

The privatization of public tasks and ownership transformation in Poland – the outline of the issue

PhD Student **Katarzyna SOLECKA**¹

Abstract

The following paper focuses on the discussion on the two issues – the privatization as the transfer of ownership rights to the public wealth onto a private entity and the privatization of public tasks as the manifestation of the deviation of public law entities to perform tasks for the benefit of private entities. The two institutions cause a lot of interest. The two concepts are very often used as synonyms thus interfering with the proper perception of the changes carried out in the economy. The reasons for this state of affairs may be sought in at least two aspects, firstly, the all the action performed by the state regarding the “public” property are in the area of common interest. The more the disposition of the property – the forfeiting of the ownership right for the benefit of a private entity – tends to be “on the carpet”. Furthermore, the emotions are aroused when it comes to the public and private collaboration due to the fear of the allegation of corruption. On the other hand, the unawareness and improper understanding of the meaning of both concepts leads to the erroneous perception of the institutions which play a significant however different roles of each in the state. It should be emphasized that between the concepts of „privatization as the ownership transformation” and „privatization of public tasks” may not be put an equals sign. The political, economic and social changes taking place cause adequate changes to the public administration. Thus the roles and duties are also changed which manifests in e.g. enabling the engagement of the public sector in the cooperation with a private partner (as in private and public partnership for example). The aim of the paper is to indicate the elements defining the objective institutions, factors allowing to distinguish the regulations and primarily allowing to answer the question why the two concepts may not be treated as identical. To explain the aforementioned I shall use a few methods – firstly to explain the concept of “privatization”, “privatization of public tasks” I shall use the historical method. Then to indicate the possibility of the performance of the public tasks in the EU law I shall use the comparative method. The following method used to discuss the objective issue is the analytical method – the aim of the two regulation will be analyzed in order to clarify the inability to consider the privatization process as the model for public and private collaboration.

Keywords: *privatization, public tasks, public-private partnership, public administration.*

JEL Classification: K23

Introduction

The paper is devoted to the discussion on the two issues – the privatization understood as the transfer of rights to the public property to a private entity and the privatization of public tasks – understood as the manifestations of public entities refraining from performing a task for the benefit of private entities.

¹ Katarzyna Solecka - Faculty of Law, University of Bialystok, Poland, kmsolecka@gmail.com

These two institutions cause a huge interest and are discussed. Over many decades Poland existed in the economic “stagnation” caused by the state intervention in the areas of its existence. It was the state which owned everything: land, enterprises or hospitals. Private ownership and private business initiative were marginalized (the worker or a farmer convenience assured a “privileged” position to attain education and professional promotion). The 70s of the 20th century were full of financial crises which showed the lack of unlimited resources of administration to realize public tasks. The following decade confirmed the trend – troubles of the public finances and thus the inability to realize the tasks assigned to the state which forced the change of the perception of the role of public entities as to the realization of public tasks. It was the beginning of the process of the cooperation between the public and private sectors as this solution was perceived as the development of the effectiveness of the administration or the growth of the quality the provided services. The political, economic and social changes taking place in Poland in the late 80s and 90s of the 20th century caused respective transformation affected also the public administration. Thus the transformation affected its roles and duties resulting in enabling the public sector to cooperate with the private partner (e.g. as in the public and private partnership). At the same time it is worth mentioning that there exist certain areas of the functioning of the state which must not or are not recommended to be transferred to the competence of a private owner. Due to the economic or safety reasons the owner of the areas should remain a public entity (e.g. penitentiary services, schools) however the goal of effective performance of tasks in these areas may be realized through assigning the “realization” by private entities.

It is a common practice that the objective concepts are used as synonyms and thus disturb the proper perception of the economic changes under way. The reasons for such a state of the matter may be sought in at least two factors: firstly all the actions of the state regarding the “public” property draw common attention. The more, the disposal of the property – the disposal of the property ownership rights to the benefit of a private entity tends to put the issue “on the carpet”. Furthermore, the emotions are aroused when it comes to the involvement in the public and private collaboration due to the allegation of corruption. On the other hand, the unawareness and wrong understanding of both concepts leads to an erroneous perception of the institutions which have to play a significant role in the state however different for each one.

It should be reiterated that between the concepts of privatization as the “ownership transformation” and “privatization of public tasks” there should be no equals sign. The aim of the paper is to present the elements defining the subjective institutions, the factors allowing to distinguish between the regulations and moreover to allow to answer the question why the concept may not be identified as the same.

Part one – privatization

Despite the fact that the papers covering the issue of “privatization” uses the definitions of the phenomenon² it is possible to find an opinion that the work on the term is not sufficient to correctly present the privatization as well as means of its implementation. In this complex process it is necessary to pay attention to the collateral processes influencing the form of ownership transformation. These factors include: economic (wish to obtain money from the sale of privatized entities, quality improvement of products, their global marketing), social (provision of good quality jobs, elimination of the overemployment, speeding up the qualification improvement of employees), ideological (limitation of the government’s role for the benefit of private institutions) or populist – improvement of the quality of life of the society and limitation of bureaucracy³.

Despite its complex character, privatization is a process which the world has been undergoing for a long time. Why is the ownership transformation so popular and why the concept of the necessity to introduce and at the same time assume the “superiority” of the private ownership over the public ownership? The disposal of the property is always connected with the supply of money to the seller – why does it pay off to purchase and most often operate a business to a private owner and it does not to a private owner? The doctrine describing the process shows many disadvantages relating to the operations of state enterprises i.e. low efficiency of the economic enterprise, inability to adjust pay to market trends, the uncertainty of the management as to bonuses for the increase of the net profit of the company⁴, running a company under “political “pressure of the public owner, overemployment, dilution of competences among employees or poorly qualified employees who wish to “wait under protection” rather than be noticed and engaged in new tasks⁵. Among the arguments for the private ownership there are innovation and efficiency⁶, attracting new investors, possibility of restructuring of enterprise,

