

PRACE NAUKOWE

Uniwersytetu Ekonomicznego we Wrocławiu

RESEARCH PAPERS

of Wrocław University of Economics

Nr 351

Finance and Accounting – Theory and Practice

edited by
Jacek Adamek
Magdalena Swacha-Lech



Publishing House of Wrocław University of Economics
Wrocław 2014

Copy-editing: Elżbieta Macauley, Tim Macauley

Layout: Barbara Łopusiewicz

Proof-reading: Barbara Cibis

Typesetting: Beata Mazur

Cover design: Beata Dębska

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Lower Silesian Digital Library www.dbc.wroc.pl,
The Central European Journal of Social Sciences and Humanities <http://cejsh.icm.edu.pl>
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Wrocław 2014

ISSN 1899-3192

ISBN 978-83-7695-406-6

The original version: printed

Printing:

EXPOL, P. Rybiński, J. Dąbek, sp.j.

ul. Brzeska 4, 87-800 Włocławek

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Arkadiusz Babczuk

Wrocław University of Economics

AUDITING THE ECONOMIC ACTIVITIES OF REGIONAL AND LOCAL AUTHORITIES – CURRENT CHALLENGES IN POLAND¹

Summary: This paper presents the challenges currently faced by the Regional Chambers of Audit in Poland with regard to auditing the economic activity of local and regional governments. This paper also discusses the most common irregularities in the Polish local and regional authorities' engagement in economic activities that were revealed during audits carried out by the Regional Chambers of Audit.

Keywords: local and regional governments, municipal finance, auditing.

DOI: 10.15611/pn.2014.351.10

1. Introduction

This paper presents the challenges currently faced by the Regional Chambers of Audit in Poland with regard to auditing the economic activity of local and regional governments. The discussion is divided into three parts. This first one consists of an overview of the legal and organisational forms which the local and regional authorities in Poland may apply while performing their public responsibilities. The middle part points out the most significant challenges arising from the audit of local and regional government's economic activity. The paper concludes with an enumeration of the most common irregularities in the Polish local and regional authorities' engagement in economic activities that were revealed during audits carried out by the Regional Chambers of Audit.

2. Forms of local authorities' operation in Poland

In accordance with Article 3 of the Polish Constitution, the Republic of Poland is a unitary state. Its territorial system, however, ensures the decentralization of government (Article 15(1) of the Constitution). The role of local and regional

¹ The views presented in this paper do not express the standpoint of any institution in which the author is employed, or with which he cooperates; the paper constitutes a part of a monograph entitled: *The mechanisms preventing the insolvency of local government units.*

authorities in the state consists in performing, in their own name and on their own behalf, a substantial part of public duties (Article 16(2) of the Constitution). The scope of public duties entrusted to the local and regional authorities is roughly defined in Article 163 of the Constitution, in accordance with which they are to perform any public government's tasks not otherwise reserved by the Constitution or Parliamentary acts to other public authorities.

The commune (*gmina*) constitutes the basic unit of local government (Article 164(1) of the Constitution). Parliamentary acts may establish other units of regional, or local and regional, government (Article 164(2) of the Constitution). The legislator, so empowered, has established district authorities (local authorities entrusted with the tasks of a supra-communal nature) and provincial (regional) authorities.² The commune enjoys a special role in the local and regional government system of the Republic of Poland since, under Article 164(3) of the Constitution, this type of local authority "shall perform all tasks of local and regional government not reserved to other units of local and regional government". The constitution-makers have thus established the principle of the commune's implied competence.

The responsibilities assigned to the individual levels of self-government have been defined in semi-constitutional law, i.e. in Articles 6 and 7 of the Commune Authorities Law dated 8th March 1990 (Dz.U. [*Journal of Laws*] of 2001 no. 142, item 1591 as subsequently amended), Article 4 of the District Authorities Law dated 5th June 1998 (Dz.U. [*Journal of Laws*] of 2001 No. 142, item 1592 as subsequently amended) and Article 14 of the Provincial Authorities Law dated 5th June 1998 (Dz. U. [*Journal of Laws*] of 2001 No. 142, item 1590 as subsequently amended). With district and regional authorities, their list is a closed one.

