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The Polish Financial Supervision Authority in the Polish administrative system

Abstract

Financial market supervision is exercised by the Polish Financial Supervision Authority (PFSA). It is a central public administration authority, but not a government administration authority. Since 1 January 2019, it has become a body of a state legal entity – the Office of the Polish Financial Supervision Authority (UKNF). A number of systemic changes concerning the shape of financial market supervision were introduced based on limited objectives without a broader analysis of the systemic consequences of these changes being conducted. This also applies to the recognition of the Office of the Polish Financial Supervision Authority as a state legal entity, and the Polish Financial Supervision Authority and its Chairman as authorities of the Office. Under administrative law, the Office remains the work apparatus of the Authority.

Key words: Polish Financial Supervision Authority, supervisory authority, public administration authority, work apparatus, state legal entity.

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The Polish Financial Supervision Authority was established in 2006 as a financial market supervisory authority¹. It replaced, at its launch, the two previously operating central government administration authorities – the Polish Securities and Exchange Commission and the Insurance and Pension Funds Supervision Commission (which, in 2002, replaced the previously operating central government administration authorities – the State Office for Insurance Supervision and the Pension Funds Supervision Office). Since 1 January 2008, the Polish Financial Supervision Authority has been in place and took over from the previously operating Banking Supervision Authority (whose work apparatus was the General Inspectorate of Banking Supervision, operating within the structures of Narodowy Bank Polski). The work apparatus of the Polish Financial Supervision Authority became the Office of the Polish Financial Supervision Authority. The Authority was established as a collegiate body.

However, the Act on Financial Market Supervision² did not recognise it as a central government administration authority, and the employees of the Office of the Authority were exempt from civil service regulations. The supervision of the Polish Financial Supervision Authority was entrusted to the Prime Minister, with such a limited scope that doubts have been raised by legal commentators as to how far these powers fall within the concept of supervision, and whether it would not be more appropriate to use the concept of control in relation to these powers³. The Constitutional Tribunal found that these powers are limited, the Polish Financial Supervision Authority is not subordinated to the Prime Minister and its status is characterised by considerable independence and autonomy⁴.

The identification of the Polish Financial Supervision Authority as a financial market supervisory authority raised doubts as to the classification

1 Cf. P. Pelc, *Tajemnica zawodowa w instytucjach rynku finansowego w kontekście polskich regulacji dotyczących cyberbezpieczeństwa*, „Cybersecurity and Law” 2019, no. 2, p. 152–153.

2 The Act of 21 July 2006 on Financial Market Supervision (consolidated text, Journal of Laws of 2020, item 2059).

3 Bartosz Wojno and Marek Wierzbowski, upon analysing the nature of the relationship between the Polish Financial Supervision Authority and the Prime Minister indicated that, contrary to the literal wording of the provision, it should be regarded as control rather than supervision. Cf. B. Wojno, M. Wędrychowski, *Komentarz do art. 3 ustawy o nadzorze nad rynkiem finansowym* [in:] *Prawo rynku kapitałowego. Komentarz*, eds. M. Wierzbowski, L. Sobolewski, P. Wajda, Warszawa 2014. A different view was expressed by M. Dyl, *Podsumowanie* [in:] idem, *Środki nadzoru na rynku kapitałowym*, Warszawa 2012.

4 Judgement of the Constitutional Tribunal of 15 June 2011, K 2/09, OTK-A 2011, no. 5, item 42.

of the Polish Financial Supervision Authority under administrative law. While it did not raise doubts that it is a public administration authority, a dispute arose as to whether it could be regarded as a central government administration authority⁵, as was the case with the earlier supervisory authorities for the capital market and the insurance and pension markets. A dispute also came about as to whether its status was closer to that of the Banking Supervision Authority, which did not have such a status. The prevailing view was that the Polish Financial Supervision Authority is a central public administration authority, not a government one⁶. It was also confirmed by case law. The Constitutional Tribunal examined with the status of the Polish Financial Supervision Authority and, in the aforementioned decision, found the Polish Financial Supervision Authority to be a public administration authority outside of government administration⁷. Furthermore, the Supreme Administrative Court held that „Although the Act does not explicitly state that the Polish Financial Supervision Authority is a central authority (a minister within the meaning of the Code of Administrative Procedure), such a conclusion should be derived from comprehensive analysis of the provisions of the Act. The Authority is the only financial market supervisory authority in Poland and,

