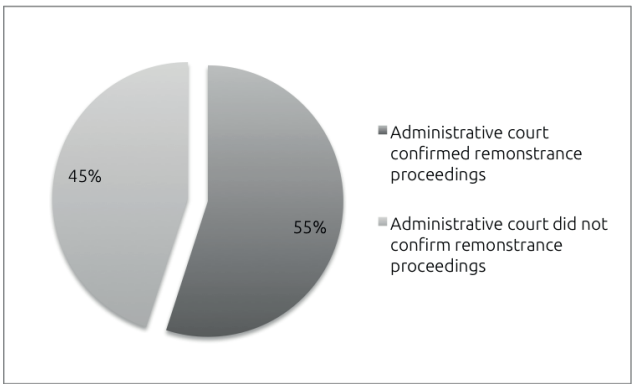
A decision was revoked after review proceedings in only one case, despite the fact that it had earlier been challenged by remonstrance. However, remonstrance was declined because of lateness or inadmissibility. Only 10 % of all decisions challenged by appeal were afterwards also challenged by actions in administrative courts (see Graph 5). Applicants were successful in about 45 % of these cases (see Graph 6).

Graph 5: Decisions challenged by law suits



Source: Data obtained upon request from the Czech Ministry of Culture.

Graph 6: Remonstrances vs. law suits



Source: Data obtained upon request from the Czech Ministry of Culture.

First-instance decisions are confirmed more often in remonstrance proceedings than in appeal proceedings. However, administrative courts did not confirm ministry decisions in more than 45 % of all cases.

The obtained data also show that the Ministry of Culture used reconsideration in more than 30 % of all cases, or more than three hundred times more often than it was used by offices in appeal proceedings. This strange situation could be caused by interdependence between first and second instance in remonstrance proceedings. In the Czech remonstrance system it could be very easy for the first-instance officials to harmonize their legal opinion with second-instance officials, who usually work in the same ministry building. However, these connections are evidence of a really low level of independence.

A decision is revoked and the proceedings returned to the ministerial first instance in almost twelve per cent of all cases, or about four times more often than a change of decision. Other cases are only marginally represented.

3 Objections and Comments Against a Hybrid Administrative Act

To understand the position and importance of objections and comments as the dispositional instruments of protection, it is necessary to clarify the position and importance of the hybrid administrative act against which the objections and comments are designed.

The hybrid character of measures of a general nature lies in their definitional characteristics: a measure of a general nature is situated between an individual administrative act and a normative (abstract) administrative act. The criterion for the dividing line between an individual and normative act is the level of specification or abstraction of the regulated matter and the addressees stated in the act. A normative administrative act is abstract for its generically designated subject and an indefinite number of addressees. An individual administrative act is specific for its specific subject and its addressees identified by name (Hendrych, 2009, pp. 78, 82). A measure of a general nature is a hybrid administrative act because it has the characteristics of both mentioned groups – it is neither a normative administrative act nor an individual administrative act, and this is related to the instruments of protection of public rights infringed by this act. Judicial decisions and doctrine show that "in national law a measure of a general nature is the only administrative act that has a generically defined subject and specifically defined addressees."[12]

This is the reason why a measure of a general nature is a hybrid administrative act in the field of individual and normative administrative acts. Hybrid administrative acts are known in various forms in many European countries[13] and they can be considered as a "*legislative response to doubts as to whether the present two forms of administrative activity – normative and individual administrative acts – are sufficient for the effective fulfilment of PA tasks*" (Hendrych, 2005, p. 231.).

One of the main goals of a measure of a general nature as a hybrid administrative act is to ensure that "aggrieved persons have a guaranteed minimum of procedural rights even in a case when an act of an administrative

12 Decision of the Czech Supreme Administrative Court from 27/09/2005, No 1 Ao 1/2005.

13 An important source for conception of Czech legal regulation of a measure of general nature is German law. German general order is defined in sec. 35 Administrative Procedure Act (Allgemeinverfűgung) as »administrative act directed at a group of people defined or definable on the basis of general characteristics or relating to the public law aspect of a matter or its use by the public at large«. The general order is a special kind of an administrative act and it must fulfil default characteristics of administrative acts, thus it regulates individual case with respect to time, place and other circumstances of certain (specific) facts. (Erbguth, 2009, pp 107–109), particularized object of and specifically captured (fixed) situation (Ipsen, 2007, pp 108, 129–131). Swiss law understands general orders in more narrowly way than the German law. Swiss general orders regulate »only« specific object in relation to the general group of addressees (see judgment of the Federal Court from 28th May 1975 in Case »Association nationale suisse pour le tourisme équestre and Mitbetieligte vs Constitutional Court in Zurich Region«, BGE 101 IA 73, pp. 74–75).

