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Organisation of municipal waste management in Polish law

Organizacja gospodarki odpadami komunalnymi w prawie polskim

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Abstract

Organization of municipal waste management in the Polish law is most of all determined by regulations introduced in the European Union Law. The Polish legislator has implemented those regulations, but unfortunately disperse this matter in many legal acts. This article will thus attempt to analyse the respective elements of the process of municipal waste management with particular emphasis on the sources of law, and obligations of real property owners, as well as the implementation and transposition of directives.

Key words: Waste law; municipal waste management

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Streszczenie

Organizacja gospodarki odpadami komunalnymi w prawie polskim jest przede wszystkim zdeterminowana przepisami wprowadzonymi w prawie Unii Europejskiej. Polski ustawodawca wdrożył te przepisy, niestety rozrzucając tę materię po wielu aktach prawnych. Ten artykuł ma na celu podjęcie próby analizy poszczególnych elementów procesu gospodarki odpadami komunalnymi ze szczególnym uwzględnieniem źródeł prawa i obowiązków właścicieli nieruchomości, jak również wprowadzenia w życie i transpozycji dyrektyw.

Słowa kluczowe: Prawo o odpadach; gospodarka odpadami komunalnymi

The organisation of municipal waste management in the Polish law is mostly determined by solutions adopted by the European law, and primarily the directives of the European Parliament and Council 2008/98/EC of 19 November 2008 concerning wastes and repealing certain directives¹, and 1999/31/EC of 26 April 1999 on landfill waste². E. Mazur – Wierzbicka notes “Unfortunately, in the period of system transformation issues related to waste management were discounted”³.

Such negligence combined with dynamic changes in the system of the European law is extremely challenging for the Polish legislator. The European law is subject to deep changes. As K. Karpus rightly points out “This act [i.e. the Directive 2008/98 – note by B.R.] was a summary concluding more than thirty years of framework directives and at the same time provided a peculiar <<new opening>> from the point of view of the European law on waste”⁴.

Significantly, these directives were implemented in the system of Polish law so that the legislator scattered the implemented matter throughout various legal acts. Thus, in order to reconstruct municipal waste management in the Polish legal system a number of legal acts governing respective

¹ OJ:L 312, 22.11.2008, p. 3.

² OJ L 182, 16.7.1999, p. 1.

³ E. Mazur – Wierzbicka, *Ochrona środowiska a integracja europejska. Doświadczenia polskie*, Warszawa 2012, p. 177.

⁴ K. Karpus, *Gospodarowanie odpadami w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej na gruncie dyrektyw ramowych w sprawie odpadów*, Włocławek 2011, p. 7.

elements of such management are required. However, such a solution is criticized in writing whose authors postulate that the issues of waste management, including municipal waste, were regulated by a single, coherent and comprehensive act of law⁵.

The terms “waste” and “municipal waste” are defined in the Act on Waste of 14 December 2012⁶. According to article 3 section 6 of the said Act, waste is “any substance or object which the holder discards or intends to or is required to discard”.

The literature highlights that this definition does not clearly and uncontestedly determine when we are dealing with waste. “The assignment of used property alone cannot be in each case deemed equivalent to the assignment of waste. Since an object (e.g. a pallet, car, computer, telephone) assigned for further use according to its purpose is not waste”⁷. As a matter of fact, the classification of an object or substance as waste is conditioned by specific circumstances. Thus, the evaluation is highly relative and subjective. “It is worth emphasizing that in light of such a definition of waste the specific substance (object), depending on the actual circumstances, can be considered waste by one entity while another one can perceive it differently”⁸.

This law also defines municipal waste. The legal definition of this term is also provided by the Act on Waste. Pursuant to article 3 section 7, municipal waste is “waste generated by households, except end of life vehicles, and waste not containing dangerous wastes generated by other waste producers which, in terms of its nature or composition is similar to waste generated by households; mixed municipal waste remains mixed municipal waste even if it has undergone a waste treatment operation that has not substantially altered its properties”.

