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Paulina BIEŚ-SROKOSZ
Akademia im. Jana Długosza w Częstochowie

Legal position and legal forms of activities of government agencies in Poland

Summary

As a result of changes in Polish legal system in the early 90s of last century, they were created new legal and organizational forms, which their legal status is different from the typical entities of public administration. This group of entities can include for example government agencies. Government agencies have been appointed to performed public tasks of economic character. Already at this point it is worth noting that hybrid construction agencies and legal forms of their actions help to define them as a special (untypical) public administration entities. What will be shown in this article.

Keywords: government agencies, legal status, legal forms of action, the construction of hybrid.

Introduction

The process of agencification of public administration in Poland commenced at the end of the 1980s. Agencies became a new form of organization of public administration in Polish legal system. Their formation stemmed from the fact that the state needed to adapt to new public tasks. Agencies were being created so that the processes of innovation, privatization and modernization in the area of agriculture and defence could take place. Some of the agencies[1] were established as a result of transformation of already operating organizational forms, that is organizational units of ministerial offices. There is not a unified model of agency, as the entities included among agencies vary depending on their legal

[1] Speech of the Agency for Privatization, which was created under the Act of 30 April 1993. National Investment Funds and their privatization, Dz.U. No. 44, item. 22 as amended. d.

organizational form and formation procedures. However, it is possible to distinguish their two common features: they are all established by state bodies, and they are organizationally and functionally interrelated with chief and central organs of public administration. There are three types of agencies: state juridical persons, administrative offices, and sole-shareholder companies of the State Treasury. The agencies examined in this paper are organized as state juridical persons and are the agencies in the strict sense of the word (so called government agencies also known as administrative agencies or state agencies). Government agencies include the following entities: Agency for Restructuring and Modernisation of Agriculture, Agricultural Property Agency, Material Reserves Agency, Military Property Agency, and Polish Agency for Enterprise Development. The agencies organized as administrative offices or sole-shareholder companies of the State Treasury are included among the agencies in the wide sense of the word.

1. The term ‘agency’ vs. Polish doctrine

In the Polish literature on the discussed subject there have not been formed common and generally accepted definitions of agencies neither in the strict nor in the wide sense of the word, which makes it difficult to classify a given public administration entity under one of those groups of agencies. Furthermore, the legislator uses the term ‘agency’ incoherently and inconsistently, making it more complicated to determine which entities are to be included among the agencies in the strict, and which in the wide sense of the word. The unification of the definition is impeded also by the term ‘executive agency’ introduced in the Public Finance Act. As a consequence, even the scholars specializing in Polish administrative law have started using those two terms interchangeably, which additionally complicates the systematization of the term ‘government agency’ among the notions functioning within administrative law.

The Polish literature on the subject lacks a unified standpoint concerning the proper grasp of the expression ‘agency’. Undoubtedly, one is wrong regarding the expression ‘agency’ and ‘government agency’ as equal. The term ‘agency’ is an umbrella term encompassing public as well as private law entities. It is used to name specific and heterogeneous organizational units functioning within administrative apparatus. Public law character of entities included among the agencies in the wide sense can be seen in the fact that they are formed to execute public tasks in the areas where the functioning of traditional organizational forms of administration would be less efficient.

The notion of agency performs an organizational function in the first place. It is also used to determine organizational units included among broadly defined administrative apparatus. The common denominator of both the entities is the word ‘agency’. It must be noted, however, that agencies are not fully formed

units and some of them have legal personality and operate through their organs chosen in compliance with the regulations of internally binding acts (agencies in the strict sense, that is government agencies). That is why it might be better to use the notions in the strict and in the wide sense separately. It stems from the fact that firstly, the agencies in the wide sense are described as organizational units which have been formed to perform public tasks. Secondly, those entities acquire forms characteristic of public and private law. Thirdly, the ways they are formed differ depending on their legal status. Fourthly, the agencies in the wide sense do not have a consistent pattern of formation, functioning, and supervision. Fifthly, the diversity of forms of agencies makes it difficult to identify the entity responsible for performed public tasks.