5 Rafał Mroczkowski believes that the Authority has the status of a state (government) administration authority. This is because it implements government policy in the field of a financial market, exercising administrative authority on behalf of the state. The territorial scope of activity of the Authority covers the area of the whole state, which gives it the features of a central authority – R. Mroczkowski, *Struktura instytucjonalna nadzoru nad funduszami inwestycyjnymi* [in:] *Nadzór nad funduszami inwestycyjnymi*, Warszawa 2011. Aleksandra Nadolska, on the other hand, is of the opinion that the Act on Financial Market Supervision lacks the *expressis verbis* qualification of the Polish Financial Supervision Authority of the category of government administration, which, however, does not determine the issue of assuming that the Authority does not belong to such bodies. The principle, according to which belonging to the central administration authorities included in the government administration is expressly stated in the normative acts pertaining to these authorities, is not absolute and does not mean at all that the range of central government administration authorities is closed to only those authorities, which are expressly defined in the provisions as such – A. Nadolska, *Status prawny Komisji Nadzoru Finansowego*, „*Annales Universitatis Mariae Curie-Skłodowska. Sectio H*” 2011, no. 2, p. 136.

6 Cf.: B. Wojno, M. Wędrychowski, op. cit.; P. Wajda, *Pozycja prawnoustrojowa i skład Komisji Nadzoru Finansowego – kilka uwag krytycznych*, „*Przegląd Prawa Publicznego*” 2009, no. 7–8, p. 138–139; A. Jurkowska-Zeidler, *Status prawny Komisji Nadzoru Finansowego jako organu administracji publicznej w świetle wyroku Trybunału Konstytucyjnego z dnia 15 czerwca 2011 roku*, „*Gdańskie Studia Prawnicze*” 2012, t. 28, p. 147–148; A. Nadolska, *Komisja Nadzoru Finansowego jako organ administracji publicznej* [in:] eadem, *Komisja Nadzoru Finansowego w nowej instytucjonalnej architekturze europejskiego nadzoru finansowego*, Warszawa 2014.

7 Judgement of the Constitutional Tribunal of 15 June 2011, K 2/09.

as part of this supervision, performs statutory tasks with respect to entities operating in this market throughout the country, in particular resolving individual cases by means of administrative decisions. It is also important to note that the Polish Financial Supervision Authority is a collegiate body, which is composed of ministers. In view of the rules of administrative procedures. It is also of fundamental importance that no other state authority has been designated which would be competent in matters falling within the scope of the Polish Financial Supervision Authority's activities, and in particular, no other authority has been designated which would be a higher power than the Authority⁸. In the opinion of the Supreme Administrative Court, the Polish Financial Supervision Authority is a central public administration authority, and there are no provisions in the Act on Financial Market Supervision that would stipulate another authority, in particular the Prime Minister, as a higher authority in relation to the Polish Financial Supervision Authority. The Supreme Administrative Court also took the same position in a number of subsequent judgements⁹.

Article 10 of the Act on Financial Market Supervision provided that the Authority and the Chairman of the Authority perform their tasks through the Office of the Authority. This means that the work apparatus of the Polish Financial Supervision Authority was the Office of the Polish Financial Supervision Authority. The Constitutional Tribunal upheld that the recognition of the Polish Financial Supervision Authority as a public administration authority outside the government administration was also decisive in determining the legal nature of the Office of the PFSA. Since the authority which performs its tasks through a specific office is not in the structure of government administration, that office cannot be regarded as an office of government administration¹⁰.

8 Decision of the Supreme Administrative Court of 31 August 2011, II GSK 1633/11, LEX no. 896398

9 Cf.: Decision of the Supreme Administrative Court of 30 August 2011, II GSK 1606/11, Lex no. 1068831; Decision of the Supreme Administrative Court of 31 August 2011, II GSK 1608/11, Lex no. 896393; Decision of the Supreme Administrative Court II GSK 1607/11, Lex no. 896392; Decision of the Supreme Administrative Court of 14 December 2011, II GSK 1649/11, Lex no. 1151663; Judgement of the Supreme Administrative Court of 21 February 2012, II GSK 67/11, Lex no. 1137965.

