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ECONOMIC ACTIVITY CONDUCTED BY PUBLICLY OWNED ESTABLISHMENTS. THE CASE OF MUSEUM

Legal person governed by public law are normally divided into corporate bodies, fixed establishments, and foundations [Fundowicz 2005, 234]. Publicly owned establishments have an important role in the society as they perform numerous public tasks. As users of publicly owned establishments, i.e. those who benefit from the services that such establishments offer, whether facultative (a library, museum or theatre) or compulsory (school or treatment), we expect the top quality offering. In principle, it is the organizer of an establishment that should secure the financial resources to run its activities, as in, e.g. a cultural institution. However, sometimes received funding proves insufficient. The article tackles the question of whether and when it is possible for a publicly owned establishment to engage in a business activity. It discusses the case of a museum. In addition, the mission of public administration is addressed in the context of conducting a non-profit making activity.

1. The concept of economic activity

In accordance with Art. 3 of the Act of 6 March 2018 on Entrepreneurs,¹ economic activity is defined as an organized gainful activity performed on one's own and on a continuous basis. This is a legal and universal definition of economic activity. Still, the act proposes a set of specific attributes that such an activity should possess to be considered economic within the meaning of the said law [Komierzyńska-Orlińska 2019, 49-50].

The main attribute is profit-making, which is the main purpose of any business. Conducting business for profit means striving to grow assets and achieve

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¹ Journal of Laws of 2019, item 1292 as amended.

a specific gain, i.e. profit [ibid., 53]. Determination of the profit-making purpose is clearly subjective and stems from the actual intention of the business entity [Powałowski 2018, 33]. This means that even if an economic activity does not raise measurable economic revenue but is conducted with a view to making a profit, the profit-making condition is met. Economic activity must also be organized, i.e. its performance must be actually and legally planned by the business entity which takes a number of organizational measures for that purpose [Sieradzka 2013, 42]. This organization occurs in two forms: functional, i.e. how a business is run, and structural, i.e. how its assets held by the business entity are structured and intertwined [Powałowski 2018, 31].

Another attribute of economic activity is its continuity. As explained by the Voivodeship Administrative Court in its justification of the judgement of 27 April 2005, continuity can be considered in three aspects: time, goal (plan), and the basis of maintenance. The element of continuity indicates a relatively firm intention to perform an economic activity, which does not exclude the option of conducting it only seasonally or until the goal set by the business entity is achieved. The legislator intended to eliminate incidental and occasional projects as economic activities. To maintain continuity, it is sufficient that the overall economic circumstances demonstrate the intention to repeat a specific set of gainful activities. This activity should be permanent and planned (purposeful), regardless of whether the plan is long- or short-term.² In addition, the activity must be carried out on one's own, i.e. independently, at one's own risk and responsibility [Komierzyńska-Orlińska 2019, 58].

If all of the above-mentioned attributes are present, the activity is considered economic. Still, it should be highlighted that one of the first and primary features of any economic activity is profit-making.

2. Definition of a publicly owned establishment

Public administration tasks are performed not only by classically understood administrative bodies but also by a specific group of entities known as publicly owned establishments.

² Judgement of the Voivodeship Administrative Court in Wrocław of 27 April 2005, I SA/Wr 3237/03, LEX no. 496830.

The term “establishment” has multiple meanings, both in colloquial and legal language. In the Polish language, establishment is, in the first place, understood as an enterprise or its part involved in manufacturing or service provision, but it also denotes a scientific, social, cultural, or healthcare facility; moreover, it can be used in the meaning of “wager” or “bet.”³ Establishment is also defined differently in various fields of law. Civil law uses the concept to refer to a part of an enterprise; in labour law, establishment is tantamount to a collection of resources and work items as well as intangible assets used to achieve employer’s goals [Liszczyński 2019, 136]; financial law identifies a budgetary establishment as an organizational and legal form of budget management [Serafin 2017, 127]. On top of that, administrative law defines a publicly owned establishment.

In Polish administrative law, the concept of publicly owned establishment, also referred to as an administrative establishment,⁴ began to emerge before the Second World War. One of the best known definitions of the idea is found in W. Klonowicki who describes a publicly owned establishment as “a collection of persons, things and rights organized by and permanently associated with public administration and intended for individual use by other persons, whether authorized or obliged to do so. As regards disputes between the establishment and its user, at least with regard to benefiting from the services of the establishment, they are settled out of court” [Klonowicki 1933, 121]. Klonowicki also subscribed to the view that publicly owned establishments, as public administration entities and legal persons, perform their public administration functions independently and are not subject to the hierarchical authority of government administration, hence they should be considered one of the forms of decentralization [ibid., 221].

