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The Qualification of Action in Administrative Justice and its Perils – the Czech Experience[1]

Abstract: This paper concerns the system of the 'main' types of administrative action in the Czech administrative justice, more precisely the qualification of the 'correct' type of an action. The boundaries between action types are not always clear, which has consequences for the protection of applicants' rights in the administrative justice proceedings. The first part of the paper deals with the theoretical level of the problem outlined. The second part deals with some recent changes in Czech case law and proposes possible solutions.

Keywords: Administrative Justice, Type of Action, Qualification of Action in Administrative Justice, Administrative Decision, Unlawful Interference, Boundaries between Actions, Administrative Act.

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Introduction

The importance of administrative justice seems unquestionable across the legal systems of European countries. It constitutes one of the key features of the rule of law and enables the executive to be controlled by independent and impartial courts. However, the path to justice is not always simple. Access to justice is influenced by a number of legal conditions and potential obstacles. These can be court fees, the possible obligation to be represented by a legal professional (and the related accessibility of free legal aid), or the clarity and 'user-friendliness' of relevant legislation.

According to Zrvandyan, administrative justice places most of the responsibility on the private person to initiate administrative proceedings against the state. Moreover, judicial systems can often be difficult for individuals to understand.[2] Navigating the procedural regulation contained in the Code of Administrative Justice[3] seems to be somewhat problematic also for the Czech administrative judiciary.

The aim of this article is to present, from our point of view, the most notable conceptual problem of the CAJ at the moment. This is related to the definition of the 'main' types of actions in Czech administrative justice, or more precisely to the qualification of the 'correct' type of action (claim) in an environment of unclear boundaries between these types and its possible implications. With this in mind, the article is divided into two parts. The first part deals with the theoretical level of the outlined problem. The second part discusses some recent developments in the Czech case-law closely related to the subject and finally suggests some possible solutions.

The Basics of the Czech Administrative Justice System

The administrative justice system in the Czech Republic is of single instance, but it does provide for the possibility of a cassation complaint as a so-called

2 Arman Zrvandyan, *Casebook on European fair trial standards in administrative justice*. Strasbourg, 2016, 10.

3 Act No. 150/2002 Coll. Hereinafter: CAJ.

extraordinary remedy.[4] Thus, in addition to the administrative courts at the regional level, the Supreme Administrative Court[5] is also part of the system. The primary intended role of the SAC is to unify the case-law of administrative courts. This is done through its extended chamber. Three-member chambers of the SAC may refer cases to the extended chamber if they have a legal opinion that is different from previous decisions or find a conflict in the case-law. However, the case-law unifying role of the SAC is continually weakening due to the increasing number of cassation complaints.[6] A similar trend can also be observed in the Polish administrative justice.[7]

In Czech law there are three 'main' (rudimental) types of actions that can be used when accessing an administrative court: an action against a decision of an administrative authority, an action against an unlawful interference, instruction or enforcement[8] of an administrative authority, and an action for protection against the inaction of an administrative authority.[9] These action types do not represent the whole scheme of action types regulated in the CAJ. The scope of CAJ is wider, containing *inter alia* disciplinary proceedings with judges, prosecutors and executors, electoral matters, and competence matters.

The concept of categorisation (or classification) of action types in administrative judicial proceedings is of course not specific to the Czech legislation. German law distinguishes between several different types of administrative action that are related to single-case decisions, general administrative acts, public law contracts, by-laws, executive regulations, and administrative direc-

4 It must be noted that the administrative judicial system in the Czech Republic is not two-instanced. However, in its current form the cassation complaint is close to an appeal, therefore the role of the SAC oftentimes resembles that of an appellate instance (which has been criticised by some authors).

5 Hereinafter: SAC.

6 Data on the increase in the number of cassation complaints is available at the webpage of SAC: <http://www.nssoud.cz/main2Col.aspx?cls=Statistika&menu=190>.

7 See Wojciech Piątek, "Access to the highest administrative courts: between a right of an individual to hear a case and a right of a court to hear selected cases", *Central European Public Administration Review* 18, no. 1. 2020.

