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# Administrative Procedure for Temporary Removal of an Animal from the Custody of Its Owner or Guardian

## Introduction

Over the centuries, many thinkers have devoted their deliberations to the subject of animals and their protection. One of the most well-known quotations referring to the problem of the proper treatment of animals, attributed to Mahatma Gandhi, is contained in the words: “The greatness of a nation and its moral progress can be judged by the way its animals are treated”. This may lead to a simple conclusion that the better the animals are treated in a given society, the higher in civilizational development it is in.

Even though in the 20<sup>th</sup> century much suffering has been inflicted on animals, often under “pseudo-scientific” research and experiments,<sup>1</sup> nowadays social movements can be observed which strive to secure animals a separate legal status, which would mean their legal personification.<sup>2</sup> One of the best known initiatives in this area was taken several years ago in Romania. Its aim was to grant dolphins known for their advanced intelligence and ability to form complex social relationships – the status of

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<sup>1</sup> See P. Singer, *Wyzwolenie zwierząt*, Warszawa 2004, pp. 62–94.

<sup>2</sup> T. Pietrzykowski, *Problem podmiotowości prawnej zwierząt z perspektywy filozofii prawa*, „Przegląd Filozoficzny” 2015, Nr 2, p. 251ff.

non-human persons. This would guarantee them the right to live, to physical integrity and to stay in the natural environment in social groups.<sup>3</sup>

Nowadays, in Poland, the issues of proper treatment of animals manifest themselves, *inter alia*, in the context of providing them with proper care and inflicting no suffering on them by owners or guardians. In the legal system of our country, animals are protected under the provisions of the Animal Protection Act of 21 August 1997 (consolidated text, Journal of Laws of 2019, item 122, as amended, hereinafter referred to as APA or the Act). According to its provisions in Art. 1(1), an animal is not an object but a living being capable of suffering. "Man owes it respect, protection and care". According to Art. 5 of the Act, every animal requires humane treatment. It consists in taking into account the needs of a given animal and providing it with care and protection (Art. 4(2) APA).

### Nature of the procedure for temporary removal of an animal from the custody of its owner or guardian

If an animal's existence is jeopardised as a result of actions or omissions of its owner or guardian, the legislator has provided for the possibility of its temporary removal under administrative law. It can be carried out in one of two modes: normal or emergency mode.<sup>4</sup> This institution is regulated in Art. 7 APA, which provides in Art. 7(3) for the so-called "*ex post facto* issuance of a decision on removal of the animal from the custody of its owner or guardian", and in Art. 7(1) for the issuance of the relevant decision if the animals have not been taken away yet. It consists in securing the animal's welfare until the judicial authorities determine whether the abuse has taken place and decide on the animal's future.<sup>5</sup>

The administrative procedure for removal of an animal is ancillary and auxiliary to criminal proceedings and is conducted in parallel with the latter with the offence of animal abuse under Art. 35(1a) APA, consisting in inflicting pain or suffering, or knowingly allowing such infliction, as its subject matter. The return of the animal to its owner or guardian depends on the final decision of a common court in a given case. In fact, the time limits for the enforcement of the decision on temporary removal of an animal are determined by the duration of the criminal proceedings. Pursuant to Art. 7(6) of the Act, the collected animal shall be returned if the court does not rule

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<sup>3</sup> *Dolphins deserve same rights as humans, say scientists*, BBC News, <https://www.bbc.com/news/world-17116882> [access: 2.09.2019].

<sup>4</sup> P. Janiak, *Czasowe odebranie zwierząt w trybie administracyjnym – podstawowe zagadnienia*, „Causus” 2019, p. 45.

