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DISPOSAL OF REAL ESTATE OF PUBLIC SUBJECTS

The contemporary Czech "model" of disposal of real estates of public subjects (as an important part of public property) is in principle built on private law operations (typically on a contract) and public law limitations of autonomy of volition of a disposing person. This on the whole traditional way of disposing of public property started to develop itself in the Czech Republic up to the nineties of 20th century. Before that Commercial Code (Act No. 109/1964 Sb.) and individual executing regulations (stepwise published) about administration of national property regulated special, *in merito* public law institutes, inclusive contractual institutes (see e.g. part ten of the quoted code), on the basis of which the disposal of real estates of, at that time sole germane public subject – the state, was exercised.

The fact that now valid Act on property of the state (Act No. 219/2000 Sb. – "ZMS") is in principle presuming the use of ways of disposing of property, which are regulated by general (private law) regulations (i.e. mostly in civil and commercial code), nevertheless, it does not mean that it would fully resign its own (specific) and by its nature "public law" institutes for disposing of state property. That means that aside public law regulation of contracting terms, or restrictions on concluding certain types of contracts (which are both predominating), public law regulates also institutes which have no analogy in private law regulations.

Typically, *unilateral provision* in accordance with Section 20 ZMS belongs to such institutes. The concerned act is of "administrative law" character, which has its template in (as noted before) previous regulations and the measure in question can be taken only in the case specified in ZMS; that means inclusive the case of forfeiture of a realty in state ownership from the organizational unit which is managing this realty and handing it over to another organizational unit at the same time, when competent state administration body detects serious faults. Generally, it is possible to denominate "unilateral provision" as an instrument of disposal of property of the state "on a vertical way".

The second institute of this type is so called *inscription* (Section 19(1) ZMS). With this institute it is possible to dispose of property between organizational units of

the state, thus here inwardly of one possessive subject - the state. It is characteristic of "inscription" that it represents an agreement based on property administrative institute, whereby its thisness consists mainly in the fact that it is based on primarily organizational agreeing act of volition (organizational units have no legal personality). "Inscription" is intended to "horizontal" move of state property.

As a whole we can say that public law regulation of disposal of real estate of the state, that means understandably mainly rules for disposal in law of this real estate towards third subjects (power of alienation, relinquish to rental, putting real estate of state in commercial companies, etc.) is thanks to the Act on property of the state (despite some deficiencies) relatively compact and has its internal logic[1]. That does not apply to public law regulation of disposal of real estate of the next public subjects[2].

The second important type of public subjects – **territorial self governmental units** ("ÚSC" – municipalities and regions) is public law volition limitation of disposing subject expressively lower than by the state alone, and it mainly has the character of influence of creation (forming) the disposing person volition than its limitation. Nevertheless, the fact that Act on municipalities (Act No. 128/2000 Sb. – „OZř") and Act on regions (Act No. 129/2000 Sb. – „KZř") are in principle presuming the use of ways of disposing of real estate of competent ÚSC conditioned in general (private) law regulations (civil and commercial code),the above mentioned acts are free to set certain public law regulation of contract conditions, respectively to making wrong property law operations. It is typical that it is especially the determination of ÚSC organ (at first council and board), which is legitimate to decide about the contract type, respectively property law transaction type of the given unit to decide (see firstly Section 85 OZř and Sections 36 and 59(2) KZř therewith) that without this decision the transaction is of no validity (see Section 41(2) OZř and Section 23(2) KZř). The specific public law institute in question has no analogy in private law sphere, even if it could be found there. Specifically, it deals with *intention* of ÚSC to sell, to exchange or to present a realty. The intention must be made public for fifteen days (in case of region for thirty days), before the decision is taken by the ÚSC organ, by hanging it out on an official board of the municipal (regional) office, with a view to opinion expression of interested persons and acceptance of their offers. However, as a whole, it is possible to suppose that regularization of disposing of ÚSC real estate is unambiguously insufficient. Primarily a clear conception is missing[3].

1 For details on disposal of property (inclusive real estate) of the state see P. Havlan, Majetek státu v platné právní úpravě, Praha 2006, p. 203 et sequentia.

2 To the term "Public subjects" see P. Havlan, Veřejné vlastnictví v právu a společnosti, Praha 2008, p. 22 et sequentia.