8 Hereafter: unlawful interference.

9 See (in order): Article 65 CAJ *et seq.*, Article 82 CAJ *et seq.*, Article 79 CAJ *et seq.*

tions. For each type of administrative action or inaction, a corresponding type of review procedure is applicable. In France, the boundary between different types of administrative action runs between unilateral and bilateral measures (administrative decisions versus contracts). On the other hand, in the common law system, judicial review is independent of a strict classification of administrative action. In English administrative law, the central question is whether a certain remedy can be obtained against the administration.[10]

From a historical perspective, a comparison with the recent Slovak legislation[11] could also be made. Slovak regulation of administrative justice includes a much more specific subdivision of action types, namely a general administrative action, an action in matters of administrative punishment, an action in matters of social security, and an action in matters of asylum, detention and expulsion. However, the list of types of action does not end there – one can also find an action against the inaction of an administrative authority or an action against another intervention of a public administration body. As in the case of the Czech CAJ, the list includes special proceedings in electoral or competence matters and more. For the purposes of this paper these specific types of proceedings are not considered.

Determination of the type of action is closely connected to protection of the public subjective rights of applicants and their right to a fair trial. The classification of administrative acts cannot therefore serve as an acceptable justification for the limitation of the right of access to court.[12] The problem of unclear classification was also strongly manifested in the context of the COVID-19 pandemic and the related judicial review of public administration acts. In the context of the pandemic, there were also legislative proposals for much

10 For more detailed discussion, see Mariolina Eliantonio, and Franziska Grashof, "Types of Administrative action and corresponding review" in *Cases, materials and text on judicial review of administrative action*, eds. C. Backes, and M. Eliantonio. Oxford, 2019, 190–197.

11 Act No. 162/2015 Coll., Správny súdny poriadok.

12 In the context of drawing boundaries between normative and individual administrative acts, see Zrvandyan, 66 and the case-law of the ECHR cited there.

less formalised administrative decision-making, such as quarantine imposed through an SMS.[13]

The Problem of Non-Standard Administrative Acts

In the Czech administrative justice system, the problem of unclear boundaries between types of actions under the CAJ arises especially (but not exclusively) in the context of distinguishing between an action against a decision of an administrative authority and an action for protection against unlawful interference. In our view, the difficulties in distinguishing between the categories of decision and unlawful interference within the scope of the CAJ lie mainly in their essentially *material definition* (definition based on material effects, not formal characteristics). More precisely, this is how a decision is defined under the CAJ (as an act of an administrative authority having the effects commonly attributed to an administrative decision without the act having to be legally designated as such), while unlawful interference is defined mostly negatively in relation to a decision (therefore a decision cannot be an unlawful interference and *vice versa*), which leads to the existence of a certain 'grey area' between these categories. Consequently, it is this grey area that the administrative courts and even more significantly the claimants must navigate.

The fact that the choice of a 'correct' type of action can be difficult is illustrated by the case-law of the SAC, which after approximately seven years proceeded to change the previously applied approach for the judicial review of administrative acts legally identified in the Czech law as 'approvals' under the Building Act, which are procedurally not administrative decisions according to the Code of Administrative Procedure.[14] The SAC first chose the form of unlawful interference for the review of these acts. Later, however, it moved

13 This regulation is contained in the amended version of the so-called Pandemic Act intended for the implementation of certain restrictive measures in connection with the COVID-19 pandemic (Act No. 94/2021 Coll.).

14 Act No. 500/2004 Coll. Hereinafter: CAP.

towards reviewing these acts as decisions within the meaning of Article 65(1) CAJ. This was mainly because the initial qualification did not lead to the effective judicial protection of applicants.[15]

Approvals under the Building Act in particular appear to be a good example of what could be described as non-standard or 'borderline' administrative acts. However, many more similar acts can be found in practice. Administrative courts have recently dealt, for example, with the nature of the judicial review of an administrative authority's request to remove an advertising device, a measure to withhold a subsidy, a resolution of a regional assembly, a reprimand to a public prosecutor, a 'notification' of a request for a review of a matriculation examination, or, most recently, the opinion of an expert committee for the implementation of gender reassignment for transsexual patients.

