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POSITIVE SILENCE TO THE REMOVAL OF TREES – AN ANALYSIS OF A LEGAL INSTITUTION

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ABSTRACT

The authorisation for removing trees constituting a common nature protection instrument was supplemented in 2017 by the obligation to notify the intention to remove trees. The right to notify and object to the intention of tree removal corresponds conceptually to the model of positive silence provided for in the amended Code of Administrative Procedure as one of the ways of administrative silence. Our objective is to analyse procedural solutions and the substantive institution of environmental protection law which consists in a notification from the point of view of assessing the correctness of its application when considering law science and administrative proceedings.

Key words: removal of trees, positive silence, administrative silence, notification

1. INTRODUCTION

If, as a rule, we accept the obligation to preserve trees as a legally protected element of nature[1], then the institution of permit for their re-

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[1] Bartosz Rakoczy, Usuwanie drzew i krzewów, Warsaw: LexisNexis, 2013, 25.

moval is seen as a general protective instrument[2]. At the same time, in the doctrine, it is assumed that the legislator has limited by doing so "the sphere of freedom of an individual within the scope of their property rights to real estate by introducing the requirement to obtain approval of the public administration authority for actions taken by that person aimed at using the object of their property rights (components of real estate)"[3]. The argument in favour of breaking the principle of *superficies solo cedit* is the necessity of nature protection, because trees perform numerous functions both in terms of ecosystem as well as anthropocentric aspects. They are the dominant spatial element, both visually and as far as ecological, climatic and environmental impact is concerned[4]. They also have health properties[5], serve as an element of cultural landscape (e.g. avenues), emphasize the architectural values of objects (e.g. parks), have protective (protection against strong winds, snow and excessive heating), regulatory (water circulation) and recreational[6] functions and, *last but not least,* they serve as wildlife refuges[7]. Therefore, on the one hand, trees are a component of the environment both in a broad and narrow sense, and, on the other hand, despite their significant natural values, in certain situations trees may also be an undesirable element of landscape and a source

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[2] Marek Górski, 'Ochrona terenów zieleni i zadrzewień', In: Prawo administracyjne materialne, ed. Zofia Duniewska, Barbara Jaworska-Dębska, Małgorzata Stahl, Warsaw: Difin, 2014, 633.

[3] Małgorzata Szalewska, 'Konstrukcja normatywna nasadzeń zastępczych w polskim prawie ochrony przyrody' Przegląd prawa ochrony środowiska, 2(2015): 36. DOI: http://dx.doi.org/10.12775/PPOS.2015.014

[4] Halina Barbara Szczepankowska, 'Wstęp', In: Drzewa w krajobrazie. Podręcznik praktyka, ed. Kamil Witkoś-Gnach, Piotr Tyszko-Chmielowiec Wrocław: Fundacja Ekorozwoju, 2014, 5.

[5] Anna Barczak, 'Zadania w zakresie ochrony terenów zieleni i zadrzewień', In: Anna Barczak, Ewa Kowalewska, Zadania samorządu terytorialnego w ochronie środowiska. Aspekty materialne i finansowe, Warsaw: Wolters Kluwer 2015, 110.

[6] WSA ruling of 2 June 2010, IV SA/Wa 476/10 with gloss by Anna Fogel, 'Pojęcie<<terenu zieleni>>' Gloss to WSA ruling of 2 June 2010, IV SA/Wa 476/10 – Critical gloss, Gdańskie Studia Prawnicze 3(2011): 33.

[7] Halina Barbara Szczepankowska, 'Wstęp', In: Drzewa w krajobrazie. Podręcznik praktyka, ed. Kamil Witkoś-Gnach, Piotr Tyszko-Chmielowiec Wrocław: Fundacja Ekorozwoju, 2014, 5.

of danger that should be eliminated (e.g. in the case of maintaining flood safety[8].) Thus, it can be stated, following Gruszecki, that the basic legal means to guarantee proper protection of trees and shrubs are administrative decisions[9]; however, such a statement needs to be specified in the light of the fact that the amendment to the Act on Nature Conservation of 11 May 2017[10] introduced, after a period of several months of a total freedom in removing trees[11], an obligation to notify the intention to remove them. The removal is done in the form of the so-called positive silence, the concept of which, its understanding and application in relation to the removal of trees, constitutes the main burden of our considerations. This does not change the fact that it is only a fragment of the problems related to the issue of trees and shrubs removal: the data presented in Supreme Audit Office (pol. Najwyższa Izba Kontroli, NIK) reports presented over the last few years show clear irregularities, including the low quality of administrative decisions issued by communes' executive bodies (formal defects of applications, non-compliance with the general principles of the Code of Administrative Procedure, lack of enforcement of the conditions set out in decisions, reduction of the costs of removing trees and shrubs, lack of enforcement of compulsory planting[12]), which directly result in the removal of trees and shrubs contrary to the provisions of the law in