³ *Słownik języka polskiego PWN*, <https://sjp.pwn.pl/sjp/zaklad;2542648.html> [accessed: 18.02.2020].

⁴ The concept of an administrative establishment as synonymous to a publicly owned establishment appeared after World War II; still, the doctrine recommends that the term “publicly owned establishment” be regarded as preferred (correct). The use of the term “administrative establishment” indicates that only public authorities are empowered to found it while today other entities, such as local government units, legal persons, and natural persons, may also establish and influence the operation of such facilities. More in Ochędowski 1996.

J. Boć points out that “an administrative establishment is an organizational unit established to provide non-pecuniary services on the basis of an administrative and legal relationship with the user” [Boć 1997, 154]. He also lists organizational and functional properties of administrative (publicly owned) establishments and highlights that: they are established to provide non-pecuniary services in the field of education (schools), culture (libraries, museums), science (universities), upbringing (pre-school facilities), re-education (correctional facilities), healthcare (hospitals, health resorts), social welfare (social care homes, orphanages); establishments are set up by various public administration bodies based on various legal grounds through various law-making instruments; the use of establishments is restricted to its users; the use can be voluntary (library) or compulsory (correctional facility); there is an organizational and legal relationship established between the establishment’s bodies and the user by the action of the law or administrative decision; between the users and the management of an establishment, a relationship of authority is created, i.e. the establishment is empowered to determine the legal and actual position of the user unilaterally, on the one hand, and, on the other, the user is obliged to submit to the instructions of the establishment’s bodies (statutes, terms of use); establishments have no legal personality; the operation of establishments is financed from the central or local government budget [ibid., 153-54].

The key distinguishing feature of a publicly owned establishment is its objective: to provide non-pecuniary services of special social significance [Ruczkowski and Rutkowski 2011, 359]. Looking at the very nature of such an entity, it transpires that its main objective is to carry out non-economic activities.

S. Fundowicz argues that the most characteristic attribute of publicly owned establishments is the legal relationships between the establishment and its users, which are regulated in an abstract manner in the terms of use (regulations) laid down by the so-called establishment authority to achieve its objectives [Fundowicz 2005, 246]. These relationships are governed both by the statutes drawn up by the establishing authority upon the foundation of an establishment and by the terms of use set by the establishment authority (e.g. a prohibition of video recording theatre performances), as well as by organizational rules of procedure and work regulations. Therefore, an impor-

tant feature of publicly owned establishments is their taking advantage of establishment authority (a specific type of administrative authority) under which the establishment's bodies are empowered to determine the legal relationships unilaterally, i.e. to establish administrative and legal relationships with the users [Wrzosek 2008, 60]. It is also emphasized that establishment authority covers not only the users but also the employees of an establishment and even individuals temporarily staying on the premises [Ruczkowski and Rutkowski 2011, 359]. Establishing an administrative and legal relationship with the users may take place under applicable law (e.g. compulsory education), an administrative decision (e.g. admission to university), a court decision (imprisonment), or by performing a factual act (e.g. purchase of a theatre ticket) [ibid.]. The exercise of establishment authority should be proportional to the services provided and should take account of the specific nature of such services (assistance to the sick, cultural activity) because the basic condition for establishment authority to exist is to mind the general interest of the public, i.e. the introduction of such orders and restrictions to leave the greatest possible freedom to the individual while, at the same time, ensuring respect for the rights of third parties and other values (patient's health, condition of an art piece) [Rybicki and Piątek 1984, 334].

When defining a publicly owned establishment, attention is also drawn to its organizational distinction. An establishment can be defined as an organizational unit other than a public authority (office) or local government that has been set up to perform public tasks, is authorized to establish administrative and legal relationships and is also equipped with human and material resources [Wrzosek 2008, 60].

3. Conditions for conducting economic activity by publicly owned establishments

Speaking of the option for publicly owned establishments to conduct economic activity, the doctrine does not offer any uniform view on this matter. Hence, some light should be cast on the structure in which such entities operate.