² „To make private and in particular to change the control over the economic or production activity or to change the ownership from social to private” E.S. Savas, *„Prywatyzacja. Klucz do lepszego rządu.”* Warszawa 1992, p. 20 I 327, after Magdalena Serwatka, *„Pojęcie prywatyzacji i jej formy”*, *Przegląd Prawa Handlowego*, luty 1995, p. 2. According to C Żuławska, “Privatization is the economy notion, which unites lowering number of jobs, municipalization of the production capital with the acceptance of participation of non-public entities and the possibility of the appropriation of the income (benefits) brought by the capital or rather by the use of it”, *„Niektóre prawne i ekonomiczne aspekty prywatyzacji”*, Państwo I Prawo 1991, book 2, p. 3 after Lidia Zacharko, Barbara Wartenbrg-Kempka, *„Stosunki prawne w procesie prywatyzacji zadań publicznych*, [w:] *„Koncepcja systemu prawa administracyjnego”* pod red. Jana Zimmermanna, Wolters Kluwer, Warszawa, 2007, p. 348.

³ E.S. Savas *„Prywatyzacja ... op. cit.*, after M. Serwatka *„Pojęcie ...”*, *ibidem*, p.22.

⁴ Iwona Salejko-Szyszczyk, *„Własność prywatna a publiczna w Polsce w latach 1995-2005 – próba porównania”*, [w:] *„Własność i kontrola w teorii i praktyce”*, cz. II pod red. Barbary Polzakiewicz i Jerzego Boehlke, Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, Toruń 2008, p. 246

⁵ The change of the owner many a time leads to the change of the perspective of the change and thus requires a change in management of oneself and the team in the change.

⁶ A. Shleifer: “State versus private ownership” *Journal of Economic Perspectives* 1998, vol 12, no. 4, p. 489 and the following.

introduction of new management methods or conquering new markets⁷. A private owner aims to increase the efficiency of his organization through the optimization of the implemented processes. As the owner he is not tied up by any instruction “from the top”, he should run the business in such a way to show profit and thus has a tangible influence on the operation of the enterprise.

Over many decades after the second world war Poland was deprived of the opportunity and thus tools to build a free market economy. Political interference, with the core of central planning, successfully disabled the adaption of the Polish economy to the trends “behind the Odra River”⁸. It was as late as the 80s and the 90s there was a hope to eradicate this system⁹. The prosperity as to the beginning of the business activity was implemented under the business activity act¹⁰. The act leveled the freedom of running businesses for both sectors. Furthermore it enabled anyone to undertake and run a business with equal rights but with the observation of certain rules (in a “peculiar” way) and provisions (and thus art 4 of the said act stated that business entities may within the business activity perform acts and activities which are not forbidden by the law. Until the enactment of a law on the privatization state enterprise¹¹ of 13 July 1990 (“Lopse”), only the liquidation privatization and the privatization commonly known as small privatization. The latter aimed to establish new small private enterprises and to acquire the property of already existing state enterprises without their liquidation by small business

⁷ E.S. Savas, *Privatization op. cit.*, p.333 after: Zbigniew Olesiński „Proces prywatyzacji w Polsce”, wyd. „Książka i Wiedza”, Warszawa, 2000, p. 46 and following.

⁸ It is worth indicating that in the 80s when new laws were enacted they manifested the tendency to liberalize and deregulate (as in Act on the state enterprise of 21.09.1981 r. *Journal of Laws* no 18 of 1991, item 80 as amended, Act on the employee authorities of the state enterprise of 25.09.1981 r., Act of the principles of running a small business by foreign natural and legal persons of 6.07.1982, Act on business operations of 23.12.1988, Act on the National Bank of Poland, act – banking law, other existing acts as a Civil code of 23.04.1964 or commercial code (Ordinance of the President of the Republic of Poland of 27.06.1934), citing: Z. Olesiński “Prywatyzacja ...” *ibidem*, p. 19 and following.

⁹ „The government in a short time manager to eliminate shortages in many areas, to strengthen the currency and improve the budget balance(...) central planning was eliminated as the main driving factor and the regulator of the economy and functioning of its entities”, compare P. Glikman, „Problemy rozwoju gospodarki na tle programu stabilizującego”, w: “Z problemów rozwoju gospodarczego”, Warszawa 1991, p.5”, citing: Z. Olesiński “Prywatyzacja ...” *ibidem*, p. 27 and following.

¹⁰ It initiated so called “owner privatization” - „Business entities started to be established mainly by natural persons, primarily in trading also foreign (trade at the border and the purchase of imported consumption goods including liquor and cigarettes) and to a lesser extent in services (tailoring, shoe repairing, flat renovation). In 1989 there were 227 000 points of sale, in 1991 as many as 630 000 (...) Additionally the act on the state enterprise allowed to sell the property of state enterprises which was often used. The act allowed the lease of part of the property what led to the creation of so called “nomenclature” company – the production by private business entities (including companies) with the use of the property of state enterprises. Similar dynamic processes existed in cooperatives. Some of the cooperatives dissolved, some sold or leased their property on the ground of unclear rules”, citing: Z. Olesiński, “Prywatyzacja ...” *ibidem*, p. 28 and following.

¹¹ *Journal of Laws* 1990, No 51, item 298.

enterprises. And the aim of the liquidation route was the protection of creditors' rights and not the ownership transformation *sensu stricto*¹².

The Lopse provided that the privatization of the state enterprise is to enable third persons to obtain shares in the companies excluding the participation of the State Treasury, established as the transformation of the enterprise or its disposal. To achieve it the state enterprise may be transformed into a company or liquidated on the basis of the principles defined in the act (art.1). The act introduced two fundamental ways of privatization: the "capital" or "liquidation" methods

The „capital privatization” is defined in Chapter 2 of the Act. It covers the ” transformation of the enterprise into a one-member company of the State Treasury and then to transfer the shares of the company transformed to third persons. The shares are transferred via an offer aimed at a wide range of purchasers (public offer) or via the disposal of shares to larger purchasers both domestic and foreign. The method may be applied only to very good enterprises of a high value, for which the public share issue is economically justified and those with perspective for effective business operations in the market economy”¹³.