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[8] Krzysztof Gruszecki, Zezwolenia na usunięcie drzew i krzewów [online]. System Informacji Prawnej LEX, 2019-04-09 15:42 [last access: 9 May 2019, 11:56]. Available online: https://sip.lex.pl/#/monograph/369220510/4

[9] Krzysztof Gruszecki, Zezwolenia na usunięcie drzew i krzewów [online]. System Informacji Prawnej LEX, 2019-04-09 15:42 [last access: 2019-05-09 11:56]. Available online: https://sip.lex.pl/#/monograph/369220510/4

[10] Act of 11 May 2017 on the amendment of the Act on Nature Conservation, Dz.U. [*Journal of Laws*] of 2017, item 1074.

[11] Act of 16 December 2016 on the amendment of the Act on Nature Conservation and the Act on Forests, Dz. U. [*Journal of Laws*] of 2016, item 2249.

[12] Cf. The analysis of the results of the NIK inspection of the tree and shrub removal area made by Anna Swiątek,'*Analiza prawna i ekonomiczna działalności administracji w zakresie usuwania drzew i krzewów', In: konferencja Korupcja w ochronie środowiska, Warsaw, 14 November 2008,* [last access: 2019-05-18] http://www.tnz.most.org.pl/korupcja/materialy/Analiza%20prawna%20w%20zakresie%20wycinki%20drzew.htm

force[13]. These issues must, however, will be excluded from the scope of our considerations.

2. LEGAL BASIS FOR REMOVAL OF TREES AND SHRUBS

In the current legal status, in accordance with Article 83 (1) of the Act on Nature Conservation[14], the removal of trees or shrubs from property or its part may take place after obtaining an authorisation issued at the request of a manager of the land property (the holder of the property - regardless of legal title[15]), with the consent of its owner (with certain exceptions) or the owner of equipment if a tree or shrub threatens its functioning. The exceptions to this rule, specified in Article 83f (1) of the ANC, were established, relating, first of all, to the subject criterion, i.e. the characteristic of trees or shrubs, such as the area (concentration up to 25 m^2), the circumference of the trunk of trees or the fact that it constitutes waste or wind throw. Secondly, the exceptions refer to the objectives of removal resulting from the obligation to implement public tasks (e.g. removing trees or shrubs reducing the visibility of signalling devices) or carry out private activities which are eligible for agricultural or forestry purposes (such as the objectives of restoring land not used for agricultural use; removal of trees or shrubs in plantations or forests). The third category, separated due to the subject-matter and entity-related specificity, is the removal of trees or shrubs which grow on real estate owned by natural persons and are removed for purposes not related to conducting business activity, as stipulated in Article 83 (1) (3a) of the ANC. Entities listed in Article 83 (1) (1-3) and (4-15) of the ANC are exempt from the obliga-

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[13] Information on inspection results 'Usuwanie drzew z terenu nieruchomości gminnych i zagospodarowanie pozyskanego drewna', No. 8/2013/P12138/LKA, Warsaw 07.06. 2013, [last access: 2019-05-18] https://www.nik.gov.pl/kontrole/P/12/138

[14] Act of 16 April 2004 on the Nature Conservation, consolidated text. Dz. U. [*Journal of Laws*] of 2018, item 1614 as amended, hereinafter referred to as the ANC.

[15] Michał Kasiński, 'Ochrona własności a ochrona przyrody, siedem mitów w sprawach reglamentacji usuwania drzew i krzewów', In: Problemy pogranicza prawa administracyjnego i prawa ochrony środowiska, ed. Małgorzata Stahl, Piotr Korzeniowski, Aneta Kaźmierska-Patrzyczna, Warsaw: Wolters Kluwer, 2017, 466.