<sup>5</sup> M. Sługocka, *Praktyczny wymiar instytucji czasowego odebrania zwierzęcia właścicielowi lub opiekunowi*, „Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji” 2017, Vol. 108, p. 45.

on its forfeiture in accordance with Art. 35(3) APA, or if criminal proceedings in this matter is discontinued. This leads to the conclusion that each time a decision under Art. 7(1) APA is issued, the head of the commune is obliged to simultaneously submit a notification on the commission of a crime by the owner or guardian of the animal in criminal proceedings.<sup>6</sup>

### Removal of an animal pursuant to Art. 7(1)

In accordance with Art. 7(1a) APA, a decision on temporary removal of an animal from the custody of its owner or guardian is “taken *ex officio*”. This provision refers to the procedure for initiating proceedings in these cases and should be understood as meaning that the initiation of proceedings for temporary removal of an animal by a head of the commune (mayor or city president) takes place *ex officio*, even though it takes place after the initiative being taken by the entities listed in Art. 7(1a) of the Act: Police, commune guard, veterinarian or authorised representative of a social organization whose statutory aim is to protect animals. The initiation of proceedings shall in this case be subject to the submission of a notification by an institutional body referred to in Art. 7(1a). This should lead to the conclusion that the notification by an ordinary citizen should have this effect if it is submitted not directly to the head of the commune (mayor or city president) but to the police, commune guard, veterinarian or the relevant social organisation.

A decision issued pursuant to Art. 7(1) of the Act shall anticipate the animals’ collection. Its adoption pursuant to Art. 7(1) APA depends on whether a local government body states that the premise referred to in Art. 6(2) of the Act – animal abuse, in particular (but not exclusively) when it takes the form referred to by the legislator in Art. 6(2)(1) to (19) APA – is fulfilled. Therefore, in order to apply Art. 7(1) APA, the head of the commune (mayor or city president) should reasonably suspect that the owner or guardian of the animal has committed a crime of animal abuse. This suspicion shall be subject to appropriate verification in criminal proceedings. This is the only way to confirm it and result in the application of appropriate consequences in terms of penalties and punitive measures.

An animal collected in this mode shall be transferred to an animal shelter, if it is a domestic or laboratory animal, or to an agricultural holding designated by the authority issuing the decision, if it is a farm animal, or to a zoo or animal shelter, if it is used for amusement, entertainment, filming, sporting activities or kept in zoos. The transfer of an animal pursuant to Art. 7(1b) APA shall be subject to the consent of the entity that the animal is to be transferred to. However, if no such consent is given,

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<sup>6</sup> M. Górski, *Odpowiedzialność administracyjnoprawna w ochronie środowiska*, Warszawa 2008, chapter III, section 3.1.4 – published by Lex Omega 2019.

the animal may be transferred free of charge to another legal or organisational entity without legal personality or to a natural person who will provide it with appropriate care. Similarly, the competent public administration authority shall transfer the animal to another entity in the event of circumstances preventing its transfer to the entities mentioned in Art. 7(1)(1) to (3) APA, if, for example, it is necessary to ensure special conditions for the animal, in particular appropriate medical treatment, which cannot be provided in shelter conditions.

Pursuant to Art. 7(2) APA, the decision issued pursuant to Art. 7(1) APA is immediately enforceable by law. It should include an additional (accessory) element in the form of an order of immediate enforceability.<sup>7</sup> This means that the decision on the temporary removal of an animal becomes enforceable even though it is not yet final and despite the fact that it may be appealed against to the second instance authority. It shall be enforceable as soon as it has been effectively served or announced to the party in the person of the animal's owner or guardian.

Two types of decisions may be made in administrative proceedings concerning removal of an animal from the custody of its owner or guardian pursuant to Art. 7(1) of the Act: a decision to remove an animal or a decision to refuse to remove an animal. The latter is taken when no grounds have been found for temporary removal of the animal. In the case of the former, the legislator provided for a fast-track procedure for lodging and processing of appeals. Pursuant to Art. 7(2a) APA, an appeal shall be lodged within 3 days of the date the decision has been served. The local government board of appeal shall process it within 7 days. However, regarding the decision on refusal to remove the animal, the 14-day period for lodging an appeal under Art. 129(2) of the Code shall apply.<sup>8</sup>

### Removal of an animal pursuant to Art. 7(3)

A decision pursuant to Art. 7(3) APA shall result in the deprivation of the owner of control over the animal without the simultaneous issuance of a decision on the temporary removal of the animal. It concerns animals that actually have already

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<sup>7</sup> See more about accessory elements of an administrative decision – E. Szewczyk, M. Szewczyk, *Zlecenie jako element akcesoryjny decyzji administracyjnej*, [in:] *Idea kodyfikacji w nauce prawa administracyjnego. Księga pamiątkowa ku czci Profesora Janusza Borkowskiego*, red. Z. Kmiecniak, Warszawa 2018, p. 318ff.

