

THE USE OF COMMUNAL PROPERTIES FOR BUSINESS ACTIVITY

1. Introduction

The issue of undertaking and conducting a business activity by a commune is controversial. The current regulations, as they stand today, are not perceived uniformly, which results in many difficulties at the stage of their interpretation and application. Moreover, it is worth pointing out that they have evolved significantly since 1989 as the legislator has applied extremely diverse regulations determined *inter alia* by the reform of local government and policy of the state¹. As a consequence, various regulations as far as communes, poviats and voivodeships are concerned were introduced².

The issue provokes the question: 'is a commune entitled to be engaged in a business activity within the current legal order, and is such an activity undertaken at the commune's discretion'? The crucial matter is also the use of communal properties for commercial purposes. Taking this into consideration, it should be pointed out that this article aims to present a general presentation of the issue regarding the business activity performed by a commune for commercial purposes on the basis of its property. The article provides a binding legal status and the interpretation of fundamental regulations. However, it does not resolve the questions resulting from the practical application of the regulations, which, due to several blanket clauses and vague phrases, were not determined precisely.

1 See C. Banasiński, M. Kulesza, *Ustawa o gospodarce komunalnej. Komentarz*, Warsaw 2002, p. 20 and next; C. Kosikowski, *Publiczne prawo gospodarcze Polski i Unii Europejskiej*, Warsaw 2007, p. 311–319; P. Krzystek, D. Wacinkiewicz, *Komunalna działalność gospodarcza w teorii i praktyce*, in K. Sławik ed., *Działalność gospodarcza – kluczowe problemy*, p. 72–74.

2 Compare Art. 9 of the 8th of March 1990 Act on Municipal Local Government (Journal of Laws of 2001 r., No. 142, item 1591 with subsequent changes) and Art. 6 of the 5th of June 1996 Act on Poviat Local Government (Journal of Laws of 2001, No. 142, item 1592 with subsequent changes) and Art. 13 of the 5th of June 1996 Act on Voivodship Local Government (Journal of Laws of 2001, No. 142, item 1590 with subsequent changes).

2. The Domains of Communal Activity

The distinction of two domains of communal activity is indispensable for an appropriate introduction of the issue:

- an activity in the public utility domain,
- an activity going beyond the domain of public utility.

The fundamental communal activity should be identified within the sphere of a public utility. The activity is a key, and at the same time a fundamental function of the local governmental unit. In other words, it is the execution of public purposes entrusted in communes which, by virtue of the Constitution of the Polish Republic, form their own tasks by fulfilling the needs of the local community³.

The catalogue of basic communal obligations is stipulated in the Municipal Local Government Act⁴. This catalogue is open and merely includes an exemplary enumeration of basic competences, often regulated in separate acts. The essential common characteristic should be underlined. The performance of communal specific tasks is the obligation of the commune as a unit of local government. It should be kept in mind, however, that an obligation shall not be identified with any rights. The commune is obliged to perform its own specific tasks, namely the tasks of public utility, since, as a public authority, it has to take on board and realize [its responsibilities regarding] particular intervention functions in the economy⁵. It should be active especially in the areas of essential social activity in which private entities, due to the lack of profitability, are not interested in undertaking a business activity⁶. In other words, a commune or a communal legal entity not only may, but is obliged to perform their fundamental competences.

The priority of activity in the public utility domain is not to give a commune profit, but to perform the tasks which aim to realize the current and continuous fulfilment of the collective needs of a local government community⁷. Therefore, the activity of a commune should not be perceived as a business activity as it is deprived of one of the most fundamental features of business activity – the profit-gaining

3 See Art. 166 of The Constitution of the Republic of Poland (Journal of Laws of 1997, No. 78, item with subsequent changes).

4 The 8th of March 1990 Act on Municipal Local Government (Journal of Laws of 2001, No. 142, item 1591 with subsequent changes).

5 C. Kosikowski, *Publiczne prawo gospodarcze Polski i Unii Europejskiej*, Warsaw 2007, p. 314

6 See judgment of the Supreme Administrative Court of 9th January 2003, SA/Gd 1968/2002, OwSS 2003, No. 4, item 105.

7 See J. Olszewski (ed.), *Publiczne prawo gospodarcze*, Warsaw 2005, p. 78; C. Banasiński, *Gospodarka komunalna*, in H. Gronkiewicz-Waltz, M. Wierzbowski (ed.), *Prawo gospodarcze. Zagadnienia administracyjnoprawne*, p. 166–186.

objective⁸. As for the rule, a commune fulfils the obligations in the name of the needs of the local government community and not for gaining profit⁹.

