

WOULD AMENDMENTS FROM 2018 IN THE ACT ON PUBLIC-PRIVATE PARTNERSHIP AFFECT THE INCREASE OF THE SCOPE OF PERFORMANCE OF PUBLIC TASKS IN PUBLIC-PRIVATE PARTNERSHIP FORMULA IN POLAND?

Assistant professor **Wioleta BARANOWSKA-ZAJĄC**¹

Abstract

Public-private partnership is one of the forms of cooperation between public entities and non-public sector entities, undertaken on the basis of an agreement for the performance of public tasks. Such a cooperation is covered by a strictly defined legal framework, which guarantees on the one hand the achievement of public law objectives and makes a guarantee of the protection of public interest. On the other hand, however, such legal framework creates a barrier to the development of cooperation between public sector and private sector. The Polish Act of 28 July 2005 and another Act of 19 December 2008 concerning public-private partnership, proved to be ineffective for real and efficient implementation of public tasks in the analyzed formula. The provisions of the latter Act do not, however, lead to significant increase in the number of agreements concerning public-private partnership. Through the amendment of 5 July 2018 there were made in the Act of 2008 some significant changes, starting from definition of public-private partnership, introducing the obligation for public entity to assess the effectiveness of the implementation of undertaking under public-private partnership as compared to effectiveness of its otherwise, criteria for the selection of a partner, the possibility of concluding public-private partnership agreement with a subsidiary of private partner, control of partnership, up to the partnership in the form of company and the task of public administration body established as competent in partnership matters. The purpose of the study is to analyze the amendments in the Act of 2008 concerning public-private partnership and attempt to assess the impact of these amendments on the efficiency, effectiveness and speed of public administration tasks, as well as to examine if these amendments are able to lead to significant increase in the number of agreements on public-private partnership concluded by central administrative bodies, as well as local self-government units.

Keywords: public-private partnership, amendments in the act, efficiency, effectiveness, public tasks.

JEL Classification: H83, K23

1. Introduction

In the realities of modern public administration, including self-government administration, struggling with insufficient funds for the implementation of numerous public tasks, a possibility of the use public-private partnership formula as one of the forms of assignment the public tasks seem to be extremely important. Due to the fact that modern public administration is unable to efficiently and effectively perform all its tasks in the classical forms, also due to the increasing number of various tasks to be performed and the increasing costs of their implementation, it has been sought new legal solutions, which give rise to the transfer of some public tasks to private entities. One of aforementioned solution is public-private partnership, which is a form of cooperation between the public sector and the private sector in order to realize widely understood public tasks², undertaken on the basis of an agreement for the performance of public tasks. Such a cooperation is covered by a strictly defined legal framework, which guarantees on the one hand the achievement of public law objectives and makes a guarantee of the protection of public interest. On the other hand, however, such legal framework create a barrier to the development of cooperation between public sector and private sector³.

¹ Wioleta Baranowska-Zajac - Department of the Law of Local Self-Government, Faculty of Law and Administration, University of Szczecin, Poland, wioleta.baranowska-zajac@usz.edu.pl.

² K. Płonka-Bielanin, *Partnerstwo publiczno-prywatne jako forma współpracy między sektorem publicznym a sektorem prywatnym w zakresie realizacji zadań publicznych* [in:] B. Dolnicki (ed.), *Sposoby realizacji zadań publicznych*, Warsaw 2016, p. 580-581, see also A. Miruć, *Partnerstwo publiczno-prywatne jako sposób realizacji zadań publicznych* [in:] J. Zimmermann (ed.), *Koncepcja systemu prawa administracyjnego*, Warsaw 2007, p. 473, K. Bandarzewski, *Prywatyzacja zadań publicznych* [in:] J. Zimmermann (ed.), *Koncepcja systemu prawa administracyjnego*, Warsaw 2007, p. 341.

³ See W. Baranowska-Zajac, *Public-Private Partnership as Form of the Performance of Tasks of Local Government Units in the Light of Polish Law* [in:] *4th International Multidisciplinary Scientific Conference on Social Sciences & Arts SGEM 2017. Modern Science. Conference Proceedings. Vol. II. Political Sciences. Law*, Albena Co., Sofia 2017, p. 631 and p. 637.

Although in Poland, the initiatives of cooperation between public entities and private entities were already taken in the 1990s⁴, entrusting public tasks to be carried out to private partners was regulated for the first time by the Act of 28 July 2005 on public-private partnership⁵. The assumption of the Act was to create a clear legal basis for cooperation between public entities and private partners, and thus - by introducing its legal framework - to promote such cooperation. However, the Act contained a number of solutions that, instead of leading to the development of partnership, stopped that development. Such solutions included, in particular, the necessity for the public entity to carry out many very detailed analyzes before the choice of the private partner, equally extensive and complicated, regardless of the scope and the type of cooperation. It is significant that, on the basis of the provisions of the Act of 2005, no undertaking was implemented in the formula of public-private partnership⁶. In connection with this, it was undertaken a work to amend the regulation of public-private partnership, which led to the adoption of a new act in this area – the Act of 19 December 2008 on public-private partnership⁷. The provisions of the latter Act do not however lead to significant increase in the number of agreements concerning public-private partnership. Despite significant changes compared to the solutions of the Act of 2005, the Act of 2008 proved to be ineffective for real and efficient implementation of public tasks in the analyzed formula.