It should be emphasized that the non-standard acts of administrative authorities mentioned above do not occur frequently in practice. These are therefore rather exceptional situations. At the same time, however, it can be pointed out that their usage in the Czech administrative law seems to be on the rise. Secondly, although the consequences of such acts may not be significant in numbers, the use of such non-standard acts may nevertheless have negative impacts in individual cases.

Negative Impacts of Non-Standard Administrative Acts

The first and probably most significant potential consequence of the unclear boundaries between types of action in administrative justice is that the applicant does not choose the appropriate type of action. More precisely, this consequence is the non-adjudicability of the action (on its merits).

15 Which has also been pointed out in the literature, e.g. see Josef Vedral, "K některým otázkám přezkumu „souhlasů" podle stavebního zákona", *Stavební právo – Bulletin*, no. 2. 2015: 19–20.

The central question is to what extent the failure to provide judicial protection in that context can be attributed to the applicant. It may be pointed out that the Czech administrative justice system does not, with the exception of proceedings before the SAC, require the applicant to be represented by a person with legal training (nor does the applicant need such training). Therefore, in some cases it can be very difficult, if not impossible, for applicants to correctly classify their claim.

Regardless of the question of legal representation, the essence of the problem is that while in simple cases, which make up the vast majority, the classification of standard administrative actions is a rather trivial and largely imperceptible step. In the case of non-standard acts, this step becomes a separate legal question, the resolution of which may be far more complex than the merits of the case. In principle, it does not seem appropriate to base the applicants' access to the administrative courts on the correct 'answer' to that question.

Secondly, it can also be argued that a distinction is being drawn between applicants, who can be divided into two groups – one which is allowed to sue 'directly' and the other which is in a sense disadvantaged by the procedural ambiguity of the contested administrative act. It should be emphasized, however, that the State is usually the originator of this ambiguity, both in terms of normative language and in terms of application by the administrative authorities. In our view, it is therefore primarily the responsibility of the State to facilitate the applicants' position.

However, the case-law of the administrative courts did not follow this assumption at first. The SAC has, in fact, routinely held that an applicant's incorrect choice of the type of action should lead to the procedural dismissal of the action. Nevertheless, this practice has been surpassed by two jurisprudential shifts. Firstly, the case-law of the SAC (following the findings of the Czech Constitutional Court) has allowed for permeability between the different types of action in the administrative justice system. Secondly, and even more significantly, the case-law introduced the obligation for the administrative court to

instruct the applicant on the 'correct' type of action in his or her case (in case the correct type was not chosen).[16]

However, all the negative impacts of the unclear boundaries between types of action in administrative justice can be associated with the applicant's position. Some will remain even after the obligation to instruct the applicant has been introduced.

In our view, first of all, it is apparent that it is not impossible that the incorrect type of action will also be chosen by the administrative court itself. Although this will not result in the inability to examine the merits of the action, it may lead to an ineffective form of judicial protection for the applicant (whereby we could argue that the correct type of action is the one which provides effective protection for the applicant). In such a case, the applicant may defend himself against such a conclusion by making a cassation complaint to the SAC.

The necessity of this procedure is, however, problematic, as it generates what could be described as an 'action-type determination procedure'. It could be described as a judicial proceeding that is entirely dedicated – instead of providing protection to the applicant – to the question of how to provide such protection. In the worst cases, there may be situations where the applicant litigates for several years before the administrative courts (or even the Constitutional Court) only to establish that the administrative act by which the applicant's rights have been infringed should have been reviewed in another type of procedure. In the meantime, the applicant has not obtained any meaningful protection of his or her rights.

