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The Scope of Public Services Performed by Municipal Local Governments in the Republic of Poland Through Budgetary Establishments

Małgorzata Ofiarska*

* Małgorzata Ofiarska, Professor of the University of Szczecin, Dr. hab., Head of the Department of Local Government Law, Faculty of Law and Administration, University of Szczecin, Poland. Author of over 250 publications, including 10 books, more than 40 articles, 95 studies in joint works and other electronic publications. Specialises in local government law and administrative enforcement proceedings. She is a member of the Centre of Information and Organization of Public Finances and Tax Law Research in Central and Eastern Europe. (e-mail: malgorzata.ofiarska@usz.edu.pl)

Abstract: The Act of 27 August 2009 on public finance – which entered into force on 1 January 2010 – and its later amendments have brought about significant changes in the scope of public services performed by the commune's self-governments through budgetary establishments. The key change has been the limitation of these services, which triggered the necessity to implement new organizational methods and new financing solutions for public services hitherto carried out by budgetary establishments. Local government authorities were forced to choose between three organizational forms and three different ways of financing of the said services. At present, public services in a commune can be carried out through: a budgetary unit (a form most closely linked to the commune's budget), a budgetary establishment (a form indirectly linked to the commune's budget) and a municipal corporation (a form that in fact assumes full commercialization of public services).

The aim of the paper is to analyse and evaluate relevant legislation, judicial practice of courts and regional accounting chambers, as well as the doctrine of local government law and public finance law regarding the scope of public services that can be financed through budgetary establishments. The hypothesis that the legislator's implementation of new legal regulations since 2010 has led to implementation of more effective management methods with regard to public services and management of public finance allocated to these services was proven to be right. The legislator's act of giving local government authorities relative freedom as to the choice of organizational and legal forms through which public services will be performed is tantamount to expecting that the authorities shall perform their tasks rationally. The leading method applied in the paper was the dogmatic and legal method, supported by the empirical and analytical method (in particular with regard to the judicial practice of courts and regional accounting chambers).

Keywords: commune; budgetary establishments; public services; commune's budget; access to public services

1. Introduction

January 2010, i.e. since the provisions of the Public Finance Act of August 27, 2009 came into force,[1] the possibility of instituting budgetary establishments as the organisational

form used to implement public tasks has been significantly limited in Poland. The possibility to institute state budgetary establishments was fully eliminated and the authority to create budgetary establishments in the local government area has been reduced to several types of public services (tasks). Formally, budgetary establishments may be set up in all categories of local government units (hereinafter LGU), i.e. municipalities, *powiats* and voivodeships, however there are most likely to be established in the municipalities due to the scope of public tasks performed by the communes in Poland. Taking into account the provisions of Article 4 section 2 of the PFA, ordering proper application of the provisions of this Act regarding LGUs also to the metropolitan unions and associations, the conclusions made herein should also refer to the municipal unions and powiat-municipality unions forming budgetary establishments.

The aim of this paper is to analyse and evaluate the normative material, the decisions taken by courts and regional chambers of audit, as well as the views of the legal scholars, local government law and public finance law regarding the subject–object scope of the authority of the commune to create municipal budgetary establishments. This authority should be understood in a broad manner, i.e. its scope should include not only founding a budgetary establishment from the very beginning, but also transforming the other organisational unit into a budgetary establishment and combining at least two budgetary establishments into one organisational unit. The shape of this authority is determined by the scope of actions (tasks) that may be implemented using the organisational-legal form of a municipal budgetary establishment. The verified hypothesis stated that the legislator, when introducing new legal regulations regarding the creation of budgetary establishments in 2010, determined the application of more effective public services management methods and the management of public finance resources for implementation of these services in the municipalities. The legislator is granting relative freedom to choose the organisational-legal form of implementing public services by the municipal bodies, while expecting rational actions from them.