Through the amendment of 5 July 2018 there were made in the Act of 2008 some significant changes, starting from definition of public-private partnership, introducing the obligation for public entity to assess the effectiveness of the implementation of undertaking under public-private partnership as compared to effectiveness of its otherwise, criteria for the selection of a partner, the possibility of concluding public-private partnership agreement with a subsidiary of private partner, control of partnership, up to the partnership in the form of company and the task of public administration body established as competent in partnership matters.

Taking the above into account the scientific purpose of the research is to analyze the amendments from 2018 in the Act of 2008 on public-private partnership and attempt to assess the impact of these amendments on the efficiency, effectiveness and speed of public administration tasks, as well as to examine if these amendments are able to lead to significant increase in the number of agreements on public-private partnership concluded by central administrative bodies, as well as local government units. The subject of the conducted analysis was therefore only the recently made amendments to the Act on public-private partnership, not all arrangements regarding the functioning of public-private partnership in Poland.

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. Such a research method allows to carry out a thorough analysis of the content of the amended legal provisions. That scientific method has been supplemented by the use of the systemic interpretation and the functional interpretation.

As well as the results of the study is concerned, it should be stated that for the purpose of the study there were investigated two main issues. First of all, there were analysed the amendments from 2018 introduced in the Act of 2008 on public-private partnership. According to the second purpose of the research, through the analysis of the abovementioned amended legal provisions, it has been made an attempt to evaluate the impact of these amendments on the efficiency, effectiveness and speed of public administration tasks, as well as to examine if these amendments are able to lead to significant increase in the number of agreements on public-private partnership concluded by central administrative bodies, as well as local self-government units in Poland.

⁴ T. Skoczyński, *Ustawa o partnerstwie publiczno-prywatnym. Komentarz*, Warsaw 2011, Wolters Kluwer Lex/el.

⁵ Journal of Laws of 2005 No 169, item 1420, as amended.

⁶ T. Skoczyński, *Ustawa o partnerstwie...*, Lex/el. 2011, M. Kulesza, M. Bitner, A. Kozłowska, *Ustawa o partnerstwie publiczno-prywatnym. Komentarz*, Warsaw 2006, p. 10, M. Gados, *Zarys problemów w realizacji umów zawieranych w ramach partnerstwa publiczno-prywatnego* [in:] T. Branecki, A. Erchemla (ed.), *Wybrane problemy współczesnej administracji*, Sandomierz 2018, p. 168-169, see also W. Gonet, *Komentarz do ustawy o partnerstwie publiczno-prywatnym. Wzory umów i pism*, Warsaw 2009, p. 11.

⁷ Consolidated text: Journal of Laws of 2017, item 1834, as amended, hereinafter as: the Act of 2008 or the Act on public-private partnership.

2. The use of public-private partnership in Poland before the amendment from July 5, 2018 of the Act on public-private partnership and the identification of related problems

The adoption of the Act of 2008 did not bring in Poland the real effects in the form of a significant increase in the number of public-private partnership agreements. In 2016, public entities announced over 460 procedures for the selection of a private partner or concessionaire⁸, however, only about 110 agreements on public-private partnerships were concluded, while even fewer projects after the signing of the agreement obtained funding for its implementation. Most often, projects in the mode of public-private partnership are carried out by local self-government units, including municipalities. At the government level, only one agreement on public-private partnership is currently being implemented⁹. This demonstrates the real inefficiency and lack of effectiveness of the provisions regarding the public-private partnership in Poland, even in their revised formula from 2008.

In connection with the above, on 26 July 2017, the Government Policy in the Scope of Public-Private Partnership Development was adopted¹⁰. The document details the barriers to public-private partnership market, which include the lack of a clear institutional structure and coordinated public-private partnership development policy, the lack of optimal legal solutions, a small number of large projects, lack of investment plans for public-private partnerships, no standardization of legal models regarding partnership and concessions, i.e. ready to use template documentation, a gap in the dissemination and search for good practices regarding projects under the partnership. It also indicates low level of knowledge about public-private partnership, difficulties in preparing projects under the partnership or their unreliable preparation, lack of dedicated project teams and experience in project implementation on the public side, problem with project financing¹¹. At the same time, the shape of public-private partnership market in Poland is determined by the dominant share in these projects of local self-government units, which, due to their financial and budgetary constraints, carry out projects of low value¹².

