

Perspectives of evolution of legal solutions concerning entrusting by local self-government units the public tasks to perform with other entities against the background of Polish law

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Abstract

On the local self-government units - municipalities, counties and voivodships - exercising public administration in Poland on the principle of decentralization of public authority, there are numerous public tasks to perform, including in particular the own tasks serving the collective needs of members of local self-government community. These tasks could be carried out by local self-government units using their own entities - organizational units, budgetary establishments, as well as municipal companies created - but could also be entrusted to perform with other, separate entities, especially non-public entities. The forms of entrusting by local self-government units the tasks with entities outside self-government structure are regulated by Polish Act of 1996 on municipal economy. The provisions of this Act were subject to several amendments in the analyzed scope. With entrusting by local self-government units the public tasks to separate entities, especially non-public entities, there are connected numerous problems that have not been solved so far. They concern the subjective scope of entities to which it is possible to entrust public tasks by self-government units, the basis and nature of the entrustment, the scope of entrustment, the legal status of the entity entrusted with tasks, obtained as a result of entrusting public tasks, the principles on which the entrustment is based, the effects of entrusting, the responsibility for performing the entrusted tasks. Taking the above into account, the scientific purpose of the research is an identification and determination of specific problems related to entrusting the performance of public tasks by local self-government units with separate entities, especially private entities, against the background of Polish law and determination of the perspectives of evolution of legal solutions concerning such entrusting.

Keywords: *local self-government, public tasks, entrusting public tasks, non-public entities.*

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1. Introduction

The local self-government units in Poland - municipalities, counties and self-government voivodships – exercise public administration on the principle of decentralization of public authority. They perform numerous public tasks, including in particular the own tasks serving the collective needs of members of local self-government community. The tasks of local self-government units could be carried out by their own entities, which are the organizational units, the budgetary establishments, as well as the municipal companies created, but could also be entrusted to perform with entities separate from self-government units,

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including especially non-public entities. The entrustment by local self-government units the tasks with entities outside self-government structure and the forms of such entrustment are regulated by the Act of December 20, 1996 on municipal economy². Not all tasks performed by local self-government units may be subordinate to entities from outside the local self-government structure or from outside the public administration structure. The subject to entrusting with external entities may only be the tasks in the field of so-called municipal economy.

According to current wording of Article 3 Paragraph 1 of The Act on municipal economy, local self-government units could, by way of an agreement, entrust tasks in the field of municipal economy to natural persons, legal persons or organizational units without legal personality, taking into account the provisions of the Act of 27 August 2004 on healthcare services financed from public funds³ and provisions of the Act of 27 August 2009 on public finance⁴ on general principles or in accordance with the provisions of:

- the Act of 19 December 2008 on public-private partnership⁵,
- the Act of 29 January 2004 on public procurement⁶,
- the Act of 24 April 2003 on public benefit and voluntary work⁷,
- the Act of 16 December 2010 on public collective transport⁸,
- the Act of 21 October 2016 on a concession contract for construction works or services⁹.

The appointed provision of the Act on municipal economy provides for contractual entrustment by local self-government units of tasks in the field of municipal economy to natural persons, legal persons and organizational units without legal personality. Such an entrustment is a specified way of carrying out a municipal economy within the meaning of Article 4 Paragraph 1 Point 1 of that Act¹⁰, on the basis of which the constituting bodies of local self-government units decide on the choice of the manner of carrying out and forms of municipal economy.

² The Act of 20 December 1996 on municipal economy, Journal of Laws of 2019 item 827, hereinafter: The Act on municipal economy.

³ The Act of 27 August 2004 on healthcare services financed from public funds, Journal of Laws of 2018 item 1510, as amended, hereinafter: The Act on healthcare services financed from public funds.

⁴ The Act of 27 August 2009 on on public finance, Journal of Laws of 2019 item 869, hereinafter: The Act on public finance.

⁵ The Act of 19 December 2008 on public-private partnership, Journal of Laws of 2017 item 1834, as amended, hereinafter: The Act on public-private partnership.

⁶ The Act of 29 January 2004 on public procurement, Journal of Laws of 2018 item 1986, as amended, hereinafter: The public procurement Act.

⁷ The Act of 24 April 2003 on public benefit and voluntary work, Journal of Laws of 2019 item 688, hereinafter: The Act on public benefit and voluntary work.

⁸ The Act on 16 December 2010 on public collective transport, Journal of Laws of 2018 item 2016, as amended, hereinafter: The Act on public collective transport.

⁹ The Act on 21 October 2016 on on a concession contract for construction works or services, Journal of Laws of 2016 item 1920, as amended, hereinafter: The Act on a concession contract for construction works or services.

¹⁰ M. Szydło, *Ustawa o gospodarce komunalnej. Komentarz*, Wolters Kluwer Lex/el. 2008.