The definition of waste is a consequence of definitions adopted in the Directive 2008/98. The term is defined in article 3 section 1 of the Directive 2008/98. It should be remarked that the said directive does not define the term municipal waste.

⁵ B. Rakoczy, *Utrzymanie czystości i porządku w gminach w prawie polskim*, Warszawa 2012, p. 7 *et seq.*

⁶ Journal of Laws of 2013, item 21.

⁷ Ł. Budziński, A. Mostowska, J. Wilczyńska, in: ed. A. Mostowska, *Ustawa o odpadach. Komentarz*, Warszawa 2014, p. 21.

⁸ A. Pacek-Łopalewska, *Ustawa o odpadach. Komentarz*, Warszawa 2013, p. 45.

The Act on Waste in article 17 also sets out the principles for managing waste, including municipal waste. According to this provision “the following waste management hierarchy is introduced:

- 1) preventing waste generation;
- 2) preparing waste for reuse;
- 3) waste recycling;
- 4) other waste recovery processes;
- 5) disposal of waste”.

Also in this case the Polish legislator followed the European legal norm. According to article 4 par. 1 of the Directive 2008/98 “1. The following waste hierarchy shall apply as a priority order in waste prevention and management legislation and policy:

- a) prevention;
- b) preparing for reuse;
- c) recycling;
- d) other recovery, e.g. energy recovery; and
- e) disposal”.

The Polish waste hierarchy is slightly different from the hierarchy set by the Directive 2008/98. It defines other recovery in more general terms, failing to give an example of other recovery, such as energy recovery.

Legal definitions adopted in the system of Polish law, as well as the principle for handling waste are the result of provisions of the aboveindicated directives being implemented in the system of Polish law.

Despite the fact that basic definitions and waste management principles were set out in the Act on Waste, a substantial number of legal regulations concerning municipal waste management are included in another legal instrument, namely the Act on Maintaining Cleanliness and Order in Municipalities of 13 September 1996.

The construction adopted in the said act assumes that the legislator imposed the obligation to collect municipal waste from real property owners and to manage it further on the municipality as the basic unit of territorial local government. With regard to the aforesaid the writings remark that we are dealing with an integrated municipal waste management system⁹.

⁹ W. Radecki, *Ustawa o utrzymaniu czystości i porządku w gminach. Komentarz*, Warszawa 2012, p. 102.

This task is an individual task of the municipality, which means that it must be handled at the municipality's own cost, risk, responsibility and on its own account¹⁰.

Simultaneously, the Polish legislator assumed that the municipality was required to organise tender in order to select the business or businesses that will provide services to the municipality.

The Polish legislator provided for two options of defining the scope of such services. The subject of the tender can be either the sole task of collecting waste from real property owners or both waste collection and management. The scope of services to be provided by the selected business will be determined by the municipality on its own. However, the literature presents critical views regarding the adopted solution, pointing to doubts occurring, in particular, in the context of public procurement¹¹.

The Polish legal system adopted a solution in which municipal waste management is financed from the funds of the inhabitants of the municipality, i.e. real property owners. Here, it must be noted that the term real property owner should be broadly understood as it not only denotes owners in the strict sense of the word but also refers to perpetual usufructuaries. The term "owner" is defined in article 2 section 1 item 4 of the Act on Maintaining Cleanliness and Order in Municipalities. It is stipulated that a real property owner "should also be interpreted as co-owners, perpetual usufructuaries and units of organisation and parties being the administrators of users of real property, as well as other holders of the real property".

The theory of law aptly identifies four types of fees – some of them being private legal fees and others public private fees. Z. Ofiarski and M. Ofiarska indicate the following fees – determined in a contract (but considering the maximum rates determined by the municipality), determined in a decision of the executive agency of the municipality (when the real property owner did not conclude a contract despite being responsible for doing so), flat rates for certain services and finally municipal waste

¹⁰ H. Izdebski, *Samorząd terytorialny*, Warsaw 2009, p. 130 *et seq.*

¹¹ E.g. K. Kuźma, D. Chojnacki, W. Hartung, K. Maćkowska, K. Szymczak, P. Zdrajkowski, *Utrzymanie czystości i porządku w gminach. Komentarz do ustawy*, Warszawa 2013, p. 126 *et seq.*

management fees¹². The first type derives from private law and the other types from public law.