As part of that document, there were also identified the activities necessary to ensure proper development and use of public-private partnership in Poland, most of which were identified as necessary to be completed within two years – at least by the end of 2020. These activities included proposing the necessary legal amendments for the development of the partnership, in particular to eliminate inconsistencies, implement improvements and reduce the risk of legal uncertainty, and to monitor the list of projected investment of public-private partnership and the existing projects database, introduce educational and information activities to disseminate knowledge about public-private partnership, development and dissemination of guidelines, recommendations and good practices for public-private partnership projects, providing an increased scope of consultancy for projects planned in this formula. It also indicates the implementation of a system of warranties and guarantees for the public and private sectors and other financial instruments reducing the costs of preparation and implementation of projects under the partnership¹³. As a result of the implementation of the measures, there were assumed an increase in the number of investments under public-private partnership through the conclusion of a hundred new partnership agreements, increase in the value of signed public-private partnership agreements in investment expenditure in the national economy in the public sector up to 5%, increase in the number of proceedings initiated by the government sector

⁸ Under the Act of 9 January 2009 on a concession for construction works or services, consolidated text: Journal of Laws of 2016, item 113, binding at that time, currently replaced by the Act of 21 October 2016 on the agreement on concession for construction works or services, Journal of Laws of 2016, item 1920, as amended, hereinafter as: the Act on the agreement on concession for construction works or services.

⁹ M. Gados, *Zarys problemów w realizacji umów...*, p. 175-176.

¹⁰ Government Policy in the scope of Public-Private Partnership Development, Annex to Resolution No. 116/2017 of the Council of Ministers of 26 July 2017, RM-111-83-17.

¹¹ Government Policy in the Scope of Public-Private Partnership..., p. 6-9.

¹² M. Gados, *Zarys problemów w realizacji umów...*, p. 177-178.

¹³ Government Policy in the Scope of Public-Private Partnership..., p. 17-19.

to select a private partner and increase in the number of agreements signed on public-private partnership in relation to the number of private partner selection announcements up to 40%¹⁴.

The reflections of the planned changes aimed at increasing the use of public-private partnership as a formula for the implementation of public tasks both at the level of local self-government and at central, governmental level there are profound and significant amendments in the Act on public-private partnership, introduced by the Act of 5 July 2018 concerning amending the act on public-private partnership and some other acts¹⁵, which entered into force on 19 September 2018.

3. Amendments to the Act of 2008 on public-private partnership made by the Act of 5 July 2018

Through the amendment of 5 July 2018 there were made in the Act of 2008 many significant changes, which in the assumption of its creators are to lead to an increase in the use of public-private partnership in Poland and an increase in the number of public undertakings implemented in this formula. They concern the definition of public-private partnership, introducing the obligation for public entity to assess the effectiveness of the implementation of undertaking under public-private partnership as compared to effectiveness of its otherwise, criteria for the selection of a partner, the possibility of concluding public-private partnership agreement with a subsidiary of private partner, control of partnership, the partnership in the form of company and the task of public administration body established as competent in partnership matters.

4. The definition of public-private partnership

On the basis of the amendment to the Act on public-private partnership, the definition of partnership was changed first. Currently, pursuant to Article 1 Paragraph 2 of the Act of 2008, public-private partnership consists in the joint implementation of a project based on the division of tasks and risks between a public entity and a private partner. In the previous version of the Act, it was pointed out that the joint implementation of the project based on the division of tasks and risks between the public entity and the private partner is the subject of public-private partnership. In the present wording the definition better reflects the intention of the legislator. Already under the rule of the analyzed provision before its amendment it was pointed out in the literature that the definition of public-private partnership resulting from the Act consists of three elements. Firstly, the definition sets the subjective scope of the public-private partnership by indicating that the entities involved in them are on the one hand a public entity, and on the other a private partner. The second element of the definition is to emphasize that the parties' cooperation is based on the joint implementation of the project based on the division of tasks. Finally, the third element is the indication that the characteristic feature of public-private partnerships is the division of risks between the public entity and the private partner¹⁶. The last two of the indicated elements determine the subjective scope of public-private partnership. The new definition is therefore more precise, as it does not focus on specifying only the subjective scope of the partnership in question, as it was before its amendment, but points to both the objective and subjective scope of the partnership.

The analyzed amendment does not seem to have a significant impact on the effectiveness of using public-private partnership institutions in practice, but it proves greater precision of the legislator, which aims to increase the scope of legal certainty in this area. Therefore it deserves to approve.

¹⁴ Government Policy in the Scope of Public-Private Partnership..., p. 20.

¹⁵ Journal of Laws of 2018, item 1693.

¹⁶ T. Skoczyński, *Ustawa o partnerstwie...*, Lex/el. 2011.

5. The obligation for public entity to assess the effectiveness of the implementation of undertaking under public-private partnership as compared to effectiveness of its otherwise

In the way of the amendment of 2018, a new chapter 1a entitled 'Evaluation of effectiveness of the implementation of the project' was introduced to the Act on public-private partnership. Within its framework, two new institutions related to the assessment of the effectiveness of the project implementation in the form of public-private partnership were established. These include the obligatory assessment of the effectiveness of implementation of the project within the public-private partnership by a public entity and the optional application by the public entity to the minister competent for regional development with the request for an opinion on the legitimacy of implementation of the project under public-private partnership.

According to Article 3a Paragraph 1 of the Act on public-private partnership, prior to the initiation of proceedings regarding the selection of a private partner, the public entity prepares an assessment of the effectiveness of implementation of the project under public-private partnership compared to the effectiveness of its implementation in a different way, in particular using only public funds.