10 Judgement of the Constitutional Tribunal of 15 June 2011, K 2/09.

The Chairman of the Polish Financial Supervision Authority was not recognised as an authority¹¹, but the Act on Financial Market Supervision granted him certain independent powers¹² (which was also reflected in the fact that the Chairman of the Polish Financial Supervision Authority could perform his tasks through the Office of the Authority, similarly to the Polish Financial Supervision Authority, which was a supervisory authority).

Starting from 1 January 2019, the legal structure of the Polish Financial Supervision Authority became overhauled¹³. The rationale for the proposed changes indicated that „the Office of the Authority, as a state legal entity, will gain independence in the disposal of its funds, allowing it to freely allocate funds on an as-needed basis. So far, in accordance with the Public Finance Act, all transfers involving a decrease or increase in asset-related expenditure of more than PLN 100,000 have required the consent of the Minister of Finance. After the introduction of the proposed changes, the only limitation will be the upper limit of expenditure, which will be defined by acts and regulations. An additional change will be the inclusion in the revenues of the Office of the Authority of fees for supervision and examinations conducted”¹⁴. Reference was made to the recommendations of the 2018 Financial Sector Assessment Programme.

11 A different view was expressed on the basis of the original wording of Art. 10(2) of the Act on Financial Market Supervision by Lesław Góral, arguing that the Chairman of the PFSA was granted certain powers as a one-person authority – L. Góral, *Ustawa o nadzorze nad rynkiem finansowym. Komentarz*, Warszawa 2013, Art. 10. Marcin Dyl also argued that the Chairman of the Authority „holds a number of self-contained powers to act as a one-person authority, which indicates that consideration may be given to recognising the Chairman as a kind of one-person administration authority” – M. Dyl, *Rola przewodniczącego Komisji* [in:] idem, *Środki nadzoru...*

12 In particular, in civil cases arising from relationships related to participation in transactions in the banking, pension, insurance or capital markets, or concerning entities operating in those markets, the Chairman of the Authority has the powers of a public prosecutor set out in the provisions of the Code of Civil Procedure. In cases of offences set out in sectoral regulations and concerning acts directed against the interests of market participants remaining in connection with the activities of entities operating in that market, the Chairman of the Authority, upon his request, has the powers of the aggrieved party in criminal proceedings.

13 Art. 10 of the Act of 9 November 2018 amending certain acts in connection with the strengthening of the supervision of the financial market and the protection of investors in that market (Journal of Laws 2018, item 2243).

14 *Rządowy projekt ustawy o zmianie niektórych ustaw w związku ze wzmocnieniem nadzoru oraz ochrony inwestorów na rynku finansowym*, 8th term of the Sejm of the Republic of Poland, Paper no. 2812.

Pursuant to the new wording of Art. 3 of the Act on Financial Market Supervision, the Office of the Polish Financial Supervision Authority has become a state legal entity tasked with providing services to the Polish Financial Supervision Authority and the Chairman of the Polish Financial Supervision Authority. The Polish Financial Supervision Authority has become the body of the Office of the Authority responsible for financial market supervision. The Chairman of the Authority has become the body of the Office of the Authority directing the activities of the Office of the Authority and representing the Office of the Authority externally. In addition, the Chairman of the Authority, by law, directs the work of the Authority and represents the Authority externally. Doubts to the above solutions were presented by Michał Torończak¹⁵ (regarding the structure of the supervisory authority) and Aleksandra Nadolska¹⁶ (regarding the position of the Chairman of the Authority, as well as the structure of the supervisory authority). Furthermore, according to Torończak, the granting of the position of a separate body of the Office of the PFSA to the Chairman of the PFSA constitutes a qualitative change. Although the Chairman of the PFSA was already vested with certain „personal” competences, formally he has all the time needed as only one of the members of a collegiate body in the form of the PFSA. Currently, however,

15 In his opinion, in this way the legislators decided to introduce a specific solution, providing that financial market supervision will be exercised not so much by a state legal entity which is the administering entity and acts through its body, but directly by a body of a state legal entity. Thus, the entity with the power to exercise authoritative influence over supervised entities is now a body of a state legal entity. The specific nature of this structure is due to the fact that it is, after all, the Office of the PFSA that is a separate legal entity with legal personality, while the PFSA is merely its body, which has not been provided with its own – separate from the Office of the PFSA – legal capacity – M. Torończak, *Kilka uwag na temat nowej konstrukcji nadzoru nad rynkiem finansowym*, „Monitor Prawniczy” 2019, no. 10, p. 537.