As it has already been said, the political changes that took place at the end of the 20th century contributed to the establishment of new organizational forms of public administration entities in Polish legal system, that is government agencies, among other things. Their objective was to adapt administration, its operations, and its organizational forms to perform new public tasks in the area of economy. The entities operating within those new organizational forms were in conflict with the traditional notion of public administration entity. It must be noted that the notion of public administration entity as well as the question which entities belong to that group of entities depend on several factors. Firstly, one must decide whether to consider a public administration entity in the strict or in the wide sense. Secondly, if a given entity is a part of public administration apparatus and meets essential conditions, it should be considered a public administration entity. Using the phrase 'meets essential conditions' one must bear in mind that the public administration entity performs public tasks in the public interest, makes use of power while performing public tasks, is formed in compliance with a legislative act or other normative act, and is subject to supervision by state organs. An organizational unit can be categorized as a public administration entity if its exclusive or main activity involves performing public tasks. It is a *sine qua non* condition. Thus the entities formed pursuant to private law (e.g. limited liability companies and joint stock companies), or the entities in which majority interest belongs to public units, may be classified as public administration entities if they meet the aforementioned sine qua non condition. One should therefore consider the notion of public administration entity in the strict sense limiting the range of entities to the ones acting pursuant to public law.

2. The essential feature of government agencies

If one is to decide whether a given agency is the agency in the strict sense, they should consider its organizational and legal form, its objective scope of performed tasks, and the way it manages the State Treasury property. It seems ob-

vious therefore that even if one uses the term "government agency", it does not mean they really deal with such an entity. Thus it must be stressed that pursuant to current binding regulations there are seven government agencies: Agency for Restructuring and Modernisation of Agriculture, Material Reserves Agency, Military Property Agency, Military Housing Agency, Agricultural Property Agency, Polish Agency for Enterprise Development, and Agricultural Market Agency. This view can also be found in case law which opts for using the notion of 'agency' in the strict sense of government agency[2].

The essential constitutive feature of government agencies is their legal personality. They acquire legal personality by way of a legislative act. The same act equips them with state property. The acquisition of legal personality enables a government agency to participate in civil law transactions as a subject. It results from the fact that agencies have been designated to perform public functions and tasks with the help of their own business enterprise. Nevertheless, it must be stressed that the acquisition of legal personality entails the acquisition of capacity to perform acts in law, and legal capacity resulting from civil law. Hence a government agency can be a subject of rights and obligations, and act as a party in relations of obligation. Simultaneously, the fact that government agencies are established by way of a legislative act, charged with public tasks, and empowered to exercise administrative power, leads one to the conclusion that they possess public and administrative legal capacity. The acquisition of legal personality by government agencies allows them to perform their tasks by making use of private law forms of action, basing mainly on civil law contracts. However, it must be noted that the immanent feature of public administration is performance of public tasks by means of legal actions of ruling nature in the sphere of so called 'empire'. On the other hand, when it comes to administrative agencies, it is private law form of execution of tasks that prevails in the sphere of so called 'dominion'. The legislator has authorized government agencies and their organs (chairmen) to take actions of ruling character the aim of which is to adjudicate individual cases by means of administrative decisions. Nonetheless, their objective scope of action and their number indicate that civil law contracts remain a prevailing form of their proceedings. Yet the question arises about the responsibility for the execution of tasks delegated by an agency to a private entity by means of civil law contract. On the one hand, entering into civil law contracts, government agencies delegate not so much tasks more activities to perform. On the other hand, not each civil law contract involves performing activities. There are also contracts concerning financial aid provided by agencies, or contracts concerning the State Treasury property trading. As it can be seen, if one is to answer the aforementioned question, they first have to divide civil law

[2] See more: wyr. WSA w Kielcach z dnia 16 grudnia 2010 r., I SA/Ke 614/10; wyr. we Wrocławiu z 29 listopada 2010 r., I SA/Wr 942/10; and wyr. WSA w Warszawie z dnia 14 października 2008 r., III SA 1086/08 Lex nr 504642.

contracts according to the subject of legal relation. Only after that condition has been met, one can move to further deliberation.