Therefore, the public entity has been obliged by the legislator to carry out, in case of the planned implementation of the project using the partnership, an assessment of the effectiveness of the project in this formula, by comparing it to the effectiveness of the project in a different way, i.e. without using the partnership, in particular by using solely public funds to its implementation. This assessment should therefore be made before the public entity takes a final decision regarding the manner of the project implementation, at the stage of planning the project implementation and considering ways of its implementation, taking into account the public-private partnership as one of such methods. Therefore, the public entity implementing the project was obliged to analyze at the stage of planning the implementation of the public task to determine whether public-private partnership formula would be an optimal, most effective way to implement the project in a given case, or maybe other ways of performing the task prove more effective.

It arises the question whether the obligation imposed on a public entity before making a decision on the use of public-private partnership formula does not constitute a kind of return to the casuistic obligations of the public entity to carry out numerous analyzes that resulted from the Act of 2005 and inhibited the development and use of public-private partnership. It seems that in the light of the current solution such a threat does not occur, and the obligation introduced is aimed at analyzing the effectiveness, which will determine whether reaching in a given situation for the partnership formula will be justified at all, and thus, if it proves unreasonable, threatening lack of efficiency, it will allow the public entity to save further work on the preparation of the project within the partnership, and potential private partners – the work on preparation for participation in the proceedings and subsequent implementation of the project. The legislator did not impose a rigid, absolute framework of compulsory assessment, but allowed to maintain its flexibility depending on the specific project planned. It is not specified in the Act which specific factors should be assessed. Contrary, the legislator established an open catalog, indicating that in the course of the assessment of the effectiveness of the project implementation in public-private partnership formula, the public entity should take into account in particular the assumed division of tasks and risks between the public entity and the private partner, estimated life cycle cost and time necessary to its implementation, as well as the amount of fees charged to users, if such fees are planned, and the conditions for changing them¹⁷. When making the assessment, the public entity is not therefore absolutely obliged to take into account its elements indicated in the Act and may take into account any other elements of the assessment, depending on the characteristics and specificity of the project planned for implementation. The obligation to make the assessment has been formulated in a concise and synthetic manner, so as not to impose a rigid framework of elements of the mandatory analysis of the public entity, which allows the public entity to maintain the flexibility of the assessment taking into account the specific project planned for implementation. This analysis will therefore have the affect on reducing the risk of a

¹⁷ Article 3a Paragraph 2 of the Act of 2008.

project failure under public-private partnership with regard to the private partner joining it, and then the actual implementation of the concluded agreement on public-private partnership by its parties.

In addition to the obligatory assessment of the effectiveness of the project implementation, the amendment also introduced the so-called certification performed by the central public administration body - the minister competent for regional development. According to Article 3b of the Act of 2008, the public entity may apply to the minister competent for regional development with a request for an opinion concerning the legitimacy of the implementation of the project under public-private partnership. In such a situation, the assessment of the effectiveness of the project implementation carried out by the public entity itself is a compulsory element of the application addressed to the minister¹⁸. As a result of the submitted application, the minister is obliged to appraise the submitted documentation with regard to the correctness and completeness of the analyzes carried out prior to the project, the legal and organizational model adopted, the private partner remuneration mechanisms, including the fees charged to users, if such fees were planned, and the conditions for their changes, and the proposed risk sharing in the venture. The opinion should be expressed by the minister within 60 days from the date of receipt of the complete application of public entity. In the course of proceedings conducted in this subject, the minister may also ask the public entity to correct, clarify or supplement the application by setting an appropriate deadline for this purpose¹⁹.

The optional institution introduced into the Act to ask for the minister's opinion on the legitimacy of using the public-private partnership formula for the intended project may significantly contribute to the improvement of the quality of undertakings developed in this formula. The minister's opinion that is possible to express is an external, objective assessment of the correctness of analyzes made previously by a public entity planning to use the public-private partnership formula, including a possible assessment of the risk sharing within the planned project and the private partner remuneration mechanism. Such an opinion may significantly influence the indication of project deficiencies or its weaknesses. One should only hope that due to its non-obligatory character, the public entities planning to implement projects in the partnership formula will use this institution and apply to the minister for such an opinion.

It should also be noted that the opinion issued by the minister under the Act has been subject to confidentiality. According to Article 3b Paragraph 5 of the Act, the opinion shall not be disclosed to third parties until the conclusion of a public-private partnership agreement, concession agreement for construction works or services or a public procurement agreement or the termination of the proceedings regarding the investment being the subject of opinion in another way. If, however, despite the opinion, no proceedings were initiated regarding the selection of a private partner, the opinion can not be disclosed earlier than two years after the date of its issue. In addition, the minister competent for regional development can not disclose information obtained in connection with the issuing of an opinion, if it would threaten to reveal the company's secret and other secrets protected by law²⁰. Therefore, due to the obligation of maintaining confidentiality of the content of the opinion, it has only an internal character in relation to a specific proceeding with the intention to use public-private partnership, planned by a specific public entity. In connection to the above, it could not be used in other proceedings by other entities.

6. Criteria for the selection of a partner

Regarding the manner and criteria for the selection of a private partner applied by the public entity, the amending Act of 5 July 2018 abolished the choice of a private partner based on the provisions of the Act on the agreement on concession for construction works or services or on the basis of the Public Procurement Act²¹. In the light of the current wording of Article 4 of the Act of 2008, the choice of a private partner and public-private partnership agreement in the field not

¹⁸ Article 3b Paragraph 2 of the Act of 2008.

