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Jan Ciechorski
Jan Długosz University in Częstochowa, Poland
e-mail: j.ciechorski@ujd.edu.pl
ORCID: 0000-0001-6659-6212

Paweł Szecówka
Jan Długosz University in Częstochowa, Poland
e-mail: p.szecowka@ujd.edu.pl
ORCID: 0000-0002-0478-4725

AMENDMENT TO ARTICLE 59 OF THE MEDICAL ACTIVITY ACT – SOME REMARKS ON THE FINANCIAL RESPONSIBILITY OF LOCAL GOVERNMENT UNITS FOR THE NET LOSS OF INDEPENDENT PUBLIC HEALTHCARE INSTITUTIONS

Abstract

The article analyses the amendment to Article 59 of the Medical Activities Act, introduced in 2021 following a ruling by the Constitutional Tribunal. As a result of the amendment, the obligation of local government units (LGUs) to cover the net losses of independent public healthcare institutions (SPZOZ) was replaced with an option to do so. The authors highlight systemic issues in the financing of healthcare in Poland, emphasizing that the amendment did not resolve the growing debt problem of SPZOZ. While the reform formally reduced the financial responsibility of LGUs, Article 61 of the Medical Activities Act still holds them accountable for the debts of liquidated SPZOZ. The amendment introduced into the Polish law system was, in fact, fictitious. The legal status did not actually change. The article presents three potential solutions:

transferring the obligation to cover SPZOZ losses to the National Health Fund (NFZ), shifting financial responsibility for liquidated institutions to the State, or legislatively clarifying the role of LGUs in financing healthcare. The analysis concludes that the lack of a comprehensive reform in healthcare financing continues to exacerbate SPZOZ debt accumulation and economic instability.

KEYWORDS

independent public healthcare institution, local government units, healthcare system, public finance

SŁOWA KLUCZOWE

samodzielne publiczne zakłady opieki zdrowotnej, jednostki samorządu terytorialnego, system ochrony zdrowia, finanse publiczne

I. INTRODUCTION

The task of the State, acting through public administration[1] (executive authority), is to assume certain responsibilities and fulfil them – this is, in other words, called 'meeting the needs of citizens'.[2] The reasons behind selecting specific tasks for realization by the State are highly diverse and may be economic, political, social, etc. The most common consequence of such a 'State takeover' is making the resulting services available to citizens free of charge or at prices lower than market rates. However, this gratuity does not mean that the given task or service has been provided 'for free', meaning without covering the costs of its fulfilment. The realization of public tasks requires public funds, which the State acquires in ways specified by legal regulations. In other words, what is free from the citizen's perspective is not free in its essence – it is paid for with public funds. This forms the foundation of the State's functioning, and the management of public funds, their collection and expenditure – what is referred to as public finance.[3] Moreover,

[1] By which the authors of the article understand both government and local administration.

[2] Jan Boć, 'Pojęcie administracji' in Boć (ed), *Prawo administracyjne* (11th edn, Wrocław 2005) 16–17.

[3] Joanna Małgorzata Salachna, 'Finanse publiczne oraz prawo finansów publicznych – podstawowe pojęcia i zasady' in Salachna (ed), *Podstawy prawa finansów publicznych* (Warszawa 2024) 21–23; Krystyna Sawicka, 'Pojęcie i zakres prawa finansów publicznych' in Wiesław Miemiec, Patrycja Zawadzka (eds) *Prawo finansów publicznych z kazusami i pytaniami* (Warszawa 2023) 22–24; Article 3 of Public Finance Act of 27 August 2009 [2024] JoL [Journal of Laws] 1530 with following changes.

the Public Finance Act of 27 of August 2009 specifies in Article 9,[4] a catalogue of entities managing public funds, referred to as public finance sector units.