The nature of communal activity which goes beyond the public utility domain is completely different. It can be identified with business activity. This field of activity is defined as a commercial one and is not limited to communal specific tasks – its main objective is to make a profit. However, a commune cannot engage in a business activity at its discretion, otherwise, as the evolution of the issue and the experience gained show, it could come, through the main sphere of actions undertaken and performed, at the expense of the inhabitants. It is inadvisable that profit should be the main objective of a commune in contradiction with the execution of its own tasks. Taking this into consideration, the legislator determined a general principle which states that a commune may perform commercial activity but only in situations which were stipulated in a separate act¹⁰. The separate act is the 20th December 1996 Act on Municipal Economy¹¹, which specifies the situations that justify undertaking the activity going beyond the public utility domain and also indicates the appropriate organizational and legal forms¹².

3. The Use of Communal Properties for Commercial Business Activity

The Act on Municipal Economy indicates three situations in which a commune can undertake a business activity. The present article discusses this in the context of communal properties¹³.

Art. 10 of the Act on Municipal Economy indicates that a commune may engage in an activity which goes beyond communal specific tasks if two conditions are met. The first condition is that the needs of the local government community are not fulfilled in the local markets. The second condition is a situation when unemployment in the commune significantly influences (in a negative way) the living standards of the local government community and undertaking the activity mentioned above is the only measure [which can be taken] for the community to express its proactive–

8 See Art. 2 of the 2nd of July 2004 Act on Freedom of Economic Activity (Journal of Laws of 2007, No. 155, item 1095 with subsequent changes); C. Kosikowski, *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warsaw 2007, p. 15–28.

9 The profit gained while performing communal own tasks cannot be ruled out.

10 Art. 9 of the 8th of March 1990 Act on Municipal Local Government.

11 The 20th December 1996 Act on Municipal Economy (Journal of Laws of 1997, No. 9, item 43 with subsequent changes).

12 See Art. 10 of the 20th December 1996 Act on Municipal Economy.

13 Properties are not the only indicator of commercial activity, however, taking into account the amount of property a commune possesses, it should be stated that they are the basis for this kind of activity.

ness in relation to the inefficiency of other actions undertaken on the grounds of other separate regulations.

Thus a commune may take advantage of the entrusted properties as an efficient, and at the same time, final measure to combat any unemployment. The arrangement of the communal property for the public serviceable purposes where workplaces will be created both at a preparatory stage (e.g. building works) and also when they will have been completed – in a building created thanks to used communal property (e.g. an airport, a sports stadium, a dumping ground) is an example of this¹⁴. The use of communal property for commercial purposes brings the effect of workplace increase, and also fulfils the needs of the commune's inhabitants.

However, it should be underlined that a commercial activity undertaken by a commune cannot compete with the business activity of private entrepreneurs existing in the market place. This transgression beyond the public utility domain could otherwise provoke outcomes quite opposite to intended purposes *inter alia* the bankruptcy of the private enterprise and its consequences¹⁵.

Art.10 section 2 of the Act on Municipal Economy stipulates another situation whereby, with the backing of the legislation, a commune can undertake and conduct commercial activities. In the name of rational property management, a commune may form commercial partnerships or become part of established partnerships, using the [their] property as a non-monetary contribution. The rational management of communal property is a prerequisite justifying undertaking a commercial activity. In other words, if the sale of communal property or the management of it in any other way causes a severe financial loss, the commune may, on the basis of this property, undertake commercial activity. The activity is performed to secure the value of the property, to manage it and for capital protection. The accepted solution is valid due to the very probable situation where it would be more profitable, especially long-term, to invest the property in the partnership capital, or to form a partnership on this basis rather than make a hasty sale. As a rational reaction for an economic situation the commune will guarantee financial care over the entrusted property.

