

Public commercial law and private law rules and values. Remarks in the light of the observable 'privatization' of public law

Prawo gospodarcze publiczne a normy i wartości prywatnoprawne. Uwagi na kanwie obserwowanej „prywatyzacji” prawa publicznego

Публичное хозяйственное право и нормы и ценности частного права. Замечания по поводу наблюдаемой «приватизации» публичного права

Публічне господарське право а приватноправові норми і цінності. Зауваження що до «приватизації» публічного права

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Summary: Public commercial law is a branch of law regulating the influence of the state and its bodies on economic and commercial processes. It is traditionally considered to be a component of a broader, more complex discipline – commercial law. Currently we can observe with an increasing frequency that private law regulations are being applied by the legislator, also within the framework of the regulations traditionally considered as a part of public commercial law. However, this practice may cause certain difficulties and setbacks, also in relation to the internal axiological consistency of the discussed law discipline.

Key words: privatization of public law, values in law and economics, public commercial law

Streszczenie: Prawo gospodarcze publiczne to gałąź prawa normująca oddziaływanie państwa i jego organów na procesy gospodarcze. Przyjęło się, że jest to element szerszej, kompleksowej dyscypliny – prawa gospodarczego. W ostatnim czasie coraz częściej daje się zaobserwować posługiwanie się przez prawodawcę prywatnoprawną metodą regulacji także w ramach unormowań tradycyjnie zaliczanych do prawa gospodarczego publicznego. Tego typu praktyka może jednak prowadzić do pewnych komplikacji, w tym również w odniesieniu do wewnętrznej spójności omawianej dyscypliny na płaszczyźnie aksjologicznej.

Słowa kluczowe: prywatyzacja prawa publicznego, wartości w prawie gospodarczym, prawo gospodarcze publiczne

Резюме: Публичное хозяйственное право – это отрасль права, которая нормирует влияние государства и его органов на экономические процессы. Предполагается, что оно является частью более широкой, комплексной дисциплины – хозяйственного права. В последнее время все более распространенным становится использование законодателем частноправового метода регулирования и в рамках норм, традиционно относимых к публичному хозяйственному праву. Однако подобная практика может привести к определенным сложностям, в том числе и в отношении внутренней согласованности рассматриваемой дисциплины на аксиологическом уровне.

Ключевые слова: приватизация публичного права, ценности в хозяйственном праве, публичное хозяйственное право

Резюме: Публічне господарське право встановлює закони, що регулюють вплив держави та її органів на економічні процеси. Прийнято вважати його елементом ширшої і більш комплексної дисципліни – господарського права. Останнім часом все частіше помічається, що законодавець використовує приватно-правовий метод регулювання, також у рамках норм, які класифікуються як публічне господарське право. Такий тип практики може призвести до певних ускладнень, також щодо внутрішньої узгодженості обговорюваної дисципліни на аксонологічному рівні.

Ключові слова: приватизація господарського права, цінності господарського права, публічне господарське право

Introductory remarks

As once noted by Jerzy Bafia any law by itself is not enough to establish a state governed by the rule of law. What is needed is law which exemplifies the ideas symbolizing the values formed as a result of the development of culture, the values which are displayed through social development and allude to the common, expressing the will and interest of the society (e.g., justice, equality, freedom, fraternity of man or human dignity).¹ Therefore, these rules of law which embody the appropriate values are perceived more favourably by the recipients of said laws and reinforce the notion of respecting the law. It is of particular importance for these parts of the legal system which impose restrictions or additional obligations upon normal private operators. One such discipline is public commercial law.

The traditional division of commercial law into private and public commercial law assumes separating the issues related to the horizontal legal relations characteristic to private law from the vertical legal relations which are characteristic to administrative law. The fact that certain representatives of the doctrine treated commercial law as a complex yet separate branch of law (or even one of the basic branches of law) did not result in developing uniform dogmatic standards expanded with comprehensive theoretical studies for this group of regulations. Thus, the further development of commercial law proceeded within the framework of its two basic disciplines: private commercial law and public commercial law.

