

<https://dx.doi.org/10.16926/gea.2024.01.02.29>

dr Anna WOJTKOWIAK

<https://orcid.org/0000-0003-1000-7292>

Jan Długosz University in Czestochowa

e-mail: a.wojtkowiak@ujd.edu.pl

The issue of the admissibility of conducting municipal services by local government units in the form of commercial companies in and outside the sphere of public utility – legal assumptions

Introduction

The issue of the permissible organisational and legal forms of conducting municipal services by local government units is defined by the acts regulating the system of the individual tiers of local government¹ and the Act of 20 December 1996 on municipal services management². Pursuant to Article 2 of the Municipal Services Management Act, municipal services management may be carried out by these units, in particular in the form of a local government budgetary establishment or commercial companies.

Municipal companies established by local government units in the economic sense serve to satisfy the collective needs of the local government community and are a form of their participation in economic trade. In this connection, it should be noted that, from the legal point of view, it is not the local government units concerned that carry out economic activity, but the specific commercial

¹ Act of 8 March 1990 on municipal government (consolidated text Journal of Laws of 2023, item 40), hereinafter referred to as municipal government act, Act of 5 June 1998 on poviat self-government (consolidated Journal of Laws of 2022, item 1526 as amended), hereinafter referred to as the poviat self-government act, Act of 5 June 1998 on voivodeship self-government (consolidated text Journal of Laws of 2022, item 2094 as amended), hereinafter referred to as the voivodeship self-government act.

² Act of 20 December 1996 on municipal management, consolidated text Journal of Laws 2021, item 679 as amended, hereinafter referred to as the municipal management act.

companies in which these units participate³. The position on this issue was taken by the Supreme Court, which in its resolution of 14 March 1995 accepted that a joint-stock company is a legal entity separate from the municipality and has its 'own' legal personality. This means that *de jure* it is the municipal company in question that participates in economic transactions, while the local government unit participates in the economic activity of the company only in the economic sense⁴. The article is an attempt to answer the question of which commercial companies may be used for the municipal services management by local government units in and out of the public utility sphere.

1. Rules for the exercise of municipal services management by local authorities in and outside the sphere of public utility

In 1990, one-stage local self-government was reactivated at the commune level in Poland after a break of more than forty years. This happened in connection with the entry into force of the Act of 8 March 1990 on local self-government⁵, which was the first in the post-war reality to define the prerequisites for the admissibility of conducting economic activity by municipalities. In its original wording, the Act expressed two principles concerning the conduct of economic activities by municipalities. The first consisted in full freedom to conduct economic activity falling within the tasks of a public utility nature. The second allowed for economic activities of a municipality going beyond tasks of a public utility nature only if "social needs" required it⁶.

Currently, the issue of municipal services management is regulated by the Act of 20 December 1996 on municipal management, which defines the principles and forms of municipal services management of local government units, consisting in the performance by these units of their own tasks in order to satisfy the collective needs of the local government community. Pursuant to Article 1(2) of the Municipal Services Management Act, municipal services management includes, in particular, tasks of a public utility nature, the purpose of which is to satisfy the collective needs of the population on an ongoing and uninterrupted basis through the provision of generally available services.

³ R. Uliasz, *Charakterystyka poszczególnych przedsiębiorców* [in:] Jan Olszewki (ed.), *Publiczne prawo gospodarcze*, Warszawa 2015, p. 59.

⁴ Resolution of the Supreme Court of 14 March 1995 III CZP 6/95, OSNC 1995, No. 5, item 72.

⁵ Journal of Laws of 1990, No. 16, item 95 (now the Act of 8 March 1990 on Municipal Self-Government)

⁶ C. Kosikowski, *Polskie publiczne prawo gospodarcze*, Warszawa 2002, p. 293, see also A. Wojtkowiak, *Kryterium zysku w odniesieniu do zasad prowadzenia działalności komunalnej przez gminy*, *Gubernaculum et Administratio*, Zeszyty Naukowe Instytutu Administracji Akademii im. Jana Długosza w Częstochowie, Częstochowa 2012, No. 1, p. 163.