The real property owner is required to pay the fee the amount of which is also determined by the municipality. The municipal council determines this fee by way of a resolution that is an act of local law. A significant characteristic of this fee is that it derives from public law, which makes it similar to tax in terms of construction. This fee is independent of the frequency and level of services provided by the business selected by tender. Thus, it should not be regarded as payment for service but it is rather a public law performance similar to tax in terms of construction.

Further handling of waste collected from real property owners is regulated by another legal act, namely the Act on Waste. This act provides for a solution in which a voivodeship, being the largest unit of the territorial division of the state, is subdivided into regions¹³. Regions are smaller areas within a specific voivodeship and their municipal waste undergoes further treatment. As a rule waste collected in one region cannot then undergo treatment in another region. This way the Polish legislator takes the proximity principle into account. However, in practice it has undesirable effects, such as the fact that municipal waste from the most extreme areas of such a region is transported to the regional municipal waste treatment plant providing services for the needs of the specific region, while the distance to such a plant can be greater than the distance to the plant in the neighbouring region. Therefore, preserving the proximity rule and disposing of waste at source is at least doubtful.

Regions are created by way of a resolution of the voivodeship assembly, thus they are determined by law. Each region must have at least one regional municipal waste treatment plant, but it can also have two or even more such plants. However, in practice the existence of the plant is the fundamental element determining the formation of the region. In addition, area is considered as another criterion, according to which it should be possible to generate such an amount of municipal waste to allow the optimum utilisation of the Regional Municipal Waste Treatment Plant. The technical requirements for such a regional plant are determined by law.

¹² Z. Ofiarski, M. Ofiarska, *Finansowe podstawy systemu gospodarowania odpadami komunalnymi*, in: eds. M. Górska, K. Nowacki, *Prawne i organizacyjne obowiązki gmin w postępowaniu z odpadami komunalnymi*, Wrocław 2012, p. 172–173.

¹³ W. Radecki, *Ustawa o odpadach. Komentarz*, Warszawa 2013, p. 180 *et seq.*

In the Act on Waste the Polish legislator also provides for the existence of the so-called alternative Municipal Waste Treatment Plants. Their fundamental role is to provide the possibility of using them as alternative plants if the Regional Municipal Waste Treatment Plant cannot perform its functions for any reason. The purpose is to ensure continuous treatment of municipal waste.

Any further technical process, when municipal waste is not treated by the Regional Plant, is regulated in the Act on Waste. The alternative municipal waste treatment plant must satisfy technical requirements equivalent to those formulated for the Regional Municipal Waste Treatment Plant¹⁴.

As indicated above, the organisation of municipal waste management also involves owners. However, responsibility is not limited only to payment of the fee, which is the source of self-financing of the system. The fee was mentioned above in the description of the financing system. The owners are also charged with other obligations without which it would be impossible to organise the management of municipal waste management.

These obligations can derive both from the Act and from the acts of local law adopted by the municipal councils.

One of the fundamental legal acts adopted by the municipality is the rules of maintaining cleanliness and order, that is, an act of local law adopted under article 4 of the Act on Maintaining Cleanliness and Order in Municipalities. Pursuant to this regulation, “1. The municipal council, having requested the opinion of the state powiat sanitary inspector, hereby adopts the rules of maintaining cleanliness and order in the municipality, hereinafter referred to as the “Rules”; the Rules are an act of local law. 2. The Rules describe in detail how cleanliness and order should be maintained in the municipality to the extent of:

- 1) requirements concerning maintenance of cleanliness and order in real properties including:
 - a) carrying out selective collection and receipt of municipal waste, including waste generated by households such as expired medicines and chemicals, waste batteries and accumulators, waste electrical and electronic equipment, furniture and other large waste, building and demolition waste, waste tyres and green waste,

¹⁴ A. Dylong, H. Słupik, D. Synowiec, W. Rymarczyk, in: *Gospodarowanie odpadami komunalnymi. Poradnik dla gmin*, eds. J. Klatka, M. Kuźniak, Warszawa 2012, p. 38 et seq.