In the performance of their responsibilities, the local authorities are empowered not only to establish their own organizational units, but also to conclude agreements with other entities. This is explicitly stipulated by the relevant provisions of semi-constitutional laws, namely Article 9(1) of the Commune Authorities Law dated 8th March 1990, Article 6(1) of the District Authorities Law dated 5th June 1998 and Article 8(1) of the Provincial Authorities Law dated 5th June 1998. A substantial part of the local and regional government's responsibilities is, however, carried out by the organisational units of local and regional authorities. The vast majority of them operate under the umbrella of the legal personality of a local and regional government unit (*statio municipi*) – as its budgetary unit or budgetary enterprise (organizational unit of the local or regional authority) [Chmielnicki 1999, p. 46].

Among the organizational units run by local and regional authorities there are also entities with a legal person status of their own (incorporated entities of local and

² Some municipalities have been granted special status – they have been awarded the right to perform some tasks otherwise endowed to districts. This has given rise to a specific category of local authorities – municipalities operating within a district framework. Also the local authorities of the capital city of Warsaw enjoy a specific status.

regional self-government)³. These include, in particular, the independent public healthcare institutions operating under the Healthcare Activities Law dated 15th April 2011 (Dz.U. [*Journal of Laws*] no. 112, item 654 as subsequently amended) as well as the cultural institutions functioning based on the Law on Organizing and Running Cultural Activities dated 25th October 1991 (Dz.U. [*Journal of Laws*] of 2001 no. 12, item 123 as subsequently amended) [Niewiadomski, Grzelczak 1990, p. 14]. In the performance of their responsibilities, the local and regional authorities may also establish or become shareholders in commercial companies, join cooperatives or water management companies [Banasiński, Kulesza, Szafranski 1997, p. 18]. Moreover, there are also other legal entities run by regional government, established under the Law itself (Regional Advisory Centres for Farming) or in line with the procedures specified therein (Regional Driver Training Centres).

The normative catalogue of commercial company types that the local authorities may establish or join is given in Article 9 of the Municipal Management Law dated 20th December 1996. These are mainly limited liability companies and joint-stock companies, but also limited partnerships or limited joint-stock companies referred to in Article 14(1) of the Public-Private Partnership Law dated 19th December 2008 (Dz.U. [*Journal of Laws*] of 2009 no. 19, item 100 as subsequently amended), i.e. companies established in the performance of public-private partnership agreements⁴.

The performance of local government's public services through a company is not subject to particular restrictions.⁵ Under Article 9(1) of the Commune Authorities Law dated 8th March 1990, any economic activity exceeding the scope of public services may be carried out by communes or commune-run legal persons only in situations provided for in the Municipal Management Law dated 20th December 1996. Article 10(1) of this Law provides that beyond the sphere of public services, a commune may establish or join commercial companies only if the following cumulative conditions are met:

- 1) there is a local community need that is not met on the local market;
- 2) the unemployment rate recorded in the commune has a significant negative impact on the local community's quality of life, while the application of other measures and the legal remedies provided for in law has not produced sufficient economic stimulation or, in particular, a significant recovery of the local market or a permanent reduction of the existing unemployment rate.

³ Regional Administrative Court in Bydgoszcz in its ruling dated 8th January 2009 indicated, among others, that there is a dichotomy of classification of local authority organizational units into the respective groups of budgetary units of the local government and of the local government's legal entities with reference to communes. Case no. II SA/Bd 878/08, published LEX no. 484875.

⁴ It is worth noting that a public entity cannot play the role of a general partner in such a company.

⁵ As stipulated in Article 1(2) of the Municipal Management Law dated 20th December 1996, the public service tasks consist in the running and continuous meeting of the collective needs of the population in the form of rendering commonly available services.