On the other hand, on the basis of Article 10(1) and (2) of the Municipal Services Management Act, outside the sphere of public utility, a municipality may establish and join commercial companies in two cases. Firstly, if the following conditions are jointly met:

- a) there are unmet needs of the municipal community in the local market;
 - b) the existing unemployment in the municipality has a significant negative impact on the standard of living of the self-governing community, and the application of other measures and legal measures resulting from the applicable legislation has not led to economic activation and, in particular, to a significant revival of the local market or a permanent reduction in unemployment.
- Secondly, if the disposal of an item of municipal property that may constitute an in-kind contribution of the municipality to a company or the disposition of it in some other way will result in a serious property loss for the municipality.

The restrictions on the formation of and entry into commercial companies by the municipality, in these two cases, do not apply to its ownership of shares in companies engaged in banking, insurance and advisory, promotional, educational and publishing activities for the benefit of local government, as well as other companies important for the development of the municipality, including those engaged in rental housing, including those related to the entitlement of the tenant to acquire ownership of the premises in the future, and sports clubs operating in the form of a capital company⁷.

On the other hand, with regard to the principles of municipal management by the poviát, the legislator in Article 6(1) of the Act on Poviát-Level Local Government stipulated that it may establish organisational units only for the purpose of performing tasks of a public utility nature, which means that the poviát may not conduct commercial activities⁸. On the other hand, in relation to the self-governing voivodeship, the legislator, in Article 10, paragraph 4 of the Municipal Services Management Act, allowed the voivodeship to establish commercial companies under the principles and in the forms specified in the Act on Local Government at the Voivodship Level. It follows from the wording of Article 13 of the Act on Local Government at the Voivodship Level that the voivodship may establish limited liability companies, joint stock companies or co-operatives in the sphere of public utility, and may join such companies or co-operatives. Outside the sphere of public utility, the voivodship may establish limited liability companies and joint stock companies and join them if the activities of the companies consist in promotional, educational, publishing and telecommunications activities serving the development of the voivodship.

⁷ See art. 10 sec 3 municipal management act.

⁸ Art. 6 sec. 2 poviát self-government act.

The provisions of the aforementioned Municipal Services Management Act, Act on Poviats-Level Local Government and Local Government at the Voivodship Level indicate a relatively wide range of possibilities of conducting activities outside the sphere of public utility by communes and voivodeship self-governments and a complete lack thereof in the case of poviats. In discussing the provisions I have cited, it should be emphasised that the activities conducted by local government units⁹ outside the sphere of public utility are regulated activities and therefore the provisions regulating them should be treated restrictively. In the practice of the application of the law, certain situations may give rise to particular doubts, especially as, for example, municipalities may justify their authority to carry out commercial activities by vague concepts such as: "unmet needs of the local community", "unemployment significantly affecting the standard of living of the local community", "serious loss of property", or "companies important for the development of the municipality". In cases of dispute, the interpretation of these terms is made by the competent administrative courts¹⁰.

Summing up the remarks of the above chapter, it should also be noted that the activities carried out by local government units outside the sphere of public utility are treated by the legislator as exceptional, because, as a rule, local government units may undertake them only when a private entrepreneur cannot do so and only for important reasons for the residents of a given community. The restriction on the possibility of carrying it out stems from the fact that carrying out economic activities entails the risk that they will not be profitable, which may expose local authorities to large financial losses for which, if carried out in the form of partnerships, they would have to be liable with all their assets.

Consequently, in my view, the rules governing the commercial activities of local authorities should also be treated restrictively with regard to the choice of organisational and legal forms in which these activities may be carried out.

2. The use of commercial companies as permissible forms of exercise of municipal services management by local authorities in and outside the sphere of public utility

2.1. General characteristics of commercial companies

A closed catalogue of commercial companies is included in Article 1 § 2 of the Act of 15 September 2000 of the Commercial Companies Code¹¹. These com-

⁹ municipality and self-governing voivodeship

¹⁰ Z. Snażyk, A. Szafrąński, *Publiczne prawo gospodarcze*, Warszawa 2023, p. 323, See Judgment of the Supreme Administrative Court of 29 May 2019, I OSK 1981/17, LEX No. 2722465.