Public administration is "people organized to perform their tasks in their designated field of activity (sphere of activity) [...]. Whether we perceive them collectively within a theoretical framework of the structure of public

service or otherwise, it will always be primarily an organized group of people pursuing some public mission equipped with a body of instruments at their disposal” [Langrod 2003, 33-34]. This definition highlights the personal dimension of administration. In contrast, when discussing administration, H. Izdebski, M. Kulesza and I. Lipowicz stress the concept of public interest and the common good as characterizing the essence of public administration [Stahl 2013, 17]. “Public administration should be understood as a collection of actions, activities and undertakings of organizational and executive character carried out for the sake of public interest by various entities, bodies and institutions on the basis of the law and in forms provided by the law” [Izdebski and Kulesza 2004, 22]. I. Lipowicz defines “administration as a system composed of individuals organized for the purpose of permanent, systematic and future-oriented service to the common good as a public mission, mainly (though not exclusively) through the regular implementation of laws, equipped for this purpose with state authority and financial and technical means” [Cieślak, Lipowicz, and Niewiadomski 2000, 54].

Therefore, the main goal of public administration is to carry out a public mission. All activities undertaken by public administration, including by publicly owned establishments, should serve the materialization of the constitutional principle of the common good.⁵ The common good clause has been widely discussed in the doctrine because of its vague and imprecise definition.⁶ The very idea of common good comes from Plato and Aristotle and was later developed by Thomas Aquinas and the Catholic social teaching [Sienkiewicz 2013, 85-87]. The principle of the common good is an overarching principle for all legal and factual acts performed by public administration [Woźniak 2017, 153].

The question of whether public administration establishments are in a position to run a business is difficult to answer in an abstract way and without addressing specific cases. Therefore, below, the author discusses available options based on the case of museum as a cultural institution.

⁵ In accordance with Art. 1 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 2009, No. 114, item 946), the Republic of Poland is the common good of all citizens.

⁶ For more on this subject, see Piechowiak 2012; Zdyb 2001, 190-205; Trzciniński 2005, 452-60; Stahl 2009, 47-60; Fundowicz 2010, 161-69.

Publicly owned establishments are permitted to conduct an economic activity but under certain conditions. The principle of “everything which is not forbidden is allowed” cannot be adopted indiscriminately in relation to the freedom of undertaking business activities by publicly owned establishments. Running a business should be sensitive to the specificity of such entities and to the mission of the entire administration, which is to seek to embody the principle of the common good.

First of all, it is important to decide whether general norms such as laws and other normative acts, including deeds of foundation, allow a specific establishment to engage in a for-profit activity. There are three situations that can occur in this case: 1) the deed of foundation prohibits economic activity; 2) the deed of foundation expressly permits economic activity; 3) the deed of foundation omits to cover this subject (it neither prohibits nor permits economic activity in an express manner).

Second of all, the provisions contained in the statutes of the institution are relevant. If the situation described in (2) and (3) above apply (the deed permits or fails to address the question of economic activity), it is the statutes that can regulate the conducting of economic activity, including its scale and methods.

The third condition for a publicly owned establishment to do business is prudent management of resources. The establishment cannot operate in such a way that its core public activity is overshadowed by profit-making. The core activity should remain a priority while the economic activity should be of an auxiliary nature that does not interfere with the overall mission. Any economic activity of a publicly owned establishment is therefore secondary and cannot be profit-oriented.

Fourth of all, the functional relationship is essential between the original services rendered by the establishment and its potential business activity. If the services provided as part of economic activities contribute to the quality of the core service, then such gainful initiatives are advisable.

4. Economic activity conducted by museums

Now, having a closer look at a cultural institution as an example, no doubt it is a publicly owned establishment [Fundowicz 2005, 263].

In accordance with Art. 2 of the Act of 25 October 1991 on the Organization and Undertaking of Cultural Activity,⁷ the organizational forms of cultural activity are, in particular: theatre, opera, operetta, philharmonic, orchestra, cinematography institutions, cinema, museum, library, culture centre, art centre, art gallery and research and records centres in various cultural domains. Within the ACA, cultural activity consists in the creation, dissemination and protection of culture (Art. 1). Pursuant to the ACA, this kind of activity is not economic activity within the meaning of separate laws (Art. 1).

The founding authority issues an act establishing a cultural institution. It sets its name, type, seat and area of activity as well as securing resources necessary to launch and maintain the cultural activity and to maintain the facility in which the activity is conducted [Fundowicz 2005, 263].