Besides, under paragraph 2 of the same Article, communes may incorporate companies governed by the Companies' Law that operate outside the scope of public services, or may join such corporations where a shareholding is received in return for bringing in a government-owned asset(s) in-kind that otherwise could not be sold or disposed of in any other manner without a significant loss.

As stipulated by paragraph 3 of the same Article, the restrictions do not apply to the commune's holding of shares/stock in companies engaging in banking, insurance or consulting, marketing, educational or publishing services to the benefit of local government as well as in other companies that are important for the commune's development, the latter including sports clubs operating as incorporated companies. It should be noted that the law-maker's use of the very general term "companies that are important for the commune's development", makes the constraints imposed on the local authorities in the sphere of establishing or joining incorporated companies by Article 10(1) and (2) of the Municipal Management Law dated 20th December 1996 quite illusionary. In the author's opinion, the importance of individual incorporated companies for the commune's development may only be assessed by the commune itself.

The authorisation of Polish districts to establish or join incorporated companies looks very different. Under Article 6(2) of the District Authorities Law dated 5th June 1998, districts may not engage in any economic activity outside the realm of public services. Here the regulation is clear-cut and unquestionable – a fact that was confirmed in a number of court and tribunal decisions (for instance, in resolution no. 310/02 of the Board of Regional Chamber of Accounts in Gdańsk, dated 5th August 2002 and published in "Orzecznictwo w Sprawach Samorządowych" 1/2003, item 25; ruling of the Supreme Administrative Court in Warsaw in case no. II OSK 288/06, dated 16th May 2006 and published in LEX no. 271344)⁶.

The provincial government has been offered more leeway by the law-makers in the sphere of establishing or joining incorporated companies. Under Article 13(1) of the Provincial Authorities Law dated 5th June 1998, within the realm of public services the provincial authorities may establish or join limited liability companies, joint-stock companies or cooperatives. As stipulated in paragraph 2 of the same Article, beyond the scope of public services the provincial authorities are empowered to establish or join any limited liability company or joint-stock company whose primary line of business includes promotional, educational, publishing or telecommunication services that facilitate the province's development.

⁶ A different approach to the problem was taken by the Supreme Administrative Court in Gdańsk in their rulings of 9th January 2003 (case no. I SA/Gd 1968/02, published LEX no. 682122) and of 6th December 2000 (case no. I SA/Gd 1977/99, published in: „Orzecznictwo w Sprawach Samorządowych” 2/2000, item 63).

3. Main challenges in auditing the economic activity of local and regional government in Poland by Regional Chambers of Audit

The concept of the economic activity of local and regional government relates, on one hand, to the provision of paid services by organizational units of the regional and local authorities and the management of public goods, and on the other hand, to the acquisition of goods and services by those units, particularly under the Public Procurement Law. It is worth noting that payment for the services provided by the local and regional government's organizational units may come either directly from the beneficiaries (consumers) of those services or from special-purpose public funds, in particular the compulsory public health insurance funds.

In accordance with the Regional Chamber of Audit Law, the Regional Chambers of Audit in Poland carry out audits of financial management and public procurement process at:

- units of regional and local government (communes, districts and provinces),
- unions of communes and unions of districts,
- inter-communal associations, associations of communes and districts and associations of districts,
- organizational units of regional and local authorities, including those with legal personalities,
- other entities which have received grants originating from the local and regional government's budgets.

Regional Chambers of Audit carry out audits of financial management and public procurement in units of regional and local government and their organizational units with regard to the legality and conformity of documentation and factual findings. These criteria, however, seem inadequate with regard to the economic activity of local and regional government. The only, and limited, possibility of expanding upon them is provided by the current wording of Article 44 (3)(1) of the Public Finance Law, which stipulates that public spending should be carried out in an expedient and prudent manner, in compliance with the following rules:

- a) achieving the best possible results from any given expenditure,
- b) selecting the best available methods and means to achieve established goals.