According to the model resulting from the provisions of Polish law, the municipal economy could therefore be carried out by entities created by local self-government units (self-government budgetary establishments, selected commercial law companies) or by external entities to which the local self-government unit entrusted some specified tasks. The entrustment of the implementation of tasks to external entities takes place through the conclusion of an agreement¹¹. Such a solution is connected with the principle of choosing the way in which the municipal economy is managed by the local self-government, while the decision in this respect can be taken by local self-government bodies, guided by the interest of the local self-government community. The need to transfer a public task could also be determined by the specific circumstances associated with it. Sometimes the transfer of the task outside the local self-government unit is also required by the legislator, who leaves no choice to the local self-government, as is the case of collecting municipal waste from property owners¹².

Despite more than 20 years of validity of the Act on municipal economy, with entrusting by local self-government units the public tasks to separate entities, including non-public entities, there are still connected numerous problems that have not been solved so far. They concern the subjective scope of entities to which it is possible to entrust public tasks by self-government units, the basis and nature of the entrustment, the scope of entrustment, the legal status of the entity entrusted with tasks, obtained as a result of entrusting public tasks, the principles on which the entrustment is based, the effects of entrusting, the responsibility for performing the entrusted tasks. The provisions of the Act on municipal economy were subject to several amendments in the analyzed scope. However, these amendments have so far not led to the development of a coherent model of entrusting local self-government units with specific tasks to external entities, as well as to solving problems existing in the indicated areas of their application.

Taking the above into account, the scientific purpose of the research is an identification and determination of specific problems related to entrusting the performance of public tasks by local self-government units with separate entities, including private entities, against the background of Polish law and determination of the perspectives of evolution of legal solutions concerning such entrusting.

The scientific method that has been applied is based on dogmatic scientific research and the typical for dogmatic of law - the logical-language analysis of legal text. It has been supplemented by the use of systemic interpretation and functional interpretation.

As far as the results of the study is concerned it lead to a conclusion that it is advisable to create a coherent, clear model of entrusting tasks by local self-government entities with entities outside the structure of self-government,

¹¹ W. Gonet, *Ustawa o gospodarce komunalnej. Komentarz. Wzory umów i regulaminów*, Wolters Kluwer Lex/el. 2010, see also C. Banasiński, K. M. Jaroszyński, *Komentarz do art. 3 ustawy o gospodarce komunalnej* [in:] C. Banasiński, K. M. Jaroszyński, *Ustawa o gospodarce komunalnej. Komentarz*, Wolters Kluwer Lex/el. 2017.

¹² See C. Banasiński, K. M. Jaroszyński, *op. cit. (Komentarz do art. 3 ustawy...)*, Lex/el. 2017.

including especially non-public entities, and the evolution of legal solutions concerning such entrusting should aim at creating such a model.

2. The subjective scope of entities to which it is possible to entrust public tasks by self-government units

The first issue that need to be considered in relation to entrusting public tasks by local self-government units to the implementation of entities outside the sphere of this self-government is the subjective scope of this entrustment, so the indication of the group of entities for which such entrustment could take place in the light of legal provisions. This is important in that range, because in the situation of the performance of public tasks in the field of municipal economy by internal units of local self-government units, which is also possible, the subjective scope of legal forms of such performance of tasks remains significantly limited.

Article 3 of the Act on municipal economy, referring to the subjective scope of entrusting the performance of tasks by local self-government units, indicates natural persons, legal persons or organizational units without legal personality. Such a general approach should be treated as the inclusion of all subjects of rights and obligations that may appear in legal transactions, according to the principles adopted in civil law. The problem that arises from the specification of these entities is that the provision of the Act on municipal economy uses the notion of organizational units, not mentioning the legal capacity that may allow the legal entity which is an organizational unit without legal personality to be independent in legal relations. However, it should be assumed that the organizational unit referred to in the analyzed provision is an organizational unit, to whom the legal act gives legal capacity, so a flawed legal entity, not every organizational unit. The organizational units that do not have legal capacity admitted by law, may not enter into any contracts on their own behalf, including contracts with local self-government units.

With reference to the scope of the subjective range of the entrustment of tasks by local self-government units the wording of the provision of Article 3 of the Act on municipal economy indicates a wide range of entities for which such entrusting could take place. Therefore, there is no obstacle for the local self-government unit to conclude a contract for the performance of a public task incumbent on this local self-government unit with a natural person, partners in a civil law partnership, foundation, association, partnership, limited liability company, joint-stock company or cooperative¹³.