¹⁹ Article 3b Paragraph 3 and Paragraph 4 of the Act of 2008.

²⁰ Article 3b Paragraph 6 of the Act of 2008.

²¹ Act of 29 January 2004 Public Procurement Act, consolidated text: Journal of Laws of 2018, item 1986, as amended, hereinafter as: Public Procurement Act.

regulated by this Act shall be governed by the provisions of the Public Procurement law. It has been prejudged clearly and without doubt that in each case the choice of a partner and conclusion of a public-private partnership agreement should apply the provisions on public procurement. Only in the situation referred to in Article 3 of the Act on the agreement on concession for construction works or services, i.e. if the private partner's remuneration is to be only the right to operate a construction object being the subject of the agreement or to perform services being the subject of the agreement or such right together with payment, to choose a partner and to the partnership agreement it shall apply the provisions of the Act on the agreement on concession for construction works or services or the provisions of Public Procurement Act²². Therefore, in such a situation, it is still possible to select a private partner based on the public procurement regulations or on the basis of the provisions on the agreement on concession. In this case, the legislator has left the choice to the public entity, which helps to ensure greater flexibility with regard to the procedures for selecting a private partner and entering into a partnership agreement. However, he did not prejudge the exclusion of the application of public procurement provisions. They could be used if the public entity realizing the project make a decision in this regard.

As part of the initiation of private partner selection procedure, a further obligation by public entity to disseminate information that the proceedings are to be aimed at concluding an agreement on public-private partnership is guaranteed – in addition to the requirement under Article 5 of the Act of 2008, functioning before the amendment, according to which a public entity after posting in the Public Information Bulletin or publication in the Official Journal of the European Union an announcement related to the selection of a private partner should additionally include in the Public Information Bulletin an information on planned public-private partnership - now, after the amendment, in the announcement initiating the procedure for the selection of a private partner a public entity should provide information that the proceedings aim at concluding the agreement on public-private partnership²³. This solution serves the wider dissemination of the partnership proceedings initiated by the public entity and the selection of a private partner, making possible to receive more private partners' offers, thus ensuring greater competitiveness for them on the one hand, and, on the other, creates a wider opportunity to select a private partner and terminate the proceedings by concluding the agreement on public-private partnership. This may contribute to the greater number of agreements concluded, and thus also to increase the scope of performing public tasks in the form of public-private partnership.

As a result of the amendment, the possible criteria for selection of the most advantageous offer from among the offers submitted by potential private partners were also changed. According to the current wording of Article 6 Paragraph 1 of the Act of 2008, the most advantageous offer is the one that presents the best balance of remuneration for a private partner or a company created for a partnership or the cost of a project borne by a public entity and other criteria related to the undertaking. Therefore, on the basis of the amendment, the offer of the private partner considered the most advantageous does not have to be relegated to the balance of private partner's remuneration and other project criteria, but may depend on the cost of the project borne by the public entity and other project-related criteria, regardless of the amount of remuneration of private partner. Such a solution creates more flexibility as regards the selection of the most advantageous offer by the public entity, because the amount of costs incurred in connection with the project by the public entity is not determined solely by private partner's remuneration, but it may also be various other costs incurred by the public entity. Such shaping of the criteria for the selection of the most advantageous offer will also make possible to choose it in a more rational and even more economical way. It may happen that even higher remuneration of private partner will not determine the high costs of the undertaking, if other elements related to the implementation of the project prove to be less expensive or in exchange for a higher remuneration, the private partner will offer a wider range of activities carried out under the project, therefore, expenses for its implementation will be saved by a public entity.

²² Article 4 Paragraph 2 of the Act of 2008.

²³ Article 5 Paragraph 2 of the Act of 2008.

The amended provisions regarding the criteria for the evaluation of offers have departed from a rigid catalog of offer evaluation criteria which, in the wording of Article 6 Paragraph 2 of the Act before the amendment, there were absolutely a division of tasks and risks related to the undertaking between the public entity and the private partner²⁴ and the dates and amounts of expected payments or other benefits of a public entity, if that were planned. On the basis of the amendment introduced in this area, the two indicated criteria were included only as examples (through the use of the phrase "in particular"), which was made by adding these criteria to the existing catalog, which in turn includes the distribution of project income between the public entity and a private partner, including income in the form of a share in the profit of the company created under the partnership, the ratio of the public entity's own contribution to the private partner's contribution, the effectiveness of the project implementation, including the effectiveness of use of assets, criteria relating directly to the subject of the project, in particular the quality, functionality, technical parameters, the level of technology offered, maintenance cost, service²⁵. Moving away from the rigid catalog of obligatory criteria for the evaluation of offers to the solely sample catalog should be assessed as an important step towards liberalization of the selection of a private partner by a public entity, which will significantly facilitate the conduct of private partner selection procedures, and thus contribute to streamlining and making the whole procedure more flexible, which, in turn, has the potential to influence the scope of implementation of public undertakings with the use of public-private partnership formula. Until now, in a situation where it was not possible to apply the criteria for the assessment of offers indicated in the Act, the public entity could not select a private partner, which led to the necessity to make the proceedings void. Currently, the public entity can independently determine the criteria for the evaluation of offers, using only alternatively the criteria specified in the Act.