¹¹ Act of 15 September 2000. Commercial Companies Code, Journal of Laws of 2022, item 1467, as amended, hereinafter: the CCC.

panies include: general partnership, partnership, limited partnership, limited joint-stock partnership, limited liability company, simple joint-stock company and joint-stock company.

Article 3 of the Commercial Companies Code provides a definition of a commercial company, from which it follows that through the articles of association of a commercial company, the partners or shareholders undertake to pursue a common objective by making contributions and, if the articles of association or the statute so provide, by cooperating in another specified manner.

The legislator has divided commercial companies into two categories: partnerships and capital companies. The group of commercial partnerships includes: general partnership, partnership, limited partnership and limited joint-stock partnership. On the other hand, the group of capital companies includes: limited liability company, simple joint-stock company and joint-stock company.

2.1.1. COMMERCIAL PARTNERSHIPS

Commercial partnerships are organisational entities which are not legal persons and which are granted legal capacity by a separate act. Equipping these entities with legal capacity means that they can be subjects of rights and obligations. Pursuant to art. 8 § 1 of the Commercial Companies Code a partnership may on its own behalf acquire rights, including ownership of real estate and other rights in rem, incur obligations, sue and be sued. The granting of legal subjectivity to commercial partnerships results from:

- granting them legal capacity,
- the fact of dispelling doubts as to whether these entities may acquire ownership of real estate and other rights in rem,
- the fact that partnerships operate businesses under their own name
- the subsidiary liability of the partners¹².

All partnerships must operate a business¹³, which means that they are always entrepreneurs. Partnerships are formed when they are entered in the Register of Entrepreneurs of the National Court Register. These companies, as a rule, do not need to have their bodies¹⁴, as their functions are performed by the partners. As a rule, their partners are liable for the liabilities incurred by them personally, jointly and severally, but subsidiarily, with all their assets together with the company. The subsidiary liability of partners is based on the fact that a creditor may demand enforcement against the assets of a partner of the partnership who is liable for the partnership's obligations only if enforcement against the assets of the partnership proves ineffective¹⁵.

¹² S. Sottysiński, A. Szajkowski, J. Szwaja, *Kodeks spółek handlowych. Komentarz do art. 1-150*, Warszawa 2006, p. 4., further see also: J. A. Strzępka, E. Zielińska [in:] J. A. Strzępka (ed.), *Kodeks spółek handlowych. Komentarz*, Warszawa 2015, pp. 46-50.

¹³ Art. 8 § 2 CCC.

¹⁴ Exceptional regulations on this issue apply to partnerships and limited joint-stock partnerships.

¹⁵ See art. 22 § 2 and art. 31 § 1 CCC.

As a rule, partners in commercial partnerships may be all legal entities: natural persons, legal persons and organisational units which are not legal persons and which are granted legal capacity by a separate act. Establishing a partnership is easier and cheaper than establishing a capital company, as the legislator does not require commercial partnerships to have share capital¹⁶. In partnerships, each partner is required to make a contribution. The object of contribution in this category of companies, in addition to monetary sums and in-kind contributions (capital contributions), may also be other benefits (e.g. services or own labour for the company)¹⁷.

2.1.2. COMMERCIAL COMPANIES

Commercial companies are legal entities that acquire legal personality when they are entered in the Register of Entrepreneurs of the National Court Register¹⁸. They do not have to be entrepreneurs as they can be established for any legally permissible purpose¹⁹. As a general rule, commercial companies may be established by any legal entity other than a single-member limited liability company. In limited liability companies and joint stock companies, each partner (shareholder) is required to make a capital contribution (money or in-kind contributions)²⁰. In the case of these two limited liability companies, the contribution cannot be a non-transferable right or other consideration (services or own labour). In contrast, in the case of a simple joint-stock company, shares are taken up in exchange for contributions in cash or in kind. For this reason, a non-monetary contribution to cover shares can also be any contribution having material value, in particular the provision of labour or services²¹. The biggest advantage of doing business in the form of commercial companies is that their partners are not liable for the company's obligations, as this liability is borne by the company. This is in line with the basic principle of civil law, according to which a legal person is liable for its obligations alone. On the other hand, the shareholders are not liable for the company's obligations, as their contribution is a form of their economic risk associated with their financial commitment to the company's assets²². For this reason, it is assumed that companies with share capital should have their own assets and bodies defined by law²³.