body relates to their interests yet the addressees cannot be designated specifically."[14] Undoubtedly this is a response to the impossibility for aggrieved persons to affect the current legislative process, controlled as it is by rules for issuing normative administrative acts. The possibility of aggrieved persons participating in the issuing of measures of a general nature is enabled by the comments and objections.

3.1 Comments and objections in Czech legislation and practice

The comments and objections that allow public participation in the issuing of a hybrid administrative act can concurrently be considered as the dispositional instruments of protection against a measure of a general nature. This is because the content of a measure of a general nature can be changed through the application of comments and objections by aggrieved persons.[15]

However, in contrast to the above-mentioned dispositional instruments of protection against individual administrative acts, they are not an instrument of protection against an issued administrative act. They are rather an instrument of protection applied during the actual process of issuing a measure of a general nature, meaning against its draft, the content of which will be the content of the issued measure of a general nature.

When an illegal act is being issued in the form of a measure of a general nature, it is necessary to prevent or minimize the negative effects on its addressees as fast as possible. In the case of the comments and objections there is room for remedy for the addressees even before the issue of such a hybrid administrative act. Therefore there is no suspensive effect, in contrast to appeals and remonstrances, however a measure of a general nature may not come into legal force until the comments and objections are properly settled.

The basic difference between a measure of a general nature and an individual administrative act is the addressees, i.e., how they are defined. This difference is reflected in the difference between appeal and remonstrance against an individual administrative act on the one hand, and the comments and objections against a measure of a general nature on the other. The individual administrative act "knows" its addressees, although their number may be even higher (dozens of people), yet a measure of a general nature does not "know" who its addressee is specifically. Thus the decisive fact is not the number of addressees of these administrative acts, but their definition. If you

14 The explanatory report on the draft of Act No 500/2004 Coll., APC, from 06/02/2004.

15 The German general order can be challenged by regular remedy with suspensive effect within one month from the date of notification (§ 68 Code of Administrative Court Procedure - Verwaltungsgerichtsordnung). After that the general order can be subject to judicial review by administrative court. The subject-matter of the action shall be the original administrative act in the shape it has assumed through the ruling on an objection, or the notice on a remedy or ruling on an objection if this contains a grievance for the first time (§ 79 Verwaltungsgerichtsordnung).

can specifically identify the addressees, it is an individual administrative act; a measure of a general nature defines its addressees indefinitely.

The initiation of proceedings to issue a measure of a general nature is connected to the publication of its draft on the official board of the administrative body issuing the act. The content of the official board is also to be published in a way that makes remote access possible (via the internet). This way of initiating and providing notification of a procedure leading to the issue of a measure of a general nature is logical because it would be very complicated to deliver the information to the unknown addressees other than by a public notice. The purpose of the publication of the draft of a measure of a general nature is to enable everyone to become familiar with the draft and eventually to protect their individual rights through the comments and objections.

Comments against a measure of a general nature may be presented by any person whose rights, duties or interests can be directly affected by the measure of a general nature. The administrative body is obligated to deal with the comments only as grounds for the measure of a general nature, and is obligated to settle them in the reasoning for the measure of a general nature. Yet there is no separate decision by the administrative body about the comments.

The legal regulation of the objections is more formalized, and in this regard probably more effective for the addressees because the administrative body makes a decision about each objection separately. The decision regarding the objections comprises its own reasoning. The reasoning for the decision regarding the objections has to comply with the same requirements as the reasoning for individual administrative acts.[16]

This makes the objections the dispositional instruments of protection of individual rights approximating a decision on an appeal or remonstrance. The legal regulation expressly excludes filing an appeal or remonstrance against a decision on objection, but this decision can be subject to *ex officio* review proceedings by a superior administrative body and the objection proceedings can also be renewed. The decision on an objection can also be subject to judicial review by administrative courts[17] similarly to a decision on an appeal and remonstrance (Skulová, 2012, p. 360). The importance of a decision regarding the objections is also highlighted by the fact that an alteration or discharge of a final decision regarding the objections may be reason for an alteration of the measure of a general nature.