7. The possibility of concluding public-private partnership agreement with a subsidiary of private partner

The new solution introduced to the Act of 2008 on the basis of its amendment of 2018 is regulated in Article 7a the possibility of concluding a public-private partnership agreement with a subsidiary of private partner. This solution is the second, apart from the possibility of establishing a company by a public entity and a private partner, pillar of the so-called institutionalized partnership²⁶. Until the amendment of the Act, such a solution was not applied due to the lack of a clear legal basis for its application. On the side of private partners, there were real, "business", rationalizing the operation of the partners needs of this form of operation within the partnership, which resulted in discouraging these partners from participating in proceedings in order to select a private partner. The current solution changes this state of affairs by providing that the public entity may consent to the conclusion and performance of a public-private partnership agreement with an one-man company of the private partner or the capital company whose sole partners are private partners, associated after the choice of the best offer for the purpose of implementing the undertaking. Upon the conclusion of the partnership agreement, the provisions on public-private partnership shall apply to such a company²⁷.

The analyzed solution is the second, apart from establishing a company by a public entity and a private partner in order to perform a public-private partnership agreement, possibility of implementing the project by a particular company set up for this purpose. In this situation, however, it is a company in which the public entity does not participate, but a purely private company - an one-man company of the private partner or the capital company whose sole partners are private partners.

²⁴ See W. Baranowska-Zajęc, *Rola partnerstwa publiczno-prywatnego w kształtowaniu bezpieczeństwa ekonomicznego w jednostkach samorządu terytorialnego* [in:] L. Bielecki, J. Mojak, A. Żywicka (ed.), *Bezpieczeństwo gospodarcze i finansowe Polski. Wymiar publicznoprawny oraz prywatnoprawny*, Lublin 2018, p. 184.

²⁵ See Article 6 Paragraph 3 of the Act of 2008.

²⁶ See R. Zyśko, *Partnerstwo publiczno-prywatne jako forma realizacji inwestycji przez jednostki samorządu terytorialnego*, *Zeszyty Naukowe Wyższej Szkoły Ekonomii i Innowacji*, seria *Ekonomia* 5(2/2012), p. 141.

²⁷ Article 7a Paragraph 1 of the Act of 2008.

The introduction of such a solution creates new opportunities for the implementation of projects under public-private partnership, and therefore undoubtedly serves to increase the scope of implementation of public tasks in this formula.

The legislator has regulated the detailed conditions for applying such a solution. According to Article 7a paragraph 2 of the Act of 2008, the conditions under which a public entity agrees to perform a partnership agreement on the part of a private partner in the form of a company in question should be defined by the public entity in the first document that will be entered available in the proceedings for the conclusion of public-private partnership agreement, in particular in the description of the needs and requirements of the contracting authority, the specification of the essential terms of the order, the documents of the concession or other documentation of the procedure for the selection of the private partner. If, however, the public entity does not provide the solution analyzed in a given proceeding, i.e. it does not allow the public-private partnership agreement to be executed by a one-man company of the private partner or the capital company whose sole partners are private partners, it should provide explicit information about such disagreement²⁸. Considering joining such a procedure and implementing the partnership agreement in the analyzed formula, the private partner will be aware of the conditions it should meet in the course of establishing the company or the fact that such a solution is not permitted by a public entity in a given situation. The lack of consent for such a solution should be clearly articulated by the public entity. Therefore, if it does not explicitly indicate the lack of such consent, it should be assumed that the application of such a solution is acceptable.

A consequence of transferring the implementation of public-private partnership agreement to the entity separate from the private partner being a party to the agreement, which is such company, is joint and several liability of the private partner and the company for damage caused to the public entity due to failure to provide the company with resources that the private partner indicated in the offer, unless the partner is not blamed for failing to provide them. Such a solution seems to be a logical consequence of concluding the agreement with another entity than the entity that actually executes it. The latter should, in order to implement it, have appropriate resources that must be obtained from a separate entity, which is a private partner. Joint and several liability based on guilt serves to minimum security of the the interests of a public entity and implement a public undertaking in the form of a public-private partnership.

8. Control of partnership

The amendment of 2018 extended the regulation of public-private partnership control exercised by a public entity. In the light of the current wording of Article 8 of the Act of 2008, the public entity is entitled not only to the ongoing control of the implementation of the project by the private partner, but also to control the property component used by the private partner to implement the project. If, as a result of control, it is shown that the asset in question is in a technical condition indicating its improper use, the public entity will be obliged to call the private partner to take appropriate measures, in particular to make expenditures to bring the asset to the appropriate technical condition. The results of failure to take actions to bring the asset to the appropriate technical condition should be specified in the agreement on public-private partnership. In any situation of improper use of the asset by the private partner, the public entity will be required to ask the private partner to take measures to ensure the proper condition of the asset, and the indication of the results of such a private partner activity is an obligatory element of the partnership agreement. In addition, in Article 8 Paragraph 3 the additional obligations were imposed on private partners on the current public reporting on the state of the project implementation and the technical condition of the asset used by the private partner for the implementation of the project, the rules and procedure of which should be specified in the agreement on public-private partnership.