The above issue also applies to the public task of healthcare protection. This task has been anchored in the very Constitution of the Republic of Poland, particularly in Article 68, which states in paragraph 1: 'Everyone has the right to healthcare protection'. This provision creates a universal entitlement for every person,[5] not just Polish citizens. However, the essence of healthcare protection as a public task of the State is defined in paragraph 2, which states: 'Public authorities shall ensure equal access to healthcare services financed from public funds for citizens, regardless of their financial situation. The conditions and scope of the provision of services shall be specified by statute'.[6]

It is, therefore, beyond doubt that the State is obliged to fulfil this task, which implicitly means an obligation to finance it. This study does not aim to analyse the entirety of the complex issue of financing healthcare tasks, as discussing the entirety of this problem would go far beyond the scope of a single article. The authors analyse the amendment to a crucial provision in this area that took place in 2021, concerning the responsibility of local government units (hereinafter interchangeably: LGUs) for the debt of independent public healthcare institutions (hereinafter interchangeably: SPZOZ – Polish: *samodzielny publiczny zakład opieki zdrowotnej*). The cause of this amendment itself is of interest (though only briefly mentioned), but the primary focus is on the consequences of the new normative solution (or perhaps its lack?).

II. THE LEGAL POSITION OF SPZOZ IN THE HEALTHCARE SYSTEM

The discussion should begin with a brief indication of the role of entities involved in the realization of healthcare services. The first entity is the National Health Fund (hereinafter interchangeably: NFZ). Its role is to manage public funds allocated for the purpose of providing healthcare services. Its primary task is to govern the public finances by financing these services,[7] thus fulfilling the constitutional

[4] See Article 9 of Public Finance Act.

[5] What the use of the quantifier 'every' indicates.

[6] Article 68 of The Constitution of the Republic of Poland of 2 April 1997 [1997] JoL [Journal of Laws] 78 483 with following amendments.

[7] The term 'health care service' is a collective category, which, according to Article 38, paragraph 1 of the Healthcare Services Funded from Public Sources Act of 27 August 2004 [2024] JoL [Journal

duty of the State to ensure access to healthcare services financed with public funds.[8] It is evident that the NFZ does not directly or indirectly provide healthcare services, as in accordance with Article 97 paragraph 6 of the Healthcare Services Funded from Public Sources Act, it cannot own an entity that performs medical activities. The provision of healthcare services is the responsibility of entities engaged in medical activities, among which the main category are independent public healthcare institutions.

The provisions of the Medical Activity Act of 15th of April 2011 regulate, among other things: the establishment, financing, and liquidation of SPZOZs.[9] Particular attention should be paid to articles 114–117a of this Act, as they regulate issues related to the financing of SPZOZ activities from public funds.[10] These provisions (especially Article 114) are directly correlated with the provisions of the Healthcare Services Funded from Public Sources Act.

The transfer of financial resources for the implementation of tasks by this category of healthcare entities takes place both through the NFZ and the founding entities, in accordance with the regulations of the Medical Activity Act. The creating entity may be the State Treasury, a local government authority, or a medical university.[11] Although the founding entities of independent public healthcare institutions form a heterogeneous category, the competences defined in the Medical Activity Act are identical for all entities in this group.[12] From the perspective of this article, the legal institution regulated in Article 59 paragraph 2 of the Medical Activity Act is important, concerning the loss of a healthcare entity that cannot be covered from its own resources.

III. JUDGMENT OF THE CONSTITUTIONAL TRIBUNAL K 4/17

Since 14 October 2021, Article 59 paragraph 2 of the Medical Activity Act was amended pursuant to the Act on the amendment of the Act on healthcare services

of Laws] 146 with following amendments, includes: health services, material health services, and accompanying services.

[8] See Art 97, 116 and 117 Healthcare Services Funded from Public Sources Act.

[9] Article 2 paragraph 1 point 5 and 10, article 3, article 4 point 2, article 50a–82 Medical Activity Act of 15 April 2011 [2024] JoL [Journal of Laws] 799 with following amendments.

[10] See Arts 114–117a of Medical Activity Act.

[11] Article 2 paragraph 1 point 6 and article 6 of Medical Activity Act.