As indicated in the literature, such a broad approach to external entities that could enter into a contract with a local self-government unit to entrust them with public tasks belonging to that unit constitutes a discriminatory solution for local self-government units. In the situation in which local self-government units perform such tasks through their own entities, it is not possible to use all possible

¹³ See W. Gonet, *op. cit.* (*Ustawa o gospodarce komunalnej...*), Lex/el. 2010.

legal entities, but at present it is only possible to use budgetary establishments (and only to perform specific tasks indicated in Article 14 of the Act on public finance) and capital companies. However, in the case when local self-government units entrust the execution of the same tasks to external entities, the latter may carry them out using all possible forms of legal entities - partnerships and companies, associations, foundations, cooperatives and as natural persons. The limitations that local self-government units have in the scope of choosing the form of carry out a municipal economy by the entities appointed alone have therefore been considered as disproportionate to the forms in which private entities can perform the same activity on the basis of a contract with a local self-government unit. Therefore, the limitation of forms of municipal economy carried out by local government units does not find a rational explanation and is unjustified¹⁴.

The performance of the task by a company that can be classified as an organizational unit of a municipality, county or self-government voivodships is not treated as entrusting performance within the meaning of Article 3 of the Act on municipal economy. A company with such a status, although it is equipped with legal personality and acts in private relations on its own behalf, is not an external entity to the local self-government unit in the light of the principles of carry out a municipal economy. Such a company, if it meets the criteria of organizational and economic dependence on the municipality, county or self-government voivodships, is an organizational unit through which the self-government performs the tasks directly imposed on it. A classic example of such a unit will be a sole-shareholder company. With such a company the local self-government unit does not have to conclude an agreement for the purpose of transferring tasks, because their scope determines, in particular, the act establishing such a unit¹⁵.

From a practical point of view, the entities that perform tasks in the field of municipal economy on the basis of a contract could, however, be, above all, entrepreneurs as entities that carry out such services in a paid way, in an organized and continuous manner¹⁶. Although the provision of Article 3 Paragraph 1 of the

¹⁴ *Idem*.

¹⁵ See C. Banasiński, K. M. Jaroszyński, *op. cit.* (*Komentarz do art. 3 ustawy...*), Lex/el. 2017, see also judgment of the Main Administrative Court of 11 August of 2005, II GSK 105/05, ONSAiWSA 2006, No 2, item 62 and K. Weltzien, *Avoiding the Procurement Rules by Awarding Contracts to an In-House Entity - Scope of the Procurement Directives in the Classical Sector*, Public Procurement Law Review 2005, No 5, p. 237 and n., M. Szydło, *Udzielanie zamówień publicznych przez instytucje zamawiające na rzecz jednostek zależnych w świetle orzecznictwa Europejskiego Trybunału Sprawiedliwości*, *Finanse Komunalne* 2006, No 5, p. 40 and n., see more W. Baranowska-Zajac, *Wpływ implementacji przepisów nowych dyrektyw zamówieniowych Unii Europejskiej, dotyczących zamówień wewnętrznych (in-house), udzielanych przez jednostki samorządu terytorialnego, na rozwój konkurencyjności i przedsiębiorczości na rynkach lokalnych* [in:] M. Ganczar, J. Król, M. Szewczak (ed.), *Wpływ prawa Unii Europejskiej na gospodarkę i samorząd terytorialny państw członkowskich*, Łódź 2016, p. 97-112.

¹⁶ See Article 4 Paragraph 1 of the Act of 6 March 2018 Entrepreneurs' Law Act, Journal of Laws of 2018 item 646, as amended, hereinafter: Entrepreneurs' Law Act, which follows that an entrepreneur is a natural person, a legal person or an organizational unit that is not a legal person, whose separate act grants legal capacity, performing business activity.

Act on municipal economy does not restrict the number of entities to entrepreneurs, but the accession to provision of services to the population is often about the acquisition of this status and requires the fulfillment of related obligations, such as registration as an entrepreneur with an indication of a specific business activity corresponding to municipal services. An entity that could not acquire the status of an entrepreneur will therefore be most often excluded as a party to the contract concluded in the discussed cases with a local self-government unit, for example a foreigner who is not entitled to perform business in the territory of the Republic of Poland. The wide range of entities mentioned in this provision points to similarities with the notion of entrepreneur resulting from the provisions of the Entrepreneurs' Law Act, which also indicates natural persons, legal persons and organizational units, and there the latter should be equipped with legal capacity. Therefore, it is right to consider the thesis that such units - equipped with legal capacity - are also referred to in Article 3 Paragraph 1 of the Act on municipal economy¹⁷.

It should also be borne in mind that it is not the purpose of the legislator to entrust the performance of a task in the mode of Article 3 of the Act on municipal economy with public entities. However, when interpreting a provision in a language way, there is no absolute prohibition on entrusting the performance of tasks to public entities. Entrusting the task in this mode is, however, not possible to another local self-government unit or a union of local self-government units, or for the sole-shareholder company of another local self-government unit (as a unit through which another local self-government unit operates directly). Moreover, as indicated above, the analyzed provision does not include the transfer of a task to a company controlled by a local self-government unit whose task it concerns, qualified as an organizational unit of this municipality, county or self-government voivodeships, which is treated as the performance of the task by that local self-government unit¹⁸.

