International Law Office®

September 28 2021

Pursuing reprivatisation claims in Poland just became harder

BARBARA JELONEK-JARCO, MAGDALENA KRZEMIŃSKA

Kubas Kos Gałkowski | Litigation - Poland

- Introduction
- Code of Administrative Procedure
- New amendments
- Comment

Introduction

On 11 August 2021 Parliament adopted an act that amends the Code of Administrative Procedure (the amended Act), setting significant restrictions on claiming for the return of property seized by the state after World War II. The amended Act has been signed by the Polish president and published in the *Journal of Laws*. After 30 days, the amended Act entered into force (on 16 September 2021).

The new regulations stir up much controversy and are the subject of intense discussion both domestically and internationally. The regulations will affect foreign as well domestic entities. In particular, persons who have been seeking the restitution of property nationalised in Poland after 1945 may acutely feel the effects of the amended Act. Before its enforcement, Polish law provided former owners or their legal successors with the opportunity to:

- recover in kind assets (mainly real estate) previously confiscated, even if they were confiscated several decades ago; or
- obtain compensation in this respect.

Following the amended Act's enforcement, these avenues will be difficult, if not impossible, to pursue.

Code of Administrative Procedure

As a rule, reprivatisation claims in Poland are primarily pursued in administrative proceedings by declaring the invalidity of an administrative decision issued in violation of the law (which leads to eliminating such a decision from legal transactions).

According to the Code of Administrative Procedure, declaring a decision to be invalid was possible in the following circumstances, which concern severe, substantive and procedural violations of law. This includes situations where the decision:

- was issued in violation of the provisions on competence (point one);
- was issued without a legal basis or in gross violation of law (point two);
- concerns a case that has already been resolved by another final decision or a case that has been settled tacitly (point three);
- was addressed to a person who was not a party (point four);
- was unenforceable on the day of its issuance and its unenforceability is permanent (point five);
- if executed, would result in a punishable act (point six); or
- contains a defect rendering it invalid by virtue of the law (point seven).

Under both the previous and new provisions, the possibility of declaring invalidity does not apply to decisions that have produced "irreversible legal effects". Before the amended Act's enforcement, declaring invalidity was not possible in decisions containing the defects specified in points one, three, four or seven if 10 years had elapsed from the date of their service or announcement. In such cases, the authority found that the decisions had not been issued in violation of the law so they were not eliminated from legal transactions and were therefore ineligible for in kind restitution of the seized property; however, in principle, this created an opportunity to apply for compensation.

Yet, in practice, the most important basis for challenging expropriation decisions issued after World War II was the defect set out in point two, for which the 10-year time limit was not applicable. In 2015 the Constitutional Tribunal questioned the possibility of declaring decisions containing this defect as invalid where a significant time lapse had occurred since the decision had been issued. This was because, in

practice, the process of declaring a decision as invalid and the resulting obligation to return expropriated property to its former owners so many years after the administrative decision was issued significantly complicated the legal transaction.

New amendments

Under the new provisions, 10 years after the service or announcement of an administrative decision – regardless of which of the aforementioned reasons for invalidity occurred – the decision cannot be declared invalid; it can only be declared as issued in violation of the law. At the same time, administrative proceedings to confirm that a decision contains one or more of the aforementioned defects cannot be commenced if 30 years have passed from the date of its service or announcement. The regulation also covers pending proceedings: upon the new provisions entering into force, proceedings initiated after 30 years have elapsed and which had not been finally concluded before 16 September 2021 have been discontinued.

The new provisions do not contain any limitation as to the nature of the decisions covered. Thus, in practice, as long as the conditions concerning the time lapse are met, the limits apply not only to decisions concerning confiscated property, but also to any other administrative decisions (eg, those issued in the investment and construction process, such as a building permit).

Comment

It is already clear that the changes introduced may seriously affect court proceedings relating to compensation for unlawfully issued administrative decisions.

As regards claims concerning property, as an administrative decision cannot be declared invalid, parties cannot claim for in kind restitution of property taken over based on decisions issued in the past. Ascertaining in administrative proceedings that a decision was issued in violation of law will make it possible to pursue compensatory claims. However, this requires initiating proceedings before a civil court and involves, among other things, paying a court fee to file a statement of claims (which can be 200,000 zlotys for first-instance proceedings).

The most controversial issue is the 30-year statute of limitations for challenging a decision. In such a case, the question arises as to how damages can be sought through litigation; to date, for parties seeking

damages, Polish courts have, as a rule, required confirmation of the defectiveness of an administrative decision by administrative means, which is no longer possible under the amended Act.

Considering the above, the new provisions entering into force will undoubtedly make it necessary for court proceedings concerning this issue to be reshaped so that they are adjusted to the amended rules.

For further information on this topic please contact Barbara Jelonek-Jarco or Magdalena Krzemińska at Kubas Kos Gałkowski by telephone (+48 22 206 83 00) or email (barbara.jelonek@kkg.pl or magdalena.krzeminska@kkg.pl). The Kubas Kos Gałkowski website can be accessed at www.kkg.pl.