[12] See more Jan Ciechorski, 'Jednostka samorządu terytorialnego jako podmiot tworzący zakład opieki zdrowotnej' in Joanna Podgórska-Rykała, Maciej Borski (eds), *Modele administracji samorządowej w wybranych państwach europejskich* (Sosnowiec 2017) 161–185.

financed with public funds and certain other acts.[13] This change is a consequence of the Judgment of the Constitutional Tribunal,[14] which found part of this provision to be inconsistent with the Constitution of the Republic of Poland. The provision before its amendment stated that 'The founding entity is obliged, within: 1) 9 months from the deadline for approving the financial report of an independent public healthcare institution, to cover the net loss for the financial year of the institution, to the extent that cannot be covered in accordance with paragraph 1, but not exceeding the sum of the net loss and depreciation costs, or 2) 12 months from the deadline specified in point 1, to issue a regulation, order, or pass a resolution on the liquidation of the independent public healthcare institution – if the net loss for the financial year cannot be covered as specified in paragraph 1, and after adding depreciation costs, has a negative value'[15]; whereas the current version reads: 'The founding entity may cover the net loss for the financial year of an independent public healthcare institution, to the extent that cannot be covered in accordance with paragraph 1, but not exceeding the sum of the net loss and depreciation costs'.[16] The Constitutional Tribunal, in the cited judgment, examined the constitutionality of imposing on local government units (LGUs), as founding entities, the obligation to cover losses generated by a medical entity. The Tribunal found Article 59 paragraph 2 of the Medical Activity Act to be inconsistent with Article 167 paragraph 4 in conjunction with Article 68 paragraph 2 of the Polish Constitution. The Tribunal indicated that the declared unconstitutionality of the provision in question concerned the failure to classify the obligation to cover the net loss generated by an independent public healthcare institution as a task delegated by the State to local government units, and, consequently, the failure to ensure financial resources from the State budget compensating the founding entity for the expenditures incurred in this respect.

The aim of this article is not a detailed analysis and description of the mentioned judgment, but it is important to point out a few key issues arising from it. The first major conclusion from reading both the content of the judgment itself and the commentary on it is the existence of a systemic problem concerning the broadly understood financing of healthcare tasks, and more specifically, the role of local

[13] Act on the Amendment of the Healthcare Services Funded from Public Sources Act and some other Acts of 11 August 2021 [2021] JoL [Journal of Laws] 1773.

[14] Judgment of the Constitutional Tribunal of 20 November 2019 – K 4/17.

[15] Article 59 paragraph 2 Medical Activity Act in the wording prior to 14 October 2021 [2021] JoL [Journal of Laws] 711 with following amendments. The literature has emphasized the mandatory nature of the obligation imposed on local government units to cover the net loss of an SPZOZ. Maciej Dercz, 'Art. 59' in Maciej Dercz, Tomasz Rek, *Ustawa o działalności leczniczej. Komentarz*, 3rd edn (Warszawa 2019) 350–362.

[16] See Article 59 paragraph 2 Medical Activity Act.

government units in this process.[17] In general, the ruling declaring the unconstitutionality of the provision imposing an obligation on local government units (LGUs) to cover the net loss of SPZOZs was based on the premise that LGUs do not have the competence to finance healthcare services (lack of naming it as their own task). There is no provision that imposes such an obligation. If, however, this necessity were considered as a liability to perform a commissioned task, the absence of funds allocated to carry out this task would be pointed out.

The issue of participation of the local government units in financing healthcare tasks is broad and complex. Many aspects of the broadly understood financing of tasks could be raised in the context of LGUs as entities establishing SPZOZs.[18] However, focusing on the issue at hand, while one may agree with the judgment and some of the arguments raised, it is a fact that declaring the unconstitutionality of these two provisions does not eliminate the essence of the problem, as it is much deeper and systemic in nature. One judgment of the Constitutional Tribunal cannot regulate such a broad issue – due to the obvious lack of legislative competence. After the ruling in case K 4/17, the most important question was what action the legislator would take, since, as of the date specified in the judgment, the provision imposing the obligation to cover the net loss by the founding entity of the SPZOZ lost binding force, but the losses did not disappear.