The civil law contract is a 'tool' used by administrative agencies to perform tasks. As a rule, they delegate the execution of an activity stipulated in the contract. It does not mean, however, that firstly, government agencies privatize that activity, and secondly, that the private entity is fully responsible for the execution of that activity. It stands justifiable that it is the agency that bears responsibility for a delegated activity, as it is the entity wholly responsible for the execution of a given tasks. The other party is responsible only in the area stipulated in the contract. Nevertheless, some doubts may be raised about the character of legal proceedings in case there are liability claims against a contractor for failure to perform or improper performance of an activity. If such is the case, it is civil law regulations that find application, unless specifically provided otherwise.

Government agencies should be perceived as the embodiment of state in property relations. For that reason, they are fully separate units resembling typical organizational units equipped with legal personality, elements of organizational structure, property, and staff. The acquisition of legal personality allows administrative agencies not only to participate in civil law relations and broadly defined economic relations but also to act as a party in civil law contracts. Government agencies apply these legal forms of action in order to perform tasks of economic character. By doing so, they act in the sphere of the state's dominion. It is noteworthy therefore that legal personality of government agencies is only a means necessary for the state to perform public tasks, not a means of satisfying agencies' own needs. In civil law relations government agencies and the State Treasury should both act as autonomous and equal legal persons.

The Polish state performs its public tasks, especially in the area of economy, with the help of diverse organizational forms characteristic of public as well as private law. A government agency is an example of such a form. Agencies have been formed so that the State Treasury could play an active role in operating business enterprise, and exert influence on it not only by means of administrative law tools. The position represented by the Supreme Court of Poland[3] indicates that state juridical persons (government agencies) are established in order to shift competence for civil law economic relations from state officers to professional managers acting as organs of state juridical persons.

It must be stressed again that administrative agencies, as organizationally, financially, and legally separate from the State Treasury, display features of typical legal persons, that is: capacity to perform acts in law, separate property, and organizational structure. Agencies operate thanks to the state property and that is why, from the economic standpoint, they still belong to the state. Since they are state juridical persons, administrative agencies should not be regarded as state companies. The property given to them by the state should be used in compli-

[3] Resolution of the Supreme Court dated 27 April 2001, III CZP 12/01, OSNC 2001 No. 10, item. 150.

ance with the acts regulating their formation and functioning, and above all intended for performance of public tasks.

The characteristic features of government agencies are their formation procedure and way of operating described in the acts on particular agencies. In those acts, the legislator stipulates the organizational structure, organs, tasks, and financial economy of a given government agency. Those regulations serve only as a framework supplemented and specified by statutes and organizational regulations of particular administrative agencies. The internal organizational structure is centralised. The chairman of an agency is an organ authorised to determine internal organizational structure of particular organizational units pursuant to internal regulations. Furthermore, he/she manages the agency and represents it before third parties. The chairman has considerably wide range of tasks, which allows one to conclude that he/she has an influence (though limited) on the functioning of the government agency in general. The organizational layout of the agency includes the head office with the chairman, then regional units with directors, and finally district offices with managers. The directors and managers act as organs and are subordinate to the chairman. They have a separate range of duties and responsibilities in their areas.

The key criterion for distinguishing government agencies from other public administration entities is the specific objective scope of the performed public tasks. Those tasks include mainly supporting innovation, modernisation of agriculture, and economy development funding. The performance of those tasks enables agencies to strengthen their position at the national and European level. Public tasks performed by government agencies are of economic character in the first place. This means that a performed task should contribute to the development and quality improvement of Polish economy. The actions taken by the agencies can be considered two-dimensionally, that is horizontally and vertically. The horizontal dimension involves the relevance of performed tasks and their influence on government administration, functioning of particular state organs, and current condition of government policy and Polish economy. As regards the vertical dimension, the performed tasks are strictly related to the area of operation of particular agency units such as the head office, regional branches, and district offices. Consequently, agencies exert an influence also on the development of local economies, play a part in the quality of life improvement in particular areas, and contribute to the image of those areas by increasing their attractiveness for local communities and prospective investors.