It should also be borne in mind that restrictions on the subjective scope of the parties to the contract for entrusting the performance of tasks of local self-government units may result from specific legal provisions. The final answer to the question of who can conclude a contract with a local self-government unit in the discussed mode requires referring to individual special acts listed in Article 3 of the Act municipal economy - the Act on healthcare services financed from public fund, the Act on public finance, the Act on public-private partnership, the Act on public procurement, the Act on public benefit and voluntary work, the Act on collective transport, the Act on a concession contract for construction works or services - and checking whether the specified entity has the ability to conclude an agreement with the local self-government unit on the basis and in the mode specified in the given act, for example submitting an offer under the tender. It may also be necessary to refer to the regulations governing the establishment of legal persons or organizational units or their possibilities of operating on the market, which also applies to natural persons. The scope of rights of individual legal entities in the

¹⁷ See C. Banasiński, K. M. Jaroszyński, *op. cit.* (*Komentarz do art. 3 ustawy...*), Lex/el. 2017.

¹⁸ *Idem.*

economic turnover will usually be the indicator of the right to conclude the discussed contract with the local self-government unit. The limitations that may arise here may concern the legal capacity of natural persons, the right to undertake business activity in connection with citizenship, the subject of the activity of legal persons and the country of their registration. The scope of possible entities may also be limited by specific provisions regarding the performance of a specific tasks, for example in the field of social assistance. Therefore, it should be assumed that the legitimacy to conclude a contract under this provision is determined by separate regulations pertaining to the creation and operation of a given entity, and, above all, the possibility of participating in economic transactions on the territory of the Republic of Poland. Legal conditions in this respect may also result from the above-mentioned acts referred to in Article 3 Paragraph 2 of the Act on municipal economy, as well as other substantive-law acts regulating self-government tasks¹⁹.

Bearing in mind the above, it should be concluded that a wide catalogue of entities to which local self-government units may entrust the performance of public tasks in the field of municipal economy under the contract resulting from the wording of Article 3 of the Act on municipal economy suffers significant restrictions – first of all, dictated by the legal possibility of concluding a contract in their own name determined by having independent legal capacity, which concerns the third - in addition to natural persons and legal persons - category of legal entities in Polish law - the organizational units. Secondly, resulting from specific provisions on procedures for the conclusion of individual contracts and performance of individual categories of public tasks, from which it is resulting that they can only be performed by entities that can obtain and have the status of an entrepreneur, and often meet additional conditions in this respect, such as obtaining a permit to perform a specific subject of economic activity as an activity subject to regulation.

3. The basis and nature of the entrustment public tasks by self-government units

According to the wording of Article 3 Paragraph 1 of the Act on municipal economy, the entrustment by the local self-government unit of tasks in the field of municipal economy to an external entity in relation to self-government should be effected through a contract. Wherein this contract may be concluded on general terms or under the provisions of five of the acts listed there - the Act on public-private partnership, the Act on public procurement, the Act on public benefit and voluntary work, the Act on collective transport, the Act on a concession contract for construction works or services. Therefore, it could be asked a question about the type and nature of that contract - is it a civil law contract or a public-law contract?

¹⁹ *Idem.*

In the literature on the subject, it was expressed both the standpoint from which it follows that the basis of the entrustment is a typical civil law contract, as well as a standpoint that presupposes that the contract is a public-law contract²⁰. However, although in the system of Polish administrative law, the public-law agreements are one of the potential legal instruments, which public administration, including local self-government, having authorizations resulting from legal provisions, is able to use, so they constitute one of the possible legal forms of public administration activities, they do not have an established legal regime²¹. There are no grounds to consider that the entrusting of tasks in the field of municipal economy by local self-government units to entities outside the system of local self-government takes place in Poland under a public law agreement, and there is no reason to assume that the basis of such entrustment could be a civil law contract, as well as a public law agreement.

The form of entrusting the performance of tasks to another entity in the field of municipal economy is therefore a contract within the meaning of civil law, as a bilateral (possibly multilateral) legal action, under which the private entity undertakes to perform a service that is an expression of municipal economy. The subject of this contract will usually be a service provided to residents (population)²². Against the background of such a basis for entrusting the tasks of local self-government units in this way, it arose a questionable issue, which is the possibility of assigning to the local self-government units the freedom of contract, that effects within the conclusion of civil law contracts. The view that approves the freedom of shaping contractual relations by local self-government units seems to be more justified, at least in relation to some of the elements of freedom of contract²³. This view is justified, because special provisions, limiting the application of this freedom to the local self-government, enable it to shape, to a greater or lesser extent, the content of the contracts. It was also stipulated that from the point of view of the freedom of contract as an expression of constitutional freedom, especially the freedom of economic activity and the right to property, local self-government could not rely on these freedoms²⁴. In addition, it should be stipulated that also to the extent that the provisions of law do not determine the decision on the contract, the choice of the contractor, the form, and especially the content of the contract, the local self-government should be guided by the interest

²⁰ W. Dłużewski, *Ustawa o gospodarce komunalnej - nadal nie rozwiązany problem zakresu komercyjności przedsiębiorczości gminnej*, Przegląd Ustawodawstwa Gospodarczego 1997, No 7-8, p. 26-27.