- b) removal of mud, snow, ice and other pollution from the parts of real estates used for public purposes,
 - c) cleaning and repairs of motor vehicles other than in car washes and repair workshops;
 - 2) the type and minimum volume of containers used for collecting municipal waste within the premises of real properties and on public roads, conditions for distribution and maintenance of such containers in good sanitary and technical order, taking into account:
 - a) the average amount of municipal waste generated by households or by other producers,
 - b) the number of people using the containers;
 - 3) frequency and method of removing municipal waste and liquid waste from real properties and from land for public use;
 - 4) (repealed);
 - 5) other requirements following from the voivodeship waste management plan;
 - 6) obligations of owners of domestic animals to protect other people from hazard or nuisance and from fouling the area for common use;
 - 7) requirements with regard to keeping farm animals in an area excluded from agricultural production, including a ban on keeping them in specific areas or respective real properties;
 - 8) identifying areas which should be subject to compulsory rat control and specifying respective dates.
3. The municipal council is required to adapt the rules to the voivodeship waste management plan within 6 weeks from the passing of the respective plan¹⁵.

Looking at the sources of obligations imposed on individual residents of the municipality or on legal entities, these obligations can be divided into those which invariably refer to all entities subject to the jurisdiction of the Republic of Poland, and those which refer only to individual residents and legal entities subject to the jurisdiction of a specific municipal authority.

In the first case statutory norms apply to all parties regardless of any circumstances. However, in the second case respective municipal councils can independently determine the obligations, of course in compliance with

¹⁵ For more information about these Rules see e.g. B. Rakoczy, *Regulaminy zbiorowego zaopatrzenia w wodę i zbiorowego odprowadzania ścieków i utrzymania czystości i porządku w gminie*, Warszawa 2008.

the Act. This results in a situation in which the obligations assigned to respective parties in respective municipalities can vary.

The solution adopted by the Polish law is primarily associated with the principles of decentralization and deconcentration. These two principles are embodied by the increasing significance of the role of territorial local government, and mostly of the municipality. The evaluation of the degree to which the idea of self-governance is put into practice goes beyond the scope of this paper. Nevertheless, the organisation of municipal waste management is the best testimony of the practical application of the principles of decentralization and deconcentration. A. Barczak accurately noted that “[...] the legislator has unambiguously stated that the place and the method of subjecting municipal waste to the abovementioned treatment are the responsibility of the municipality”¹⁶. Although this view was expressed in the time when the previous Act on Waste was still in force and prior to amending the Act on Maintaining Cleanliness and Order in Municipalities, it has remained valid.

The municipal council was granted very realistic legislative competences which generally determine the correct management of municipal waste. The significance of the municipal council to issues related to municipal waste management is the scope of the matter the council is required to regulate by way of resolutions. One such resolution was mentioned above in the paragraph discussing aspects related to the rules of maintaining cleanliness and order in municipalities. The legislative competences of the municipal council, as a matter of fact, determine the scope of the basic responsibilities of real property owners. The municipal council is the authority which, to the extent of its competences, distributes the responsibilities related to municipal waste management among the municipality itself and real property owners who predominantly are also the producers of waste.

An analysis of the respective obligations of real property owners must be preceded by some information regarding the division of the obligations between a public entity and a private entity.

According to article 5 of the Constitution of the Republic of Poland of 2 April 1997: “The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage

¹⁶ A. Barczak, *Zadania samorządu terytorialnego w zakresie ochrony środowiska*, Warszawa 2006, p. 125.

and shall ensure the protection of the natural environment pursuant to the principles of sustainable development". Also, reference must be made to article 74 section 2 of the Constitution of the Republic of Poland which stipulates that: "Protection of the environment shall be the duty of public authorities".

Both provisions lead to the conclusion that tasks related to environmental protection, including municipal waste management, are carried out by public authorities. Article 5 of the Constitution indicates that the Republic of Poland is responsible for ensuring environmental protection in compliance with the principle of sustainable development. On the other hand, according to article 74 section 2 of the Constitution: "Protection of the environment shall be the duty of public authorities".