3. The group of tasks of agencies and their legal forms of activities

The objective scope of the tasks performed by government agencies makes it possible to build a typology of agencies based on types of undertaken tasks.

Thus there can be distinguished: government agencies administering with the State Treasury property (Agricultural Property Agency, Military Property Agency, and Military Housing Agency), the government agency administering with state reserves (Material Reserves Agency), government payment agencies (Agency for Restructuring and Modernisation of Agriculture, and Agricultural Market Agency), and the government agency supporting entrepreneurs (Polish Agency for Enterprise Development). Taking into account not only the objective scope of the performed tasks but also the functions that all the agencies can perform, there can be distinguished functions supporting: the state, an individual, economic growth, government policy, and cooperation between the government and the society. The tasks as well as the functions of administrative agencies are influenced by political, economic, and social factors, which determines the scope of duties performed by those entities. The functions performed by government agencies should be analysed through the prism of undertaken tasks stipulated by normative acts. Each agency can perform numerous functions, providing that it stems from the catalogue of tasks devolved to them.

Another feature distinguishing government agencies from other public administration entities is the diversity of their legal forms of operation. Performing public tasks agencies employ legal forms of operation characteristic of public law (administrative decisions and substantive technical actions) and private law (civil law contracts). Nevertheless, legal regulations do not authorise government agencies to make a free choice between those two forms of operation but precisely regulate that matter. As stipulated in current legislation, each administrative agency makes use of civil law contracts in compliance with specific provisions of law regulating their formation and functioning.

The duties devolved upon government agencies are performed within the framework of public and private law. It is however the latter that plays more relevant role in their operations. It stems from the fact that private law allows for flexibility and optimization of actions undertaken by administration. As a result, it is possible for administration to solve evident as well as complex problems efficiently and comprehensively. The application of contracts in performing public administration tasks is conducive to the effectiveness of various entities. The occurrence of contract approach in administration can be explained twofold, by using traditional paradigm shift construct or otherwise.

All the government agencies in Poland make use of civil law contracts in compliance with specific provisions regulating their formation and functioning. The legislator has not established a unified procedure for entering into civil law contracts. Hence there are two possible paths. As regards the first one, the legislator stipulates the conditions to be fulfilled by the parties, and allows them to determine remaining elements of the legal relation which cannot be stipulated by regulations. As regards the other one, the legislator only points to exemplary issues which the parties have to deal with by means of contract, and leaves re-

maining issues to be settled by means of private law. It is also common for the legislator to decide about the legal form of selecting the parties of civil law contract. There are two possible ways: in accordance with public contract awarding procedure stipulated in the Public Procurement Act[4] or without application of that procedure. However, substitution of administrative law relations for private law relations results in futility of administrative control. Instead, there is judicial control of private law nature, which is based on different principles. It must be stressed that administration is oriented towards public interest whereas private entities concentrate on their own benefit.

Employing civil law contracts regulated by civil and administrative law, public administration entities have to take into account aspects of validity and efficacy of those contracts. Simultaneous application of civil and administrative law makes it difficult to determine which branch of law should be given priority. It seems therefore justifiable to state that a civil law contract is valid if all the conditions dictated by civil as well as administrative law are fulfilled[5]. Legal limitations stipulated in administrative law regulations are designed to prevent loss, minimize risks and failures on the part of public administration entities.

When it comes to public law forms of operation, not all government agencies are authorised to perform legal actions of ruling nature. The legislator clearly stipulates situations in which an organ of government agency is authorised to render administrative decisions as an agency. Organs of agencies are obliged to render administrative decisions only in the cases stipulated by specific provisions of acts. Nevertheless, one must bear in mind that dealing with administrative decisions rendered by government agencies the regulations of Administrative Procedure Code will not always be applicable[6].

The fact that some government agencies do not have statutory authorisation to render administrative decisions is an intentional measure employed by the legislator, as the administrative decision is a decisive act of ruling nature itself. It is issued in specific and individual cases of administrative nature by entities performing administrative functions. For this reason, Agency for Restructuring and Modernisation of Agriculture, Agricultural Market Agency, Agricultural Property Agency, Material Reserves Agency, and Military Housing Agency make particular decisions by way of administrative acts. Remaining administrative agencies, that is Polish Agency for Enterprise Development and Military Property Agency, issue administrative decisions in a considerably smaller range of cases.