In a broader sense, the problem of so-called borderline situations between types of actions in the administrative justice system is *inefficiency*, particularly in the form of increased economic costs for both the applicants and administrative courts. On the applicant's side, in particular, it will be more difficult to prepare the action. On the part of the administrative courts, it may be mainly

16 For both questions see, *inter alia*, the finding of the Constitutional Court of 14 August 2019, No. II. ÚS 2398/18.

the staff or material resources spent on the aforementioned 'action-type proceedings'. Particular mention should be made of the previously recommended practice whereby, if the applicant was unsure of the appropriate type of action, they had to bring several actions simultaneously (with only one being heard on the merits). The inefficiency of this practice is obvious.[17]

Administrative Decision According to the CAJ

For the reasons outlined above, it seems appropriate to pay attention to the boundaries between types of action in administrative justice. In the Czech context, the simplest solution seems to be to adopt a clear interpretation of what is meant by the decision according to the CAJ, since it is this category and its application that more or less (directly or indirectly) determines the applicability of each type of action. In this context, the case-law of the Czech administrative courts has undergone a certain development in the last decade, which, however, did not fully meet the mentioned requirement.

A 'decision', within meaning of Article 65(1) of the CAJ, is one of the key institutions of administrative justice. This is due to the fact that the action against decisions accounts for the largest proportion of all types of administrative actions in the Czech administrative justice. However, a decision for the purpose of judicial review cannot simply be identified with a decision within the meaning of the CAP because 'a decision' within the meaning of Article 67(1) of the CAP and within the meaning of Article 65(1) of the CAJ do not necessarily overlap (the latter is generally broader).

Earlier case-law of administrative courts emphasised the so-called material concept of a decision for the purposes of judicial review.[18] The material

17 For more details, see Tomáš Svoboda, "Nad (nejasnými) hranicemi mezi žalobními typy podle soudního řádu správního (2. část)", *Právní rozhledy* 27, no. 12. 2019: 435–439.

18 See Zdeněk Kühn, "§ 65 [Standing]." in Zdeněk Kühn, Tomáš Kocourek, Petr Mikeš, Ondřej Kadlec, Karel Černín, Filip Dienstbier, and Karel Beran, *Soudní* řád *správní: komentář*. Praha, 2019, 514.

concept prefers the content of the challenged administrative act at the expense of its statutory designation or procedural form. However, over time a requirement for the 'correction' of this concept through introduction of certain formal criteria has begun to take shape in the case-law. The approach of taking into account both material and formal criteria was first adopted by the extended chamber of the SAC some 10 years ago and has persisted to the present day. The formal requirements imposed on the decisions of administrative authorities are not expressly laid down by the CAJ but are derived from case-law. The primary consideration in the qualification of an administrative act is still its material criteria, but formal criteria are added. The resulting approach is referred to as the so-called *material-formal* concept of the decision.[19]

According to the Czech literature, the main reason for this correction of the earlier strictly material approach is considered to be the need to preserve the boundary between the types of action, namely between an action against a decision and an action for protection against unlawful interference. Without considering the formal criteria, even informal acts would be subject to judicial review through an action against a decision.[20] This could result into merging of the categories of administrative decision and unlawful interference.[21] The proclaimed purpose of the distinction between a decision and an unlawful interference is to provide effective judicial protection for the public subjective rights of individuals,[22] thereby fulfilling the very purpose of administrative justice.

These formal criteria adopted by case-law constitute a prerequisite for judicial review of an administrative act through the action against a decision. If the court does not assess the challenged act as a decision under Article 65(1) of the CAJ, it is obliged to inform the applicant of the possibility of changing the type of action. However, this can only happen under certain conditions

19 Kühn, 514.

20 See Pavel Šuránek, "§ 65 [Standing]." in *Soudní* řád *správní. Komentář*, ed. L. Jemelka. Praha, 2013, 499.

21 See also Lukáš Potěšil, "§ 65 [Standing]." in Lukáš Potěšil, Vojtěch Šimíček, Lukáš Hlouch, Filip Rigel, and Martin Brus, *Soudní* řád *správní. Komentář*. Praha, 2014, 550.

22 See also Kühn, 514.

(e.g. timeliness of the appropriate type of action), otherwise the court will reject the action as inadmissible.[23]

Overview of Formal Criteria According to the Case-Law of the SAC

Despite the different nature of individual acts examined by the SAC in cassation proceedings, certain recurring formal requirements can be identified and abstracted. However, the administrative courts do not always require all these requirements and their presence does not necessarily mean that a certain act is qualified as a decision under Article 65(1) of the CAJ.