As a rule, it is the founding entity which is responsible for providing financial resources to cultural institutions (Art. 12 ACA). Ministers, heads of central administration bodies, as well as local government units are required to budget for the activities of cultural institutions that they establish. Often, however, the founders fail to satisfy the entire financial needs of cultural institutions, which is why their heads strive to exploit other sources of funding for their institutions, in line with the scope of activity regulated by the statutes [Gwardzińska 2019, 99].

Individual forms of activity of cultural institutions, such as museums or libraries, are governed by their respective specific laws and, if such laws prove insufficient, by the provisions of the ACA.

When analysing the problem of conducting business activity by museums, the Act of 21 November 1996 on Museums⁸ provides clarification of the concept of museum as a non-profit organizational unit whose objective is to collect and permanently protect the natural and cultural property of humanity, both material and non-material, promote the values and content of collections, disseminate the basic values of Polish and world history, science and culture, shape the cognitive and aesthetic sensitivity and enable access to and use of collections (Art. 1 AOM). As clearly follows from this pro-

⁷ Journal of Laws of 2020, item 194 [henceforth cited as: ACA].

⁸ Journal of Laws of 2019, item 917 as amended [henceforth cited as: AOM].

vision, the museum does not and cannot operate for conducting economic activity for profit.

The museum's task is to achieve the goals listed above by, in particular: 1) collecting historical monuments to the extent defined in the statutes; 2) cataloguing and scholarly description of collections; 3) storage of collected historical monuments in conditions ensuring proper state of preservation and safety, and their storage in a manner that makes them available for research purposes; 4) safeguarding and preserving collections and, as far as possible, safeguarding immovable archaeological monuments and other immovable material and natural structures of cultural value; 5) staging permanent and temporary exhibitions; 6) organizing research and study expeditions, including archaeological ones; 7) conducting educational activities; 7a) promoting and conducting artistic activity and one conducive to dissemination of culture; 8) making collections available for educational and research purposes; 9) ensuring appropriate conditions for visitors and for using collections and collected data and information; 10) conducting publishing activity (Art. 2 AOM). This list is open and only point to available options and opportunities of development.

In accordance with Art. 14, sect. 1 and 3 AOM (state and local government museums), museums, as cultural institutions, enjoy legal personality and can begin to operate upon entry in the Register of Cultural Institutions kept by the founding authority. The entry is made *ex officio*.

The museum's goal as a cultural institution is, in the first place, to create, disseminate and protect culture, i.e. to perform tasks imposed by the ACA. These activities are not essentially gainful but aim to execute the public mission. The mission of public administration covers, but is not limited to, the performance of public tasks, i.e. "state-controlled satisfaction of collective and individual needs of citizens resulting from people's coexistence in communities" [Fundowicz 2009, 158]. The museum should perform public tasks by conducting its statutory activity in the first place (non-profit making by its very nature), other than economic activity, yet, having met certain conditions, it is permitted to conduct economic activity.⁹

⁹ Judgement of the Voivodeship Administrative Court in Poznań of 23 May 2018, I SA/Po 285/18, LEX no. 2505621.

Referring to the conditions of conducting business activity discussed elsewhere, the AOM reads that museums may conduct, economic activity (as a secondary one) in order to finance the activity referred to in Art. 2 (Art. 9 AOM). Therefore, it seems like the law explicitly allows the conducting of business activity. It should be emphasized that, if pursued by the museum, business activity is optional and should fall under the rules laid down in separate regulations.

In the case of a museum, also the second of the conditions is also met. To conduct economic activity, a museum must specify how it is going to be conducted in its statutes or regulations, which is expressly provided for in the AOM. In particular, the museum statutes sets out the terms of conducting economic activity, referred to in Art. 9, if the museum intends to do so (Art. 6, sect. 2, point 7 AOM); on top of that, a museum without legal personality, including one operating within the structure of an organizational unit, is run based on the regulations imposed by the entity referred to in Art. 5, sect. 1 AOM. The provisions of sect. 1-4 apply accordingly to such regulations (Art. 6, sect. 6 AOM).