²¹ Unlike, for example, German law, where public-law agreements, including administrative-law agreements, constitute one of the legally prescribed legal forms of public administration activities – see M. Szydło, *Ustawa o gospodarce...*, 2008, zob. też H.-U. Erichsen, *Das Verwaltungshandeln* [in:] H.-U. Erichsen, D. Ehlers (ed.), *Allgemeines Verwaltungsrecht*, Berlin 2002, p. 402 and n., H. J. Wolff, O. Bachof, R. Stober, *Verwaltungsrecht. Band 2*, München 2000, p. 199 and n.

²² C. Banasiński, K. M. Jaroszyński, *op. cit. (Komentarz do art. 3 ustawy...)*, Lex/el. 2017.

²³ M. Szydło, *op. cit. (Ustawa o gospodarce...)*, Lex/el. 2008, see also M. Kalisiak, W. Paluch, *Działalność gospodarcza gminy i powiatu*, Zielona Góra 2000, p. 169.

²⁴ C. Banasiński, K. M. Jaroszyński, *op. cit. (Komentarz do art. 3 ustawy...)*, Lex/el. 2017.

of the community, including the efficient fulfillment of the community's needs, transparency of action, equality of external entities, protection of municipal property. These guidelines should also be subordinated to contracts concluded on general terms, not subject to any restrictions resulting from the acts concerning the conclusion of contracts entrusting the performance of tasks by local government units, as referred to in Article 3 of the Act on municipal economy²⁵. The civil law freedom of contract granted to local self-government units is subject to restrictions resulting not only from the provisions of specific legal acts that determine the scope of the contract, its content or the choice of contractor, but also from the nature of the local self-government unit as a public authority and the public nature of tasks in the field of municipal economy under which civil law contracts are concluded.

From the point of view of legal qualification, the analyzed contract is a form of administration activity based on the parties' equivalence. Accepting the task is a voluntary decision of the entity concerned, usually an entrepreneur who performs an economic activity falling within the scope of municipal economy. However, a non-profit entity may also be a party to the contract leading to entrust the performance of a self-governmental task to an outside entity, what results from the Act on public benefit and voluntary work. The possibility and mode of concluding a contract by a specific entity results therefore from separate provisions, especially those referred to in the content of Article 3 of the Act on municipal economy. Remaining a legal action regulated by civil law, the contract for entrusting a public task by a local self-government unit to an external entity is subject to additional regulations, going beyond the civil law, resulting in particular from public law.

This does not refer only to the signaled issue of the group of entities that are entitled to conclude such a contract with the local self-government unit and the mode of their selection, in particular by conducting a tender. The purpose of the contract is the practical performance of the public task by an external entity, in accordance with the essence of the municipal economy as defined in Article 1 Paragraph 1 of the Act on municipal economy, which is the satisfaction of the collective needs of the local self-government community. In this contract, the contractor of the local self-government unit shall ensure current and continuous satisfaction of the collective needs of the population through the provision of publicly available services. If so, various elements of the contract may result from specific legal provisions regulating its content, and in the unregulated area, the local self-government unit should shape it in such a way as to achieve the objectives of municipal economy to the highest degree. The obligation of the local self-government unit as a public-law entity exercising public authority is also to ensure equality and fair competition as well as transparency of all activities related to the conclusion of the contract²⁶.

²⁵ *Idem.*

²⁶ *Idem.*

The provisions of the Act on municipal economy provide for the transfer of public tasks outside a local self-government unit, but at the same time outside the public sector. Transfer of the task outside the public sector based on a civil law contract, which is determined also by public law, requires the will of both the public and private entities. The practical possibility of the conclusion of such a contract depends also on the existence of a market for a specific service on which private entities operate, or at least on their interest in creating such a market²⁷.