On the other hand, under art. 37 of the Act, the liquidation of the state enterprise was performed in order to:

- 1) transfer the ownership of the enterprise or its organized property parts,
- 2) contribute an enterprise or its organized property part to a company,
- 3) give for a defined time to use against payment of the enterprise or its organized property parts¹⁴.

This type of privatization was to comprise “small, untypical enterprises (e.g. construction design offices) and poor¹⁵ enterprises requiring significant organizational changes”¹⁶.

The following step in the Polish privatization process was the enactment on 30 August 1996¹⁷ of the law on commercialization and privatization of state enterprises¹⁸. As the previous act provided that the transformation had to lead to its

¹² M. Serwatka, “Pojęcie ...” *op. cit.*, p. 22.

¹³ See Z. Olesiński, “Prywatyzacja ...”, *op. cit.*, p. 48 and following.

¹⁴ „(...) the provisions of the privatization act indicating *essentialia negotii* of the privatization agreement on the free use of property, refer clearly to the essential elements of the lease contract and create the obligation as a separate and named out of the nomenclature of the code”, M. Serwatka, “Pojęcie ...”, *op. cit.*, p. 25.

¹⁵ Different: M. Serwatka, “Pojęcie...”, *ibidem*, p. 23: „In the case of enterprises in the poor organizational or financial state, liquidation is performed on the basis of the premises of the act on state enterprises”.

¹⁶ Z. Olesiński, “Proces ...”, *op. cit.*, p. 48; A different opinion is expressed by J. Jacyszyn „The liquidation of the enterprise in order to privatize it is the most favorable form particularly for the enterprises in good economic standing” – “Prywatyzacja przedsiębiorstw państwowych”, Wrocław 1991, p. 37, citing: M. Serwatka, “Pojęcie ...”, *op. cit.*, p. 23.

¹⁷ Journal of Laws: The act is prepared according to the accepted concept of the directions of privatization of state enterprises in 1996 enclosed in the attachment no 12 of the budget act for 1996 (citing: J. Jacyszyn, “Prywatyzacja ...” *ibidem*, p. 15).

¹⁸ „The act has been one of the most controversial legal acts of current legislature of the 3rd Republic of Poland. It was the subject of serious disputes and arguments, it revealed much political and judgmental emotions, the doctrine referred to it incidentally when becoming the subject of

privatization, the new act provided the possibility of commercialization¹⁹ for any other purpose than privatization²⁰. Furthermore, “the act (...) differently shapes the range of subjects entitled to initiate the transformation procedure (among others via the limitation of rights in this area the bodies of the state enterprise, in particular the general meeting of the employees of the state enterprise, conferring the right to individually initiate the transformation of the state enterprise to the Minister Of State Treasury), introduces substantial subject limitations within the possibility to transform a state enterprise into a company²¹ introduces the changes regarding the way of establishment and organization of the bodies for the one-member company of the State Treasury or the matter of the transformation of the state treasury²² into a limited liability company with the contribution of the State Treasury and the creditors)²³.”

The new law introduced also changes or new solutions in the area of respectively:

1) indirect privatization²⁴ (previously described as „capital privatization”) – comprising among others the change of : the procedure of subscription of shares in single-member companies of the State Treasury established as the result of commercialization of a state enterprise, the definition of bodies whose competence is to transfer shares, rules of the preferential purchase of shares of the company established as the result of commercialization by employees,

2) direct privatization (previously described as „liquidation”) – the law refrains from the fundamental, on the grounds of the until-then binding law the concept of the organized part of the enterprise and uses the definition of the enterprise under art. 55¹ of the civil code and for the first time defines the

opinions and decision of the Constitutional Tribunal which asserted it to be in the then current version unconstitutional. The law underwent the legislative procedure again, the law as adopted and then signed by the President”, J.Jacyszyn, “*Wokół ustawy o komercjalizacji i prywatyzacji przedsiębiorstw państwowych*”, Rejent, 1997, p.14.

¹⁹ See Kazimierz Bandarzewski, „*Commercialization of state enterprises*”, Zakamycze, 2003.

²⁰ Beata Kozłowska- Chyła, „*Nowa ustawa o komercjalizacji i prywatyzacji przedsiębiorstw państwowych – główne kierunki zmian ustawodawczych*”, Przegląd Prawa Handlowego, czerwiec, 1997 r., p. 1.

²¹ Art. 4 clearly excluded companies operating under other separate laws at par with the legal act.

²² The so called commercialization from the conversion of claims. But the procedure to transform the state entity into a company with the contribution of the Treasury of State and creditors is a separate privatization path because despite the name „commercialization with the claims conversion” it is indeed commercialization combined with the privatization of the state entity for which the legislator designed a particular procedure different from the one for the indirect privatization process. It means that the right of the employees to the free acquisition of shares defined in the chapter on indirect privatization is precluded in the case of commercialization with the conversion of claims as established for a different form of privatization. B, Kozłowska – Chyła, “*Nowa ustawa ...*”, op. cit., p. 7.

²³ Kozłowska-Chyła, “*Nowa ustawa ...*”, ibidem, p. 2 and following.

²⁴ See Wioletta Pawłowska, „*Komercjalizacja i prywatyzacja przedsiębiorstw państwowych, cz. I*”, [w:] „*Radca prawny*”, nr 4, 1997, p. 18.

conditions the permission to privatize a state enterprise according to the respective procedure, the procedure of direct privatization²⁵ was changes as well.

Despite numerous novelization, the said law has been valid until present²⁶. The issue which objectively deserves to be mentioned is public aid. The entrance of Poland into the European Union initiated the necessity to assess the current processes of ownership transformation in regard to the aid awarded to the business persons by the state. Under art. 107 of the Treaty of the UE Operations any aid awarded by the member states or with the usage of the state resources in any form which distracts or is a threat to the competition through favoring certain types of business or the production of certain goods is not compliant with the internal market within the scope of its influence on the trading exchange with the member states. During the current privatization processes in Poland, The European Commission issued a decision demanding return the acquired aid²⁷ and the information pertaining had long been of the public interest.