The municipalities have been granted quite extensive range of freedom, manifested in the ability to distinguish between the three forms of organisational structure and three different methods of financing public services. Currently, public services in the municipality may be implemented within the framework of: budgetary unit (the form most closely related to the budget of the commune (the form indirectly related to the municipal budget) and the municipal corporation (the form assuming full commercialization of public services). The consequence of such choice is either leaving the implementation of the specific public tasks of the municipality in close relation with its budget or implementing their execution and financing in fact outside the public finance sector. In the latter case, it is often not full commercialization of public services, as its implementation may be financed from the municipal budget through granted donation or subsidies, or supported otherwise, e.g. by means of specific preference in taxation with public levies.

The method based on legal theory (the dominant method) has been used in the paper, complemented with the empirical–analytical method (specifically in relation to the decisions by courts and the regional chambers of audit), as well as the comparative method regarding the evolutionary changes to the legislation made in the reviewed period.

Article 15 PFA expresses the essence of a local government budgetary establishment, concluding that it is an organisational unit of the public finance sector, executing the distinguished tasks and covering the costs of its operation from the revenues. Obtaining the revenues by the local government budgetary establishment means that the surplus of revenues over expenditure may occur. However, such situation does not mean the budgetary establishment carries out only the profit-making economic activities and not the operations in the field of public utility.[2]

2. The Scope of Tasks of the Municipalities Specified in Article 7 of the Local Government Act and the Entitlement to Create Municipal Budgetary Establishments

The objective criterion, providing the normative shape to the authority of the municipality to create municipal budgetary establishments, consists in the own tasks of the municipality. Specifying the limits of the authority of the municipality to create (join or transform) a municipal budgetary establishment requires the analysis of the catalogue of own funds of the municipality under Article 7 of the Local Government Act of March 8, 1990[3] and confronting it with the catalogue of the LGU's own funds under Article 14 of the PFA, defining the scope of operation of a local budgetary establishment. Each of these catalogues is of different nature. The catalogue specified in Article 7 of the LGA is of open nature – as the enumeration of own tasks of the municipality was preceded with the phrase "in particular"[4] – whereas the catalogue of own tasks of the LGU adopted in Article 14 of the PFA (reference to municipality included) is extensive (closed). Specifying the open catalogue of own tasks of the municipality in Article 7 of the LGA is not a coincidence. It is a consequence of the regulation contained in Article 6 section 1 and 2 of the LGA, from which the presumption of the competence of the municipality in the field of satisfying collective needs of the local community results. This provision states that all public issues of local significance, not reserved by law to other entities, belong to the scope of the own tasks of the municipality. Unless the law provides otherwise, such matters shall be decided upon by the municipality. This presumption is supplemented by the catalogue of issues belonging to the own tasks of the municipality contained in Article 7 section 1 of the LGA.[5]

The views of the legal scholars and the case law assign different functions to the provisions of Article 6 and 7 of the LGA. The assumption of the competence of the municipality is an important constructional element of the principle of the independence of municipality guaranteed by the Constitution.[6] The institution of presumption of the competence of the municipality in the public matters of local importance and from the further provisions of the Act on the local government proves that the general and abstract determination falls within the competence of the municipal council, whereas in an individual and specific manner it belongs to the competence of the commune head (mayor, city president, etc.).[7] It should be explicitly stated, however, that assuming the competence of the municipality in all public matters does not constitute independent grounds for taking any action, neither it authorises the municipality to independently create any public issue of local

importance, as pursuant to the principle of the rule of law formulated in Article 7 of the Constitution of the Republic of Poland, public authority bodies operate on the grounds and within the limits of the law.[8] Both Article 6 and the supplementary Article 7 of the LGA are the norms oriented solely on the tasks, and not competence, thus cannot constitute the grounds for any sovereign act of the municipal body.[9] Such actions may be taken pursuant to a specific provision of a separate law. The views of the legal scholars also specify a different view that Article 6 and Article 7 of the LGA may be, and – in many cases – are the independent and sufficient grounds for resolving public issues of local importance. Different assessment of these provisions would mean depriving them of legally significant consequences and, as a result, result in their loss of meaning.[10] Pursuant to the other, more moderate view, the provision of Article 7 section 1 of the LGA, due to its general meaning (task-oriented general clause) constitutes the legal guarantee of the organisational freedom of the local government in arranging public services.[11]