3 In detail to disposal of property (inclusive real estate) of territorial self- governmental units see P. Havlan, Majetek obcí a krajů v platné právní úpravě, Praha 2004, p. 197 et sequentia, respectively relevant part of 2nd edition of

Analogous and in many respects even worse situation of public law regulation of real estate disposal is also by the following, in an exemplary way mentioned, subjects. To the most typical public subjects undoubtedly belong public universities. Rector or organs or persons authorized by the statue of public university decide about disposal of real estate (see Section 34(4) and 35(4) of Act No. 111/1998 Sb., on universities - "ZVŠ"). A decision can be taken after previous assent of executive council of public university (Section 19(2) ZVŠ) and after opinion expression of academic senate of public university (Section 9(2/c) ZVŠ); the executive council is obliged to announce any release of a previous written assent in seven days from its release to the Ministry of Education (Section 15(6) ZVŠ). Law operations "without assent of executive council and without announcement to the Ministry of Education are not valid" (Section 15 ZVŠ). As a typical example of no conception it can be here subsequently introduced at least that the Act on universities has no rule on transfer of real estate (curiously in contradiction to transfer of movable assets) on fixing the price in case of their remunerate transfer, nor the rule based on which it is possible to transfer a realty only in public interest, or if the transfer is more economical than another way of dispose of property (thing) in case of gratuitous conveyance[4].

The issue of disposal of real estate looks similar to public universities by relatively new public subject of autonomous public institution type such as **public research institutions** ("VVI") according to the Act No. 341/2005 Sb.; consequently, the main activity of the subject is research and its infrastructure. The organs of VVI (director and board) have to decide on disposal according to terms predetermined by the Act No. 341/2005 Sb. Firstly, VVI cannot dispose of a realty without a previous written assent of executive board, whereas to predetermined operations assent of the founder is needed, and that all under the sanction of absolute (unconditional) invalidity. By alienability of real estate, unlike in case of universities, it is explicitly predetermined that VVI must negotiate a price as high as it is usual at such place and time, and prospective gratuitous conveyance is possible only in public interest[5].

The situation of **Associations of professionals** (Chambers) in given area is absolutely alarming. With reference to public subjects of so called interest (professional) self-government we cannot find in any single acts of law (concerning this subject) any trace of any integrated regulation of disposal of real estate. The above described situation is connected with the fact that the regulation of the whole problem firstly relies in the internal regulations of associations. Nevertheless,

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4 More to that see also P. Havlan, H. Neumannová, Veřejné vysoké školy jako subjekty vlastnického a jiných majetkových práv, "Právní rozhledy" 2006, no. 6, p. 203 and 204, or see also P. Havlan, M. Radvan, Czech Public Universities as Property and Tax Subjects. In Conference proceedings: Sovremennye problemy teorii nalogovogo prava (The Modern Problems of Tax Law Theory), Izdatěľstvo Voroněžskogo gosudarstvennogo universitěta, Voroněž 2007, p. 216 and 217.

5 More to that see P. Havlan, Veřejné výzkumné instituce, "Právní zpravodaj" 2005, no. 12, p. 11.

associations in the majority of cases are not fulfilling these expectations, which can be traced back also in the fact that needed methodical help of state administration, i.e. firstly competent ministries[6], is in principle missing.

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Fundamental importance of real estate in ownership of public subjects – essentially, it is a core of public ownership as a comprehensive socioeconomic phenomenon with its unfungible functions – "stabilizational" function and "generally socializational" function - demands an appropriate legal regulation. It should be in final stage a comprehensive regulation of the given problem in a form of Act on property of public subjects and its scope determined general (basic) rules of disposal of property and especially of real estate. In the meantime there should be effort made for some perhaps "partial" improvements, which means adoption of the Act on property of territorial self-governmental units (under consideration already some time before), or to spread methodical help in this area by competent ministries, etc.

6 More to that see P. Havlan, H. Neumannová, K profesním komorám jako subjektům vlastnického a jiných majetkových práv, "Právní zpravodaj" 2007, no. 4, p. 11.

Streszczenie

Opracowanie stanowi krótką krytyczną analizę przepisów prawnych dotyczących rozporządzania nieruchomością przez wybrane podmioty publiczne (państwo, jednostki samorządu terytorialnego, uniwersytety państwowe, państwowe instytucje badawcze i stowarzyszenia zawodowe). Autor starał się przedstawić istotę typowych problemów związanych ze stosowaniem analizowanych regulacji w Republice Czeskiej prezentując jednocześnie propozycje stosownych rozwiązań.