The process of ownership transformation is the topic which may arouse extreme emotions – on the one hand it may reflect the changes²⁸ under way as an

²⁵ Following B. Kozłowska – Chyła, “*Nowa ustawa ...*”, *op. cit.*, p. 7 and following.

²⁶ Journal of Laws 2013, No 216, consolidated text.

²⁷ Materials available on the website of the Office for the Protection of competition and Consumers, the source: http://www.uokik.gov.pl/informacje_o_decyzjach_komisji_europejskiej2.php- last accessed on Oct. 9th 2013;

²⁸ Out of total 8.453 state enterprises until the end of 2006 the ownership transformation covered 5 747 entities, besides 1 654 of the agricultural enterprises were incorporated into the Resources of the Agricultural Ownership of the State Treasury (RAOST) i and liquidated”, B. Błaszczuk, „*Sektor publiczny w Polsce i na świecie a polityka prywatyzacji*”, the document is available online at <http://webcache.googleusercontent.com/search?q=cache:t3bHlpFHLy4J:www.pte.pl/pliki/0/247/Sektor%2520publiczny%2520w%2520Polsce%2520i%2520na%2520swiecie%2520a%2520polityka%2520prywatyzacji.doc+&cd=2&hl=pl&ct=clnk&gl=pl> (on Oct. 6th, 2013).”; „In 2012 the privatization process covered 4 state enterprises (in the years 1990-2012 in total 7 555 enterprises), out of which 1 was directly privatized in the procedure of sale, and 3 were liquidated due to economic reasons. In total until the end of 2012 2 118 had been *directly* privatized and in 1127 the liquidation processes ended. Last year 35 one-member State Treasury companies were indirectly privatized, including 7 in the form of the free disposal of shares for the benefit of the local authorities and shares of one were contributed to another one-member State Treasury company. In 2012 in companies were privatized only with the domestic contribution. As the result of commercialization of state enterprises in the years 1990-2012 1710 companies were established including 607 indirectly privatized. The majority of companies was established in the Silesian Voivodship(306) and Mazovian voivodship(230) the smallest number in Lubuskie voivodship (35) and Warmian and Mazurian voivodship (37). At the end of 2012 1047 companies as the result of commercialization in (2011 – 1097) including 178 one member State Treasury (228 in the year before). The number of companies with the contribution of the State Treasury remained the same. In the years 1990-2012 261 were established including 59 with the contribution of foreign capital. Since the beginning of the privatization process 1563 employee companies were established (in 2012 non changes were observed). According to the data of the Ministry of Treasury State the proceeds from indirect privatization in 2012 amounted to PLN 8477 million (PLN 13002,2 million against the previous year) and from direct privatization PLN 70.7 million (against PLN 54 million the previous year) – the Main Statistical Office – “*Privatization of state entities in 2012*” material available from http://www.stat.gov.pl/gus/5840_14237_PLK_HTML.htm (last accessed on Oct. 9th 2013).

indispensable part of economic policy of the state. On the other hand, arouses strong negative stir – via the bond between this process and politics it is associated with abuse and the downsizing of jobs. Since it is impossible to withhold the process it may be worthwhile having proper communication of changes so that the society could understand the processes undergone and the fear of transformation had a quick ear.

Part two – public task and its privatization

The economic changes under way were accompanied by the system changes which manifested in among others the creation of local authorities. The law of 1990 on the introductory provisions introducing the law on the local authority²⁹ except the regulations regarding the character of the communal property or the procedure of the acquisition of the property by local authorities (gminas)³⁰, it created the foundation to normalize both of the state and the body of the local authority. The term public tasks alone has been known in the administrative scientific area for decades, however it is undisputable that it is the tasks that determine the administration because it has been established to carry out³¹. Consequently it has to be asserted that the broadest notion is the “state task”, which in turn contain the catalog of “public tasks” and the latter distinguish among themselves the group of “public administration tasks”³². The tasks are undoubtedly related to the function and role of the administration. The changes underway in many areas of the state functioning make the administration as well as their functions and duties change respectively. This interdependence in turn causes the difficulty in defining many notions in the area of the administrative science³³ including the concept of the “public task”. Despite the fact that this issue was defined in the papers broadly and at the same time heterogeneous however the doctrine notices the phenomenon of *re-reconstruction through simplification* [bolded –by the Author] of both the methods of the performance of the administration and its delivery of tasks, essence and goals³⁴. It is undoubtful that

²⁹ Journal of Laws of 1990, No 32, item 191.

³⁰ The issue of the transformation of communal enterprises into commercial law companies is beyond the framework of this paper so the issue is solely signaled.

³¹ Joanna Wyporska – Frankiewicz, „Publicznoprawne formy działania administracji o charakterze dwustronnym”, Wolters Kluwer, Warszawa, 2010,” p. 38.

³² Andrzej Panasiuk, “Zinstytucjonalizowane formy współpracy podmiotów publicznych z prywatnymi”, Wszechnica Polska Szkoła Wyższa TWP, Warszawa,” p. 109 and following.

³³ „The relative approach prevails. The role of administrative law regulates relations and not one-sided actions, the theory of systems and the science of management are evident. The more we tend to be precise, the less clear the definition” – I. Lipowicz, „Dylematy ...”, *op. cit.*, p. 31.