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[4] The Act of 29 January 2004. Public Procurement Law, Dz.U. z 2013 r., poz. 907 z późn. zm. The provisions of the Act apply to all situations under which the contract under civil law of public administration.

[5] This position was confirmed in the jurisprudence of the Supreme Court. Exp. The Supreme Court of 26 November 2002., V CKN 1445-1400, OSNC 2004 No. 3, item. 47.

[6] An example is the already mentioned two-month period, entitlement body of the Agency for Restructuring and Modernization of Agriculture to settle the matter.

The fact that agencies are authorised to render administrative decisions and exercise administrative power does not mean they are organs of public administration. Being a state juridical person, each administrative agency acts pursuant to Article 38 of Civil Code, that is acts through its organs which, in principle, have the status of legal person organs. Pursuant to the acts regulating formation of government agencies, the majority of their organs are empowered to render administrative decisions in the areas stipulated by those acts. Administrative decision is an obligatory form used by public administration organs to exercise power in each case concerning individual rights and obligations of law addressees in a given sphere regulated by administrative law. Thus, considering the position represented by the Voivodeship Administrative Court[7], it must be stated that if there are no binding regulations authorising organs to issue administrative decisions, it cannot be presumed that this activity can be done by an organ which has been delegated to perform public administration functions. There is no space for presumption of competence, as in each category of cases it is necessary to invoke substantive law regulations which then leave the door open for administrative proceedings. It must be therefore stated that if a government agency as well as its organs issue an administrative decision concerning an individual case stipulated by specific regulations, they can be said to have the status of public administration organ in the functional sense. Above all, it stems from the fact that by means of decision an agency and its chairman decide about granting or deprivation of the right of a given beneficiary to receive financial aid. The procedure leading to administrative decision issued in individual cases is at each stage similar to the procedure generally applied in public administration. Nonetheless, in the acts on particular agencies the legislator enumerates a number of exceptions like for instance deadline extension for issuing decisions in the first or second term.

Another distinguishing feature of government agencies is the way they are supervised. They are supervised by ministers competent for given matters. The analysis of the applicable regulations shows that the superior-subordinate relationship between a minister and a government agency does not display features of legal supervision. Without a doubt, the legislator, though using the term 'supervision over agencies', does not specify nor enumerate particular activities included within the scope of activities performed by agencies. Taking into account the provisions of acts on particular agencies, it must be pointed out that subordination of a given agency to a given minister takes the form of direction. In some cases, that is in the case of Polish Agency for Enterprise Development, Material Reserves Agency, and Military Property Agency the relationship takes a broader form involving organizational subordination. It also seems that the intention of the legislator was to establish very strong connections of ruling, dependent-like,

[7] Decision of the Administrative Court in Warsaw on 27 May 2005, IV SA/Wa 1921/05.

and coordinative nature between those agencies and chief public administration organs. That sort of bond is designed to ensure uninterrupted performance of public tasks on the part of agencies, and to guarantee that all their activities are performed in compliance with the instructions issued by the directing body.

In general, the relations between an administrative agency and a given minister are based on acts of direction including guidelines, notices, instructions, and decisions. Those acts are binding, general, and unilateral, and agencies are obliged to comply with them. The competent ministers issue acts of direction in accordance with the general norm of competence regulated in Article 34a of the Act on Council of Ministers. It is noteworthy that acts of direction, which as a rule should regulate only the situation of government agencies, indirectly regulate also the situation of beneficiaries and entrepreneurs who benefit from the aid provided by agencies. What is more, acts of direction command administrative agencies to act in a given way, the effect of which is to achieve the goals that a given minister is bound to achieve.