16 Giving the status of a state legal entity to the Office of the PFSA and not to the PFSA itself in no way contributes to strengthening the independence of the national supervisory authority. Financial issues aside, it is also impossible to see this measure as rational in view of the fact that the task of the Office of the PFSA is to serve the PFSA internally, and therefore the Office of the PFSA does not operate externally in a broad sense. It is also pointless to complicate the issue of the capacity to sue or be sued of a supervisory institution. Such an arrangement of the internal relations of a state legal entity is completely incomprehensible, given the fact that the Chairman is not only a member of the PFSA, but can also act within the scope of the PFSA's jurisdiction in certain areas, including the issuance of administrative orders and decisions. The implemented dualism of the bodies makes it problematic in certain situations to distinguish when the Chairman of the PFSA acts as the Chairman, and when he represents the PFSA with his actions – A. Nadolska, *Soft law w regulacji rynku finansowego w Polsce: rekomendacje, wytyczne i lista ostrzeżeń publicznych KNF*, Warszawa 2021.

the Chairman of the PFSA is both a member of a collegial body of a state legal entity of the Office of the PFSA, which is the PFSA, and a separate body of that entity. The legal position of the Chairman of the PFSA is therefore complex¹⁷. However, this does not lead to the Chairman of the Authority being granted the role of a financial market supervisory authority. This role is provided for by the Act on Financial Market Supervision only for the Polish Financial Supervision Authority.

According to Magdalena Śliwa-Wajda, the legal consequence of this change in the legal and constitutional position of the Polish Financial Supervision Authority is that we are dealing with an unconventional situation, since from the perspective of the relevant provisions of civil law, the Polish Financial Supervision Authority is a body of a state legal entity (and thus the PFSA is part of the Office of the PFSA), while from the perspective of the provisions of administrative law, the Polish Financial Supervision Authority is a public administration authority (and thus the Office of the PFSA is an auxiliary apparatus serving the PFSA. In addition, it should be pointed out that, although the current relationship between the Office of the PFSA and the PFSA – in the sense of the science of administrative law – is certainly unprecedented, this circumstance has no impact on the PFSA's supervisory decisions and thus, in fact, on the Authority's use of supervisory instruments¹⁸.

Significant consequences of the adopted structural solutions occur in the area of civil liability. Bartosz Wojno argues that due to the fact that the Office of the PFSA has been granted the status of a state legal entity, the State Treasury will not, as a rule, be liable for the obligations of the Office of the PFSA (Art. 40 § 1 of the Civil Code). The issue of liability for damage caused by an unlawful act or omission in the exercise of public authority may be complicated, since under Art. 417 § 1 of the Civil Code such liability is incurred by the State Treasury or a local government unit or other legal entity exercising such authority by operation of law. The complexity of the situation will consist of the fact that the public authority in the area of financial market supervision will be exercised not by a legal entity, but by a body of a state legal entity¹⁹.

The legislators did not choose to use the solution previously adopted in the financial market introduced on the grounds of forced restructuring,

17 M. Torończak, *op. cit.*, p. 538.

18 M. Śliwa-Wajda, *Komentarz do art. 131 [in:] Prawo bankowe. Komentarz*, eds. A. Mikos-Sitek, P. Zapadka, Warszawa 2022, p. 977.

19 B. Wojno, *Komentarz do art. 1 [in:] Prawo rynku kapitałowego. Komentarz...*

where the Bank Guarantee Fund (and not its authorities) was identified as the forced restructuring authority, although at the same time it was assumed that, although it is a legal entity performing the tasks set out in the Act, it is not a state legal entity or any other state organisational unit²⁰.