³⁴ „And so for example the notion of public task of administration is reduced to the formula of public services (...) the quality of administration. (...) In the democratic lawful state public tasks of the administration may not be reduced to the offering public services or to the goals realized by the government on the current basis. It is not possible to reduce the system of the public administration to some organizational structure of a universal enterprise offering public services”, A. Błaś, „Administracja publiczna w warunkach gospodarki rynkowej”, [w:] „Prawo CCXCV

over the years a practical form and the evolution of the concept of the public task is observed. As it was presented in the first part of the paper, it was in the 80s of the 20th century when legal regulations commencing the liberalization attempt of the market were initiated. And thus the already mentioned law on state enterprises provided that state enterprises may be established as enterprises according to general rules and public utility enterprises. These, in turn, under art. 8 of the act aim to continuously satisfy current needs of customers. In particular, the enterprises aim to produce and provide services among others of sanitary engineering, city transport, supply of electric, gas energy, heating and entertainment services. We may assert that it was one of the first definitions of the public task³⁵ assuming that production and provision of services belong to the catalog of the tasks presented. The Constitutional Tribunal in turn, in the decision of 13 March 1997³⁶ found a commonly binding (for the time) interpretation of the notion of the public usage task in a way that as the character of “public task“ it should have the broadest sense possible and should be associated with public tasks whose realization belongs to the governmental and local authorities. These task comprise the satisfaction of the group needs of the society among others: water, energy, gas and heat supplies, road and transport maintenance, science development, provision of education, health care and social help, realization of different entertainment needs, etc. The realization of the tasks may be carried out in different organizational forms, not only in the legal form of the public usage enterprise provided for in the act on public enterprises³⁷.

The papers on the subject provide us with numerous concepts of the perception of the public task, however there is a known view that there is no need and possibility to assign this notion with a general meaning³⁸. According to Z. Ziemiński, the task is the action to pursue a defined goal³⁹. One may find a view that the task may be perceived through the action context and competences.

Współczesne europejskie problemy prawa administracyjnego i administracji publicznej, w 35. rocznicę utworzenia Instytutu Nauk Administracyjnych Uniwersytetu Wrocławskiego”, Wydawnictwo Uniwersytetu Wrocławskiego, 2005 p. 74.

³⁵ It was confirmed by among others circuit court in Warsaw in the decision of 15.02.2002, file no. V Ca 102/02.

³⁶ File no W 8/96.

³⁷ The Tribunal also raised the issue of bodies performing tasks of public usage do not aim at maximizing their profit. In the justification of the resolution we read „that organization units performing such tasks realize them without the certainty whether they can cover the costs with their own earnings. Hence their activity must not be aim to gain profit and most frequently is financed from public sources”.

³⁸ M. Modliński *“Pojęcie interesu publicznego w prawie administracyjnym”*, Warszawa 1932 et al after: Małgorzata Stahl, *„Cele publiczne i zadania publiczne”*, [w:] *„Koncepcja systemu prawa administracyjnego”* pod red. Jana Zimmermanna, Wolters Kluwer, Warszawa, 2007p. 95.

³⁹ Z. Ziemiński, *“O pojmowaniu celu, zadania, roli i funkcji prawa”*, Państwo I Prawo, 1987, no 12, pp. 18-19, citing A. Panasiuk, *„System zamówień publicznych. Zarys wykładu”*, Public Procurement Legal Publisher, Warszawa, 2013, p. 306.

Due to that assertion it is possible to assume the definition of the public task as a legal obligation realized in the public interest assigned to the entity by the law⁴⁰.

The changes performed were made more dynamic due to the entrance of Poland to the European Union. Along with the entrance, Poland transferred part of its independent rights in the legislative area and thus a need arose to subject national procedures to European Union regulations. The law of public procurement has been subjected to this procedure⁴¹. The 2004/18/WE of the Council and European Parliament regarding the coordination of procedures on public procurement for construction works, supplies and services are defined by the subject of the public law by outlining the characteristics of the subject. One of the characteristics is the goal of the establishment of the subject entity which is to satisfy needs in the general interest, which do not have industrial or trade character⁴². The description of this notion may be found in numerous decisions of the Tribunal of Justice of the European Union (previously: The European Tribunal of Justice, further: ETJ). In the decision in the case C-360/96 (Arnhem) ETJ ruled that the needs without the industrial or trade character are realized outside of the market [with not competition from the competitive enterprises- from the Author] because the state (local authorities) establishing a public law subject aims at self-realization of some important social needs or at least have a significant influence on the realization of the needs, ETJ is of the opinion that the notion of the “subject of the public law” should be interpreted in a functional way⁴³. If a certain subject entity has been established to satisfy general needs of industrial or trade connotations and then it started a competitive activity, there is no change in its status of the “subject of the public law” since it runs the non-trade activity for which it was originally established⁴⁴.

There is no doubt that the realization of public tasks is carried out in order to realize a certain interest named “common” or “public”. According to the dictionary definition of the word “interest” one find out that it means “profit, benefit”⁴⁵. On the ground of the science of administration this term has also evolved⁴⁶. One has to agree with the standpoint of T. Woś where he assumed the interest as an evaluative category, a term defined descriptively as the most

⁴⁰ „(...) the public task is a legal obligation therefor it may not have a status not related to any entity in the legalorder”, M. Tabernacka, *„Konstrukcja prawna zadania publicznego”*, [w:] *„Prawo CCXCV Współczesne europejskie problemy prawa administracyjnego i administracji publicznej, w 35. rocznicę utworzenia Instytutu Nauk Administracyjnych Uniwersytetu Wrocławskiego”*, Wydawnictwo Uniwersytetu Wrocławskiego, 2005”, p. 410 and following.

⁴¹ A. Sołtysińska, *„Europejskie prawo zamówień publicznych. Komentarz”*, WKP, wyd. II.

⁴² The following characteristics are: 1) being a legal entity and 2) financing of the entity to a large extent by the state, local authorities or other subjects of the public law or such in which the management is supervised by these entities or [subject – from the Author] in which over a half of members of administering, managing or supervisory bodies were appointed by the state, local authorities or other entities of public law- art. 1 item 2, point 9, sentence 2 of the Directive.

⁴³ The ruling of the Tribunal of 12.12.2002., C-470/99;

⁴⁴ The ruling of the Tribunal of 15.01.1998 r. C-44/96, „Mannesmann”.

⁴⁵ Polish language dictionary: <http://sjp.pwn.pl/szukaj/interes>;

⁴⁶ Compare the definitions by J. Langa, F. Longchampa – citing A. Panasiuk, *„Zinstytucjonalizowane ...”*, *op. cit.*, p. 132 and following.

adequate solution to a given practical situation with the acceptance of commonly recognized values and current economic and political conditions⁴⁷. Realizing a public interest by the administration is connected with obtaining some benefit. This benefit may not only be purely economic, financial but also connected with fulfilling its role. Making such an assumption one may consider benefit and competition as the driving power making the performance of tasks more dynamic⁴⁸.