4. The scope of entrustment public tasks by self-government units

In the Article 3 of the Act on municipal economy, it appears that entrustment of tasks by local self-government units to external entities may concern tasks in the field of municipal economy. The municipal economy was in turn defined in Article 1 Paragraph 2 of the Act, from which it results that it covers, in particular, tasks of a public utility character, whose aim is to provide current and continuous satisfaction of the collective needs of the population through the provision of publicly available services. This municipal economy is referred to all three levels of local self-government, which currently operate in Poland²⁸. Interpreting this provision in conjunction with the relevant provisions of local self-government systemic acts²⁹ applicable in Poland, it should be assumed that municipal economy consists in the own tasks of self-government performed by local self-government units in order to meet the collective needs of self-government community, and therefore tasks in the field of municipal economy possible to be entrusted for external entities through the contract will be the own tasks aimed at ensuring by local self-government unit the collective needs of residents forming a self-government community. It follows from the above that the scope of entrusting the performance of tasks of local self-government units to external entities is narrower than the scope of tasks incumbent on local self-government units in Poland as such. If the entrusting is to include tasks in the field of municipal economy in the above sense, it will be limited only to the own tasks. Except for the sphere of the possibility of such entrusting remain the categories of tasks that could be performed by local self-government units on the basis of the provisions of the Constitution of the Republic of Poland, local self-government systemic acts and the acts of administrative substantive law impose specific tasks on self-government units, that is tasks commissioned in the field of government administration, whose execution by local self-government units in such a form results directly from the legal acts and the entrusted tasks, which takeover by local government units from government administration bodies results from agreements

²⁷ *Idem.*

²⁸ *Idem.*

²⁹ To local self-government systemic acts it belong the Act of 8 March 1990 on municipal self-government, Journal of Laws of 2019 item 506, hereinafter as: the Act on municipal self-government, the Act of 5 June 1998 on the county self-government, Journal of Laws of 2019 item 511 and the Act of 5 June 1998 on voivodship self-government, Journal of Laws of 2019 item 512.

concluded between them for this purpose. Entrusting tasks outside the public sphere in the mode of Article 3 of the Act on municipal economy does not cover the sphere of tasks commissioned to local government units, as well as the tasks entrusted to them, even if the latter were aimed at satisfying the collective needs of members of self-government communities. The literature emphasizes, however, the difficulties in distinguishing between own tasks and commissioned tasks³⁰, existing especially in the light of the provisions of Article 7 Paragraph 1 of the Act on municipal self-government, which constituting a catalogue of its own tasks, uses the expression "in particular", signaling that the catalogue is not closed and of Article 6 Paragraph 1 of this Act, which shows that the scope of the municipalities' activity includes all public matters of local significance, not covered by acts for other entities.

In the literature, the boundaries of the activities of local self-government units as public authorities in the field of municipal economy also refer to the sphere of the imperium and the dominium, and it is pointed out that municipal economy is basically in the sphere of the dominium.

Because it relates to activities related to the use of communal property. In cases where the performance of specific services is outsourced in the mode of Article 3 of the Act on municipal economy the private property could become the basis for the activity in question³¹.

Moreover, the statement that we are dealing with the own tasks of local self-government does not mean that all such tasks will be carried out in the forms of municipal economy.

Though they must be tasks that are suitable for carrying them out in a way that suits the ways and forms of municipal economy. For example, it will be the provision of services in the field of collective water supply and sewage disposal, where the form of local self-government administration is a civil law contract. In turn, the example of the own task that does not correspond to the municipal economy is shaping and conducting spatial policy in the municipality³² - forms of action here are based on the adoption of legal acts by the municipal authorities (local spatial development plan), strategic documents (study of conditions and directions of the spatial development of the municipality), issuing administrative decisions (decision on building conditions), as well as making numerous analyzes for spatial planning³³.

Entrusting a public task in the sphere of municipal economy is an alternative to the direct operation of the local self-government unit in the area of its implementation, while the choice in this matter is left to the constituting body of local self-government unit. Usually the reason for entrusting a public task outside

³⁰ M. Szydło, *op. cit.* (*Ustawa o gospodarce...*), Lex/el. 2008.

³¹ See more C. Banasiński [in:] M. Wierzbowski, H. Gronkiewicz-Waltz (ed.), *Prawo gospodarcze. Zagadnienia administracyjnoprawne*, Warszawa 2015, p. 117 and n.

³² According to the Act of 27 March 2003 on planning and spatial development, Journal of Laws of 2018 item 1945, as amended.

³³ See C. Banasiński, K. M. Jaroszyński, *op. cit.* (*Komentarz do art. 3 ustawy...*), Lex/el. 2017.

the public sphere may be the lack of sufficient public resources for its implementation, the risk related to market participation, which the public unit wants to avoid, the idea of better adaptation to market conditions of a private entrepreneur who has the advantage over public administration in the area of efficiency and flexibility of the task³⁴.

5. The principles on which the entrustment by local self-government units with public tasks is based

In Article 3 of the Act on municipal economy, the legislator applied a reference to two groups of legal acts. The first group includes legal acts whose provisions should be taken into account by local self-government units when concluding contracts regarding the entrusting of public tasks in the field of municipal economy to external entities on general principles or under the provisions of one or more acts belonging to the second group. The second group therefore includes legal acts on the basis of which, alternatively to the general principles resulting from the Civil Code, there should be concluded the contracts regarding the entrusting of tasks in the field of municipal economy by local self-government units. To the first of these groups, the legislator includes the Act on healthcare services financed from public funds and the Act on public finance, and there will be applied, depending on the subject of such a contract, the relevant provisions of the first or the second of that act. The second group includes the Act on public-private partnership, the Act on public procurement, the Act on public benefit and voluntary work, the Act on collective transport, the Act on a concession contract for construction works or services.