Currently, on the grounds of public commercial law, we may observe the trend of the lawmaker applying also private law legal solutions with an increasing frequency. Such an approach undeniably transforms the original administrative commercial law into a discipline of a new and complex character where values characteristic for public law and private law clash. The aim of this study is an attempt to examine the aforementioned changes occurring within the framework of public commercial

¹ J. Bafia, *Praworzędność*, Warszawa 1985, p. 11.

law, also, in the context of the possible conflicts of values which may increasingly frequently materialize within the framework of the broadly understood public commercial law.

1. Commercial law and public commercial law

Consistently with the adopted convention, public commercial law is a component of a broader group of rules defined as commercial law. This broader discipline covers with its scope any and all rules of law crucial from the point of view of economic activity.² The debate regarding existence, scope and criteria for isolating commercial law has been perpetuated with greater or lesser intensity since the concept of separate commercial law became more common, i.e., since the Twenties of the XX century.³

Certain clues regarding the character and scope of commercial law can be drawn from the origins of this discipline. As it is rather commonly indicated the idea of a separate commercial law is a result of the state rejecting the traditional liberal concepts, under which economic and commercial relations were regulated relatively lightly, in favour of regulations assuming direct responsibility for the shape and functioning of the economic system.⁴

Therefore, the state stops intervening in economic processes only incidentally, only when the necessity of protecting the basic rights and goods such as life and health of citizens arises, and instead engages in actively shaping and developing economical processes by introducing specific social solutions rooted in the solidarity-based and socialist ideas which have been in development since the XIX century.⁵

C. Kosikowski rightfully noted that “the type of behaviour and attitude of the state towards the economy influences and determines the scope of behaviours and attitudes of the said state in the field of lawmaking”;⁶ As a consequence, “the scope

² K. Strzyczkowski, *Prawo gospodarcze publiczne*, Warszawa 2007, p. 33.

³ J. Wiszniewski, *Prawo gospodarcze*, Warszawa 1982, pp. 10–11.

⁴ At times an earlier period is being indicated as the time of emergence of the commercial law. See: R. Blicharz, J. Grabowski, in: *System Prawa Administracyjnego*, t. 8A. *Publiczne prawo gospodarcze*, ed. R. Hauser, Warszawa 2018, pp. 16–18.

⁵ A. Chelmoński, *Prawo gospodarcze*, *Gazeta Sądowa Warszawska* 1924, no. 36, p. 553; S. Włodyka, *Prawo gospodarcze. Zarys systemu. Część ogólna*, Warszawa 1981, pp. 11–12.

⁶ C. Kosikowski, *Idea prawa gospodarczego i jego działy*, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1993, vol. 55, no. 1, p. 16.

of legal regulation of the economical processes is not permanent.”⁷ This is particularly noticeable in the context of the contemporary history of countries in central and eastern Europe. Under the conditions of the centrally planned economy a need existed to develop an expansive legal regulation concerning economic relations. In turn during the period of economic reforms the significant part of the regulations previously forming the core of former commercial law became obsolete. The scope of commercial law was expanded with the regulations important from the point of view of operations and functioning of the market economy. Further change in this area as well as in the character of commercial law was effected by the prospects of and eventual accession of Poland to the European Union. Thus, commercial law is not a discipline of law with clear and permanently determined boundaries. It makes formulating certain opinions regarding the values which are supposed to be upheld by commercial law slightly more difficult.

From among the various concepts of commercial law presented in Polish literature the concept of commercial law as a complex branch of law is being most frequently invoked. Under this concept commercial law consists of specific elements of the traditional branches of law regulating economic processes. In particular commercial law consists of the components of state (constitutional) law referring to the principles of economic system or the ownership system, the elements of administrative law regulating operations of the so-called economic administration and this part of civil law regulations that governs the framework of the private law entities (natural persons, legal persons and imperfect legal persons) as well as the civil law actions taken by the said entities within the framework of their commercial operations (specifically particular contracts).⁸

As J. Wiszniewski indicates, “rules of commercial law, despite belonging to various branches of law, form in their whole a specific system. The system is understood as a functional whole, i.e., the whole which has a specific goal and structure – specific and determined relations between elements of the system. The goal of the system of commercial law is to ensure adequate functioning and development of the economy. The legal norms are elements of this legal system. These norms are formed and interpreted in a manner ensuring their contribution to the realization of the goals of the system. The affiliation of each of commercial law legal norms with one of the basic branches of law does not contravene their character resulting from a given norm being affiliated also with the system of commercial law. Each

⁷ Ibidem.