<sup>8</sup> See judgements of the Voivodeship Administrative Court in Poznań: II SA/Po 254/12 of 27 June 2012; IV SA/Po 142/15 of 8 July 2015, IV SA/Po 327/15 of 10 September 2015; judgement of the Voivodeship Administrative Court in Łódź of 10 January 2014, II SA/Łd 1052/13 and judgement of the Voivodeship Administrative Court in Warsaw of 9 October 2014, IV SA/Wa 1188/14, and judgement of the Voivodeship Administrative Court in Gliwice of 6 December 2017, II SA/Gl 707/17 and the rationale referred to therein; available at CBOSA.

been collected. The intervention referred to in this provision may take place if two conditions are met at the same time. Namely, if leaving an animal in the care of its former owner or guardian is likely to endanger its health or life by reason of abuse, and if, at the same time, the case is urgent.<sup>9</sup> This mode allows for urgent intervention, for example, where it is established that the animals are kept in inappropriate housing conditions<sup>10</sup> by not providing adequate shelter from cold, heat, rain, snow, or kept in areas where they are liable to be harmed, or are grossly neglected or unattended by being kept in rooms or cages that prevent them from maintaining their natural posture (Art. 6(2)(10) and (17) APA). An administrative decision pursuant to Art. 7(3) of the Act is issued *ex post facto*.<sup>11</sup> It is taken when the animal is no longer with its owner or guardian – contrary to the procedure provided for in Art. 7(1) APA. This means that in this case the evidence and investigation procedure taken by the administrative body is aimed at a consecutive and, at the same time, thorough examination of factual and legal circumstances related to the removal of the animal and existing at the moment of its removal, and not at the moment of issuing a decision. As a consequence, the proceedings by the head of the commune (mayor or city president) cannot be limited to the acceptance of the actual actions of the entity that collected the animal, but must be preceded by proceedings in which the authority examines the legitimacy of the animal having been collected.<sup>12</sup> The head of the commune (mayor or city president) is obliged to exhaustively and completely determine the facts of the case and make a legal assessment of the same.<sup>13</sup> Circumstances accompanying the receipt of an animal should be documented by the authority and presented in the rationale for the decision, so that it is possible to verify whether a situation justifying the issuance of a decision pursuant to Art. 7(3) of the Act actually occurred.<sup>14</sup>

Although the provision does not explicitly specify this, the notification referred to in Art. 7(3) APA, submitted to the public administration body whose task will be to issue the *ex post facto* decision, should be sufficiently detailed so that the head of the commune (mayor or city president) who will issue the decision has full data concerning the case at its disposal. The person carrying out the removal should indicate in it

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<sup>9</sup> Judgement of the Supreme Administrative Court of 26 April 2019, II OSK 1135/18, Lex 2683925.

<sup>10</sup> The Supreme Administrative Court in its judgement of 15 January 2019, II OSK 656/18, available at CBOSA, ruled that leaving a dog unattended, without food and tied up on a chain is a form of animal abuse.

<sup>11</sup> Judgement of the Supreme Administrative Court of 25 April 2017, II OSK 1678/16, available at CBOSA.

<sup>12</sup> Judgement of the Supreme Administrative Court of 11 June 2013, II OSK 2417/12, available at CBOSA.

<sup>13</sup> Judgement of the Voivodeship Administrative Court in Poznań of 6 June 2013, IV SA/Po 165/13, available at CBOSA.

<sup>14</sup> Judgement of the Voivodeship Administrative Court in Opole of 24 October 2013, II SA/Op 348/13, available at CBOSA.

the date of collection, the place where it took place and the name of the entity which carried it out and, in addition, the animal, its owner and the reasons for the removal.

a) Death of an animal and insubstantiality of the proceedings under Art. 7(3) of the Act