The own tasks of a municipality have been divided into two categories, i.e. obligatory and optional. Pursuant to Article 7 section 2 of the LGA, the separate Acts specify which tasks of the municipality are mandatory. The legislator imposing an obligation on the municipality to perform a specific public task means that the municipality cannot evade this obligation.[12] The legal scholars, however, hold the view that the municipality should perform the operations obligatory in their scope of financing using all legally available funds.[13] The other tasks of the municipality, which the municipality is not obliged to perform, are of optional nature. However, these tasks cannot be freely created by the municipality. The optional tasks should be objective, i.e. have a legal basis, whereas in the absence of an entity clearly indicated in the Act, the municipality may undertake their performance on the basis of a general presumption of its competence.

The catalogue formulated in Article 7 section 1 covers 22 types of own tasks of the municipality, covering the following:

- spatial order, real estate management, environmental and nature protection and water management
- municipal roads, streets, bridges, squares and road traffic organisation
- water supply and pipes, sewage system, urban waste water disposal and treatment, maintenance of cleanliness and order and sanitary facilities, landfills and municipal waste disposal, supply of electricity, heat and gas
- telecommunications activities
- local public transport
- health protection
- social assistance, including care centres and institutions
- support for family and foster care systems
- municipal housing construction
- public education
- culture, including municipal libraries and other cultural institutions, as well as the protection and care of monuments
- physical culture and tourism, including recreational areas and sports facilities
- market places and market halls
- municipal greenery and trees

- municipal cemeteries
- public order and public safety, as well as fire and flood protection, including the equipment and maintenance of the municipal flood-control storage facility
- maintenance of the municipal public and administrative utilities and facilities
- pro-family policy, including the provision of social, medical and legal care for pregnant women
- supporting and disseminating the concept of local government, including creating conditions for the operation and development of auxiliary units and implementing programmes to stimulate civic participation
- promotion of the municipality
- cooperation and activities to the benefit of the non-governmental organisations and other public benefit entities[14] (church organisational units of the religious associations having regulated relations with the state, LGU associations, social cooperatives, companies operating pursuant to the Act on Sports of June 25, 2010,[15] not aimed at making profit)
- cooperation with local and regional communities of other countries

The aforementioned catalogue of the own tasks of the municipality may not be considered equal to the admissible scope of operations of the municipal budgetary establishment. Neither the concept of assuming the competence of the municipality constituting a structure of the provision of Article 6 of the LGA, nor the open catalogue of the tasks of the municipality formulated as the municipal budgetary establishments may not lead to the conclusion that the decision-making bodies of a municipality exercise full freedom at instituting organisational units in the form of municipal budgetary establishments. Article 14 of the PFA, establishing the subjective limits of the operation of the municipal budgetary establishment constitutes an obstacle for such a conclusion.

3. The Scope of Tasks of the Municipality Specified in Article 14 of the LGA and the Entitlement to Create Municipal Budgetary Establishments

Article 14 of the PFA adopts the catalogue of own tasks of the LGUs, including municipalities, which may be implemented within the framework of a municipal budgetary establishment. Neither the Public Finance Act of November 26, 1998,[16] nor the Public Finance Act of June 30, 2005 contained such a provision.[17] This means that until December 31, 2009, municipalities had been free to establish budgetary establishments in order to execute public tasks, the point of reference being a catalogue of own tasks of the municipality formulated in Article 7 section 1 of the LGA and other own tasks of the municipality to be implemented pursuant to the assumption of competence under Article 6 of the LGA.

The legal status in this regard has changed significantly since the current Public Finance Act entered into force, i.e. since 1 January 2010, as Article 14 of the PFA has been in force with regard to the provisions of Article 7 section 1 of the LGA and Article 6 of the LGA has introduced restrictions on conducting activities of the municipality using

the organizational and legal form of the municipal budgetary institution. A wide scope of the public tasks of the commune, shaped by the systemic, economic and political factors throughout the previous periods,[18] has been significantly limited compared with the possibility to execute them using the municipal budgetary establishment. Such actions have been taken as it was necessary to consolidate public finance and increase the transparency of the public finance sector, as well as limit the so-called non-budgetary organisational forms.