3.2 Problems relating to objections and comments

In relation to the filing of objections and comments there is no devolutive effect because the administrative body making the decisions about objections

16 Decision of the Czech Supreme Administrative Court from 24/11/2011, No 1 Ao 5/2010.
17 Decision of the Czech Supreme Administrative Court from 07/01/2009, No 2 Ao 1/2008.

is the body issuing the contested act. Therefore it is a similar situation as in the case of remonstrance. Moreover, according to current legal regulation, in the case of the objections and comments there is without doubt no place for the principle of two instances (in contrast to the appeal and the doubtful remonstrance). This leads to similar doubts about the effectiveness of the comments and objections as mentioned in connection with remonstrance. The fact that the administrative body that published its own draft of a measure of a general nature reviews this draft (with respect to the comments and objections) may be problematic.

The mentioned method for settling the comments of aggrieved persons may lead to a change to the draft for an issued measure of a general nature, i.e., the comments can fulfil their purpose as an instrument for the protection of rights. However, the fact that there are no separate proceedings or separate decision on the comments reduces the effectiveness of the comments as an instrument for rights protection.

On the contrary, the method for settling objections is close to a decision on an appeal or remonstrance, and therefore its effectiveness is increased. On the other hand, however, the level of rights protection provided by objections is significantly weakened by the fact that the objections are only available for owners of real estate whose rights, duties or interests linked to the exercise of proprietary rights, can be directly affected by the measure of a general nature (and/or other persons, when determined by the administrative body). The objections can only be lodged by a privileged group of people.

4 State Monument Care in the Czech Republic

For a better description of the means of protection of public subjective rights in the Czech Republic we decided to focus on one of the PA sections: State Monument Care. It is defined by Czech law as a set of activities, measures and decisions through which the official bodies and the professional organizations f SMC shall, in conformity with the needs of society, provide for the conservation, protection, access to and appropriate use by society of, cultural monuments.[18] In this PA section there are both individual administrative acts and hybrid administrative acts.[19]

The fundamental individual administrative acts that form the basis of the SMC in the Czech Republic are the decisions proclaiming an object as a cultural

18 The State Monument Care (SMC) legislation is fundamentally concentrated in the Act on State Monument Care No 20/1987 Coll. The main objective of monument care is the preservation of culturally significant objects, and in the Czech Republic it is based on the responsibility for the condition of the cultural monuments being transferred from the state to the owners of the monuments. SMC is a public interest that significantly affects the private sector and is guaranteed by state administration as well as local administration. Similar principles can be seen even on the international level, or in other countries' national legal codes (Forrest, 2010, p. 19).

19 There are also normative administrative acts applied, but according to the topic of this article – they will not be mentioned further.

monument[20], by definition individual administrative acts made by a central administrative body in the area of cultural administration – the Ministry of Culture. The proclamation of an object as a cultural monument is a significant intervention in proprietary rights because it means limitations in terms of the disposal of property. This proclamation is the most frequent form of cultural heritage protection in the Czech Republic and it is a decision made *ex officio* in the public interest. The remonstrance is a dispositional instrument available for purposes of these decisions. The second group of individual administrative acts made by central administrative bodies that are a part of SMC consists of decisions made in administrative proceedings initiated by an application, mostly from the owners of cultural monuments or affected organizations.[21]

The major administrative procedures performed by the Ministry of Culture are the proclamation of an object as a cultural monument, authorization to perform certain activities relating to monument care, and granting financial support to monument owners.[22] The Ministry of Culture hears and decides a lot of proceedings that are either applied for or decided *ex officio*. The number of proceedings concerning proclamation of cultural monuments is around 213 per year,[23] where remonstrances were applied for in approximately 8% of cases[24]. The decisions were fully confirmed in more than half of the cases where the remonstrance was submitted. A similar tendency can be seen in the cases of authorizations to perform archaeological research. Since 2009 the Ministry of Culture has dealt with 17 cases, while it granted authorization to perform archaeological research in only 5 of them. The rest of the decisions were negative. In two cases a remonstrance was submitted, but in those two cases the original decision was also fully confirmed. In these cases of decision-making by the Ministry of Culture the protection instruments – the remonstrance – were used, but the original decisions were fully confirmed anyway.