⁸ Apart from its key components commercial law understood in this particular manner also consists of certain regulations drawn from financial, criminal and labour law. See also: J. Wiszniewski, *Prawo gospodarcze*, pp. 7–8.

of the basic branches of law also forms a system. Systems of the basic branches of law have their goals. These goals are, however, qualified as values of a more general character.”⁹

Subsequent divisions are effected within the framework of commercial law understood in this manner. The division in regard to the subjective criterion is the most significant. As a result of this division, we can distinguish private commercial law regulating the mutual legal rights and obligations of the participants of commercial exchange (horizontal relations) and public commercial law regulating the legal rights and obligations of economic entities towards the state as well as competencies of public bodies towards the entities engaged in commercial activity (vertical relations).¹⁰

Commercial law approached as a whole is currently not being subjected to thorough theoretical deliberations. As the doctrine indicates the representatives of public commercial law and private commercial law do not aspire to establishing a common concept of commercial law or even certain common research areas.¹¹ It is particularly noticeable that the norms of commercial law understood in this particular manner do not display the peculiar characteristics enabling aggregating these norms into an independent branch of law. On the contrary, these norms display the characteristics of classical branches of law they derive from, i.e., civil law and administrative law in particular.¹²

Thus, isolating commercial law is primarily of importance to systematizing efforts. Doing so enables observing specific legal regulations from the perspective of their influence on functioning of the economy. It is particularly significant within the framework of the principle of unity of civil law and departing from the classical regulations of commercial law effective in the Polish legal order. However, as it has been previously indicated, commercial law is usually considered when its two basic fields are being determined: private commercial law and public commercial law. The studies on commercial law as a separate branch (either a basic or complex branch), including the studies referring to the values upheld by regulations of this law, are not currently carried out.¹³ As A. Bator indicates, commercial law “did not

⁹ J. Wiszniewski, *Prawo gospodarcze*, p. 8.

¹⁰ C. Kosikowski, *Idea prawa gospodarczego...*, p. 16.

¹¹ G. Góralczyk, *Samodzielność pojęciowa prawa gospodarczego jako problem analitycznej teorii prawa*, Acta Universitatis Wratislaviensis no. 3337. Prawo 2011, no. 312, p. 144.

¹² L. Kieres, in: A. Borkowski, A. Chelmoński, M. Guziński, K. Kiczka, L. Kieres, T. Kocowski, *Administracyjne prawo gospodarcze*, Wrocław 2005, p. 20.

¹³ The doctrine indicates that the usefulness of commercial law may be displayed in treating it as a platform “for the inter-branch synthesis effected on the higher echelon than within the framework of the basic departments of the taxonomy of law and aimed at integrating the results produced previously

develop its own lexical subsystem to the extent that would enable it to categorize the elements of the extra-linguistic reality significant to commercial operations. In turn, commercial law draws extensively from other industry dictionaries [...]. Under these circumstances it is difficult to expect emergence of a relatively consistent industry dogma (specific science) of commercial law.”¹⁴

Therefore, commercial law understood in this manner is primarily a carrier for the values developed on the level of individual basic branches of law from which commercial law draws its rules. Because these rules, and thus the said values, are drawn from such diverse legal systems as civil law or administrative law these rules, by the virtue of commercial law understood in this particular manner, shall produce possible conflicts of values. German doctrine even presents a separate concept of “commercial law as a collection of rules used to resolve conflicts between the contradictory interests involved in economy.”¹⁵