The most frequently required formal criteria is the procedure for issuing a decision as a formalised binding procedure of the administrative authority preceding the issuance of the act. This does not have to be an administrative proceeding or procedure within meaning of the CAP.[24] However, it should have similar characteristics, such as the presence of the parties to the proceedings and the purpose, which is to issue an individual administrative act in a specific case for a specific subject. Such a procedure should be regulated by law and conducted by the administrative authority within the limits of its competence. The minimum standard of the protection of the rights of the subject is to be guaranteed by the basic principles.[25]

Other frequently occurring formal criteria are the formal aspects of the decision. The SAC has interpreted this concept in different ways. It is possible to encounter a requirement for the content of the decision within the meaning of Article 68 of the CAP, and the reasoning of the decision is emphasized. However, the absence of reasoning is not an obstacle; the designation of the

23 See, *inter alia*, the resolution of the Supreme Administrative Court of 28 February 2018, No. 6 As 357/2017–26; or resolution of the Supreme Administrative Court of 13 August 2020, No. 6 Afs 61/2020–41.

24 Or similarly according to the Tax Code (Act No. 280/2009 Coll.).

25 Which are regulated in Articles 2–8 of the CAP and also represent the procedure for issuing a decision in its minimalist sense.

administrative authority, the designation as a decision and the statements may suffice.

Emphasis is placed on the notification of the decision to the addressee and the documentation of the procedure and its outcome, typically the administrative file. In some cases, a written record in the relevant documentation is sufficient. The requirement for a written form of the decision is not often explicitly stated, but it is generally considered necessary.

However, none of the above-mentioned formal criteria is universally required, and it is possible to encounter cases where, on the contrary, the presence of a particular formal criteria is rather (indirectly) called in question. Thus, these are more typical criteria that occur in various combinations, but neither their cumulative fulfilment nor a particular combination is required. Probably the most frequently occurring formal criteria remains the formalised procedure leading to issue of the act under review.

It is clear that the case-law of the SAC does not currently provide clear guidance to applicants (and their legal representatives) on the qualification of the challenged administrative act. Indeed, the very fact that the formal characteristics are predominantly determined by the extended chamber of the SAC testifies to the diversity of legal opinions across the three-member chambers of the SAC. In assessing the nature of the acts at issue, the SAC sometimes follows a pragmatic approach and is guided more by the similarity of the act under review to an act it has already dealt with in a previous decision. While in some cases the court refers to more detailed formal criteria, in other cases it is satisfied with the existence of an individual administrative act in written form issued by the competent administrative authority.

Applicants therefore may be advised to follow the case-law and try to look for parallels between the currently challenged administrative act and the acts that the SAC has previously reviewed. Thanks to the courts' duty to instruct, it is no longer a problem that separates applicants from access to the court for good. However, the current case law is not always unambiguous, let alone

'user-friendly', and does not provide the necessary certainty for the parties to the proceedings.[26]

Even some of the SAC judges have previously stated that they do not consider its case-law to be consistent.[27] Similarly, authors of this paper, as they have also similarly expressed earlier in literature,[28] believe that there needs to be a clear interpretation the concept of a decision according the CAJ in the Czech administrative law. However, the inconsistency of the SAC case-law seems to have made the boundary between a decision and an unlawful interference even more unclear. This conclusion is, however, somewhat paradoxical; the SAC case-law should, of course, lead to the opposite.

Conclusions

We believe that the problem of the qualification of an act of an administrative authority, and choice of the corresponding type of action in subsequent judicial review, can currently be divided into two basic levels. The first level is the problem of the inconsistency of the legislator in the use of statutorily defined forms of administrative acts, specifically the use of so-called non-standard acts (other than the general legal types of administrative acts foreseen by the legislator). In the case of so-called non-standard acts, the solution, of course, is not to use such acts at all. But this expectation does not seem realistic, as these acts seem to be used more rather than less. This will secondarily generate and

26 For more details, see Denisa Skládalová, "Formální znaky rozhodnutí podle soudního řádu správního pohledem judikatury NSS", *Právní rozhledy* 29, no. 12. 2021: 435–442.