20 Proclaiming an object as a cultural monument is one of the forms of monument care in the Czech Republic. Other forms are the Proclamation of an Object as a National Cultural Monument, Monument Reservation Status and Monument Zone Status, but the proclamation of those is not an administrative decision and most of these forms are not decided by the Ministry of Culture. More in: Varhaník, 2011. The state proclaims an object a cultural monument or gives an area a certain protective status (Zone or Reservation) which means additional duties for the owners of these objects or property in these areas and these duties can be enforced by the state using variety of administrative acts.

21 This means persons or organizations applying for authorization to perform archaeological research or a permission to restore cultural monuments etc.

22 Thus the foundations of SMC in the Czech Republic are a selection of objects that should be protected and the duties of the owners to protect these monuments at their own expense. There is an option to apply for a financial reimbursement (contribution) for these expenses. These reimbursements are provided by state and local authorities, but there is no legal claim to them.

23 For example in 2009 there were 173 proceedings concerning proclamation of a cultural monument, where 23 decisions (ca. 13 %) were negative. In 2009 there were 140 objects proclaimed cultural monuments, but since then the amount of cultural monuments proclaimed per year has slowly risen.

24 In 14 % of the cases the case was decided in front of an administrative court, and those cases were mostly decided in favour of the plaintiff.

Exactly the opposite could be seen in the area of state financial support for the renewal of cultural monuments.[25] 38 remonstrances have been submitted against decisions by the Ministry of Culture since 2009, but only a minimum of the original decisions have been confirmed.[26] In the majority[27] of these remonstrance cases there was a decision in favour of the applicant by the Ministry before the remonstrance proceedings started.

There were significant differences in the results of these remonstrance proceedings. In the case of proclaiming an object a cultural monument the point is that it is an act that imposes certain requirements (like legal duties) on the owners of such objects. It is only logical that these would be the cases where the means of protection would often be used, yet in addition where the chances of success of these remonstrances are not high. In the cases of the authorizations to perform archaeological research, remonstrances should be applied as well, yet statistics show that the percentage is lower. Unlike in those cases, the case of financial support from the state differs completely. The effectiveness of remonstrance in cases of financial support is extremely high, though the rectification of the decision is performed even before the remonstrance proceedings starts through the full satisfaction of the applicant. The question is how much this corresponds to the quality of decision-making by the Ministry of Culture, the effectiveness of the legal framework and administrative practice in this area, and what role is played by the fact that there is no legal claim to financial support for cultural monuments.

The important information is that the number of remonstrances against decisions made by the Ministry of Culture is increasing: there were 37 remonstrance cases in 2007 and that number has increased through the years to 75 cases in 2012. The ratio of legal actions against the remonstrance cases on the other hand has decreased, as well as the number of the Ministry's decisions that were revoked in these legal proceedings. These tendencies could lead to the conclusion that the effectiveness of decision-making by the Ministry of Culture has improved in first-instance proceedings as well as in the remonstrance cases.

In SMC there are also individual administrative acts provided by non-central administrative bodies at regional and municipal level. In this case the proper dispositional protection would be an appeal. The regional authority, or the municipal authority of a municipality with extended competence, has a crucial role in monument care, like in producing the binding opinions required by law in the case of the restoration of cultural monuments or national cultural monuments. If the owner of a cultural monument wants to perform alterations, reconstruction work, etc., he/she should request a binding

25 This financial support is provided by the state from the state budget. Decisions about provision of this support are also taken by the Ministry of Culture. More in: Pek, 2009.

26 In the cases where the remonstrances were submitted, only four original decisions were confirmed.

27 This tendency occurred in 34 cases.

opinion, which is an independent decision in administrative proceedings.[28] This is one of the most important regulations in SMC because it allows it to control and adjust the administration of monument care for the monuments that are not its direct property.