tion to obtain an authorisation, but also from the obligation to submit a notification; the latter concerns only the owners of real estate being natural persons who intend to remove trees for purposes not related to conducted economic activity. On receipt of the notification, the competent authority shall carry out an inspection to determine the name of the tree species and the circumference of its trunk; the inspection shall be recorded in a form of a protocol. The competent authority may, by administrative decision, object to the intention to remove the tree if the tree meets the conditions laid down in Article 83f (14) or (15) of the ANC. The issue of objection to the notification, only indicated here, is the subject of analysis provided in section 4. The subject-matter of the discussed legal regulation are trees, the concept that gained legal definition as a result of the amendment of the Act of 25 June 2015[16]. Pursuant to Article 5 (26a) of the Act, this term is understood as "*a perennial plant with one main woody stem (trunk) or several main woody stems and branches forming the crown at any time during the development of the plant*", which to some extent eliminated doubts present in the literature as to the scientific criteria for assessing the existence of "trees" as an object of legal protection. A legal definition has not been given for the term "tree removal"; the case law has held that "tree removal" means an act by which a tree physically ceases to exist[17], which means, first, that the action, i.e. the intention of a person submitting a notification (an applicant), is relevant for the removal of the tree and, second, that the effect of the action is to physically remove the tree, whether it is done through felling or uprooting[18].

This short presentation of the binding legal status allows us to move on to considerations on the legal nature of the authorisation for trees and shrubs removal itself and the institution of notification in the (sub)system of environmental protection law against the administrative law system.

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[16] Act of 25 June 2015 on the amendment of the Act on the Communal Authority and some other Acts, Dz.U. [*Journal of Laws*] of 2015, item 1045.

[17] NSA ruling of 22 October 2009, II OSK 1630/08.

[18] Bartosz Rakoczy, Usuwanie drzew i krzewów, Warsaw: LexisNexis, 2013, 21.

3. AUTHORISATIONS IN ENVIRONMENTAL PROTECTION LAW – A NORMATIVE CONCEPT AND ITS EFFECTS

We consider it crucial that the assumption, stating that the basic function of environmental protection law is the preventive function and counteracting the undertaking of activities which are inherently harmful to the environmental resources or indifferent thereto, but which nevertheless threaten the protected goods in the name of the general interest, is the key to environmental protection law. The function is performed primarily by administrative decisions of a protective nature, taking the form of a permit or an authorisation[19]. The analysis of legislative material allows for the adoption of a generalisation which makes it possible to distinguish, within the framework of administrative decisions issued in connection with the use of environmental resources, emission permits (Article 4 of the Act 'Environmental Protection Law'[20] in conjunction with Article 180 et seq. of the EPL) and investment permits (related to location and construction procedures)[21] and authorisations (visible especially in the waste management law and nature conservation law), supplemented to a lesser extent by a consent, licence or concession[22]. It is assumed that in the system of environmental protection instruments, emission permits and authorisations are jointly preventive protection instruments, but they differ substantially because authorisations are understood as decisions restricting the right to conduct business activity. In contrast, the (emission) permit is not a condition for carrying out economic activity in general, but a condition for conducting it in a specific manner - through the use of installations[23]. In

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[19] Anna Barczak, 'Sprawiedliwość ekologiczna w administracyjnej reglamentacji korzystania ze środowiska', In: Sprawiedliwość ekologiczna w prawie i praktyce, ed. Tomasz Bojar-Fijałkowski, Gdańsk: Fundacja Rozwoju Uniwersytetu Gdańskiego, 2016, 14.

[20] Act of 27 April 2001 – the Environmental Protection Law, consolidated text Dz. U. [*Journal of Laws*] of 2018, item 799 as amended, hereinafter referred to as the EPL.

[21] Bartłomiej Krzyczkowski, 'Pozwolenia i zezwolenia z zakresu prawa ochrony środowiska – uwagi terminologiczne', Ochrona Środowiska. Prawo i polityka, 2(2008): 18.

[22] Bartłomiej Krzyczkowski, 'Pozwolenia i zezwolenia z zakresu prawa ochrony środowiska – uwagi terminologiczne', Ochrona Środowiska. Prawo i polityka, 2(2008): 17.

[23] Marek Górski, In: Marek Górski et al., Prawo ochrony środowiska. Komentarz, 3rd edition, Warsaw: CH Beck, 2019, 548.