IV. SIGNIFICANCE OF ARTICLE 59 PARAGRAPH 2 OF MEDICAL ACTIVITY ACT IN ITS NEW WORDING AFTER 14 OCTOBER 2021

The change adopted by the legislator is the transformation of the obligation of covering the loss of an independent public healthcare institution (SPZOZ) by the local government unit (LGU) into an option, i.e., the amendment converted the duty of the LGU into the possibility of covering the loss of the healthcare entity. There are at least a few issues in this change that require commentary. First, it should be noted and emphasized that the change introduced by the legislator does not really solve the systemic problem described above. M Muszyński decided

[17] See more Judgment K4/17; and Zbigniew Gromek, 'Glosa do wyroku TK z dnia 20 listopada 2019 r., K 4/17' [2021] Przegląd Sejmowy 267.

[18] Paulina Gaudyn, 'Przekształcenia samodzielnych publicznych zakładów opieki zdrowotnej a sytuacja finansowa samorządów' [2015] Finanse Komunalne 50; Aneta Gęsiarz-Krasucka, Marcin Wielgolaski, 'Wybrane zagadnienia dotyczące miejsca i roli jednostek samorządu terytorialnego w obszarze ochrony zdrowia w świetle wyroku Trybunału Konstytucyjnego z 20 listopada 2019 r. (K 4/17)' [2020] Samorząd Terytorialny 32.

to give his separate opinion within the judgment's explanation, stating that the legislator, 'by creating a new mechanism, will easily be able to reconstruct the solution bypassing the constitutional barriers established in the judgment due to their general (Article 167 paragraph 4 in conjunction with Article 166 paragraph 2, Article 68 paragraph 2) or limited scope (Article 2). Therefore, the Tribunal issued a judgment that only seemingly resolves the problems raised in the application'.[19] The Tribunal raised many issues regarding the financing of the task of healthcare protection by public authorities, particularly discussing the role of LGUs in this process (which, parenthetically, should not exist at all).[20] This judgment could have been an interesting impetus for intensifying work on systemic change, but as we can see, that has not happened.

The narrow issue considered by the Tribunal was the problem of covering the net loss of SPZOZ, however, the amendment to Article 59 paragraph 2 of the Medical Activity Act has certainly not solved this problem. The optionality of covering the loss is certainly a positive change in the context of LGU finances, as it allows the non-coverage of net losses. In fact, this also seems justified from the perspective of the duty to finance healthcare, which, as already mentioned, clearly falls within the scope of the entity at the State level, which is the National Health Fund (NFZ). Nevertheless, the problem of the existence of losses has not been resolved; neither a new method of covering them nor an alternative entity responsible for this obligation has been indicated. The new wording of the discussed provision does not in any way resolve the issue of what to do with the accumulating annual losses, which can be considered as systematic sui generis.

The introduced change only seemingly removes the financial responsibility of LGUs for the economic situation of SPZOZ. It is essential to recall Article 61 of the Medical Activity Act, which remains unchanged. According to the meaning of this provision, the founding entity of SPZOZ is responsible for its financial obligations upon its liquidation. Ultimately, the financial connection, or rather the financial responsibility of the founding entity for the debt of SPZOZ, still exists. Only its timing has changed. In practice, therefore, in the absence of financing for the annual net losses, this debt will continue to grow (which actually happens), the formal responsibility for the negative financial result of SPZOZ still rests

[19] Mariusz Muszyński, 'Zdanie odrębne sędziego TK Mariusza Muszyńskiego do wyroku Trybunału Konstytucyjnego z dnia 20 listopada 2019 r., K 4/17', OTK-A 2019/67.

[20] See more Judgement K 4/17 and Zbigniew Gromek, 'Glosa do wyroku TK z dnia 20 listopada 2019 r., K 4/17' [2021] Przegląd Sejmowy 267; Jan Ciechorski, 'Art. 61' in J Ciechorski, *Ustawa o działalności leczniczej. Komentarz do wybranych przepisów* (LEX/el. 2024); Tomasz Sroka, 'Wybrane problemy dotyczące finansowania przez władze publiczne świadczeń opieki zdrowotnej ze środków publicznych w świetle Konstytucji' [2021] Państwo i Prawo 76.

with the local government unit as the founding entity. If this loss were not tied, in the event of liquidation, to the LGU under Article 61, one could agree that the change introduced by the legislator as of 14 October 2021, at least resolved this one problem. However, due to the lack of any change to this regulation, in the event of the liquidation of a local government healthcare entity, its loss will still burden its founding entity. It thus seems that the legislator made only a superficial effort to 'comply' with the Constitutional Tribunal's judgment – without a deeper consideration of the problem and finding its solution.