¹⁶ An exception applies to a limited joint-stock partnership, which must have a share capital of min. PLN 50,000

¹⁷ J. Loranc-Borkowska, *Przedsiębiorcy w: B. Gnela (ed.), Prawo handlowe dla ekonomistów*, Warszawa 2019, p. 38.

¹⁸ Art. 12 CCC

¹⁹ See art. 151 § 1, art. 300¹ § 1 CCC, further in this subject see: J. A. Strzępka, E. Zielińska [in:] J. A. Strzępka (ed.), *op. cit.*, pp. 286-287.

²⁰ Art. Further in this subject see: W. Popiołek [in:] J. A. Strzępka (ed.), *op. cit.*, p. 681.

²¹ See art. 300² CCC.

²² See Art. 151 § 4 CCC, further in this subject see: J. A. Strzępka, E. Zielińska [in:] J. A. Strzępka (ed.), *op. cit.*, pp. 290-291 and Art. 301 § 5. CCC, further in this subject see: W. Popiołek [in:] J. A. Strzępka (ed.), *op. cit.*, p. 679.

²³ J. Loranc-Borkowska, *op. cit.*, pp. 47-48.

2.2. Doctrinal views on the applicability of the different categories of commercial companies to municipal management by local authorities in and outside the sphere of public utility

The applicability to municipal services management in and out of the public utility sphere of limited liability companies by local authorities does not raise concerns. On the other hand, the question of conducting municipal services management in and outside the sphere of public utility by commercial partnerships is the subject of disputes in the literature on the subject. Doubts about the legitimacy of using this form are caused primarily by the fact that the legal structure of partnerships is based on the subsidiary liability of partners for their obligations and the issue of personal management of the company's affairs by its partners. Unfortunately, the Municipal Services Management Act does not provide a clear answer to the question whether local government units in the sphere and outside the sphere of public utility may establish commercial partnerships. In order to resolve this issue, the content of Articles 2, 9(1) and 10 of the Municipal Services Management Act should be analysed.

As I mentioned earlier, it follows from the literal wording of Article 2 of the Municipal Services Management Act that municipal management (both in the public utility sphere and outside of it) may be conducted in the form of all commercial companies. At the same time, it should be pointed out that the issue of the forms of conducting municipal services management is also regulated by Article 9(1) of this Act, according to which local government units may establish limited liability or joint-stock companies and may join such companies. Analysing the literal wording of the two above-mentioned provisions, it should be noted that in neither of them does the legislator differentiate the situation of local government units with regard to the sphere in which they intend to operate in a given organisational and legal form. This fact gives rise to disputes in the literature on the possibility of using commercial partnerships to carry out municipal management in and out of the public utility sphere. Three groups of views can be found in the literature.

C. Banasiński and M. Kulesza in their commentary to Art. 9 of the Act on municipal services management assume that the provisions of Art. 2 and 10 of the Municipal Services Management Act use a broader term than companies, and in their opinion Art. 9 does not narrow the general ability to establish all commercial companies by local government units and thus does not exclude the possibility to establish partnerships both within and outside the public utility sphere²⁴.

In the source literature, one may also encounter the view that a comparison of the content of Articles 9(1) and 10 of the Municipal Services Management Act leads to the conclusion that Article 9(1) indicates the types of companies authorised to conduct activity in the public utility sphere and Article 10 indicates the

²⁴ C. Banasiński, M. Kulesza, *Ustawa o gospodarce komunalnej. Komentarz*, Warszawa 2002, p. 81.

types of companies that may exist outside it. Therefore, in the sphere of public utility, local government units may establish only limited liability companies and joint stock companies and outside it all types of commercial companies²⁵, provided that they meet the requirements set out in Article 10(1)-(5) of the Municipal Services Management Act. At the same time, it should be borne in mind that poviats may conduct activity only in the sphere of public utility and therefore, taking into account Article 9 of the Municipal Services Management Act, (with the previously assumed assumption that it indicates the types of companies authorised to conduct activity in the sphere of public utility) poviats may establish only limited liability and joint-stock companies. On the other hand, as far as the self-governing voivodship is concerned, it too may, on the basis of Article 13 of the Act on Local Government at the Voivodship Level (in and outside the sphere of public utility), establish only these two types of commercial companies. Thus, in practice, taking into account the interpretation of the provisions adopted by the second group of representatives of science, the problem of the possibility to establish personal commercial companies outside the sphere of public utility refers only to municipalities.