A decision under Art. 7(3) of the Act is issued *ex post facto*. It is taken when the animal has already been collected. The issuing authority is obliged to assess whether the premises for removing the animal occurred when it was being done. It is therefore issued on the basis of the facts existing at the time of the act of collection and not at the time of that decision. This leads to the conclusion that events that will take place after the date of removal of the animal – such as the death of the animal – shall not render the administrative proceedings pursuant to Art. 105(1) of the Code of Administrative Procedure unsubstantiated.<sup>15</sup> For this reason, the proceedings for temporary removal of an animal from the custody of its owner or guardian shall not be discontinued.

b) Evidence proceedings

With regard to the evidence and investigation procedure preceding the issuance of a decision on the removal of an animal in the mode laid down in Art. 7(3) of the Act, adequate preparation of the entities collecting the animal becomes particularly important. As already mentioned, the decision is issued *ex post facto* (several or ten or so days) after the event justifying the decision. It is therefore important that the circumstances justifying the removal are properly documented. While this does not cause any problems for institutional entities, such as police officers or commune guards, it may be problematic if the animal is collected by an authorized representative of a social organization. Both police officers and commune guards can prepare valid reports in which all circumstances and facts accompanying a given event are recorded in detail. However, practical experience shows that an employee of a social organization does not always possess adequate qualifications. In any such case, reliable photographic documentation of the state of the animal and its housing conditions is essential.

Other evidence frequently used in this procedure includes an opinion of an expert veterinarian to whom the animal is transported immediately on collection, indicating the psycho-physical condition of the animal. In addition, it may be justified during the procedure to carry out a visual inspection of the animal and of the housing provided to it by the owner.

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<sup>15</sup> Judgement of the Supreme Administrative Court of 29 November 2016, II OSK 442/15; judgement of the Supreme Administrative Court of 14 January 2016, II OSK 782/15, available at CBOSA.

### Participants of the proceedings for temporary removal of an animal from the custody of its owner or guardian

Pursuant to Art. 7(1) and (3) of the Act, the entity conducting proceedings as a body of first instance is the head of the commune (mayor or city president). The local jurisdiction of these authorities shall be determined by the location of the animal at the time of its collection. Pursuant to the provisions of Art. 17(1) of the Code of Administrative Procedure<sup>16</sup> – the body adjudicating in the second instance shall be the local government board of appeal. In turn, a party to the proceedings conducted in the aforementioned modes shall be the owner or guardian/guardians of the animal, who are entitled to carry out all procedural activities in the administrative proceedings.<sup>17</sup> The Act does not define the term “guardian”. It should therefore be understood, in accordance with its universal meaning, as a person who takes care, looks after, attends to an animal.<sup>18</sup>

However, the person who collects the animal under Art. 7(3) APA – i.e. a policeman, a commune guard or a representative of a social organisation whose statutory objective is to protect animals, who is authorised to collect the animal – shall not be the party to the proceedings. The legislator authorised these persons only to collect the animal and then obliged them to immediately notify about this fact the body authorised to issue an administrative decision. The fact that an association or other social organisation has submitted a notification of the animals’ removal does not mean that they have a legal interest within the meaning of Art. 28 CAP, which would allow such an organisation to be considered a party to the administrative proceedings. Its participation in the proceedings would be possible only if it applied to be admitted to participate in it with the rights of a party.<sup>19</sup> Both in administrative proceedings conducted in accordance with the procedure set out in Art. 7(1) and 7(3) there may appear entities with the rights of a party. They do not substitute a party but appear next to and independently of the party. In practice it occurs most frequently when a social organisation expresses its will to participate in the proceedings. A relevant decision is taken by the head of the commune (mayor or city president) by way of a resolution appealed against by a complaint pursuant to Art. 31(2) CAP. In each case,

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<sup>16</sup> The Act of 14 June 1960, consolidated text, Journal of Laws of 2018, item 2096, as amended (hereinafter referred to as CAP or the Code).

<sup>17</sup> Judgement of the Voivodeship Administrative Court in Gliwice of 13 March 2019, II SA/Gl 936/18, Lex 2644312; The party to the proceedings will not be a social organization to which the animal worker has been admitted. See more widely E. Szewczyk, M. Szewczyk, *Status organizacji społecznej w postępowaniu prowadzącym do wydania decyzji na podstawie art. 7 ust. 3 in fine ustawy z dnia 21 sierpnia 1997 r. o ochronie zwierząt (t.j. Dz.U. z 2019 r. poz. 122 ze zm.)*, *Gloss to the judgement of the Supreme Administrative Court of 24 February 2020*, II OPS 2/19, in print.