Kijowski's view, authorisations are considered to be authorising acts and constitute institutions of substantive administrative law consisting in undertaking actions by public administration bodies that enable the entity to display certain behaviours, without which such behaviours would be legally unacceptable[24]. In public economic law, an authorisation is treated as a form of rationing economic activity and understood as "an act of will of a competent public administration authority stating the admissibility of undertaking economic activity by an interested entrepreneur to a specific extent as a result of a statement that this entrepreneur meets the conditions specified by law for its conduct[25] (which may also include the obligation to comply with environmental protection requirements[26]). Unlike concessions, it is provided for the pursuit of activities in areas important but not strategic from the perspective of the country[27], provided that the introduction of this form of rationing does, however, fall within the guidelines resulting from the principle of proportionality. This reservation appears to be crucial from the perspective of authorisations for tree and shrub removal, since it means that the concept of authorisations for tree and shrub removal is only applicable to economic entities. When amending the Act on Nature Conservation, the legislator aptly (though only intuitively) noticed this effect of using the concept of "authorisation" in the legal language, resigning from the obligation to obtain it in the event that such activity is not carried out on real estate and/or does not constitute a reason for tree removal. Similarly, this applies to a situation when the removal of trees and shrubs is performed for the purposes of water maintenance and flood protection, as pointed out by Krzyczkowski[28].

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[24] Dariusz R. Kijowski, Pozwolenia w administracji publicznej, Białystok: Temida 2, 2000, 39.

[25] Kazimierz Strzyczkowski, Prawo gospodarcze publiczne, Warsaw: LexisNexis, 2011, 227.

[26] Marek Górski, In: Marek Górski et al., Prawo ochrony środowiska. Komentarz, 3rd edition, Warsaw: CH Beck, 2019, 549.

[27] Agnieszka Wołoszyn-Cichocka, In: M. Zdyb, Grzegorz Lubeńczuk, Agnieszka Wołoszyn-Cichocka, Prawo przedsiębiorców. Komentarz, Warsaw: CH Beck, 2019, 522.

[28] Bartłomiej Krzyczkowski, 'Pozwolenia i zezwolenia z zakresu prawa ochrony środowiska – uwagi terminologiczne', Ochrona Środowiska. Prawo i polityka, 2(2008): 23.

Summarizing the considerations carried out so far, it should be stated that the authorisation within environmental protection law constitutes a form of preventive consent for conducting business activity consisting in using environmental resources as a way of rationing its behaviour in relation to the environment and its components. Thus, the resignation from the obligation to obtain the authorisation by natural persons who remove trees without any connection with the economic activity, pursuant to Article 87f (3a) of the ANC, should be considered as an appropriate solution which meets the requirements of the constitutional principle of proportionality. It does not mean, however, that the entity not conducting business activity cannot influence the environment in a way that will require, outside the catalogue of orders and prohibitions of a general and abstract nature (e.g. constitutional order to take care of the environment), also milder forms of prevention, which include the notification of the intention to remove the tree, regulated by Article 83f (4) of the ANC.

4. NOTIFICATION OF INTENTION TO REMOVE TREES AS AN INSTRUMENT OF PREVENTIVE PROTECTION

The term *notification* governed by Article 83f (4) of the ANC should be understood as a request for consent to the removal of trees (and trees only, shrubs' removal has been left to the free decision of the landowner) constituting a qualified form of informing the authority of the intention to take a specific action, enabling the authority to check its legal admissibility in a preventive manner and, if there is no objection, making it possible for taking legal action[29].

The notification may be submitted by a landowner exclusively and it includes the removal of trees for non-business purposes. This means, firstly, that it is necessary to verify whether the owner who is a natural person is carrying out any economic activity on the land at all and whether the tree is removed for purposes not related to that activity. This requires, first

[29] Marek Lewicki, 'Zakres zastosowania przepisów o milczącym załatwieniu sprawy', In: Milczące załatwienie sprawy przez organ administracji publicznej, ed. Zbigniew Kmieciak, Małgorzata Gajda-Durlik, Warsaw: Wolters Kluwer, 2019, 195.

of all, an assessment of the place of business within the meaning of public economic law.