As it was reiterated before, the transformation in our reality causes among others the stretching of the range of coexistence of state and private subjects and thus it expands its co-participation in realizing public tasks⁴⁹. This cooperation may take on different forms and one of them is the cooperation within the public and private partnership. Below is the characterized concept.

The difficulty to define the concept of the public administration refers also to the issue of the "public and private partnership". Assuming its broad understanding, one shall assume it is the cooperation of the public and private sectors of any type with the aim to realize broadly understood commonwealth or as the partnership cooperation when carrying out relatively big projects which aim to realize task of public utility and meeting the expectations of beneficiaries⁵⁰.

In the opinion of other authors, the public and private partnership may be defined as the partnership of the public and private sectors aiming to realize ventures or to provide services traditionally provided by the public sector. The cooperation is based on the assumption that each of the parties is able to discharge duties assigned to it more effectively than the other side. The sectors complement each other within the partnership looking after the portion of the joint task which they can perform best. Due to the division of tasks, responsibilities and risks within the public and private partnership the most effective economic way of the establishment of infrastructure and the supply of public services⁵¹. Each of the parties benefits from the cooperation proportionally to its contribution⁵².

⁴⁷ T. Woś, „*Wywłaszczenia I zwrot nieruchomości*”, Warszawa, 2004, p.38”, cite after A. Panasiuk, „*Zinstytucjonalizowane...*”, *op.cit.* p. 131

⁴⁸ E. Knosala, „*Zadania publiczne, formy organizacyjnoprawne ich wykonywania I nowe pojęcia – zakres niektórych problemów do dyskusji nad koncepcją system prawa administracyjnego*”, cite after A. Panasiuk, „*Institutionalized forms...*”, p. 112”.

⁴⁹ M. Stahl, „*Cele publiczne ...*”, *op. cit.*, p. 100.

⁵⁰ The Public and Private partnership as a method of realizing public tasks”, Ministry of Economy and Labor, Department of Regional Policy, Warsaw 2005.

⁵¹ In the paper the notion of public and private partnership in the economic aspect as the „market partnership to define the realization of business or marketing goals of defined partners whose activities are based on the deviation of risk, profits, on the coordination of activities, exchange of information and joint monitoring of the market”, A. Krejner – Nowecka, „*Jakość partnestwa a sukces outsourcingu w przedsiębiorstwie*”, (w:) „*Przedsiębiorstwo partnerskie*, M. Romanowska i M. Trocki (edition), Warsaw 2002, p. 323 and following and A. Szromnik, „*Partnestwo podmiotów rynku miast I regionów – koncepcja marketingowa*”, Samorząd Terytorialny 2004, no 12, p. 6 and following. [common:] *Koncepcja systemu prawa administracyjnego*” pod red. J. Zimmermanna, Wolters Kluwer 2007, p. 475.

⁵² B. Korbus, M. Strawiński, „*Partnerstwo publiczno – prywatne. Nowa forma realizacji zadań publicznych*”, wydanie 2, Lexis Nexis, Warszawa 2009, pp. 58-59, [common:] „*Partnerstwo publiczno-prywatne. Poradnik*”, Praca zbiorowa, The Office for Public Procurement, 2010, pp. 21-22.

On the grounds of the European Union law, the European Commission defines the public and private partnership as the form of cooperation between the state power and private enterprises which aim to guarantee financing, construction, management and maintenance of the infrastructure or the supply of services⁵³. In turn the Polish legislator asserted that the object of the public and private partnership is a common realization of the enterprise is based on the division of tasks and risks between the public and private subjects⁵⁴. So the essence of cooperation within the public and private partnership on the social and economic grounds and the aim is the realization of public tasks in an effective way⁵⁵. There are many models of cooperation such as: OM – exploitation and maintenance, BOT – construction, exploitation and transfer, DBO – design, building and exploitation⁵⁶. Analyzing the partnership on the ground of the “Lopse” act it should be indicated that it covers joint realization of a venture:

- a) building and reconstruction of a construction,
 - b) provision of services,
 - c) delivery of work in particular provision of an asset with facilities escalating the value or the usefulness or
 - d) other consideration,
- linked to the maintenance and management of an asset used to carry out a public and private venture or is related to it.

An indispensable element of the partnership is the link between the actions and exploitation, maintenance and management of an asset used for the purpose of the cooperation. Only then can one speak of the cooperation within the public and private partnership⁵⁷.

One can frequently note interpretations justifying the cooperation between the public and private sectors with the economic situation of the cooperation and through that the “conditioning” of the performance of defined tasks by administration depending on the available financial sources. However the role and the essence of the state do not allow to change their “owner” – “give over to private hands” and in that sense to privatize public tasks by private entities.

Can the entrusting to perform such a task release the public entity from the responsibility for its performance? The answer to that question is negative – the responsibility for its performance further remains the public entity’s. It is worth noting that one of the most important sources appointing the public administration as the proper to carry out public tasks is the Constitution of the Republic of

⁵³ Green Paper on Public-Private Partnerships and Community law on public contracts and concessions (COM(2004) 327 final CdR 239/2004 fin.

⁵⁴ Art. 1 item 2 of the act on public and private partnership of 19.12.2008 r. (Journal of Laws of 2009, No 19, item 100).

⁵⁵ Żaklina Skretny, „Partnerstwo publiczno – prywatne jako rodza prywatyzacji i sposób realizacji zadań jednostek samorządu terytorialnego”, [w:] PWSZ IPiA STUDIA LUBUSKIE, Tom VI, Sulechów 2010, p. 261.

⁵⁶ More in-depth on the subject see: A. Panasiuk, „Zinstytucjonalizowane ...”, *op.cit.*, p. 46 and following.

⁵⁷ The justification of the bill on public and private partnership, p. 12.