It should be noted that Article 59 of the Medical Activity Act introduces a solution intended to prevent situations resulting in the necessity for a local government unit to cover the net loss of SPZOZ. This objective is pursued through the obligation imposed on the head of the medical entity to prepare a recovery program in cases where the financial loss of the institution exceeds 1% of the net revenues indicated in the financial statements (Article 59 paragraph 4 of the Medical Activity Act). The provisions of this article also specify, among others, the deadline for preparing the recovery program (paragraph 4), the actions preceding its preparation (paragraph 5), as well as the mandatory minimum content of the recovery program (paragraph 6).

Another aspect that needs to be addressed is the necessity for a high level of precision in public finance law. The regulation of the Medical Activity Act discussed in this article clearly concerns the management of public funds by a local government unit, which is a public sector entity.[21] More precisely, Article 59 paragraph 2, after its amendment, introduced the possibility of covering the net loss of SPZOZ, a matter that reflects the quasi-financial responsibility of the LGU as the founding entity of SPZOZ. As indicated earlier, the principle is to strive for the greatest possible legal precision in matters related to public finances, which is their characteristic feature (one might say inherent), especially in contrast to the functioning of the private sector.[22] Of course, it is not possible to eliminate all discretionary aspects – and that is a good thing. However, introducing a change that, in essence, allows for the unlimited growth of debt in public sector entities without indicating a procedure for their debt relief is not introducing discretion but rather creating a gap in public finances that will eventually have to be filled somehow.

The final issue that requires addressing is the importance of the public task of healthcare protection. It is difficult to classify public tasks as more or less impor-

[21] Article 9 paragraph 2 of the Public Finance Act expressly lists the local government unit as an entity of the public finance sector.

[22] See more Krystyna Sawicka, 'Finanse publiczne a finanse prywatne' in Wiesława Miemiec, Patrycja Zawadzka (eds), *Prawo finansów publicznych z kazusami i pytaniami* (Warszawa 2023) 35–37.

tant, but in the case of some tasks in comparison with healthcare, the issue does not seem to be that much complicated. Performed analysis of some various public tasks from within the State budget raises the reflection that spending public funds on various advertising campaigns, 'communication' expenses, and training for employees (not necessarily from poorer social groups) seems undoubtedly far less important than expenditures on healthcare. If the legislator (including the constitutional one) has decided to take on the task of healthcare protection, then it is their duty to perform it. In other words, there cannot be a situation in which such an important issue as health – which is critical for every citizen – is treated worse than other tasks with clearly lower priority. The growing debt of SPZOZ certainly impacts the functioning of these entities, particularly their ability to provide healthcare services, which is their purpose and reason for existence. The managers of these entities should lead operations in such a way as to prevent the increase in debt, as it could result in the paralysis of their tasks, especially in a situation where there is currently no statutory entity that would be obligated to cover the debt generated by SPZOZ.

V. SUMMARY AND PROPOSALS FOR POTENTIAL CHANGES

Upon analysing the changes introduced in the Medical Activity Act, it should be noted that the problem of financing healthcare services is clearly systemic. As aptly indicated by M Florczak-Wątor, with reference to the judgment of the Constitutional Tribunal of 7 January 2004,[23] the proper functioning of the healthcare system crucially depends on the legislature's appropriate delineation of the competences conferred upon institutions performing public tasks in the field of health protection.[24] However, the question arises whether it is possible to improve the situation we are dealing with without changing the entire system. No specific or advanced works are taking place regarding system changes, and entities such as SPZOZ have to function somehow. Below, three paths will be presented that the authors believe could solve or at least minimize the described legal problem. The authors are aware that these proposals are not without flaws, but they may play an important role in opening the discussion on the subject matter.

The first proposal that clearly solves both problems (the link between LGUs and financing healthcare and the problem of covering losses and the debt of SPZOZ) is to include the National Health Fund (NFZ) in Article 59 paragraph 2, instead

[23] Judgment of the Constitutional Tribunal of 7 January 2004 – K 14/03.