The view that in the sphere of public utility local government units may only establish limited liability and joint-stock companies, and all types of commercial companies outside of it, is not shared by min. J. J. Zięty, who, commenting on the content of Article 9 of the Municipal Services Management Act, claims that the companies listed therein constitute a closed catalogue of commercial companies in which local government units may participate, regardless of the type of tasks they perform through them. In his opinion, the catalogue of companies contained in Article 9 of the Municipal Services Management Act is also applicable when interpreting the provisions contained in Article 10 of the Municipal Services Management Act. At the same time, this author emphasises that the use of the notion of commercial companies by the legislator in Article 10 of the Municipal Services Management Act should not prejudice the fact that outside the sphere of public utility, municipalities may also establish commercial partnerships²⁶. A similar po-

²⁵ W. Gonet, *Ustawa o gospodarce komunalnej. Komentarz. Wzory umów i regulaminów*, Warszawa 2010, p. 21, 53, 66-70, S. Czarnow, *Status prawny spółki gminy w świetle ustawy o gospodarce komunalnej*, Państwo i Prawo 1998, coll. 4, pp. 69-74, S. Czarnow, *Cel i przedmiot przedsiębiorstwa spółki gminy w świetle ustawy o gospodarce komunalnej*, Rejent 1998, nr 1, p. 60, S. Czarnow, *Działalność gospodarcza jednostek samorządu terytorialnego jako element gospodarki komunalnej*, Rejent 2002, No. 2-3, p. 39, W. Dłużewski, *Ustawa o gospodarce komunalnej – nadal nie rozwiązany problem zakresu komercyjności przedsiębiorczości gminnej*, Przegląd Ustawodawstwa Gospodarczego 1997, No. 7-8, p. 27, likewise L. Kieres, *Wolność gospodarcza w działalności jednostek samorządu terytorialnego* [in:] I. Szydło – Niżnik, P. Dobosz, M. Smaga, *Instytucje współczesnego prawa administracyjnego. Księga jubileuszowa prof. J. Filipka*, Kraków 2001, p. 325, M. Bałdyga, *Gospodarka komunalna – aspekty prawne*, Ostrołęka 2004, p. 53.

²⁶ J.J. Zięty, *Ustawa o gospodarce komunalnej. Komentarz*, Warszawa 2012, komentarz do art. 9, <https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogeZdkmbuhe3damboob-qxalrtha3dcmzgtgayq&refSource=toc>.

sition on this issue is also presented by M. Szydło, who is of the opinion that the statement that local government units may only establish limited liability and joint-stock companies in and outside the public utility sphere is prejudiced by an argument of a systemic nature. In his opinion, the fact that Article 9 begins a special chapter of the commented Act devoted to the issue of companies with the participation of local government units prejudices the fact that only the companies listed therein may be used to conduct municipal services management in and outside the sphere of public utility²⁷.

Also C. Banasiński²⁸ and K. M. Jaroszyński commenting on Article 9 of the Municipal Services Management Act conclude that the concept of commercial companies used in Articles 2 and 10 of the Municipal Services Management Act should be made more precise. In their opinion: "the relevant forms referred to in the Act with regard to the conduct of municipal services management are the joint-stock company and the limited liability company. This should be considered to be prejudiced by the provision of Article 9(1) of the Municipal Services Management Act, providing that local government units may establish limited liability companies or joint stock companies, and may also join such companies."²⁹ In the opinion of these Authors, this normalization would be meaningless if it were assumed that other provisions of the Municipal Services Management Act, especially Articles 2 and 10 of the Municipal Services Management Act, using the concept of commercial companies, refer to all companies provided for by commercial law, extending the possibilities arising from Article 9 of that Act. According to C. Banasiński and K. M. Jaroszyński, a rational legislator established a catalogue of companies in Article 9 of the Municipal Services Management Act because its purpose was to indicate which commercial law companies the local government may use. The norms arising from this article are detailed in nature, indicating specific companies as organisational and legal forms permissible for local government units. In their opinion, the notion of commercial companies used in Articles 2 and 10 of the Municipal Services Management Act is of a collective and referential nature. For this reason, these Authors assume that, as far as "permissible companies" are concerned, these articles refer to Article 9 of the Municipal Services Management Act and not to all the possibilities provided for in the Code of Commercial Companies³⁰.

