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Legal aspects of the resolutions determining the acceptable types and quality of fuels under Polish legislation

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Keywords:

Air pollution, air quality, resolutions determining the acceptable types and quality of fuels, low emission, anti-smog resolutions

Abstract

The article focuses on the selected aspects of introducing a resolution by a self-government of a province, which allows to determine the acceptable types and quality of fuels. The impact of polluted air on human health is significant. The actions carried out by the local authorities should be aimed on seeking effective air protection remedies; nonetheless, the scale of these activities seems to be still insignificant. One of the legal mechanisms is introducing resolutions determining the acceptable types and quality of fuels by a self-government of a province in order to protect the health of Polish residents and reduce the negative impact of air pollution on the environment. The question, however, is whether such resolutions could be audited with respect to the execution of such a resolution and whether they effectively lead to air quality improvement.

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1. INTRODUCTION

Air pollution has been a broadly discussed topic in Poland over the last decade. The growing problem of low air quality in Poland is still far from standards adopted by the European Union. Poland is one of the most polluted countries in the European Union [2018 World Air Quality Report Region & City... 2018] and the air quality standards seem to regularly exceed in the winter season. The condition of air quality in Poland is determined mostly by the low emission originating from the municipal and transporting sector [Narodowy Fundusz Ochrony Środowiska i Gospodarki Wodnej... 2016]. Transport is however responsible for the low air quality only in the local scale. Additionally, the emissions from burning solid fuels (mostly coal of poor quality) and waste, particularly used for domestic heating as well as using inefficient heating installations contribute to increase of the air pollution. The above mentioned type of air pollution resulting from low emission has a negative effect on the human health life and environment. Particularly, air pollution leads to increasing asthma rates and respiratory system diseases [Zieliński, Wielgus, Dreliszak, Zukow, 2018].

Insufficient measures to protect the health of Polish residents and to reduce the negative impact of air pollution

The problem of low air quality has been signaled in the judgment of February 22, 2018 of the European Union

Court of Justice [Judgment... 2018], stating that the Republic of Poland has failed to fulfil its obligations under, respectively, Article 13(1), in conjunction with Annex XI, the second subparagraph of Article 23(1), and Article 22(3) of, in conjunction with Annex XI to, Directive 2008/50/EC of the European Parliament and of the Council of May 21, 2008 on ambient air quality and cleaner air for Europe [Directive... 2008] ('CASE'). The European Court of Justice concluded particularly that no appropriate measures have been incorporated in the ambient air quality programmes. The above cited decision confirms that the measures undertaken by the Polish government seem to be still insignificant.

Another example of low air quality are the findings in the audit (P/17/078) of the Supreme Audit Office [Air Protection in Poland... 2018] concerning air protection that dramatically demonstrate that the carried out actions were inadequate with respect to the scale of the problems related to unsatisfactory air quality in Poland. Moreover, the actions aimed at improving of air quality did not provide a substantial improvement. The problem of unsatisfactory legal measures is therefore significant. At the same time, the lack of comprehensive analysis and research from the legal perspective can be observed.

Air pollution and smog

It is important to note the use of the correct terms with respect to the smog, as introducing resolutions

determining the acceptable types and quality of fuels on the self-government of a given province level is often [Gawel 2019; Stala-Szlugaj 2018] described as the so-called 'anti-smog resolutions'. Therefore, it is necessary to outline the term 'smog'. Having said that, it is necessary to mention that the Great Smog of London between 5th and 9th December 1952 was primarily caused by exceeding of the sulphur compounds in the atmosphere. Several factors are mentioned as the cause of smog in London at the end of 1952, in particular, the atmospheric conditions combined with increased combustion coal. As a result of air inversion, cold air was trapped under a layer of warm air, along with car exhaust fumes, smoke from factories located and households in London. Polluted air was stopped under a layer of fog and floated at the street level [Nawrot 2018]. In light of the above, describing the resolutions determining the acceptable types and quality of fuels on the self-government of a given province level as anti-smog resolutions seems to be misleading, as in a fact, the resolutions determining the acceptable types and quality of fuels are intended to limit the low emissions. According to the Encyclopaedia Britannica [Encyclopædia Britannica... 2019], the term 'smog' means community-wide polluted air and: *'the term is derived from the words smoke and fog, but it is commonly used to describe the pall of automotive or industrial origin that lies over many cities. The term was probably first used in 1905 by H.A. Des Voeux to describe atmospheric conditions over many British towns'*. The term 'smog' has been therefore reserved for specific conditions, resulting from both natural and industrial pollution under specific atmospheric settings. Today, almost every air pollution (irrespective of the legal, economical or environmental perspective) seems to be defined as smog. In a fact, the leading air pollution factor in Poland is particulate matter PM10 and PM2,5 [Kostrz, Satora 2017], while the Great Smog of London is identified by high concentrations of sulphur oxide (SO) and particulate matter [Jeffrey et al. 2009]. At this point, it should be noted that the term smog has spread significantly and its meaning seems to be broadened.