Poland⁵⁸. The state which carries out the principles of the democratic lawful state must define public tasks as a legal act or the constitutional act⁵⁹. Through such a legal regulation firstly the protection of citizens against the violation of the obligation of the state is assured, secondly it enables to guarantee the actions by the state to carry out its obligations as well as it is a guarantee that the executive authority is deprived of the powers to influence the shape of public tasks and only enables their realization⁶⁰. Thus even if it's other than public administration bodies undertake to perform public tasks⁶¹, it shall not constitute the right of that entity to accept responsibility for those tasks and simultaneously it will not deprive the state entity of the said – the public entity will not waive its responsibility for its performance with no regard to who in fact carries out the tasks and the task will not lose its legally public character.

Conclusion

Over several decades of the market economy in Poland, it may be noticed that administration which carries out the goals on its own (protection administration) ceased to fulfill its role. The state in the previous system had set too many tasks and consequently ceased to hold proper financial sources. The transformation under way led to among others the activization of the private initiative (business) and involvement of the private sector in the realization of

⁵⁸ For example: The principle of the participation of local authorities in governing is expressed in art. 163 of the Constitution: „Local authorities perform public tasks not reserved by the Constitution or acts for bodies of other public authorities”. In turn the confirmation of the principle of performing by the local authorities substantial part of public tasks in its own name and on its own responsibility is art.6 item 2 of the Constitution. Public tasks serving the needs of the local authorities community as their are performed by local authorities as their own (art. 166 item 1 of Constitution). Then he tasks performed in a particular goal are a part of public tasks.

⁵⁹ „The public tasks defined by the constitution may not be freely interpreter limiting or expanding their range”, A. Błaś, „*Granice prywatyzacji zadań publicznych w państwie prawa*” [w:] Samorząd Terytorialny III Rzeczypospolitej. 10 lat doświadczeń, S. Michałowski (red.), Lublin 2002, p. 306 I 307, citing: M. Tabernacka, „*Konstrukcja ...*”, *op. cit.* p. 418. With the different opinion: S. Fundowicz, „*Dynamiczne rozumienie zadania publicznego*”, [w:] „*Między tradycją a przyszłością w nauce prawa administracyjnego*”, Księga jubileuszowa dedykowana Prof. J. Bociowi, Wyd. Uniwersytetu Wrocławskiego p. 158: „The acquisition by the state is carried out by incorporating in the legal norm some actions as public tasks or through common assignment of certain actions to the range of public tasks in the legal distribution on the basis of indisputable and undoubtful presumption [underlining – Author] that a defined action is carrying out a public task particularly when a legal entity undertakes to perform such a task and this action is dot defined in a legal norm as a legal action of private law.”

⁶⁰ M. Tabernacka, „*Konstrukcja ...*”, *ibidem*, p. 413.

⁶¹ „As the result of starting a cooperation between the public and private sectors, the privatization is called „contracting out” which takes place when a commercial private enterprise gains an opportunity to perform certain category of public services e.g. disposal of waste, cleaning streets, etc.) and the nature remain public in the hands of a public entity obliged to perform public task under the law. The alternative to the aforementioned procedure is s mixed system of „mixed economy entities” according to which new entities of commercial law are created with the mixed public and private participation which are created to perform certain task of public usage.” A. Panasiuk, „*Zinstytucjonalizowane ...*”, *op. cit.*, p. 58.

public tasks. It seems that the founding factors of the cooperation initiative between the two sectors is the satisfaction of common needs for which the public administration is responsible. Joint realization of ventures has to lead to the improvement of efficiency or the effectiveness of administration with the sustained legal public character of the tasks. As the subject papers assert not all areas of the state functions may possibly be privatized. The following aspects fall into that category: the reduction of costs which will lower the quality, low importance of innovation, poor competition with ineffective customer choice and poor mechanism of building reputation⁶² the penitentiary sector is a good example. Additionally it is worth paying attention to the following interdependence: the more stable the situation of the state the more willingly it undertakes to perform tasks. And in the case of insufficient capital sources, the state delegate the realization of public tasks to private entities. In turn the foundation of the processes of property transformation are primarily the changes to the ownership relation. The state loses the influence on the actions of economic entities and in the case of unprofitable enterprises decreases the expenditure on their financing. The enterprises managed by private entities many a time increase the quality of goods and services provided increasing their own effectiveness. One should agree with B. Błaszczyk that “the atmosphere around the privatization implying common affair and abuse was unfair and fed social fears and anxiety as to the legitimacy of the privatization. In this course of affairs even governments and ministers appreciating the importance of the privatization as to the desired structural changes in the economy were not able to make a breakthrough in the wall of prejudice, anxiety toward it. (...) It is high time to finally treat the privatization in a matter-of-fact way and with no bias as an indispensable part of the state’s economic policy”⁶³.

Bibliography

Books and articles:

1. Kazimierz Bandarzewski, „Komercjalizacja przedsiębiorstw państwowych”, wyd. Wolters Kluwer, Kraków, 2003.
2. Adam Błaś, „Administracja publiczna w warunkach gospodarki rynkowej”, [w:] „Prawo CCXCV Współczesne europejskie problemy prawa administracyjnego i administracji publicznej, w 35. rocznicę utworzenia Instytutu Nauk Administracyjnych Uniwersytetu Wrocławskiego”, Wydawnictwo Uniwersytetu Wrocławskiego, 2005, str. 73-85.
3. Barbara Błaszczyk, „Sektor publiczny w Polsce i na świecie a polityka prywatyzacji”, the document is available online at <http://webcache.googleusercontent.com/search?q=cache:t3bHlpFHLy4J:www.pte.pl/pliki/0/247/Sektor%2520publiczny%2520w%2520Polsce%2520i%2520na%2520swiecie%2520a%2520polityka%2520prywatyzacji.doc+&cd=2&hl=pl&ct=clnk&gl=pl> (on Oct. 6th, 2013).

⁶² A. Shleifer, “*Własność państwowa ...*”, *op. cit.*, s. 495.