²⁷ M. Szydło, *Ustawa o gospodarce komunalnej. Komentarz. Warszawa 2008*, komentarz do art. 9, <https://sip.lex.pl/#/commentary/587239743/37183?tocHit=1>.

²⁸ This author has previously taken a different view on the issue at hand, see in C. Banasiński, M. Kulesza, op. cit., p. 81.

²⁹ See C. Banasiński, K. M. Jaroszyński, *Ustawa o gospodarce komunalnej. Komentarz. Warszawa 2017*, komentarz do art. 9., <https://sip.lex.pl/#/commentary/587725070/522510/banasinski-cezary-jaroszynski-krzysztof-maurycy-ustawa-o-gospodarce-komunalnej-komentarz?cm=RELATIONS>.

³⁰ Ibidem, komentarz do art. 9., <https://sip.lex.pl/#/commentary/587725070/522510/banasinski-cezary-jaroszynski-krzysztof-maurycy-ustawa-o-gospodarce-komunalnej-komentarz?cm=RELATIONS>.

In my opinion, the view of C. Banasiński and K. Jaroszyński expressed in 2017 in the Commentary to the Law on Municipal Services Management proved to be very valuable especially in the context of the subsequent amendment of the Law on Municipal Services Management introduced by Article 8 of the Law of 5 July 2018 on the amendment of the Act on public-private partnership and certain other acts³¹, which repealed Article 9(2) of the Public-Private Partnership Act, which allowed local government units to establish limited partnerships or limited joint-stock partnerships, pursuant to Article 14(1) of the Public-Private Partnership Act of 19 December 2008³². At the same time, it is worth noting that in the current state of the law on the basis of the Public-Private Partnership Act, local government units may only establish limited liability companies and joint-stock companies³³ under public-private partnerships in order to jointly implement a project based on the division of tasks and risks between the public entity and the private partner. This fact can also be seen as an argument for the validity of accepting the conclusion that the only forms of conducting municipal services management in and out of the public utility sphere recognised by the legislator are limited liability and joint stock companies.

Summary

From the considerations presented above and the views presented by the representatives of science, the most correct, in my opinion, are the interpretations of the provisions adopted by the third group of representatives of science, which lead to the conclusion that the only forms of economic activity appropriate for the performance by local government units of tasks in and outside the public utility sphere are two commercial capital companies (a limited liability company and a joint stock company). Such a conclusion may be drawn from Article 9 Paragraph 1 of the Act on Municipal Services Management and Article 13 of the Act on Public Utilities. Moreover, it is worth emphasising that the use of capital companies to carry out municipal services management in and outside the public utility sphere is justified, among other things, by the fact that they are based on the concept of capital involvement of shareholders and their liability for the company's obligations only up to the amount of their contribution³⁴. Pursuant to Articles 151 § 1 and 304 § 1 of the Commercial Companies Code limited liability companies and joint-stock companies may carry out any activity permit-

³¹ See art. 8 of the Act of 5 July 2018 on amending the Act on public-private partnership and certain other acts, Dz.U.2018, item 1693.

³² Act of 19 December 2008 on public-private partnership, consolidated text Journal of Laws of 2023, item 1637., hereinafter PPPA

³³ See 14 sec. 1 PPPA

³⁴ K. Kruczalak, *Prawo handlowe zarys wykładu*, Warszawa 2008, p. 154.

ted by law, and therefore there are no objections to local government units carrying out the public tasks entrusted to them in the form of capital companies³⁵ and also conducting commercial activity in this form.