Legal basis for resolutions determining the types of fuels

The CASE obliges Member States to ensure that, in the event of exceedance of limit values whose entry into force has expired, air protection plans set out appropriate measures so that the period in which they are not met is as short as possible. The main national act laying down the principles of environmental protection and the conditions for the use of its resources, specifies different legal measures is the Act on the environmental protection of April 27, 2001 [Act on the environmental protection... 2001]. The Act specifies for the first time elementary rules aimed at low emission reduction by way of introducing resolutions determining the acceptable types and quality of fuels on the self-government of a given province (*pl. sejmik województwa*) level [Kucęba, Kulej-Dudek 2016]. The

adoption of a resolution determining the acceptable types and quality of fuels is regulated under Article 96 of the Act on the environmental protection and enables specifying standards for devices used for solid-fuel burning, types of such fuel or the quality of the fuels authorized for use. The existing shape of Article 96 has been specified in 2015. The Act of September 10, 2015 amending the Act on the environmental protection [Act of 10 September 2015 amending the Act on the environmental protection... 2015] clarified the scope of the resolution adopted by a regional council of a province. The above mentioned amendment of the Act on the environmental protection entered into force on November 12, 2015. Under Article 96, the self-government of a given province may, in order to prevent negative impact on human health or the environment, introduce restrictions or bans on operating installations in which the fuels are burned. The amendment of this regulation was particularly aimed at eliminating doubts related to the scope of the resolution and the manner of its implementation as the earlier authorisation to adopt resolutions determining the acceptable types and quality of fuels was limited and could lead to misleading interpretations. In a judgment of August 22, 2014 no. II SA/Kr 490/14 of the Provincial Administrative Court in Krakow [Judgment of the Provincial Administrative Court... 2015], the court concluded that the resolution determining the types of fuels authorized for use exceeded the statutory authorisation provided under Article 96 of the Act on the environmental protection. The construction of a given resolution had an impact on violation of other legal acts such as the constitutional regulations, energy law, construction law or the civil code. The court also stated that authorisation under the above mentioned provision enables differentiating the legal situation of its addressees only as to the use of a given type of fuel as well as the territory. There is no statutory legal basis to introduce other substantive criteria other than those mentioned directly under Article 96 of the Act on the environmental protection. Having said the above, Article 96 was amended and several important issues, as observed by the courts, have been taken into account while shaping the existing regulation.

2 ANALYSIS OF ARTICLE 96 OF THE ACT ON THE ENVIRONMENTAL PROTECTION

Under Article 96 section 1 of the Act on the environmental protection, the self-government of a given province may adopt a resolution, which specifies the standards for installations used for solid-fuel burning, types of such fuel or the quality of the fuels authorized for use. The board of the province develops a draft of such resolution and provide the relevant competent authorities with such draft for an opinion. The regulation of Article 96 indicates which elements of the resolution are compulsory and which can be optional. The mandatory elements of each resolution constitute: (i) the borders of the area in which restrictions or prohibitions are introduced; (ii) types of entities or

installations for which restrictions or prohibitions are introduced; (iii) the types or quality of fuels allowed for use or the use of which is prohibited in the area covered by the resolution or technical parameters or solutions of installations in which the fuels are burnt.

Considering the growing importance of such resolutions, one of the key elements of a given resolution determining the acceptable types and quality of fuels is the territorial scope of a specific resolution. Any reference in this respect can be considered as a lack of precision in defining the scope of the restrictions introduced, and consequently, may be classified as a violation of the law. The Constitution of the Republic of Poland of April 2, 1997 [Constitution... 1997] describes in Article 31 section 3:

'Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.'

In light of the above, if the resolution introduces a ban, while applying restrictions could be a satisfactory measure, it will be considered as violating the proportionality principle and the constitutional regulation mentioned above. It is important to note that while developing resolutions which introduce the above restrictions, it should be considered that every resolution constitutes a limitation of the protected civil rights and freedoms under the Constitution [Judgment of the Supreme Administrative Court... 2015]. The question, however, is whether a restriction or a ban should be introduced. In order to achieve the aim that is preventing the negative impact on human health or the environment, each case should be analysed individually, and also whether it is enough to introduce restrictions, if necessary, to achieve this objective will be prohibitions or whether there will be a need for both restrictions and bans [Gruszecki 2019].