The third circumstance is stipulated in Art. 10 section 3 of the Act on Municipal Economy. The rule does not set any condition for undertaking a commercial activity by a commune. The only prerequisite for forming a commercial partnership or joining up with an existing partnership is that such an activity would be essential for the commune to function and develop. In the aforementioned article the legislator additionally specified the activity domains that were found crucial. Advisory,

14 Compare P. Krzystek, D. Wacinkiewicz, Komunalna działalność gospodarcza w teorii i praktyce, in K. Sławik (ed.), Działalność gospodarcza – kluczowe problemy, p. 81–84

15 C. Banasiński, M. Kulesza, Ustawa... op. cit., p. 20 and next; W. Maciejko, P. Zaborniak, Tworzenie spółek kapitałowych przez samorząd gminny jako forma ograniczania lokalnego bezrobocia, "Samorząd Terytorialny" 2007, No. 1–2, p. 68–69

educational, promotional and editorial activities supporting the development of the commune and also banking and insurance activities were included in this. The aforementioned catalogue shall be considered open, and takes into consideration the phrase: "... and also other partnerships important for the development of the commune"; with the reservation that Art. 10 section 3 will be interpreted in the context of the Act on Municipal Local Government. Thus, the usefulness and necessity for the development and functioning of the commune, but also for fulfilling fundamental needs of the local government community, is the priority of commercial activity admissibility¹⁶. The commune may use communal properties for forming commercial partnerships on this basis to ensure the balanced development and the progress of the commune, however, exclusively for the activity that serves public purposes.

4. Conclusions

In the Polish legal system the Act on Municipal Local Government and the Act on Municipal Economy refer to the issues of undertaking and conducting business activity by a commune. The regulations stipulate the fundamental domains of communal activity and also the rules for undertaking commercial activity.

The analysis of binding regulations specifies the essential, for the subject discussed, role of communal properties – they create a real basis for commercial activity. The fact is that the Act on Municipal Economy stipulates only three situations in which a commune may go beyond the sphere of its own specific tasks. However, the construction of the regulations and the phrases used result in a much larger number of factual situations that justify undertaking such a business activity. The statement that a commune does not engage in business activity at its discretion is still valid. The analysis of the prerequisites stipulated in the Act on Municipal Economy supports the statement that the activity going beyond the sphere of communal, specific purposes is only justified when it serves the public policy¹⁷. The commune may then use their properties for business activity when it is aimed at improving the status of the local government community, combating unemployment, managing the property in a rational way and when guaranteeing development and progress.

Additionally, apart from the activity discussed in the present publication, communal properties may be an object of sale, exchange, renouncement, perpetual

16 See P. Zaborniak, *Glosa do wyroku NSA z dnia 6 grudnia 2000 r. I SA/Gd 1977/1999, "Samorząd Terytorialny" 2002, No. 7–8, p. 137–138*; Judgment of the Supreme Administrative Court of 6th December 2000, I SA/Gd 1977/1999, *OwSS* 2001, No. 2, item 63.

17 C. Kosikowski, *Publiczne prawo gospodarcze Polski i Unii Europejskiej*, Warsaw 2007, p. 314.

usufruct, lease and tenancy, consigning in permanent management and also be charged with limited real rights, made as non-monetary contributions into partnership capital (contribution balance sheets), passed to public enterprises as stock and as the property of the foundations that are being formed. However, such a use of property is only possible on the grounds of the regulations stipulated in the Act on Property Management along with the application of a number of complementary acts¹⁸.

18 The 21st August 1997 Act on Property Management (Journal of Laws of 2004, No. 261, item 2603 with subsequent changes).

Streszczenie

Przedmiotem niniejszej publikacji jest ogólne przedstawienie zagadnienia podejmowania przez gminę działalności gospodarczej w oparciu o posiadane nieruchomości. Publikacja bazuje na obowiązującym stanie prawnym oraz wykładni przepisów odnoszących się do podstawowych sfer aktywności gminy. W sposób szczególny uwzględnia działalność o charakterze stricte komercyjnym, wobec której stawia pytania: czy gmina może prowadzić taką działalność i czy ewentualnie może ją podejmować dowolnie? Odpowiedzi i rozwiązania akcentowanych wątpliwości formułuje poprzez wskazanie stanów faktycznych zakładających wykorzystanie gminnych nieruchomości, jako tworzących realne podstawy do prowadzenia działalności komercyjnej.