The provision of Article 14 of the PFA of 2009 has no equivalent in the previous PFA of 2005 and PFA of 1998. This is due to the adoption of a different concept concerning the creation of the budgetary establishments as the organisational and legal form of activity in the public finance sector in the current PFA. The possibility to create budgetary establishments only in the area of certain activity by the local government units has been limited. The provision of Article 14 of the PFA should be considered a specific provision in relation to Article 7 section 1 and Article 6 of the LGA, however only in the scope of the authority to create municipal budgetary establishments. If applying the conflict of laws rule *lex specialis derogat legi generali* (namely "the specific norm repeals the general norm"), the authority of the municipality to create municipal budgetary establishments should be analysed taking into consideration the provisions of Article 14 of the PFA. This provision has extensively enumerated the own tasks of the LGU, thus formulating a closed catalogue of such tasks. It is not possible to apply the assumption of the competence of the municipality in creating the municipal budgetary establishments in order to implement own tasks not directly listed in Article 14 of the PFA. It should also be emphasised that the term "own tasks" has been used in Article 14 of the PFA in a very general manner, i.e. without distinguishing them into mandatory and optional tasks. It is allowed to create the municipal budgetary establishments to implement own tasks of the municipality, both the mandatory and optional ones.

The following scope of own tasks of the municipality may be performed within the municipal budgetary establishments:

- housing management and the management of commercial premises
- municipal roads, streets, bridges, squares and road traffic organisation
- water supply and pipes, sewage system, urban waste water disposal and treatment, maintenance of cleanliness and order and sanitary facilities, landfills and municipal waste disposal, supply of electricity, heat and gas
- local public transport
- market places and market halls
- municipal greenery and trees
- physical culture and tourism, including maintenance of recreational areas and sports facilities
- social assistance, vocational and social reintegration, as well as vocational and social rehabilitation of disabled persons
- keeping various species of exotic and domestic animals, including, in particular, the animals in danger of extinction, in order to protect them outside their natural habitats
- cemeteries

The comparison of the catalogues of the own tasks of the municipality specified in Article 7 section 1 of the LGA and Article 14 of the PFA proves that the catalogue contained in Article 14 of the PFA is more narrow. This means that although certain own tasks of the municipality have been indicated in Article 7 section 1 of the LGA, they may not be executed by the municipal budgetary establishment. This issue concerns tasks in the field of telecommunications, public education, culture or fire and flood protection. Article 14 of the PFA sets the limits for the activities that can be executed within the municipal budgetary establishment; however, it does not ultimately define the area of activity of the municipal council with regard to the creation (transformation or merging) such budgetary establishments. It is necessary to analyse this provision along with the provisions of Article 7 of the Act on Municipal Economy of December 20, 1996,[19] stating that the activity extending the scope of public utility tasks may not be executed in the form of a municipal budgetary establishment. Only the commercial companies are allowed to render commercial services. The sole representation that a particular service has the nature of a public utility constitutes an indispensable condition for such service to be rendered by a municipal budgetary establishment; however, it is not a sufficient condition. The objective limitations imposed by the legislator in Article 14 of the PFA should also be taken into consideration.[20]

In that context, the presentation of the concept of "public utility" is of primary importance. This concept has been used, i.a. in Article 9 section 4 of the LGA. The public utility tasks are the own tasks of the municipality, specified in Article 7 section 1 of the LGA, whose aim is to meet the collective needs of the population on an ongoing and uninterrupted basis by providing universal services. This is assumed to be a legal (statutory) definition of "public utility".[21] The term "public utility" has also been used in Article 1 section 2 of the MEA. Pursuant to this provision, municipal economy comprises in particular the public utility tasks whose aim is to meet the collective needs of the population on an ongoing and uninterrupted basis by providing universal services. The essence of the concept of "public utility" has been expressed in the same way as in the Article 9 section 4 of the LGA. There is no universal catalogue of the public utility tasks. It is open and subject to amendments, determined by the life cycle of the inhabitants, external conditions and the general social and economic situation which requires adaptation of the provision of services to these changes. In the circumstances of a particular case, a determination as to whether a specific service provided fulfils the conditions of public utility should be made by reference to the distinctive features of that service, which indicate its importance to the municipal community.[22]