Museum's economic activity must be of an auxiliary nature to its core operations. It is therefore permitted to run a gift shop in a museum. Similarly, museums may be involved in publishing, as explicitly stated in the AOM. For example, the Warsaw Uprising Museum runs its own publishing house which issues books, CDs, albums, etc. Again, running a gift shop does not downplay or obstruct the museum's main activity, so this condition is also met. Another example of such initiatives may be the organization of thematic workshops, meetings with experts closely related to current exhibitions, scientific conferences and lectures, rental of premises, as long as it does not obstruct the performance of the museum's core tasks and is not only focused on profit-making but also on promoting the museum by encouraging visitors to tour permanent exhibitions. In addition, the museum personnel can be delegated to carry out conservation works for consideration [Gwardzińska 2019, 100].

The last condition to be met regarding the possibility of conducting economic activity is raising the quality of the core services. An example of such activities carried out in the museum can be, apart from the aforesaid gift shop, running a café or installing a vending machine with snacks or drinks.

The possibility of having coffee or a meal during a few hours' visiting of the museum significantly enhances the quality of the core services. A buffet offering lunches can be found, for example, in the Copernicus Science Centre in Warsaw.

An interesting fact linked to the ubiquitous computerization and digitization is the economic activity carried out by publicly owned establishments and collecting fees for the use of new technologies. So far, charging fees for virtual tours or for sharing digitized data as part of museum's economic activity have not been challenged because it is conducive to achieving the objectives listed in Art. 2, point 3 and 8 AOM. However, whether digitizing data on a selected exhibit at the request of an individual should not be considered a paid form of economic activity deserves some consideration. For this purpose, the museum would have to appoint an employee to perform such a service. In addition, another form of for-profit activity conducted by the museum and relying on the computerization of publicly owned establishments could be, for example, offering e-learning courses for museum guides.

Conclusion

In conclusion, it goes without saying that publicly owned establishments are allowed to conduct economic activity. However, this activity is subject to certain restrictions. The principle of "everything which is not forbidden is allowed" cannot be adopted indiscriminately in relation to the freedom of undertaking business activities by publicly owned establishments. A publicly owned establishment should meet several conditions in order to be able to conduct gainful activity in line with its original purpose and mission. First of all, its statutes and foundation deeds must allow it. The definition of economic activity points to its profit-making character. In publicly owned establishments, the profit-making side of economic activity cannot overshadow the core objectives of a public institution, i.e. provision of services for which the establishment was founded. Economic activity should also be conducive to the quality of the establishment's main services. The example of museums demonstrates that the activities undertaken by publicly owned establishments are not necessarily focused on profit-making but on executing the mission of public administration. By definition, museum is an organizational unit of non-profit making character whose objective is to collect and permanently

protect the natural and cultural property of humanity, both material and non-material, promote the values and content of collections, disseminate the basic values of Polish and world history, science and culture, shape the cognitive and aesthetic sensitivity and enable access to and use of collections. All economic activity carried out by the museum must be of auxiliary, not striving for profit but for the embodiment of the principle of the common good, which is a guiding principle for all legal and factual activities of public administration.

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Economic Activity Conducted by Publicly Owned Establishments. The Case of Museum

Summary

The article aims to answer the question of whether and when publicly owned establishments are allowed to conduct economic activity. The concepts of economic activity and publicly owned establishment are explained. The author points out that publicly owned establishments are not fully free to undertake business activity but must fulfil certain conditions to be able to do so. By discussing the case of museums, the author considers the options and forms of possible economic activity. It was emphasized that the economic activity carried out by a museum must be of an auxiliary nature and should not be focused on profit-making only but should, in the first place, help execute the mission of public administration.

Key words: publicly owned establishments, administrative establishments, economic activity, museum

Prowadzenie działalności gospodarczej przez zakłady publiczne na przykładzie muzeum

Streszczenie

Artykuł ma na celu odpowiedź na pytanie, czy i kiedy zakłady publiczne mogą prowadzić działalność gospodarczą. Wyjaśniono w nim pojęcie działalności gospodarczej oraz zakładu publicznego. Wskazano, że w odniesieniu do zakładów publicznych prowadzenie działalności gospodarczej nie jest dowolne, i wyliczono warunki, od których zależy prowadzenie takiej działalności. Na przykładzie muzeum wskazano w jakiej formie może być prowadzona działalność gospodarcza. Podkreślono, że działalność gospodarcza prowadzona przez muzeum musi być działalnością dodatkową, nienastawioną na osiągnięcie zysku, lecz na realizację misji administracji publicznej.

Słowa kluczowe: zakłady publiczne, zakłady administracyjne, działalność gospodarcza, muzeum

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