Another field that includes decision-making by a regional and municipal authorities, is the financing of SMC. The law provides the possibility of providing a financial benefit to the cultural monument owner but with no legal claim. These financial contributions are provided by regional and municipal authorities from their own budgets.[29] Regional and municipal authorities also take administrative decisions about actions to protect cultural or national cultural monuments. These proceedings enforce the public interest and take place if the owner does not fulfil his/her duties in terms of the protection of the monuments.[30]

Another legal form used in monument care in the Czech Republic is a measure of a general nature which got into SMC legislation only as Plans for Protection of Monument Reservations or Monument Zones that could be used to protect and preserve cultural values in a specific area. These measures of a general nature replaced the legislative rules[31] that were used before and that strengthened the protection of subjective rights, because dispositional instruments of protection are not usable against legislative rules. However, issuing measures of a general nature in this case is only optional.

Every person whose rights, duties or interests can be directly affected by a measure of a general nature may present comments against that measure of a general nature. The Plans for Protection establish the conditions and requirements for enforcing SMC in these areas, which directly affects rights and duties only of the owners of the immovable property located in these areas.[32] Objections against measures of a general nature can also only be used by the owners of the immovable property in these areas, the subjects of these means of protection merge, and although the application of comments cannot be excluded, it is highly improbable that they will ever be used.

28 The binding opinions given through the Act on SMC are administrative decisions that state the conditions for monument maintenance, repair, reconstruction and restoration and are independent. SMC also acknowledges a binding opinion that is an expert opinion of administrative bodies and is only a dependent part of another administrative decision. An appeal should be aimed against the merit of the decision, but could be in fact aimed against the content of the binding opinion.

29 The Ministry of Culture provides this financial contribution if there is an extraordinary interest for society in conserving a cultural monument.

30 These proceedings are either applied for or carried out ex officio. It is a guarantee that the rules are complied with.

31 Legislative rules in the Czech Republic are represented by legal norms issued based on delegation by law.

32 One of these affected obligations is, for example, the obligation to request a binding opinion about construction, reconstruction etc., in a protected area.

SMC in the Czech Republic is based on the transfer of responsibility for the condition of cultural objects from the state to the owners, where the state also controls compliance with stipulated duties, and has the right to intervene in the case of a breach of these duties. But this approach requires adequate motivation from the state or a compensation for the limitation of the proprietary rights of the owners of the monuments. This is not well provided for in the Czech Republic, and this can be demonstrated using the example of the aforementioned financial contributions. This results in a situation in which proclaiming an object a cultural monument may mean a significant burden for the owner, who in turn wishes to protect him/herself from such an administrative decision, even though the proclamation is an act of protection of cultural heritage. The question is to what extent the state provides real protection for the monuments and how effective this protection is from the point of view of the use of the dispositional instruments of protection against administrative acts.

5 Conclusions

Appeals and remonstrances as means of protection against individual administrative acts are constructed in a significantly different way than objections and comments as means of protection against hybrid administrative acts.

Appeals and remonstrances may be submitted by an appellant against individual administrative acts that have already been issued. Also, the appellant is a party to the prior proceedings and he/she is also advised by a public authority as to how to proceed with the appeal. On the other hand, objections and comments may be submitted against measures of a general nature (hybrid administrative acts) that have not yet been issued. These means of protection are submitted by persons who think that their individual rights could be affected. The principle of two instances does not apply to this legal construction.

Czech appellant and remonstrance authorities lack guarantees of independence. This fact is generally accepted by the Czech legal environment but could cause uneasiness in other countries that have established independent appellate tribunals. Moreover, a review of administrative decisions should be able to protect public interests as well as individual rights. A lack of independence could cause an unbalance between these values to the detriment of individuals or, worse, to the detriment of both public interests and individuals. As we showed above, some errors cannot be redressed by administrative courts. Czech legislation misses some fundamental goals connected with means of protection. Administrative means of protection cannot be considered only as a lower degree before judicial proceedings. Administrative means of protection should provide necessary standards such as independence.

We think that the effectiveness of appeal and remonstrance is decreased by the absence of real guarantees of independence in appellate and remonstrance proceedings, but we also have to point out that for the same reason the effectiveness of remonstrance is much lower than the effectiveness of appeal. Proceedings conducted by a remonstrance authority cannot be considered as independent second instance. This means that Czech PA differentiates between two types of individual administrative acts depending on whether they were issued by central public authorities or not. There is no guarantee that administrative decisions issued by central authorities are of higher quality, yet the addressees of these acts have lower levels of protection for their individual rights. At the same time, there is no real policy stating which proceedings should or should not be conducted at the central level of public government.