An important remark regarding this mandatory element describing the borders of the area in which restrictions or prohibitions are introduced, is the environmental impact. In practice, such solutions do not certainly need to cover the entire administrative units (such as whole municipalities), as the environmental impacts occur independently of any administrative borders [Gruszecki 2019]. The bans or restrictions may be applied only to the types of fuels used, or to their quality, or to both. Furthermore, the bans or restrictions may describe the technical parameters or solutions of installations.

Article 96 of the Act on the environmental protection also describes non-compulsory elements of resolution determining the acceptable types and quality of fuels that can be as follows: (i) the manner or purpose of using fuels that is subject to the restrictions set out in the resolution; (ii) duration of restrictions or prohibitions during the year; (iii) duties of entities covered by the resolution to the extent

necessary to control the implementation of the resolution. Such option allows introducing additional restrictions on the manner or purpose of using fuels covered by the restrictions resulting from the resolution. In other words, a resolution determining the acceptable types and quality of fuels may be tailored to the needs of the relevant province authority, if the authority observes the need to diversify the manner or purpose of using fuels covered by restrictions [Gruszecki 2019]. An example is that the optional elements of resolutions were not introduced in the Resolution no. XLI/1405/17 of the self-government of Lower Silesia province of November 30, 2017 [Resolution no. XLI/1405/17... 2017]. The resolution does not contain duration of restrictions or prohibitions during the year, as the intention was that the restrictions shall apply throughout the year. The Resolution no. XXXII/452/17 of the self-government of Lesser Poland province of January 23, 2017 [Resolution no. XXXII/452/17... 2017] does not define the manner or purpose of using fuels that is subject to the restrictions set out in the resolution. This means that the above mentioned resolution covers all installations emitting or supplying heat, including installations used for heating purposes, as well as for food preparation and other purposes.

In light of the above, Article 96 enables using by the self-government of a given province a relative flexible instrument aimed at air protection improvement and based on the given examples, the self-government of a province may adjust a resolution to particular conditions and areas.

On the other hand, for the area of Krakow, which has not been covered by the Lesser Poland resolution, there is a separate regulation introduced by Resolution no. XVIII/243/16 of the self-government of Lesser Poland of January 15, 2016 [Resolution no XVIII/243/16... 2016] regarding the introduction of restrictions on the operation of installations in the area of the Krakow City Commune banning solid fuels combustion in the residential sector as of September 1, 2019. The introduction of a separate regulation for Krakow is justified by the special conditions for the city. First of all, due to the high-density housing, high levels of air pollution are exposed to almost one million residents residing in Krakow. Due to the well-developed infrastructure of the heating and gas network in Krakow, there are also technical possibilities to completely eliminate the combustion of solid fuels in individual installations. Unfavourable topographic and climatic conditions of Krakow require the adoption of restrictions that will ensure permanent reduction of emissions from the combustion of solid fuels.

The scheme of introducing a separate resolutions by the self-government of a given province is however only a partial solution in light of a long-term perspective of reducing the negative impact of air pollution on the environment. No generally applicable regulations defining emission limits at the national level are currently introduced under Polish law. It should be outlined that the level of air quality is influenced not only by the local emission, but

also by polluting sources located in neighbouring areas. The lack of national and generally binding regulation for the entire Polish territory, may lead to deterioration of air quality. From the legal point of view, it may also differentiate the standards depending on the localisation of the same types of installations. Such scheme consisting of separate resolutions adopted by the self-government of a province can be considered as far from ideal. More effective could be introducing appropriate solutions at the national level, including subsidies for exchange of the existing heat sources and subsidies for ecological fuels. Another example could also be introducing an obligation to document and control exhaust gases and also, as a social postulate, raising awareness as to the energy efficiency and use of the renewable energy sources.

3 DISCUSSION

As the structure and elements of the resolution determining the acceptable types and quality of fuels were pointed out above, several problems arise together with the adoption and the control of the resolutions.

With respect to the current shape of Article 96 of the Act on the environmental protection, the Provincial Administrative Court in Krakow of October 3, 2017, case II SA/Kr 750/17 [Judgment of the Provincial Administrative Court in Krakow... 2017] indicated that the protection of environment (under Article 68 section 4 of the Constitution) and human health is a duty of public authorities (under Article 74 section 2 of the Constitution). The case concerned introduced restrictions in the operation of installations in which fuels are burnt. Under Article 90 section 1 of the Act on province government [Act on province government... 1998] specifies that anyone whose legal interest or right were violated by a local law act issued in a public administration case, may – following an ineffective request to remove the violation directed to a given self-government, which issued a regulation – challenge the regulation before the administrative court. In other words, the plaintiff shall demonstrate the legal interest, which means a personal, specific and current legally protected interest that can be executed on the basis of a specific law, usually through a directly binding act. The legal interest is individual, specific and verifiable. The plaintiffs, who were entrepreneurs selling coal, raised that the resolution in question infringes plaintiffs' legal interest as the imposed restrictions and prohibitions result in restricting the coal market, and also creating unequal conditions of running a business compared to the sellers of other fuels than coal, such as biomass. The court did not agree with such approach and questioned their legal interest, as that the contested resolution did not expressly prohibit the sale of any type of coal or its production. The court has not observed infringement of the constitutional proportionality principle or property right. Protection of the environment (as specified under Article 74 (1) and (2) of the Constitution) and, unquestionably, protection of human health (Article 68 (4) of the Constitution), enjoy