2. Private law norms and values in the context of public commercial law

The scope and, in consequence, also the character of commercial law are subject to rather frequent changes. It is so because the form of commercial law is always a reflection of the attitude of the broadly understood state towards the economy. As T. Długosz rightfully notes, all changes in this attitude are always a result of ideological entanglement. “Liberalism advocates limited participation of the state in the economy whereas other ideologies are aiming for the state which enjoys a stronger or more active participation in the economy, e.g., the «intermediate» ideologies include the doctrine of the welfare state or the concept of the social market economy. Each model of state interventionism is supported by a selection of values which

in these departments (S. Włodyka, A. Chelmoński). The ultimate goal of the integration studies may consist in developing new legal institutions, frequently of complex and heterogeneous legal nature, which serve to improve the regulatory functions of law in specific areas of economic life (e.g., land use planning, special economic areas, public procurements, public–private partnership agreements, certain types of licenses, legal implements for regulating international goods exchange etc.). However, we may claim otherwise – that commercial law understood as a peculiar method of researching legal phenomena is a specific mode of observing and assessing the traditional legal institutions in term of their adequateness for reaching the stipulated economic goals”, R. Blicharz, J. Grabowski, in: *System Prawa Administracyjnego*, vol. 8A, pp. 21–22.

¹⁴ A. Bator, *Czy powinniśmy wyodrębnić prawo gospodarcze?*, in: *Współczesne funkcje państwa wobec gospodarki. Księga jubileuszowa Profesora Tadeusza Kocowskiego*, eds. K. Kiczka, W. Małecki, Wrocław 2022, pp. 66–67.

¹⁵ S. Włodyka, *Prawo gospodarcze...*, p. 12.

are based on historical experiences, achievements, tradition and culture of a given social and legal community. The ideological stance and experiences of a given community are changing and thus the scope, intensity and form of the state intervention in economy are also changing and it may happen that the attitude of the state towards the economic processes will change in absence of normative changes.¹⁶

Contemporary commercial law is adjusted to the demands of the social market economy. Thus, over the past decades its basic function has changed. Within the framework of the market economy system commercial law becomes "more useful for the purpose of protecting economic entities rather than for legitimizing economic rulership of the state."¹⁷ The character and function of the discussed branch of law were modified gradually. In the initial stage of the transformation the very important components of public commercial law consisted of e.g., the regulations concerning commercialization and privatization of the state-owned enterprises, the application of which nowadays considered a thing of the past. Currently, within the framework of the broadly understood administering of public property, the public procurement regulation appears to be the primary object of interest of the doctrine and practice.

Similarly to commercial law the modern public commercial law is an example of a complex law discipline. On one hand public commercial law is a part of a more expansive system of norms under the umbrella of commercial law. On the other the individual components of public commercial law may be treated as elements of other branches of law. During its development commercial law underwent numerous changes in regard to its character and scope. In particular within the framework of public commercial law we may currently observe not only the norms regulating vertical relations, which are characteristic to the administrative law method of regulating affairs, but increasingly numerous norms concerning and shaping horizontal relations which are typical of civil law. The complexity of the regulations of public commercial law may induce search for structural and theoretical similarities between this discipline of law and commercial law. However, we must immediately draw attention to the fact that whereas the complexity of commercial law is a result of the essential characteristics of this discipline, which covers with its scope the entirety of regulations referring to economic processes, the complex approach to public commercial law is a result of the intentional actions of the legislator. It is so because public commercial law is frequently a product of utilizing legal instruments

¹⁶ T. Długosz, *Kompetencja w publicznym prawie gospodarczym*, Warszawa 2021, p. 32.

¹⁷ C. Kosikowski, *Idea prawa gospodarczego...*, p. 16.

specific to private law where it is possible (and at times even desirable) to use public law regulations.