However, attention should be paid to article 86 of the Constitution of the Republic of Poland, which stipulates that: "Everyone shall care for the quality of the environment and shall be held responsible for causing its degradation. The principles of such responsibility shall be specified by statute".

This provision articulates a somewhat different subject than in article 5 and 74 section 2 of the Constitution of the Republic of Poland. Article 86 is addressed to everyone. This is a very broad term covering every individual, every legal entity and every unit of organisation without legal personality.

However, based on these three quoted constitutional norms a conclusion could be formulated that the problem of environmental protection, including waste management, is distributed among various categories of entities, with the most important division being the division into public law entities and private law entities. However, everyone's obligation to care for the environment must be perceived through the prism of the obligation of public authorities. Therefore, a question arises concerning the relationship between the obligations of public authorities and the obligation of everyone.

Without any doubt the rule is that public authorities are required to protect the environment and at the same time they are responsible for the condition of the environment, including the organisation of municipal waste management. Everyone's obligation to care for the environment must be seen as an exception from the principle of the obligation of public authorities. However, another question arises as to why the Polish legislator split the issues of environmental protection into the obligations of public authorities (as a rule) and everyone's obligations (as an exception).

Such participation is essential. Regardless of the degree to which the public authorities are involved in environmental protection they are not capable of acting correctly in the area of environmental protection, including in the area of managing municipal waste, without the participation of private entities. Thus, at least the minimum involvement of private entities in environmental protection is necessary. However, such involvement must be justified, well-balanced and compliant with the constitutional standards of limiting the rights and freedom of an individual.

The municipal waste management solutions adopted in the system of Polish law are the best exemplification of the abovementioned assumptions. The involvement of the real property owner relates to the areas of municipal waste management in which the public authorities are not capable of operating waste management on their own.

Therefore, it is the real property owner who is responsible for segregating waste according to specific fractions and categories. Thus, the Polish legislator achieves the goal following from the principle of separating and initial management of municipal waste directly at source. However, the municipal council can allow non-selective collection of municipal waste, but in this case the consequence of being discharged from the obligation to selectively collect waste is the necessity to pay a higher waste management fee. The surcharge is used for the purposes of alternative selection of municipal waste.

The real property owner is also required to provide the real property with a container for collecting municipal waste and to maintain such a container in a proper condition. However, also in this case the legislator made it possible for the municipal council to adopt a resolution under which the municipality could take this duty over from the real property owner. In addition, the municipal council decides on whether the obligation to pay the fee should be imposed on the owner due to the fact that the municipality has taken over the obligation to supply the real property with the abovementioned container. Also in this case an additional cash performance is allocated towards the costs of providing real properties with relevant containers.

Regardless of whether the owner was obliged to provide the real property with a municipal waste container or whether this duty was taken over by the municipality, the owner is required to ensure access to the container so that the municipal waste can be effectively collected by the waste collector.

An interesting and independent obligation of the real property owner is the submitting of a declaration that forms the basis for determining

the number of residents in the specific real property. This number is necessary to calculate the municipal waste management fee.

An important element of the waste collection system is the so-called selective waste collection points. These points are an alternative solution to collecting municipal waste directly from the real property owner. Real property owners can also fulfil their obligation by delivering municipal waste to a point of selective municipal waste collection. Thus, real property owners may choose their preferred way of fulfilling their obligation – they can either provide access to municipal waste to be collected from their property or deliver the waste to points of selective municipal waste collection.

To sum up it must be indicated that the organisation of municipal waste management in Polish law is a complex issue considering the legal acts by which it is regulated. As mentioned above, the legal grounds are formed by two fundamental acts of law. Such a distribution of the subject matter does not further the practical application of the regulations, which alone gives rise to difficulties.

The problem of municipal waste management was essentially split between the municipality (as a rule) and the real property owners (as a matter of exception). Municipal waste management is the responsibility of the municipality. Nevertheless, certain obligations are also imposed on the real property owners.

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