²⁸ See Article 7a Paragraph 2 and Paragraph 3 of the Act of 2008.

9. The partnership in the form of company

Significant changes have been made to the public-private partnership implemented in the form of a company established by a public entity and a private partner to implement a public-private partnership agreement. First of all, after the amendment, the public entity and the private partner based on the provisions of the partnership agreement will be able to establish only a capital company, i. e. a limited liability company or a joint-stock company²⁹. Therefore, the possibility of using personal partnerships - a limited partnership and a limited joint-stock partnership - was excluded.

Secondly, in accordance with the provisions of the amendment, the company may be established for a definite period, necessary to perform a public-private partnership agreement and to terminate its affairs³⁰. At the same time, however, the specified duration of the company may be extended for an indefinite period only in cases specified by the legislator. Such a construction can be implemented in a situation in which the private partner will no longer be included in the group of shareholders due to the fact that during the time of the company established for a definite period, the private partner sold shares in the company to a public entity or they were canceled³¹. Basically, therefore, the company will be created for a definite period and only as it will be necessary for the performance of the agreement on public-private partnership, and the extension for an indefinite period will only apply to the situation where the private partner no longer owns shares in the company, they belong exclusively to the public entity.

When evaluating the analyzed changes, it should be agreed with the position of the legislator expressed in the justification of the amendment, namely that the liability of partners in the capital companies is better suited to the complex relationships that often occur in multi-level public-private partnership projects, thus eliminating the possibility of using personal partnerships is the right solution. In addition, both the limited partnership and the limited joint-stock partnership were not used in practice in this area³².

Thirdly, the legislator predicted that the public-private partnership agreement could be carried out through an already existing public company by purchasing shares in such a company by the private partner³³. In practice, this means the possibility of joining a private partner to an existing municipal company³⁴. The introduced solution extends the catalog of possibilities of cooperation between the public and private parties within the organizational structure of public-private partnership projects. It could also be an important negotiating point between potential partners in the procedure of selecting a private partner. Lack of establishing such a possibility under the current legal status could have influenced the increased costs of project implementation in the public-private partnership formula through the need to appoint a new company each time, as well as impede the use of existing municipal companies in the area of cooperation between the public sector and the private sector. On the basis of this solution under the new legal status such cooperation may facilitate the continuity of municipal companies and ensure protection of the public interest. However, it arises a question about the scope of accepting such a solution on the side of potential private partners.

10. The task of public administration body established as competent in partnership matters

The amendment to the Act on public-private partnership has also established a public administration body competent in matters of public-private partnership, which is the minister competent for regional development, at the same time imposing a number of tasks on this body. To these tasks, in accordance with Article 16a Paragraph 2 of the Act of 2008, belong to carry out certification in relation to the partnership, thus issuing opinions on the legitimacy of the

²⁹ See Article 14 Paragraph 1 of the Act of 2008.

³⁰ Article 14a Paragraph 1 of the Act of 2008.

³¹ Article 14a Paragraph 2 of the Act of 2008.

³² See J. Kot, T. Korczyński, *Nowelizacja ustawy o partnerstwie publiczno-prywatnym*, Rzeczpospolita of 11 September 2018.

³³ Article 14 Paragraph 1a of the Act of 2008.

³⁴ J. Kot, T. Korczyński, *Nowelizacja ustawy o partnerstwie...*

implementation of the project under public-private partnership, dissemination and promotion of good public-private partnership practices, preparation and dissemination of templates of agreements for partnership, guidelines and other documents used in the planning and implementation of public-private partnership, maintaining a database of public-private partnerships, substantive support for public entities implementing projects, analyzes and assessments of the functioning of public-private partnerships, including the state and financial perspectives of private sector involvement.

At the same time, public entities were given an extensive information obligation necessary to implement to the minister, including information on each stage of the public-private partnership proceeding - from its initiation, through the conclusion of the agreement together with detailed data on it, changes made to the agreement up to the fact of the establishment of a one-man company of private partner or a company of private partners or a company with the participation of a public entity and a private partner³⁵. At the same time, the public entity should provide the required information within 30 days of the occurrence of the event to which the information pertains³⁶, and on basis of them, the minister publishes information in the database of public-private partnerships available on the website maintained by the office servicing this minister³⁷. The introduced changes implement the postulates of the necessity of institutional support from the state authorities to improve the use of public-private partnerships by public entities, including, in particular, local self-government entities.

Establishment of a central government administration body competent in matters of public-private partnership is an expression of a more comprehensive, systemic approach to public-private partnership. The creation of the project database is an expression of introducing elements of good practice into public-private partnership, which can significantly facilitate private parties making decisions related to joining planned undertakings in this formula, and thus its wide use to carry out public tasks.

11. Conclusions

By amending the Act on public-private partnership, the Polish legislator aimed to improve the legal environment in the implementation of projects under public-private partnership, which would entail increasing the number and efficiency of project implementation in the formula of public-private partnership in Poland³⁸. Taking into consideration the small interest in performing public tasks in this formula and the low effectiveness of measures taken so far in this area, this goal should be considered extremely important.