The analysis of the provisions of Article 14 of the PFA and Article 7 of the MEA indicates that the municipal budgetary establishment may only render services which jointly fulfil two criteria: constituting public utility services and fitting the catalogue of tasks specified in Article 14 of the PFA.[23] However, the existence of these premises does not mean that the municipality is obliged to create a municipal budgetary establishment in order to perform its own specific tasks. The legislator leaves the municipality with a relatively wide choice of organizational and legal forms for implementation of its own tasks. A municipality may perform public utility tasks through organizational units the municipality has established for this purpose, in particular through the municipal budgetary

establishments or commercial law companies or through other entities not related to the municipality, natural persons, legal persons or organizational units without legal personality, which are organizationally not related to the commune – pursuant to the contracts for performance of tasks concluded with them.[24] The use of budgetary facilities by the municipalities is justified especially in those areas where the revenues from their activities cover to a large extent the costs of such activities, although at the same time they cannot be maximised due to social reasons and must be supplemented with subsidies from the municipal budget. Apart from the sphere of public utility, the choice of the organisational and legal form for the performance of own tasks of the municipality is significantly limited, as the possibility of creating a municipal budgetary establishment to perform tasks beyond the sphere of public utility has been excluded.[25]

General specification of the own tasks of the municipality may be the source of various doubts as to its interpretation, in particular whether the specified task of the municipality lies within the scope of public utility or exceeds it. This raises the question of whether its implementation may be delegated to the municipal budgetary establishment or should be executed by a municipal company or other entity. The example of such doubt has been setting the boundaries of the own task of the municipality consisting in maintaining housing management and managing commercial premises by the municipal budgetary establishment. It has been assumed that the task of maintaining housing associations by a municipal budgetary establishment, even when the commune owns a part of the premises in a given housing association, goes beyond the scope of public utility. The volume of the share of municipal ownership in the whole housing community remains irrelevant.[26] Delegated administration, including the complex handling of the housing associations, may not be the subject of activity of the municipal establishment as it does not constitute public utility. Rendering the services of property administration delegated by other entities (property owners' or tenants' associations) is not a public utility and does not meet the collective needs of the population on an ongoing and uninterrupted basis by providing universal services. It only meets the needs of the owners of other properties or the owners of properties constituting a given housing association, who ordered the execution of a commercial service. Such activity does not serve the purpose of executing own tasks by the municipality. The scope of these tasks does not include handling the real property belonging to other people, including the provision of management or administration services to separate entities, such as – pursuant to the provisions of law – housing associations, regardless whether the municipality is one of the members of the housing community.[27]

4. Execution of Public Tasks by the Municipal Budgetary Establishment Pursuant to the Provisions of Separate Acts

The provisions of Article 14 of the PFA and Article 7 of the MEA do not comprehensively specify the powers of the municipality to perform specific public tasks with the use of an organisational and legal form of a municipal budgetary establishment. This does not mean, however, that the separate acts broaden the closed catalogue of the own tasks of

a municipality, formulated in Article 14 of the PFA, which may be executed within the framework of a municipal budgetary establishment. The provisions of separate acts are of a precise and defining nature in relation to the general and framework regulations contained in Article 14 of the PFA. This request may be justified on the basis of the selected examples of such separate rules.