The aforementioned intertwining character of civil-law and administrative law provisions “is related to increasingly evident phenomenon of «publicization» of private law and privatization of public law.”¹⁸ The indicated processes, progressing not only within the framework of public commercial law, are a result of the lawmaker departing from the traditional manner of formulating acts of law. Frequently these acts do not cover with their scope the regulations from a single basic branch of law but regulate given issues in a complex manner – by utilizing private law and administrative law method of applying regulations. Such practice frequently makes it more difficult to unambiguously qualify a given regulation as a public-law or private law regulation; this, in turn, may at times result in the regulation itself being classified differently by different representatives of the doctrine. As K. Horubski notes “apart from the normative restrictions imposed upon the entities governed by private law with the goal of protecting the values equated with – due to their supra-individual character – the public interest, the process of publicization of private law is characterized by the public law instruments (in particular the administrative-law implements but also the criminal-law implements as well as mixed implements – administrative-criminal) encroaching «upon the area formerly reserved solely for the private law implements». These instruments are a specific «supplement» to private law regulations and therefore they complement civil law solutions. However, the discussed process is not accompanied by eliminating the methods for regulating social and economic relations which are typical of private law.”¹⁹

The process of publicization of private law characterized hereinabove may consist of either supplementing the legal structures from the field of private law (“without questioning the essence of their function and intentionality”) with selected implements of public law (a phenomenon particularly visible in the field of public procurements) or modifying traditional private law solutions with the goal

¹⁸ Z. Duniewska, in: *System Prawa Administracyjnego*, vol. 1. *Institucje prawa administracyjnego*, ed. R. Hauser, Warszawa 2015, p. 176. As noted by J. Habermas, *Strukturalne przeobrażenia sfery publicznej*, Warszawa 2007, p. 291: “As early as following the conclusion of the First World War law began to evolve to a certain degree alongside the society and gave birth to the complex mixed process initially recorded under the name of «publicization of private law» («Publizierung des Privatrechts»); later we got used to considering the very same process from the opposite point of view, mainly as privatization of public law.”

¹⁹ K. Horubski, *Publicyzacja prawa prywatnego w obszarze prawa zamówień publicznych*, Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 2018, no. 540, p. 83. See also: M. Safjan, *Pojęcie i systematyka prawa prywatnego*, in: *System Prawa Prywatnego*, vol. 1. *Prawo cywilne – część ogólna*, ed. M. Safjan, Warszawa 2007, p. 49.

of "creating a space more conducive for their functioning under the conditions of modern market."²⁰

The recent years brought significant growth in interest in specific disciplines of public commercial law. Such disciplines as competition law, infrastructure sectors' law or public procurement law were the subject of a sizable number of practical and theoretical studies. In turn the more general aspects of public commercial law did not enjoy greater interest.²¹ Unfortunately, the noticeable direction of public commercial law development is not conducive to the more expansive theoretical deliberations on the essence or the basic values characterizing this discipline. The dynamic development of specific disciplines of public commercial law, frequently regulated through complex legal acts, may in time lead to isolating these disciplines entirely. Public commercial law may at such time transform into a peculiar 'general part' of public law regulations regarding economic processes. However, forgoing a more thorough reflection on the subject of public commercial law as a whole may in the longer perspective lead to disintegration of this discipline.

The potential threats to integrity of public commercial law include concepts aimed at isolating private law provisions from this complex branch of law. The assemblage of norms obtained in this manner would supposedly constitute a foundation for a separate "scientific and educational discipline devoted to applying private law in the public sector"²² which would, however, constitute an element of civil law. Isolating such "public sector private law" would possibly enable the civil law science to cover with its scope these public commercial law provisions which utilize private

²⁰ M. Safjan, *Pojęcie i systematyka...*, p. 49.

²¹ A. Powalowski, *Wprowadzenie do aksjologii prawa gospodarczego publicznego*, Acta Universitatis Wratislaviensis no. 3977. Prawo 2019, no. 329, p. 222.