When registering in the Central Electronic Register and Information on Economic Activity (hereinafter referred to as CEIDG), an entrepreneur who is a natural person indicates the address of residence and the address of conducting business activity (these may be the same or different). Moreover, the entrepreneur is obliged to indicate a permanent place of business activity which may be an office, a shop, a service point, a warehouse, a yard or a flat, while "The place of business activity should not be identified with the actual place of rendering services, but with the place where the entrepreneur undertakes administrative activities, collects tax documentation, agreements with contractors and other documents."[30] In the context in question, this means that the authority has to verify whether the activity is conducted (1), in case of a positive answer, there has to be a verification on which part of the real estate it is conducted (2), and then, whether the removal of trees takes place in direct connection with its conduct (3). It is possible to carry out business activity e.g. on a hardened yard in a part of the land property and remove trees in the back of that land, in its recreational part. This in turn means that the authority receiving the notification must verify the content of other administrative decisions (permits, authorisations, licences and consents, not necessarily from the area of environmental protection law), and rarely is this authority competent to issue such decisions. The problem would be solved by a declaration of non-linkage between tree removal and business purposes under pain of criminal liability, which we propose as a comment *de lege ferenda*. The argument in favour of the assessment of the place of conducting business activity (as a separate part of land property) in relation to the place where the tree covered by the notification is located is the disposition of the standard contained in Article 83f (17) of the ANC, according to which: "If, within 5 years from the inspection, a decision on the building permit was applied for on the basis of the Act of 7 July 1994 'Construction law', and the construction is related to conducting business activity and will be carried out on the part of the real estate on which the

[30] The Ministry of Entrepreneurship and Technology on the website of the information and service site for entrepreneurs .www.biznes.gov.pl, May 16, 2019.

removed tree grew, the authority referred to in Article 83a (1), taking into account the data established on the basis of the inspection, imposes on the owner of the real estate, by way of an administrative decision, the obligation to pay a fee for the removal of the tree." It is worth noting in this context that the legislator linked the conduct of business activity with an application for a building permit, omitting any other form of rationing of the investment process itself (submission of construction works, putting into use and change of use, demolition works), just to remain only with examples related to the investment and construction process. This solution should be considered not only as contradictory to the arguments of the legislator's rationality, but above all, as differentiating, in an unjustified manner, the legal position of entrepreneurs, in other words: unconstitutional.

The authority is also responsible for the verification of the legal title to the property, as the right to file the notification is vested only in the owner who is a natural person, unlike the right to file an application for an authorisation which is vested in any holder of the property. This complicates the situation of perpetual usufructuaries, lessees or long-term holders of independent real estate (who make the prescription at the end of the prescription period), who (without justification as to the distinction) will not benefit from the institution of the notification, and in the event of its submission, should be opposed by the authority (see below). Such a distinction is (again) unreasonably unfounded and must be regarded as contrary to the principle of proportionality.

Moreover, the applicant is not obliged to provide any attachments to the notification confirming their right to dispose of the real estate, and the obligation to determine the legal title thereto rests with the authority conducting the proceedings. It should be emphasized that this solution is unique on the scale of Polish law and administrative proceedings.

Another element subject to assessment by the authority is the subject criterion - i.e. verification whether the intention to remove trees concerns the tree which trunk circumference, measured at a height of 5 cm, exceeds: 1) 80 cm - in the case of poplars, willows, ash-leaved maple and silver maple; 2) 65 cm - in the case of chestnut trees, false acacia and London plane; 3) 50 cm - in the case of other tree species. Otherwise, neither a notification nor an authorisation is required for tree removal.

That assessment, together with the evaluation of all the other criteria, may be carried out, in particular, during a visual inspection carried out by the authority within 21 days of the date of submission of the notification in order to determine, as appropriate: *1) the name of the tree species; 2) the circumference of the trunk at a height of 5 cm and where at that height the tree: (a) has several trunks - the circumference of each of those trunks; (b) does not have a trunk - the circumference of the trunk below the crown of the tree*, and, although this provision does not expressly provide for this, an assessment of the relationship between the locations of the tree and the place of conducting business activity. The inspection is recorded in a form of a protocol, the findings of which may also be used, pursuant to Article 83f (17) of the ANC, to impose a penalty (its amount depends, among others, on the circumference of the trunk).

After the inspection, the authority, within 14 days from the date of inspection, may, by way of an administrative decision, file an objection if the tree meets the conditions specified in Article 83f (14) of the ANC: the tree is located in a property entered in the register of monuments or in the area designated in the local spatial development plan for greenery or protected by other provisions of the local spatial development plan, or the location of the tree is covered by areas of nature conservation, or the tree meets the criteria to be recognized as a natural monument under the Regulation of the Minister of the Environment of 4 December 2017 on the recognition of living and inanimate nature formations as nature monuments[31], and in this case, the authority acts, contrary to the literal wording of the statutory phrase, in the conditions of the administrative recognition bound by the law determined by the objectives of nature conservation[32].