It seems, however, that ensuring that local and regional communities have access to information on the relative costs and benefits of fulfilling the tasks of local and regional government is of most importance to the proper functioning of civil and open society [Szołno-Koguc 2011, p. 117]. In consequence, it seems important to grant the Regional Chambers of Audit the power to audit the economic activity of local and regional government using the criterion of the economy of financial management (good management). The assessment of self – government's economic activities should focus on whether the established goals were achieved and what costs were created in the process. An analysis of the economy of financial management

would make it possible to determine whether the activities of the audited entity are expedient and prudent and whether it would have been possible to complete the tasks assigned with a lesser expenditure or in a more effective manner.

The development of local and regional government's economic activity in Poland relates in particular to the increasing use of the incorporated company model for performing the tasks of local and regional government. It must also be noted that the Medical Activity Law dated 15th April 2011 stipulates that regional and local authorities must either cover the losses incurred by the independent public health care centres (SP ZOZ) managed by them or transform the centres into incorporated health care providers. Therefore, it is expected that in 2014 there will be a sharp rise in the number of health care providers operating as commercial companies. It is worth noting that there are currently nearly 600 hospitals and 1,700 outpatient clinics operating as independent public health care providers (Table 1).

Table 1. Number of medical service providers in Poland as of 30.04.2011

Medical service providers	Hospitals	Outpatient facilities	Total
Countrywide total, of which:	736	17.862	18.598
Non-public facilities, of which:	155	16.171	16.326
independent public health care centres transformed into commercial companies by the local authorities	117	312	429
Public facilities, of which:	578	1.688	2.266

Source: [*Przekształcenia...* 2011, pp. 2-3].

In this context it is especially important to define the category of the organizational units of local and regional government, particularly of the local and regional government's legal entity. In the judicial doctrine and case law, there are disparate views on whether it is possible to treat incorporated companies whose dominant or sole owner is a local and regional government as local and regional government legal entities. According to some authors, incorporated companies are not local government legal entities due to the fact that they cannot get classified as belonging to the public finance sector. Others indicate that for an incorporated company to be considered a local government legal entity, all of its shares/stock must be owned by the local government unit. There also exists a view that for an incorporated company to be considered a local government legal entity, it is enough for the local government unit to own the majority of its shares or stocks. In accordance with the principle of legality, however, the powers of public auditing authorities should be expressly defined by law. It is therefore not possible to presume auditing powers [Srocki 2010].

As mentioned above, a significant proportion of local and regional government's tasks in Poland is carried out through incorporated companies. Furthermore, a significant portion of communal property has been transferred to such companies. Also significant is the process of the 'debudgetisation of communal debt', whereby

debt is incurred by municipal companies instead of local or regional government units. Municipal companies' debt is not taken into account when assessing whether local and regional government units' debt is within legal limits. Furthermore, as there are no reporting requirements, municipal companies' debt cannot be precisely assessed and currently is subject to estimation only. According to the author's research, in 2009-2012 municipal companies' debt was equal to approximately 20%-25% of the official debt of local and regional government units in Poland. Including local and regional government commercial companies, particularly those created by transforming independent public health care centres expressly in the remit of audits carried out by Regional Chambers of Audit, would be an important step towards ensuring the transparency of public finance [Babczuk 2012, pp. 5-16].

Some of the other most important challenges in auditing the economic activity of local and regional government in Poland are also the provision of the appropriate level of financing for the auditing activities of the Regional Chambers of Audit and the provision of the required knowledge and skills to the auditors. Including local and regional governments economic activity carried out as commercial companies within the remit of audits by Regional Chambers of Audit would require a significant increase in the number of auditors and the costs of their activity. Meanwhile, Regional Chambers of Audit, along with all public administration in Poland, must be prepared to limit their cost levels in the coming years.

Auditing the economic activity of local and regional government units requires different knowledge and skills from those required by auditing their administrative activity. This is particularly true of entities operating as commercial companies. Municipal companies are covered by private sector regulations. These entities also usually exhibit a different organizational culture. This may cause problems for auditors used to principles of operation employed in bureaucratic organisations⁷.