Financial market supervision is not governed by the Constitution of the Republic of Poland, so the financial market supervisory authority does not have the special constitutional position held by the central bank, Narodowy Bank Polski. Therefore, an ordinary legislature has a special role in determining the position of the financial market supervisory authority in the system and its shape. After a period of supervision exercised by specialised supervisory authorities in Poland, they decided to create an integrated supervisory authority (originally – in 2002 – only for the insurance and pension market, which made it possible to terminate the term of office of the Chairman of the Pension Funds Supervision Office early after the 2001 parliamentary elections, but this was formally motivated by savings²¹), made it a collegiate body, and placed this supervision outside the central bank. In 2006, it was decided not to make the new integrated financial market supervision authority a central government administration authority, in order to be able to exempt its staff from civil service regulations²². In 2018, a decision was made to give the Office of the Polish Financial Supervision Authority separate legal personality in order to ensure financial independence for the Polish Financial Supervision Authority. All of this indicates that, when making major decisions that are significant for the system, *de facto* very limited objectives were set, not addressing systemic issues at all, and the systemic consequences of the solutions adopted were not analysed or taken into account at all.

As a result and at present, financial market supervision is exercised by the Polish Financial Supervision Authority, which under civil law is a body of a state legal entity, and under administrative law retains the status of a central public administration authority, except that it acts outside the legal personality of the State Treasury (under civil law). Financial market supervision remains outside

20 Cf. Art. 3(1) and (3) in connection with Art. 65 of the Act of 10 June 2016 on the Bank Guarantee Fund, the deposit guarantee system and forced restructuring (consolidated text, Journal of Laws 2022, item 793).

21 *Rządowy projekt ustawy o zmianach w organizacji i funkcjonowaniu centralnych organów administracji rządowej i jednostek im podporządkowanych oraz o zmianie niektórych ustaw*, 4th term of the Sejm of the Republic of Poland, Paper no. 83.

22 *Rządowy projekt ustawy o nadzorze nad rynkiem finansowym*, the 5th term of the Sejm of the Republic of Poland, Paper no. 654.

the structure of government administration, and the powers of the Prime Minister under the supervision exercised over the Polish Financial Supervision Authority are limited. Under civil law, the Chairman of the Polish Financial Supervision Authority is a body of a state legal entity, besides the fact he has been granted personal powers in this respect, he has not become a supervisory authority and therefore does not have the attributes of an administration authority under administrative law. The Chairman's powers should continue to be considered either in relation to his role as a body of the Office of the Polish Financial Supervision Authority or as the chairman of a collegiate body which is the Polish Financial Supervision Authority. Under administrative law, the Office of the Polish Financial Supervision Authority has not lost the attribute of the work apparatus of the Polish Financial Supervision Authority as a supervisory authority. The Office of the Authority continues to provide services not only to the Authority, but also to its Chairman, even though he is not an administration authority. Under Art. 417 of the Civil Code, it remains problematic to determine who is liable for an unlawful act or omission of public authority – the State Treasury or the Polish Financial Supervision Authority? In the case of the Polish Financial Supervision Authority, public authority is exercised by the Polish Financial Supervision Authority, which is a body of the Office of the Polish Financial Supervision Authority, and not by the Office of the Polish Financial Supervision Authority, despite it being considered a state legal entity.

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Komisja Nadzoru Finansowego w polskim systemie administracyjnym

Streszczenie

Nadzór nad rynkiem finansowym sprawuje Komisja Nadzoru Finansowego. Jest ona centralnym organem administracji publicznej, ale nie jest organem administracji rządowej. Od 1 stycznia 2019 roku stała się ona organem państwowej osoby prawnej – Urzędu Komisji Nadzoru Finansowego. Wiele zmian ustrojowych dotyczących kształtu nadzoru nad rynkiem finansowym wprowadzono, kierując się ograniczonymi celami bez głębszej analizy ustrojowych konsekwencji tych zmian. Dotyczy to też uznania Urzędu Komisji Nadzoru Finansowego za państwową osobę prawną, a Komisję Nadzoru Finansowego i jej Przewodniczącego za organy Urzędu. Na gruncie prawa administracyjnego Urząd pozostaje aparatem pracy Komisji.

Słowa kluczowe: Komisja Nadzoru Finansowego, organ nadzoru, organ administracji publicznej, aparat pracy, państwowa osoba prawna