[24] Monika Florczak-Wątor 'Art. 68' in P Tuleja, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (2nd edn, Warszawa 2023) 250–251.

of other creating entities. Moreover, this change would require restoring the mandatory nature of covering the loss generated by the creating entity. Indicating in this place the main financing entity for the entire healthcare task seems to be a natural consequence of the currently functioning healthcare system in Poland. This would then identify the entity responsible for covering the debt, and, secondly, the involvement of LGUs in this process would be avoided, which has been identified as problematic. Article 61 of the Medical Activity Act would become irrelevant in this case. However, this solution has a fundamental flaw: in such a case, the National Health Fund would not only finance the costs of providing healthcare services, as required by the Healthcare Services Financed from Public Funds Act, but also the losses of SPZOZ. It should not be controversial to state that this loss could be caused by various factors, with one of them (often the primary one) being the provision of healthcare services beyond the limit specified in the contract between the NFZ and the service provider, which could justify the proposed solution to the problem. However, the financial deficit of SPZOZ could be caused by other reasons not directly related to the so-called over-limit services, in which case it would be difficult to justify its coverage by the NFZ. In the current legal state, the NFZ is a public payer responsible for the healthcare services provided. Its task is not to provide financial support for the functioning of a service provider but only to pay, in accordance with the contract for healthcare services financed from public funds, for the services provided by the service provider. Consequently, such a legislative solution would introduce a systemic change because it would affect the entire healthcare insurance system.

Another possibility that would change the situation of SPZOZ would be amending Article 61 of the Medical Activity Act. If the legislator wanted to leave the optional nature of financing the net loss by LGUs, the real problem, as demonstrated, is the final financial responsibility, which, according to the current wording of this provision, burdens the LGU. Changing the wording of this provision and indicating that financial responsibility in the event of liquidation falls on the State Treasury would be at least a partial solution to the problem. An argument in favour of this proposal is that, through the functioning of this group of service providers, the State fulfils its constitutional obligation to ensure access to healthcare services financed from public funds. The special role of SPZOZ in the healthcare system was emphasized in the justification of the Judgment of the Constitutional Tribunal of 18 December 2002.[25]

[25] The Judgment of the Constitutional Tribunal of 18 December 2002 – K 43/01. In the justification of this judgment, it was stated: 'The fundamental constitutional rules relating to public healthcare are contained in Article 68 of the Constitution, particularly in paragraphs 2, 3, and 4. These provisions impose duties on public authorities regarding ensuring citizens' access to healthcare services financed from public funds. Recognizing that the public healthcare system, being the fundamental

It is worth noting that these two proposals, in a slightly more developed form, were proposed by the Senate as amendments to the discussed Act. However, the Sejm rejected the amendments without justification.[26]

The third solution takes into account the legislator's decision to introduce and maintain the institution of the creating entity and its financial link to the implementation of the constitutionally guaranteed task of healthcare protection. However, this would require certain changes in the relevant local government laws. Not only would the regulations indicating the participation of LGUs in the implementation of the task need to be introduced, but also appropriate changes ensuring funds for covering its costs. The question here is whether this change would be too far-reaching and overly burdensome for local government units. A variant of this proposal is the stance of the Constitutional Tribunal in its judgment of 20 November 2019, in which it considered covering the net loss of SPZOZ to be an entrusted task of the local government units. It seems that this concept definitely requires further analysis, but the authors indicate this possibility as one of the ways that could, in some sense, organize the system in the discussed area.

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element in fulfilling the constitutional duties of public authorities to ensure access to healthcare services, should be built on the principle of economic rationality, it is impossible to ignore the fact that there are insurmountable barriers to the economization of this system'.

[26] Resolution of the Senate of the Republic of Poland on the Act amending the Healthcare Services Financed from Public Funds and certain other Acts (Sejm Paper No 1540 with its justification); Report of the Health Committee on the Senate's Resolution regarding the Act amending the Act on Healthcare Services Financed from Public Funds and certain other acts (Sejm Paper No 1581).

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