the same protection as property law. Therefore, the court concluded that taking into account the proportionality principle, a common good, which is environmental protection and protection of human health, prevails over individual interests. Further, the court concluded, that resolutions determining the acceptable types and quality of fuels in question introducing restrictions on the operation of installations, imposing restrictions on all entities that operate installations, has an impact on the legal situation of entities operating the installations. The plaintiffs are not covered by this regulation as the questioned resolution did not concern coal trade, but limitations in the operation of installations, not only coal, and was aimed at air quality improvement. Therefore, it does not directly affect the plaintiffs' scope of rights or obligations. Having said that, the legal interest has not been demonstrated by the plaintiffs. Although introduction of resolutions determining the acceptable types and quality of fuels will contribute to the reduction of hard coal consumption by households, nonetheless, an increase of demand for high quality coal dedicated to modern boilers, especially for qualified coal fuels. The above judgment calls for discussions to be held if possible pointing out the meaning of the environmental protection. The grounds for challenging the above resolution are concentrated on intervention in economic situation of individuals. Therefore, educational campaigns should be carried out stressing out the importance of environmental protection and protection of human health, prevailing over individual interests.

The resolutions determining the acceptable types and quality of fuels do not determine sanctions for non-compliance. This sanction has been indicated under Article 334 of the Act on the environmental protection: who does not comply with the restrictions, orders or prohibitions set out in the resolution of the a self-government of a province in accordance to Article 96, shall be subject to a fine. As the resolutions determining the acceptable types and quality of fuels do not directly determine sanctions for non-compliance, the addressees of the resolutions are not fully aware of its legal consequences. Execution of additional sanctions under the Act on the environmental protection should be also introduced on the statutory level by way of broadening the scope of sanctions that should be decisive and immediately enforceable.

4 CONCLUSIONS

In view of the above, it should be concluded that there is a constitutional duty to protect the environment and human health, and the public authorities are obliged to prevent the negative consequences of the environmental pollution. Such general goal should be considered by the authorised self-governments of a given province while developing a specific resolution determining the acceptable types and quality of fuels.

Having mentioned all the aspects of resolutions determining the acceptable types and quality of fuels that

can be adjusted and tailored to the specific conditions, it can be concluded that Article 96 enables using by the self-government of a given province a relative flexible instrument aimed at air protection improvement. Nonetheless, broadening the scope of sanctions for non-compliance with the resolutions on the statutory level should be introduced.

The question arises as to whether the effect of the resolution played a significant role in shaping the efficient mechanism leading to air quality improvement. The carried out actions seems to be inadequate with respect to the scale of the problems related to unsatisfactory air quality in Poland. According to the Assessment of the impact of the implementation of air protection programs, anti-smog resolutions and the 'Clean Air' program on CO₂ emission [Zyśk, Olkusiński, Kogut, Szurlej, Surówka 2019] implementation of plans included on Air Protection Programs and anti-smog resolutions can lead to a relatively small (approx. 1%) reduction of CO₂ compared to the base year 2017. Currently, nine provinces in Poland have introduced resolutions determining the acceptable

types and quality of fuels, which are Lower Silesia, Lubusz, Łódzkie, Opole, Lesser Poland, Masovia, Subcarpathia, Silesia, Greater Poland, and this might be viewed as still a sign of a progress.

As already mentioned, the lack of national and generally binding regulations for the entire Polish territory is a major *de lege ferenda* postulate [Zacharczuk 2017]. The regulations aimed at air quality improvement should cover every group of combustion processes. The legal actions should be planned as a scheme of activities in a long term perspective. The legislator should consider substantial changes from scratch starting with the subsidies for exchange of the heat sources and subsidies for ecological fuels. As may be observed, using renewable energy sources instead of traditional conventional energy sources seems to be a difficult and long-term process. The coal lobby is rather strong in Poland and can effectively protect its interests [Grzymała 2016]. Transition from the solid fuels to renewable energy sources as soon as possible is inevitable and necessary.

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