²² R. Szczepaniak, *Stosowanie prawa cywilnego a podział na prawo publiczne i prywatne*, in: *Problemy pogranicza prawa cywilnego*, ed. R. Szczepaniak, Warszawa 2022, p. 158. The author refers to the concepts developed on the grounds of German science where two phenomena became subject of deliberations "the so called private administrative law (*Verwaltungsprivatrecht*) and the application of civil law within the boundaries of administrative law. [...] In terms of German science we may even speak of two trends of deliberations. *The Verwaltungsprivatrecht* is a specific private administrative law in the normative and science-education meaning. Whether it is a part of the broadly understood administrative law (the idea supported by the majority of German scholars) or a sub-discipline of civil law is a subject to a debate. This does not change the fact that in the normative understanding it is concerned with regulating civil-law relations in the public sector. In the majority of cases it is also subjected to the jurisdiction of civil law courts. The second research and studies trend was devoted to applying provisions of civil law within the framework of administrative law (*Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht*) and is interested in a different phenomenon, mainly the previously indicated phenomenon of «developing» administrative law «at the expense of civil law.» It is so because in this case we are dealing with the aspect reserved for administrative law, i.e. administrative law relations."

law mode of regulation and thus would introduce civil institutions and values into public law. According to R. Szafrński the broadly understood public sector is contemporarily one of the main areas for applying civil law regulations. Exclusion of such important regulations from the spectrum of interest of representatives of civil law doctrine is thus, in his opinion, unjustified.²³

Concepts also emerge according to which the mutual intertwining of private-law and public-law regulations (also in the field of public commercial law) may be treated as a potential threat to the values protected by public law. In the process of its historical development public law developed an adequate system of legal protection instruments which can be utilized by private entities in the case of unlawful and unchecked operations of the bodies of public administration. In turn private law does not have such protection implements in place. The civil-law relations based on the principle of formal equality of the subjects of law favour the materially stronger entities which are frequently able to impose their will on a formally equivalent but materially weaker entity. Thus, as rightfully noted by E. Łętowska, the peculiar 'privatization' of the operations of state authority bodies, until now operating in the public area, may be viewed as a sort of "departure from a more rigorous public law regime. Private law regime is less afflictive and poignant for a stronger entity because it restricts and controls such an entity to a lesser degree."²⁴

Conclusion

Intertwining of the values specific to public and private branches of law has been always a quality specific to commercial law which aggregates determined norms solely on the basis of the subjective criteria regardless of the applied method of regulation. Further division of commercial law into private and public commercial law was to be, in principle, based on the subjective criterion under which the applied method of regulation plays a crucial role.

However, as the above deliberations indicate, the original criteria separating public commercial law from private commercial law are currently not being respected. In particular the introduction of the provisions utilizing private-law regulations within public commercial law, including regulations directly referencing the Civil Code, is a challenge for the public commercial law doctrine, specifically

²³ R. Szczepaniak, *Stosowanie prawa cywilnego...*, pp. 158–159.

²⁴ E. Łętowska, *Prawo cywilne: złudzenia – kamuflaże – manipulacje*, in: *Problemy pogranicza...*, pp. 43–44.

in the aspect of the values these regulations represent. The harmonious coexistence of the norms expressing the idea of the freedom of an individual and the norms which restrict this freedom within the framework of the same branch of law may result in certain difficulties with interpretation. These difficulties may be remedied through referring to a certain system of values common for the entirety of public commercial law. These values primarily stem from the constitutional regulations shaping the entirety of the economic system of the Republic of Poland among which the principle of a democratic state governed by the rule of law and materializing the principles of social justice and the concept of social market economy are of primary importance.²⁵

Too extensive application of private-law regulations in the field of public commercial law gives birth to new threats. On one hand the civil-law components of public commercial law spark understandable interest among representatives of the doctrine of civil law. The voices advocating for exclusion of these regulations from public commercial law emerging in this context may have given birth to justified concerns among representatives of this legal doctrine. On the other hand the excessive privatization of public commercial law may be perceived as a phenomenon violating the legal instruments of public law utilized for protecting rights of an individual. Forasmuch private law is not an adequate instrument for resolving disputes emerging in the context of applying regulations primarily aimed at protecting the multi-aspect public interest in the field of economic relations.

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²⁵ M. Szydło, *Swoboda działalności gospodarczej*, Warszawa 2005, pp. 1–6.

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