Pursuant to Article 83f (15) of the ANC, the authority lodges an objection also if the notification concerns the removal of the tree covered by the obligation to obtain the authorisation for its removal or if the formal defects of the notification are not filled. It should therefore be recognised that the fulfilment of the condition of 'removal of trees for business purposes' (as well as the fact that the person submitting the notification is not the owner but manages the real estate on the basis of a different legal

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[31] Dz. U. [*Journal of Laws*] of 2017, item 2300.

[32] WSA ruling of 14 February 2019, II SA/Kr 1502/18.

title or actual status) will result in the necessity to issue an administrative decision in the form of an objection to the intention of tree removal, within which the competent authority must provide a thorough factual justification, indicating the link between the location of the tree to be removed and the conducted economic activity, and, what is important, the activity of any kind, and not only from the scope covered by the building permit, as this case is qualified only in relation to the effects of removing trees within the period of 5 years, and does not constitute a prerequisite for assessment of the objectives of tree removal (this is the objective "not related to economic activity" in general and not the activity within which the building permit is required).

Thus, the objection takes the form of an administrative act of a specific nature, adopted in order to block the initial, non-authoritative concretization of the applicant's rights and is to prevent the entity from acquiring a right that is contrary to the values anchored in the legal system[33]. In conclusion, it should be emphasized that if no objection is raised by the administrative body within 14 days from the date of the inspection, the applicant-owner may remove the tree; this right is binding for 6 months from the date of expiration of the period for objection by the authority which should be justified by a change in the factual circumstances constituting the basis for the previous notification (e.g. trunk circumference increase justifying the classification of the tree as a natural monument). The change of legal circumstances (disposal of a real estate) at any time (and thus also within 6 months) results in the expiration of the right of the previous owner. However, the prerequisite for undertaking business activity requiring a building permit for the part of the real estate on which the tree has been removed does not show any connection with the expiration of that 6-month period, as its effect is only the obligation to pay a fine for tree removal, and not the recognition of the illegal action taken by the applicant.

[33] Agata Cebera, Jakub Grzegorz Firlus, 'Reprezentacja interesu zbiorowego w sprawach milcząco załatwianych', In: Milczące załatwienie sprawy przez organ administracji, Zbigniew Kmieciak Małgorzata Gajda-Durlik, Warsaw: Wolters Kluwer, 2019, 120.

5. ADMINISTRATIVE SILENCE AND ITS APPLICATION TO THE NOTIFICATION OF INTENTION TO REMOVE TREES

The purpose of this section is to analyse the institution of "positive silence" as a result of the notification that rises no objection of an administrative body, especially in the context of assessing whether the regulation of the amended Code of Administrative Procedure may be applicable thereto[34], within the framework of which Chapter 8a of the Code of Administrative Procedure, 'Administrative silence,'[35] was introduced. This issue is so important as the scope of application of this institution is determined by the provisions of specific substantive laws, and the application of the code regulations to the provisions in force before their entry into force is disputed.

The starting point is the reservation that the administrative silence, apart from the aspect of inaction, is treated as a special tool in the hands of the legislator, helping to improve the efficiency of the administration by introducing the fiction of a positive outcome of the case[36]. The *administrative silence* consists in the assumption that at the end of a specified period of time the matter is settled in accordance with the party's request. The aim of this institution is to accelerate and simplify administrative proceedings, as well as to streamline and reduce the costs of administration.

The regulation of *administrative silence* can be found in the Code of Administrative Procedure, which states that the Code of Administrative Procedure regulates proceedings before public administrative bodies in individual cases which belong to the jurisdiction of these bodies and are resolved by way of administrative decisions or tacitly. Pursuant to Article 122a (1) of the Code of Administrative Procedure, however, a case may be settled tacitly if a special provision so provides. The provision of Article 122a (2) distinguishes tacitness consisting in the failure to issue

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[34] Act of 14 June 1960 – the Code of Administrative Procedure, i.e. Dz. U. of 2018, item 2096 as amended.

[35] Act of 7 April 2017 on the amendment of the Act - the Code of Administrative Procedure and some other Acts, Dz. U. of 2017, item 935.

[36] Małgorzata Szalewska, Klauzula generalna fikcji pozytywnego rozstrzygnięcia w sprawach administracyjnych przedsiębiorców, Administracja: teoria, dydaktyka, praktyka 4(2010):85.

a decision or decision terminating the proceedings in a case, i.e. tacit termination of the proceedings and tacitness defined as not objecting thereto, the so-called tacit consent (known also as the 'positive silence'). There is no doubt that the latter structure is regulated in Article 83f (8) of the ANC; the question is rather whether the code structure can be applied to it.