<sup>18</sup> Judgement of the Voivodeship Administrative Court in Warsaw of 18 March 2014, IV SA/Wa 2877/13, available at CBOSA.

<sup>19</sup> Judgement (not final) of the Voivodeship Administrative Court in Wrocław of 10 January 2018, II SA/Wr 637/17, available at CBOSA.

possible participation of a social organisation in administrative proceedings shall be decided by the administrative body conducting the proceedings, provided that such organisation proves that its participation is justified by its statutory objectives and there is a public interest in this (Art. 31(1) of the Code).

### **Removal of an animal from the custody of its owner/ guardian and financial consequences of this action**

Pursuant to the provisions of Art. 7(4) APA, in the event of issuing a decision pursuant to Art. 7(1) or (3) APA, “the costs of transport, subsistence and necessary medical treatment of the animal shall be charged to its former owner or guardian”. It should be stressed that it is not always possible to specify – as it were “in advance” – the specific cost of subsistence and necessary medical treatment in the decision on the temporary removal of animals. At this initial stage of the procedure, it is often impossible to predict the duration of the treatment required for an animal, as well as the actual costs of its maintenance. This is generally impossible, e.g. because it is not clear whether the treatment will be effective immediately and how long it will last, or because it is difficult to predict in advance the length of the criminal proceedings in which the final decision on the animal’s forfeiture or return to the owner will be taken. For this reason, in the jurisprudence of administrative courts it is assumed that a decision on the temporary removal of an animal may but does not have to include a determination of the costs of transport, subsistence and necessary treatment.<sup>20</sup> Therefore, the amount of those costs does not have to be determined in the same decision in which the authority decides on the temporary removal of the animal from the custody of its owner. However, in order for the owner or guardian of the animal – in the absence of a decision on costs in the decision on temporary removal – to be aware of the necessity to pay them in the future, it is necessary to include a relevant instruction in the said decision.

In cases referred to in Art. 7(1c) APA, if the entity the animal is to be transferred to does not consent to this, or if other circumstances occur preventing the transfer of the animal to the entities referred to in Art. 7(1), the animal may be transferred free of charge to another legal or organisational entity without legal personality or to a natural person who will provide it with appropriate care. In such a situation, it will only be permissible to charge the owner with transport costs and documented medical costs, since it follows from the provision that the animal is transferred free of charge, which means that there will be no costs for the animal’s subsistence on the part of the authority.<sup>21</sup>

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<sup>20</sup> Judgement of the Voivodeship Administrative Court in Kielce of 24 July 1997, II SA/Ke 461/14, available at CBOSA.

<sup>21</sup> Judgement of the Voivodeship Administrative Court in Opole of 24 October 2013, II SA/Op 348/13, available at CBOSA.



The adoption of a decision on costs at a later date must therefore be regarded as admissible and not contrary to Art. 7(4) APA. However, prior issuance of the decision on temporary removal is necessarily required.<sup>22</sup> In this context, the decision on costs appears to be a decision dependent on the decision on the temporary removal. The preceding decision – i.e. one on the temporary removal of the animal – determines the content of the decision on the costs of transport, subsistence and medical treatment. A decision on costs shall be given in separate proceedings but a precedent decision on the removal of the animal is necessary for the former being issued.<sup>23</sup> Therefore, the decision on costs is a decision linked to the decision on the animal's removal.

The obligation to pay the costs of transport, maintenance and necessary treatment of the animal is a public-law obligation. To order the party to pay these costs, the administration authority must provide detailed reasons for doing so. The amount of these costs and the way in which they are calculated cannot be arbitrary. It shall correspond to the actually incurred expenditure.<sup>24</sup>

### Rationale for the decision

The adoption of a decision to remove an animal from the custody of its owner/guardian, as in the case of any administrative decision, requires the public authority to take a fair account of the facts of the case, in this case by establishing that the animal was actually kept in improper housing conditions, in a state of gross negligence, in rooms or cages preventing it from maintaining its natural posture. At the same time, however, the interest of the owner (guardian) of the animal should be taken into account, as well as the arguments and evidence presented by them which may justify that it is not necessary to collect the animal.