The acts referred to in Article 3 Paragraph 1 of the Act on municipal economy should be obligatorily applied by the local self-government unit that decides to entrust the execution of tasks in the field of municipal economy to an external entity. Depending on the specific intention of self-government entrusting the task, the reference to specific provisions results from the scope of their application. If this scope includes the planned operation of a local self-government unit, then the act to which it has been referred to is applied to it in its entirety (within the scope resulting from the act under consideration). In the wording of the provisions of the Act on municipal economy under consideration, it is not necessary to look for exclusions relating to specific acts listed there or the possibility of using them other than directly³⁵. Both the wording "including" and "in the mode" of the above-mentioned provisions means direct referral to them. The provision of Article 3 Paragraph 1 is the regulation of the Act on municipal economy confirming certain possibilities of acting by the local self-government units and some related obligations arising from the legislation in force. At the same time, it could not be assumed that the catalogue of listed acts is closed, as well as that they are applied in a separable manner. For example, Article 4 Paragraph 1 and

³⁴ *Idem.*

³⁵ *Idem.*

2 of the Act on public-private partnership provides for the selection of a private partner under the Act on public procurement or on the basis of the Act on the concession contract for construction works or services³⁶. References to other acts that should be used by local self-government units when concluding contracts for entrusting tasks may therefore be of multiple character, which may affect the occurrence of difficulties in concluding such contracts.

The main assumption of the application of the acts mentioned in Article 3 Paragraph 1 of the Act on municipal economy is to ensure transparent operation of local government units, which should not affect the equality of entities entering into relations with them or the principle of free competition. The procedures resulting from the acts to which the referral was applied, are also intended to protect the finances of local self-government units, both against excessive expenditures as well as against excessive risk related to conducting business activity³⁷.

The common denominator of the established acts is the definition of requirements related to the conclusion and content of the contract binding local self-government units. Two acts - included above to the first group of them - refer directly to a determined field of municipal economy, regulating the rules for determined contracts. The remaining acts mentioned in Article 3 Paragraph 1 of the Act on municipal economy are of a general nature concerning a wide range of local self-government tasks. An external entity may perform them on the basis of a contract concluded after the procedure resulting from the provisions of the Act on public procurement. The undertaking may also, depending on the decision taken by the local self-government, rely on performing tasks in the mode of public-private partnership, conclusion a concession contract or cooperation with entities subject to the provisions on public benefit activities. In this situation, priority in concluding the contract will be given to the relevant legal act.

Agreements providing for co-financing from public funds may be related to the application of determined provisions of the Act on public finance. There may also be a situation in which no specific conditions related to the conclusion of the contract will come into play, especially if a specific contract would be excluded from the application of the Act on public procurement and the project will not be implemented in any of the formulas subject to other acts. Such an agreement should be concluded on general principles, which should be understood as regulations of the Civil Code. Even in this case, local self-government units are bound by the need to ensure effective implementation of their tasks, while maintaining the requirements of equality, competition, transparency, publicity and protection of local government property and public finances³⁸.

The legal determinants of concluding a contract and shaping its content result not only from general principles (the Civil Code) and the legal acts referred to in Article 3 Paragraph 1 of the Act on municipal economy. The Act on municipal economy and the systemic acts of local self-government, defining the

³⁶ *Idem.*

³⁷ *Idem.*

³⁸ *Idem.*

overriding objectives of the activity of local self-government units, as well as special provisions referring to specific tasks and related contracts are also important. The terms of providing services also result from the compulsory content of contracts, often regulated by the legislator, concluded with recipients, and from requirements directly set by the legislator, such as contained in the regulation for water supply and sewage disposal, which has the status of a local law act³⁹.

6. The effects of entrusting public tasks by local self-government units and the legal status of the entity entrusted by local self-government units with public tasks

The construction of entrusting the performance of tasks means that the local self-government unit, whose task has been assigned, is obliged in the public-law sense to perform it as the administrator of this task. The activity of entrusting the execution of the task may take place in favor of various entities independent of local self-government unit. Entrusting the execution of tasks leads to the possibility of changing the entity that deals with them, for example, after the period for which the order was awarded, or as a result of taking over the task of the contractor who improperly performs the task. However, the local self-government unit remains competent in the administrative-legal sense of the determined task. It is also always the entrusting entity, because it is not possible to transfer the task by an external entity to another entity, except only subcontractors⁴⁰.

As regards the legal status of entities to which local self-government units entrust public tasks in the mode of Article 3 of the Act on municipal economy, which they possibly acquire through the fact of entrusting them with the performance of public tasks, despite the performance of tasks of this type, they do not acquire the status of a self-government entity, a self-government unit, a public-law entity. These entities, acting in the sphere of municipal economy on the basis of a contract do not become recipients of a commented legal act. Their relationship with the entity applying the act is based on a contractual relationship, conditioned by the regulations to which Article 3 of the Act on municipal economy referred. The public-legal conditions of performing tasks within the municipal economy are applicable to local self-government entities⁴¹.