The code regulation of tacit consent in itself has a dependent meaning, and its application is possible "if a special provision so provides", which, in the intention of the authors thereof, means that it can be applied only to the regulations that will be amended after the adoption of the amendment to the Code of Administrative Procedure[37]. This would mean that the construction of tacit consent could be applied only in the future, after the amendment of acts within the scope of substantive administrative law. However, such a conclusion would, in our opinion, contradict the legislator's rationale and seems to be contrary to the rule *lex posterior generalis non derogat legi priori speciali* which should mean that to the extent that the special acts do not contain any different regulations, the provisions of Chapter 8a of the Code of Administrative Procedure should be applied accordingly[38].

Moreover, the circumstances of the enactment and entry into force of the amendment to the ANC, introducing the obligation to make the notification, entered into force on 14 June 2017, two weeks after entry into force of the amendment to the Code of Administrative Procedure introducing the institution of tacit consent. Thus, we recognize that the

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[37] Justification of the government bill on amending the Act –the Code of Administrative Procedure and some other Acts, Parliamentary Paper No. 1183, 8th term of office, pp. 45-46, as well as Marek Lewicki, 'Zakres zastosowania przepisów o milczącym załatwieniu sprawy', In: Milczące załatwienie sprawy przez organ administracji publicznej, ed. Zbigniew Kmieciak, Małgorzata Gajda-Durlik, Warsaw: Wolters Kluwer, 2019, 204.

[38] Marcin Kamiński, 'Milczenie administracyjne a milczące załatwienie sprawy i jego weryfikacja. Rozwiązanie normatywne w prawie polskim na tle prawnoporównawczym, In: Milczące załatwienie sprawy przez organ administracji publicznej, red. Naukowa Zbigniew Kmieciak, Małgorzata Gajda-Durlik, Warsaw: Wolters Kluwer, 2019, 46, and Hanna Knysiak-Sudyka, 'Zakres zastosowania przepisów Kodeksu postępowania administracyjnego o milczącym załatwieniu sprawy – problemy interpretacyjne', In: Milczące załatwienie sprawy przez organ administracji publicznej, red. Naukowa Zbigniew Kmieciak, Małgorzata Gajda-Durlik, Warsaw: Wolters Kluwer, 2019, 185, Cf. WSA ruling of 17 January 2018, IV SA/Po 973/17.

provision expressed in Article 87f (8) of the ANC: "*After the inspection, the authority, referred to in Article 83a (1), may, within 14 days from the date of inspection, by way of an administrative decision, file an objection. The tree may be removed if the authority has not objected within this time limit"* contains an encoded standard of tacit consent of the authority to tree removal, ending the proceedings on the matter, by deliberately failing to comply with the legal requirements for objection to the proposed intention. It shall constitute a decision on the merits of the case, in accordance with the content of the request of the applicant, to which the provisions of Chapter 8a of the Code apply respectively.

The positive silence assumes that the authority which assessed the facts and found no grounds for objecting is active; this activity in the case of tree removal is particularly visible in the context of the obligation to inspect the site and draw up a protocol. The legislator linked the result of the expiry of the period for objection not with the fact that the notification was submitted, but rather with the fact that the inspection and drawing up of a protocol was performed. It should be noted, however, that even in such a situation where the protocol was drawn up, the tacit consent may not be a manifestation of "active" behaviour, i.e. the result of a deliberate choice between an objection and its absence. In an extreme case, it may also result from a simple negligence of the authority[39] in taking a decision (expressing an objection) within a 14-day time limit.

The positive silence gives concrete shape to and individualizes the norm of the legal order, and becomes a material form entitling[40] to perform the activity covered by the notification, i.e. tree removal. The resulting individual rule has the content rooting from the party's own request and, in fact, it is the party itself which shapes its power under the specific 'supervision' of a public administrative authority[41], so that it cannot be linked to a planting order.

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[39] Zbigniew Kmieciak, 'Milczące załatwienie sprawy a prawo do odwołania i skargi do sądu administracyjnego', Państwo i Prawo 9(2018): 55.

[40] Zbigniew Kmieciak, 'Milczące załatwienie sprawy a prawo do odwołania i skargi do sądu administracyjnego', Państwo i Prawo 9(2018): 55.