The changes introduced in the course of the amendment reflect a more business-oriented, economic approach to the implementation of public tasks in the formula of public-private partnership, encouraging private entities to participate in proceedings aimed at implementing public undertakings in the form in question, to conclude and execute agreements on public-private partnership. Significant flexibility of public-private partnership procedures and increasing the legal security of entities taking part in it has the potential to increase interest in participating in the performance of public tasks in this formula, both on the part of private partners and public entities.

As a result of the amendments the instruments for the creation of the state's policy and its bodies with regard to public-private partnership were also passed, which seems necessary for its development. On the basis of this change in approach, the state authorities will show interest in the implementation of projects under public-private partnership, preparation and implementation of projects will not be left only to the partners themselves, state authorities will monitor the whole phenomenon and thus bear responsibility for the complex legal, economic and business phenomenon, which is public-private partnership. In particular, in this area, the possibility of asking the public entity to obtain from the minister competent for regional development an opinion on the merits of implementing the undertaking in the form of public-private partnership deserves a positive evaluation.

³⁵ Article 16b Paragraph 1 of the Act of 2008.

³⁶ Article 16b Paragraph 2 of the Act of 2008.

³⁷ Article 16b Paragraph 4 of the Act of 2008.

³⁸ Justification to the government bill amending the act on public-private partnership and some other acts, The Parliament of the Republic of Poland Print No. 2333.

This institution may become a catalyst for the process of popularizing the model of public-private partnership in Poland, especially in centers where awareness of the value of public-private cooperation is smaller, including in small municipalities as local self-government units. At the same time, project certification has the potential to translate into an increase in the quality of planned projects under the partnership, which will certainly increase their success, and their appropriate structuring at such an early stage may trigger the desired effect also from the point of view of potential private partners - a thoroughly prepared pre-implementation analysis may translate into higher quality and shortening the negotiation phase of the private partner selection procedure.

Although it will probably be necessary to wait a few years for the real effects of the introduced amendments in the form of a real increase in the scope of public undertakings prepared and implemented under the public-private partnership formula, it could be now made an assessment that the changes can have a chance to improve the use of public-private partnership for the implementation of public tasks in Poland, and thus to increase the scope of performing public tasks in this important formula. The introduced amendments, with the skillful and effective use of the institutions resulting from them, both on the part of public entities and private partners, have the potential to increase the use of public-private partnerships in Poland.

Bibliography

1. Bandarzewski K., *Prywatyzacja zadań publicznych* [in:] Zimmermann J. (ed.), *Koncepcja systemu prawa administracyjnego*, Warsaw 2007.
2. Baranowska-Zajac W., *Rola partnerstwa publiczno- prywatnego w kształtowaniu bezpieczeństwa ekonomicznego w jednostkach samorządu terytorialnego* [in:] Bielecki L., Mojak J., Żywicka A. (ed.), *Bezpieczeństwo gospodarcze i finansowe Polski. Wymiar publicznoprawny oraz prywatnoprawny*, Lublin 2018.
3. Baranowska-Zajac W., *Public-Private Partnership as Form of the Performance of Tasks of Local Government Units in the Light of Polish Law* [in:] *4th International Multidisciplinary Scientific Conference on Social Sciences & Arts SGEM 2017. Modern Science. Conference Proceedings. Vol. II. Political Sciences. Law*, Albena Co., Sofia 2017.
4. Gados M., *Zarys problemów w realizacji umów zawieranych w ramach partnerstwa publiczno- prywatnego* [in:] Branecki T., Erchemla A. (ed.), *Wybrane problemy współczesnej administracji*, Sandomierz 2018.
5. Gonet W., *Komentarz do ustawy o partnerstwie publiczno- prywatnym. Wzory umów i pism*, Warsaw 2009.
6. Kot J., Korczyński T., *Nowelizacja ustawy o partnerstwie publiczno- prywatnym*, Rzeczpospolita of 11 September 2018.
7. Kulesza M., Bitner M., Kozłowska A., *Ustawa o partnerstwie publiczno- prywatnym. Komentarz*, Warsaw 2006.
8. Miruć A., *Partnerstwo publiczno- prywatne jako sposób realizacji zadań publicznych* [in:] Zimmermann J. (ed.), *Koncepcja systemu prawa administracyjnego*, Warsaw 2007.
9. Płonka-Bielanin K., *Partnerstwo publiczno- prywatne jako forma współpracy między sektorem publicznym a sektorem prywatnym w zakresie realizacji zadań publicznych* [in:] Dolnicki B. (ed.), *Sposoby realizacji zadań publicznych*, Warsaw 2016.
10. Skoczyński T., *Ustawa o partnerstwie publiczno- prywatnym. Komentarz*, Warsaw 2011.
11. Zyśko R., *Partnerstwo publiczno- prywatne jako forma realizacji inwestycji przez jednostki samorządu terytorialnego*, *Zeszyty Naukowe Wyższej Szkoły Ekonomii i Innowacji*, seria *Ekonomia* 5(2/2012).