27 According to judge F. Dienstbier, the extended chamber of the SAC should admit the inconsistency of its case law and clearly state whether, in addition to the fulfilment of the material criteria of a decision, it insists on the requirement of a certain form prescribed by law (which is already certain at present), and, where appropriate, what formal criteria an administrative authority's act must fulfil in order to be considered a decision within the meaning of the CAJ. See the dissenting opinion of Judge F. Dienstbier on the reasoning of the Resolution of the Extended Chamber of the Supreme Administrative Court of 18 April 2017, No. 6 Afs 270/2015–48.

28 See Skládalová, 435–442.

reinforce the implied unclear boundaries between types of action in the administrative justice system.

Therefore, more can probably be done on the second level – the level of an unambiguous interpretation of the categories defined by the CAJ, in particular on the level of an easy-to-understand interpretation of decisions made under the CAJ.

The case-law of the SAC has more or less consistently required the presence of formal criteria of a decision over the last decade. Despite this fact, the court has been rather casuistic in determining these formal criteria and has so far resigned itself to trying to define these in a generalised manner. In our opinion the case-law of the Czech administrative courts has not yet established a sufficiently clear and universal interpretation of the 'correction' of the material concept of a decision within the meaning of Article 65(1) of the CAJ. A common consensus in the form of the minimum required formal criteria of a decision is thus lacking.

We believe that this interpretation is achievable by the case-law (setting aside possible legislative changes) only if properly clarified by the SAC's extended chamber. Its case-law should provide non-casuistic guidance to applicants in the form of universally required formal criteria. What is less clear is whether a completely convincing solution can be reached in this way. Otherwise, the solution could be a revision of the legislation; a revision that would take into account the fact that the legislator may not be consistent in other instances in creating so-called non-standard acts of administrative authorities, which may be difficult to classify under the defined types of actions in the administrative justice system. Or, in other words, the legislative construction of the administrative justice system should account for these situations.

References

Eliantonio, Mariolina, and Franziska Grashof. "Types of Administrative action and corresponding review." In *Cases, materials and text on judicial review of administrative action*, edited by Chris Backes, and Mariolina Eliantonio. Oxford, 2019.

Kühn, Zdeněk. "§ 65 [Standing]." In Zdeněk Kühn, Tomáš Kocourek, Petr Mikeš, Ondřej Kadlec, Karel Černín, Filip Dienstbier, and Karel Beran, *Soudní* řád *správní: komentář*. Praha, 2019, 511–530.

Piątek, Wojciech. "Access to the highest administrative courts: between a right of an individual to hear a case and a right of a court to hear selected cases." *Central European Public Administration Review* 18, no. 1. 2020: 7–23.

Potěšil, Lukáš. "§ 65 [Standing]." In Lukáš Potěšil, Vojtěch Šimíček, Lukáš Hlouch, Filip Rigel, and Martin Brus, *Soudní* řád *správní. Komentář*. Praha, 2014, 544–574.

Skládalová, Denisa. "Formální znaky rozhodnutí podle soudního řádu správního pohledem judikatury NSS." *Právní rozhledy* 29, no. 12. 2021: 435–442.

Šuránek, Pavel. "§ 65 [Standing]." In *Soudní řád správní. Komentář*, edited by Luboš Jemelka. Praha, 2013, 485–522.

Svoboda, Tomáš. "Nad (nejasnými) hranicemi mezi žalobními typy podle soudního řádu správního (2. část)." *Právní rozhledy* 27, no. 12. 2019: 435–439.

Vedral, Josef. "K některým otázkám přezkumu „souhlasů" podle stavebního zákona." *Stavební právo – Bulletin*, no. 2. 2015: 14–23.

Zrvandyan, Arman. *Casebook on European fair trial standards in administrative justice*. Strasbourg, 2016.

Finding of the Constitutional Court of 14 August 2019, No. II. ÚS 2398/18.

Resolution of the Supreme Administrative Court of 28 February 2018, No. 6 As 357/2017–26.

Resolution of the Supreme Administrative Court of 13 August 2020, No. 6 Afs 61/2020–41.