⁶³ B. Błaszczyk, „*Sektor publiczny*”, *op. cit.*

4. Beata Kozłowska – Chyła, „Nowa ustawa o komercjalizacji i prywatyzacji przedsiębiorstw państwowych – główne kierunki zmian ustawodawczych, „Przegląd Prawa Handlowego”, czerwiec, 1997 r., str. 1-9.
5. Joanna Wyporska – Frankiewicz, „Publicznoprawne formy działania administracji o charakterze dwustronnym”, Wolters Kluwer, Warszawa, 2010.
6. Sławomir Fundowicz, „Dynamiczne rozumienie zadania publicznego”, [w:] „Między tradycją a przyszłością w nauce prawa administracyjnego”, Księga jubileuszowa dedykowana Prof. J. Bociowi, Wyd. Uniwersytetu Wrocławskiego, str. 154-166.
7. Jerzy Jacyszyn, „Wokół ustawy o komercjalizacji i prywatyzacji przedsiębiorstw państwowych”, „Rejent”, nr 2, 1997 r., str. 14-34.
8. Irena Lipowicz, „Dylematy zmiany siatki pojęciowej w nauce prawa administracyjnego”, [w:] „Koncepcja systemu prawa administracyjnego” pod red. Jana Zimmermanna, Wolters Kluwer, Warszawa, 2007, str. 21-43.
9. Zbigniew Olesiński, „Proces prywatyzacji w Polsce”, wyd. „Książka i Wiedza”, Warszawa, 2000.
10. Andrzej Panasiuk, „System zamówień publicznych. Zarys wykładu”, Public Procurement Legal Publisher, Warszawa, 2013.
11. Andrzej Panasiuk, „Zinstytucjonalizowane formy współpracy podmiotów publicznych z prywatnymi”, Wszechnica Polska Szkoła Wyższa TWP, Warszawa.
12. Wioletta Pawłowska, „Komercjalizacja i prywatyzacja przedsiębiorstw państwowych, cz. I”, [w:] „Radca prawny”, nr 4, 1997, str. 18-21.
13. Magdalena Serwatka, „Pojęcie prywatyzacji i jej formy”, Przegląd Prawa Handlowego, luty, 1995,
14. Andrei Shleifer, „Własność państwowa a własność prywatna”/„State versus Private Ownership”, „Journal of Economic Perspectives”, 1998, Vol. 12, No.4.
15. Żaklina Skretny, „Partnerstwo publiczno – prywatne jako rodza prywatyzacji i sposób realizacji zadań jednostek samorządu terytorialnego”, [w:] PWSZ IPiA STUDIA LUBUSKIE, Tom VI, Sulechów 2010, str. 255-269.
16. Małgorzata Stahl, „Cele publiczne i zadania publiczne”, [w:] „Koncepcja systemu prawa administracyjnego” pod red. Jana Zimmermanna, Wolters Kluwer, Warszawa, 2007, str. 95-117.
17. Aleksandra Sołtysińska, „Europejskie prawo zamówień publicznych. Komentarz”, WKP, wyd. II.
18. Iwona Salejko-Szyszcak, „Własność prywatna a publiczna w Polsce w latach 1995-2005 – próba porównania”, [w:] „Własność i kontrola w teorii i praktyce”, cz. II pod red. Barbary Polszakiewicz i Jerzego Boehlke, Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, Toruń 2008.
19. Magdalena Tabernacka, „Konstrukcja prawna zadania publicznego”, [w:] „Prawo CCXCV Współczesne europejskie problemy prawa administracyjnego i administracji publicznej, w 35. rocznicę utworzenia Instytutu Nauk Administracyjnych Uniwersytetu Wrocławskiego”, Wydawnictwo Uniwersytetu Wrocławskiego, 2005, str. 409 -422.
20. Lidia Zacharko, Barbara Wartenberg-Kempka, „stosunki prawne w procesie prywatyzacji zadań publicznych”, [w:] „Koncepcja systemu prawa administracyjnego” pod red. Jana Zimmermanna, Wolters Kluwer, Warszawa, 2007.
21. „Partnerstwo publiczno-prywatne”, Poradnik, praca zbiorowa, Urząd Zamówień Publicznych, Warszawa 2010.

Case law:

1. Ustawa z 21.09.1981 r. o przedsiębiorstwie państwowym, tekst jednolity (Dz. U. z 1991, poz. 80, ze zm.).
2. Ustawa z 31.01.1989 r. o Narodowym Banku Polskim (Dz. U. z 1989, Nr 4, poz. 22).
3. Ustawa z 31.01.1989 r. – Prawo bankowe (Dz. U. z 1989, Nr 4, poz. 21).
4. Ustawa z 25.09.1981 r. o samorządzie załogi przedsiębiorstwa państwowego (Dz. U. z 1981, Nr 24, poz. 123).
5. Ustawa z 23.12.1988 r. o działalności gospodarczej (Dz. U. z 1989, Nr 41, poz. 324).
6. Ustawa z 23.04.1964 r. Kodeks cywilny, tekst jednolity (Dz. U. z 1990, nr 55, poz. 321).
7. Rozporządzenie Prezydenta RP z 27.06.1934 roku – kodeks handlowy (Dz. U. z 1934, Nr 57, poz. 52 ze zm.).
8. Ustawa z 13.07.1990 r. o prywatyzacji przedsiębiorstw państwowych (Dz. U. z 1990, Nr 51, poz. 298).
9. Ustawa z 30.08.1996 r. o komercjalizacji i prywatyzacji przedsiębiorstw państwowych (Dz. U. z 1996, Nr 118, poz. 561 oraz tekst jednolity Dz. U. z 2013, poz. 216).
10. Ustawa z 10.05.1990 r. – Przepisy wprowadzające ustawę o samorządzie terytorialnym (Dz. U. z 1990, Nr 32, poz. 191).
11. Ustawa z 2.04.1997 r. Konstytucja Rzeczypospolitej Polskiej (Dz. U. z 1997, Nr 78, poz. 483).
12. Ustawa z 19.12.2008 r. o partnerstwie publiczno-prywatnym (Dz. U. z 2009, Nr 19, poz. 100 ze zm.).