Objections and comments do not provide such a high level of protection against hybrid administrative acts as appeals and remonstrances against individual administrative acts. To some extent this is due to the fact that measures of a general nature lie somewhere between individual administrative acts and normative administrative acts. This means that a measure of a general nature cannot be enforced as directly and immediately as an individual administrative act.

However, comments and objections are not means of protection that are a priori unable to avert the negative impacts of defective measures of a general nature. They are means of protection that can actually solve disputes within PA without relying on the administrative judiciary. They act against a proposed measure of a general nature, meaning that potential defects could be corrected before it is issued, unlike appeals and remonstrances, which can only be submitted after the issuing of an individual administrative act. On the other hand, the effectiveness of objections and comments could be decreased by the absence of the devolutive effect in the proceedings.

Comments are more effective than objections in that they are available to a wider range of persons. Objections are more effective than comments in terms of the manner of the proceedings. These differences are based on the assumption of more possibilities of intervention against the legal sphere of people entitled to submit objections than the legal sphere of people who can "only" submit comments.

The effective use of remedies, whether appeal, remonstrance, objection or comment, depends on many factors such as the knowledge held by the addressees or the construction of the material and procedural legal regulation. We think that the effectiveness of means of protection is directly connected with the effectiveness of PA as a whole.

We verified the outlined conclusions on a chosen section of PA (SMC) which is appropriate for the case study mainly because of the contrast between the

public and private interests or the high level of individuality of the specific types of proceedings. As mentioned before, in these proceedings there is high potential for disputes and the use of measures of protection.

As a result of our research into the chosen section of PA, we revealed that measures of protection against the most common decision processes, especially the proclamation of objects as cultural monuments or the issuing of binding opinions, indirectly point out problems in the PA section relating to monument care as a whole. The fact that many decisions were cancelled in the appeal process and returned to first instance, or changed by the appellate authority, indicates problems with the subjectivity and individuality of particular cases where it is necessary to consider cultural values and where there are high demands placed on the owners of the cultural monuments. Most of the issued decisions respect public interests, yet these are in sharp contrast to the interests of private persons. At the same time, the state is unable to compensate for all private losses. It is therefore possible to say that the analysed means of protection in the PA section on monument care are effective in terms of the protection of the rights of owners of cultural relics or objects of cultural value. On the other hand, the effectiveness of the remedies also indicates the problematic and often flawed decision-making of first-instance authorities. This fact could be caused by specifics and the professional demands of the PA section on monument care, where professional consideration is performed by the National Heritage Institute which, although it performs technical consideration, is still a different authority from the public authorities that perform the actual decision-making.

Hypothesis described in foreword of this article was not fully verified, because the lack of data, which are not continuously gathered by Czech public bodies. We were not able to make direct link between lack of devolutive effect, or independence in organizational arrangement between first and second instance administrative bodies and inefficiency of described means of protection. Still, obtained data did not disprove outlined hypothesis and it showed some partial inefficiencies (e. g. share of cancelled decisions by courts), which could be linked with our hypothesis in future (with enough data).

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POVZETEK

1.02 Pregledni znanstveni članek

Dispozitivna sredstva varstva zoper upravne akte (pred izvršljivostjo) in njihova učinkovitost

Ključne besede: pravno sredstvo, pritožba, ugovori, pripombe

Javna uprava se pogosto izvaja prek izdajanja javnih aktov enostranske in zavezujoče narave. Vendar so (in morajo biti) v javni upravi zagotovljeni tudi pravni instrumenti, s katerimi se lahko tisti, za katere so upravni akti zavezujoči, branijo pred nezakonitostjo in nepravilnostjo teh upravnih aktov. Obstoj in primerno učinkovitost teh pravnih instrumentov lahko razumemo kot nujni del (*sine qua non*) demokratične pravne države in načela zakonitosti. Članek obravnava tako imenovana dispozicijska pravna sredstva, ki omogočajo varstvo pred še ne izvršljivimi upravnimi akti. Glavna ugotovitev članka je, da bi odsotnost devolucijskega učinka ali zagotovitve neodvisnosti organizacijske ureditve med prvo in drugo stopnjo upravnih organov lahko omejevala učinkovitost teh sredstev.

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