³⁹ *Idem.*

⁴⁰ *Idem.*

⁴¹ C. Banasiński, K. M. Jaroszyński, *Komentarz do art. 1 ustawy o gospodarce komunalnej* [in:] C. Banasiński, K. M. Jaroszyński, *Ustawa o gospodarce komunalnej. Komentarz*, Wolters Kluwer Lex/el. 2017.

7. The responsibility for performing public tasks entrusted by local self-government units

In connection with the possibility of entrusting specific public tasks by local self-government units to external entities, it arises a question about responsibility for performing such tasks. In this regard, it should be recognized that delegating the execution of the task to another entity pursuant to Article 3 of the Act on municipal economy does not combine with the exemption of the local self-government unit from the obligation to ensure the implementation of the task. This obligation, as legally binding in public law, can not be transferred by the contract to individuals from the private sector or other public entities. The scope of jurisdiction of a local self-government unit is defined by the act and could not be changed by civil law. Therefore, the local self-government is not exempt from the need to ensure the final effect in the form of implementation of the task. An external entity may be entrusted with execution itself, whereas such entity does not become a self-government entity. It is therefore necessary to distinguish the public-law obligation to ensure the performance of a task that is imposed on a local self-government unit, from the actual private exercise of it on the basis of a contract. The public-law responsibility for its implementation remains with the self-government administration bodies - it is expressed, for example, in the assessment of the efficiency of the tasks performed by the supervisory authorities, as well as in the political assessment of the local government during elections. A private (external) entity that performs the task on the basis of a contract bears only civil liability, related to the fulfillment of contractual obligations, their non-performance or improper performance⁴². The legislators' use of the wording, according to which local self-government units may "entrust the performance of tasks", does not create a state of equivalence with their transfer. The entrusted execution therefore covers all activities aimed at actually providing certain communal services to residents, but does not necessarily lead to their absolute factual assurance and does not incur liability for the lack of such assurance.

8. Conclusions

Entrusting the tasks imposed on local self-government units to external entities by way of contracts is very important from the point of view of the efficiency of performing public tasks by local self-government. However, it is also a complex legal structure that causes complex effects and creates problems of different nature. These problems appear already at the stage of determining to whom the performance of such tasks could be entrusted with in this formula. In this area a wide range of entities for which entrustment is possible, indicated in the Act on municipal economy, is not compatible with the catalogue of internal units of local self-government units, that could not be entrusted with similar tasks. Such a

⁴² C. Banasiński, K. M. Jaroszyński, *op. cit.* (Komentarz do art. 3 ustawy...), Lex/el. 2017.

solution creates a situation of discrimination by the legislator in the area of performing tasks with the scope of municipal economy. The model of entrusting the performance of tasks or performing the tasks in the field of municipal economy should take into account a more uniform subjective scope. In the situation of local self-government units performing tasks using their own internal units the possibilities remain much more limited. In addition, a wide catalogue of entities indicated in Article 3 of the Act on municipal economy could be significantly narrowed depending on the type of tasks entrusted – some of them could be performed only by entities having the status of entrepreneurs, often conducting a specific type of regulated business activity, and other – by non-profit entities.

The shape of the subject-matter of the entrustment of tasks by local self-government units is also not fully understood, because on the basis of current legal solutions such entrustment could concern only tasks in the field of municipal economy, to which, in the light of this definition, only own tasks are included. This means that from the category of tasks which could be entrusted to external entities there are excluded the assigned tasks, even to serve the collective needs of members of self-government communities, including tasks assigned by local self-government units to other local self-government units.

In the current model of entrusting tasks of local self-government units to entities of an external nature the form of entrusting tasks could only include civil law contracts, excluding administrative law agreements, whose legal regime has not been regulated in Polish administrative law, which makes them function only as a theoretical legal forms of the operation of public administration, including local self-government. Entrusting tasks to external entities by local self-government units, however, is subject to strict legal requirements and therefore it should be considered whether the formula of the agreement of public law would not be more functional in this area.

Entrusting tasks in the field of municipal economy by local self-government units requires to refer in specific cases to a series of special acts, of which only some are listed directly in Article 3 of the Act on municipal economy. It causes that there is a risk of concluding the contract and its execution in a way that will not take into account all the requirements resulting from the provisions of applicable law.

The above circumstances indicate the need to rethink the currently operating model of entrusting tasks by local self-government units with entities outside the structure of self-government, including especially non-public entities, and to take attempts to create a coherent, clear model of such an entrusting of public tasks by local self-government entities with entities outside the structure of self-government, including especially non-public entities. The evolution of legal solutions concerning such entrusting should aim at creating such a model.

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