In my view, this is the right solution, as limited liability companies are legal entities separate from local authorities, with their own property which remains in their possession. As separate legal persons, they have an organisational and functional relationship with their "partners", who are members of their bodies and thus influence their activities³⁶. At the same time, it is worth noting that capital companies may appear in legal transactions as sole proprietorships, with the result that their sole partner (shareholder) may be a local government unit, which may thus have a significant influence on the functioning of the entity created by it. Pursuant to Article 12.4 of the Municipal Services Management Act, in one-person companies of local government units, the function of the shareholders' meeting (general meeting) is performed by executive bodies of these units³⁷, which gives them the possibility to manage their activity independently. Due to the above-mentioned features, capital companies are willingly used by local government units to carry out municipal services management in and outside the sphere of public utility and, in my opinion, due to their cited advantages, it is right to limit the forms of carrying out municipal services management to capital companies.

Bibliografia

Wykaz literatury

Bałdyga M., *Gospodarka komunalna – aspekty prawne*, Ostrołęka 2004.

Banasiński C., Kulesza M., *Ustawa o gospodarce komunalnej. Komentarz*, Warszawa 2002.

Banasiński C., Jaroszyński K.M., *Ustawa o gospodarce komunalnej. Komentarz*, Warszawa 2017.

Czarnow S., *Cel i przedmiot przedsiębiorstwa spółki gminy w świetle ustawy o gospodarce komunalnej*, „Rejent” 1998, nr 1.

³⁵ Doubts about the applicability of the limited liability company form for the implementation of public utility tasks arose against the background of the now-defunct Commercial Code – see S. Czarnow, Status prawny spółki gminy w świetle ustawy o gospodarce komunalnej, op. cit., p. 69 et seq.

³⁶ M. Guziński, Przedsiębiorcy publiczni i zarząd mieniem publicznym, [in:] A. Borkowski, A. Chełmoński, M. Guziński, K. Kiczka, L. Kieres, T. Kocowski, Administracyjne prawo gospodarcze, Kolonia Limited 2009, pp. 275-6.

³⁷ Further in this subject see: A. Wojtkowiak, Spółki prawa handlowego jako przedsiębiorcy wykonujący działalność o charakterze użyteczności publicznej, Przegląd Prawa Publicznego 2013, No. 1.

- Czarnow S., *Status prawny spółki gminy w świetle ustawy o gospodarce komunalnej*, „Państwo i Prawo” 1998, z. 4.
- Czarnow S., *Działalność gospodarcza jednostek samorządu terytorialnego jako element gospodarki komunalnej*, „Rejent” 2002, nr 2–3.
- Dłużewski W., *Ustawa o gospodarce komunalnej – nadal nie rozwiązany problem zakresu komercyjności przedsiębiorczości gminnej*, „Przegląd Ustawodawstwa Gospodarczego” 1997, nr 7–8.
- Gonet W., *Ustawa o gospodarce komunalnej. Komentarz. Wzory umów i regulaminów*, Warszawa 2010.
- Guziński M., *Przedsiębiorcy publiczni i zarząd mieniem publicznym*, [w:] A. Borkowski, A. Chełmoński, M. Guziński, K. Kiczka, L. Kieres, T. Kocowski, *Administracyjne prawo gospodarcze*, Wrocław 2009.
- Kieres L., *Wolność gospodarcza w działalności jednostek samorządu terytorialnego* [w:] I. Szydło-Niżnik, P. Dobosz, M. Smaga, *Instytucje współczesnego prawa administracyjnego. Księga jubileuszowa prof. J. Filipka*, Kraków 2001.
- Kosikowski C., *Polskie publiczne prawo gospodarcze*, Warszawa 2002.
- Kruczalak K., *Prawo handlowe. Zarys wykładu*, Warszawa 2008.
- Loranc-Borkowska J., *Przedsiębiorcy*, [w:] B. Gnela (red.), *Prawo handlowe dla ekonomistów*, Warszawa 2019.
- Snażyk Z., Szafranski A., *Publiczne prawo gospodarcze*, Warszawa 2023.
- Sołtysiński S., Szajkowski A., Szwaja J., *Kodeks spółek handlowych. Komentarz do art. 1–150*, Warszawa 2006.
- Strzępka J.A. (red.), *Kodeks spółek handlowych. Komentarz*, Warszawa 2015.
- Szydło-Niżnik I., Dobosz P., Smaga M., *Instytucje współczesnego prawa administracyjnego. Księga jubileuszowa prof. J. Filipka*, Kraków 2001.
- Szydło M., *Ustawa o gospodarce komunalnej. Komentarz*, Warszawa 2008.
- Uliasz R., *Charakterystyka poszczególnych przedsiębiorców*, [w:] J. Olszewski (red.), *Publiczne prawo gospodarcze*, Warszawa 2015.
- Wojtkowiak A., *Kryterium zysku w odniesieniu do zasad prowadzenia działalności komunalnej przez gminy*, „Gubernaculum et Administratio” 2012, nr 1.
- Wojtkowiak A., *Spółki prawa handlowego jako przedsiębiorcy wykonujący działalność o charakterze użyteczności publicznej*, „Przegląd Prawa Publicznego” 2013, nr 1.
- Zięty J.J., *Ustawa o gospodarce komunalnej. Komentarz*, Warszawa 2012.