[41] Jan Zimmermann, Aksjomaty postępowania administracyjnego, Warsaw: Wolters Kluwer, 2017, 183.

However, the possibility of moving the tacit consent in appeal proceedings is problematic. Due to the fact that this form of settling the matter has been clearly distinguished from a decision as an act terminating administrative proceedings, the thesis of inadmissibility of appeals in cases settled tacitly should be accepted[42], although it is easy to imagine a situation in which the interest of neighbours or co-owners of real estate would argue in favour of verifying the positive silence in appeal proceedings. The doctrine even formulates opinions that the notification does not initiate administrative proceedings[43] if it does not result in issuing an objection which would make the question about the application of the code structure completely wrong. It should be considered that the notification of an intention to remove trees initiates administrative proceedings, and within their framework, evidence proceedings are conducted, including verification of a legal title, the fact of conducting business activity and the links between such activity and tree removal, as well as inspection, however, the legislator has adopted a positive silence construction to end the proceedings. At the same time, the legislator allows for appropriate use of extraordinary procedures in matters settled tacitly. Their implementation permits to eliminate legal consequences of qualified infringements of procedural regulations (e.g. submission of a notification to an inappropriate authority) or substantive law provisions (e.g. lack of inspection and only accepting photographic material delivered by the applicant)[44].

It is also worth pointing out the results of the case settlement in the form of positive silence[45]. This institution, as a rule, causes secondary substantive effects consisting in giving the results of the notification the value

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[42] Zbigniew Kmieciak, 'Milczące załatwienie sprawy a prawo do odwołania i skargi do sądu administracyjnego', Państwo i Prawo 9(2018): 55.

[43] Marek Górski, In: Marek Górski et al., Prawo ochrony środowiska. Komentarz, 3rd edition, Warsaw : CH Beck, 2019, 501.

[44] Zbigniew Kmieciak, 'Milczące załatwienie sprawy a prawo do odwołania i skargi do sądu administracyjnego', Państwo i Prawo 9(2018): 55.

[45] Hanna Knysiak-Sudyka is in favour of its recognition as a legal form of administration, 'Zakres stosowania przepisów Kodeksu postępowania administracyjnego o milczącym załatwieniu sprawy – problemy interpretacyjne', In: Milczące załatwienie sprawy przez organ administracji publicznej, ed. Zbigniew Kmieciak, Małgorzata Gajda-Durlik, Warsaw: Wolters Kluwer, 2019, 180.

of durability, although in the case of removing trees, this durability was limited to 6 months. The procedural effects of the positive silence concept include the possibility to issue a certificate on tacit settlement of the matter pursuant to Article 83f (12) of the ANC, containing at the same time the norm concerning the binding of the authority with the issued certificate: "*The authority, referred to in Article 83a (1), may, before the lapse of the period referred to in paragraph 8, issue the certificate on the lack of grounds for objection. The issue of the certificate shall exclude the possibility of lodging an objection referred to in paragraph 8 and shall entitle the holder to remove the tree.*"

6. Summary

There is no doubt that the institution of *positive silence (or tacit consent)* is a part of the tendency to simplify procedures and is increasingly being used in substantive administrative law. The administrative silence is therefore becoming "an alternative to the classical model of concluding administrative proceedings, it accelerates and simplifies the proceedings, as well as streamlines and reduces the costs of administration"[46]. At the same time, the adoption of this construction in relation to natural persons who do not remove trees for the needs of their business activity, but in isolation from the fact of its operation, promotes the maintenance of cohesion of the notional network used in administrative and public economic law in which authorisations are acts of rationing in the area of starting economic activity. Such a solution should also be considered as compliant with constitutional standards, serving at the same time as the balance between the need to protect individual interests (the interest of the owner) and the public interest, which constitutes nature conservation.

This does not change the fact that the adopted solution, although accurate in its assumption, encounters many practical problems related both to the verification by the administrative body of the objectives of tree removal, inactivity of the authority which holds back conducting the inspection and drawing up the protocol, and low environmental awareness of the applicants. It is worth noting that the legislator introduced a security measure against the failure to file the notification in the form

[46] Government bill on amending the Act 'The Code of Administrative Procedure' and some other acts, print No. 1183.

of a fine for damage or destruction of a tree or for tree removal without the authorisation or notification; however, in this respect, only the civic attitude of neighbours or a pure coincidence may lead to triggering the aforementioned sanction.

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