Pursuant to Article 19 section 2 of the Act on public collective transport of December 16, 2010[28] the municipality, as the organiser of public collective transport (i.e. the entity providing the functioning of the public collective transport in the given area), may carry out transportation within the framework of the public collective transport in the form of a municipal budgetary establishment. The essence of the public collective transport is the public carriage of passengers by regular services, operated at specified intervals and along specified routes, communication lines or networks. Pursuant to this provision, the organiser may independently carry out transportation within the framework of the public collective transport only in the form of a municipal budgetary establishment.[29] In such case, the municipal budgetary establishment is the operator of the public collective transport, i.e. the entity authorised to operate business activity consisting in the carriage of passengers on certain transport lines, pursuant to an internal act laying down the conditions governing the performance of these services. The municipality, as the organiser of the public collective transport, is obliged to present information, by January 31 each year, to the competent marshal of the voivodeship regarding the public collective transport, specifically the number of transport lines on which the public collective transport is executed by the operator being a municipal budgetary establishment.

Pursuant to Article 3, section 2, point 1 of the Act of June 13 2003 on social employment,[30] the centre of social integration may be created by the LGUs, including a municipality, in the form of a municipal budgetary unit or a municipal budgetary establishment. The centre of social integration provides professional and social reintegration through the following services:

- training the skills that enable people to fulfil social roles and achieve social positions accessible to those who are not socially excluded
- acquisition of professional skills and apprenticeship, retraining or upgrading professional qualifications
- learning to plan life and meet needs through own efforts, in particular by being able to earn own income through employment or business activity
- learning the skills of rational management of the cash held

Public tasks specified in the act on the public collective transport and the act on social employment which may be carried out by the municipality within the framework of a municipal budgetary establishment are not other tasks compared with the tasks specified in Article 14 of the PFA. Public collective transport is included in the task specified as "local public transport" in Article 14 point 4 of the PFA, while running a social integration centre is included in the task indicated in Article 14 point 7a of the PFA as professional and social reintegration.

5. Final Conclusions

When the Public Finance Act of August 27, 2009 came into force in Poland, there have been ca. 2,900 local budgetary establishments (mostly municipal budgetary establishments) which employed ca. 82,000 people.[31] As of December 31, 2012, only 796 local budgetary establishments were operating,[32] while there were 779 local budgetary establishments on December 31 2015[33] (mostly municipal budgetary establishments). The obligation to present such information was repealed on January 1, 2017, due to repealing Article 69 of the Act of 30 August 1996 on Commercialisation and Certain Authorisations of Employees,[34] which obliged the head of the commune (the mayor or the president of a city), the starost, the voivodeship marshal and the executive body of the union of LGUs to submit to the minister competent for the Treasury the information concerning the transformation and privatisation of municipal property, including the list of organisational units.

Various own tasks of the municipalities listed in Article 14 of the PFA are executed within the framework of the municipal budgetary establishment. Currently, the following establishments are created: social inclusion centres, urban sports and recreation centres, tourism and sports and recreation centres, municipal economy centres, municipal utilities, waste management centres, urban markets, urban cleaning centres, housing management centres, municipal building administrations, road and green maintenance centres, municipal equipment operation centres, water and waste water plants. This means that the municipalities use the form of municipal budgetary establishment to execute the public tasks related to satisfying the basic needs of the community.

Selecting the organisational-legal form of municipal budgetary establishment, pursuant to Article 4 of the MEA, falls within the exclusive competence of the municipal council. It has been proven that this choice is not free, since certain forms of regulation in this scope have been introduced by Article 14 of the PFA and Article 7 of the MEA. The consequence of choosing the form of a municipal budgetary establishment is the possibility for the municipal council to set prices and fees or the method of setting prices and fees for municipal services of public utility nature and for the use of the municipal public utility facilities and equipment. Under the aforementioned statutory provision, the municipal council may grant this entitlement to the executive body of the municipality (commune head, mayor, city president). The prices established (directly or by indicating the manner of setting these prices) in the resolutions, are binding for both the entities rendering municipal services of public utilities, as well as for the recipients of these services, thus they are universally binding. Similarly, the fees for the use of the municipal public facilities and equipment are universally binding – they are binding on the entities which make the facilities and equipment available, as well as on all the users of administrative units.[35]

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