### Controversies arising from the application of Art. 7 APA concerning the issuance of a decision on the temporary removal of an animal

One of the controversies arising from the application of Art. 7(3) of the Act is the insufficiently specified deadline for submitting a notification on the collection of an animal to the administration body of the first instance. The legislator referred to the

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<sup>22</sup> Judgement of the Voivodeship Administrative Court in Olsztyn of 21 November 2013, II SA/Ol 815/13, available at CBOSA.

<sup>23</sup> More on subsidiary decisions see E. Szewczyk, *Współdziałanie organów administracji publicznej a decyzje zależne na przykładzie unormowań dotyczących planu ruchu zakładu górniczego*, „Studia Prawa Publicznego” 2019, Nr 2, p. 90.

<sup>24</sup> Judgement of the Voivodeship Administrative Court in Kraków of 21 February 2018, II SA/Kr 1566/17, available at CBOSA.

term as “immediate”, which means that this should be done as soon as possible. In practice, however, due to the lack of sanctions for failure to meet the deadline, such notifications are often submitted after several or even ten or so several days. Undoubtedly, this may have a negative impact on the findings made in the course of evidence and investigation proceedings. The collected animal should be treated and cared for. Due to the passage of time, it is more difficult to prove that at the time of taking it away from the owner or guardian it was in a much worse condition. The legislator should therefore specify a definite, relatively short period within which the notification should be made (e.g. 2 days) and the penalties for failure to meet it.

Moreover, in practice there are also numerous problems related to the taking an animal back by the owner from the entity to which it was transferred, if the court neither rules on the animal's forfeiture nor discontinues the proceedings. The emergency procedure for the collection of animals, linked to the immediate enforceability of the decision, undoubtedly constitutes a significant interference in the rights of animal owners. Therefore, the legislator should supplement the Act with regulations providing for a “fast track” of animal collection by the owner, who often has problems with determining where the animal actually stays, as it happens that it is transferred from one entity to another. These difficulties arise also due to the fact that the provision of Art. 7(1)(1–3) APA does not require that the indication of the entity to which the animal is to be transferred should take place in some special form.

In addition, attention should also be paid to the time limits applicable in proceedings on issuance of a decision on the animal's removal. Since the appeal and its consideration by the local government board of appeal are conducted in a faster procedure (3 and 7 days respectively), it would be worth shortening the time for issuing a decision by the first instance authority, which, in accordance with Art. 35(3) CAP, is obliged to take a decision within one month, and in cases it considers to be particularly complicated – within two months.

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**Abstract:** In Polish legal system, animals are protected under the provisions of the Animal Protection Act of 21 August 1997 (consolidated text, Journal of Laws of 2019, item 122, as amended, hereinafter referred to as APA or the Act). According to its provisions in Art. 1(1), an animal is not an object but a living being capable of suffering. “Man owes it respect, protection and care.” If its existence is jeopardised as a result of actions or omissions of its owner or guardian, the legislator has provided for the possibility of its temporary removal under administrative law. It can be carried out in one of two modes: normal or emergency mode. This institution is regulated in Art. 7 APA, which provides in Art. 7(3) for the so-called “*ex post facto* issuance of a decision on removal of the animal from the custody of its owner or guardian”, and in Art. 7(1) for the issuance of the relevant decision if the animals have not been taken away yet. It consists in securing the animal’s welfare until the judicial authorities determine whether the abuse has taken place and decide on the animal’s future. Numerous controversies have arisen in relation to the application of the Act’s provisions on removing an animal from the custody of its owner or guardian. They are related, *inter alia*, to the deadline for the persons who collect the animal for submitting a relevant notification to the competent administrative authority, which has an impact on evidence in administrative proceedings. In addition, due to insufficient regulation of these issues, there are difficulties in determining the location of the animal by the owner and taking it back if the court neither rules on the animal’s forfeiture nor discontinues the proceedings. Moreover, the time limit for the first instance authority to decide on the animal’s removal – which may last one or even two months – should be considered as too long, especially in case of the second instance proceedings, which must be finalised within 7 days.

**Keywords:** administrative procedure for removal of an animal from the custody of its owner or guardian