Wykaz aktów prawa

- Ustawa z dnia 8 marca 1990 r. o samorządzie terytorialnym, Dz. U. z 1990 r., nr 16, poz. 95.
- Ustawa z dnia 8 marca 1990 r. o samorządzie gminnym, t.j. Dz. U. z 2023 r., poz. 40 ze zm.
- Ustawa z dnia 20 grudnia 1996 r. o gospodarce komunalnej, t.j. Dz. U. z 2021 r., poz. 679 ze zm.

Ustawa z dnia 5 czerwca 1998 r. o samorządzie powiatu, t.j. Dz. U. z 2022 r., poz. 1526 ze zm.

Ustawa z dnia 5 czerwca 1998 r. o samorządzie województwa, t.j. Dz. U. z 2022 r., poz. 2094 ze zm.

Ustawa z dnia 15 września 2000 r. Kodeks spółek handlowych, t.j. Dz. U. z 2022 r., poz. 1467 ze zm.

Ustawa z dnia 19 grudnia 2008 r. o partnerstwie publiczno-prywatnym, t.j. Dz. U. z 2023 r., poz. 1637.

Ustawa z dnia 5 lipca 2018 r. o zmianie ustawy o partnerstwie publiczno-prywatnym oraz niektórych innych ustaw, Dz. U. z 2018 r., poz. 1693.

Wykaz orzecznictwa

Uchwała SN z dnia 14 marca 1995 r. III CZP 6/95, OSNC 1995, nr 5, poz. 72

Wyrok Naczelnego Sądu Administracyjnego z dnia 29 maja 2019 r., I OSK 1981/17, LEX nr 2722465.

Problematyka dopuszczalności prowadzenia gospodarki komunalnej przez jednostki samorządu terytorialnego w formie spółek handlowych w i poza sferą użyteczności publicznej – założenia prawnoustrojowe

Streszczenie

W myśl art. 2 ustawy o gospodarce komunalnej gospodarka komunalna może być prowadzona przez jednostki samorządu terytorialnego m.in. w formie spółek handlowych. O ile zastosowanie do prowadzenia gospodarki komunalnej w sferze i poza sferą użyteczności publicznej spółek kapitałowych przez jednostki samorządu terytorialnego nie budzi wątpliwości, to inaczej jest już w kwestii prowadzenia gospodarki komunalnej w sferze i poza sferą użyteczności publicznej przez osobowe spółki handlowe. Moim zdaniem ustawa o gospodarce komunalnej nie daje jednoznacznej odpowiedzi na pytanie, czy jednostki samorządu terytorialnego w celu realizacji zadań publicznych w sferze użyteczności publicznej oraz poza tą sferą mogą tworzyć osobowe spółki handlowe. Analiza przepisów oraz ich wykładnia językowa, celowościowa i systemowa, mogą prowadzić do różnych wniosków, czego odzwierciedlenie odnajdujemy w zróżnicowanych poglądach doktryny na ten temat.

Słowa kluczowe: jednostki samorządu terytorialnego, użyteczność publiczna, spółki handlowe, spółki kapitałowe, spółki osobowe, gospodarka komunalna.