4. Irregularities in the economic activities of Polish local and regional government as exposed in audits carried out by Regional Chambers of Audit

Regardless of the challenges indicated above, the economic activity of regional and local authorities in Poland is subject to audits by Regional Chambers of Accounts. The scope of comprehensive audits carried out in 2012 by Regional Chambers of Accounts included, amongst others, the following issues relating to the economic activity of regional and local authorities:

- budget spending, including public procurement,
- management of public and State Treasury fixed assets,
- settlements between the regional or local authority and its organizational units (such as budgetary enterprises).

The transparency of public spending is to be ensured by the adherence to the Public Procurement Law dated 29th January 2004. In 2012, 1,830 cases of

⁷ For more information see [Szczerski 2009].

irregularities regarding public procurement procedures were reported, which accounted for 11.5% of all irregularities exposed by the audit by Regional Chambers of Accounts. Both the preparation phase of the public procurement process and the award process were affected.

The most serious and most numerous irregularities occurred in the following areas:

- failure to establish, or the incorrect establishment, the value of the procurement – 155 cases,
- non-compliant announcement of intent to award a public procurement contract – 109,
- failure to properly announce the award of a public procurement contract or the contract award – 100,
- failure to produce or the non-compliant production of the report on public procurement procedure – 98,
- lack of or non-compliance of the Terms of Reference – 86,
- non-compliant definition of the rules for providing a bid bond or irregularities regarding the refund or withholding of bid bonds (e.g. delayed refund, failure to withhold or withholding without merit) – 78,
- failure to call on the contractors to deliver the missing documentation and powers of attorney in accordance with Article 26 (3) of the Law – 69,
- non-compliance with the rule of consistent application of the Law – 60,
- terms and conditions of bidder eligibility (e.g. failure to disclose them in the advert and/or in the Terms of Reference, failure to describe the method used for eligibility assessment, eligibility conditions that were disproportionate or irrelevant to the object of the procurement) – 49,
- unlawful amendments to the contract already awarded – 43,
- incorrect definition of the object of procurement – 42,
- incorrect application of bidder exclusion rules (failure to exclude, exclusion without merit) – 42.

In the course of audits regarding the management of public assets, 1,171 cases of irregularities were reported, of which the most common were:

- failure to comply with regulations on the sale of real estate – 333 cases,
- failure to comply with regulations regarding appropriations of public assets other than the sale or perpetual usufruct (rental, lease, permanent administration etc.) – 264,
- failure to produce or the non-compliant production of a real estate resource utilisation plan – 73,
- failure to comply with regulations regarding real estate turned into perpetual usufruct (e.g. registration of third-party interest, annual fee adjustment, fee rates etc.) – 57,
- failure to adopt a resolution regarding a long-term management plan for the housing resources – 55,
- failure to maintain or the non-compliant maintenance of a register of real estate resources – 48.

In 2012, 221 cases of irregularities relating to the settlement of budgets between regional or local authorities and their organizational units were exposed. Of that number, 12 cases were related to budgetary enterprises failing to pay surplus current assets into the budget, or failing to do so on time.

5. Conclusions

The economic activity of regional and local authorities in Poland is subject to audits by Regional Chambers of Audit. However, the Chambers face a number of challenges in this respect. These result from the vague criteria of audit, restrictions imposed on the scope of such audits as well as the Chamber's limited human resources and competence.

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KONTROLA AKTYWNOŚCI EKONOMICZNEJ JEDNOSTEK SAMORZĄDU TERYTORIALNEGO W POLSCE – AKTUALNE WYZWANIA

Streszczenie: Niniejsze opracowanie prezentuje wyzwania stojące przed regionalnymi izbami obrachunkowymi na polu kontroli aktywności ekonomicznej jednostek samorządu terytorialnego. Ponadto wskazuje nieprawidłowości najczęściej ujawniane w toku kontroli prowadzonych przez regionalne izby obrachunkowe.

Słowa kluczowe: jednostki samorządu terytorialnego, finanse komunalne, kontrola.