Considering the content of direction acts, one can determine their objective scope which includes: detailed procedure of performance of particular tasks including performance of secondary activities; preparation of programmes and plans then approved by a given minister; preparation of opinions and reports on operations in a given year; improvement of an agency's performance in a given area (within a particular time frame and according to guidelines issued by a given minister after control); and the ways of use of the entrusted State Treasury property. Furthermore, ministers oblige the chairmen of government agencies to submit projects or contracts for approval. The chairmen have to also request for permission to undertake acts in law stipulated by regulations.

To conclude, it is worth mentioning that although under the provisions of acts on particular agencies the relationship between the agency and the minister takes the form of 'supervision', it should be understood as 'direction', whereas in the case of Polish Agency for Enterprise Development, Military Property Agency, and Material Reserves Agency it should be understood as organizational subordination. Both the content and the legal nature of the acts concerning government agencies indicate that they are acts of direction (guidelines, notices, and instructions). Within this scope of consideration, what might play an important role are *de lege ferenda* conclusions (concerning the law as it should stand). Firstly, the competent ministers should issue notices stating which entities are subordinate to and which are supervised by them. Secondly, the legislator should replace the term "supervision" with the term "subordination" in the acts on particular government agencies. Thirdly, there should be drawn a border line determining the extent to which ministers can interfere in the operations of agencies without depriving them of independence to perform their tasks. Fourthly, the legislator should clearly stipulate the prerequisites for dismissing the chairmen from their posts.

4. Conclusions

The analysis of specific features of Polish government agencies discussed in this paper leads to the conclusion that their functioning has not been regulated consistently and comprehensively. There are still a considerable number of issues left unregulated, which in consequence is a source of a diversity of views held by the representatives of Polish legal doctrine. Thus it seems justifiable to suggest some alterations. Firstly, in the Act on government agencies the legislator should form the legal definition of a government agency along with explication of its particular characteristic features. Secondly, the legislator should equip agencies with legal personality by means of legislative provision. Thirdly, organs of agencies (chairmen and supervisory board) should be singled out from their organizational structures. The formation of agency's supervisory board is justifiable, as it would entail continuous supervision of the agency's financial economy. The board should include public administration organs as well as the representatives of trading companies which the State Treasury has shares in, and which operate in the same subject area as the agency. Fourthly, the legislator should establish the detailed procedure for appointing and dismissing the chairman and the supervisory board. The stress should be put on the prerequisites for dismissing the chairman, as currently it remains unregulated. Fifthly, the legislator should enumerate general tasks and competence of government agencies and their organs. Furthermore, the legislator should regulate legal forms of their operation, and unambiguously stipulate which provisions are of *lex generalis* and which are of *lex specialis* nature. Sixthly, legal supervision over the operations of government agencies should be exercised by competent ministers in concert with the minister competent for the State Treasury affairs, or the minister competent for finances, depending on the nature of activities performed by a given agency. Furthermore, there should be established a catalogue of supervisory activities which could be specified by means of legislative provision in acts on particular government agencies. Seventhly, as regards the internal control system, it seems justifiable for the legislator to regulate one model of exercising internal control in the strict sense. Currently, the legislator leaves the issues of organization, operational procedures, and scope of controlling activities with particular chairmen. On the one hand, it is justified by the specific character of the tasks performed by agencies. On the other hand, it seems more adequate to establish a unified model of internal control in the strict sense for all the government agencies.

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Pozycja prawna i prawne formy działania agencji rządowych w Polsce

Streszczenie

W wyniku zmian polskiego systemu prawnego, na początku lat 90. ubiegłego wieku tworzone były nowe formy organizacyjno-prawne, które swoim statusem prawnym odbiegały od typowego podmiotu administracji publicznej. Do tej grupy podmiotów możemy zaliczyć między innymi agencje rządowe. Agencje rządowe powoływane były w celu realizacji zadań publicznych o charakterze gospodarczym. Już w tym miejscu warto podkreślić, że hybrydowa budowa agencji oraz formy prawne ich działania przyczyniają się do określenia ich jako szczególne (nietypowe) podmioty administracji publicznej. Co zostanie wykazane w niniejszym artykule.

Słowa kluczowe: agencje rządowe, status prawny, prawne formy działania, budowa hybrydowa.